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Litigation Rulemaking

ABSTRACT. Agencies and courts have generally been understood to relate in two primary ways. First, judicial review of agency action under the Administrative Procedure Act is the cornerstone of the agency-court relationship. Second, and more recently, scholars have identified how agencies act as litigation gatekeepers, influencing which suits may proceed in federal court. But we have yet to recognize a third critical and emerging relationship between agencies and courts: agencies acting as litigation rulemakers.

As litigation rulemakers, agencies implicitly amend the Federal Rules of Civil Procedure and shape how litigation proceeds in federal court. Agencies have engaged in notice-and-comment rulemaking restricting the availability of binding arbitration, adjudicated cases to require courts to grant class relief, and issued guidance limiting the confidentiality of settlement agreements. Whether through notice-and-comment rulemaking, adjudication, guidance, or other actions, agencies are directing judges as to how they should address cases that appear before them. In so doing, agencies are effectively modifying the default procedural regime set forth by the Federal Rules.

Understanding litigation rulemaking deepens our awareness of how the Federal Rules are shaped and put into practice in the federal courts. The legitimacy of litigation rulemaking is bolstered by its similarities to the Rules Enabling Act process for amending the Rules, and the two processes often complement each other. In many ways, litigation rulemaking illuminates the complexity of the relationship between agencies and courts. Agencies acting as litigation rulemakers often impose additional constraints on the courts, and when courts respond to these agency actions, a novel institutional dialectic arises. Notably, by effectively amending the procedural regime that governs federal litigation, agencies are also shaping substantive law.

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INTRODUCTION

At mid-century, Charles Clark, one of the primary drafters of the Federal Rules of Civil Procedure,[1] articulated the need for a regular reexamination and revival of procedural law: "Unless revivified, the modern new procedure will soon become as hard and unyielding as the old systems to which reform was directed. Such, after all, is the nature of red tape, which procedure is and which all orderly conduct of human activities must be."[2] Quoting an earlier historian of the law, Clark compared the "'inveterate nature of the incongruity between procedure and substantive law,' for 'the former petrifies while the latter is in its budding growth,' and 'the conservatism of the lawyer preserves the incongruity.'"[3]

Indeed, the law of civil procedure calls for constant revision. Over the past half-century, the growth of the federal docket,[4] the rise of alternative forms of dispute resolution,[5] and the advent of the administrative state[6] have all contributed to dramatic changes in the landscape of litigation. Today, heeding Clark's call, administrative agencies are newly revivifying procedural law. By tailoring the rules of civil procedure to different areas of substantive law, agencies are effectively amending the Federal Rules of Civil Procedure, ensuring that they do not become "hard and unyielding." This Note describes these agency actions and how they compare to the traditional approach to procedural lawmaking.

This Note proceeds in five parts. Part I begins by reviewing the established process of drafting and amending the Federal Rules of Civil Procedure, as set out in the Rules Enabling Act. A closer look at this process illuminates how federal courts have established their procedural regime in the past and foreshadows the similarities between the existing rulemaking process and the new, agency-led approach.

Part II outlines the different relationships between administrative agencies and federal courts. The two primary ways in which agencies relate to federal

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1. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961 (1987).

2. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 507 (1950).

3. *Id.* (quoting CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 31, 37 (1897)).

4. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396 (1982); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1859 (2014).

5. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2806-14 (2015).

6. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 422, 425-27 (2008).

courts are (1) through the review of agency action by federal courts and (2) through agencies functioning as litigation gatekeepers for private enforcement suits brought in federal courts. This Note introduces an emerging, third relationship between agencies and federal courts: agencies acting as litigation rulemakers. As litigation rulemakers, agencies are taking actions that effectively amend the Federal Rules and are thereby setting the procedural boundaries for claims brought in federal court.

Agencies acting as litigation rulemakers are shaping court procedures at both the front and back end of litigation. Part III details examples of litigation rulemaking at the front end of federal litigation, where agencies are deciding what kinds of claims can proceed in federal court and what forms these claims can take. For instance, through notice-and-comment rulemaking, some agencies have required that certain claims be adjudicated in federal court. In another case, an agency has decided that class waivers of arbitration are not permitted. Part IV examines how agencies have engaged in litigation rulemaking at the back end of federal litigation, where agencies are shaping the kinds of relief available to parties litigating disputes in federal court. For example, a few agencies have limited the confidentiality of court orders and settlement agreements through guidance that urges parties to disclose certain information to federal agencies. Another agency has ordered the disclosure of information relating to class action settlements. These examples illustrate how agencies are able to play a role in writing the procedural rules at each stage of federal litigation.

Finally, Part V compares the conventional court rulemaking process with litigation rulemaking and investigates its benefits and drawbacks. The benefits include the ability of agencies to use their expertise to fashion procedural rules appropriate for each regulatory regime, the capacity of agencies to engage in polycentric problem solving, and the ability of agencies to tailor procedural regimes to make them more coherent with particular substantive aims. The drawbacks include the potential for outside influence and agency capture to affect litigation rulemaking and the decline of transsubstantive procedural law. On net, the benefits likely outweigh the costs. But court rulemaking has not receded into the past; rather, agencies are now joining forces with the courts in reshaping the Federal Rules. As a result, litigation rulemaking and court rulemaking can and should complement each other. The Note concludes with a discussion of what the advent of agency-led litigation rulemaking means for federal litigation and for the relationship between administrative agencies and federal courts generally.

The agency actions discussed in this Note are important not only because they are each individually significant—and in many cases, the subject of active, high-profile litigation and debate—but also because they illuminate the capacity of agencies to regulate courts and the litigation that takes place within the courthouse doors. While the examples are drawn from a range of agencies, each

demonstrates how courts are being constrained in a heretofore unrecognized way. In addition, when federal courts respond to litigation rulemaking through judicial review of agency action, a novel dialectic arises. This dialectic between agencies and courts raises new questions about the legitimacy of litigation rulemaking, the scope of judicial review, and the role of Congress in overseeing this agency-court relationship.

On balance, I conclude that this kind of agency action not only abides by traditional separation-of-powers boundaries but is also desirable. In Clark's words, litigation rulemaking promotes congruity between procedural and substantive law. In combination with court rulemaking, litigation rulemaking not only helps ensure that the Federal Rules are "revivified," but also enhances the democratic legitimacy of the overall project.

I. COURT RULEMAKING

Historically, the task of drafting the rules of procedure for federal litigation has been assigned to the federal courts themselves. In the Rules Enabling Act of 1934, Congress authorized the federal courts to set their own rules of practice, procedure, and evidence, subject to Congress's ability to reject, modify, or defer any of the rules.[7] Pursuant to the Act, the federal courts coordinate the task of rulemaking through the Judicial Conference of the United States and its Committee on Rules of Practice and Procedure, typically referred to as the Standing Committee.[8] The Standing Committee regularly reviews recommendations from its five advisory committees and proposes changes to the rules to the Judicial Conference as "necessary to maintain consistency and otherwise promote the interest of justice."[9] The different advisory committees that propose changes are comprised of federal judges, practicing lawyers, law professors, state judges, and representatives from the Department of Justice.[10]

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7. *See* 28 U.S.C. §§ 2071-2077 (2012); *see also* 28 U.S.C. § 331 (2012) (describing the federal courts' obligation to "carry on a continuous study of the operation and effect of the general rules of practice and procedure"); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 931-33 (describing the various forms of the rules committees over the twentieth century); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1198-1202 (2012).

8. *See* 28 U.S.C. § 2073(b) (2012).

9. *Id.*

10. *See* James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process

One of the advisory committees focuses on drafting and amending the Federal Rules of Civil Procedure. As initially drafted, the Rules were meant to comprise a transsubstantive procedural regime for federal courts, collapsing distinctions between law and equity and granting judges greater discretion to shape courtroom proceedings.[11] I refer to the Rules Enabling Act process for drafting and amending the Federal Rules of Civil Procedure as court rulemaking.

Today, the court rulemaking process involves at least seven stages of comment and review and typically takes two to three years from start to finish. Anyone can begin the process of drafting or amending a Rule by proposing a suggestion to the Standing Committee, which will refer the proposal to the relevant advisory committee. The advisory committee will decide whether to accept, defer, or reject the suggestion. If accepted, the suggestion will be drafted as an amendment and published for public comment. The advisory committee will then consider the public comments and send a report to the Standing Committee with its final recommendations. If the Standing Committee approves the proposed rule change, it will send its recommendation to the Judicial Conference along with its own report. The Judicial Conference will then consider proposed amendments at its annual September meeting, and if approved, the amendments will be transmitted to the Supreme Court. If the Supreme Court approves the rules, it must then send the proposed amendments to Congress. If Congress does not enact legislation within seven months to reject, modify, or defer the rules, the rules take effect as law on December 1 of that year.[12]

Federal courts also reformulate the procedural rules for litigation through judicial decisions that interpret the scope of the Rules.[13] For instance, as Stephen Burbank and Sean Farhang describe, the Supreme Court's decisions on pleading requirements have brought about "momentous civil litigation reform that would be impossible to secure from the legislature or its delegated procedural lawmaking bodies."[14] Although this Note largely focuses on comparing the Rules Committee-led court rulemaking process to the novel practice of agency-led litigation

/how-rulemaking-process-works/overview-bench-bar-and-public [http://perma.cc/CPY5-H59J].

11. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 601 (2005).

12. *See* Duff, *supra* note 10.

13. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1603-12 (2014).

14. *Id.* at 1605-06 ("*Wal-Mart*, *Twombly*, and *Iqbal* are a few recent examples of the Court using its Article III judicial power to achieve results that would have been very difficult or impossible to achieve through the exercise of delegated legislative lawmaking power under the Enabling Act."). Many commentators have observed that the Court was implicitly amending the Federal Rules through *Iqbal* and *Twombly*. *See* Stephen B. Burbank, *Summary Judgment, Pleading, and*

rulemaking, it is important to keep in mind that the courts also reshape the Federal Rules through adjudicative decisions.

But the federal courts are no longer the sole authors of the rules that govern the litigation that takes place within their doors. In recent years, federal administrative agencies have emerged as central figures in changing these rules. As the following Part explains, this function of federal agencies departs from existing accounts of the role of administrative agencies in federal litigation.

II. AGENCIES AND COURTS

The relationship between agencies and courts takes many forms. Most fundamentally, courts exercise judicial review over agency action to ensure that agencies act within their statutory authority. Agencies, in turn, regulate the litigation that proceeds in federal courts through litigation gatekeeping, deciding which private suits even make it to federal court. This Note identifies a third relationship between federal agencies and federal courts: litigation rulemaking. As litigation rulemakers, agencies regulate the shape and structure of the litigation that takes place in federal courts, effectively amending the Federal Rules of Civil Procedure. Although agencies have engaged in litigation rulemaking in a wide range of substantive areas, this function of agencies has yet to be identified or understood.

First, federal agency action is almost always reviewable by federal courts. Under section 702 of the Administrative Procedure Act (APA), "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[15] This language creates the strong presumption in favor of the reviewability of agency action, and judicial review is often sought in order to ensure that agencies are acting pursuant to their statutory authority.[16] The subjects of agency action can also seek judicial review to ensure agencies respect the

the Future of Transsubstantive Procedure, 43 AKRON L. REV. 1189, 1191 (2010) ("In *Twombly* and *Iqbal*, by contrast, the Court ignored the requirements of the Enabling Act and its own prior decisions on the difference between judicial interpretation and judicial amendment."); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84-89 (2010) (explaining how the "legislative-like decisions in *Twombly* and *Iqbal* . . . have caused many to question the continuing role of the rulemaking process and its current statutory structure"). Whether the Court's actions in these cases were permissible amendments of the Federal Rules is a distinct debate and outside of the scope of this Note.

15. 5 U.S.C. § 702 (2012). Section 701(a) of the APA contains two exceptions to this right of review: section 702 judicial review is not available if the "statute[] preclude[s] judicial review" or if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (2012).

16. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 477 (1987).

due process rights of regulated parties.[17] But the scope and breadth of judicial review of agency action remains hotly contested. Recent years have witnessed the revival of debates about the appropriate level of judicial deference to agency decision making and the extent to which the legislature and judiciary should supervise agency action.[18] Nevertheless, judicial review remains the cornerstone of the agency-court relationship.

Second, many agencies act as litigation gatekeepers for suits brought in federal courts.[19] As litigation gatekeepers, certain agencies exercise their power to oversee, coordinate, permit, and prohibit private litigation. This includes determining whether a private right of action should lie in a particular context[20] and evaluating private lawsuits on a case-by-case basis to decide whether the suits should proceed.[21] According to David Freeman Engstrom, litigation gatekeeping can be categorized along five primary dimensions:[22]

> (1) An agency has affirmative authority if it directly controls private enforcement efforts and residual authority if the agency influences private enforcement by exercising its procedural rights — for example, its right to intervene in cases as an interested party.[23]
>
> (2) An agency engages in retail gatekeeping if it exercises case-by-case oversight of private enforcement or wholesale gatekeeping if the agency instead creates private rights of action across the board.[24]
>
> (3) An agency's decision to permit or prohibit private suits from proceeding in court may be either legally binding or merely advisory.[25]

17. *See id.*

18. *See generally id.*

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

20. *See id.* at 619 & n.4.

21. *See id.* at 619-20, 620 n.5. Many commentators have called for agencies to have even more expansive "gatekeeping" authority in different domains. *See id.* at 620 n.6 (listing scholars who have called for greater agency involvement in litigation).

22. *See id.* at 644.

23. *See id.* at 647.

24. *See id.* at 647-48.

25. *See id.* at 649-50.

> (4) An agency may be authorized to exercise its gatekeeping authority passively—by expressing its view as to whether a private enforcement action should proceed[26]—or actively—by taking control of the private enforcement action or displacing it with a public enforcement proceeding of its own.[27]
>
> (5) An agency can exercise either veto authority, meaning that private suits proceed unless the agency holds otherwise, or license authority, meaning that private suits require agency approval in order to go forward.[28]

Each of these binaries describes how agencies make decisions about whether private enforcement actions can proceed in federal court and when public enforcement should step in and supplant private litigation.

In addition to judicial review and litigation gatekeeping, agencies and courts relate in yet a third way: agencies determine not only *whether* litigation can take place in federal courts but *how* the litigation will unfold. In this role, agencies act not as litigation gatekeepers but instead as *litigation rulemakers*. As litigation rulemakers, agencies establish the terms on which litigation will proceed, laying out the procedural rules that will govern particular sets of claims. That is, agencies effectively amend the existing Federal Rules of Civil Procedure outside of the traditional Rules Enabling Act process. This is different from litigation gatekeeping, as explained by Engstrom, which does not capture agencies implicitly amending the rules by which civil litigation takes place in federal courtrooms. Litigation rulemaking is a distinctive agency function: agencies are not regulating whether private litigation proceeds or whether public litigation takes its place, but rather, the requirements for private litigation as it takes place in federal courts.[29]

In the discussion that follows, I refer to the procedural regime set forth in the Federal Rules of Civil Procedure as encompassing not just the text of the Rules but also the case law that tells courts how the Rules should be applied. For

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26. For instance, in a False Claims Act case, the Department of Justice may move to dismiss or settle a case out from under a private plaintiff-relator, subject only to a basic fairness hearing, by registering its view with the court and requesting dismissal. *See id.* at 650.

