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REASON GIVING AND RULE MAKING IN PROCEDURAL LAW

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Judges are the managers of the cases litigated before them and the administrators of the procedural rules that govern the litigation of cases. This Article investigates problems with the procedural rules closely associated with a judge's managerial capacity and suggests a new paradigm for crafting and evaluating these rules by drawing on the administrative law principles of reason giving in decisionmaking.

I argue that for certain types of procedural rules, rulemakers should abandon the task of trying to regulate procedure by promulgating rules or standards regarding the desired outcome of the application of the device at issue. Instead, they should turn their attention to regulating the process by which judges make procedural decisions. Borrowing concepts from administrative law, this Article argues that rulemakers should employ the technique of reason giving to regulate select procedural devices. Reason giving and the information it produces can work in tandem in the procedural realm by leveraging a core intuition—that requiring regulators and the regulated to engage in a reasoning process constitutes an effective form of regulation. The Article envisions how rulemakers can promote this sort of process among trial court judges, and how that process can ameliorate some of the problems that rulemakers encounter in current attempts to regulate procedural devices.

The Article concludes by suggesting that commentators rethink the value of precedential opinions in some procedural decisions. Rather than straining to identify uniformity in the application of vague standards, rulemakers should be satisfied that they have regulated an area through the delegation of authority and the promotion of a systematic use of that authority by judges as regulators and regulated subjects. These sorts of decisions have the potential for developing stability and standards in certain areas of procedural law.

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INTRODUCTION

Today's trial judge has a dual role. In her traditional robes, she hears motions and conducts trials; she charges the jury and writes opinions. But in her more modern garb she is an administrator and a manager. She shepherds the cases on her docket, managing the scope of the lawsuit with decisions grouping parties and claims; she oversees the volume and pace of discovery. In large cases such as class actions or actions consolidated as multidistrict litigation, she might supervise a complex scheme of claim notice and award distribution. Despite these two functions, the procedural tools available to the judge are largely the implements developed for and suited to the older, more traditional role. Given the realities of modern

litigation, rulemakers should rethink the structure of the rules most closely aligned with a judge's managerial and administrative role. It is time to look directly to the mechanisms of administrative law to solve the administrative problems of litigation.

It is sometimes easier to identify the existence of a problem within civil procedure than to diagnose the sources of the problem. When scholars and commentators tackle problematic procedural issues, their critiques and suggestions are often directed at multiple levels of inquiry.

The big-picture questions of procedural theory contemplate the role that procedure can or should play in a system of dispute resolution. Procedural theory at this broad and abstract level involves regarding the purpose that procedure itself should serve. These are the overarching theoretical questions about procedure, the ones that ask: "Why does procedure matter?" and "what goals should procedure advance?"[1] The American system accommodates many different values. It is here that one finds the bedrock principles of procedure: that it should be fair, efficient, and predictable; that it should serve the needs of litigants in particular and society at large; that it results in the final and accurate resolution of disputes between private parties. These broad ideals set the agenda for selecting and designing procedural devices, and act as baselines for assessing the successes or failures of how procedure functions in a system of dispute resolution.

While theories and ideals provide a general framework for discussions about the design and function of a procedural system, they do not lead inexorably to a particular device or set of devices. Procedural devices are the means by which procedural ends are carried out, and the existence and design of these devices represent the "basic choice[s] of procedural form."[2] Many procedural devices exist as part of an arsenal of tools from which judges or parties can choose to shape litigation. These devices have emerged and evolved through informal judicial practice, written judicial opinions, and formal rulemaking by legislatures or committees. A given procedural device or a set of procedural devices might not be the best solution to a procedural problem and is usually not the only answer to a procedural problem. Nonetheless, the selection and use of procedural devices is what transforms dispute resolution from the aspirational to the actual.

Most procedural devices are implemented through a written rule or set of rules. Crafting these rules is an important task, and just as in any other

1. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 975 (1987) (describing broad theoretical questions about procedure).

2. *Id*. at 912.

substantive area of law, decisions about rule design can have a serious impact on the function of a regulatory scheme or device.

The rule for the device might be designed as a rule, a standard, a multi-factored test, a set of guidelines,[3] or perhaps there might not be a stated rule at all, with rulemakers simply relying on a set of practices and conventions.[4] It might be forged through legislation, through notice and comment rule making, through another formalized rulemaking process, or through adjudication. The rule might expressly delegate discretion to a judge or impart interpretive discretion to the judiciary to fill in the particulars of a broadly articulated principle.[5]

The questions of why and how rule design matters are not new to civil procedure or to any other area of law. This Article aims to do more than make the obvious claims that the overarching goals of civil procedure are important, that the selection of procedural devices matter, and that good rule design is critical to the success of a procedural system. Rather, it examines how rule design can be improved by looking beyond the traditionally conceived relationships between theory, rule choice, and rule design. This permits an assessment of rule design without having to constantly reevaluate and justify decisions about broad procedural theory or the choices of existing procedural devices.

For the purposes of this Article, I assume that the overarching goals and values of civil procedure remain indeterminate—that is, I accept that rulemakers, judges, and commentators are unlikely to settle on a unified set of compatible theories to underpin the whole of procedure that could single-handedly dictate the results of a search for optimal rule selection and design. I also assume that the existing set of devices used in American procedure remains constant.[6] Although the current arsenal of devices may not consist of the best possible solutions to various procedural problems, they are the methods that have emerged through the formal and informal processes of device development. This Article investigates whether certain aspects of rule design can improve procedure, even if the debates and puzzles over device selection remain unsolved. Although this Article

3. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992) (describing rules, standards, and other variations in types of legal rules); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 959 (1995) (describing "a fuller sense of the repertoire of available devices"); *see also* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 88 (1983) (discussing the use of guidelines).

4. Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1133 (1993) (discussing the importance of practices and conventions in guiding judicial decisionmaking).

5. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967–70 (2007) (describing explicit and interpretive discretion).

6. This is not to say that devices *do* remain constant. For example, the current growth of large multi-distract litigation consolidated actions as compared with class actions might signal the rise of one device in prominence and the decline of another.

focuses on the problems posed by certain joinder devices, the analysis could be extended to other devices closely associated with managerial judging, such as certain rules governing discovery.

This Article is part of a larger project that I have undertaken to investigate the problems that arise with the procedural rules that stand at the intersection of traditional and managerial judging. The standards governing some of the rules for joinder of claims and parties embody many of these problems. The standards that govern these rules, particularly the "transaction or occurrence" standard and the "common question of law or fact" standard, are notoriously inscrutable. Judges and scholars lament the lack of uniformity but brush it aside as an unfortunate byproduct of the flexibility and discretion that joinder necessarily entails. Standards for joinder have become a moving target for judges and litigants alike—a state of affairs that no one appears to like but that everyone appears to accept as unhappily inevitable. I have argued that it is a mistake to write off the doctrinal difficulties in certain procedural rules as the inevitable product of managerial judging and judicial discretion. The root of the problem lies in a mismatch between the purpose of the procedural devices themselves and how the rules implementing these devices have been crafted.[7] That observation alone is only one half of the story. If the current rules are not working, then what should go in their place?

This Article begins to answer that question by looking at the problem of managing litigation through an administrative law lens. For certain types of procedural rules, rulemakers should abandon the task of trying to regulate procedure by promulgating rules or standards regarding the desired outcome of application of the device at issue. Instead, they should turn their attention to regulating the *process* by which judges make procedural decisions by employing the tool of a reason-giving requirement to regulate select procedural devices. By combining an explicit grant of discretion with factors that a judge must consider and a requirement that a judge must state specific reasons for her decision, such a rule would begin to capture the balance of flexibility and uniformity that has thus far been elusive.

The process of giving reasons addresses judges in their roles as regulators of procedure as well as subjects of procedural regulation, because they too are actors in the dispute resolution system. By encouraging judges to consider certain categories of facts and then reveal these findings as the basis for decisions, "[t]argeted information-disclosure regulation seeks to provide individuals with information that will steer their choices toward a particular desired regulatory outcome without explicitly

7. See Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012).

mandating the outcome."[8] In other words, by specifying ex ante the type of information judges ought to consider in making certain procedural decisions, rulemakers can push judges towards desired outcomes without anticipating or specifying those outcomes in advance. This novel approach would require a significant restructuring of the relevant rules of civil procedure, and I model one example using Rule 15(c) of the Federal Rules of Civil Procedure.

The Article proceeds in three parts. Part I delves into the procedural problems that have resulted from the application of vague standards to managerial settings. Focusing on joinder, it describes how the current instability in the rules can be attributed to unresolved debates about the nature of managerial discretion and the balance between uniformity of outcomes and flexibility of judges. It then highlights how many of these problems are compounded by the fact that certain procedural devices are effectively insulated from meaningful appellate review.

