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SHOULD THE RULES COMMITTEES HAVE AN AMICUS ROLE?

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Despite its formal status as promulgator of federal-court rules of practice and procedure, the Supreme Court is a suboptimal rule interpreter, as recent groundbreaking but flawed rules decisions illustrate. Scholars have proposed abstention mechanisms to constrain the Court in certain rule-interpretation contexts, but these mechanisms disable the Court from performing its core adjudicatory functions of dispute resolution and law interpretation. This Article urges a different solution: bring the rulemakers to the Court. It argues that the Rules Committees—those bodies primarily responsible for studying the rules and drafting rule amendments—should take up a modest amicus practice in rules cases to offer the Court information that may improve its decision making in rules cases. The Article explores the possible forms of such a role and articulates guiding norms for its structure, timing, and content.

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INTRODUCTION

THE Supreme Court is experiencing a “procedure revival,”¹ deciding more cases involving certain federal rules than in previous eras.² The cases often result in controversial interpretations of court rules that are critical to litigation, from pleading standards to class-certification

¹ Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 *Rev. Litig.* 313, 314 (2012).

² Elizabeth G. Porter, *Pragmatism Rules*, 101 *Cornell L. Rev.* 123, 124 (2015) (“[T]he Roberts Court has decided more cases involving the Federal Rules of Civil Procedure in ten years than the Rehnquist Court did in twice that time.”). Some members of the Court may be pressing the revival more than others. Compare Scott Dodson, *A Revolution in Jurisdiction*, in *The Legacy of Ruth Bader Ginsburg* 137, 137–39 (Scott Dodson ed. 2015) (highlighting Justice Ginsburg’s role in advancing jurisdictional doctrine), with Scott Dodson, *Justice Souter and the Civil Rules*, 88 *Wash. U. L. Rev.* 289, 289–90 (2010) (noting the infrequency of Justice Souter’s opinions in civil-procedure cases).

standards to the validity of the rules themselves.³ These interpretations have wide-ranging effects because the Court's pronouncements affect the scope and application of rules ubiquitously at stake in the lower courts.⁴ It is unsurprising that the Supreme Court's most famous rule-interpretation opinions dominate the list of most-cited opinions.⁵

The importance of the Court's turn to procedure has prompted scholars to question the interpretive norms the Court uses—or should use—when it approaches rules cases.⁶ Because rule interpretation lacks the separation-of-powers backdrop of statutory interpretation, scholars have pressed for an independent normative foundation for rule interpretation that focuses on rule-of-law, legitimacy, and accuracy values.⁷

Animating the normative conversation is a recognition that the Supreme Court is, in some ways, less equipped to make rule-interpretation pronouncements than the rulemaking bodies themselves. Relying on analogies to administrative law, scholars have offered Court-side solutions for shifting interpretive authority away from the Supreme Court and toward rulemakers or lower-court judges. These proposals range from encouraging the Court to abstain and remand certain rule-application questions⁸ to creating a referencing procedure for reallocating certain rule-interpretation questions from the Court to the

³ See *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011) (class-certification standards under Rule 23); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (validity of Rule 23); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (pleading standards under Rule 8); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (pleading standards under Rule 8).

⁴ See Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 *Minn. L. Rev.* 2167, 2170 (2017) (“[F]ederal courts must interpret the Rules in literally every civil case . . .”).

⁵ See Adam N. Steinman, *The Pleading Problem*, 62 *Stan. L. Rev.* 1293, 1357 tbl.1 (2010) (ranking opinions).

⁶ See Mulligan & Staszewski, *supra* note 4, at 2170–73 (contrasting different cases); Porter, *supra* note 2, at 125 (critiquing the interpretive methodologies the Roberts Court has used in rules decisions).

⁷ See Mulligan & Staszewski, *supra* note 4, at 2173 (“[W]e turn to first principles and provide a comprehensive argument for the position that the Rules demand a distinctive theory of interpretation.”).

⁸ See Porter, *supra* note 2, at 130.

Rules Committees—the bodies primarily responsible for studying the rules and drafting amendments to them.⁹

These Court-side proposals offer useful insights, especially in their focus on institutional capacity and judicial modesty. But they also encounter structural difficulties and risk marginalization of the adjudicatory functions of the Court. Any abstention or referral process delays authoritative adjudication of the dispute, costing the parties time and wasted effort and denying the public and future litigants an immediate answer on important procedural questions. The decisional process for determining which cases or issues should or should not be decided by the Court itself can be difficult and contentious.¹⁰ Further, if the parties know or suspect that the Court is likely to refuse to decide the issue, they will not seek the Court’s review in the first place, which ultimately will render the lower courts the primary—and fragmented—judicial authority on some important questions of rule interpretation and application.¹¹ Finally, the Rules Committees sometimes draft rules without specific applications or interpretations in mind, preferring to

⁹ See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 *UCLA L. Rev.* 1188, 1236–40 (2012); see also Mulligan & Staszewski, *supra* note 4, at 2174 (revising the proposed referencing procedure). I use the term “Rules Committees” to refer to the Committee on Rules of Practice and Procedure (colloquially called the “Standing Committee”) plus the five area-specific Advisory Committees primarily responsible for amendment proposals. See *Committees on Rules of Practice and Procedure Chairs and Reporters, U.S. Courts* (Oct. 25, 2016), <http://www.uscourts.gov/file/committee-rules-practice-and-procedure-chairs-and-reporters> [https://perma.cc/2TM7-YBB2].

¹⁰ See Lumen N. Mulligan & Glen Staszewski, *Institutional Competence and Civil Rules Interpretation*, 101 *Cornell L. Rev. Online* 64, 67, 69–70 (2016) (distinguishing between “policy-change” and “equity” cases); Porter, *supra* note 2, at 177–78 (distinguishing between “managerial” and “interpretation” cases). Mulligan, Staszewski, and Porter all seem to acknowledge that neat categories belie the reality that cases fall along a continuum, see Mulligan & Staszewski, *supra*, at 70 n.34, and Porter, *supra* note 2, at 135–36, but they seem to disagree about how to classify the most critical cases, such as *Twombly* and *Dukes*, see Mulligan & Staszewski, *supra*, at 73.

¹¹ By way of analogy, in 2015, Dow Chemical petitioned for certiorari to resolve a pervasive circuit split on whether Rule 23 requires proof of class-wide injury. See *Petition for a Writ of Certiorari at 15–18, Dow Chem. Co. v. Indus. Polymers*, 137 S. Ct. 291 (2016) (No. 14-1091). But in the midst of briefing, Justice Scalia unexpectedly died, likely leaving the Court split 4-4 on the issue and unable to muster a controlling opinion. Rather than proceed under these circumstances, Dow settled, resulting in dismissal of the petition, see *Dow Chem. Co.*, 137 S. Ct. 291, and leaving the lower courts as the primary but fragmented authority on the question.

have the Supreme Court gloss the rules through judicial interpretation, and it is unclear how abstention or referral would bridge that gap.¹²

Given these difficulties, I propose a different path. Instead of urging the Court to abdicate its adjudicative responsibility, I suggest improving the Court's adjudicative capacity by bringing the rulemakers to the aid of the Court. In short, I propose giving the Rules Committees a voice in cases before the Court.

Rules Committee participation in adjudication could take a number of forms.¹³ The most promising and least disruptive form would give the Rules Committees a role in amicus practice. This role would allow the rulemaking bodies to present to the Court information often necessary for effective rule interpretation—underlying rule policy, rulemaker intent, rule interrelatedness, empirical data, and the like—without disrupting the Court's existing adjudicative processes. The practice would be meant to improve, rather than disrupt, the Court's adjudicative and decision-making processes.

My proposal would, however, disrupt existing amicus practice because, at present, the Rules Committees have no involvement in amicus practice at all. The two main reasons for this noninvolvement are that the Rules Committees purposefully refrain from involvement in adjudications and that the Solicitor General normally represents the interests of the United States before the Supreme Court. Giving the

¹² I discuss this in more detail in text accompanying notes 258–59.

¹³ The most radical form would give the Rules Committees a formal but separate decision-making role in resolving disputes through the rendition of advisory opinions at the insistence of potential or existing litigants. The Judicial Conference has authorized its Committee on Codes and Conduct to issue advisory opinions regarding judicial ethics rules. *Published Advisory Opinions*, Judicial Conference of the U.S. (April 6, 2017), <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct/published-advisory-opinions> [<https://perma.cc/5HFF-U7EW>]. Interestingly, the Federal Judicial Center has suggested extending a similar authority to the Rules Committees, see Winifred R. Brown, *Federal Rulemaking: Problems and Possibilities* 131–32 (1981), <http://www2.fjc.gov/sites/default/files/2012/FdRlmg.pdf>, and there are reports (though I cannot find documentation) that the Standing Committee considered creating such a procedure in the 1990s during its long-range plan project but ultimately declined to do so. See Telephone Interview with John Rabiej, Former Chief of the Support Office, Judicial Conference Comm. on the Rules of Practice & Procedure (Dec. 28, 2016). Advisory opinions at the insistence of potential disputants, however, present acute structural, logistical, and constitutional difficulties, as well as concerns about the relative institutional capacity of the rulemakers for case adjudication, see Porter, *supra* note 2, at 154–56, 183–84, all of which my more modest proposal for amicus participation avoids.

Rules Committees a role would therefore require reconsideration of amicus norms.

I urge reconsideration of those norms. The Rules Committees have useful information to impart to the Court's consideration of rules cases, and the Court's business suffers without it. The Office of the Solicitor General, when it participates as amicus in rule-interpretation cases, often lacks this information. Further, the Solicitor General cannot adequately represent the interests and policies underlying the rules because its advocacy must—and should—represent a number of other interests, including the policy preferences of the President, the efficacy of the executive branch, and the interests of the government as a litigant. In the midst of these interests, the interests of the judiciary in the fair and effective functioning of the procedural rules do not receive full attention.

This Article thus reconsiders those amicus norms and argues for giving the Rules Committees an amicus role in rule cases. That role could take different forms. The weakest form would give the Rules Committees a collaborative role in filings by the Solicitor General by normalizing a practice of having the Solicitor General seek and consider input provided by the Rules Committees. The strongest form would give the Rules Committees independent authority to file amicus briefs. Hybrid forms would normalize consultation but also grant independent amicus authority in specified circumstances, such as if the Solicitor General refused to file an amicus brief or had a conflict of interest.

The Article defends this amicus proposal in three parts. Part I sets the stage by articulating the need for rulemaker input in rule-interpretation cases before the Supreme Court. It details the rulemaking process, contrasts the relative institutional capacities of the Supreme Court and the rulemaking bodies, and highlights the separation between rulemakers and the Court. Using two case studies, this Part exposes the harms of forcing the Court to adjudicate rule-interpretation cases without rulemaker input.

Part II then defends the proposal to grant the Rules Committees an amicus role as a mechanism for supplying rulemaking information to the Court. It details the different forms this role could take and considers what limits should attend to the role. This Part also considers the mechanics of Committee amicus practice and suggests that responsibility for amicus content and drafting be located in the

Administrative Office's Office of General Counsel, which is staffed by career attorneys who already provide support to the Rules Committees.

Part III then addresses some objections to my proposal, including the objections that existing amicus practice is adequate, that my proposal is too disruptive to the Rules Committees, that the proposal magnifies political slants or other biases, and that other obstacles are insurmountable. I explain why these objections are misplaced or unavailing and conclude that the Rules Committees should play an amicus role in certain rules cases before the Supreme Court.

I. THE SEPARATION BETWEEN RULEMAKERS AND THE COURT

The Rules Enabling Act delegates rulemaking authority to the Supreme Court but allocates drafting responsibility to Rules Committees. In modern practice, the Rules Committees are the rule experts, and the Supreme Court largely stays out of the rulemaking process, with the exception of exercising final approval. Upon promulgation, the Rules Committees' work is finished. The task of interpreting the rules then falls to the Court, and the Rules Committees largely refrain from involvement in the Court's adjudicatory process. This separation, especially at the adjudicative stage, impoverishes Court decision making.

A. The Rulemaking Separation

In 1934, Congress passed the Rules Enabling Act, which delegated to the Supreme Court the power to promulgate "rules of practice and procedure."¹⁴ The Court, on its own initiative, promptly created and outsourced the drafting function of civil rules to an Advisory Committee whose members were appointed by the Court as a whole.¹⁵

For the first few decades of civil rulemaking under the Act, the Advisory Committee was dominated by academics and prominent

¹⁴ Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2071–2077 (2012)). For the definitive history of the Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

¹⁵ Order, *Appointment of the Committee to Draft Unified System of Equity and Law Rules*, 295 U.S. 774 (1935).

practitioners rather than sitting federal judges.¹⁶ Meetings were closed to the public, and discourse was vigorous but insular. In 1958, Congress directed the Judicial Conference to “carry on a continuous study of the operation and effect” of the rules and to recommend changes,¹⁷ and the Judicial Conference then delegated primary drafting responsibility to the Standing and Advisory Committees.¹⁸ During this time, the Supreme Court generally deferred to the civil rules Advisory Committee but sometimes revised rules on its own.¹⁹ Meanwhile, Congress rarely intervened to prevent a rule from taking effect.

Things changed in the 1970s, when Congress began a two-decade span of rulemaking engagement and reform.²⁰ Congress rejected the proposed Federal Rules of Evidence,²¹ and critics of the cloistered and facile rulemaking process urged more transparency, public participation, and levels of review.²² In 1988, Congress amended the Rules Enabling Act to open any Committee business to the public, require the appointment of a Standing Committee, provide that any Advisory Committees be composed of members of the bench and bar, and direct that any rulemaking recommendation be accompanied by an explanatory note of the rule and a written report explaining the decisions and any dissenting views.²³

Rulemaking today displays several important features. First, the composition of Rules Committee membership, over which the Judicial

¹⁶ Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1109 n.24 (2002).

¹⁷ Pub. L. No. 85-513, 72 Stat. 356 (1958) (codified as amended at 28 U.S.C. § 331).

¹⁸ See Struve, *supra* note 16, at 1107.

¹⁹ *Id.* at 1106 n.11. Once, the Court revised a rule of criminal procedure unilaterally, without any Advisory Committee involvement. See Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. Am. Judicature Soc’y 250, 257 (1963).

²⁰ David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 Utah L. Rev. 927, 946–47. For a critique of the rulemaking process, see Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905, 936 (1976).

²¹ Struve, *supra* note 16, at 1107 n.16.

²² See *id.* at 1107–08.

²³ *Judicial Improvements and Access to Justice Act*, Pub. L. No. 100-702 § 401, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. § 2073 (2012)).

Conference rules grant the Chief Justice the sole appointment power,²⁴ has become dominated by judges. The Advisory Committee on Civil Rules now has seven district judges, one appellate judge, one state judge, four practitioners, one representative from the Department of Justice, one academic, and two nonvoting academic reporters.²⁵ Second, the more open process has shifted the rulemaking focus away from an academic enterprise and toward a more democratic process characterized by caution, accommodation, compromise, and, at times, capitulation.²⁶ This shift in process has affected the substance of rule proposals²⁷ and has caused some to worry about undue interest-group influence on the rulemaking process.²⁸ Third, the insertion of additional layers and approval processes has slowed—perhaps even has ossified—rulemaking.²⁹

At the same time, the Supreme Court has become less involved in the rulemaking process. Before 1988, the Court occasionally rejected rules proposed by the Advisory Committee and occasionally promulgated its own rules without the aid of the Advisory Committee.³⁰ Today, rulemaking's additional layers, public-participation vetting process, and

²⁴ About the Judicial Conference, U.S. Courts, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/SNS7-9FDL>].