27. *See id.* at 650–54.

28. *See id.* at 654–55.

29. Not all litigation rulemakers are litigation gatekeepers. As discussed in Part V, an agency's ability to engage in litigation rulemaking is rooted in its statutory authority. An agency (or court) could interpret its statutory mandate to allow the agency to modify the rules of civil litigation for a particular kind of suit (litigation rulemaking) but *not* to permit the agency to block suits from proceeding in court (litigation gatekeeping).

instance, under Rule 12(b)(6), a court can dismiss a complaint for its failure to state a claim.[30] But the Rule cannot be applied without looking to the relevant case law—specifically, the plausibility-pleading requirements established in *Bell Atlantic v. Twombly*[31] and *Ashcroft v. Iqbal*.[32] In other contexts (most prominently, arbitration), the relevant jurisprudence is not just federal courts' interpretations of the Rules but also their interpretations of related statutes, such as the Federal Arbitration Act (FAA), that affect how courts apply the Rules. To take just one example, the Federal Rules regime includes not just the text and case law on Rule 12 (under which motions to compel arbitration are typically brought) but also the FAA case law that dictates how courts must apply Rule 12 given an arbitration agreement.[33] Just as *Twombly/Iqbal* and Rule 12(b)(6) are inextricably bound together, the FAA and Rule 12(b) defenses are intertwined as part and parcel of the Federal Rules regime.

The subsequent Parts describe examples of agencies engaging in litigation rulemaking in different forms—through notice-and-comment rulemaking, adjudication, guidance, and agency-specific orders. Each action can be understood not merely as a standard agency action[34] but also as an implicit amendment to the existing procedural regime set forth in the Federal Rules. I focus on a few specific examples in order to demonstrate how agencies have engaged in litigation rulemaking in a manner distinct from litigation gatekeeping. Although I provide examples from a range of legal contexts, I do not canvass all instances of agency-led litigation rulemaking. Rather, the aim here is to document a discernible—and critical—pattern of agency action and to understand it in the context of the established court rulemaking process.

To illustrate how agencies are transforming litigation in federal courts today, the agency actions described in the following two Parts are divided by the stage of litigation that they impact. These examples demonstrate how agencies can play a role at any of the various phases of a lawsuit brought in federal court. In the process, I explain how litigation rulemaking can take different forms—notice-and-comment, guidance, adjudication, and other orders—and the implications of an agency choosing one form over the other. Through each of these actions, agencies engaging in litigation rulemaking are regulating courts' exercise of their judicial power.

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30. *See* FED. R. CIV. P. 12(b)(6).

31. 550 U.S. 544 (2007).

32. 556 U.S. 662 (2009); *see* sources cited *supra* note 14 (noting that the Court has implicitly amended the Federal Rules through *Iqbal* and *Twombly*).

33. *See infra* Section III.A.

34. Because agencies that act as litigation rulemakers do so through an established form of agency action, such as notice-and-comment rulemaking, these agency actions are typically subject to APA § 702 judicial review as well.

III. AGENCIES AT THE FRONT END

I begin with examples of litigation rulemaking in which agencies have rewritten the procedural rules governing cases that have just been filed in court. For instance, agencies are using notice-and-comment rulemaking to limit the availability of binding arbitration. At least one agency has also restored the right to class relief through a series of adjudications and a policy of nonacquiescence with adverse federal court decisions. Both examples illustrate how agencies are playing an increasingly salient role in determining the form that cases take in federal court—deciding which kinds of claims will be subject to binding arbitration and which cases, once filed, will continue to be adjudicated in front of federal judges.

A. Binding Arbitration Clauses

The FAA was enacted in 1925 to abolish common law rules that made it difficult to obtain specific performance of an agreement to arbitrate and to align federal court practice with state practices that specifically enforced agreements to arbitrate.[35] The FAA "lay somewhat dormant"[36] until the 1980s, when, in a series of decisions, the Court began to read the statute to embody a federal presumption in favor of enforcing arbitration agreements.[37] Since then, the Court has held that the FAA preempts state law[38] and governs agreements to arbitrate statutory claims[39] as well. According to the Court, arbitration involves "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[40] As this line of case law developed, companies and private parties across all sectors of the economy began adding arbitration clauses to a wide range of agreements with individual consumers and other parties.[41] Today, arbitration clauses are commonly found in all sorts of contracts,

35. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 59 (2015).

36. *Id.*

37. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

38. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

39. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

40. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

41. *See* Horton & Chandrasekher, *supra* note 35, at 59; Arbitration Agreements, 82 Fed. Reg. 33,210, 33,215-16 (July 19, 2017).

and the Supreme Court has formulated a policy of upholding arbitration agreements in essentially all cases.[42]

But not all agencies have followed the Court's lead. Pointing to the drawbacks of binding arbitration, several agencies have pushed back by issuing rules limiting the availability of binding arbitration. Acting through the notice-and-comment rulemaking process, these agencies have justified their actions as congressionally authorized. As discussed below, the Centers for Medicare & Medicaid Services (CMS) has based its rule banning binding arbitration on its general statutory mandate to promote public health and safety. In response to even more specific statutory instructions, the Consumer Financial Protection Bureau (CFPB) has curtailed the availability of arbitration in consumer contracts. Through notice-and-comment, these agencies are telling federal courts how to act when faced with arbitration agreements. As a result, these agency actions are a prime example of litigation rulemaking.

1. CMS Rule on Binding Arbitration

In October 2016, the CMS, which is an agency within the Department of Health and Human Services (HHS), promulgated a final rule under the Social Security Act that barred long-term care facilities (which include nursing homes) from entering into binding predispute arbitration agreements with their residents.[43] This rule applied to all long-term care facilities that received Medicare and Medicaid funding, which encompassed almost all long-term care facilities in

42. *See* Resnik, *supra* note 5, at 2838-40. Of course, debates about the validity of arbitration agreements have continued apace in the literature and in litigation. *See, e.g.*, *id.* at 2810-11; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [http://perma.cc/8A79-DC6Y] (quoting Andrew Pincus, a lawyer who has represented companies using arbitration in several major FAA cases before the Court, reflecting, "Arbitration provides a way for people to hold companies accountable without spending a lot of money. It's a system that can work.").

43. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,800 (Oct. 4, 2016) (codified in scattered sections of 42 C.F.R.).

the country[44] and up to 1.5 million individuals.[45] The agency cited several distinct provisions of the Social Security Act as statutory bases for the new rule.[46]

As initially proposed, the rule had focused on improving the disclosure and transparency of predispute arbitration clauses without banning them.[47] However, after receiving nearly 10,000 comments on the proposed rule,[48] including feedback from patient groups concerned about the widespread use of arbitration,[49] the agency issued a final rule that banned binding predispute arbitration clauses altogether.[50] The final rule also prohibited long-term care facilities from

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44. *See* Rebecca Hersher, *New Rule Preserves Patients' Rights To Sue Nursing Homes in Court*, NPR (Sept. 29, 2016), http://www.npr.org/sections/thetwo-way/2016/09/29/495918132/new-rule-preserves-patients-rights-to-sue-nursing-homes-in-court [http://perma.cc/M845-UDWW].

45. *See* Jessica Silver-Greenberg & Michael Corkery, *U.S. Just Made It a Lot Less Difficult To Sue Nursing Homes*, N.Y. TIMES (Sept. 28, 2016), http://www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html [http://perma.cc/PAG3-RS3J] [hereinafter Silver-Greenberg & Corkery, *U.S. Just Made It a Lot Less Difficult To Sue Nursing Homes*]. The *New York Times* has reported on the effects of arbitration clauses in cases where nursing home residents were unable to bring claims in court as a result of having signed binding predispute arbitration clauses as a condition of admission into the nursing home. For instance, in May 2014, a woman with Alzheimer's was sexually assaulted twice in two days by other nursing home residents, according to an investigation by the state's department of public health. Although the state's investigation found that the nursing home had "failed to protect" the woman, the woman's family was unsuccessful in its attempt to have the arbitration clause in its agreement voided. According to the *Times*, between 2010 and 2014, more than one hundred cases against nursing homes for wrongful death, medical malpractice, and elder abuse were forced into arbitration. *See id.*; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [http://perma.cc/8R87-HZVF].

46. *See* 81 Fed. Reg. at 68,791-93 (citing, *inter alia*, §§ 1102(a) and 1871 of the Act, which authorize the HHS Secretary "to issue such rules as may be necessary to the efficient administration of the functions of the Department," § 1866, which "requires all Medicare providers and suppliers to agree to certain conditions in order to participate in the Medicare program," § 1902(a)(27), a similar provision for Medicaid providers, and §§ 1819(d)(4)(B) and 1919(d)(4)(B), which require long-term care facilities to "meet such other requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary" (footnote omitted)).

47. *See* 81 Fed. Reg. at 68,790. For instance, the proposed rule would have required facilities using predispute arbitration clauses to provide in-depth explanations of the arbitration agreements to the residents who were signing them. *See id.*

48. *See* Hersher, *supra* note 44.

49. Silver-Greenberg & Corkery, *U.S. Just Made It a Lot Less Difficult To Sue Nursing Homes*, *supra* note 45.

50. *See* 81 Fed. Reg. at 68,800.

requiring residents to sign arbitration agreements as a condition of being allowed to continue to stay at the facilities.[51] In addition, the rule imposed a requirement that when a long-term care facility and resident resolved a dispute with arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision had to be retained by the facility for five years and remain available for inspection upon request by the CMS. This provision allowed arbitration proceedings to be kept confidential while enabling the agency to evaluate the role of arbitration in long-term elder care.[52]

The CMS's litigation rulemaking did not go uncontested. Soon after being issued, the CMS rule was challenged in court, and a federal district judge issued a preliminary injunction against the rule.[53] The court held that the agency had exceeded its statutory mandate to impose "requirements relating to the health and safety [and the well-being] of the residents" with the rule.[54] As discussed below, the decision reflected the tensions inherent in an agency's regulation of federal court proceedings. It also demonstrated the dialectic developing between agencies and courts about the proper scope of federal civil litigation and the procedural rules that should govern it.

While the case was on appeal, the 2016 presidential election took place, resulting in a change in the Administration and in the agency's direction. Consequently, in early June 2017, the CMS voluntarily dismissed the appeal[55] and issued a revised proposed rule removing the ban on arbitration agreements. The new rule mandates only that binding arbitration agreements be in plain language, that the agreements be clearly communicated to residents who are signing them, and that all signed arbitration agreements and final arbitration agreements be kept on file for inspection by the CMS.[56]

Although the original arbitration rule was withdrawn after the election, the rulemaking revealed how the agency could play a role in crafting the federal procedural regime. Other agencies have taken similar steps.

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51. *See id.*

52. *See id.*

53. *See* Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 934-38 (N.D. Miss. 2016).

54. *Id.* at 937 (quoting 42 U.S.C. §§ 1395i– 3(d)(4)(B), 1396r(d)(4)(B)); *see also id.* at 939.

55. *See* Jeff Overley, *CMS Abandons Nursing Home Arbitration Appeal*, LAW360 (June 2, 2017), http://www.law360.com/articles/930890/cms-abandons-nursing-home-arbitration-appeal [http://perma.cc/2Q3C-GTQK].

56. *See* Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26,649 (proposed June 8, 2017) (to be codified at 42 C.F.R. pt. 483).

2. *CFPB Rules on Binding Arbitration*

While the CMS based its rulemaking on its general statutory mandate, in other cases, Congress has expressly instructed administrative agencies to issue rules governing the enforceability of arbitration agreements. In 2010, the Dodd-Frank Act tasked the CFPB with studying the use of mandatory arbitration agreements in consumer contracts and if necessary, issuing a rule to limit the use of these agreements to protect consumers.[57] In July 2017, the Bureau issued a final rule prohibiting consumer financial providers from using binding arbitration clauses that waive consumers' rights to bring their claims collectively.[58] The rule was a response to the Bureau's findings that few consumers consider bringing individual actions against financial service providers, either in court or in arbitration, and that class actions provide a more effective method of securing relief for unlawful practices by consumer financial companies.[59]

The CFPB's new rule had two major components.[60] First, the rule prohibited consumer financial service providers from requiring consumers to sign binding predispute arbitration clauses that would bar them from bringing class actions with respect to financial products or services.[61] Second, the rule required covered providers that are involved in arbitration proceedings to submit certain records to the Bureau, such as the size of arbitration awards. The purpose of this part of the rule was to monitor arbitrations so that the Bureau could identify additional consumer protection concerns warranting future agency action and could publish portions of these arbitral records in order to increase the transparency of the process.[62]

The rule met immediate resistance. Within approximately three months, both the House of Representatives and the Senate voted to overturn the rule, led by Republican lawmakers who thought it impeded the interests of the financial

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57. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(a), (b), 124 Stat. 1376, 2003-04 (2010).

58. 12 C.F.R. pt. 1040. For a more comprehensive history of the rule, see Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017). The widespread interest in the rule and the contentious nature of the Bureau's rulemaking process was evidenced by the more than 110,000 comments that the Bureau received between the publication of the proposed rule in May 2016 and the issuance of the final rule in July 2017. *See id.* at 33,246.

59. *See id.* at 33,220-45.

60. *See id.* at 33,210.

61. *See id.*

62. *See id.* at 33,210, 33,317.

industry.[63] Soon thereafter, President Trump signed the congressional resolution striking down the rule.[64] But even though the rule did not survive the shift in political winds, it was a prime example of litigation rulemaking. The CFPB had marshaled its resources and expertise to engage in comprehensive information-gathering, followed by focused and informed rulemaking, in a way that furthered Congress's consumer financial protection goals, pursuant to the Dodd-Frank Act.

The CFPB rule was just one example of Congress responding to the rise of arbitration by directing agencies to regulate it. For instance, the Dodd-Frank Act also amended the Truth in Lending Act to prohibit binding predispute arbitration in certain mortgage loans,[65] and in early 2013, the CFPB promulgated final rules to implement this statutory directive.[66] Outside of the CFPB context, in 2004, Fannie Mae issued guidance prohibiting binding predispute arbitration language in all mortgages that the agency purchases or guarantees in mortgage-backed securities.[67] And in 2007, Congress barred binding predispute arbitration clauses in certain loans made to service members, a policy that was further implemented through Department of Defense regulations broadening the range of consumer products in which binding arbitration was banned.[68] In 2008, Con-

63. *See* Jessica Silver-Greenberg, *Consumer Bureau Loses Fight To Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), http://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html [http://perma.cc/VZV5-F2HN].