Part II explores the relationship between administrative law and procedure to show the utility of borrowing from administrative law to solve managerial problems in litigation. It then explores the foundations of the concept of "reason giving" in general as well as its uses in administrative law.

Part III examines how a reason-giving requirement could function as a procedural rule by coupling an explicit delegation of discretion with a list of factors that judges must consider when rendering a decision and stating reasons. Using the Rule 15(c) "relation back" rule as an example, it demonstrates how the rule can be transformed from an amorphous "transaction or occurrence" rule into a vehicle for more sophisticated and transparent analysis that is uniform in process even if not always in outcome. Part III then argues that judges should be required to give reasons under these rules, however, it stops short of suggesting that the mandate involve a requirement of a written opinion. Part III concludes with a discussion of the role that appellate review can and should play in effectuating the reason-giving rules at the district court level.

I. DIAGNOSING DEFICIENCIES IN PROCEDURAL RULES

This Part builds a methodology for identifying the procedural rules and devices that have created unique problems that might be ameliorated by use of a reason-giving approach. Two competing impulses are found in the rules crafted to implement procedural devices: the desire to strictly regulate procedure via ex ante rules and the desire to craft devices that grant

8. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1845 (2012).

generous flexibility and discretion. Some devices and rules fit one or the other model rather clearly. For others, however, these impulses clash.[9] The reason I highlight this tension here is because I will argue that certain procedural devices ought to *accommodate* rather than *resist* the tension between regulation and discretion.

A. The Tension Between Strict Rules and Judicial Flexibility

Rules are used to implement substantive policy objectives. There is always a temporal and conceptual distance between the rulemakers who establish policy-implementing rules ex ante and the decisionmakers who apply these rules to concrete factual scenarios ex post. This gap is most evident in situations in which complex and unpredictable facts require creative and nuanced reasoning from a decisionmaker. Scholars typically characterize these trade-offs as part of the rules versus standards debate.[10] The role and scope of judicial flexibility is at the heart of this conflict, as is the value of uniformity and predictability in a dispute resolution system. In this sense, concerns about discretion are pervasive across almost all areas of law, including procedure. This tension between the benefits of ex ante rules specification and ex post decisionmaking is not susceptible to a unitary solution across all rules and procedural devices. However, reason-giving rules are useful in a limited set of circumstances.

This Part identifies these circumstances by presenting a spectrum of procedures that one might want to be governed by strict rules, and those which one might want to be subject to explicit grants of discretion. Two insights emerge from this inquiry. First, it becomes clear that certain procedural devices manifest a unique tension between a strict ex ante rule and a delegation of interpretive discretion. This tension is inherent in the judicial role as manager, and is a distinct problem from the general question of balancing the interests of ex ante rules and ex post standards. Second, confusion over the nature of discretion, that is, whether the discretion is for the purposes of interpreting and applying the rule, or whether the discretion is for the purposes of maintaining managerial flexibility, has led to instability and confusion in the law. This part

9. *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1977 (1989) (noting the "inconsistency . . . between the goal of uniformity and the goal of flexibility").

10. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 140–42 (1991) (discussing the trade-off between allowing individuals to better predict the application of rules and ensuring that rules are able to effectively adapt to change); Diver, *supra* note 3, at 70 (examining the trade-offs in regulatory rulemaking between transparency, accessibility, and congruency); Kaplow, *supra* note 3, at 577 (discussing the relative desirability of ex ante versus ex post promulgation of rules).

identifies these tensions and difficulties in order to highlight the limited but important set of rules that may benefit from a reason-giving approach.

1. Procedure Without Discretion: The Argument for Strict Rules

The arguments for legislating through strict rules instead of flexible standards to govern a given area of law are familiar. Most justifications for strict rules boil down to the fact that highly predictable rules are easy for decisionmakers to apply. Aside from these general arguments favoring strict ex ante rules, there are four arguments why some procedural devices should be crafted as rules with limited (or even no) discretion for the judge.

a. Coordination of Basic Procedures

Non-discretionary rules provide the modest yet valuable service of simplification through coordination. Rather than reinventing the procedural wheel for each and every case or litigant, some rules dictate the standard baseline technicalities by which courts will operate. For example, standardized document formats ensure that the judge and other parties are, quite literally, reading from the same page. The benefits of using strict rules to coordinate procedures are limited in value, and are easily outweighed by other policy concerns such as the need for judicial discretion or the benefits of local innovation. Departures from the applications of strict procedural rules are rarely bothersome so long as they are accompanied by sufficient notice and an assurance that such a departure does not leave another party at a disadvantage.

Extensive and rigid coordination efforts have been used before to address the ills of a procedural system. The old nineteenth century writ system developed, in part, to provide a strict and formal structure,[11] but the rigidity of the system led to a situation in which seemingly arbitrary distinctions and errors in classification took on a life of their own and overwhelmed the judiciary's ability to adjudicate the merits of a given dispute.[12] Nevertheless, the creation of a unified body of procedural rules for the federal system was considered a major achievement because of its coordination benefits.[13] Thus, it suggests that rulemakers will favor strict

11. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035–42 (1982); G. Edward White, *The Intellectual Origins of Torts in America*, 86 YALE L.J. 671, 678 (1977) (The 19th century writ system "became increasingly haphazard as a classification device.").

12. White, *supra* note 11, at 681–82.

13. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 698–99 (2010) (describing creation of transsubstantive rules); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002–04 (1989) [hereinafter Subrin, *Federal Rules*]; Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption,* 87 DENV. U.

rules to coordinate procedure when the task is easily accomplished but will not insist on a costly or complicated system of rigid rules merely for the sake of coordination.

b. Litigant Equality

Consistency of outcomes (and the attendant predictability) achieves a certain degree of equality among and between litigants.[14] Concerned that differences among procedural rules "would bestow significant 'substantive' advantages on a litigant as compared to how that litigant would fare"[15] in a different forum, many have noted that a party's litigation opportunities should not be subject to the unchecked whims and idiosyncrasies of a random decisionmaker such that similarly situated parties are given roughly the same opportunities to build a case or defense before a tribunal.[16]

Litigant equality, however, is not an unlimited principle in American jurisprudence. Although inconsistent outcomes under similar circumstances might be viewed as a symptom of unfair procedure and something that violates an intuitive sense of fairness,[17] the American system openly accepts and even invites variation in the procedural and substantive rules that apply to litigants.[18] Despite the availability of different jurisdictions with different substantive and procedural rules, echoes of the harms of litigant inequality persist. Litigants who take advantage of procedural differences between different courts are accused of "forum shopping."[19] While litigant equality may appear to be a core concern motivating

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L. REV. 377 (2010) (summarizing and critiquing scholarly and judicial arguments for transsubstantive procedural rules).

14. *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1893 (2002) ("If a dispute resolution system processes similar cases to disparate outcomes, there is something wrong with the process.").

15. Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1938 (1991).

16. The value of litigant equality here refers to equal treatment as between similarly situated litigants. Rubenstein, *supra* note 14, at 1892; *see also* Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1645 (1998) (The concept of litigant equality is "that like cases ought to be treated alike."). A different concept of litigant equality, "the fair allocation of power among litigants" who are parties in the same litigation, is also an important procedural value, although not one that I consider here concerning the *uniformity* of rules. Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 852 (1986).

17. *See* Rubenstein, *supra* note 14, at 1893.

18. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643–46 (1981) (exploring the advantages and disadvantages of concurrent jurisdictions for purposes of dispute resolution and norm articulation); Subrin, *Federal Rules*, *supra* note 13, at 2020 (discussing the proliferation of local procedural rules).

19. Horizontal forum shopping—choosing from among different states—is tolerated as an acknowledged feature of our federal system, *see* Ferens v. John Deere Co., 494 U.S. 516, 527 (1990), whereas vertical forum shopping—choosing between state and federal courts—is frowned upon in diversity jurisdiction cases. Van Dusen v. Barrack, 376 U.S. 612, 642–43 (1964).

momentous procedural decisions such as *Erie*, that principle is limited by the fact that *Erie* was really about the role of federal courts in adjudicating state law claims and not about making broader arguments for litigant equality across the board.[20]

Litigant equality thus tells us something about the need for uniformity within certain jurisdictional boundaries,[21] but it does not tell us anything about the ideal size of the jurisdictional unit within which uniformity should be achieved. Intuitions of justice and fairness point to basic litigant equality on an intrasystem rather than intersystem level and suggest the importance of transsubstantive rules of procedure. These considerations, however, do not concern equality of constitutional proportions.[22] Moreover, the value of litigant equality involves the operation of other ideals aside from uniformity of rules, most notably resource inequities and disparity in access to effective counsel.[23]

Therefore litigant equality is an unconvincing reason for utilizing strict rules to regulate procedure. First, as shown above, the value of litigant equality is surprisingly weak, given initial intuitions about the role of equality in procedural justice. Second, even to the extent that the value of litigant equality holds some sway, it must be balanced against the costs of using rigid rules. The best that might be said for the value of litigant equality in procedure is that uniformity is a lofty goal. However, it is not one that, in and of itself, calls for the unquestioned use of strict rules. Recognition of this fact clears the path for greater comfort with procedural rules that grant broad discretion to trial judges.

c. Predictability

To the extent that strict rules produce uniform and consistent outcomes,[24] the use of such rules may be favored for their ability to

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20. Hanna v. Plumer, 380 U.S. 460, 468 (1964) (stating that the "twin aims" of *Erie* include the "discouragement of forum-shopping and avoidance of inequitable administration of the laws") (citing Erie v. Tomkins, 304 U.S. 64, 73 (1938)); *see* Freer, *supra* note 16, at 1644–46.