²⁵ See Advisory Committee on Civil Rules, U.S. Courts (Oct. 1, 2016), <http://www.uscourts.gov/file/committee-rules-practice-and-procedure-chairs-and-reporters> [<https://perma.cc/2TM7-YBB2>].

²⁶ Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 *Geo. L.J.* 887, 902–07 (1999).

²⁷ See, e.g., Letter from Sam C. Pointer, Jr., Chairman, Advisory Comm. on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice & Procedure, 146 *F.R.D.* 519, 523–25 (1992) (detailing changes made to the Rule 11 proposal in response to public comments). See generally Scott Dodson, *A Negative Retrospective of Rule 23*, 92 *N.Y.U. L. Rev.* 917 (2017) (explaining the influence of dynamic social and political conditions on proposals to reform Rule 23).

²⁸ See, e.g., Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Institutional Reform: An Institutional Approach*, 15 *Nev. L.J.* 1559, 1595–96 (2015).

²⁹ Struve, *supra* note 16, at 1103–04; see also Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 *Law & Contemp. Probs.* 229, 235 (1998).

³⁰ See, e.g., Order, 374 U.S. 863, 882–83 (1963) (amending Rule 25); Order, 367 U.S. 1009, 1015 (1961) (amending Rule 25); Order, 308 U.S. 642 (1939) (amending Rule 81); Clark, *supra* note 19, at 252 (reporting that the Court sua sponte amended Rule 46 of the Federal Rules of Criminal Procedure in 1956); Struve, *supra* note 16, at 1106 n.11 (reporting that the Court rejected some amendments prior to 1958).

appointment of trusted Committee members has left the Supreme Court with little effective role in rule promulgation. Although the Act delegates the ultimate authority for prescribing rules to the Supreme Court,³¹ as a practical matter, the Supreme Court today acts principally as a “rubber stamp[] in the rulemaking process,” and individual justices rarely dissent from rule approval.³²

In some ways, this separation at the rulemaking stage makes sense. The rulemakers are institutionally better equipped than the Court to draft rules and legislate rule policy for the lower courts. Rules Committee membership is dominated by sitting lower-court judges and lawyers who use the rules in everyday practice and actual cases.³³ The Rules Committees fulfill the Judicial Conference’s obligation to continuously study the rules,³⁴ and they do, often with the benefit of empirical data and studies commissioned from the Federal Judicial Center.³⁵ Because the rules are “interdependent,” multiple and simultaneous rule amendments can be “tightly coordinated.”³⁶

In contrast, the Supreme Court is far less equipped to engage in rulemaking.³⁷ The justices have limited federal trial-level experience and lack the procedural expertise of the rulemakers.³⁸ Indeed, justices have openly confessed ignorance of how the rules work in practice and what problems they present or solve.³⁹ And the Court has neither the time nor

³¹ 28 U.S.C. § 2072(a) (2012).

³² See Marcus, *supra* note 20, at 961. Congress also rarely intervenes. See Bone, *supra* note 26, at 908; Struve, *supra* note 16, at 1115 & n.55.

³³ Bone, *supra* note 26, at 896.

³⁴ 28 U.S.C. § 331.

³⁵ See Thomas E. Willging, Past and Potential Uses of Empirical Research in Civil Rulemaking, 77 *Notre Dame L. Rev.* 1121, 1124 (2002).

³⁶ Bone, *supra* note 26, at 946.

³⁷ Marcus, *supra* note 20, at 944.

³⁸ Arthur R. Miller, From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure, 60 *Duke L.J.* 1, 86–87 (2010) (“The Justices do not have the time, trial-court experience, or on-the-ground information to evaluate the consequences that procedural changes may have on private enforcement of substantive law or what alternative enforcement mechanisms should be established if litigation pathways are impaired.”).

³⁹ See, e.g., Transcript of Oral Argument at 13–17, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015) (Breyer, J.) (“I can’t remember my civil procedure course.”); Order, 146 F.R.D. 401, 504–05 (1993) (statement of White, J.) (“[T]he trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the

the resources to study the workings of the rules in a specific context or on a more general, ongoing basis. Accordingly, the Court rarely interferes in rulemaking.⁴⁰

B. The Adjudicative Separation

At the same time, the Rules Committees play their rulemaking role without engaging in the titration of their rules through the adjudicatory process. Two reasons seem to guide this separation.

First, the Rules Committees, in particular, see their role as rulemakers as separate from the Court's roles as adjudicator and interpreter. Much like Congress with legislation, the Rules Committees take responsibility for the drafting of the law and leave its application and exposition in cases to the courts.

But even Congress occasionally files an amicus brief to make the Court aware of facts stemming from Congress's institutional knowledge or expertise.⁴¹ And, in any event, the Rules Committees in this context are less like Congress and more like agencies.⁴² Like agencies, the Rules Committees have direct experience and specialized knowledge, which they use to set agendas and incorporate policy preferences into the rules.⁴³ Like agency regulations, the rules pass through a notice-and-comment period.⁴⁴ These similarities suggest that the Rules Committees,

rulemaking committees . . ."); Order, 409 U.S. 1132, 1132–33 (1972) (Douglas, J., dissenting) (arguing that the justices are “so far removed from the trial arena that [they] have no special insight, no meaningful oversight to contribute”).

⁴⁰ Individual justices—including Frankfurter, Black, Douglas, Powell, Stewart, and Rehnquist—have openly disclaimed independent judgment and instead expressed full deference to the Advisory Committee in approving the rules. See Struve, *supra* note 16, at 1127–29, 1154; cf. Order, 146 F.R.D. at 403 (letter from Chief Justice William H. Rehnquist) (“While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.”).

⁴¹ Amanda Frost, *Congress in Court*, 59 *UCLA L. Rev.* 914, 964 (2012).

⁴² The loose analogy of the Rules Committees to agencies has been recognized by many others. See, e.g., Burbank, *supra* note 14, at 1193; Mulligan & Staszewski, *supra* note 9, at 1191–93; Porter, *supra* note 2, at 152–53, 176.

⁴³ See Porter, *supra* note 2, at 151–52.

⁴⁴ *Procedures Governing the Rulemaking Process*, U.S. Courts (Dec. 1, 2015), <http://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0> [<https://perma.cc/P44A-9F5E>].

like agencies, ought to have a say when the Court interprets or construes the rules they drafted.⁴⁵

The second reason for the separation is that the Supreme Court is more institutionally equipped than the rulemakers at adjudication of disputes and case-specific application of the rules,⁴⁶ so even if the rulemakers thought it appropriate to bridge the gap, they might believe they have little to add.

The relative capacities of the Court and the Rules Committees in matters of adjudication do not mean that adjudication—and the rule interpretation necessarily attendant to it—should be uninformed by rulemaker expertise. Indeed, accurate rule interpretation often draws upon information primarily in the hands of the rulemakers, such as rulemaker intent, the purpose of the rule, how the rule interrelates to other rules, the history of the rule and relevant amendment proposals, the “legislative facts” underlying the rule, and how the rule currently works in practice.⁴⁷

⁴⁵ Agencies typically get a say at the adjudicative stage. See *infra* text accompanying notes 145–62. Some agencies even have independent interpretative authority. See M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1386–91, 1400, 1403 (2004).

⁴⁶ Mulligan & Staszewski, *supra* note 10, at 86; Porter, *supra* note 2, at 182.

⁴⁷ See *Bus. Guides v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 546 (1991) (treating rulemaker intent as relevant to its interpretative analysis); Am. Bar Ass'n, Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C., October 6, 7, 8, 1938 and of the Symposium at New York City, October 17, 18, 19, 1938, at 224–25 (Edward H. Hammond ed., 1939) (statement of Advisory Committee Chairman William Mitchell) (arguing that copies of preliminary drafts, Committee reports, meeting notes, and articles written by Committee members should all be relevant to rule interpretation and application).

I do not mean to defend, as others have, a particular methodology of rule interpretation. See, e.g., Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720, 728–29 (1988) (arguing that the Court has broad latitude to interpret the rules and that “the historical views of the Advisory Committee—which merely drafted the Rule—of its meaning should be entitled only to limited weight”); Marcus, *supra* note 20, at 928–29, 957 (urging reliance on “rulemaker intent and purpose”); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 Hastings L.J. 1039, 1093 (1993) (advocating for “a more activist role in the interpretive stage”); Struve, *supra* note 16, at 1102–03 (calling for judicial restraint and deference to the Advisory Committee notes); cf. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) (urging rules to be interpreted as statutes). Compare *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (“Although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and meaning, the construction given by the Committee is ‘of weight.’”)

The constraints of adjudication can hamper the Court's ability to gather this information effectively in order to construe rules accurately. When deciding a specific case, the Court is cabined by the happenstance of the facts of the case, the applicable law, and the parties' arguments. The Court follows principles of *stare decisis* and focuses first on the narrow dispute at stake rather than broader questions of the rule and its interrelatedness to other rules or statutes or interests.⁴⁸ These adjudicatory constraints, coupled with a lack of rulemaker input, risk suboptimal decision making in rule-interpretation cases. The following case studies involving important rule interpretations illustrate this claim.⁴⁹

1. Rule 8: Twombly

In *Bell Atlantic Corp. v. Twombly*,⁵⁰ a putative class of telecommunications subscribers sued regional telecommunications providers for an antitrust conspiracy to avoid competing in each other's regions.⁵¹ The complaint alleged facts supporting conscious parallel conduct—i.e., each provider staying within its own territory and

(quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444 (1946)), with *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 557 (2010) (Scalia, J., concurring) (“The Advisory Committee’s insights into the proper interpretation of a Rule’s text are useful to the same extent as any scholarly commentary. But the Committee’s *intentions* have no effect on the Rule’s meaning.”).

⁴⁸ Mulligan & Staszewski, *supra* note 9, at 1209–11. The Court is ambivalent about how to approach rule interpretation in this context. See Porter, *supra* note 2, at 127–28 (identifying two interpretive methodologies).

⁴⁹ By emphasizing these particular cases, I do not mean to suggest that other illustrations do not exist. In *Schiavone*, for example, the Court construed Rule 15(c) to deny relation back under certain facts. 477 U.S. at 30–31. No amicus briefs were filed. The then-Reporter for the Advisory Committee later wrote that *Schiavone*'s interpretation “seemed inconsistent with the purpose of Rule 15(c) . . . [and] at odds with the aims expressed in Rule 1,” Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 *Duke L.J.* 597, 619 (2010), and the Rules Committees swiftly drafted amendments to abrogate the reasoning of *Schiavone*, see *Amendments to Federal Rules of Civil Procedure*, 134 *F.R.D.* 525, 574, 637–38 (1991), including an Advisory Committee Note stating that “the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8,” Fed. R. Civ. P. 15(c)(3) advisory committee’s note to 1991 amendment. Perhaps the Court would have reached a different result had the Advisory Committee’s views been put before it at the time.

⁵⁰ 550 U.S. 544 (2007).

⁵¹ *Id.* at 550–51.

knowing that the others were doing the same—and that the parallel conduct was the result of an agreement among the providers not to compete.⁵²

The Supreme Court held that the complaint failed to meet the standard of Rule 8 of the Federal Rules of Civil Procedure, which requires a “short and plain statement of the claim showing that the pleader is entitled to relief,”⁵³ and it ordered the complaint dismissed under Rule 12(b)(6) for failure to state a claim upon which relief could be granted.⁵⁴ The Court, however, “barely glance[d] at the text of” the rules.⁵⁵ Instead, it focused on pleading policy, and it found illumination in the Court’s own understanding of civil litigation.⁵⁶ This focus led the Court to make four major changes to pleading standards, all of which were in error,⁵⁷ and all of which were made without the benefit of rulemaker input.

First, the Court created a new standard that the complaint state a claim that is “plausible.”⁵⁸ This plausibility standard requires the pleading of sufficient facts, independent of giving notice.⁵⁹ But Rule 8 has never been understood to require the pleading of facts in this way. Indeed, the drafters of Rule 8 specifically dispensed with the prior

⁵² *Id.*

⁵³ Fed. R. Civ. P. 8(a).

⁵⁴ *Id.* 12(b)(6); *Twombly*, 550 U.S. at 570.

⁵⁵ Porter, *supra* note 2, at 137. The Court’s sole textual hook was that the complaint “show[]” entitlement to relief, see *Twombly*, 550 U.S. at 557, an embarrassingly thin reed on which to work a major change in pleading standards.

⁵⁶ Marcus, *supra* note 20, at 973 (“[T]he Court [in *Twombly*] made no attempt to unpack rule text or unearth rule maker intent or purpose and instead based its decision on policy concerns.”).

⁵⁷ Edward A. Purcell, Jr., From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts, 162 U. Pa. L. Rev. 1731, 1736 (2014) (“[I]n imposing a plausibility requirement for pleadings, *Twombly* and *Iqbal* not only departed from the text and original understanding of Rule 8 but also rejected hundreds of years of legal practice defining the nature of the motion to dismiss for failure to state a claim.”).

⁵⁸ *Twombly*, 550 U.S. at 556 (asserting that a complaint must have “enough factual matter (taken as true) to suggest” unlawful conduct and that this standard “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement”).

⁵⁹ See Scott Dodson, Comparative Convergences in Pleading Standards, 158 U. Pa. L. Rev. 441, 460 & n.117, 461–62 & nn.126–27 (2010).

regime's requirement of pleading facts.⁶⁰ Instead, the drafters meant to instill a more relaxed regime focused on notice⁶¹ and to confine the pleading of facts to that goal.⁶² It is worth noting that the Rules Committees had studied the relatively low standard of Rule 8 continuously since the famous case of *Conley v. Gibson* and had repeatedly declined to amend it to impose a higher standard despite invitations to do so by the Supreme Court.⁶³

Second, the Court interred the venerable language from *Conley* that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁶⁴ The *Twombly* Court suggested that this language could mean that “a wholly conclusory statement of claim would survive a motion to dismiss,”⁶⁵ and it therefore disapproved of the standard.⁶⁶ But the Court misread *Conley* and ignored the proper remedy already existing in the rules. *Conley* was right: a complaint should not be *dismissed* under Rule 12(b)(6) in such circumstances. The problem of a “the defendant acted unlawfully and caused me injury” complaint—the failure to provide adequate notice—is remedied by a rule specifically directed to that problem: a Rule 12(e) motion for a more definite statement.⁶⁷ The majority opinion does not even acknowledge Rule 12(e).

⁶⁰ See *id.* at 449; cf. 1848 N.Y. Laws 521 (requiring “[a] statement of the facts constituting the cause of action”).

⁶¹ See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 433 (1986).

⁶² See Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–61 (1943); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 825 (2010).

⁶³ See Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. Davis L. Rev. 1483, 1503–11 (2013).

⁶⁴ 355 U.S. 41, 45–46 (1957) (citing *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302 (1940); *Dioguardi v. Durning*, 139 F.2d 774 (1944); and *Cont'l Collieries v. Shober*, 130 F.2d 631 (1942)).

⁶⁵ 550 U.S. at 561.

⁶⁶ *Id.* at 563.

⁶⁷ See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 Wis. L. Rev. 535, 553. This was the contemporaneous understanding of Rule 12(e) at the time of its adoption. See James A. Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure*, 47 Yale L.J. 50, 62 (1937).