64. *See* Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, HILL (Nov. 1, 2017, 4:43PM EST), http://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of-banking [http://perma.cc/2BVZ-ZEU7].

65. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1414, 124 Stat. 1376, 2149 (2010).

66. *See* Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11,280, 11,281, 11,386-88 (Feb. 15, 2013).

67. *See* Kenneth R. Harney, *Fannie Follows Freddie in Banning Mandatory Arbitration*, WASH. POST (Oct. 9, 2004), http://www.washingtonpost.com/wp-dyn/articles/A18052-2004Oct8.html [http://perma.cc/GUS2-7QZV]; *B8-3-02: Special Note Provisions and Language Requirements*, FANNIE MAE (Aug. 20, 2013), http://www.fanniemae.com/content/guide/selling/b8/3/02.html [http://perma.cc/62H2-FWHR]. The guidance contains the caveat that mortgages subject to mandatory arbitration are ineligible for sale to or securitization by Fannie Mae unless the provision provides that "in the event of a transfer or sale of the mortgage or an interest in the mortgage to Fannie Mae, the mandatory arbitration clause immediately and automatically becomes null and void and cannot be reinstated." *Id.*

68. *See* 10 U.S.C. § 987(e)(3), (f)(4) (2012). In July 2015, the Department of Defense issued new final rules that broadened the range of "consumer credit" products covered by the Military Lending Act to better correspond to the range of products considered "consumer credit" under the Truth in Lending Act. *See* Limitations on Terms of Consumer Credit Extended to Service

gress amended agricultural law to require that livestock or poultry contracts containing arbitration agreements disclose the right of the producer or grower to decline the arbitration agreement,[69] which was further implemented through Department of Agriculture regulations in 2011.[70]

In other cases, Congress has granted agencies the statutory authority to engage in litigation rulemaking to limit arbitration — encouraging them to do so — but agencies have not exercised this authority. For instance, the Dodd-Frank Act authorized the SEC to issue rules to restrict arbitration agreements in contracts between consumers and securities broker-dealers or investment advisers,[71] but the agency has not yet used this authority to constrain the use of arbitration, in part due to fear of political blowback.[72] Nevertheless, the CFPB's recent action on consumer-oriented arbitration agreements is just one example of a broader trend of agency-led litigation rulemaking relating to arbitration.

3. Litigation Rulemaking and Rule 12

These agency rules relating to the enforceability of arbitration agreements implicitly amend Rule 12 of the Federal Rules of Civil Procedure. To understand how, consider how an agency action like the CMS rule affects a proceeding to enforce an arbitration clause in federal court. When a party seeks to enforce an agreement to arbitrate, the standard procedure is for the party to file a motion to compel arbitration.[73] Motions to compel arbitration are typically governed by

Members and Dependents, 80 Fed. Reg. 43,560, 43,560, 43,599 (July 22, 2015) (codified at 32 C.F.R. pt. 232).

69. 7 U.S.C. § 197c (2012).

70. *See* Implementation of Regulations Required Under Title XI of the Food, Conservation, and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration, 76 Fed. Reg. 76,874, 76,874-890 (Dec. 9, 2011).

71. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1841, § 921(a)-(b) (2010) (codified at 15 U.S.C. §§ 780(o), 80b-5(f) (2012)). The Dodd-Frank Act also prohibited the use of arbitration agreements in connection with certain whistleblower proceedings. *See* Dodd-Frank § 922(b) (2010) (codified at 18 U.S.C. § 1514A(e) (2012)).

72. *See* Editorial, *Will Jay Clayton Protect Investors?*, N.Y. TIMES (Jan. 7, 2017), http://www.nytimes.com/2017/01/07/opinion/sunday/will-jay-clayton-protect-investors.html [http://perma.cc/79FE-A77Z].

73. *See* 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3569 (3d ed.), Westlaw (database updated Apr. 2017). The FAA authorizes court proceedings for motions to compel arbitration but does not specify the Federal Rule under which such a motion should be brought. *See* 9 U.S.C. § 4 (2012). Because there is no Federal Rule that directly speaks to how courts should address arbitration agreements, litigants and judges typically deal with motions to compel arbitration within the framework of the existing Rules.

Rule 12, which outlines seven defenses available to parties in response to a plaintiff's initial pleadings for relief, including lack of subject-matter jurisdiction under Rule 12(b)(1), improper venue under Rule 12(b)(3), and failure to state a claim upon which relief can be granted under Rule 12(b)(6).[74] Courts vary as to which provision of Rule 12 a defendant should cite in bringing a motion to compel arbitration. Some courts have held that a motion to compel arbitration should be evaluated as a Rule 12(b)(1) motion,[75] while others consider motions to compel arbitration to be 12(b)(3)[76] or 12(b)(6) motions.[77] Regardless of which provision of Rule 12 a court references in evaluating a motion to compel arbitration, however, the effect of the agency's litigation rulemaking is the same.

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74. *See* FED. R. CIV. P. 12(b). While certain courts permit litigants to bring these motions to compel arbitration under different provisions of Rule 12(b), others set stricter rules, for instance, forbidding district judges from considering motions to compel arbitration as Rule 12(b)(1) motions. *See* City of Benkelman, Neb. v. Baseline Engineering Corp., 867 F.3d 875, 881 (8th Cir. 2017).

75. *See* Gilbert v. Donahoe, 751 F.3d 303, 306 (5th Cir. 2014) (holding that a district court should dismiss a case for lack of subject matter jurisdiction, under Rule 12(b)(1), when the dispute is subject to binding arbitration); *see also* 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed.), Westlaw (database updated Apr. 2017) ("[T]here is authority to the effect that other matters of defense, including a claim that the plaintiff's failure to arbitrate precludes the maintenance of an action in federal court, cannot properly be raised on a motion to dismiss for lack of subject matter jurisdiction. Yet there is authority to the contrary on the subject, particularly when the obligation to arbitrate is mandatory." (footnote omitted)).

76. *See* Noble Drilling Servs., Inc. v. Certex USA, Inc., 620 F.3d 469, 472, n.3 (5th Cir. 2010) (stating that the Fifth Circuit has not "definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper rule for motions to dismiss based on an arbitration . . . clause" and explaining that the Fifth Circuit has accepted Rule 12(b)(3) "as a proper method for dismissal").

77. *See* Guidotti v. Legal Helpers Debt Resolution, LLC, 716 F.3d 764, 771-76 (3d Cir. 2013) (explaining that the Rule 12(b)(6) standard is appropriate when the "affirmative defense of arbitrability of claims is apparent on the face of a complaint" and discovery is not necessary (quoting Somerset Consulting, LLC v. United Capital Lenders, LLC, 832 F. Supp. 2d 474, 481 (E.D. Pa. 2011))); *see also* 13D WRIGHT ET AL., *supra* note 73, § 3569 n.38.

A few courts have held that when further factual development is needed, the motion to compel arbitration should be decided by applying the Rule 56 summary judgment standard. However, these courts have concluded that there is little difference between applying the Rule 56 standard and the Rule 12(b)(6) standard, since judges evaluating motions to compel arbitration typically consider evidence outside of the pleadings in either case. *See City of Benkelman*, 867 F.3d at 881-82 (holding that a motion to compel arbitration can be analyzed under either Rule 12(b)(6) or Rule 56); *Guidotti*, 716 F.3d at 771-76; Tinder v. Pinkerton Security, 305 F.3d 728, 735 (7th Cir. 2002) ("The FAA does not expressly identify the evidentiary standard a party seeking to avoid compelled arbitration must meet. But courts that have addressed the question have analogized the standard to that required of a party opposing summary judgment under Rule 56(e) of the Federal Rules of Civil Procedure . . . .").

By issuing its rule on arbitration, the CMS directed federal courts to deny motions to compel arbitration brought in the context of agreements between nursing homes and elderly residents. In so doing, the agency effectively amended Rule 12(b) to disallow a federal court from granting a motion to compel arbitration in certain cases. To be clear, the agency did not amend the types of defenses that a defendant may assert under Rule 12(b), nor did it expressly change the text of the Rule. Rather, the agency instructed the court as to how it must respond to a motion to compel arbitration in the particular context of a contract between a nursing home and an elderly resident. This kind of action exemplifies litigation rulemaking.

One might argue that this agency action involves an interpretation of the FAA, rather than an implicit amendment to the Federal Rules. But recall that the FAA itself can be understood as a gloss on the Federal Rules. The FAA case law establishes a norm that federal courts should almost always grant motions to compel arbitration under Rule 12. By specifying the application of Rule 12 in the context of arbitration, the FAA (and related case law) has effectively become part of the Federal Rules regime. In the face of this regime, the CMS and CFPB rules directed courts as to how they should respond to certain kinds of arbitration agreements. These agencies acting as litigation rulemakers were self-avowedly interpreting their own authorizing statutes, not the FAA.[78]

In fact, through the notice-and-comment process, these agencies effectively pointed out contradictions between their own interpretations of their substantive statutes and the federal courts' interpretations of the FAA. While the courts have read the FAA to establish a pro-arbitration policy in all substantive areas of law, these agencies have read other statutes—here, the Social Security Act and the Dodd-Frank Act—as militating against arbitration. By publishing these anti-arbitration rules in the Federal Register, the agencies told courts how to reconcile these statutory commands. The agencies asserted the importance of congressional interests that the courts—in the eyes of the agencies—had ignored.

A clash in the courts resulted. As the November 2016 CMS litigation revealed, at least one court stood ready to question whether an agency could issue a rule contradicting the courts' existing understanding of what to do when faced with a motion to compel arbitration. Through the conflict that played out in the briefing, argument, and eventual opinion, the judge and agency debated their appropriate roles in setting the ground rules for federal civil litigation. This interbranch dialogue was a natural consequence of litigation rulemaking. By telling judges how to apply the Rules to the cases before them, agencies are bound

78. In any event, it is not clear that the CMS or CFPB rulemaking could be considered a valid interpretation or amendment of the FAA. Any agency's reading of the FAA as prohibiting mandatory arbitration would depart so significantly from the judiciary's established interpretation of the FAA that it likely would not be lawful.

to come into conflict with the courts. The result is a vital debate about the institutions' relative roles in interpreting statutory intent and advancing the public interest through procedural change.

The CMS and CFPB examples also raise important questions about the scope of statutory authority. When litigation rulemaking takes places through notice-and-comment, agencies may ground their actions in either broad or narrow statutory mandates. For instance, the CMS justified its rulemaking on the basis of a general statutory mandate in the Social Security Act. In contrast, the CFPB's rule stemmed from a specific grant of rulemaking authority in the Dodd-Frank Act. These two approaches have different implications for litigation rulemaking and its perceived legitimacy. On the one hand, basing a rule on a general statutory grant of authority may mean the rule is more susceptible to a court challenge, since a court can more easily conclude that the agency's interpretation of the statute fell too far afield of congressional intent. This is what happened in the court challenge to the CMS rule.[79] On the other hand, allowing agencies to interpret general statutory mandates to formulate specific rules through notice-and-comment rulemaking affords agencies important flexibility. This flexibility permits agencies to issue rules that may not have been expressly contemplated at the time the statute was passed but that would have been considered necessary by the Congress that wrote the statute in light of contemporary developments. For instance, Congress may not have delegated to CMS the express authority to regulate binding arbitration agreements between nursing homes and their elderly residents, simply because such agreements were not common when the Social Security Act was written. Reasonable minds may differ on the legitimacy of agency action in the absence of sufficiently express delegation.[80] The point is simply that notice-and-comment rulemaking brings the question of underlying statutory authority to the fore.

Setting aside these arguments, the CMS and CFPB examples illustrate how agencies have engaged in litigation rulemaking at the front end of litigation. And despite subsequent shifts in political support for some of the arbitration rules, these actions unveiled agencies' overall capacity to engage in litigation rulemaking.

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79. *See* Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 934-38 (N.D. Miss. 2016).

80. The litigation and briefing in the court challenge to the CMS rule highlight the arguments on both sides. *See id.*

B. Class Waivers in Arbitration Agreements

Litigation rulemaking has also reshaped the lawfulness of class action waivers in the context of arbitration agreements. Again, this is evidenced by the juxtaposition between the Court's jurisprudence on class action waivers and an agency's response to this case law.

In the past few decades, the Court has not only limited litigants' access to judicial forums in cases involving arbitration but also the availability of class actions for parties to arbitration agreements. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, for instance, the parties to an arbitration agreement had stipulated that their contract was silent regarding the availability of class arbitration.[81] The Court held that under the FAA, class arbitration was not permitted[82] because "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[83] According to the Court, the parties were required to specify a contractual basis for allowing class arbitration.[84]

The Court doubled down on this logic in *AT&T Mobility LLC v. Concepcion*, holding that the enforcement of a class waiver in a standard form contract containing an arbitration clause is lawful and not unconscionable under the FAA or common-law contract principles.[85] The Court asserted that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[86] In *American Express Co. v. Italian Colors Restaurant*,[87] the Court reinforced this point, holding that class waivers in arbitration agreements are enforceable under the FAA even if the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery and arbitration is economically infeasible.[88] Taken together, these cases embody a policy in favor of class arbitration waivers under

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81. 559 U.S. 662, 668-69 (2010).

82. *Id.* at 684-87.

83. *Id.* at 685.

84. *Id.* at 682-84, 687.

85. 563 U.S. 333, 352 (2011).

86. *Id.* at 344.

87. 133 S. Ct. 2304, 2310-11 (2013).

88. *See id.*

the FAA.[89] In the face of this case law, however, the NLRB has decided that collective action is critical and issued a series of decisions preserving the right to engage in class arbitration in the labor context.

1. NLRB Decisions on Class Waivers

In recent years, the National Labor Relations Board (NLRB) has issued a number of decisions that have barred employer-employee agreements containing clauses that waive employees' rights to bring class or collective actions. The NLRB has held that sections 7 and 8 of the National Labor Relations Act (NLRA) do not permit these waivers, even in the face of the Court's jurisprudence upholding arbitration and arbitral class waivers.[90]

In 2012, in *D.R. Horton, Inc.*, the NLRB decided, in a 3-2 decision, that an employer violated sections 7 and 8 of the NLRA when it required employees covered by the Act to sign an agreement that precluded them from filing joint, class, or collective claims against their employer in any arbitral or judicial forum.[91] Specifically, the Board held that the agreement interfered with the section 7 right of employees to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[92] The following year, the Fifth Circuit reversed the Board's decision, holding that the arbitration agreement was

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89. The Court has continued to reinforce its pro-arbitration policy in its most recent decisions on the subject. In 2015, the Court upheld a class waiver in an arbitration clause under the FAA and rejected a claim that the waiver could be invalidated by state law. *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 466, 471 (2015). In 2017, the Court again held that state law could not stand in the way of enforcing an arbitration agreement. *See* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425-26, 1429 (2017).