21. Rubenstein, *supra* note 14, at 1885 (describing "trans-venue equality").

22. *Id*. at 1886–90; Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek*,* 72 U. CIN. L. REV. 527, 531 (2003) (discussing the non-constitutional nature of the *Erie* value of litigant equality).

23. Rubenstein, *supra* note 14, at 1881 ("Procedural rules governing party status can also indirectly reduce equipage disparities."). Equality might also clash with other procedural values, such as party autonomy. *See* Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 574 (2012) (In complex litigation, "[t]he Supreme Court has consistently favored the liberty of individual adjudication over equality."); *see also* Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 668 (2012) (stating that procedural equality implicates a "system's commitment to equalized information" among litigants).

24. However, as one prominent scholar has observed, "[t]here is little that is simple or predictable about contemporary federal procedure." Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988).

promote predictability. Predictable rules allow litigants to structure their affairs, both in terms of the consequences of substantive law and the procedural rules that will govern possible litigation.[25]

Like the value of litigant equality, the value of predictability is not absolute. Perfectly predictable rules often run afoul of equitable notions of a "fair" or "correct" result because the rigidity required for perfect predictability would render many rules either over- or under-inclusive. To this end, scholars and jurists have wrestled with the general problem of how to craft predictable and transparent rules that simultaneously ensure equitable and context-sensitive results. Rules for procedural devices, however, have an added wrinkle. The operation of some devices can deprive a party of the ability to assert or defend against a claim, thus heightening the urgency to provide a predictable framework for such procedural devices.

These "claim-determinative" devices are instrumental in ensuring that a party can predict whether application of a given procedural rule will block his ability to assert a claim or a defense to a claim. The motion to dismiss and summary judgment are the most obvious examples of devices that affect a party's ability to assert a claim or defense.[26] Other devices also share this quality such as res judicata and the rules that act in its service. Because losing the ability to assert a claim in a future action is a grave consequence, these rules ideally should reduce uncertainty about whether a future action will be barred.[27]

Some devices might be described as "quasi-claim-determinative." For example, certification of a class is, for all practical purposes, a prerequisite for claimants with negative expected value claims to bring a lawsuit.[28] Uncertainty about the nature of a device such as a class action can show up both in the text of a rule and its application, and this unsettled state of affairs does a disservice to the development and use of the device.

A lack of predictable claim-determinative rules implicates the broader value of court access and administration of justice. In other words, suppose that any given procedural device could become perfectly transparent and predictable, if only we had the proper judicial resources to contribute to the effort. This clearly would be the best result, especially assuming that perfect transparency and predictability would not interfere with equitable

25. *But cf*. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 cmt. C (1971).

26. *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

27. The Supreme Court has wrestled with the value of uniformity of preclusion law. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001) (requiring federal district courts to adopt the preclusion rules of the state in which they sit is more compatible with *Erie*'s demands of uniformity).

28. *See* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 694–95 (2005). Additionally, certification all but ensures a quick settlement of large claims; Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995).

concerns. In a world of scarce judicial resources, it is the claim-determinative rules that are most deserving of this attention.

d. Structural Concerns

The category of structural concerns addresses broader concerns of whether and how uniformity should be used to further the interests of a system of dispute resolution and its place in a larger polity.

Rules of jurisdiction embody some of these concerns. To the extent that they allocate authority among and between sovereigns and guarantee certain aspects of due process to litigants, jurisdictional rules implicate structural and political concerns that demand uniform treatment of parties or uniform baselines of conduct. Both constitutional and legislatively enacted subject matter jurisdictional boundaries implicate weighty, overarching principles that receive frequent congressional attention and regular policing by district, appellate, and Supreme Court opinions.[29] Similarly, federal and state courts, as well as state legislatures, pay frequent and intense attention to the rules and boundaries of personal jurisdiction.[30]

Although courts and commentators prize clear and uniform rules of jurisdiction,[31] this project has been largely aspirational. With the exception of a few decisions delineating clear interpretations of isolated parts of statutes governing subject matter jurisdiction,[32] the Supreme Court has been notoriously unable to craft jurisdictional rules with clear and predictable applications, despite strenuous exhortations to the need for such clarity.[33] Other structural devices such as standing suffer from similar problems.[34] For now, it is sufficient to note that areas of structural concern

29. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77 (2010) (defining a corporation's principal place of business under the diversity jurisdiction statute); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005) (interpreting the relationship of the supplemental jurisdiction statute and the diversity jurisdiction statute).

30. *See* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1067 (3d ed. 2010).

31. *See, e.g.*, Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 7 (2011) (arguing that uniformity and clarity are fundamental objectives of federal jurisdictional rules); Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 683 (1981) (discussing "the importance of clarity in rules governing courts' jurisdiction").

32. *See Hertz*, 559 U.S. at 92–93 (resolving circuit split over the principal place of business for a corporation in favor of the "nerve center" test); Carden v. Arkoma, 494 U.S. 185 (1990) (diversity jurisdiction statute referring to corporations does not cover business associations that are not corporations).

33. *See* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 993–1007 (2009) (describing incoherence in several jurisdictional doctrines); Adam N. Steinman, *The Meaning of* McIntyre, 18 SW. J. INT'L LAW 417, 438–41 (2012) (describing the lack of clarity and majority opinions in recent personal jurisdiction cases).

34. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011) ("At the most basic level, standing doctrine is confusing and unpredictable."); William A.

are ones in which consistency and predictability are sought, if not necessarily achieved. Although this Article does not focus on designing rules for jurisdictional devices, this category is still of particular importance because of the interaction between jurisdiction and the operation of certain procedural devices like compulsory counterclaims or joinder of parties. That is, the structural concerns of jurisdictional devices can add another element favoring regulation to otherwise "managerial" procedural devices.

The push and pull between the appeal of strict procedural rules with consistent outcomes and the realities of the costs and practical difficulties of such rules are reflected in the different attitudes that rulemakers take toward crafting the rules that implement procedural devices. While there are some rules in which consistency is deliberately subordinated to other procedural values, in other instances, the extent to which uniformity should be enforced or imposed is either unstated or clearly aspirational. It is in these situations that tensions in interpreting and applying procedural rules can arise. Although judicial discretion is not the only procedural value to compete with uniformity, it looms large in the debate, and is considered below.

2. Procedural Devices for Which a High Degree of Judicial Flexibility is Desirable

The concept of judicial discretion extends beyond the procedural realm. Discretion's role in the creation, interpretation, and application of substantive law is acknowledged as much as it is debated.[35] What distinguishes these arguments as they are applied to procedural devices is that judicial discretion plays a particular *procedural* role with regard to procedural devices.[36]

Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) ("The structure of standing law in the federal courts has long been criticized as incoherent.").

35. *See* Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 955 (2010) (any amount of flexibility in a substantive rule of law allows for "considerable manipulation" through judicial discretion); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345 (1990) (exercise of judicial discretion in statutory interpretation involves creating substantive policy); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1568 (2003) (arguing that the American common law method restrains substantive judicial discretion, which should be a comfort to opponents of greater judicial discretion); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40 (1985) (discussing "delegated lawmaking"—when a statute or the Constitution gives courts authority to develop substantive law through incremental common law evolution); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 793–94 (1989) (arguing against substantive policymaking by courts under the guise of statutory interpretation).

36. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (distinguishing between primary and secondary discretion); *see also* Bone, *supra* note 5, at 1967–69 (describing sources of authority for the exercise of procedural

Procedural theorists have expressed differing views of the value of judicial discretion. Commentators applaud judicial discretion when it gives judges the power to manage cases and leverage their experience to tailor procedure to the needs of each unique case before the court.[37] Some scholars have questioned whether judicial discretion is, in fact, a useful tool.[38] Others have blamed the use of judicial discretion for producing erratic and unpredictable results.[39] Trial court judicial discretion has a special procedural function because of the judge's role in case management.[40]

Trial court judges are tasked with administering lawsuits. Even cases that are not officially the stuff of complex litigation can be multi-party, multi-claim affairs that require managerial attention from the trial judge. To this end, some modern procedural devices have been crafted to imbue trial judges with "broad discretion to deal fairly with the case at hand."[41] Many of these devices have been fashioned by judges themselves, either through judicial ruling or through the federal rulemaking process, thus judicial

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discretion). Certain procedural issues, such as jurisdiction, might also benefit from enhancing or contracting trial court discretion. *See* Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 507, 533–37 (2012).