Third, the Court distinguished between legal conclusions and factual allegations. Specifically, it disregarded the complaint's allegations of an agreement and antitrust conspiracy because "these are merely legal conclusions resting on the prior allegations."⁶⁸ But allegations like "agreement" and "conspiracy" straddle the line between legal conclusions and factual allegations, as even the author of *Twombly* later appeared to confess,⁶⁹ and they mark a line that, in any event, was abandoned by the 1930s rulemakers as unworkable in practice.⁷⁰

Fourth, the Court justified all these changes as necessary to control discovery costs, especially in the kind of massive antitrust class action at issue in *Twombly*.⁷¹ The discovery rules already give judges tools to control discovery costs,⁷² but the Court dismissed them "given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."⁷³ As support for this "common lament," the Court cited to a 1989 article by Judge Frank Easterbrook.⁷⁴ And the Court reasoned that the existence of controls was beside the point in any event because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."⁷⁵

Yet reports by the Federal Judicial Center, the research arm of the judiciary and a regular data collector for the Rules Committees, have repeatedly concluded that discovery costs are under control in the vast

⁶⁸ *Twombly*, 550 U.S. at 564.

⁶⁹ See *Ashcroft v. Iqbal*, 556 U.S. 662, 698–99 (2009) (Souter, J., dissenting) (finding no daylight between the allegations deemed conclusory by the majority and the allegations deemed nonconclusory by the majority).

⁷⁰ See Kevin M. Clermont, *Litigation Realities Redux*, 84 *Notre Dame L. Rev.* 1919, 1930 (2009); cf. Charles E. Clark, *Handbook of the Law of Code Pleading* 225–27 (2d ed. 1947) (recounting the hopeless code-pleading distinctions among ultimate facts, evidentiary facts, and conclusions of law).

⁷¹ See *Twombly*, 550 U.S. at 558–59; Scott Dodson, *New Pleading, New Discovery*, 109 *Mich. L. Rev.* 53, 64 (2010).

⁷² *Twombly*, 550 U.S. at 593–94 n.13, 596 n.15 (Stevens, J., dissenting).

⁷³ *Id.* at 559 (citing Frank Easterbrook, *Discovery as Abuse*, 69 *B.U. L. Rev.* 635, 638 (1989)).

⁷⁴ *Id.* at 559, 560 n.6.

⁷⁵ *Id.* at 559.

majority of cases and that discovery abuse is rare.⁷⁶ Further, the claim that frivolous lawsuits cause high-stakes choices is not supported empirically.⁷⁷ The data do suggest that meritless litigation and high discovery costs can be problematic in a small category of cases, but the data as a whole do not justify a transsubstantive rule change of pleading standards.⁷⁸ Equally troubling is that there is no evidence that the change worked by *Twombly* will even address the problem surmised by the Court,⁷⁹ especially in light of the dynamism of litigation.⁸⁰

For each of these errors, the terse text of Rule 8 and its sparse Advisory Committee Note no doubt left room for *Twombly*'s creative revisionism. The lack of guidance allowed the Court to cherry-pick from among sources, including partisan amicus briefs, to rely on its own *ipse dixit* factfinding on discovery costs to justify its conclusions,⁸¹ and to craft a transsubstantive solution for the circumstances of an atypical

⁷⁶ See generally Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (2009), <https://www.fjc.gov/sites/default/files/2012/DisSurv1.pdf> [<https://perma.cc/RNF5-85GG>] (reporting that satisfaction with the pretrial process is relatively high and discovery costs are relatively reasonable); Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393 (1994) (disputing the perception of widespread discovery abuse). The rules specifically deal with the alleviation of costs of electronic discovery. See Fed. R. Civ. P. 26(b)(2)(B).

⁷⁷ See Robert G. Bone, Modeling Frivolous Suits, 145 U. Pa. L. Rev. 519, 579 (1997) (“The results of our formal analysis neither rule out nor clearly confirm a serious frivolous suit problem.”).

⁷⁸ See *id.* at 589.

⁷⁹ Alexander A. Reinert, The Costs of Heightened Pleading, 86 Ind. L.J. 119, 125–26 (2011). See also Jonah B. Gelbach, Material Facts in the Debate over *Twombly* and *Iqbal*, 68 Stan. L. Rev. 369, 376–77 (2016) (concluding that “empirics cannot conclusively resolve the case-quality aspects of the *Twombly* debate”).

⁸⁰ See Scott Dodson, A Closer Look at New Pleading in the Litigation Marketplace, 99 Judicature, no. 2, 2015, at 11, 13–14, 16–17 (detailing some of the costs and ancillary effects of the new pleading standard).

⁸¹ No party or amicus brief offered any data regarding discovery costs. See Clermont & Yeazell, *supra* note 62, at 848.

case.⁸² The Court subsequently compounded the errors of *Twombly* in *Ashcroft v. Iqbal*, a case that relied almost exclusively on *Twombly*.⁸³

As customary, the Rules Committees did not participate in any way in *Twombly*. Yet the Rules Committees had information that could have been useful to the Court and perhaps could have swayed the outcome. They had information about discovery costs, about the interconnections among various pleading rules and between pleading rules and discovery rules, about the abilities of lower courts to control discovery, and about the reasons why the Advisory Committee on Civil Rules had repeatedly declined to amend Rule 8 or disapprove of *Conley*.⁸⁴ The Rules Committees could have explained that the “short and plain statement of the claim” language was deliberately different from previous standard requiring a “statement of facts constituting a cause of action,” that the drafters of Rule 8 deliberately avoided the terms “cause of action” and “statement of facts,” that legal conclusions can serve notice purposes as readily as factual allegations, and that no member of the 1930s Advisory Committee thought Rule 8 should serve a factual-sufficiency function.⁸⁵

These efforts would not require communing with the spirit of Charles Clark, the chief drafter of Rule 8; the information I identify was already in the hands of the Rules Committees. And Rule Committee endorsement of information such as the rarity of disproportionate discovery costs and the efficacy of judicial case management would have made it hard for the Court to rely on the contrary evidence and arguments that it did. It is difficult to imagine how Justice Souter could have written *Twombly* in the face of Rules Committee support for the dissent’s arguments and their predicate facts. But in the absence of an authoritative source for this information, and with the Solicitor General

⁸² See Marcus, *supra* note 20, at 944–45; Suja A. Thomas, How Atypical, Hard Cases Make Bad Law (See, e.g., the Lack of Judicial Restraint in *Wal-Mart*, *Twombly*, and *Ricci*), 48 Wake Forest L. Rev. 989, 991–92 (2013).

⁸³ See 556 U.S. 662 (2009). For a complete history and analysis of the two cases, see Scott Dodson, New Pleading in the Twenty-First Century: Slamming the Federal Courthouse Doors? 47–75 (2013).

⁸⁴ Mulligan & Staszewski, *supra* note 9, at 1220. Indeed, the Rules Committees that year approved important e-discovery amendments that codified mechanisms for controlling e-discovery costs, including cost-shifting. See Fed. R. Civ. P. 26(b)(2).

⁸⁵ Marcus, *supra* note 20, at 976–80, 983.

voicing support for the defendants,⁸⁶ the Court sidestepped the arguments in the dissent, effectively rewrote Rule 8, and dramatically altered civil pleading.⁸⁷

2. Rule 23: Dukes

As with *Twombly*, rulemaker input could have illuminated a recent decision interpreting Rule 23, the federal class-action rule. In *Wal-Mart Stores v. Dukes*,⁸⁸ a nationwide class of 1.5 million current and former female Wal-Mart employees sued the retail giant for gender discrimination in promotions.⁸⁹ The Court held that the class could not be certified⁹⁰ and, in the process, glossed Rule 23(a)(2) in an important new way.

Rule 23(a)(2)'s commonality requirement demands, for certification, "questions of law or fact common to the class."⁹¹ The Court's focus on commonality was curious because Wal-Mart's petition for certiorari barely mentioned commonality,⁹² no doubt because commonality had always been a relatively easy condition to satisfy and because the claimants seemed to easily satisfy it in the case.⁹³ The claimants posed common questions such as whether the women were subjected to unlawful discrimination, whether they all worked for Wal-Mart, and, as Justice Ginsburg pointed out in her concurrence, whether they were

⁸⁶ For a more detailed discussion of the Solicitor General's influence on the Court in *Twombly*, see *infra* text accompanying notes 138–41.

⁸⁷ Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 *Notre Dame L. Rev.* 849, 883–85 (2010) (arguing that the Court effectively engaged in rulemaking); 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, 333–34 (2013) (asserting that the Court "essentially rewrote Rule 8").

⁸⁸ 564 U.S. 338 (2011).

⁸⁹ *Id.* at 342.

⁹⁰ *Id.* at 348–60. The Court interpreted other parts of Rule 23 in problematic ways—including Rule 23(b)(2) and the level of evidentiary proof required for certification. *Id.* at 360–67. I do not address those issues here, but they seem like apt candidates for useful input by the Rules Committees as well.

⁹¹ Fed. R. Civ. P. 23(a)(2).

⁹² Robert H. Klonoff, *The Decline of Class Actions*, 90 *Wash. U. L. Rev.* 729, 774 (2013).

⁹³ See *id.* at 773; A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 *B.U. L. Rev.* 441, 443 (2013).

subjected to excessively discretionary decision making that led to disparate results in promotions.⁹⁴

But the Court added a second issue on certiorari to address commonality,⁹⁵ and Wal-Mart, along with a number of other amici such as the Chamber of Commerce (but not the Solicitor General), devoted significant briefing to the opportunity to limit Rule 23(a)(2).⁹⁶

The Court eagerly took the bait. It interpreted Rule 23(a)(2) to require common questions to speak to whether all class members have suffered the same injury, such that there is a common question that is “central to the validity of each one of the claims” and whose answer is “capable of classwide resolution.”⁹⁷ This formulation, seemingly adopted in part from a law review article whose author was not even discussing Rule 23(a)(2),⁹⁸ changed the commonality requirement from a relatively easy condition of common law or fact to a much more difficult condition of common rights or relief⁹⁹—a change that has foiled many certification attempts since.¹⁰⁰ As in the Rule 8 context, the Court subsequently entrenched its errors by relying heavily on *Dukes* in later cases.¹⁰¹

The current version of Rule 23(a) has remained essentially unchanged since 1966, and its drafters did not anticipate the many changes in the substantive law and in class-action practice that occurred after its

⁹⁴ *Dukes*, 564 U.S. at 370–71 (Ginsburg, J., concurring in part and dissenting in part). This “would seem sufficient to satisfy the common question requirement.” Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DePaul L. Rev. 497, 507 (2016).

⁹⁵ Klonoff, *supra* note 92, at 774.

⁹⁶ *Id.* For more on the refusal of the Solicitor General to participate, see *infra* text accompanying note 136.

⁹⁷ *Dukes*, 564 U.S. at 350. For an argument that “the Court’s holding does not speak primarily to the content of Rule 23(a)’s commonality requirement,” but instead “sounds in the liability policies of Title VII,” see Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027, 1038 (2013).

⁹⁸ See Klonoff, *supra* note 92, at 776–80 (referencing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)); Spencer, *supra* note 93, at 471–72 (same).

⁹⁹ See Robert G. Bone, *The Misguided Search for Class Unity*, 82 Geo. Wash. L. Rev. 651, 700 (2014); Spencer, *supra* note 93, at 472–73.

¹⁰⁰ See Klonoff, *supra* note 92, at 778–79; Spencer, *supra* note 93, at 445–48.

¹⁰¹ *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (citing *Dukes* in discussing the certification-proof standard and offering dictum support for the need for admissible evidence to show that the case is susceptible to awarding damages on a class-wide basis).

enactment.¹⁰² Yet Congress passed Title VII, the law under which the plaintiffs sued in *Dukes*, in 1964 with private enforcement of its norms in mind.¹⁰³ The 1966 drafters specifically adapted Rule 23(b)(2) to those kinds of discrimination claims. Further, Rule 23(a) and its antecedents had a rich and defined pedigree that could have informed the Court's decision making.¹⁰⁴

Rule Committee involvement, then, could have informed the Court that its commonality interpretation, in the words of one of the Advisory Committee's current members, "cannot be squared with the text, structure, or history of Rule 23(a)(2)."¹⁰⁵ In the absence of textual support, the Rules Committees could have explained Rule 23(a)(2) in light of its historical pedigree: that the 1966 drafters abandoned notions of common rights and common relief and opted to retain only the condition of common questions of law or fact.¹⁰⁶ Such a view could have persuaded the Court that its common injury requirement, in the estimation of a former reporter, "demands more than the drafters of Rule 23(a)(2) ever intended be necessary."¹⁰⁷ Further, the Rules Committees could have detailed subsequent Committee study of Rule 23, explained why Rule 23(a) was not amended, and documented the changed attitudes toward individualism and commonality¹⁰⁸ that might have informed the Court's approach to the rule. The Rules Committees did not, and *Dukes* became law.

¹⁰² See Arthur R. Miller, Keynote Address, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 *Emory L.J.* 293, 295 (2014).

¹⁰³ See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* 94–101 (2010).

¹⁰⁴ See Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 *B.U. L. Rev.* 213, 301–04 (1990) (book review); see generally Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987) (documenting the history of Rule 23 from medieval times to 1966).

¹⁰⁵ Klonoff, *supra* note 92, at 776; see also Purcell, *supra* note 57, at 1735 (characterizing the opinion as having a "highly questionable legal foundation").

¹⁰⁶ Spencer, *supra* note 93, at 461–65.

¹⁰⁷ Miller, *supra* note 102, at 298.

¹⁰⁸ See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 *Harv. L. Rev.* 78, 148–53 (2011); Judith Resnik, *From "Cases" to "Litigation,"* 54 *Law & Contemp. Probs.* 5, 8–11 (1991).

II. BRIDGING THE SEPARATION WITH AN AMICUS PRACTICE

These case studies suggest that the separation between the Rules Committees and the Supreme Court at the adjudicative stage can lead to impoverished decision making and erroneous rule interpretation. One solution is to narrow the adjudicatory separation between the Rules Committees and the Court. And there is an easy way to narrow the separation, one that neither disrupts the existing adjudicative structure nor infringes upon the Court's core adjudicatory powers but rather offers the Court the information it needs to perform its adjudicatory function optimally. The solution is to give the Rules Committees an amicus role in the adjudication.

The idea initially may seem to create an odd intrabranched dynamic—in some sense, the judiciary could be seen as arguing before itself. But Article III does not prevent such an arrangement,¹⁰⁹ and, upon deeper reflection, the concept is no stranger than having the judiciary act as legislature (drafting the rules), executive (executing the rules), and judiciary (interpreting the rules).¹¹⁰ Further, in other contexts, the rulemaker gets a voice in how its rules should be interpreted. State solicitors general get a voice in how state laws are interpreted; the Department of Justice (or sometimes Congress or an independent agency) gets a voice in how federal laws are interpreted; agencies, ethics commissions, bar organizations, and the like can issue advisory opinions.

Nevertheless, federal-court rulemakers stay silent. And without rulemaker input, assistance in rule interpretation falls to the Court, parties, and amici, all of which are suboptimal because they represent different interests from rulemakers and lack the firsthand knowledge and expertise of the rulemakers. What is needed is Rules Committee participation, and the most logical and defensible place for Rules

¹⁰⁹ The Court has appointed counsel to represent the judicial branch and prosecute contempt actions when the Department of Justice is unwilling to do so, see *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987), and even the Solicitor General has taken the position that such an appointment is consistent with judicial powers under Article III, see Brief for the United States as Amicus Curiae Supporting Petitioner at 8 n.2, *United States v. Providence Journal Co.*, 485 U.S. 693 (1988) (No. 87-65), 1987 WL 881049.

¹¹⁰ Cf. Porter, *supra* note 2, at 183 (“Recognizing the power of the Court as a rulemaker gives theories of deference to rulemaking a whiff of circularity, if not of self-dealing.”).