90. Section 7 of the Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (2012). Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights" guaranteed in section 7 of the Act. 29 U.S.C. § 158(a)(1) (2012).

91. *See* 357 N.L.R.B. 2277, 2277-82, 2288-89 (2012).

92. *Id.* at 2278, 2281, 2288 (quoting 29 U.S.C. § 157 (2012)).

enforceable under the FAA and that the Board had no authority to ignore longstanding FAA jurisprudence, even in light of its reading of the NLRA.[93]

But the NLRB was undeterred. Just two years later, in *Murphy Oil*,[94] it reaffirmed its initial holding in *D.R. Horton*. In so doing, the Board continued to resist the federal courts' interpretation of the relationship between the FAA and the NLRA and their interpretation of whether the "concerted activity" protected by section 7 encompasses the ability to bring a class or collective action.[95] The Fifth Circuit reversed the Board's decision but refused to hold the Board in contempt for its recalcitrance to follow the *D.R. Horton* holding. Instead, it reasoned that because the "Board may well not know which circuit's law will be applied on a petition for review," the Board did not have to apply the Fifth Circuit's holding in *D.R. Horton* in deciding *Murphy Oil*.[96]

In 2016, the Seventh Circuit split from the Fifth Circuit's position and affirmed the NLRB in *Lewis v. Epic Systems Corporation*, deciding that Section 7 of the NLRA's protection for "concerted activities" included employees' right to engage in class, representative, and collective legal processes.[97] As a result, the court held, the NLRA rendered unenforceable any contract provision purporting to waive employees' access to such remedies and the FAA did not preclude the agency action.[98]

Soon thereafter, the Ninth Circuit reinforced the circuit split in *Morris v. Ernst & Young, LLP*.[99] Like the Seventh Circuit, the Ninth Circuit held that a "concerted action waiver" violated the NLRA and was therefore unenforceable.

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93. *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357-62 (5th Cir. 2013).

94. *See* 361 N.L.R.B. No. 72 (Oct. 28, 2014).

95. *Id.*

96. Murphy Oil USA v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015) ("We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence."). A person can seek review of an NLRB decision in the circuit court in the place where the employer allegedly engaged in the unfair labor practice in question, the circuit court in any place where the person resides or transacts business, or the D.C. Circuit. *See* 29 U.S.C. § 160(f) (2012).

97. 823 F.3d 1147, 1153-54 (7th Cir. 2016). In between the Fifth Circuit's *Murphy Oil* decision and the Seventh Circuit's ruling in *Epic Systems*, the Eighth Circuit (in *Owen v. Bristol Care, Inc.*) and Second Circuit (in *Sutherland v. Ernst & Young, LLP*) both held that class waivers in arbitration agreements are enforceable in Fair Labor Standards Act (FLSA) cases, declining the plaintiffs' requests that the court follow the NLRB's reasoning in *D.R. Horton* that the labor statute (in this case, the FLSA rather than the NLRA) protected the right to collective action. *See* Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053-55 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 296-99 (2d Cir. 2013).

98. *See Epic Systems*, 823 F.3d at 1156-60.

99. 834 F.3d 975 (9th Cir. 2016).

Moreover, the Ninth Circuit held that the NLRA's ban on barring concerted legal claims did not ban arbitration and therefore, that the court's holding was not inconsistent with the FAA jurisprudence. According to the court, the concerted action waiver would be illegal even if the employment agreement had a clause requiring all disputes to be resolved in court rather than through arbitration—and therefore, that the arbitration was mandatory did not affect the court's decision.[100]

In January 2017, the Supreme Court granted certiorari in *Epic*, *Murphy Oil*, and *Ernst & Young*, consolidating the three cases,[101] and the cases were heard in October 2017.[102] Even as this litigation proceeded, however, the NLRB continued to reinforce its position that employees cannot waive their rights to bring NLRA claims as a class in related cases.[103]

2. *Litigation Rulemaking and Rule 23*

In declining to defer to the Fifth Circuit's ruling in *D.R. Horton* and reaffirming its own position against the enforceability of class waivers in employer-employee arbitration agreements, the NLRB has pursued a policy of nonacquiescence. As a general matter, nonacquiescence refers to an agency's refusal to conduct its own proceedings consistently with adverse rulings of federal courts of appeals.[104] The NLRB is known for nonacquiescence, having reserved the right to nonacquiesce in its own adjudications since at least 1944.[105] The result is that the agency's approach to pressing its view of the law often places it in a tug-of-war with the courts. In this most recent series of cases, the NLRB has—notwithstanding pro-arbitration, anti-class action jurisprudence and federal

100. *Id.* at 984-85.

101. *See* Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017); Ernst & Young, LLP v. Morris, 137 S. Ct. 809 (2017); NLRB v. Murphy Oil USA, 137 S. Ct. 809 (2017).

102. *See October Term 2017*, SUP. CT. U.S. (2017), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2017.pdf [http://perma.cc/5TUM-S8BX].

103. *See, e.g.*, On Assignment Staffing Servs., Inc., 362 N.L.R.B. No. 189 (2015) (holding that an opt-out provision in an arbitration agreement is ineffective and an additional burden on employees' protected rights to pursue collective action); PJ Cheese, Inc., 362 N.L.R.B. No. 177 (2015) (holding that the six-month statute of limitations in § 10(b) of the NLRA is ineffective even if the employees signed the arbitration agreement more than six months before an unfair labor practice charge was filed with the NLRB).

104. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

105. *See id.* at 706.

court decisions rejecting the agency's *D.R. Horton* position—continued to voice its disapproval of class waivers in employer-employee arbitration agreements.

This nonacquiescence through adjudication has yielded a novel interpretation of litigants' rights to class relief. The NLRB has held that employees have a right to seek class relief under the NLRA and that any waivers of this right are unenforceable as a matter of law. This legal conclusion, reaffirmed through one agency adjudication after another, constituted an implicit amendment to Rule 23.

To be clear, the agency and courts did not justify their decisions as reinterpretations of Rule 23. Rather, the NLRB held that its decisions were grounded in the agency's interpretation of section 7 of the NLRA,[106] and the Seventh Circuit said the same.[107] The purpose of this reasoning was to draw a distinction between Rule 23 establishing a "procedural" right to a class action, and section 7 creating a "substantive" right to class relief. By reading the right to class relief as inherent in the NLRA, the agency could find that this "substantive" right survived pro-arbitration FAA case law.[108] But notwithstanding the stated distinctions between "substantive" and "procedural" rights, the effect of the NLRB decisions was the same: allowing employees to bring arbitral class actions in employment cases. The outcome would have been no different had the agency carved out an exception for class relief under Rule 23 instead of section 7. The Seventh Circuit implicitly recognized the equivalence, reasoning that the NLRA was "not written on a clean slate" and instead, incorporated the widely accepted equitable class and collective procedure practices that had been in existence since at least the nineteenth century.[109] Thus, the NLRB's adjudications effected a nuanced amendment to the Federal Rules regime.

Thus, the NLRB is engaging in litigation rulemaking, establishing rules for how judges should approach claims brought to their courtrooms. When litigation rulemaking takes the form of adjudication, nonacquiescence serves as a tool for the agency to promulgate its views, particularly when the federal courts disagree with the agency. Although agency adjudication is nominally only between the two parties in a dispute, when combined with a policy of nonacquiescence, it leads to the creation of a rule that the agency applies consistently to similarly situated parties, in defiance of the federal courts. The end result resembles a rule that emerges from notice-and-comment, albeit one that is memorialized in the Federal Reporter rather than in the Federal Register. Although the courts retain

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106. *See, e.g.*, D.R. Horton, Inc., 357 N.L.R.B. 2277, 2286 (2012).

107. *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016).

108. *See id.*; AT&T LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

109. *See Epic Systems*, 823 F.3d at 1154.

their power of judicial review over this agency action, the NLRB's policy on class waivers reflects adjudication-based litigation rulemaking in action.

IV. AGENCIES AT THE BACK END

Not only have agencies regulated access to courts on the front end, but they have also set rules about the relief that courts may grant parties. In recent years, agencies have issued guidance regulating the confidentiality of court orders and settlement agreements. At the same time, one agency has begun the process of regulating the distribution of class action settlements, which typically takes place at the end of litigation. Both in the context of court secrecy and of class action settlement distributions, agencies are prescribing the nature of the remedial relief that federal courts may award to parties before them.

A. Confidential Court Orders and Settlement Agreements

Federal litigation has long been wracked by debates about the extent to which court proceedings should be kept confidential. Court secrecy can range from shielding court processes, such as trials, hearings, and status conferences, from the public eye to sealing court orders and settlements. In recent years, a growing number of scholars have called for greater transparency in litigation. As Judith Resnik argues, open and public courts reinforce equality by "performing a commitment that disputants are equal."[110] By promoting a shared understanding of what law is and how it is made, open access to courts strengthens democratic self-governance.[111]

The Federal Rules cover court secrecy in Rule 26. Rule 26 lists detailed requirements for discovery, disclosure, and protective orders in federal civil suits. Among other things, it states that a court may issue a protective order "for good cause" in order to protect a party or person "from annoyance, embarrassment, oppression, or undue burden or expense."[112] Although legislatures have enacted statutes to limit court secrecy,[113] agency action in this arena has not yet been well documented, nor connected to the Federal Rules governing the confidentiality of court orders and settlement agreements. But recent agency action reveals the role of litigation rulemaking on the back end of federal court adjudication and how agencies' effective amendments to the Federal Rules can shape lawsuits.

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110. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 537 (2006).

111. *See id.* at 537, 570.

112. FED. R. CIV. P. 26(c).

113. *See* Resnik, *supra* note 110, at 561-65 (providing examples of such statutes).

1. *NHTSA & CPSC Best Practices for Protective Orders and Settlement Agreements*

In March 2016, the National Highway Transportation Safety Administration (NHTSA) issued guidance urging parties and courts involved in motor vehicle safety lawsuits to include provisions in protective orders or settlement agreements that allow for the disclosure of relevant auto safety information to NHTSA and other appropriate government authorities.[114] In issuing this guidance, NHTSA pointed to recent investigations involving the Takata airbag recalls and General Motors ignition switches as examples of how identifying motor vehicle risks early can help protect public safety and welfare.[115]

Current law requires industry participants to report certain information to NHTSA, but not all stakeholders fulfill these reporting obligations in a timely manner. In particular, confidentiality restrictions embedded in protective orders or settlement agreements in private litigation, whether court sanctioned or privately negotiated, prevent parties from providing information about motor vehicle safety concerns to the agency.[116] NHTSA's new guidance seeks to combat this secrecy. The guidance asks judges and litigants to prevent safety defect information from being completely shielded in sealed court documents so that the agency can gather the information that it needs to set appropriate motor vehicle safety standards and ensure compliance with federal standards.

According to the agency, protective orders, settlements, or other confidentiality agreements that bar information obtained in private litigation from being conveyed to NHTSA violate Rule 26 of the Federal Rules of Civil Procedure and its state-law parallels, which require a showing of good cause for imposing confidentiality.[117] The agency recognized that under Rule 26, courts have the discretion to decide whether to restrict access to certain documents upon a showing of good cause but determined that the "public's interest in access to court records is the strongest when the records concern public health or safety."[118] Therefore, NHTSA urged courts and litigants to carve out exceptions permitting the dis-

114. *See* NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 Fed. Reg. 13,026, 13,027-28 (Mar. 11, 2016).

115. *See id.* at 13,027.

116. *See id.*

117. *See id.* at 13,026-27.

118. *See id.* at 13,028. The agency cited state laws and various public policy considerations that supported its position that public health and safety are relevant considerations in determining whether the confidentiality of court documents is appropriate. *See id.* at 13,028-30.

closure of confidential information relating to safety defects to the agency, finding that complete confidentiality would not meet the "good cause" requirement otherwise, given the risks to public health and safety.

In December 2016, the Consumer Product Safety Commission (CPSC) adopted parallel guidance, modeled on NHTSA's, pushing for transparency in court orders in cases involving consumer protection.[119] Specifically, the CPSC's guidance urges parties and courts to ensure that protective orders, confidentiality agreements, and settlements specifically allow for disclosure of relevant consumer product safety defects to the CPSC and other government public health and safety agencies. The guidance points to safety information related to dangerous playground equipment, collapsible cribs, and all-terrain vehicles that was kept from the CPSC by protective orders in private litigation. In order to address the lack of transparency with respect to these court orders, the guidance provides draft language that parties can use to create exceptions to confidentiality designations and to permit parties to report relevant information to the CPSC and other relevant agencies.

Like NHTSA's guidance, the CPSC guidance addressed inconsistent reporting from parties involved in private litigation. Under current law, certain categories of manufacturers, retailers, and distributors are statutorily required to report to the CPSC when they find that a product does not comply with a law or that it contains a defect that could create either a substantial product hazard or an unreasonable risk of serious injury or death.[120] However, these stakeholders

119. *See* CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 Fed. Reg. 87,023 (Dec. 2, 2016). The Commissioner who proposed the guidance stated that the agency chose to publish the guidance without notice and comment because it was "not required, nor helpful," in this case. The APA does not require notice and comment for guidance, and it informs the public of the relevant legal authorities and best practices without imposing any new legal duties on parties. Therefore, as the sponsoring Commissioner put it, "seeking comment [in this case] simply ties up precious CPSC resources, and needlessly delays safety-enhancing action." Press Release, Consumer Product Safety Commission, Statement of Commissioner Marietta S. Robinson on CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreement in Private Civil Litigation (Nov. 22, 2016), http://www.cpsc.gov/about-cpsc/commissioner/marietta-s-robinson/statements/statement-of-commissioner-marietta-s-2 [http://perma.cc/JN5H-MBF8]. In contrast, NHTSA solicited comments on its proposed guidance and responded to them in its final publication of the guidance in the Federal Register. *See* NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 Fed. Reg. at 13,026.

120. *See* CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 Fed. Reg. at 87,023 (citing 15 U.S.C. § 2064(b) (2012)).

often fail to meet their reporting requirements. If these stakeholders then enter into protective orders in private litigation relating to consumer products, other parties, including those without the statutory obligations, may be prevented from sharing important product safety information that they have discovered with the agency.[121] Moreover, to shield incriminating documents discovered before trial, defendants often demand blanket productive orders as a condition of settlement.[122] The guidance is aimed at allowing the agency to collect information regarding consumer product-related safety hazards in a timely way so that the agency can address consumer safety issues as they arise and stem consumer harm before it becomes widespread.[123]

2. *Litigation Rulemaking and Rule 26*

Both NHTSA and the CPSC explicitly invoked the Federal Rules of Civil Procedure in their guidance. Specifically, both agencies stated that their guidance furthered the goal of transparency and public welfare inherent in Rule 26. The CPSC guidance expressly relied on NHTSA's legal analysis, asserting that when protective orders and settlement agreements "shield relevant and actionable safety information behind nondisclosure provisions, they violate the good-cause requirement of Rule 26 of the Federal Rules of Civil Procedure, its state corollaries, and the well-established public policy favoring protecting public health and safety."[124]

Rule 26(c) states that any party from whom discovery is sought may move for a protective order to shield documents. As explained above, under Rule 26, the court may issue a protective order, for good cause, in order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense."[125] The Rule includes examples of the kinds of protective orders that a federal court may issue, for instance, forbidding the disclosure or discovery of information, designating the persons who may be present when the discovery is conducted, or sealing a deposition.[126]

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121. *See id.* at 87,023-24.