37. *See, e.g.*, Bone, *supra* note 5, at 1970 (discussing the importance of procedural discretion); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 412 (2007) (discussing the inevitability of discretion in judicial decisionmaking); Marcus, *supra* note 35, at 1605–15 (expressing "guarded optimism" about the trend toward greater discretion); Rosenberg, *supra* note 36, at 662 (conferring judicial discretion is necessary because of the impossibility of designing a rule addressing any issue that might arise); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 262 (1990) (discussing the justifications for judicial discretion).

38. *See, e.g.*, Bone, *supra* note 5, at 1963 ("The pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases is empirically unsupported and at best highly questionable.").

39. *See* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 76 (1995) (Increased discretion leads to "arbitrary and discriminatory behavior."); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426–27 (1982) (Broad judicial discretion in case management threatens judges' impartiality.); Shapiro, *supra* note 9, at 1995 (arguing that unconstrained discretion can be harmful and lead to abuse of power by judges); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 558 (2006).

40. *See* Resnik, *supra* note 39, at 386–91.

41. Shapiro, *supra* note 9, at 1975; *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80 (1989) ("The federal rule drafters . . . relied to a large extent on trial judge discretion to shape optimal lawsuit structure for each dispute."); Burbank, *supra*, note 24 at 715 ("[T]he trend of modern procedural law has been away from rules that make policy choices towards those that confer on trial courts a substantial amount of normative discretion."); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2081–85 (1989) (describing the "procedural flexibility" in the FRCP); Gensler, *supra* note 13, at 674 ("Today, active judicial case management is a defining characteristic of the federal civil pretrial scheme."); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 473 (2003) ("The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.").

preferences are often reflected in the text of the rule as well as in their interpretation.[42]

One example of such a procedural device is the pretrial conference. Although the scope of district judges' powers has been more precisely defined under the modern instantiation of Rule 16,[43] it is still a tool of great flexibility and discretion for a judge to shape the course of litigation. It continues the "tradition of discretion—of authorizing a range of actions but not requiring them."[44] The rule makes "case management an *express* goal of pretrial procedure."[45] It authorizes judges to hold one (or more) pretrial conferences during which she can set the schedule for motions and discovery, discuss and set the scope of discovery, discuss the possibility of settlement, and somewhat more controversially, actively engage the parties in settlement negotiations.[46] The rule stipulates that the terms of the order "may be modified only for good cause and with the judge's consent,"[47] ensuring that the judge retains flexibility and discretion over the shape of the case as it unfolds during the pretrial phase. In fact, the decision to hold a pretrial conference at all is totally discretionary, and the judge may decide simply to issue a pretrial order.[48] Because the matters to be discussed at a pretrial conference are within the judge's discretion, the judge can focus on matters most important to each case without expending court resources on extraneous matters. Rule 16 is thus a model of a rule that grants judicial discretion. Although it is not unconstrained, it is the hallmark of a regime in which judges are given broad authority to manage the cases before them without undue ex ante rule interference. Indeed, it is meant to work in tandem with other managerial tools such as joinder and discovery.[49]

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42. *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 628 (1994) ("Because procedural rules are designed to facilitate judicial administration, judges are given considerable leeway to craft such rules to conform to their preferences."). Judicial discretion is also connected with the idea of the inherent powers of district judges. *See generally* Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311 (2010).

43. *See* Shapiro, *supra* note 9, at 1981–85.

44. *Id*. at 1985.

45. WRIGHT ET AL., *supra* note 30, § 1521 (emphasis added).

46. FED. R. CIV. P. 16(b)(3)(A), (B); *see also* MAURICE ROSENBERG, The PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION 5–11 (1964) (discussing the role of pretrial conferences generally and in federal court); David A. Rammelt, Note, *"Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965, 981–85 (1990) (describing use of Rule 16 in judicial management of settlement negotiations); Shapiro, *supra* note 9, at 1989 (discussing Rule 16 and "the authority of judges to nudge, or shove, the parties toward settlement").

47. FED. R. CIV. P. 16(b)(4).

48. WRIGHT ET AL., *supra* note 30, § 1524.

49. *Id*. § 1522 ("Rule 16 also serves as an essential adjunct of the joinder and pleading provisions in the federal rules.").

Rule 16 is an example of a federal rule that *does* confer varying amounts of discretion to district judges. However, it does not capture any normative conclusions about whether judges *should* have procedural discretion or how wide that discretion should be. Commentators differ sharply in their assessments of the wisdom and utility of granting trial judges broad managerial powers.[50] Thus, it would be a mistake to make an argument premised on some sort of a shared notion of the types of devices for which a high degree of procedural judicial discretion is desirable.

There is, however, a way in which thinking about the desirability of discretion can be helpful. Whether or not commentators ultimately will ever agree on an optimal level of discretion, judging on the ground will continue to follow its own course. The stage has been set for a managerial model of adjudication. Short of an outright ban on a particular practice, judges will manage cases in a way that manifests a certain amount of discretion. Even in the face of stated limitations, "experience with the Federal Rules of Civil Procedure confirms [that] federal judges do not react well to rules that limit their discretion."[51]

3. The Intersection of Regulation and Discretion

There is an inevitable tension between strict rules and flexible discretion. This tension is particularly acute when the value of flexibility is connected as much to the management of a lawsuit as it is to the flexibility to accommodate a range of factual situations under the rubric of a single standard. This Subpart focuses on how that tension arises in certain procedural devices, using joinder as an example.

Some joinder devices manifest this tension when the rulemakers craft written rules that do not appear to grant discretion to trial judges but nonetheless are often described by both courts and commentators as if they were discretionary.[52] That is, although the wording of a rule that requires a "transaction or occurrence" conveys a standard, and thus a healthy degree of interpretive discretion, some judges treat the standard *itself* as if it were optional, discarding the standard when it seems expedient or equitable.[53]

Viewed in isolation, the "transaction or occurrence" standard does not appear to be ambiguous concerning a grant of explicit discretion.[54]

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50. *See, e.g.*, Gensler, *supra* note 13 (discussing existing debate over case management and discretion and advocating for a stronger case management system).

51. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 238 (1997).

52. Effron, *supra* note 7, at 776.

53. *Id*.

54. To the extent that the language of the standard itself is vague, it represents a deliberate delegation of interpretive discretion. *See* Bone, *supra* note 5, at 1970.

However, the provenance of the text sheds light on why the rule has been treated as creating such broad discretion. The "transaction or occurrence" language in the rule predates the FRCP. In fact, the word "transaction" came directly from the former Equity Rule 30,[55] and twelve years before the advent of the FRCP, the Supreme Court used Equity Rule 30 to formulate the "transaction or occurrence" standard for counterclaims falling within a federal court's ancillary (now supplemental) jurisdiction.[56]

When the Advisory Committee incorporated substantially all of Equity Rule 30 into rules such as Rule 13(a), 15(c), and 20,[57] it tied the *text* of a mandatory rule to the inherent flexibility of the equitable tradition.[58] Thus, in addition to broader intentions to structure the FRCP to foster flexibility in judicial management of cases, the text of the rule itself is deeply connected with equitable practice. Herein lies the tension—the rulemakers have sought to set a uniform standard for a rule, but have used language from an equitable rule associated with case-by-case adjudication and judicial discretion. The text of the transaction or occurrence standard, then, captures the clash between strict rules and judicial flexibility, but crafting the rule in this way has done little to resolve the tension, and instead has created a doctrine that many consider unworkable.

Historical development of the text of the joinder rules provides only a partial explanation for this conflict. Thus, replacing the current standards with "better standards" is only a partial solution.[59] The primary source of tension is in the nature of the devices themselves. A comparison of two joinder devices, the amendment of a pleading to include an otherwise time-barred claim ("relation back") under Rule 15(c), and compulsory counterclaims under Rule 13(a) demonstrates how this tension exists and how it differs across devices. The analysis will show that both rules are examples of this tension, but that the degree and quality of the tension are not equal. Each device presents its own challenges.

There are good reasons that both relation back and compulsory counterclaims should be governed by relatively strict rules. A litigant should be able to determine with some certainty whether or not she will lose the ability to bring a claim in a future action or an amended pleading. Likewise, unpredictable applications of these rules dilute the value of repose to defendants that res judicata and statutes of limitations are meant to provide. The claim for uniformity in the text, interpretation, and application of the compulsory counterclaims is particularly strong because

55. 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 1401 (3d ed. 2010).

56. *See* Moore v. N.Y. Cotton Exch., 270 U.S. 593, 609–10 (1926).