Committee participation is in the well-established form of the amicus brief.

A. Why Amicus Curiae?

Historically, the amicus was a true “friend,” “without having an interest in the cause,” who offered “his own knowledge . . . for the information of the presiding judge.”¹¹¹ The amicus often helped the court understand how a ruling might affect nonparties.¹¹² As one court put it: “He acts for no one, but simply seeks to give information to the Court.”¹¹³ In England, for example, a member of Parliament once informed the court as amicus of the intent of the legislature.¹¹⁴

Once a rarity, amicus briefs now are filed in more than eighty-five percent of the Court’s argued cases.¹¹⁵ Most amicus briefs urge the Court to decide for a particular party.¹¹⁶ Empirical studies have shown that amicus participation can make a difference in the outcome of the decision.¹¹⁷

As a result, judges often criticize amicus briefs on the ground that they are not really neutral but rather restate arguments and positions of the parties.¹¹⁸ Some see amicus briefs as “the judicial counterpart of lobbying and congressional hearings in the legislative process.”¹¹⁹

¹¹¹ Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *Yale L.J.* 694, 694 (1963) (quoting Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 62–63 (1879)).

¹¹² *Id.* at 696–97.

¹¹³ *Campbell v. Swasey*, 12 *Ind.* 70, 72 (1859).

¹¹⁴ Krislov, *supra* note 111, at 695.

¹¹⁵ Lee Epstein & Jack Knight, *The Choices Justices Make* 4 n.b (1998); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. Pa. L. Rev.* 743, 744 (2000); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 *Va. L. Rev.* 1757, 1768 (2014).

¹¹⁶ Kearney & Merrill, *supra* note 115, at 841–42. For a history of the amicus, especially its American transition from neutral “friend” to party advocate, see Krislov, *supra* note 111, at 697–704.

¹¹⁷ Kearney & Merrill, *supra* note 115, at 749–50.

¹¹⁸ See *Ryan v. Commodity Futures Trading Comm’n*, 125 *F.3d* 1062, 1063 (7th Cir. 1997) (Posner, J.) (“The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s briefs. Such amicus briefs should not be allowed.”).

¹¹⁹ Krislov, *supra* note 111, at 717.

Justice Scalia once bemoaned: “There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.”¹²⁰

An amicus brief from the Rules Committees, however, has the potential to fill the nonpartisan gap that Justice Scalia identified, in the forgotten tradition of a true “friend of the court.” By statute and regulation, the Rules Committees are composed primarily of neutral experts charged with “carry[ing] on a continuous study of the [Rules’] operation and effect”¹²¹ for purposes of “recommend[ing] to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules . . . as may be necessary to maintain consistency and otherwise promote the interest of justice.”¹²² The business of the Rules Committees is to promote the neutral efficacy of the federal rules.

B. The Inadequacies of the Solicitor General

Amicus practice on behalf of the United States is already dominated by a particular repeat advocate who commands the trust of the Court and possesses the appearance of neutrality: the Solicitor General.¹²³ The Solicitor General is charged with representing the interests of the United States as whole, which ostensibly includes the interests of the judicial branch, and the Solicitor General does occasionally file amicus briefs on behalf of the United States in private-party cases involving rule interpretation.¹²⁴ If the Solicitor General represents these interests, why then, one might wonder, should the Rules Committees be given any role? Why not just trust the Solicitor General?

This objection gains additional force because the Department of Justice is, formally, a part of the rulemaking process. Each Rules Committee includes at least one ex officio member from the Department

¹²⁰ *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting).

¹²¹ 28 U.S.C. § 331 (2012).

¹²² 28 U.S.C. § 2073(b).

¹²³ The Solicitor General participates as party or amicus in more than half of the Court’s merits docket. See Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 *Ariz. St. L.J.* 1183, 1185 (2013). For seminal books on the Solicitor General, see Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (1987), and Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (1992).

¹²⁴ See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioner, *Unitherm Food Sys. v. Swift-Eckrich*, 546 U.S. 394 (2006) (No. 04-597).

of Justice.¹²⁵ The Solicitor General him- or herself is an ex officio member of the Advisory Committee on Appellate Rules.¹²⁶ On rare occasions, the Solicitor General has proposed new rules to the Standing Committee.¹²⁷ In some instances, especially the failed class-action reform efforts of 1978, the Justice Department has taken an active role in pressing amendments with the Advisory Committee and Congress.¹²⁸

But the connection between the Solicitor General and the rulemaking process is more attenuated in practice than it formally appears. Direct participation by the Solicitor General in the rulemaking process is rare to nonexistent.¹²⁹ The Department of Justice members of the Rules Committees primarily voice the interests of the government as litigant, especially for criminal rules when the executive branch acts as prosecutor. Often, internal tensions within the Department of Justice mean that the representative cannot effectively advocate in the rulemaking process at all.¹³⁰ Outside of the formal committee membership, communication between the Justice Department and the Rules Committees has always been sporadic at best.¹³¹ And there is no evidence that, at the adjudicative stage, the Solicitor General consults even with the particular Justice Department representatives who serve on the Rules Committees. Accordingly, the formal participation of the

¹²⁵ Committees on Rules of Practice and Procedure Chairs and Reporters, U.S. Courts (Oct. 25, 2016), <http://www.uscourts.gov/file/committee-rules-practice-and-procedure-chairs-and-reporters> [<https://perma.cc/2TM7-YBB2>].

¹²⁶ *Id.*

¹²⁷ For one example, see Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 720–21 (2006).

¹²⁸ See David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. Pa. L. Rev. 1531, 1535 (2017).

¹²⁹ See E-mail from Donald B. Verilli, Former Solicitor General of the U.S., to Scott Dodson (Nov. 11, 2016) (on file with author); Telephone Interview with John Rabiej, *supra* note 13.

¹³⁰ See Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 *Hastings L.J.* 843, 873–74 (2002) (summarizing the reflections of a former Department of Justice representative to the Advisory Committee on Rules of Evidence).

¹³¹ See Engstrom, *supra* note 128, at 1548–49 (offering one brief episode of communication between DOJ and the Civil Rules Advisory Committee regarding an executive-branch push for class-action reform but that DOJ “had not even been made aware of” the Committee’s deliberations on Rule 23 reform).

Department of Justice does not translate to a functional representation by the Solicitor General of the input or views of the Rules Committees.

But even were the Solicitor General attuned to the rulemaking process, the Solicitor General cannot be expected to fairly represent the Rules Committees' interests at the adjudicative stage. There is no doubt that Solicitors General see themselves, at least in some respects, as the "Tenth Justice," concerned with the greater interests of the government and in partnership with the Court to make the laws work effectively.¹³² But the Solicitor General also represents the interests of the government as a party to the litigation.¹³³ And, as a member of the executive branch who serves at the pleasure of the President, the Solicitor General often represents the political or institutional interests of the executive branch, or, even more narrowly, the President.¹³⁴ These structural features no doubt help explain why scholars have concluded that the Solicitor General's amicus practice is partisan.¹³⁵

Further, the Solicitor General's primary amicus view in most rules cases almost certainly will be biased heavily toward representing the United States's interests as a future party litigating under the rules. Accordingly, the Solicitor General's position is likely to be heavily

¹³² Caplan, *supra* note 123, at 17–18.

¹³³ David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 *Law & Contemp. Probs.* 165, 167–75 (1998).

¹³⁴ See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 *B.C. L. Rev.* 1323, 1363–65 (2010); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 *Calif. L. Rev.* 255, 284–87 (1994); Louis Fisher, *Is the Solicitor General an Executive or a Judicial Agent? Caplan's Tenth Justice*, 15 *Law & Soc. Inquiry* 305, 306–07 (1990) (book review); Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 *Loy. L.A. L. Rev.* 1105, 1105–08 (1988); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 *Stan. L. Rev.* 799, 802–05 (1992) (book review); cf. Luther A. Huston et al., *Roles of the Attorney General of the United States* 52 (1968) (explaining that the Attorney General is expected to act as the President's advocate).

¹³⁵ See Elliott Karr, *Independent Litigation Authority and Calls for the Views of the Solicitor General*, 77 *Geo. Wash. L. Rev.* 1080, 1085–89 (2009) (reporting presidential pressure on the Solicitor General's advocacy); Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 *Judicature*, no. 6, 1983, at 256, 261–64 (1983) (finding that Solicitors General in Republican administrations file amicus briefs in more criminal cases and fewer civil-rights cases than Solicitors General in Democratic administrations); see also Krislov, *supra* note 111, at 714, 720 (arguing that the Solicitor General as amicus is prone to policy and ideological advocacy).

influenced by this consideration rather than by the consideration of impartially reflecting the judicial interests at stake.

These political and branch-specific interests undoubtedly will collide with the judiciary's interests in fair and workable court rules. The President, executive branch, and Justice Department may have views, for example, on how class-action practice should affect Title VII enforcement (as in *Dukes*) or what kinds of pleading standards should attach to private antitrust claims in light of the Federal Trade Commission's antitrust policies (as in *Twombly*). And because the President has no power over the judicial branch—unlike most agency heads, who serve at the pleasure of the President—the President and Justice Department can press a rule-interpretation agenda only through advocacy in adjudication.

Indeed, the Solicitor General declined to file an amicus brief in *Dukes* even though the case presented a set of crucially important issues to class-action practice, and even though the Equal Employment Opportunity Commission (“EEOC”) filed an amicus brief in the lower courts.¹³⁶ Perhaps the Solicitor General could not reconcile the policy implications of private enforcement of Title VII (as the EEOC pressed)¹³⁷ with the business lobby that is so important to electoral politics (as the President may have foreseen) and with the possibility that the United States could be a class-action defendant in similar cases (as other agencies may have feared). It is not a stretch to surmise that the interests in the effective functioning and proper interpretation of Rule 23 played a subordinate role in the Solicitor General's decision not to file a brief. In any event, the absence of the Solicitor General left an amicus void filled by the partisanship and cacophony of more than twenty-five private amicus briefs.

In contrast, the Solicitor General—a Republican appointee—filed an amicus brief in *Twombly* supporting the telecom defendants.¹³⁸ The Solicitor General's brief framed the issue less as a rule-interpretation issue and more as a substantive antitrust issue, identifying “a substantial interest in the proper standard for allowing antitrust suits to move past

¹³⁶ See Solimine, *supra* note 123, at 1206–07.

¹³⁷ *Id.*

¹³⁸ Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126).

the motion-to-dismiss stage.”¹³⁹ Nevertheless, the brief struck a strongly partisan chord on rule interpretation, with little legal support in Rule 8, that paralleled reasoning in the Court’s opinion. The Solicitor General conjured the same unsupported specters of frivolous litigation, discovery costs, and coerced settlements highlighted in the Court’s opinion.¹⁴⁰ The brief raises the same misplaced beef with *Conley*: that *Conley* “would preclude dismissal even of totally conclusory complaints that provide virtually no factual predicate for the alleged injury.”¹⁴¹ Notably absent from the Solicitor General’s brief is any mention of other protections against excessive discovery costs, any empirical evidence of the costs of meritless suits or the incidence of discovery abuse, or any understanding of how Rule 12(e) applies to *Conley*. It seems likely that the Solicitor General’s brief had a profound effect on the Court’s opinion.

The Solicitor General’s role of centralizing litigation strategy for the long-term interests of the government as a whole is appropriate for executive interests in which disparate agencies may have “a more parochial view of the interest of the Government in litigation.”¹⁴² But in the context of court rules, the Solicitor General’s view is the one likely to be parochial—focusing on government litigation and presidential policy interests as opposed to the broader interests of the civil justice system to all litigants and the judiciary. For this reason, the Rules Committees should have a voice in rule-interpretation cases before the Supreme Court.

C. Forms of Amicus Roles

Giving voice to the Rules Committees through participation in amicus briefing could take a number of forms. This Section explores each.

¹³⁹ *Id.* at 1–2.

¹⁴⁰ *Id.* at 7 (arguing that a plaintiff with a meritless claim could “potentially force a substantial settlement”); *id.* at 1–2 (asserting that meritless antitrust lawsuits “force parties either to expend substantial resources to defend themselves or to succumb to *in terrorem* settlement demands”); *id.* at 25 (worrying about “strike suits and *in terrorem* settlement demands”).

¹⁴¹ *Id.* at 18.

¹⁴² *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

1. Weak Form: Consultation

The weakest form of Rules Committee amicus participation would merely require the Solicitor General, which is the Justice Department's delegate for representing the interests of the United States before the Supreme Court,¹⁴³ to consult with the Rules Committees in any amicus brief it files on an issue of rule interpretation or application. Currently, when the Solicitor General files an amicus brief on an issue of rule interpretation, the norm is that the Solicitor General neither seeks, nor does the Rules Committees provide, consultation.¹⁴⁴ Indeed, the Advisory Committee appears reluctant to communicate with the Solicitor General regarding current cases.

I find this somewhat odd. The regulation granting the Solicitor General the Department of Justice's Supreme Court practice directs the Solicitor General to "consult[] with each agency or official concerned."¹⁴⁵ After all, the Solicitor General needs to understand the interests of the affected entities and needs to draw upon their expertise in crafting the position of the United States. The same needs exist, perhaps even with greater urgency, when the affected entity is the judicial branch and the interest is the effective and appropriate functioning of court rules.

No law would need to be changed to authorize this weak form of Rules Committee participation. The Solicitor General and the Rules Committees need only normalize the practice of consultation and craft internal rules for its implementation.

The weak form of consultation has the advantage of being the least disruptive of the Solicitor General's status as primary representative of the United States before the Supreme Court. It also creates the least work for the Rules Committees—consultation is far less onerous than independent brief drafting. In addition, it allows the Rules Committees' interests to be represented by perhaps the most effective and frequent Supreme Court advocate, who is highly credentialed and respected, is a

¹⁴³ See 28 C.F.R. § 0.20(c) (2016) ("[The Solicitor General] [d]etermin[es] whether a brief *amicus curiae* will be filed by the Government, or whether the Government will intervene, in any appellate court.").

¹⁴⁴ See Email from Donald Verilli, *supra* note 129.

¹⁴⁵ See 28 C.F.R. § 0.20.

Court specialist, has few financial constraints, and boasts an unparalleled win rate.¹⁴⁶

The weak form of consultation has the disadvantage of subordinating the judiciary's interests to the authority of the Solicitor General. Even after consultation, the Solicitor General may choose to present a position in opposition to the views of the Rules Committees, express the views of the Rules Committees in a way that is different from the way the Rules Committees believe proper, decline to address issues deemed important by the Rules Committees, or decline to file a brief in the case at all.¹⁴⁷ An amicus-consultation-only role is particularly problematic when the Solicitor General is already representing the United States as a party litigant.

Nevertheless, this weak form, at the very least, would allow the Rules Committees to offer some voice in the litigation—albeit one filtered through and beholden to the whims of the Solicitor General.

2. Strong Form: Independent Amicus Authority

The strongest form of Rules Committee amicus participation would give the Rules Committee the authority, independent of the Solicitor General, to file an amicus brief in any case involving the interpretation or application of a federal rule. This strong form would offer the Rules Committees the autonomous ability to offer a position unfiltered by the Solicitor General.

Congress would have to authorize this power through statutory amendment. Although the Court routinely grants private entities' requests to participate as amici,¹⁴⁸ Congress has granted the Department of Justice sole authority—with specified exceptions—to represent the

¹⁴⁶ See Robert Scigliano, *The Supreme Court and the Presidency 183–84* (Samuel Krislov ed., 1971); see also Cordray & Cordray, *supra* note 134, at 1324, 1335–37 (calculating a 60–70% win rate overall for the Solicitor General, and a 70–80% win rate for the Solicitor General as amicus, and noting that the Solicitor General operates with less burdensome financial constraints than most private litigants).