122. *See id.*

123. *See id.* at 87,023 ("The timely collection of information regarding consumer product-related safety hazards is essential for carrying out the Commission's public health and safety mission.").

124. *See id.* at 87,024.

125. FED. R. CIV. P. 26(c).

126. *See id.*

As written, Rule 26 does not prohibit parties from shielding motor vehicle or product safety information from the relevant federal agencies. However, the NHTSA and CPSC guidance interpret Rule 26's good-cause requirement to foreclose courts from issuing protective orders or sealing court documents so as to prevent the disclosure of safety defect information to the agencies. In so doing, the agencies expanded Rule 26's good-cause requirement to limit the confidentiality of court orders or settlement agreements in cases involving automobile or product safety defects.

Litigation rulemaking in this context differs from the previous examples because guidance is not final agency action and is legally nonbinding.[127] In practice, however, guidance can have binding effect, much like rulemaking and adjudication. For instance, if private parties reasonably believe that failure to follow the guidance will have adverse consequences, then guidance can have practically binding effect.[128] This is particularly the case when parties are repeat players before agencies, interacting with or appearing before them multiple times. Additionally, even though the agencies may disclaim the legally binding nature of the document, it can effectively harden into a fixed rule with binding effect if the agencies choose to apply or enforce it consistently.[129]

For instance, although neither NHTSA nor the CPSC have avowed an intention to enforce their guidance, if, in the future, the agencies were to make final agency action contingent upon the parties adopting these new provisions, then

127. The APA requires notice and comment for all agency rulemaking unless the agency is issuing "interpretative rules" or "general statements of policy." 5 U.S.C. § 553(b) (2012); *see* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004). Interpretative rules and general statements of policy are collectively considered "guidance" or "nonlegislative rules." To prevent agencies from avoiding the requirements of the APA when they promulgate rules, an extensive doctrinal framework governs courts' distinctions between legislative rules and guidance. Courts focus primarily on whether a nonlegislative rule has a "binding" effect and if so, whether that effect is merely an interpretation of an existing statute or legislative rule. If the rule is binding and not merely interpretative, then it will likely be considered a legislative rule, and therefore, courts will require the agency to satisfy the procedural rulemaking requirements in order for it to be lawful agency action. *See* Manning, *supra*, at 893-94.

128. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992). Robert Anthony argues that if an agency intends a document to be legally binding, then the document should be issued as a legislative rule instead of as guidance. *See id.* at 1327; *see also* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. U.S. 37 (Oct. 12, 2017), http://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [http://perma.cc/7N97-ADNG].

129. *See id.* at 1329.

this guidance may appear to have the legally binding characteristics of a legislative rule.[130] Take, for instance, the CPSC, which regularly conducts investigations of potential violations of federal consumer product safety laws.[131] If the agency were to make decisions in the course of its investigations — such as whether to issue subpoenas for information from manufacturers or whether to threaten certain civil penalties — on the basis of whether the manufacturers under investigation had complied with the best-practices guidance, the effect would be to make the guidance practically binding.

Guidance can also be a way for agencies to conduct "trial runs" of litigation rulemaking before crystallizing these changes to the Federal Rules through notice-and-comment rulemaking or adjudication. For instance, if guidance proves effective, then an agency may formalize it into a rule through notice and comment. The agency can then justify the new rule by referencing the effectiveness of the nonbinding guidance. On the other hand, if the guidance is effective in certain instances but not sufficiently widely adopted, then an agency can implement the same rule through notice-and-comment rulemaking or adjudication in order to oblige greater compliance.

By issuing this novel guidance, these agencies have responded to concerns about federal court secrecy and transparency by imposing additional rules atop Rule 26's existing procedural requirements. Through litigation rulemaking, these agencies have effectively amended the Federal Rules regime, tailoring the procedural rules that govern certain federal cases in furtherance of the agencies' goals of promoting public health and safety.

B. Class Action Settlements

Litigation rulemaking by agencies has also played a role in class action settlements. Under Federal Rule of Civil Procedure 23(e), courts are tasked with reviewing and authorizing proposed class action settlements in order to ensure their fairness.[132] After a judge approves a class settlement, however, there is typically little to no reporting of how effective the notice to class members was, how

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130. *See id.* ("It is possible that an agency will use mandatory or rigid language even though it does not intend the document to be regularly applied without further consideration. There is nevertheless a practical binding effect if private parties suffer or reasonably believe they will suffer by noncompliance.").

131. *See* Office of Gen. Counsel, *Staff Guidance on Enforcement of Civil Penalties*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Sept. 2015), http://www.cpsc.gov/s3fs-public/OGC EnforcementGuidance_0.pdf [http://perma.cc/A8Y2-PXSB].

132. *See* FED. R. CIV. P. 23(e)(2).

the settlement was distributed to class members, or what percentage of the settlement fund was eventually paid out.[133] More often than not, a class action settlement is administered by one of a handful of large companies that specialize in identifying, notifying, and handling claims by class members.[134] These claims administrators typically keep the claims rates confidential.[135] The result has been nearly complete obscurity of the effectiveness of class action settlements and distributions, despite Rule 23's formal requirement that a court only approve a settlement if it is "fair, reasonable, and adequate."[136]

Class members typically lack the incentives to monitor the claims distribution and the behavior of class counsel because monitoring is costly relative to each participant's individual stake.[137] This is particularly true in the context of consumer class actions, which usually involve only small dollar amounts recovered by each class member.[138] Some judges have scrutinized class notices, claims rates, and the adequacy of class counsel more closely, attempting to ensure that Rule 23(e)'s requirements are not rendered meaningless. For instance, in one recent case involving an allegedly defective trigger mechanism in a line of rifles, a court found that the initial claims rate was less than one percent of the class, leading the court to demand an improved notice program for the class action settlement.[139] Other judges rigorously scrutinize proposed class settlements at

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133. *See* Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, RAND INST. FOR CIV. JUST. 2 (July 2008), http://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR599.pdf [http://perma.cc/85PM-EYZA] ("Ironically, a veil of secrecy can fall over class action litigation the moment the judge signs off on the agreement."); *see also id.* at 34 ("Our efforts demonstrate that it is very difficult, even for researchers with significant resources, to find distribution data in completed class action lawsuits . . . . What this means is that court records themselves typically do not contain distribution data and class action participants are generally unwilling to provide it to interested persons. In other words, the data are neither publicly available nor privately provided.").

134. Alison Frankel, *FTC's Class Action Claims Investigation Could Be "Bombshell" for Consumer Cases*, REUTERS (Nov. 15, 2016), http://www.reuters.com/article/us-otc-ftc-idUSKBN13A2MU [http://perma.cc/6ACM-TXAQ].

135. *See id.*

136. FED. R. CIV. P. 23(e)(2).

137. *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 512-13 (2011).

138. *See id.* at 517.

139. *See* Frankel, *supra* note 134; *see also* Perry Cooper, *More Judges Eying Class Claims Data? If So, Then What?*, BLOOMBERG BNA (Feb. 5, 2016), http://www.bna.com/judges-eying-class-n57982067030 [http://perma.cc/KDD9-SYF7] (describing how one judge who asked a settlement administrator to report the claims filed and the payouts to class members at the final approval hearing found an unacceptably low claims rate by class members).

the preliminary approval stage on a regular basis, reasoning that the court's inquiry about whether the settlement is fair, reasonable, and adequate should be just as serious at the initial stage as at final approval.[140] But courts vary in their approaches and, despite their efforts, lack information about the effectiveness of class settlements. The Federal Trade Commission (FTC) has decided to tackle this problem head on.

1. FTC Orders to Claims Administrators

In November 2016, the FTC announced that it had issued orders to eight claims administrators asking them to detail the procedures they use to notify class members about settlements and the response rates for various methods of notification.[141] The FTC called for the claims administrators to disclose information about their ten largest cases in each of the last three years, which translates to a request for data on notice procedures and claims rates in a total of 240 class actions. This order is expected to result in the largest-ever database of information about participation in consumer class actions. The FTC has not named the eight companies that received orders, but two large claims administrators, Epiq and Analytics, have reported that they received and are reviewing FTC data requests.[142]

The FTC voted 3-0 to issue these orders, stating that it was authorized to issue them under Section 6(b) of the Federal Trade Commission Act,[143] which permits the FTC to require entities to file "annual or special . . . reports or answers in writing to specific questions" in order to gather information about an organization, individual, or other entity.[144] The agency is also authorized to

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140. *See, e.g.*, Cotter v. Lyft, Inc., 193 F. Supp. 3d 1030, 1036-37 (N.D. Cal. 2016); *see also* Perry Cooper, *Five Tips To Green Light Class Settlements*, BLOOMBERG (Oct. 12, 2017), http://www.bna.com/five-tips-green-n73014470892 [http://perma.cc/7G3S-UWU5].

141. *See FTC Seeks To Study Class Action Settlements*, FTC (Nov. 14, 2016), http://www.ftc.gov/news-events/press-releases/2016/11/ftc-seeks-study-class-action-settlements [http://perma.cc/Q9LF-29YN]. It is not clear from either news reports or the FTC's own statements describing these orders whether the orders are binding and what their legal status is.

142. *See* Frankel, *supra* note 134.

143. *See FTC Seeks To Study Class Action Settlements*, *supra* note 141.

144. 15 U.S.C. § 46(b) (2012); *see A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FTC (July 2008), http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [http://perma.cc/9DR7-EC6F].

> As with subpoenas and [civil investigative demands], the recipient of a 6(b) order may file a petition to limit or quash, and the Commission may seek a court order requiring compliance. In addition, the Commission may commence suit in Federal

"'make public from time to time' portions of the information that it obtains, where disclosure would serve the public interest."[145]

The orders are part of the agency's broader litigation rulemaking efforts through the Class Action Fairness Project, which is focused on studying class action settlements related to consumer protection and competition in order to ensure that these settlements "provide appropriate benefits to consumers."[146] As a part of the project, the FTC "monitors class actions and files amicus briefs or intervenes in appropriate cases; coordinates with state, federal, and private groups on important class action issues; and monitors the progress of legislation and class action rule changes."[147] The project also includes the Notice Study,[148] which is analyzing consumer understanding of class action notices, and the Deciding Factors Study,[149] which is looking at the factors that influence consumers' decisions to participate in a class action settlement.[150]

2. *Litigation Rulemaking and Rule 23*

The FTC's orders reflect a first step toward regulating class action settlements through litigation rulemaking. In an effort to begin addressing the gap between a court's ex ante approval of a class action settlement and low ex post claims rates, the FTC issued these orders and initiated the two studies relating to consumer understanding of class action notices and participation in class action settlements. The FTC's efforts resemble the beginning of a process to revise Rule 23 to take actual claims rates into account in determining whether a class action settlement is sufficiently fair. Whether the FTC issues a rule in response

> court under Section 10 of the FTC Act . . . against any party who fails to comply with a 6(b) order after receiving a notice of default from the Commission . . . . The Commission's 6(b) authority enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose . . . . Section 6(b) enables the Commission to obtain answers to specific questions as part of an antitrust law enforcement investigation, where such information would not be available through subpoena because there is no document that contains the desired answers.

A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority, *supra*.

145. *See id.* (quoting 15 U.S.C. § 46(f) (2012)).

146. *FTC Seeks To Study Class Action Settlements*, *supra* note 141.

147. *Id.*

148. *See* Agency Information Collection Activities; Proposed Collection; Comment Request, 82 Fed. Reg. 32,816 (July 18, 2017); Agency Information Collection Activities; Proposed Collection; Comment Request, 80 Fed. Reg. 25,676 (May 5, 2015).

149. *See id.* at 25,677.

150. *See FTC Seeks To Study Class Action Settlements*, *supra* note 141.

to the data on consumer class action settlements or leaves the task to the federal courts, its efforts can inform a revision of Rule 23 that takes into account actual claims settlement processes. Alternatively, the FTC's data can be used by courts applying the Rule 23(e) standard to decide whether to approve class settlements.

In fact, the FTC's efforts are being complemented by the formal court rulemaking process. The Rules Committee recently submitted proposed Rule 23 amendments to the Supreme Court addressing these very issues. Like the FTC, the Committee identified gaps in notice rates to potential class members and is focused on improving this process. The Committee has proposed changing the Rule to encourage administrators to notify class members by email and other electronic means, not just regular postal mail.[151] Additionally, the Committee proposed a list of factors that the court should take into account in determining whether a class settlement is fair, reasonable, and adequate under Rule 23(e), including the costs, risks, and delay of trial and appeal, the claims distribution process, and the timing and payment of attorney's fees.[152] This list of factors expressly includes "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" as a new subsection Rule 23(e)(2)(C)(ii).[153] This, too, illustrates the overlap between the agency's efforts to gather data about and regulate claims settlements and the Rules Committee's attempts to require federal judges to take similar factors into account.

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151. *See* Memorandum from Rebecca A. Womeldorf, Rules Comm. Chief Counsel, to Scott S. Harris, Clerk of the Supreme Court of the U.S. 266-67 (Oct. 4, 2017) [hereinafter 2017 Proposed Amendments], http://www.uscourts.gov/sites/default/files/2017-10-04-Supreme-Court-Package_0.pdf [http://perma.cc/9XX5-MU3M].

152. *Id.* at 269-70.

153. *Id.* at 269. *See id.* at 213-14. In an earlier Note to the proposed Rule 23 amendments, the Rules Committee stated,

> Measuring the proposed relief may require evaluation of the proposed claims process and a prediction of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important. The contents of any agreement identified . . . may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules, to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice and Procedure (July 1, 2016), *in* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 226, http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf [http://perma.cc/GS76-FQ4C].

The overlaps between the FTC's goals and the Committee's proposed amendments demonstrate how agencies and courts can work together in amending the Federal Rules regime. The information that the FTC uncovers through its orders can be used to regulate claims administrators and require them to improve their processes, or even just to disclose claims rates to judges. At the same time, the court rulemaking reveals that courts are beginning to scrutinize claims rates and the adequacy of class settlement procedures at preliminary and final approval and even seeking to memorialize these changes in the text of Rule 23. The synchrony of these efforts illustrates how litigation rulemaking and court rulemaking need not be in conflict; rather, agencies and courts can use their strengths to amend the Federal Rules together. The next Part delves further into these dynamics.