57. FED. R. CIV. P. 13(a) advisory committee's note 1.

58. *See* Subrin, *supra* note 1, at 922.

59. Effron, *supra* note 7, at 812.

existence (or lack) of a compulsory counterclaim may be used to obtain subject matter jurisdiction,[60] thus implicating the structural value of federalism.

On the other hand, both compulsory counterclaims and relation back are also contexts in which judicial flexibility is prized. At a minimum, both devices need the interpretive discretion found in a broad standard insofar as they require a judge to make factually-laden and context-specific determinations, and to proceed best on a case-by-case basis. This, however, does not distinguish the procedural device of counterclaims from any other determination—procedural or substantive—that a court must make that depends heavily on facts.

Beyond this ordinary need for flexibility in fact-intensive cases, joinder devices implicate a special type of discretion and flexibility: the case management functions of the judge. As outlined above, judicial discretion is particularly favored when it is used in service of managing and shaping litigation.[61] Both counterclaims and amended pleadings are intimately tied to case management, insofar as they affect the size and scope of a trial as well as pretrial motions and discovery. The decision to add extra claims to a lawsuit is one that turns on whether or not the two claims make a sensible litigation unit.[62] A trial judge has special expertise in exactly these facts—when does it make sense to require claims to be litigated together?

This special knowledge is more than just an expertise in procedural law. Take, for example, decisions over minimum contacts in personal jurisdiction. These are also highly fact-specific inquiries. The facts at issue, however, ultimately have little to do with anything that will happen inside the courthouse walls. Instead, they are almost exclusively about a party's actions regarding the facts of the cause of action itself.[63] Compulsory counterclaims and relation back, on the other hand, concern facts about the cause of action *and* how these facts will affect the litigation of the claims. It is this connection about which judges have special expertise, and this expertise might warrant a more deferential stance towards judicial discretion.

Thus, the tension between strict rules and flexible discretion is a feature of the devices of amended pleadings and compulsory counterclaims and not

60. WRIGHT ET AL., *supra* note 55, § 1414.

61. Although Resnik and others are wary of managerial judging, I take its presence and use in litigation as a given, both because it reflects present realities of how courts operate, and because rulemakers have explicitly promoted these values. My argument attempts to account for such values, rather than reconsider their utility.

62. This decision can take the form of a strict ex ante rule that a plaintiff can join any claims, related or unrelated (Rule 18), or the ex post rules discussed here for counterclaims and relation back that require a more nuanced analysis.

63. Or, in a general jurisdiction case, the facts at issue are about a party's basic activities in the forum. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2854 (2011).

just a feature of the particular drafting of the current Rules 13(a) or 15(c). Accepting that relation back is a useful procedural device and accepting that it exemplifies an inherent clash between uniformity and discretion, the question then becomes how rulemakers can avoid exacerbating this tension when designing the directive. By turning to the tools of reason giving, rulemakers could do a better job of crafting rules that leverage this expertise rather than allowing inconsistent decisions to evolve into incoherent doctrine under the guise of discretion and case-by-case decisionmaking.

The examples I have given demonstrate that the managerial veneer of litigation produces a special tension between rules and discretion, but that these tensions manifest differently across different devices. Notice, for example, that Rule 15(c) decisions are almost always *prospective*; that is, the decision to allow a party to add an otherwise time-barred claim affects the shape and scope of ongoing litigation. Decisions regarding compulsory counterclaims, however, are sometimes *retrospective*, meaning that the judge will not actually be consolidating or shaping the scope of the first lawsuit but will only decide whether or not to bar a subsequent claim. Thus, one might have different reactions to the tension between strict rules and flexibility in each of these cases. Because of the urgency of the res judicata problem in compulsory counterclaims and the asynchronous nature of the assertion of the claims, the argument for accommodating both uniformity and an explicit grant of discretion within the same rule is weaker for Rule 13(a) than it is for Rule 15(c). These differences will affect whether (and how) a reason-giving approach is an appropriate solution to the current problems in the rules.

B. Procedural Devices Insulated from Meaningful Appellate Review

Many trial court procedural decisions are structurally insulated from appellate review,[64] and this fact contributes to the deficiencies in certain procedural rules such as some of the joinder devices. These decisions are made during the intermediate stages of litigation, meaning that, by the time a final judgment[65] has been rendered and the case is eligible for appeal,

64. In addition to the structural barriers to appellate review, some procedural decisions are unreviewable by operation of statute or rule. *See* Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711, 718 (2013); *see also* Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011) ("Ordinarily, orders denying summary judgment do not qualify as 'final decisions' subject to appeal.").

65. 28 U.S.C. § 1291 (2006). According to the Supreme Court, a decision of a district court is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

many procedural issues have fallen away and parties do not appeal them with a meaningful degree of frequency.[66]

In response to the difficulties posed by the complexities of interlocutory review doctrine, numerous commentators have critiqued the doctrine and proposed reforms to the rules of finality and appealability.[67] Despite the difficulties that this doctrine causes, courts and commentators have articulated reasons for the final judgment rule. Litigation can proceed more smoothly and efficiently if it is free from the constant interruption and delay of appellate review.[68] Moreover, just as joining claims and parties before a trial court saves parties and judges from the costs of duplicative litigation, the final judgment rule acts as a type of appellate joinder device, saving the parties from multiple appellate proceedings.[69]

This Article approaches the interlocutory review problem from a different angle by examining how the design of procedural rules can anticipate and accommodate dampened appellate review. Reason giving, while not a replacement for appellate review, can buttress the functions of law statement and error correction in situations where these are likely to be missing.

Certain types of procedural devices are often the subjects of decisions that do not dispose of a case on the merits.[70] The final judgment rule does

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66. This Subpart focuses primarily on the federal systems. A few states have notable exceptions to the final judgment rule, such as New York which permits regular and broad interlocutory appeals during litigation. *See* DAVID D. SIEGEL, NEW YORK PRACTICE § 526 (4th ed. 2005); 12 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE: C.P.L.R. § 5701 (LexisNexis 2d ed.).

67. *See* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539 (1998) (proposing modifications to the collateral order doctrine); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 423 (2013) ("[J]udicial treatment [of interlocutory appellate review is] so inconsistent that the regime is too complicated and too unpredictable."); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 787–89 (1993) (summarizing the history, problems, and proposed solutions to the final judgment rule); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643 (2011) (arguing for non-discretionary interlocutory review of certain decisions in multidistrict litigation); Martin H. Redish, *The Pragmatic Approach to Appealability in Federal Courts*, 75 COLUM. L. REV. 89 (1975) (suggesting a pragmatic approach to interlocutory review); Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219 (2013); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007) (proposing two reforms to simplify the doctrine of interlocutory appeals).

68. *See* Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 738 (2006).

69. Will v. Hallock, 546 U.S. 345, 350 (2006). For criticisms of this position see Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, LAW & CONTEMP. PROBS., Summer 1984, at 165, 165 (criticizing the arguments against piecemeal appeals). *But see* Redish, *supra* note 67 (explaining the need for a flexible approach to balance the interests of efficiency and error correction); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, LAW & CONTEMP. PROBS., Summer 1984, at 171, 171–73.

70. Moreover, the "collateral order" doctrine does not operate to ameliorate this problem because they do not meet the third part of a standard that requires that the district court order "be effectively

not, by itself, form an impermeable barrier to review of intermediate orders.[71] Even if litigants must wait until a final judgment has been rendered, they often appeal many orders, such as key evidentiary rulings, because of the importance of the issues to the ongoing interests of the parties. Although a procedural ruling might not directly affect the merits, other pressing interests, such as protection of privileged information, can propel a party toward an appeal.[72]

Some issues, however, fall by the wayside by the time a court renders a final judgment because they are effectively moot.[73] Decisions about permissive joinder of parties are one example. Suppose, for example, that after a fire in an apartment building, several property owners sue their respective insurance companies for denials of coverage under identical policy clauses. They file a lawsuit together in federal court using permissive joinder under Rule 20. The district court denies the motion for permissive joinder on the basis that the different policies are not part of the same "transaction or occurrence" as required by Rule 20. Although they had hoped to benefit from the cost-saving of coordination, each plaintiff has a positive expected value claim, and thus the parties proceed separately with their own actions. By the time that an appeal of the Rule 20 decision would be available, all of the parties have either litigated their claim to judgment or settled[74] with the defendant. The appeal thus never materializes.

The lack of meaningfully available appellate review of certain procedural devices has two consequences. First, it can be frustrating to

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unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

71. As a technical matter, a party can appeal many procedural decisions, even if, as a practical matter, it no longer has an incentive to do so. Moreover, interlocutory appeals are permitted in a small number of situations. *See* FED. R. CIV. P. 23(f) (permitting appeal of an order granting or denying class certification).

72. The hardships caused by such disclosure are sometimes large enough that courts will (or should) grant interlocutory appeal of the issue. *See* Robertson, *supra* note 67.