¹⁴⁷ For examples of Solicitor General practice in these circumstances involving agencies, compare Devins, *supra* note 134, at 296–300 (describing interactions between the Solicitor General and the EEOC); Karr, *supra* note 135, at 1095–96 (describing interactions between the Solicitor General and the FEC and FTC).

¹⁴⁸ See Kearney & Merrill, *supra* note 115, at 762 & n.58.

interests of the United States in federal court.¹⁴⁹ Granting the Rules Committees the authority to file an amicus brief in their own names, without the consent of the Department of Justice, would therefore require separate statutory authorization.

Congress has, however, done so in rare instances. The Federal Elections Commission (“FEC”), the Office of Senate Legal Counsel, and special prosecutors appointed under the Ethics in Government Act of 1978 all have independent litigating authority in all courts,¹⁵⁰ in part because of potential conflicts of interest with the executive branch,¹⁵¹ which have arisen from time to time.¹⁵² Notably, FEC commissioners, congressional staff, and special prosecutors—much like the Rules Committees—do not serve at the pleasure of the President.¹⁵³

The FEC and special prosecutors are somewhat obvious cases because of the likelihood of direct conflicts with the President. The Office of Senate Legal Counsel is a bit different. Congress has authorized the Senate Legal Counsel to intervene or appear as amicus on behalf of the whole Senate, Senate committees or subcommittees, or individual members in any legal action “in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue” and when “directed to do so by a resolution adopted by the Senate.”¹⁵⁴ The position of Senate Legal Counsel is filled by the president pro tempore of the Senate and by a resolution of the Senate; the Counsel is accountable to members of the leadership of both political parties.¹⁵⁵

Not to be left out, the House of Representatives has created an Office of General Counsel to provide legal assistance and representation to the

¹⁴⁹ 28 U.S.C. § 516 (2012) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

¹⁵⁰ 2 U.S.C. § 288d(a) (2012); I.R.C. §§ 9010, 9040 (2012); 28 U.S.C. § 594; 52 U.S.C. § 30107(a)(6) (Supp. II 2015).

¹⁵¹ See Devins, *supra* note 134, at 274.

¹⁵² See, e.g., *Buckley v. Valeo*, 425 U.S. 946 (1976) (denying executive officials leave to intervene when the FEC was already a party).

¹⁵³ Devins, *supra* note 134, at 287–88.

¹⁵⁴ 2 U.S.C. §§ 288e(a), 288b(c).

¹⁵⁵ 2 U.S.C. §§ 288(a), 288a(a).

House and whose positions are appointed by the House Speaker, and Congress by statute has permitted the House General Counsel to make appearances in federal court.¹⁵⁶ The Bipartisan Leadership Advisory Group of the House authorizes filings by the House general counsel.¹⁵⁷ Rarely, and almost always for political posturing, individual members of the House or Senate will file amicus briefs on their own.¹⁵⁸

The House and Senate counsels defend members of Congress in lawsuits against them related to their official business and have represented Congress's interests in other cases, such as in defending or challenging the constitutionality of the line-item veto, the independent-counsel statute, and *qui tam* statutes.¹⁵⁹ Yet perhaps because the Solicitor General is a far superior Supreme Court advocate, the houses rarely participate in cases.¹⁶⁰

Rarity is an argument for a grant of authority, not against it. Self-restraint and resource constraints—features characterizing the Rules Committees—suggest that independent litigating authority would be used only when necessary. And because only the Solicitor General may file amicus briefs without the Court's consent,¹⁶¹ the Court could also act as a check against excessive Rules Committee amicus practice. At the same time, the argument for authority is consistent with the spirit of amicus briefs: to give courts more information and therefore a higher likelihood of reaching the right result.¹⁶²

¹⁵⁶ R. H. Rep. II.8; 2 U.S.C. § 5571(a).

¹⁵⁷ Frost, *supra* note 41, at 944.

¹⁵⁸ See Rorie L. Spill Solberg & Eric S. Heberlig, *Communicating to the Courts and Beyond: Why Members of Congress Participate as Amici Curiae*, 29 *Legis. Stud. Q.* 591, 607 (2004).

¹⁵⁹ Frost, *supra* note 41, at 945 & n.164.

¹⁶⁰ See *id.* at 945 n.168 (finding that, as of July 2011, the Senate counsel participated in only fourteen Supreme Court cases since the Senate counsel's creation); Eric Heberlig & Rorie Spill, *Congress at Court: Members of Congress as Amicus Curiae*, 28 *Se. Pol. Rev.* 189, 194–95, 202–05 (2000) (surmising that house counsels' amicus briefs are both infrequent (approximately eight per Term) and of modest success (48% win rate) because they lack the reputational prestige of the Solicitor General, who often is litigating for the other side).

¹⁶¹ See *Sup. Ct. R.* 37.4; Karr, *supra* note 135, at 1093 & n.70.

¹⁶² See Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 *J.L. & Pol.* 639, 641, 643 (1993); cf. Frost, *supra* note 41, at 965 (using this argument to make the case for more congressional amicus briefs).

There are downsides, of course, to the strong form of amicus authority. Despite its likely infrequency, the strong form of amicus authority would intrude upon the function of the Solicitor General to formulate and execute a coordinated, long-term litigation strategy for the United States.¹⁶³ Equally troubling is that the strong form would require the Rules Committees to exercise ongoing oversight and substantial judgment in implementing its amicus authority. Such oversight and judgment would demand greater resources to monitor cases and issues, would alter the focus of the Rules Committees from exclusive ex ante rulemaking to some consideration of ex post adjudication and rule interpretation, and could open the Rules Committees up to charges of politicization in its choice of cases in which to participate. It is unclear if the Rules Committees would even want such authority.

3. Hybrid Forms: Conditional Amicus Authority

Hybrid forms of Rules Committee amicus participation could require the weak form but give the Rules Committees filing authority only under certain limited and specified conditions, such as in one or some combination of the following: (a) when the Solicitor General acts contrary to the Rules Committees, such as if the Solicitor General declines to file an amicus brief or asserts a rule-interpretation position that the Rules Committees dispute; (b) the Supreme Court invites the Rules Committees to submit an amicus brief; or (c) the validity or constitutionality of a rule is called into question.

Hybrid forms could use any combination of these three conditions. The most limited hybrid form of amicus authority would grant the Rules Committees independent amicus authority only when all three conditions are met. The most relaxed form would grant authority when any one condition is met. Other combinations populate the range between the most limited and the most relaxed.

These hybrid forms would preserve the ability of the Rules Committees to offer an unfiltered voice where necessary while minimizing the encroachment into the prerogatives of the Solicitor General. And by specifying the conditions, the hybrid forms would take some of the decision making burden off of the Rules Committees. These

¹⁶³ See Ronald S. Chamberlain, *Mixing Politics and Justice: The Office of Solicitor General*, 4 J.L. & Pol. 379, 395–96 (1987).

hybrid-form conditions, each of which is discussed in more detail below, have established analogues in other areas of the law, though the unique status of the Rules Committees complicates the analogies in some instances.

a. Conflicts with the Solicitor General

Conflicts with the Solicitor General can arise if the Solicitor General declines to file an amicus brief, already represents the United States as a party, or files an amicus brief that takes positions that the Rules Committees disclaim.

Some independent agencies, such as the Federal Trade Commission, can represent themselves at the Supreme Court if the Solicitor General refuses to litigate on their behalf.¹⁶⁴ Other agencies have similar power,¹⁶⁵ and, in the past, the Supreme Court has appointed counsel to represent Congress to defend the constitutionality of a statute in the face of a refusal by the Solicitor General to do so.¹⁶⁶

For reasons that are unclear, the Solicitor General often declines to file amicus briefs in major cases implicating rule interpretation. The Solicitor General did not file a brief in, for example, *Krupski v. Costa Crociere S.p.A.*,¹⁶⁷ an important case on the interpretation of Rule 15(c), which governs the relation-back of amendments to pleadings. Nor did the Solicitor General file a brief in *Dukes, Amchem Products v. Windsor*, or *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, three of the biggest Rule 23 cases the Court has decided in the last twenty years. *Shady Grove* is a particularly egregious example because the validity of Rule 23 itself was at stake in the case, and the Court's resolution of Rule 23's validity hinged on the scope and interpretation of

¹⁶⁴ See Karr, *supra* note 135, at 1085.

¹⁶⁵ See Devins, *supra* note 134, at 264; cf. *United States v. Windsor*, 133 S. Ct. 2675, 2712–14 (2013) (Alito, J., dissenting) (suggesting that the Bipartisan Legal Advisory Group (“BLAG”) had authority to defend the Defense of Marriage Act on appeal on behalf of Congress when the Justice Department refused to do so).

¹⁶⁶ See, e.g., *Myers v. United States*, 272 U.S. 52, 57, 176 (1926) (appointing Senator George Wharton Pepper to argue on behalf of Congress when the Solicitor General refused to defend the constitutionality of a federal statute restricting the President's power to remove the Postmaster General).

¹⁶⁷ 560 U.S. 538 (2010).

Rule 23.¹⁶⁸ Nor did the Solicitor General file an amicus brief in *Semtek International v. Lockheed Martin Corp.*, in which the Court hinted that a particular construction of Rule 41 might be invalid under the Rules Enabling Act.¹⁶⁹ It is hard to imagine that the Rules Committees would have had nothing useful to add to the Court's consideration of those cases in the absence of the participation of the Solicitor General.

Of course, a large part of the Solicitor General's participation is direct representation of the United States when it is a party to the litigation, and, in those cases, the Solicitor General obviously would not file an amicus brief. When those cases involve rule interpretation, the conflict between the interests of the judiciary and the interests of the government as a litigant is acute, and the Court could benefit from the more neutral, objective views of the Rules Committees, even if—and perhaps especially if—those views are in contrast with the position of the Solicitor General.

Conflicts could arise even when the Solicitor General chooses to file an amicus brief. The Solicitor General could take a position in the brief that the Rules Committees dispute. In such circumstances involving agencies, the Solicitor General sometimes—though not always—acknowledges the disagreement in its brief or authorizes the agency to file a brief staking out its own position.¹⁷⁰ The Rules Committees could have a similar option in such circumstances. If their positions are not portrayed to their satisfaction in the Solicitor General's brief, then they could have the authority to file their own amicus brief so that the issues are fully and fairly aired for the Court.

b. Amicus Invitations by the Court

The Court regularly invites participation from outside entities. Often, the outside entity for whose views the Court calls is the Solicitor General. But the Court occasionally—about twice per Term under Chief Justice John Roberts—invites amicus participation from those other than

¹⁶⁸ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010); *id.* at 446–47 (Ginsburg, J., dissenting).

¹⁶⁹ 531 U.S. 497, 503 (2001).

¹⁷⁰ *Devins*, *supra* note 134, at 277, 289–302. In some ways, this can enhance the Solicitor General's credibility, just as not hiding contrary precedent enhances any litigant's credibility. *Id.* at 277.

the Solicitor General, typically to defend the decision below when no party wishes to defend it or to argue for a lack of subject-matter jurisdiction.¹⁷¹ The Court has no official rules on when or whom it invites,¹⁷² but the justification is to ensure “adversarial presentation of all legal issues the court deems pertinent.”¹⁷³

Inviting an amicus brief from the Rules Committees is somewhat different. It is less about ensuring adversarial presentation on an issue necessary to the resolution of the case and much more about apprising the Court of key information relevant to rule interpretation.¹⁷⁴ In this respect, an invitation to the Rules Committees would be more like a call for the views of the Solicitor General, though the Court usually makes such invitations at the certiorari stage,¹⁷⁵ or the views of interested states, which the Court has invited a number of times.¹⁷⁶

The Court might wish to invite the Rules Committees to participate at the merits stage if, for example, the Rules Committees can offer useful expertise that the Solicitor General cannot, if the United States is already a party, or if partisan views of the executive branch are likely to dominate the Solicitor General’s presentation. The Court might conclude that neutral and expert Rules Committee participation can offer more defensible cover than Solicitor General participation in particularly controversial rules cases that may affect the Court’s institutional legitimacy.¹⁷⁷

¹⁷¹ Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations*, 101 *Cornell L. Rev.* 1533, 1535, 1551, 1565–68 (2016).

¹⁷² *Id.* at 1535 (“[T]here is no official guidance on when the Court will invite such an amicus, whom it will invite, how it makes its selections, or the precise nature of the amicus’s mandate.”).

¹⁷³ Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 *U. Chi. L. Rev.* 859, 889 (2013).

¹⁷⁴ See Amanda Frost, *The Limits of Advocacy*, 59 *Duke L.J.* 447, 465–67, 516–17 (2009).

¹⁷⁵ The Solicitor General does not need the Court’s invitation or permission to file an amicus brief. See *Sup. Ct. R.* 37.4.

¹⁷⁶ See James C. Ho, *Defending Texas: The Office of the Solicitor General*, 29 *Rev. Litig.* 471, 478, 478–79 nn.23–25 (2010).

¹⁷⁷ See Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 *Am. J. Pol. Sci.* 468, 494 (1997) (describing the Court’s interest in such cover).

For their parts, the Solicitor General and the Rules Committees might prefer such an arrangement. Participation upon invitation by the Court—essentially releasing the Rules Committees from the burden of deciding when to participate in a case—is likely to be seen as less political to the Rules Committees and less intrusive into the Solicitor General’s prerogatives. The Solicitor General, meanwhile, might prefer to have the Rules Committees shoulder some of the workload in such cases so that it can focus on core political-branch efforts and presidential agendas.

c. Questions of Validity or Constitutionality

Arguably the most important issue for any federal rule is its validity under the Enabling Act and under the Constitution. The Rules Committees today take seriously the limits of their rulemaking authority and often decline to propose rules of questionable validity.¹⁷⁸ When a federal rule is challenged on validity grounds, the Rules Committees could have valuable information to share with the Court. The Rules Committees house the experts; they can offer insights into the intended scope of a rule and the likely implications of that scope.

The Department of Justice has an interest in defending the validity of a federal rule when it is a neutral observer. But it is institutionally less capable than the Rules Committees of offering useful information on questions of rule validity to the Court. Further, the Department of Justice is not always a neutral observer. In criminal cases, the United States is a party litigant seeking a particular result—a conviction—in the specific case. It has the same goal in a variety of civil suits in which the United States is a party litigant or is likely to be a party litigant in the future. In such cases in which the validity of a rule is questioned, the Department of Justice may not fairly represent the views of the Rules Committees and the interests of the courts, especially if the Department of Justice is the party challenging, or agrees with the party challenging, the rule’s validity. And, as mentioned above, the Solicitor General frequently

¹⁷⁸ See Burbank, *supra* note 14, at 1078–79. Further back, the Committees’ record is mixed. See Stephen B. Burbank, Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act, 1989 Duke L.J. 1012, 1038 n.163 (book review) (arguing that the rulemakers have “not always been keenly aware of” their limits (emphasis omitted) (citation omitted)).

declines to file an amicus brief at all in cases in which the Court confronts a question of rule validity.¹⁷⁹

In related circumstances, the Court has held that when the Department of Justice agrees that a statute is unconstitutional or declines to defend it, “Congress is the proper party to defend [its] validity.”¹⁸⁰ In *INS v. Chadha*, for example, the Court addressed the constitutionality of the legislative veto, an issue on which the President and Congress had divergent interests.¹⁸¹ Because the Department of Justice was challenging Congress’s use of the veto, Congress entered an appearance through both houses’ counsels to defend the veto’s constitutionality.¹⁸² Likewise, in *Bob Jones University v. United States*,¹⁸³ the Reagan Administration decided to support Bob Jones’s challenge to the IRS policy of denying tax breaks to racially discriminatory private schools, and so the Court appointed a “counsel adversary” to defend the IRS’s policy.¹⁸⁴

These analogues line up imperfectly with challenges to the validity of the federal rules. *Chadha* and *Bob Jones* arose from inter- and intrabranch conflicts with the government as a litigant in both cases, necessitating the need for divided-government participation to ensure adversarial presentation of the issues. Nevertheless, the similarities suggest that the Rules Committees should play a role in such cases. The aggrieved parties in these cases were Congress and the IRS.¹⁸⁵ Congress, after all, has an interest in ensuring that the policies it enacts into law are found constitutional; agencies have an interest in ensuring that the policies they promulgate by regulation and action are found valid and constitutional.