V. AGENCIES AS LITIGATION RULEMAKERS

The examples in the preceding sections are just a few illustrations of agency actions that effectively amend the Federal Rules regime. Although the text of the Rules remains the same, these agencies are implicitly amending the Rules by limiting how federal judges apply the Rules. For instance, on its own, Rule 12 does not limit the discretion of judges faced with motions to compel arbitration. But by issuing a rule banning predispute binding arbitration, the CMS directed judges to deny these Rule 12 motions in an entire class of cases. To take another example, Rule 26 allows courts to restrict access to court filings given good cause. As written, the Rule grants judges wide latitude to determine the appropriate scope of protective orders. However, the NHTSA and CPSC guidance urges courts to decide that Rule 26 requests to restrict the disclosure of auto and product safety information do not meet the good-cause requirement. By cabining the judicial discretion inherent in the Rules, these agencies are amending the baseline that the Rules establish. This is what characterizes these actions as litigation rulemaking.[154]

154. Whether to call this "interpretation" or "amendment" is in some sense a semantic choice. Interpretations can be narrow or broad, like amendments. This is why judicial decisions that "interpret" statutes often have the same effect as legislative "amendments," altering the meaning and application of statutes. *See* Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 104-05, 104 n.43 (2003). To the extent that both "interpretations" and "amendments" can change the meaning of laws (including the Federal Rules) and limit the discretion of future courts, the two terms may be interchangeable. *See, e.g.*, Burbank & Farhang, *supra* note 13, at 1606 ("In addition, in our view, all of the decisions strained any principled distinction between judicial interpretation and judicial amendment.").

Given this descriptive understanding, this Part turns to the question of how litigation rulemaking compares to court rulemaking. An initial comparison reveals the unmistakable similarities between the two approaches, bolstering the legitimacy of litigation rulemaking. An analysis of the benefits and drawbacks of litigation rulemaking follows. The benefits include the ability of agencies to marshal their expertise, solve multifaceted, multi-party problems, and make procedural and substantive law more coherent. The drawbacks include special-interest influence on agency decision making and the erosion of transsubstantive law. On net, however, the benefits of litigation rulemaking appear to outweigh the costs. In addition, litigation rulemaking provokes institutional questions new and old — about the legitimacy of this kind of agency action in our broader system of government, about the nature and impact of this new dialectic between agencies and courts, and about the effect of procedural rulemaking on substantive law.

A. Court Rulemaking Versus Litigation Rulemaking

To understand why litigation rulemaking matters — and whether it is legitimate — the first step is to compare it to court rulemaking, the established process for drafting and amending the Federal Rules. The resemblances are striking, and the structural similarities between the two processes reinforce the legitimacy of the newer agency-led approach.

Both court rulemaking and litigation rulemaking are rooted in statutory delegations of authority from Congress. Just as the courts write the Rules under the authority of the Rules Enabling Act,[155] agencies engage in litigation rulemaking on the basis of specific statutory grants of authority (for instance, the Dodd-Frank Act). Courts ensure this remains the case, since the very function of judicial review under the APA is to ensure agency fidelity to statutory intent.

More commonly, "interpretation" refers to divining the meaning of a text by referencing the drafter's underlying intent. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 405-62 (1989). This is not what litigation rulemaking typically entails. As litigation rulemakers, agencies are not attempting to uncover the underlying intent of either the Rules Committee or Congress. Put another way, these agencies are not claiming that the Rules were meant to be read or applied one way or the other. Rather, these agencies are deciding that the Rules should be applied a certain way, without reference to drafters' intent, usually in light of other statutory commands and contemporary legal realities (such as the rise of mandatory arbitration). Therefore, these agency actions are better described as implicitly amending — rather than interpreting — the Federal Rules regime.

155. *Cf.* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1334-35 (2006) (arguing that Congress should not have delegated rulemaking authority to the courts and the Rules Enabling Act should be held to violate the separation of powers).

In addition, the role of the judiciary in court rulemaking mirrors the role of administrative agencies in litigation rulemaking.[156] Like an agency, the Court is delegated power by Congress to craft the law—in this case, the law of civil procedure—through a combination of rulemaking and adjudication. Rulemaking takes place through the seven-stage drafting process, and adjudication yields novel interpretations of the written Rules.[157] Like administrative agencies, the Court faces an ongoing choice between amending the Rules through the rulemaking process and reinterpreting the Rules through adjudicative decisions.[158] Because the Rules Enabling Act delegates the power "to prescribe general rules of practice and procedure"[159] to the Court, some have analogized the Rules as "akin to agency regulations."[160] Others have called for a "*Chevron*-inspired deference regime" to the Court's interpretation of the Rules.[161] The debates about the appropriate role of the Court in expanding or restraining the Rules even echo debates about the appropriate authority of administrative agencies. And even if the role of the Supreme Court in drafting the Federal Rules is limited,[162] the overall bureaucracy of the Judicial Conference, its Standing Committee, and the

156. *See* Mulligan & Staszewski, *supra* note 7, at 1194, 1202-05.

157. *See id.* at 1195-96 (describing how *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), are examples of the Court authoring and amending the law of civil procedure through adjudication as well as the formal rulemaking process). *But see* Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 146-47 (2015) (stating that the Court's actual role in the rulemaking process is not well understood and may at times have been "perfunctory," although this may lead the Court to express its views on the Rules through adjudication).

158. *See* Mulligan & Staszewski, *supra* note 7, at 1206. At times, the Court has expressed skepticism of judicial decisions that reinterpret the scope of the Rules. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999) ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a [Federal Rule] thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a Rule outside the process Congress ordered . . . ."); *see also* sources cited *supra* note 14.

159. 28 U.S.C. § 2072(a) (2012).

160. *See* Porter, *supra* note 157, at 125 & n.8. Some have analogized the Court to an administrative agency in order to advocate for either rulemaking or adjudication as a preferred approach for amending the Rules. *See* Marcus, *supra* note 7, 929-30 (contending that "courts should defer to rulemaker expectations when they apply the Federal Rules in litigation" and "lack the prerogative to apply them as they see fit"); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102 (2002) (arguing that "alterations to the Rules should undergo the process specified in the Enabling Act, rather than taking effect through judicial fiat in the course of litigation").

161. *See* Porter, *supra* note 157, at 177.

162. *See id.* at 144-48.

five advisory committees, combined with rulemaking and adjudication, emulates the structure of an administrative agency.

In fact, court rulemaking was changed in the late 1980s to parallel the administrative process. The 1980s amendments required the Rules Committee to hold open meetings and provide advance notice of these convenings. The amendments also extended the time before proposed Rules would become effective from three to seven months. The goal of these reforms was to empower public monitoring and interest group involvement and to decrease the need for constant congressional oversight. Strikingly, these were the very aims of the APA when it was passed in 1946.[163] As a result, agency-led litigation rulemaking today resembles court rulemaking in more ways than one. Both processes involve technocratic lawmaking, expert input, public participation, and congressional checks. Therefore, to the extent that court rulemaking reflects Congress's view of what a legitimate process for drafting and amending the Rules looks like, litigation rulemaking shares in this legitimacy.

Of course, not all agency-led litigation rulemaking is the same.[164] Notice-and-comment rulemaking involves public participation (as with the CMS and CFPB), similar to the comment and hearing periods during the court rulemaking process. But because adjudications only bind the parties at hand, agencies do not solicit broader public input when they decide which legal rule to apply, even if the agency plans on applying that rule in all future disputes (as with the NLRB). And because guidance is nonbinding, agencies sometimes solicit public comment (as with NHTSA), and sometimes do not (as with the CPSC). But when agencies depart from the norms of court rulemaking, their litigation rulemaking is typically constrained—adjudication is limited to the parties in a case, and guidance is nonbinding.

The advent of litigation rulemaking, therefore, presents a novel institutional pathway for changing the rules of federal civil litigation. Although the similarities between court rulemaking and litigation rulemaking bolster the legitimacy of this new approach, the institutions remain distinct. Next, I turn to the particular benefits and drawbacks of litigation rulemaking that stem from these institutional differences.

B. Benefits of Litigation Rulemaking

Agencies are structurally well equipped to act as litigation rulemakers for several reasons. First, given their expertise and institutional capacity, agencies

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163. *See* Burbank & Farhang, *supra* note 13, at 1593-96.

164. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1396-97 (2004).

are well suited to craft the appropriate procedural rules for particular areas of law. Second, many of the problems that procedural rulemaking seeks to solve are polycentric in nature and therefore better suited for agencies to resolve. Third, in the process of interpreting and implementing their authorizing statutes, agencies acting as litigation rulemakers can better align procedural regimes and congressional priorities.

1. Domain-Level Expertise

First, agencies are adept at making domain-level determinations about the appropriate rules for particular classes of claims. Like litigation gatekeeping, litigation rulemaking involves "an interconnected mix of ground-level factual questions about the enforcement landscape and higher-level, synthetic questions about the overall 'coherence' of the regulatory regime."[165] Agencies (like legislatures) have the ability to take a synoptic view of the regulatory regime and decide the appropriate procedural rules for litigation in that arena. For instance, NHTSA and the CPSC can survey the range of industries that they regulate, identify gaps in the reporting of product safety defects, and determine the procedural rules that would remedy the problem. Based on this information, these agencies can craft procedural rules like those embodied in their best practices guidance for protective orders and settlement agreements. As Engstrom put it, agencies, which are staffed with experts and embroiled in highly specific decision making on a daily basis, are "likely to have defter command of these high- and low-level issues than legislators."[166] Likewise, agencies are often well suited to engage in ongoing monitoring, and they can use this information to update previous rulemakings and decisions.[167]

Agencies' ability to marshal expertise helps them make these domain-specific judgments. Expertise has long been a justification for delegating administration to specialized agencies.[168] As James Landis put it, in reflecting upon the rise of

165. *See* Engstrom, *supra* note 19, at 664.

166. *Id.*

167. *See id.* In contrast, in retail gatekeeping, the agency's task is "not forming broad-scale, 'legislative' judgments about the net social costs or benefits of competing regulatory approaches but rather a far more quotidian, 'adjudicative' sorting of more or less meritorious cases." *Id.*

168. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23-26 (1938) (arguing that expertise "springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem"); *see also* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1042 n.24 (2006) (listing *Chevron* and other cases in which the Supreme

the New Deal-era administrative state, "the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, . . . and the power through enforcement to realize conclusions as to policy."[169] As bureaucracies with the staff, knowledge, and experience to administer the relevant statutes and exercise authority in their relevant domains, agencies like NHTSA and the CPSC have the expertise necessary to evaluate what procedural regimes are necessary or helpful for particular kinds of claims. The answer may vary by domain. Whereas limits on confidentiality may further public health and safety in the context of consumer products, the relative costs of limiting confidentiality could cut the opposite way in another realm, such as national security or defense. Agencies can make these decisions better than courts in part because they have the resources and capacity to gather the necessary information. Agencies can hire experts, conduct studies, do field work, and gather the data needed to customize the procedural rules for a particular set of claims.[170] Moreover, agencies often have the legal and practical capacity to acquire nonpublic information.[171] Agencies can marshal these institutional advantages in litigation rulemaking, permitting procedural regimes to be tailored to particular legal domains in a way that transsubstantive rulemaking does not.

Courts, in contrast, have less inherent expertise and diminished capacity to gather information. Judges and members of the Rules Committee are not necessarily domain-specific experts — in product safety, consumer finance, health care, or any other area.[172] And although the Rules Committee solicits public comment during the court rulemaking process, the public input is sometimes sparse and may not always be subject area-specific.[173] Although the court rulemaking process mirrors litigation rulemaking in many ways, the two processes do not fully function in the same way. Agencies can typically marshal their area-level expertise more effectively. Even if public input is sparse, an administrative agency has the ability, capacity, and practice of proactively gathering information in other ways, since they frequently do so for nonprocedural agency action. Case-by-case

Court has cited agency "expertise as a justification for presuming congressional preference for agency resolution of statutory ambiguities").

169. LANDIS, *supra* note 168, at 23-24.

170. *See* Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 1029 (2017).

171. *See* LANDIS, *supra* note 168, at 42-43; Deacon, *supra* note 170, at 1014-18.

172. *See Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committee*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/2017_committee_roster_0.pdf [http://perma.cc/BDV9-JAQK]. Although there are law professors and lawyers on the various advisory committees, they are often generalist practitioners or civil procedure specialists.

173. *See* Struve, *supra* note 160, at 1111-12.

adjudication in the courts is even less driven by area-specific expertise. Courts shaping the Federal Rules regime through cases like *Iqbal* and *Twombly*, or the various NLRA suits in the federal courts, cannot engage in comprehensive information gathering. Instead, the judges making these decisions are limited to the briefing and their own research.

Relative to courts, agencies are particularly well suited to determine what procedural regimes will improve social welfare broadly, rather than in the context of a particularized dispute.[174] For instance, an agency can better identify when a limit on the confidentiality of protective orders and settlement agreements in the motor vehicle and product safety contexts will advance the safety of the American public.[175] An agency's specialized expertise in a particular area of law and regulation makes it better positioned to make these broad-ranging judgments than a judge presiding over a particular case or the Rules Committee.[176] Just as legislatures are often better positioned to make wholesale judgments about regulating social and economic domains, agencies are better suited than courts to craft the procedural rules that address wider ranging concerns.

2. *Polycentric Problem Solving*

Second, agencies are particularly well equipped to engage in polycentric decision making. Polycentric decision making refers to dealing with disputes that have implications beyond the two immediate parties to a controversy. Lon Fuller famously described a polycentric problem as follows: "We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute

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174. *See* Engstrom, *supra* note 19, at 668 (explaining that agencies evaluating the "merits" of a private enforcement claim by looking more broadly at the social welfare or legislative fidelity of the claim are "implement[ing] a conception of merit that is *different* from what judges or juries would otherwise deliver," meaning that the gatekeeping is "tak[ing] on a fundamentally different and more 'regulatory' character").

175. *See* Resnik, *supra* note 110, at 565 ("As these problems are profoundly ones of social policy, legislative engagement is needed to regulate the power of parties and judges either to enable information generation through courts or to inhibit that potential.").