73. *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1182 (1990) ("[D]iscovery disputes, a judge's management of a case, or denials of motions to dismiss on venue grounds, all may evade review even if the disgruntled party also loses the final judgment."); Steinman, *supra* note 67, at 1241 ("Under [the FRCP], strict adherence to the final judgment rule might not allow for meaningful appellate review of the trial court decisions that really matter."); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 661 (FRCP pretrial procedures are "a set of lower court rulings that, while often significant, were as likely as not to be unreviewable.").

74. Settlement also affects appellate review of issues in a world of interlocutory review. Many cases end in settlement rather than judgment, and therefore any intermediate orders issued before settlement are not appealed. *See* Yeazell, *supra* note 73, at 661–62 (around 70% of cases are unappealable on account of settlement). This affects procedural issues and non-procedural issues equally, and thus it is unlikely that settlement itself places a special burden on procedural orders. Nonetheless, it does contribute to a narrowed pool of appealable orders, especially to the extent that procedural decisions can affect parties' incentives to settle.

litigants. At its worst, decisions that are tantamount to "'unreviewable discretion' . . . conflict[] with litigants' basic sense of fairness and undermines societal trust in the judicial process."[75] Additionally, the lack of appellate review impedes the common law development of legal rules that one would normally expect in the American system. Incorporating a reason-giving element into procedural devices that are insulated from appellate review may be one strategy for ameliorating these difficulties.

First, these rules address the problem of the appearance of unreviewable discretion. Models of reason-giving rules in administrative law developed, in part, as a response to the problem of delegated discretion.[76] Such rules derive legitimacy primarily from their process rather than their outcome. Thus, a reason-giving model would impose a structure on these procedural devices that would assure litigants and observers that these procedural areas are subject to transparent and organized principles rather than opaque and less predictable actions of individual judges.[77]

Second, reason-giving rules (whether appealable or not) would begin to fill in the interstices of procedural doctrines that are insulated from regular or robust law-stating function of the appellate courts. A lack of common law development is not necessarily a problem in and of itself. Plenty of legal systems use means other than lengthy judicial opinions as the primary means to promulgate and develop legal rules,[78] and our own system is replete with examples of decisions without opinions,[79] or opinions that are explicitly excluded from the world of binding precedent.[80] The difficulty arises when rulemakers assume that all rules are subject to the same process of common law development when, in fact, that may not be true. Professor Yeazell has referred to this "striking result" as an "experiment in judicial decentralization and deregulation."[81] If the purpose of appeals is to

75. Robertson, *supra* note 68, at 741; *see also* Pollis, *supra* note 67, at 1648 (discussing the value of access to appellate review).

76. *See infra* Part II.B.

77. The important caveat here is that reason-giving rules can go only so far in improving the current situation insofar as reason-giving rules themselves depend on appellate review in order to be effective. I address this particular concern *infra* at Part III, suggesting that the addition of some process is a significant improvement in and of itself, and that one might consider constructing a method of very limited interlocutory appeal with a high standard of review to enforce these rules that does not unnecessarily slow or interrupt litigation.

78. *See* Phillipe Bruno, *The Common Law from a Civil Lawyer's Perspective*, *in* INTRODUCTION TO FOREIGN LEGAL SYSTEMS 1, 8 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994).

79. *See* Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1396 (2000) (discussing the Supreme Court's somewhat regular practice of issuing decisions without opinions).

80. *See* Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004) (describing authoritative status of unpublished opinions).

81. Yeazell, *supra* note 73, at 662.

"to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system,"[82] then one must explore what happens when this goes missing in a particular area of the law.

The difficulties emerge in the way that procedural rules are promulgated, interpreted, and applied. The job of the rulemaker is to draft legal rules which then govern the resolution of future disputes. Once a rule exists, judges must decide how and when to apply it to new and changing factual situations. In a common law precedential system, these decisions of law are subject to review by appeals courts. Over time, the binding opinions form the nuanced network of rules and standards that govern particular areas. Thus, one "principal value of appellate proceedings is . . . to formulate rules of law."[83] The faulty assumption is that just because the method of a promulgation for a body of rules (such as the FRCP) is uniform, so too would be the availability of appellate review.

Of course, simply establishing a system that includes appellate review with appellate courts that have law-stating powers does not ensure the smooth and inevitable development of clear legal rules or principles. The most notorious example from the world of civil procedure is in personal jurisdiction, where the Supreme Court has been unable to articulate a single, clear, and binding standard for minimum contacts in specific jurisdiction cases.[84] While one can easily dwell on such spectacular failures of law giving, in other situations the Supreme Court and appellate courts have fulfilled their harmonizing and law-giving functions quite nicely.[85]

When appellate courts do not perform this law-stating (and even law-making) function, the process is truncated. The division of labor between trial and appellate courts in the American "tiered system" makes the appellate courts specialists in formulating and harmonizing legal rules.[86] Although the existence of an appellate tribunal is, itself, not necessary for the evolution and formulation of legal rules, its pervasiveness in most areas of substantive law has shaped how judges and commentators believe that the law can and should be developed.[87] The quiet absence (or dampened

82. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985).

83. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 252 (1979).

84. *See generally* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (issuing plurality opinions regarding specific jurisdiction).

85. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77 (2010) (resolving a subject matter jurisdiction circuit split).

86. *See* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 469–70 (1998) (summarizing the law-giving and harmonizing functions of appellate courts).

87. For example, commentators have suggested and debated the proposition that the structure of the common law system produces the most efficient legal rules. *See* Todd J. Zywicki, *The Rise and Fall*

presence) of the appellate courts in some procedural matters can go unnoticed because the issues are merely sheltered and not banished from appellate review. In other words, by privileging the law-making function of the appellate courts without accounting for the manner in which it is sidelined in some procedural rules, commentators have missed an opportunity to investigate how the design of rules itself can shape the growth and interpretation of legal rules.

Many scholars who have addressed the intersection of procedural decisions and interlocutory review have suggested reforms of the appellate process itself. I propose that rulemakers accept that there are areas of law with reduced appellate review, and that this fact should influence how rules themselves are crafted, namely, that the *content* and *form of the text* of the rules should be designed to aid in their common law development in the absence of appellate review.

To illustrate both the promise and the problems of appellate review of procedural devices, a comparison of the rules for joinder of parties is instructive. Rule 19 governs the required joinder of parties, and Rule 20 governs the permissive joinder of parties. Under the structure of Rule 19, a court is required to join a party if it claims an interest in the subject matter of the litigation and the court cannot "accord complete relief among existing parties" in that party's absence.[88] If joinder is not feasible, typically because of problems with subject matter or personal jurisdiction, the court must decide whether the action should proceed at all.[89] Because this structure often results in a final judgment—the total dismissal of some lawsuits—Rule 19 cases are appealed more frequently than are Rule 20 cases. There is, correspondingly, more appellate case law on Rule 19, particularly Rule 19(b), than there is concerning the interpretation and application of Rule 20.

One should not rush to the hasty conclusion, however, that more appellate law is a panacea for the problems surrounding the interpretation and application of procedural rules. Rule 19 is notoriously inscrutable.[90] Thus, the lack of interlocutory review cannot be blamed on its own for producing an incoherent body of law for Rule 20. It is one factor of several that contributes to the difficulties in governing procedural devices such as permissive joinder. The lack of appellate opinions in Rule 20 decisions

of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551 (2003) (summarizing and contributing to the debate over the efficiency of the common law). Additionally, some scholars have pointed to evidence that trial judges have an aversion to reversal by a court of appeals. *See* Drahozal, *supra* note 86, at 477.

88. FED. R. CIV. P. 19(a)(1)(A).

89. FED. R. CIV. P. 19(b).

90. *See* Bone, *supra* note 41, at 107–14 (criticizing the structure of Rule 19); Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061 (1985) (describing the problems and competing and conflicting aims of Rule 19).

means that the two rules are subject to slightly different problems: Rule 19 decisions adhere to a recognized standard, but the applications to various fact situations remain uncertain. Rule 20 has this problem as well, but suffers under the additional burden of unclear and under-harmonized statements of the law itself. Thus, one must account for the function of appellate review in order to understand its place among other problems plaguing procedural rules. This will help to pinpoint and distinguish solutions that target the use of facts from solutions that target the absence of reliably available law-stating authority.

Error correction is the other traditional function of appeals courts. Generally, in American courts, the error-correction function is limited to issues of law, and trial court decisions of fact are rarely reviewed.[91] Although the fact–law distinction is notoriously fuzzy,[92] it does constrain the error-corrective function of appellate review. One could respond to the fact that these procedural rules are not frequent subjects of error correction in a few different ways. One is to accept that errors of law will occur with a higher degree of frequency in the application of only some procedural devices. Another is to increase the availability of appellate review by tweaking the interlocutory appeals doctrines. Yet a third response is to redefine the mission of a district judge in executing these devices, therefore subtly altering the meaning of what "error" might be. When error is confined to the *process* of making a procedural ruling rather than to the content of the ruling itself, pressure is taken off of higher courts to perform the error-corrective function.