The same could be said for the Rules Committees: they promulgate procedural policy through the federal rules, with the *ex ante*

¹⁷⁹ See *supra* text accompanying notes 167–69.

¹⁸⁰ *INS v. Chadha*, 462 U.S. 919, 940 (1983).

¹⁸¹ *Id.* at 952–58.

¹⁸² See Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 *Law & Contemp. Probs.* 47, 52 (1998).

¹⁸³ 461 U.S. 574 (1983).

¹⁸⁴ Devins, *supra* note 134, at 276.

¹⁸⁵ *Chadha*, 462 U.S. at 931 (“When an agency of the United States is a party to a case in which the Act of Congress it administers is held unconstitutional, it is an aggrieved party for purposes of taking an appeal . . .”).

predictability that the rules provide. The Rules Committees take their limits seriously; when they propose a rule, they have vetted it against the possibility of invalidity, especially considering the intended scope of the rule to avoid conflict with the Rules Enabling Act. The Rules Committees therefore have functional and institutional reasons for ensuring that their rules are found valid and constitutional. Like Congress in the context of a statute and an agency in the context of its regulations, the Rules Committees can be seen as “aggrieved parties” to a validity challenge to a federal rule and thus should have a voice in its defense.

The Court currently employs an avoidance canon when interpreting rules: it will interpret a rule to be valid under the Rules Enabling Act if that interpretation is possible.¹⁸⁶ The premise justifying the presumption is well grounded in many instances because the rulemaking process, with its deliberate study and layers of inter- and intrabranched checks, makes it unlikely that a promulgated rule, properly interpreted, will transgress the limits of the Rules Enabling Act.¹⁸⁷ But the reasoning is circular in instances in which the Rules Committees have proposed rules close to the limits of the Rules Enabling Act on the understanding that the Supreme Court will hold the rule invalid if the rule exceeds its limits.¹⁸⁸ And the Court’s use of the avoidance canon has led to some strained interpretations of the rules.¹⁸⁹

Whatever its virtues, the avoidance canon is no substitute for Rules Committee amicus participation. Information from the Rules Committees useful to validity questions can actually be provided rather than presumed. Perhaps that information would support the soundness of safe constructions of the rule in question. Or perhaps that information would undermine the soundness of alternative constructions of the rule

¹⁸⁶ See, e.g., *Shady Grove Orthopedic*, 559 U.S. at 405–06; *Semtek*, 531 U.S. at 503–04; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845 (1999). For more, see Struve, *supra* note 16, at 1147–52 (discussing the motivation for and the potential problems of using the avoidance canon in rule interpretation).

¹⁸⁷ See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (stating that a court can refuse to apply a federal rule “only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions”).

¹⁸⁸ See Burbank, *supra* note 14, at 1178–79.

¹⁸⁹ See, e.g., Stephen B. Burbank, *Semtek*, *Forum Shopping and Federal Common Law*, 77 *Notre Dame L. Rev.* 1027, 1039–42 (2002); Struve, *supra* note 16, at 1151–52.

in question, forcing the Court to consider other constructions or confront the validity question head-on.¹⁹⁰ Perhaps the Rules Committees would confess error and agree that a rule should be held invalid, thereby taking some of the pressure off of the Court to reach a contrary decision.¹⁹¹ Or perhaps the Rules Committees would explain that the rule was drafted without any understanding about its validity in the expectation that the Court would resolve the question. Any such information would be useful to the Court, and would lead to more honest decision making than reliance on the generalized assumptions of the avoidance canon.

D. Content

The previous Section focused on the amicus role and explored some norms for deciding when and how the Rules Committees should participate. A separate but related question is what norms the Rules Committees should follow when deciding what informational content to provide in an amicus brief.

The views called for naturally will depend upon the circumstances of the case and the particular rule at stake, and the sound discretion of the Rules Committees should guide decisions about content. But, in general, certain categories of content seem particularly important for rule-interpretation cases.

First, and perhaps most usefully, if the Court's interpretation will depend upon "legislative facts" like discovery expense or judicial-management issues, the Rules Committees could offer information on how the rules work in the lower courts.¹⁹² The Rules Committees, charged with continuous study of the rules, engage in regular

¹⁹⁰ See Burbank, *supra* note 189, at 1042–46 (revealing that Rule 41(b)'s rulemaking materials contradict the Court's interpretation of the rule).

¹⁹¹ See *Talk Am. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring); *Order of Jan. 21, 1963*, 374 U.S. 865, 870 (1963) (Black & Douglas, JJ.) (acknowledging "the embarrassment of having to sit in judgment on . . . rules which we have approved and which as applied in given situations might have to be declared invalid"). The Court has the gumption to declare its own actions unconstitutional—it once held invalid its own General Order in Bankruptcy No. 8 as exceeding its rulemaking authority under the Bankruptcy Act. See *Meek v. Ctr. Cty. Banking Co.*, 268 U.S. 426, 434 (1925).

¹⁹² For background on "legislative" facts as contrasted with "adjudicative" facts, see Kenneth Culp Davis, *Facts in Lawmaking*, 80 *Colum. L. Rev.* 931, 940–41 (1980), and Kenneth Culp Davis, *Official Notice*, 62 *Harv. L. Rev.* 537, 549 (1949).

deliberations, commission surveys and empirical studies, and solicit the input of the bench and bar. They are a far more reliable source of useful information from which the Court can make legislative factfinding than anecdotal evidence, outside sources, partisan presentation by the parties, amici, or the Department of Justice, or the Court's own intuition,¹⁹³ as *Twombly* amply illustrates.¹⁹⁴

Second, the Rules Committees can inform the Court when it is considering changes to rules currently at issue in a case.¹⁹⁵ Possible rule amendment could be reason for the Court to deny certiorari in a case or, if it has already granted certiorari, dismiss the writ as improvidently granted. It also could signal to the Court that the issue is one better resolved in the first instance by the rulemaking process rather than by case adjudication.¹⁹⁶

¹⁹³ See Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 *Minn. L. Rev.* 1, 9–11 (1986) (arguing that the Court is ill equipped to obtain evidence for proper legislative factfinding); Mulligan & Staszewski, *supra* note 9, at 1218 (pointing to “the institutional advantages of rulemaking in collecting legislative facts”).

¹⁹⁴ See *supra* text accompanying notes 80–87.

¹⁹⁵ The Standing Committee has communicated such information to Congress when Congress was considering legislation that overlapped with the Rules Committees' agendas. See, e.g., Letter from the Committee on Rules of Practice and Procedure to the Honorable Henry J. Hyde (Apr. 21, 1997), in *Advisory Comm. on Civil Rules, Agenda Book for Oct. 6–7, 1997*, at Agenda Item VI, <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-october-1997> [https://perma.cc/4LEJ-PDTB] (urging the House to reject a proposed statutory amendment to a Federal Rule of Evidence because the Advisory Committee had placed the issue on its next meeting's agenda, and refusing to take a position on an offer-of-judgment statutory provision but nevertheless offering advice about problems the Committee encountered); Letter from the Committee on Rules of Practice and Procedure to the Honorable Orrin G. Hatch (Apr. 29, 1997), in *Agenda Book*, *supra*, at Agenda Item VI (urging the Senate regarding the same).

¹⁹⁶ In *Amchem Products v. Windsor*, for example, the Court took note of a committee proposal to overrule the very circuit decision under review in *Amchem*, but assumed that the proposal would not go forward because many of the public comments “were opposed to, or skeptical of, the amendment,” and so the Court promulgated its own incomplete test that declined to reach the extent of the Advisory Committee's proposal. 521 U.S. 591, 618–21 (1997). The awkward timing of the decision threw the Advisory Committee into some disarray about how to proceed, with some members “urg[ing] that simple adherence to the committee's published proposal would be unwise” because “there is great risk that inconsistencies may exist between what the Court intended and what the amended rule might come to mean.” Draft Minutes of the Civil Rules Advisory Committee at 32, in *Agenda Book of the Civil Rules Advisory Committee* (1998). Although the Advisory Committee recognized that *Amchem* was both different from and less drastic than the Advisory

Third, the Rules Committees could offer information relevant to rule interpretation of which the Court may not be aware and which the parties cannot or do not provide. For example, because the Court and parties are focused on the particular facts of the case and the particular rules at stake in some isolation, the Rules Committees could offer broader perspectives on how particular interpretations proffered by the parties might affect other cases or other rules. Antitrust class actions, for example, present very different concerns and pressures than more run-of-the-mine cases, and how the rules operate in a big antitrust or class-action case may overwhelm consideration of how the rules operate in less extreme cases. The Rules Committees could remind the Court of those differences and the potential effects of construing transsubstantive rules. Likewise, the Rules Committees could offer the historical context of the origins of the rule and whether the bases, policies, and justifications for those origins continue in force today.¹⁹⁷ If the validity or constitutionality of a rule is challenged, the Rules Committees might be able to provide information about the rule's intended scope.¹⁹⁸ If the Court is considering overruling or altering a prior interpretation of a

Committee's proposal, see *Amchem*: First Thoughts, in *Agenda Book*, supra note 195, at Agenda Item V(B) ("The Court notes, but does not reach, additional problems presented by the *Amchem* case itself If rule provisions are to be proposed for measuring the impact of settlement on the calculus of Rule 23(a) and (b), they must be generated out of sources other than the Court's opinion."), the Advisory Committee ultimately abandoned further rulemaking on the matter, see Draft Minutes of the Civil Rules Advisory Committee at 32, in *Agenda Book of the Civil Rules Advisory Committee* (1998). It is worth pointing out that the decision has been criticized as being "difficult to square with" Rule 23 and the accompanying Advisory Committee Note. See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. Pa. L. Rev. 1495, 1500–01 (2017). The Solicitor General declined to file a brief in *Amchem*.

¹⁹⁷ Providing reliable historical information could be tricky. Rules Committee terms are typically three years, and it may be that, on a particular issue, the current Rules Committee members have no special insight into the motivations or deliberations of past Rules Committee members. Perhaps the reporters, which generally participate in rulemaking for far longer terms, can offer a more sure-footed institutional memory, but historical questions no doubt will arise that cannot be answered by the present Rules Committees or the Administrative Office. Still, humility can be useful. The Court might appreciate hearing that the current Rules Committees have no greater insight into a particular rule's origin than the parties.

¹⁹⁸ Because a narrow scope is less likely to invalidate the rule, the scope of the rule is crucial to the validity question. See *Walker v. Armco Steel Co.*, 446 U.S. 740, 748–52 (1980).

rule, the Rules Committees could inform the Court of any past—and failed—attempts to amend the rule and the reasons for those attempts and failures.¹⁹⁹

These general norms of amicus content confine Rules Committee participation to the neutral expertise justifying Rules Committee participation in the first place. They help cast the Rules Committees as true “friends of the court,” supplying useful information that perhaps cannot be provided reliably or fully by other entities.

E. An Illustration: Sibbach

Skeptics of my proposal might consider an instance in which a member of the Rules Committee did file an amicus brief in a case challenging the validity of a federal rule. The case was *Sibbach v. Wilson & Co.*, decided by the Court in 1941.²⁰⁰ The district court, sitting in diversity, had ordered the plaintiff to submit to a physical examination under Rule 35, a discovery rule of the Federal Rules of Civil Procedure. She refused, and the district court ordered the contempt sanction of imprisonment under Rule 37, a sanctions provision for discovery-rule violations. The U.S. Court of Appeals for the Seventh Circuit affirmed the sanction, and the Supreme Court granted certiorari on the question of whether Rules 35 and 37 were valid under the Rules Enabling Act.²⁰¹

Rule 35 had gained notice in Congress about possibly exceeding the Act’s scope,²⁰² and the case was clearly seen as a test case on the validity of the new federal rules.²⁰³ Despite the enormity of the question presented—whether a federal rule was invalid under the Rules Enabling Act, a challenge reaching the Court just three years after their original promulgation—the Solicitor General declined to file an amicus brief.

¹⁹⁹ Cf. Mulligan & Staszewski, *supra* note 9, at 1218 (noting that this circumstance calls for rulemaking rather than adjudication).

²⁰⁰ 312 U.S. 1 (1941).

²⁰¹ *Id.* at 6–7.

²⁰² See Burbank, *supra* note 14, at 1176 (discussing how questions of the Advisory Committee’s rulemaking power with respect to Rule 35 “attracted attention and prompted questions and discussion in Congress”).

²⁰³ See *id.* at 1181 n.718 (“In fact, *Sibbach* was a test case from the beginning.”).

Only one amicus brief was filed: by the Chairman of the Advisory Committee, William D. Mitchell.²⁰⁴ His brief raised the essential argument, left unargued by the parties, that the federal rules at issue did not authorize the particular sanction imposed in the case.²⁰⁵ That issue was critical because the question on which the Court granted certiorari—whether Rules 35 and 37 were valid under the Rules Enabling Act—was itself dependent upon the assumption that the rules could be used the way the lower courts used them.²⁰⁶ If, as Mitchell argued, the rules did not authorize the sanction at issue, then the question of their validity should be analyzed differently or perhaps avoided entirely.²⁰⁷

Mitchell argued that, in fact, the rules do not allow imprisonment for contempt for violation of a Rule 35 order.²⁰⁸ Quoting the text, Mitchell emphasized that Rule 35 provides for no sanction, and Rule 37's physical-coercion provisions expressly exclude Rule 35 enforcement.²⁰⁹ Further, Mitchell pointed out, "the record of the proceedings of the Advisory Committee" confirm this reading of the text,²¹⁰ and Mitchell attached as an appendix the drafts considered by the Advisory Committee and the reporter's transcript from the deliberations on them.²¹¹ This narrower reading of the rules helped Mitchell's argument that, as true "rules of practice and procedure," they were within the

²⁰⁴ Brief for William D. Mitchell as Amicus Curiae, *Sibbach*, 312 U.S. 1 (No. 28), 1940 WL 46492. It appears that Mitchell filed the brief in his own name because, at the time, the Advisory Committee was inactive, but the brief clearly carried the weight of his office.

²⁰⁵ Id. at 3 ("So far as the record shows, it seems to have been assumed by the parties and by the courts below that physical coercion of the petitioner by imprisonment for contempt is provided for in the rules.").

²⁰⁶ Id. at 8 ("The question as to the validity of the rules should not be determined on the assumption that they authorize any physical coercion by imprisonment or otherwise to enforce an order for physical examination. They expressly prohibit resort to such means.").

²⁰⁷ Id. at 24 (recognizing that the Court could "have the judgment reversed on the narrow ground that contempt proceedings are unauthorized, without a decision on the question of the validity of the rule authorizing physical examinations"). Mitchell nevertheless argued against this narrow ground, calling it "unfortunate, not only for both parties to this cause, but from the standpoint of the public interest" to avoid the question of the rules' validity. Id.