176. The value of agency expertise is reflected in agencies' internal adjudicative proceedings. As litigants' access to class actions in courts has diminished in recent years, certain agencies have devised their own internal procedures for processing multiple claims at once. Michael Sant'Ambrogio and Adam Zimmerman describe the many benefits of agencies applying their expertise to shape how different classes of claims are processed: increasing the efficiency and consistency of legal proceedings, generating information, building the legitimacy of adjudication, complementing rulemaking, and bolstering agency enforcement. *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1600, 1681-91 (2017). Many of these benefits carry over when agencies apply their expertise to shaping the procedural rules for courts as well.

tensions after a complicated pattern throughout the web as a whole."[177] A case like this is complex not just because of the number of parties that could be affected, but because the form of award or relief granted has repercussions on other parties with stakes in the outcome of the dispute.[178] A classic example is a lawsuit between an employer and a labor union representing a class of workers. A court's award of higher wages to certain workers — say, assembly line technicians — could have ripple effects on the wages due to other kinds of workers — say, machinists — who may not be parties to the dispute.[179] According to Fuller, courts are generally not well suited to resolve these sorts of polycentric problems.[180] In contrast, agencies, with their ability to gather information from and involve all parties, are much better suited to the task.[181]

Class action settlements are a prime example. The effectiveness of the notice of settlement to the class will affect the recovery available to all members of the class. If the class notice is effective, then more class members will file claims and the claims rate will be higher. Depending on how unclaimed funds are distributed, a higher claims rate can decrease the size of the award available to each class member. Thus, questions about how the notice should be written, what the appropriate claims rate should be, and how settlements should be structured are all issues that agencies are particularly well equipped to tackle as litigation rulemakers. By establishing the procedural rules governing class actions, agencies can bring their institutional capacity to bear on these polycentric problems.[182]

This, for example, is where the FTC comes in. Unlike the courts, the agency has the institutional capacity to compel claims administrators to divulge data about the distribution of class action settlements. Then, the agency can take one of two approaches. It can make this data public for federal judges to take into account in deciding what information to request in advance of approving a settlement and whether to sign off on a settlement. Alternatively, the agency can

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177. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

178. *See id.*

179. *See id.* at 395-96.

180. *See id.* at 401-04.

181. Of course, many, if not all, lawsuits have effects on parties beyond the named plaintiffs and defendants. The question is one of degree — some disputes have more polycentric dimensions than others. *See id.* at 397. "It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached." *Id.* at 398. The point here is simply that when it comes to disputes with particularly polycentric elements, agencies may be better equipped than courts to craft the relevant procedural rules.

182. "[T]he fact that an adjudicative decision affects and enters into a polycentric relationship does not of itself mean that an adjudicative tribunal is moving out of its proper sphere," but rather, that the agency has a role to play in shaping the tribunal's approach to the dispute. *Id.* at 403.

use this information to promulgate a rule or issue guidance governing class action settlements. In so doing, the agency can factor in the data that it has gathered, its knowledge of the different kinds of industry actors, and consumer interests across industries and geographies. With either approach, the agency can tackle the polycentric problem of evaluating and addressing claims rates in a way that courts cannot.

3. Coherence

Third, agencies are better able to align procedural regimes with congressional priorities. Because agencies, unlike courts, must justify their actions in light of their statutory mandates, litigation rulemaking can promote fidelity to Congress's broader goals. Put another way, litigation rulemaking can improve the coherence between a set of substantive interests—such as the goal of minimizing consumer safety defects and protecting public health—and the procedural regime in place for vindicating those interests.[183] NHTSA and the CPSC, for instance, emphasized that their new guidance served two purposes: (1) fulfilling the agencies' duty to protect public health and safety and (2) reinforcing the statutory obligations of regulated parties to report safety defects. The guidance aligned the procedural rules that govern product safety cases with the goals of product safety statutes more broadly. Thus, NHTSA is carrying out its statutory mandate not only by issuing substantive rules—for instance, rules about what kinds of automobile airbags and arm rests will minimize car crashes—but also procedural rules to accomplish the same legislative ends. As another example, the CMS found that it could better achieve Congress's goal of protecting the health and safety of elderly Medicare and Medicaid recipients by ensuring they would not be subject to mandatory arbitration clauses. In so doing, the agency sought to realign the substantive aims of the Social Security Act and the relevant procedural regime.

Not every substantive statutory goal merits the same procedural regime. For example, limiting the confidentiality of settlements is likely less appropriate for trade secrets disputes, where intellectual property rights are more important, than for product safety suits. Agencies, with their area-specific expertise and staffs, are well equipped to make these nuanced decisions. Courts and the Rules Committee, on the other hand, are institutionally and traditionally limited to making transsubstantive changes to the Federal Rules. In part, this is due to the

183. One way to conceptualize coherence is that it "demands not only that the legal rules of a statutory scheme be consistent but also that they reflect a unitary vision of that scheme." Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990).

Rules Enabling Act's direction that the Court "prescribe *general* rules of practice and procedure."[184] Moreover, the Committee's practice of keeping the Rules fairly transsubstantive over time reflects an implicit institutional constraint that formal amendments be transsubstantive. This constraint, however, does not bind agencies acting as litigation rulemakers. Litigation rulemaking can ensure that the procedural regime does not frustrate congressional intent and that the courts cannot use procedural formalities to stand in the way of Congress's aims.

C. Drawbacks of Litigation Rulemaking

But litigation rulemaking has its drawbacks. For one, agency capture might mitigate the legitimacy and effectiveness of litigation rulemaking. If regulated entities unduly influence an agency's behavior, then allowing the agency to amend the procedural regime for federal courts may be less desirable. Second, where the benefits of transsubstantivity override the value of domain-specific litigation rulemaking, court rulemaking may be preferable.

1. Agency Capture

First, capture may corrode the quality of litigation rulemaking. A well-documented weakness of administrative agencies is that they often suffer from regulatory capture. Regulatory capture refers to the process by which the regulated industry is able to push regulation in a direction away from the public interest and toward the industry's own interests.[185] Powerful parties are able to shift the regulatory process in this way "because they face more concentrated benefits or costs and so have greater incentive to invest in information or lobbying efforts, and also because they can better solve the collective action problems that often stymie group-based political action."[186]

In the context of litigation rulemaking, certain parties might wield disproportionate influence in agency decision making.[187] This influence could shape, among other things, whether the agency action takes place, whether it is binding

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184. 28 U.S.C. § 2072(a) (2012) (emphasis added); *see also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013).

185. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 73 (Daniel Carpenter & David A. Moss eds., 2014).

186. Engstrom, *supra* note 19, at 674.

187. *See id.*

or nonbinding, and whether it applies only prospectively or also retroactively. Capture can detract from the agency's use of its expertise to set procedural rules, promote fidelity to legislative goals, and ensure the equitable treatment of similarly situated parties. Thus, capture can make litigation rulemaking both less effective and less fair.

However, court rulemaking may not be free of bias or its own form of capture, as reflected in the changing composition and preferences of the various rulemaking committees. As initially structured, the 1930s committee for drafting the Federal Rules of Civil Procedure did not include any sitting judges.[188] Although judges were eventually added to the committees, it was not until the Court was led by Chief Justice Burger that the key committees "came to be dominated by judges," who, as Burbank and Farhang have argued, "are presumably more likely than lawyers or academics to protect institutional interests, as well as [be] more susceptible to direction from on high."[189] According to Burbank and Farhang, the politicization of the process was made even more apparent by the fact that the Chief Justice "markedly favored judges appointed by Republican Presidents" in appointing individuals to the Advisory Committee and that the Chief Justice had repeatedly made his disregard for the "litigation explosion" of the 1970s clear.[190]

Furthermore, recent decades have seen interest groups active at all stages of the rulemaking process, from advisory committee hearings to congressional review.[191] These interest groups include the plaintiffs' bar, defense bar, civil rights groups, corporations, and others.[192] For instance, in 1983, interest group lobbying blocked changes to the federal-service-of-process rule.[193] Controversies involving the court rulemaking process and specific rulemaking proposals in the 1980s led to a series of amendments to the Rules Enabling Act that required

188. *See* Burbank & Farhang, *supra* note 13, at 1587.

189. *Id.* at 1588; *see also* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015).

190. *See* Burbank & Farhang, *supra* note 13, at 1588.

191. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 903 (1999). The increase in public participation in the rulemaking process is the result of deliberate changes by Congress to the rulemaking process, including the creation of the Standing Committee, which is tasked with holding public meetings on proposed revisions to the Rules. These changes were made as a part of amendments to the Rules Enabling Act in the 1970s and 1980s. *See* Porter, *supra* note 157, at 145. "But while these modifications are clearly intended to make the rulemaking process more transparent, more accountable to the public, and presumably more effective, it is unclear what effect, if any, this revised process has on the Court's formal rulemaking power." *Id.*

192. *See* Bone, *supra* note 191, at 903.

193. *See id.*

rulemaking committees to hold open meetings, provide explanations with all proposed rules, and issue reports detailing minority views on proposed rules.[194] The amendments resulted in a court rulemaking process that resembled, in large part, the APA's notice-and-comment and public hearing requirements for agency action.[195] Nevertheless, the politicization of court rulemaking has continued apace since.[196]

To the extent that court rulemaking is itself influenced by these outside factors, it may be impossible to choose between litigation rulemaking or court rulemaking solely on the basis of which is less "politicized" or "captured."[197] In fact, Robert Bone has suggested that the politicization of the court rulemaking process has undermined its legitimacy.[198] Burbank and Farhang have pointed out that the increased inclusiveness of the process has made it difficult to pass legislation to block a Federal Rule, in part because transsubstantive rules inevitably help some interests while harming others.[199] It's not clear, therefore, whether the degree of politicization can help us meaningfully choose between an agency- or court-led approach.

Moreover, we might tolerate weak capture. Weak capture refers to when special interests compromise an agency's ability to serve the public interest, but the public is still served by the regulation, relative to no regulation at all.[200] On this logic, even if capture is an unavoidable feature of litigation rulemaking, the resulting procedural rules could still serve the public interest. In fact, weak capture may be desirable if domain-specific litigation rulemaking has enough benefits of its own.

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194. *See* Burbank & Farhang, *supra* note 13, at 1591-94.

195. *See id.* at 1595; *see also supra* Section V.A.

196. *See* Bone, *supra* note 191, at 903-07; *see also* Redish & Amuluru, *supra* note 155, 1315 (underscoring that "from the outset many of the Rules possessed a distinctly political nature because the manner in which they are shaped inherently impacts the enforcement of society's substantive policy choices").

197. It would be impossible to envision or create a perfectly technocratic rulemaking process in which the only considerations taken into account are what would make the system "work better." First, judgments about which rules for the system would be welfare-enhancing depend on rulemakers' views about how to measure welfare or efficacy. Second, any human decisionmaker is inherently and inevitably influenced both by his or her politics or policy preferences and by his or her technocratic judgments grounded in expertise.

198. *See* Bone, *supra* note 191, at 907-08.

199. *See* Burbank & Farhang, *supra* note 13, at 1596.

200. *See* Daniel Carpenter & David A. Moss, *Introduction*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 185 at 1, 12 ("[W]eak capture prevails when the *net* social benefits of regulation are diminished as a result of special interest influence, but remain positive overall.").

2. Transsubstantivity

Others contend that the value of domain-specific procedural regimes is outweighed by the benefits of transsubstantivity. These arguments are bolstered by the fact that the Federal Rules were meant to be transsubstantive.[201] Rule 1 states: "These rules govern the procedure in *all* civil actions and proceedings . . . . They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of *every* action and proceeding."[202] To many, this transsubstantivity is what makes the Rules valuable—and not as politically contentious as they would otherwise be. As David Marcus has described it, "[w]ere rulemakers to discriminate among antecedent regimes for particularized procedural treatment, they would put at risk the modicum of political neutrality that transsubstantivity otherwise offers."[203] Indeed, proposed rule amendments that have involved "specialized treatment for particular categories of litigation," such as a 1990s proposal for a maturity requirement for mass tort class actions, have provoked backlash.[204] If transsubstantive rules are in fact better able to avoid the pitfalls of political influence, court rulemaking may be preferable to agency-led litigation rulemaking.[205]

But even Marcus concedes that transsubstantivity may be less desirable when the legislature enacts domain-specific procedural law.[206] Legislatures possess greater democratic accountability, competence in coordinating the aims of regulatory regimes through legislation, and capacities that make them more capable of acting as procedural lawmakers.[207] On this line of reasoning, because agencies acting as litigation rulemakers function in a legislative capacity—under legislative authority delegated by Congress itself—litigation rulemaking should not be limited to transsubstantive lawmaking in the way that court rulemaking is. If

201. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 512 (1986).

202. FED. R. CIV. P. 1 (emphasis added).

203. David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1235 (2013).

204. *See id.* at 1235 & n.189.

205. *See* 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, 2074-85 (1989).

206. *See* Marcus, *supra* note 203, at 1234 ("Trans-substantivity has no general justification that should limit the legislative prerogative to enact substance-specific process law . . . . [L]egislatures likely enjoy broad powers to legislate process law as they see fit.").

207. *See id.* at 1228-34.

there is value in having distinct procedural rules for different substantive regimes, agencies may be better positioned to write these rules.

In reality, the transsubstantivity of the Federal Rules exists "in name only."[208] Courts have long applied the Federal Rules in different ways to different kinds of cases, both formally and informally. Formally, for instance, the Court has issued special rules that apply to habeas cases.[209] Informally, managerial judging by district judges entails tailoring discovery, motion practice, and protective orders to the contours of each dispute.[210] Scholars have also "plea[ded] for contextualism," arguing that procedural rules be customized for different categories of cases.[211] As Bone has pointed out, the drafters of the Federal Rules valued transsubstantivity only because of their storied belief that procedural rules could be justified without referencing their impact on substantive outcomes—a belief that has long since been repudiated.[212] If transsubstantivity is just an aspirational ideal, or even a mere façade, then agency-led litigation rulemaking may be a way to establish domain-specific procedural rules more consistently and transparently.

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On net, the value of domain-specific decision making, polycentric problem-solving, and coherence appears to outweigh the potential drawbacks. As discussed, court rulemaking is not immune from capture, and expertise-driven decision making often transcends the theoretical benefits of transsubstantivity. But whether one is superior is perhaps beside the point. In reality, litigation rulemaking can complement court rulemaking, as it has done so far.

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208. Miller, *supra* note 184, 370.

209. *See* Resnik, *supra* note 201, at 526.

210. *See id.* at 527; *see also* Resnik, *supra* note 4, at 391-415.

211. Resnik, *supra* note 201, at 547; *see also* Miller, *supra* note 184, at 370-71 ("[C]onsideration should be given to abandoning the transsubstantive principle requiring that the Federal Rules be 'general' and applicable to all cases—a notion that supposedly is embedded in the Rules Enabling Act . . . . That might encourage giving serious thought to putting cases on different litigation tracks and devising different procedures that are deemed appropriate for the characteristics of the cases posted to each track.").

212. *See* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 334 (2008) ("The fact that substantive policy is always a part of procedural justification means that transsubstantivity as an independent value or ideal makes no sense at all."). Bone argues that the optimal level of generality for procedural rules should be determined by balancing the costs and benefits of rules that are relatively more general or specific. *See id.*

D. Institutional Implications

Although this Note describes only a few instances of agency-led litigation rulemaking, these examples demonstrate an emerging trend in agency action. Agency action that effectively amends the Federal Rules has accelerated in recent years, not just by politically prominent agencies, like the NLRB, but also by less salient bodies, like the CPSC. The rise of litigation rulemaking may be attributable to an array of factors, including the current political context. That is, litigation rulemaking may be stepping in where one of the primary alternatives—legislating procedural rules through statute—is stymied by political polarization and gridlock.[213] Transsubstantive amendments (such as changes to the FAA) often provoke political interests across the spectrum and are doomed from the start.[214] This can be the case with the Rules Committee process as well, although amendments through the court rulemaking process continue to occur.[215] Agencies, on the other hand, are able to circumvent legislative logjam by taking actions grounded in their existing statutory mandates or in specific grants of authority from Congress.