The structure of appellate jurisdiction either prohibits or substantially narrows the ability of appeals courts to adjudicate procedural disputes pertaining to a good deal of pretrial decisions by trial judges. This amounts to a deprivation of certain types of information. It means that litigants, judges, and rulemakers are deprived of the law-stating information that appellate courts would ordinarily supply. It also means that there is a lack of information concerning when and how often lower courts err in their application of procedural rules. Once the problem of appellate review is cast as an *informational* problem rather than a *structural appellate* problem, the possibility of reformulated rules becomes more attractive.

Taking these two broad problems together, the procedural devices best suited for reason-giving rules have key attributes in common. First, these devices are those that are used for the purposes of managing and regulating litigation. Second, these devices are those about which a trial judge has special knowledge and expertise, much like an agency administrator. Third,

91. *See* McAllister v. United States, 348 U.S. 19, 20 (1954) (reviewing findings of fact from a district court bench trial using a "clear error" standard).

92. *See* Effron, *supra* note 7, at 774.

using an outcome-based standard has not produced an acceptable balance of judicial flexibility and rule uniformity. Fourth, in some situations, insulation from appellate review further contributes to the clarification and common law development of the device's rule.

II. PROCEDURAL LAW AND THE PUZZLE OF REASON GIVING

This Article proposes using reason giving, a tool of administrative law, as a solution to a judicial problem. This Part addresses a few background hurdles. First, it examines the validity of turning to administrative law by establishing the shared space between the management of a lawsuit and the administrative functions of an agency or administrator. It then turns to the concept of reason giving. Writ large, reason giving is a value and project that extends far beyond administrative law. In fact, insofar as much of the visible output of the judiciary comes in the form of written, justificatory opinions, it might already seem that reason giving is a central function of the trial judge. This Part distinguishes the general project of giving reasons from its more specific applications in administrative law in order to demonstrate what these reason-giving rules might add to civil procedure.

A. The Connection Between Administrative Law, Procedure, and Delegated Discretion

Procedural law regulates several different types of actors in the dispute resolution system. Lawyers are obvious targets, as well as private persons, both as litigants and third parties.[93] Commentators have thoroughly explored the topic of lawyers and private persons as subjects of procedural regulation, and, indeed, the regulation of the behavior of lawyers, litigants, and other persons and entities involved in judicial proceedings is one of the most important functions of procedure. But procedural rules also regulate the behavior of judges because they too are actors in the dispute resolution system.[94] Procedural rules govern judicial behavior by supplying the standards, either mandatory or permissive, for managing litigation. Judges are regulators and administrators of procedure. By the most formal definition, the few judges who serve as members of the Rules Advisory Committee are rulemakers in the traditional sense of drafting and implementing rules. However, even judges who are not involved in that

93. *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 540 (2011) ("[E]very public procedural rule[] effectively regulates three distinct relations: that of government to disputant, that of the disputants *inter se*, and that of the disputants to strangers.").

94. I have used the term "judicial behavior" rather than "judicial conduct" since the latter often refers to the professional and ethical rules governing judges. *See* MODEL CODE OF JUDICIAL CONDUCT (2011).

process are the day-to-day regulators of procedure,[95] the administrators of delegated authority.

Over the past few decades, several prominent scholars have argued that trial judges, in their managerial capacities, have taken on a second mantle as administrators.[96] Managerial judging has made trial judges the primary administrators of procedural law. Judges participate in the *process* of rule making; they are one of the primary *subjects* of that regulation[97] and are also a major *consumer* of the regulatory work of procedure. Accounting for these roles can aid in the design of the procedural devices closely associated with the phenomenon of managerial judging.

Particularly when managing complex litigation, the day-to-day work of a trial judge resembles that of a modern high-level administrator as much as it does the classical model of a robed figure presiding over a trial and writing opinions.[98] These observations have led commentators to suggest that some of the tools of administrative law would be helpful in ameliorating some of the pressures that the administration of modern litigation can place on judicial responsibilities.[99] For example, the observation that mass litigation operates in parallel to public administration

95. *See* Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 651 (2011) ("Taken together, the various pretrial doctrines amount to the construction of a distinctively judicial mode for the regulation of variance and cost imposition in civil litigation.").

96. *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 595 (2011) (Class actions "resemble administrative regulation."); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338 (Class actions are a "centralizing device designed to accomplish some of the same functions as performed by the state."); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 902 (1996) ("[T]he rise of [mass] settlements in tort mirrors the development of public administrative agencies earlier in this century."); Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5; *see also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 5 (2000) ("[C]lass actions . . . share an essential attribute of government actions."). *But see* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 431 (1999) ("[T]he mass tort paradigm resembles more closely private legislation implemented through private administrative means.").

97. Judges are not the only subjects of regulation. Rule 11 illustrates nicely how a procedural rule can regulate the behavior of multiple actors. Rule 11 regulates the conduct of lawyers, requiring that the lawyer sign and certify written motions, pleadings, and other paper; dictates the mechanics of the signature; and tells lawyers how to file a motion for sanctions under the rule. Rule 11 also contains instructions directed at the judge, permitting a judge to levy sanctions at her own initiative, and providing the standard by which sanctions are calculated. Rule 11 also regulates the behavior of parties, by extending the duties of Rule 11(b) to parties who violate or are "responsible for the violation" of that rule. FED. R. CIV. P. 11.

98. *See* Jonathan T. Molot, *An Old Judicial Role for A New Litigation Era*, 113 YALE L.J. 27, 39–42 (2003) (contrasting the traditional judicial role with modern managerial judging); Resnik, *supra* note 39, at 376–77 (describing managerial judging).

99. *See, e.g.*, Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012).

has led some scholars to consider administrative law solutions to the problems of complex litigation because administrative law has, to a large degree, addressed issues of legitimacy and competence.[100] Commentators have met these solutions with debate and some tentative approval.[101] Some of these responses suggest methods for accommodating and improving the occurrences of managerial judging; others reject these administrative practices as judicial overreaching or as inappropriately delegating authority to the lawyers and third parties involved in processing complex litigation. In any case, few commentators deny that the phenomenon of managerial judging has become entrenched in modern judicial practice and is facilitated by procedural rules, particularly those that govern pretrial practice.

The analogies are not confined to the world of complex litigation. Scholars have also examined the rulemaking process itself and its relationship to principles of administrative law. Noting the uneasy position that the FRCP occupies between the legislative and judicial branches,[102] commentators have called for the application of administrative law principles to the promulgation, passage, and interpretation of the FRCP.[103] This scholarship often focuses on the Supreme Court as the locus of rule making and the target of reform. For example, Professors Mulligan and

100. Scholars have proposed several such solutions: structuring judicial settlement review in the manner currently utilized by agencies during the rulemaking process, Molot, *supra* note 98, at 51–58; Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 512 (2011) ("[M]any scholars have observed that class action settlement funds often resemble 'private' or 'miniature' administrative agencies."), providing for wider participation rights similar to those in formal rule-making, Nagareda, *supra* note 96, at 950–52, calculating attorneys' fees, Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 408 (2011), fairness hearings for class actions, William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1477–79 (2006) (arguing for a class action investigatory agency at the settlement stage), and supervision of class counsel, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 236–268 (2007); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007).

101. *See, e.g.*, Elizabeth Chamblee Burch, *Governing Securities Class Actions*, 80 U. CIN. L. REV. 299, 305–07 (2011) ("The public law analogy to political governance holds the most promise for addressing both the principal-agent and the class member-lead plaintiff relationship."); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997) (offering a cautious endorsement of Judge Weinstein's managerial methods). *But see* Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 589 (1994) (describing managerial judging as the "disturbing trend of mass tort judges to usurp authority over the conduct of such cases, frequently in the name of judicial efficiency and economy").

102. *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888–89 (1999) (summarizing critiques of the rulemaking process); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 599–600 (2010) (describing the various bodies involved in the rulemaking process).

103. *See, e.g.*, Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141–69 (2002) (arguing "for an interpretive approach [to the FRCP] that proceeds from an awareness of the scope of the Enabling Act delegation").