²⁰⁸ Id. at 7.

²⁰⁹ Id. at 8–9.

²¹⁰ Id. at 10.

²¹¹ Id. at 10–12.

scope of the Rules Enabling Act even if they had some effect on substantive rights.²¹²

As for remedies, Mitchell argued that the Court should clarify “that the rule does not authorize arrest or physical compulsion,”²¹³ and he suggested that the Court, if it holds the rules valid, should nevertheless “order the judgment of commitment for contempt vacated on the ground that contempt proceedings are not authorized by Rule 37.”²¹⁴

Mitchell’s position that the rules did not authorize the contempt sanction in the first place, if correct, would have been a victory for the petitioner, but she had not pressed the argument prior to his brief. In a brief responding to Mitchell’s argument, she informed the Court that the reason she had not pressed the argument was that she did not know about the Advisory Committee materials before Mitchell appended them to his brief, and that she reasonably read the rules to authorize the contempt sanction issued by the district court.²¹⁵ Faced with Mitchell’s brief, she acknowledged her “interest[] in having the court determine that she need not submit to a physical examination” and consented to the remedy suggested by Mitchell.²¹⁶

Mitchell’s brief no doubt aided the Court. The Court relied upon the materials that Mitchell appended to his brief, tracked his argument that the rules did not authorize the district court’s order of contempt, and followed Mitchell’s suggestion of vacating the contempt order.²¹⁷

Sibbach was a watershed moment for the future validity of the rules,²¹⁸ and, as such, it was a unique case. And its statutory

²¹² Id. at 15–16.

²¹³ Id. at 25.

²¹⁴ Id.

²¹⁵ Reply to Brief of Respondent and to Brief of William D. Mitchell as Amicus Curiae at 5–6, *Sibbach*, 312 U.S. 1 (No. 28), 1910 WL 21011 [hereinafter Reply Brief]. But cf. Burbank, supra note 14, at 1181 n.718 (“*Sibbach* was a test case from the beginning. The trial judge entered a contempt order to assist Sibbach’s counsel in challenging the validity of Rule 35. Moreover, *both parties* deliberately chose not to raise the Rule 37 question so as to present the ‘real question.’”).

²¹⁶ Reply Brief, supra note 215, at 6.

²¹⁷ See *Sibbach*, 312 U.S. at 16.

²¹⁸ See Burbank, supra note 14, at 1032–34 (“[T]he Court reminds us of Congress’s power under the Constitution to regulate federal practice and procedure, interprets ‘procedure’ broadly for that purpose, and fails to suggest any limitations on the Court under the Rules Enabling Act that are more restrictive than the limitations on Congress . . .”).

interpretation of the Rules Enabling Act has been roundly criticized.²¹⁹ But these aspects of *Sibbach* do not detract from the useful role that the Advisory Committee chairman played. His brief filled a gap left open by the parties and the absence of the Solicitor General, offered information within the competence of the Rules Committees on the scope of the rules in question, provided difficult-to-obtain documentation about the Advisory Committee's deliberations, and suggested arguments useful to the Court. Whatever one thinks of the statutory-interpretation portion of the opinion in *Sibbach*, Mitchell's brief can be seen as a useful and successful aid to the Court's rule-interpretation analysis.

F. Mechanics

Sibbach was decided in an era when rulemaking was more flexible and less transparent.²²⁰ The changes to the rulemaking structure since 1958 have imposed additional layers and more formality to the process.²²¹ Today's rulemaking structure is built for the deliberative, pervasive, objective, and predictive business of rulemaking, not the unified, episodic, positional, and evaluative business of legal advocacy. This Section thus considers the mechanics of an amicus practice in light of the current structure.

Who should represent the Rules Committees? The Judicial Conference could appoint a "counsel" to the Standing Committee or to each Advisory Committee to perform necessary advocacy functions. Such a counsel would have the advantage of gaining a firsthand knowledge of the business of the Rules Committee and the workings of the rules.

But the position also would suffer from several significant disadvantages. The most troubling would be the control of the Chief Justice, who appoints all members of the Standing and Advisory

²¹⁹ See, e.g., *Shady Grove Orthopedic*, 559 U.S. at 411–14 (Scalia, J., plurality opinion) (“*Sibbach*’s exclusive focus on the challenged Federal Rule—driven by the very real concern that Federal Rules which vary from State to State would be chaos, . . . is hard to square with § 2072(b)’s terms.”); Stephen B. Burbank & Tobias Barrington Wolff, Redeeming the Missed Opportunities of *Shady Grove*, 159 U. Pa. L. Rev. 17, 27–31 (2010).

²²⁰ See Struve, *supra* note 16, at 1103–09.

²²¹ *Id.*

Committees.²²² Some commentators already bemoan the risk of political partisanship that the Chief Justice's appointment power entails.²²³ If the Chief Justice also directly appoints the principal advocate for the Rules Committees, then whatever partisanship exists at the rulemaking stage will be exacerbated at the adjudicative stage. Other disadvantages include cost (the addition of a new membership seat or the displacement of an existing membership seat), the dual role of rulemaker and advocate that such a membership position would entail, the rotating nature of the counsel if the position is subject to the normal three-year term, and the incentives of such a position to aggressively assert the role of and powers of that office.

A better solution would use the Administrative Office of the United States Courts, an entity created by Congress in 1939 to provide administrative support to the federal judiciary.²²⁴ Included within the Administrative Office is its Office of the General Counsel, which provides legal counsel and services to the Administrative Office and to the Judicial Conference and helps support the rulemaking process.²²⁵ The Director of the Administrative Office hires the General Counsel and Assistant Directors, and, as the Director's delegates, those officers hire career staff attorneys, including, currently, three line attorneys specifically to assist the Rules Committees.²²⁶ Currently, the attorneys' support consists of providing research and administrative assistance, much as a judicial clerk for a judge, but the statute appears to permit the

²²² See 28 U.S.C. § 331 (2012) (specifying that the Chief Justice appoints the members of the Standing Committee); About the Judicial Conference, U.S. Courts, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [<https://perma.cc/SNS7-9FDL>] ("The Chief Justice has sole authority to make committee appointments.").

²²³ See *infra* text accompanying note 260.

²²⁴ 28 U.S.C. §§ 601–612.

²²⁵ In Profile: The Administrative Office of the U.S. Courts – Annual Report 2015, U.S. Courts, <http://www.uscourts.gov/statistics-reports/profile-administrative-office-us-courts-annual-report-2015> [<https://perma.cc/GPK8-4SWF>].

²²⁶ 28 U.S.C. § 602(d) (giving the Director authority to delegate his hiring authority to other AO personnel); *id.* § 604(a) (granting the Director hiring authority); Interview with John Rabiej, *supra* note 13.

Judicial Conference to authorize and instruct the General Counsel to take on an advocacy role.²²⁷

Locating the Rules Committees' advocacy function in the Administrative Office's Office of General Counsel capitalizes on existing mechanisms and competencies. The Office of General Counsel attorneys already gain firsthand knowledge of Rules Committee business because they work closely with the Rules Committees. They are career attorneys with the neutrality that comes from governmental service and distance from political (or Chief Justice) appointment.²²⁸ Some increased burden would attend taking on an amicus role, but, as the previous Sections in this Part demonstrate, most involvement is likely to be limited to specific contexts, the information is largely already in the hands of the Rules Committees and the Administrative Office, and participation would be through consultation or briefs without oral argument.

Granting the Administrative Office's General Counsel authority to represent the Rules Committees formally before the Supreme Court would, however, require congressional authorization. Currently, the Administrative Office's attorneys are statutorily disabled from "engag[ing] directly or indirectly in the practice of law in any court of the United States."²²⁹ It would be a simple amendment for Congress, however, to grant the General Counsel in this section a limited court-appearance authority for the purpose of representing the Rules Committees, in an amicus capacity, before the Supreme Court in specified circumstances. Indeed, such an amendment would also supersede any concerns about the limitations of the Rules Enabling Act on Rules Committee amicus participation and any concerns about encroachment into the Department of Justice's statutory prerogative.

²²⁷ 28 U.S.C. § 604(a)(24) (granting the Judicial Conference authority to assign other unspecified duties to the Director).

²²⁸ They are also removed from control by the Judicial Conference. See About the Judicial Conference: Membership, U.S. Courts, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [https://perma.cc/SNS7-9FDL] ("Judicial Conference committees . . . are policy-advisory entities and are not involved in making day-to-day management decisions for the United States courts or for the Administrative Office.").

²²⁹ 28 U.S.C. § 607.

Once statutory authority is granted, who would authorize any amicus filing and how might information be communicated effectively? The Judicial Conference should be able to develop effective procedures for the amicus role I propose. The details of any procedures would require the balancing of considerations internal to the judiciary and the bodies participating, but some general schematics seem straightforward. For consultation on an amicus brief filed by the Solicitor General, the Administrative Office attorneys should communicate directly with the Solicitor General's office based on information obtained from the Advisory Committees, the Federal Judicial Center, and any other relevant materials, without further involvement from the Judicial Conference or Standing Committee. For the filing of an amicus brief, the Standing Committee should authorize the Administrative Office attorneys to file a brief, while the relevant Advisory Committee, a subcommittee, or the reporter, along with the Federal Judicial Center, should consult on its content.

To be sure, independent amicus filings would require instituting internal procedures that significantly depart from the normal rulemaking structure. Currently, the Judicial Conference, the Standing Committee, and the Advisory Committees typically meet only twice a year in a staggered format to allow for the required layers of rulemaking review.²³⁰ Review takes months—longer than the speed required for an effective amicus practice, even if that amicus practice is infrequent. Thus, the procedures for filing an amicus brief would require sporadic ad hoc meetings of Advisory Committee members and fewer layers of review.

These procedures, however, seem workable. Subcommittees of the Advisory Committees regularly meet by teleconference more often than twice a year, and it seems a stretch to say that effective participation by the relevant Advisory Committee in the drafting of an amicus brief by Administrative Office attorneys would be unreasonably difficult.

²³⁰ See About the Judicial Conference: Membership, U.S. Courts, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (“Traditionally, the Chief Justice has called the annual meeting in September and a semi-annual session in March.”); Open Meetings and Hearings of the Rules Committee, U.S. Courts, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/open-meetings-and-hearings-rules-committee> [<https://perma.cc/43UE-TKUH>] (scheduling staggered meetings of the Standing Committee and the Advisory Committees).

Further, because amicus practice is not rulemaking, it need not follow the statutory rulemaking-review structure, and nothing prevents the Judicial Conference from streamlining the process for amicus practice. The Judicial Conference could, for example, grant the Standing Committee the power to authorize an amicus filing and direct the relevant Advisory Committee, or a subcommittee, to assist in developing the content of any authorized brief without further review by the Standing Committee or Judicial Conference.²³¹

III. ALTERNATIVES AND OBJECTIONS

This Part anticipates and addresses possible alternatives and objections to my proposal for Rules Committee participation in an amicus practice. It focuses on the following: that participation is unnecessary in light of existing materials, that the Rules Committees are not institutionally up to the task, that the Rules Committees will resist the role, and that intrabranch advocacy presents structural concerns.

A. Sufficient Existing Materials

This objection challenges the need for a Rules Committee amicus role by pointing to the wealth of materials, tools, and mechanisms available to the Court. The parties are there to press arguments, presumably some arguments that the Rules Committees would make. When the parties do not, amici can. When amici do not, the Court can use traditional legal research to find reputable sources such as public Rules Committee materials, commentary from Advisory Committee members, and treatises and hornbooks. When such materials still provide a shaky answer, the Supreme Court can deploy tools to avoid speculative reasoning, such as by denying certiorari or dismissing a writ as improvidently granted or issuing a narrow opinion. Why, the objection goes, aren't these already sufficient to address my concerns?

The answer is that they do in many cases, but they don't in a few. And those few—like *Twombly* and *Dukes*—are likely to be the crucial rules cases in which the views of the Rules Committees are needed most. Rules Committee participation is a beneficial stopgap for them.

²³¹ Similar procedures work well enough for Congress when it files an amicus brief. See Frost, *supra* note 41, at 944.

And the relative infrequency of the need for Rules Committee participation makes the logistics of that participation more palatable, not less.

Part II already documented some reasons why briefs by the Solicitor General may not fully or accurately represent the Rules Committees' views.²³² It is worth pointing out here that other amici have similar failings. For one, the Court has become skeptical of private amicus practice, often viewing it as partisan and unhelpful.²³³ For another, the sheer volume of amicus briefs in contentious cases can dilute their effect or force the justices into biased heuristics to give credence to some over others.²³⁴

Academic amicus briefs have more appearance of neutrality, but there is reason to believe that the Court affords them less credibility than it would a brief from the Rules Committees. Academics have agendas, too, and judges often view them as disconnected from real-world practice on the ground.²³⁵ Even procedural scholars are likely to have less information about the particular rules at stake than the Rules Committees, which are charged with ongoing study and are composed of members with firsthand experience working with the rules. If there is doubt about how the Rules Committees are expressing their views, nothing prevents other amici, including academics, from seeking permission to file their own briefs to voice their views.

It is true that the Court on its own can cobble together rulemaking materials or member commentary that may be available and relevant to the Court.²³⁶ But the Court is an imperfect researcher,²³⁷ and the

²³² See supra text accompanying notes 123–42.

²³³ See supra text accompanying notes 118–21.

²³⁴ It appears, for example, that the prestige of the amicus matters. See Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *Law & Soc'y Rev.* 807, 827 (2004). For the volume of amicus filings, see supra text accompanying note 115.

²³⁵ See Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 *Green Bag 2d* 251, 251 n.1 (2015).

²³⁶ See, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 613–19 (1997) (relying on public statements by the Advisory Committee reporter); *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (stating that the views of the Advisory Committees' "authorized spokesmen" deserve weight in construing the rules); cf. Marcus, supra note 20, at 965–67 (arguing that various types of Committee materials should be given weight by the Court).

materials it assembles may not accurately reflect the Rules Committees' views.²³⁸ The Rules Committees know best what materials and information most accurately reflect the views of the Rules Committees, and the Rules Committees can assemble and present those views far more efficiently than the Court.

Consider, again, *Twombly*, probably the most important case ever on Rule 8. The Court had before it the parties' briefs, the amicus brief of the Solicitor General, and a host of private amicus briefs by legal scholars (on both sides), the American Bar Association ("ABA") in support of neither party, business groups such as the Chamber of Commerce in support of petitioners, and the American Antitrust Institution in support of respondents. And the Court's opinion relied upon commentaries from academics and former rulemakers like Charles Clark and treatises like *Wright & Miller*.²³⁹

Despite this wealth of information, the Court lacked an authoritative brief containing reliable information about the meaning of Rule 8, the history of amendment proposals on and Committee study of Rule 8, the relationship between *Conley* and Rule 12(e), and the empirics of discovery costs and meritless litigation.²⁴⁰ Notably, no party or amicus brief offered any data regarding discovery costs.²⁴¹ Accordingly, the Court relied on incomplete information and its own assumptions of the way litigation and the civil rules work. A brief from the Rules Committees could have caused the Court to write its opinion quite differently.

B. Institutional Competence

This objection questions the efficacy of Rules Committee participation on two fronts. One is a form of advocacy competence.

²³⁷ See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1290–300 (2012).

²³⁸ In *Amchem Products v. Windsor*, for example, the Court cited to the Advisory Committee Note and Reporter Ben Kaplan's post-adoption commentary on Rule 23, *Windsor*, 521 U.S. at 613–14, but others have argued that the Court misread the Note and questioned how representative Kaplan's views were of the Advisory Committee as a whole, see Burbank & Farhang, *supra* note 196, at 1500–01 & 1501 n.30.