As the following Section explains, the legitimacy of litigation rulemaking is bolstered by the judicial and congressional checks on agency action. These checks and balances give rise to a unique dialectic between agencies and courts: as agencies try to tell courts how to deal with cases, courts that disagree push back through judicial decision making. The result of this interbranch dialogue is a new procedural regime that has lasting effects on substantive legal outcomes.

1. Legitimacy

As described earlier, the legitimacy of litigation rulemaking is rooted in its resemblance to court rulemaking. Just as courts' authority to promulgate the Federal Rules comes from Congress via the Rules Enabling Act, agencies' authority to act as litigation rulemakers comes from Congress via authorizing statutes. These statutes provide the legal basis for agencies to promulgate rules through notice-and-comment, engage in adjudications involving statutory interpretation, and issue guidance and orders interpreting congressional mandates. Even agencies acting as litigation rulemakers remain bound by the requirement that they not exceed their statutory authority. As a result, although

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213. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2-3, 11-17 (2014).

214. *See* Deacon, *supra* note 170, at 1032-33; *see also supra* note 199 and accompanying text.

215. *See, e.g.*, 2017 Proposed Amendments, *supra* note 151.

litigation rulemaking may raise separation of powers questions, these questions (and their answers) are no different than those associated with other forms of agency action, including litigation gatekeeping.[216]

Nor is litigation rulemaking unchecked. At any time, Congress can constrain an agency's authority through legislation. Judges, too, have long been charged with holding agencies to their statutory limits — and have done so. When courts have invalidated agencies' attempts to engage in litigation rulemaking, they have typically done so by deciding that agencies exceeded the scope of their statutory authority. For instance, the federal court preliminarily enjoining the CMS rule against arbitration held that the agency had surpassed the authority it was granted by Congress.[217] The district judge found that the statutory language allowing the agency to act for the purposes of "protecting [resident] health and safety" was insufficient to permit the agency to limit nursing homes' use of arbitration agreements.[218] Like other agency action, litigation rulemaking is constrained by institutional checks.

The legitimacy of litigation rulemaking can vary by context. In certain cases, Congress may expect that agencies will engage in litigation rulemaking to administer the law; while in others, Congress may intend the opposite. The question of whether the agency is exceeding its authority depends on the substantive statute. Take, for example, the CFPB, which, in the Dodd-Frank Act, was expressly tasked with promulgating a rule regulating arbitration.[219] In that case, it was clear that Congress intended the agency to consider litigation rulemaking as

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216. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17-28, 44 (2017); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2256 n.20 (2001). As Gillian Metzger has pointed out, only the most extreme anti-administrativists believe that statutory delegations of authority to the executive branch should be completely invalidated. So long as we have delegation, many features of the modern administrative state necessarily follow, including deference to agency interpretations of statutes. The question of what level of delegation should be allowed and what evidence of delegation should be required before a court defers to agency action is beyond the scope of this Note. Many of Metzger's arguments about the constitutionality of the administrative state are relevant to separation-of-powers concerns about agency action generally, including litigation rulemaking. *See* Metzger, *supra*, at 72, 87-95.

217. *See* Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 934-38 (N.D. Miss. 2016).

218. *Id.* at 934. Note that this is the view of one district judge, subject to appellate review and competing interpretations of the agency's authority to promulgate such a rule.

219. *See supra* note 57 and accompanying text.

part of its project of protecting consumers.[220] Of course, not all statutory authorizations to engage in litigation rulemaking need be this express.[221] The key point is that agencies acting as litigation rulemakers are acting openly and as coordinate branches of government. Litigation rulemaking does not involve imposing unilateral restraints on the judiciary, but rather fashioning amendments to the Federal Rules with the oversight of both Congress and the courts.

2. *Agency-Court Dynamics*

Litigation rulemaking presents a new frontier in the relationship between agencies and courts. Even if litigation rulemaking were to slow down in a political climate more averse to agency action, the examples outlined here are central to understanding the institutional landscape today. As litigation rulemakers, agencies are able not just to regulate third-party industry actors and individuals, but courts as well. In telling judges how to approach litigation in their own courtrooms, agencies impose additional constraints on judicial action. This type of constraint is unlike others with which we are familiar: it is not the executive refusing to enforce a judicial decree; nor is it Congress issuing a rule of decision in a case[222] or attempting to limit federal courts' jurisdiction through a statute.[223] Instead, agencies are engaged in an interbranch dialogue about the appropriate procedural regimes for different kinds of substantive claims. Agencies may be directing courts about how to treat different kinds of claims, but agencies remain

220. Even those who believe that the Federal Rules regime is best kept transsubstantive have noted that at times, Congress may want to permit domain-specific procedural rules. *See, e.g.*, Carrington, *supra* note 205, at 2086 ("There may be times when Congress should respond to cries for substance-specific procedural advantage. Clearly, procedure can affect substance and there are constituencies that Congress might wish to favor who could benefit from a legislated thumb on the procedural scales. If necessary to effect enforcement of a substantive right, Congress may be justified in building into substantive enactments specific procedural provisions.").

221. The question of how express statutory authorization for an agency action should be is a context-specific inquiry, and one that has traditionally been left for courts to decide in each situation.

222. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-40 (1995) (explaining that Congress cannot "prescribe rules of decision" to the courts, although it can "amend applicable law," and discussing the relevant case law, including *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992)); *see also* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1322-26 (2016) (reaffirming that Congress may not direct a rule of decision, though it may amend substantive law in pending cases).

223. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 738-39, 765-66, 776-78 (2008); *see also* Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMM. 377 (2009) (explaining how Congress attempted to strip jurisdiction through the Military Commissions Act of 2006).

constrained by courts' power to exercise judicial review of agency action. As a result, agencies and courts end up working together to generate the procedural regime for federal litigation in a novel way.

In acting as litigation rulemakers, agencies are not taking over judicial functions, but rather stepping in to help administer substantive statutory mandates. In fact, litigation rulemaking helps ensure that the rules of civil litigation do not contradict or undermine substantive statutory goals articulated by Congress. For instance, the NLRB has held that bans on class arbitration undermine the congressional policy in favor of collective action embodied in the NLRA. By reformulating the default rule on class arbitration in the labor context, the NLRB has sought to align the procedural regime applied to these disputes with the substantive statutory policy set by Congress.

The example of FTC action on class action settlements demonstrates how agencies and courts can work together through litigation rulemaking to write the rules of civil litigation. By ordering claims administrators to report data on the rates at which class members respond to notices and participate in class actions, the FTC can gather information that federal judges cannot—data that judges will then be able to use when deciding whether to approve class settlements. Courts, after all, are given substantial leeway to decide whether to approve class settlements. Armed with the FTC data, judges can more thoughtfully determine whether a settlement is "fair, reasonable, and adequate," consistent with Rule 23(e). For instance, judges could use this information to decide whether a class notice is sufficient or whether to impose additional requirements on parties before approving their settlement. While the FTC orders are, thus far, focused on data-gathering and do not yet amount to an effective amendment of the Federal Rules, this example demonstrates how agencies and courts can work collaboratively and how litigation rulemaking can ensure a more informed application of the Federal Rules in civil litigation.

The complementary nature of litigation rulemaking and court rulemaking is exemplified by recent proposals for specialized procedural rules. In December 2016, the Administrative Conference of the United States[224] recommended that the federal court system adopt a special set of procedural rules for social security

224. The Administrative Conference of the United States is an independent federal agency that researches and reports on ways to improve the workings of federal agencies, "including fair and effective dispute resolution and wide public participation and efficiency in the rulemaking process." *About the Administrative Conference of the United States (ACUS)*, ADMIN. CONF. OF U.S., http://www.acus.gov/about-administrative-conference-united-states-acus [http://perma.cc/4VNN-28FB].

cases being reviewed in federal court.[225] The Administrative Conference noted that the Rules Enabling Act "does not require that procedural rules be trans-substantive" and that a range of factors—including the high volume of social security litigation, the Federal Rules' failure to account for issues that arise during judicial review of social security cases, and the costs of having different local rules about social security cases across the country—suggest the need for specialized rules.[226] These proposals demonstrate that agencies are not only engaging in domain-specific rulemaking themselves, but they are also promoting these ideas to the formal federal court rulemakers as well. The advent of litigation rulemaking does not render court rulemaking irrelevant; nor does it preclude the ability of court rulemaking to amend the Federal Rules in domain-specific ways. Instead, the practices of administrative agencies inform the practices of the federal courts. Court rulemaking goes hand-in-hand with litigation rulemaking.

The joint participation of courts and agencies can enhance the legitimacy of the overall project. As it stands, court rulemaking is marked by concerns about judicial politicking. These concerns are rooted in fears that the Rules Committee seeks to influence substantive outcomes and in worries about lopsided public participation unduly shaping the Rules. Even unwarranted worries about the courts becoming more partisan can be enough to detract from judicial legitimacy.[227] Offsetting this, agencies acting as litigation rulemakers can complement courts' endeavors and ensure that the judiciary is not the only actor responsible for the federal procedural regime—nor the sole channel for public participation. Litigation rulemaking multiplies avenues for public engagement and prevents the courts from being the only ones who decide what litigation should look like, enhancing the democratic legitimacy of the endeavor.

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225. *See Administrative Conference Recommendation 2016-3: Special Procedural Rules for Social Security Litigation in District Court*, ADMIN. CONF. OF U.S. (Dec. 13, 2016), http://www.acus.gov/sites/default/files/documents/Recommendation%202016-3.pdf [http://perma.cc/VX6Y-EDFA].

226. *Id.* at 1.

227. *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 306 (2003) ("[F]or separation of powers to work at any level requires insistence on functional distinctions between different branches of government. When judicial advice moves beyond idiosyncratic efforts by individual judges to regular corporate commentary, the judiciary loses more of its unique character. The lines between judicial and legislative decisionmaking become increasingly blurred."); *see also* Burbank & Farhang, *supra* note 13, 1600-01 ("The rulemakers are not courts, and rulemaking under the Enabling Act is not an exercise of judicial power under Article III. It is essentially a legislative activity, not a judicial activity, and federal judges are understandably reluctant to be seen as active participants in a political process.").

3. Substantive Outcomes

To say that litigation rulemaking impacts only civil procedure would be to tell an incomplete story. Agencies acting as litigation rulemakers set the rules for how claims are brought to the courts, but the procedural rules affect what happens to those claims afterward as well. For instance, when an agency adjudication requires a federal court to hear a class action, it affects the decision on the particular claim being heard, the nature of the relief awarded, and the shape of the substantive legal regime that governs future claims like it. Likewise, when an agency issues a rule that forbids a court from enforcing an arbitration clause, the agency requires the court to hear a claim and to issue a decision—leading to the development of substantive law.[228] Thus, the procedural rules that structure the course of a lawsuit mold the substantive law that emerges as well.

The impact of procedural rulemaking on substantive law is even more significant today, given the rise of "regulation by litigation." Regulation by litigation refers to how litigation shapes the law when direct regulation and legislation are absent.[229] Regulation by litigation has become increasingly common as political gridlock thwarts legislative action and the ossification of rulemaking makes notice-and-comment rulemaking less frequent.[230] When actors attempt to develop the law through litigation, the procedural regime that frames the litigation becomes even more important. For instance, individuals often bring class actions to call for institutional change, whether in a prison system[231] or at a workplace.[232] Changes in procedural rules about how courts treat these class actions inevitably impact the substantive outcomes of these cases—that is, whether these institutions end up changing their policies. As regulation by litigation becomes

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228. This is not to say that every denial of a motion to compel arbitration is followed by a court ruling on the merits. The point is simply that a court's refusal to send a case to arbitration brings the case closer to being resolved on the merits by a court.

229. *See, e.g.*, ANDREW P. MORRISS ET AL., REGULATION BY LITIGATION 1-2 (2009); Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How To Regulate*, 29 HARV. ENV. L. REV. 179 (2005) (describing both the role of interest groups in forcing agencies to take action and the role of agencies in bringing suits against private parties on the basis of novel interpretations of the law).

230. *See* Engstrom, *supra* note 19, at 624; *see generally* MORRISS, *supra* note 229. Tobacco litigation is a common example of this phenomenon. In the 1990s, state attorneys general sued major cigarette manufacturers to recover Medicaid expenditures attributable to cigarette smoking. The litigation, which spanned more than five years, took the place of ordinary legislation and regulation of the tobacco industry. The litigation resulted in a settlement agreement that established rules governing the manufacturers' future behavior. *See* MORRISS, *supra* note 229, at 126.

231. *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2011).

232. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

more common, the importance of the procedural regime for substantive outcomes will only grow. And the role of agencies in shaping these procedural regimes will become increasingly relevant.

Litigation rulemaking can also push recalcitrant agencies or gridlocked legislatures to act. For example, by exhorting courts not to allow auto and product safety defects to be kept secret from oversight agencies, the NHTSA and CPSC guidance helps agency officials collect the information necessary to decide what substantive safety regulations might be needed in the future. This information may motivate agencies (or Congress itself) to issue new substantive regulations. In this way and others, agencies shape substantive legal regimes when they implicitly amend the Federal Rules.

CONCLUSION

Civil procedure is no longer the same. Through notice-and-comment rulemaking, adjudication, guidance, and other actions, agencies acting as litigation rulemakers are helping forge the federal procedural regime. It is difficult to overstate the importance of the rules of civil litigation. These rules determine the claims heard in court, the future of the law being litigated, and the relief available to injured parties. Agencies are playing a critical role in shaping the rules at each step.

As a result of these agency actions, the rules of civil procedure are being calibrated to different classes of cases. This is precisely the kind of legal landscape that Robert Cover called for several decades ago:

> It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.[233]

Far from overstepping their bounds, agencies acting as litigation rulemakers are serving a coordinating function between the courts and Congress, tailoring procedural regimes to particular statutes and bringing area-specific expertise to bear on the question of how litigation should be structured. And by helping ensure that courts function consistently with Congress's legislative goals, agencies are bringing greater coherence to the legal regime.

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233. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975).

Understanding litigation rulemaking sheds light on these interbranch dynamics and raises new questions about the legitimacy of agency action, the scope of judicial review, and the role of Congress in overseeing agency-court relations. As recent litigation reveals, these questions are far from abstract. Rather, the debates reflect our convictions about the appropriate roles of agencies, courts, and Congress in our system of self-government today.