²³⁹ E.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59, 561 n.7 (2007).

²⁴⁰ Mulligan & Staszewski, *supra* note 9, at 1220.

²⁴¹ Clermont & Yeazell, *supra* note 62, at 848.

Unlike the Solicitor General or the elite private Supreme Court bar, the Rules Committee and Administrative Office attorneys lack a burnished reputation as Supreme Court advocates. Further, rulemakers approach problems differently from advocates. The Rules Committees are neutral, consensus-seeking experts rather than partisan advocates, and are more attuned to prospective drafting than fact-specific application.²⁴² As a result, one might surmise that the Rules Committees' participation in the highly specialized context of Supreme Court cases will be unsuccessful.

The premise itself is suspect; Rules Committee membership is dominated by practitioners and judges, whose usual business is comprised of fact-specific application and court advocacy. True, few can measure up to the high bar set by the Solicitor General and other Supreme Court specialists. But that does not mean that Rules Committee participation will be insufficient or ineffective. To the contrary, when Rules Committee participation sticks to its strengths—its institutional knowledge, neutral objectivity, and expertise—it is likely to add positive value to the Supreme Court's interpretive process. That should be reason enough for an amicus role.

A second front of attack stems from a charge of institutional myopia. The Rules Committee members are part of a relatively homogeneous elite, which, the argument goes, causes them to focus on a narrow set of issues or ignore run-of-the-mill problems in favor of big commercial cases.²⁴³

I do not deny the homogeneity that dominates both the Court and the Rules Committees. But my proposal is less beholden to homogeneity than the alternatives. The Rules Committees and Administrative Office attorneys are certainly no more homogeneous than the Court itself, the private amicus participants before the Court, and the Solicitor General.²⁴⁴ Indeed, there are good reasons why the Rules Committees

²⁴² See Porter, *supra* note 2, at 182 (asserting that applications “would not be susceptible to resolution through rulemaking, particularly given the lengthy, consensus-based rulemaking process” and that “[s]uch discretionary, fact-laden questions are not within the institutional competence of rulemakers”).

²⁴³ See generally Brooke D. Coleman, *One Percent Procedure*, 91 Wash. L. Rev. 1005, 1008 (2016) (arguing that the vast majority of federal and state cases are governed by a set of rules made by and for the one-percent elite).

²⁴⁴ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1527–29 (2008) (commenting on the elitism of the Supreme Court bar); Struve, *supra* note 16, at 1136

are likely to press more democratic views. They are exposed to—and in many instances are responsive to—a demographically broad range of views during the rulemaking public-comment period. They consider the historical work of the Rules Committees and engage in continuous study of the rules over time and across a range of cases. And they have the benefit of the nonpartisan studies of the Federal Judicial Center. Perhaps more diversity on the Rules Committees would produce an even more powerful and effective amicus practice. But whatever the membership of the Rules Committees—homogeneous or diverse—the Rules Committees can play an important role in offering information to the Court that it might not otherwise have or credit.

C. Institutional Resistance

The Rules Committees themselves might resist an amicus role. Three reasons for resistance come to mind: the limits of the Rules Enabling Act, the appearance of partisanship, and the difficulties of representing the views of the Rules Committees. None, in my view, justifies complete resistance. Indeed, as I will show, the final point supports my proposal.

The Rules Committees might worry that the Rules Enabling Act, by prescribing for the Rules Committees a rulemaking role but saying nothing about an amicus role,²⁴⁵ implicitly prohibits the Rules Committees from playing an amicus role. Yet I know of no other statutory rulemaking authorization that has been construed to contain such a negative inference. Agencies—even those whose statutory mandate is directed to rulemaking—still consult with the Solicitor General when the Solicitor General files a brief regarding the regulations' meaning.

Further, the Rules Enabling Act has not prevented the Rules Committees from friendly participation before Congress. In 1997, for example, the Standing Committee wrote letters to both the House and Senate urging Congress to reject a proposed statutory amendment to the Federal Rules of Evidence because the Advisory Committee had placed

(“Compared with the other rulemaking bodies, however, the Court appears less representative, less knowledgeable, and perhaps more liable to engraft erroneous policy choices on the Rules.”).

²⁴⁵ 28 U.S.C. §§ 2071–2077 (2012).

the issue on its next agenda.²⁴⁶ In the same letter to the House, the Standing Committee offered advice about problems the Advisory Committee had encountered in its experience with an offer-of-judgment rule related to legislation the House was considering.²⁴⁷ In the 2000s, the Standing Committee and Advisory Committee on Civil Rules signaled to Congress their approval of a precursor to the Class Action Fairness Act to expand diversity jurisdiction in class actions.²⁴⁸ Admittedly, these communications are not directly analogous to amicus practice, but they at least complicate any negative inference that the Rules Enabling Act permits only rulemaking.

Finally, the Rules Enabling Act has never been construed to prevent individual committee members from making public statements about the proper interpretation of the rules, and the Court has even relied on the statements of these “authorized spokesmen” of the Advisory Committees as proper authority.²⁴⁹ Given the knowledge and information that the Rules Committees can offer, there is just no reason to construe the Rules Enabling Act as disabling communication between the Rules Committees and the Solicitor General.

Even were I wrong about the limits of the Rules Enabling Act, the solution would be simple: Congress should grant the Rules Committees amicus authorization as delineated in this Article. Some congressional action is likely to be necessary anyway in order to authorize amicus participation independent of the Department of Justice. Such congressional action also would obviate any concerns about the limits of the Rules Enabling Act.

Another reason for Committee resistance might stem from the fear of seeming partisan or political. Yet it is hard to see how the kind of participation articulated here would create that impression very often. Rules Committee amicus participation in its weakest form merely offers assistance to the Solicitor General; in its strongest form, it manifests as a

²⁴⁶ See *supra* note 195.

²⁴⁷ Letter from the Committee on Rules of Practice and Procedure to the Honorable Henry J. Hyde, *supra* note 195.

²⁴⁸ See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 *Miss. C. L. Rev.* 323, 388, 390 (2005).

²⁴⁹ *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444 (1946); see also, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 613–19 (1997) (relying on public writings by the Advisory Committee reporter).

neutral, friend-of-the-Court brief authored by career staff attorneys of the Administrative Office. This kind of role surely is no more political or partisan than rulemaking itself, and it is certainly less so than the amicus practice of the Solicitor General, who is able to maintain a plausibly neutral reputation.²⁵⁰

To be sure, partisanship and its appearance are possible. These concerns may justify institutional caution (including the discretion to decline to advocate) and careful positioning by the career attorneys of the Administrative Office in any authored brief, just as the Rules Committees and Administrative Office have done in public correspondence with Congress.²⁵¹ But one need not throw the baby out with the bathwater.

A final reason for institutional resistance may be to avoid confronting the organizational difficulties of ascribing a single position to represent the views of a committee of individuals (and perhaps even of individuals who are no longer on the Rules Committees). Yet this difficulty is no less surmountable than for any other conglomeration of interests represented by any of numerous amicus briefs filed with the Court. The executive branch is a multimember institution with competing and disparate interests, yet the Solicitor General is expected to speak with one voice.²⁵² Even the highly fractured Congress, which often has difficulty speaking with one voice,²⁵³ can have uniform views on institutional interests.²⁵⁴ The smallness of the Rules Committee membership and the shared and largely apolitical goals of court rulemaking suggest at least the possibility that the Rules Committees could agree upon an acceptable position.²⁵⁵

Even if coming to a resolution proves difficult in certain cases, it is better than the alternative. Currently, the Court, when it cares about Rules Committee views, sometimes credits public statements by

²⁵⁰ Caplan, *supra* note 123, at 3–7.

²⁵¹ See *supra* note 195.

²⁵² Frost, *supra* note 41, at 921.

²⁵³ See Kenneth A. Shepsle, Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron, 12 *Int’l Rev. L. & Econ.* 239, 254 (1992).

²⁵⁴ Frost, *supra* note 41, at 919.

²⁵⁵ Marcus, *supra* note 20, at 962.

individual committee members,²⁵⁶ which may not accurately reflect the views of the committee as a whole, if such a view actually even existed.²⁵⁷ At the very least, Rules Committee participation could confirm or call into question the reliability of those public statements as indices of committee intent or rule meaning.

And the inability of the Rules Committees to come to a unified position in a certain case is itself useful information for the Court. It may be that, when the rule at issue was drafted, the Rules Committees lacked a full or shared understanding of the meaning of a rule, its scope, or its intended application in a specific case.²⁵⁸ Perhaps the Rules Committees drafted a vague or highly discretionary rule with the understanding and expectation that its meaning should not be fixed but should develop through case-by-case adjudication or even evolve over time. Allowing the Rules Committees to explain that situation to the Court—that there is no consensus Rules Committee view—could lead to more honest rule interpretation by forcing the Court to justify its interpretation on grounds other than Committee intent.²⁵⁹

To be sure, institutional modesty is important to maintaining the Rules Committees' neutrality and credibility in any amicus practice in the first place. But neither the appearance of politicization nor the difficulties of participation justify a blanket prohibition on Rules Committee participation when it can offer information useful for effective rule interpretation or application.

²⁵⁶ See, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 613–19 (1997); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990).

²⁵⁷ See Burbank & Farhang, *supra* note 196, at 1501 n.30 (suggesting that the Court in *Amchem* gave undue weight to Ben Kaplan's writings, which may not have been representative of the Committee's intentions); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 498–99 (1986) (making the general point).

²⁵⁸ Cf. William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum. L. Rev. 609, 672–76 (1990) (pointing out this fact in the context of congressional lawmaking). See also Shepsle, *supra* note 253, at 254.

²⁵⁹ Just this Term, in *Microsoft Corp. v. Baker*, No. 15-457, for example, counsel for Petitioner, counsel for Respondent, and members of the Court all asserted at oral argument that the Advisory Committee had varying agendas in mind when it considered and proposed Rule 23(f). See Transcript of Oral Argument at 3, 18, 28, 35, 40, 56–59, 61, *Microsoft Corp. v. Baker*, No. 15-457 (argued Mar. 21, 2017). The Rules Committees could have helped clarify which one (if any) of the assertions made at oral argument was correct.

D. Political Objections

The Supreme Court has been portrayed as the primary agent of a litigation counterrevolution favoring defendants, the government, and business interests,²⁶⁰ and some might fear that granting an amicus role to Rules Committees composed of conservative Chief Justice appointees will continue to fuel the Court's agenda by, for example, giving the Court an ostensibly neutral (but actually partisan) cover for its decisions.

That possibility exists, though my proposal to appoint career Administrative Office attorneys to represent the Rules Committees in amicus practice should create some distance between the role and any partisanship of the Chief Justice.²⁶¹ Because the Chief Justice remains the head of the judicial branch, some influence is unavoidable, but the layers of authority and the career status of staff attorneys at the Administrative Office should provide some insulation from direct influence by the Chief Justice.

Further, it seems equally possible that Rules Committee participation will check the ability of the Court (or the Solicitor General) to use unstudied or cherry-picked arguments to push partisan agendas²⁶²—as the Court arguably did in both *Twombly* and *Dukes*. The Federal Judicial Center, for example, a congressionally created entity whose purpose is to research and study improvement of judicial administration in federal courts,²⁶³ and which reports to a board rather than directly to the Chief Justice,²⁶⁴ regularly conducts important and largely nonpartisan studies

²⁶⁰ Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. Pa. L. Rev. 1543, 1580, 1613 (2014); Richard Posner et al., *How Business Fares in the Supreme Court*, 97 Minn. L. Rev. 1431, 1470–72 (2013); Purcell, *supra* note 57, at 1742; Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1107 (2006).

²⁶¹ See *supra* text accompanying notes 224–27.

²⁶² See generally Adam M. Samaha, *Looking Over A Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. Rev. 554 (2017) (suggesting that the addition of certain interpretive evidence can constrain, rather than expand, discretion).

²⁶³ 28 U.S.C. § 620(a) (2012).

²⁶⁴ *Id.* § 621(a). The Chief Justice is the permanent chairperson of the board, but the Director of the Administrative Office also is a permanent board member, and the Judicial Conference elects by vote the other members, who are lower federal judges. *Id.* A simple majority vote controls. *Id.* § 622(b). The Director and Deputy Director of the Federal Judicial Center serve at the pleasure of the board, but research staff are appointed by the Director or her delegate. *Id.* §§ 624(1), 625(b).

of the rules and their efficacy in the federal courts for the benefit of the Rules Committees.²⁶⁵ Of course, the Court could press an agenda despite the views of the Rules Committees or contrary to the studies of the Federal Judicial Center,²⁶⁶ but there is no reason to think that the Court is so results oriented and so unconcerned with its institutional legitimacy that Rules Committee participation could not offer at least some check on agendas of the Court or its members.

CONCLUSION

For these reasons, the Rules Committees should have, and should take advantage of, the opportunity to participate in amicus practice before the Supreme Court. That role would benefit the Court's rule-interpretation decision making.

This role has virtues for the Rules Committees as well. Despite the leadership role in rulemaking given to them by the Rules Enabling Act, the Rules Committees seem gun-shy about stepping on the Court's toes. In two recent class-action amendment packages, for example, the Advisory Committee on Civil Rules abandoned amendment proposals in part on the ground that the Supreme Court was likely to take up the issue, or had just recently decided a case on the issue.²⁶⁷ The Advisory Committee's response to *Twombly* and *Dukes* is similarly suggestive. In both cases, the Advisory Committee considered amendments to alter the results in those cases but then declined to pursue them, perhaps in part because of the unseemliness of overruling the Supreme Court.²⁶⁸

Deference to the Supreme Court is understandable. The Chief Justice heads the Judicial Conference and appoints members of the Rules

²⁶⁵ See generally Willing, *supra* note 35 (discussing the Advisory Committee's use of the Federal Judicial Center for assistance in examining the current operation of the rules through empirical research).

²⁶⁶ One narrative of *Twombly* is that the Court was frustrated with rulemaking inaction in raising pleading standards and so did so on its own. See generally Hoffman, *supra* note 63.

²⁶⁷ See Dodson, *supra* note 27.

²⁶⁸ See Hoffman, *supra* note 63, at 1512–13, 1529 (questioning why rulemakers have “effectively acquiesced in the Court's common law heightening of pleading standards for all cases” when the rulemakers have consistently rejected proposals to do just that).

Committees.²⁶⁹ The Supreme Court is the congressionally delegated body that ultimately approves and prescribes the rules.²⁷⁰ And the Rules Committees' members—primarily judges and practitioners—are in the habit of looking to the Supreme Court as the ultimate authority on the law.²⁷¹ These features of the relationship between the rulemakers and the Court may explain why the Rules Committees shy away from amendments that are contrary to recent Court rulings.

Amicus participation presents a way for the Rules Committees to be deferential to the Court while fulfilling a more active role. Amicus participation recognizes the Court's primacy in case decision making and rule interpretation but offers the Rules Committees the opportunity to influence that decision making by voicing their informed views. Narrowing the adjudicative separation through a Rules Committee amicus role gives the Rules Committees the opportunity to help both the Court and themselves.

²⁶⁹ See About the Judicial Conference, U.S. Courts, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [https://perma.cc/SNS7-9FDL].

²⁷⁰ 28 U.S.C. § 2072(a) (2012).

²⁷¹ See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703, 739 (2016) (“And at the pinnacle of legal prestige is the U.S. Supreme Court, which commands the utmost gravitas.”).