Staszewski recently have suggested that policy changes in rules of civil procedure should be made through rule making rather than through adjudication.[104] Here, I suggest taking the argument one step further to extend some of the principles of administrative law to trial court judges. To the extent that Congress (via the rules drafters) has delegated discretion to judges for certain regulatory choices and outcomes, it may be appropriate to turn to administrative law for lessons in how to constrain and manage delegated discretion vis à vis district judges[105] insofar as their practices and decisions have become part of a "bottom-up" method of procedural regulation.[106]

Most procedural rules adhere to a model that is more or less analogous to the style of regulation known in administrative/regulatory law circles as "command and control." The rules come in the form of "do this" or "don't do that." Compliance with a rule is measured by adherence to its rules. For many procedural rules and devices, command and control works quite well. If rulemakers want parties to serve a summons that states the name of the court and the parties, then it will draft a rule mandating that a summons must "name the court and the parties."[107] If the rulemakers want to specify a range of permissible behaviors, these too can flow from the dictates of a directive.[108]

Procedural regulation is not limited to a purely didactic approach. Regulators can elicit desired results by constructing a system of incentives to encourage the subjects of regulation to engage in desired conduct. If rulemakers want to enable cost-effective and efficient notice procedures, they can encourage certain parties to waive formal service of process by imposing the costs of service on a party who chooses against waiver.[109]

Just as rulemakers can regulate through methods such as command and control and through other incentives, so can they regulate through processes aimed at delivering good outcomes, rather than dictating the outcomes themselves ex ante. It is a practice that already occurs at a

104. *See* Mulligan & Staszewski, *supra* note 99, at 1191–92.

105. *See* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 6 (2011) (applying administrative law principles to the Supreme Court certiorari process). Professor Watts explores the possibility of applying the non-delegation doctrine itself to certiorari doctrine. I do not believe that the strictures of the non-delegation doctrine itself are implicated in most of the rules and devices that I discuss, mainly because the rules themselves do not seem to be an impermissible delegation of authority. I borrow, however, her emphasis on regulatory solutions to the problems of delegated authority.

106. *See* Mark Moller, *Procedural Siloing*, PRAWFS BLAWG (Aug. 21, 2012, 10:35 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/08/procedural-siloing.html ("Procedural law is bottom-up law. It tends to develop at the trial court level, not the Supreme Court level.").

107. FED. R. CIV. P. 4(a)(1)(A).

108. *See, e.g.*, FED. R. CIV. P. 4(e) (specifying several alternative methods for serving individuals within a judicial district of the United States).

109. FED. R. CIV. P. 4(d)(2).

minimal level in procedural regulation, and my proposal here is to recognize and amplify its place as a regulatory tool.

B. Reason Giving and Its Uses as a Regulatory Tool

I have suggested that certain aspects of judicial trial management closely resemble the tasks of an administrator and that, therefore, the operation of certain procedural devices might best be regulated as if they were in the domain of administrative law. The administrative law tool that I suggest is reason giving, yet one might argue that the project of writing justificatory decisions is already central to the judicial role. This section investigates the phenomenon of reason giving as a general matter, and its role as a regulatory tool in particular.

The project of administrative law is instructive because "explicit reason-giving [is] a major part of the industry of the administrative state"[110] and could have applications beyond the agency context.[111] The principle has shaped the practice of administrative decisionmaking since its inception, and "the Supreme Court has extended the demand for explicit reason-giving to virtually every form of agency action and every conceivable type of deficiency in an agency's stated justification for its action."[112]

Administrative law deals largely with the problem of delegated authority. Legislatures delegate decisionmaking and rulemaking authority to administrative agencies because agencies possess the resources and expertise to engage in the particularized and context-specific activity of generating, interpreting, and applying rules. Delegated authority, however, comes at the cost of a loss of democratic accountability and the concern that agency decisions are founded on incorrect or incomplete findings of fact, on arbitrary or impermissible reasoning, or are otherwise unsound. Administrative law contains a web of doctrines to accommodate the benefits of delegated authority while managing its difficulties. One key feature of this system is the reason-giving requirement for agency decisionmaking.

The reason-giving requirements in administrative law stem from explicit statutory requirements and case law development. The

110. Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 957 (2007); s*ee also* Short, *supra* note 8, at 1813 ("Reason giving is central to U.S. administrative law and practice.").

111. Stack, *supra* note 110, at 1013–20 (suggesting that certain actions of the President taken under powers granted by Congress are subject to the *Chenery* reason-giving requirements).

112. *Id*. at 962; s*ee also* Short, *supra* note 8, at 1815 (explaining that the APA's "arbitrary and capricious" standard for agency rulemaking "demand[s] rational reasons and evidence developed by an agency").

Administrative Procedure Act (APA) itself requires a statement of reasons to accompany certain types of decisions.[113] The Supreme Court has added to the reason-giving requirement by specifying in the *Chenery*[114] decision that "agency actions will stand or fall based on the reasons that the agency itself provides, even if other reasons could be found to support those actions."[115] The Court further defined reason giving in the context of arbitrary and capricious review of informal agency action in the *Overton Park*[116] and *State Farm*[117] cases. This line of cases established "hard look" review, which requires more than simply a statement of reasons and demands that an agency consider and document evidence and competing policy alternatives.[118] The growth and development of the hard look doctrine has been tied to courts' conception of how much authority has been delegated to administrative agencies and how best to manage that discretion.[119] The scope of administrative reason giving and the permissible range of influences and evidence for those decisions has been the subject of intense academic debate in administrative law circles. The important point here is to expose the foundations of administrative law reason giving that make it unique—namely, that the validity of a decision is measured by the nature and quality of the reasons given by the decisionmaker, rather than by reasons or arguments that could be supplied post hoc by a reviewing tribunal.[120]

There is an intuitive appeal to reason giving, and discussions of the virtues of giving reasons has a long and rich intellectual history that engages any number of public and private actors: the philosopher, the legislator, the judge, the administrator, and the citizen-observer. When a decisionmaker delivers a reasoned justification for a decision, it signals that the grounds for decision are public and could be verified or replicated by an external source. A reasoned decision is harder to characterize as the product of a decisionmaker's whim or fancy.

The benefits of reason giving inure to different parties. Reason giving benefits the parties to a dispute when the decisionmaker has listened to or

113. Administrative Procedure Act § 8(b), 5 U.S.C. § 557(c)(3)(A) (2006).

114. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

115. Short, *supra* note 8, at 1818.

116. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

117. Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

118. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5–6 (2009) (describing the evolution and standards of hard look review).

119. Garland, *supra* note 118, at 520–525.

120. *See* David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, *in* COMMON LAW THEORY 134, 143–146 (Douglas E. Edlin ed., 2007) (discussing the reason-giving duties of judges and administrative agencies in other common law countries).

accounted for the positions of the interested parties and then based the decision on rational and publicly accessible grounds.[121] Third parties and the public at large benefit from the information generated by the decision and also from the assurance that decisionmaking processes are fair such that the *process* for reaching a decision is relatively predictable, even if the *outcome* of every decision is not. The decisionmakers themselves benefit from reason giving insofar as it clarifies one's own thinking and illuminates facts or conclusions that might need additional support.[122]

These are appealing thoughts: who *wouldn't* prefer a transparent statement of reasons for every decision? The development of the common law itself seems to place justificatory decisions at its core: the content of the law itself springs from a series of decisions about specific disputes that are resolved with reference to public and generalizable reasons.[123] The practical reality, however, is that many decisions made by judges, as well as decisions from other decisionmakers, are issue without a statement of reasons.[124] Portrayals of the judicial role as a center of reason giving tend to focus on the central and dispositive decisions that judges make. Judges, however, must make many decisions, not all of which can or should be supported by publicly reasoned and written opinions.[125] Moreover, in most instances, judges are not *required* to give reasons for their decisions.[126] That is to say, a judicial decision may stand if the ruling is correct, even if the reasoning is wrong.[127]

Administrative law is one realm where the project of giving reasons moves from a virtuous (and perhaps aspirational) practice, to a regulatory tool. Reason-giving requirements in administrative law address specific problems with the administrative state, namely, the need for transparency, democratic accountability, and the regulation of delegated discretion. Reason giving is thought to ensure a certain level of quality and uniformity in the decisionmaking process because decisions are made by diffuse

121. *See generally* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283 (2008).

122. Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180. This may or may not be true of *written* reasons, a question to which I return in Part III.B.2.

123. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995).

124. *See id*. at 637.

125. *Id*.

126. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 379 (2012) ("Neither constitutional review of federal legislation nor the standards of appellate review of lower court decisions impose this demanding uphold-only-for-the-reasons-given rule.").

127. *See* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 472 (1981) (failure to give reasons in criminal case not reversible error); Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 333 n.147 (1982) ("A case frequently cited to support broad statements that due process does not require judges to give reasons for their decisions is Arizona v. Washington, 434 U.S. 497 (1978)."). *But see* FED. R. CIV. P. 52(a)(1); 18 U.S.C. § 3553(c) (2006) (requiring judges to disclose reasons when sentencing some criminal defendants illustrate a few exceptions to this general rule).

administrators on vastly different subjects. They assure the public and interested parties that, not only are the decisions rational and transparent, but that the process and outcome are available to the public in a predictable and uniform manner. Many of these problems and motivations map nicely onto the realm of managerial judging, and it is to this area that I now turn. Thus, despite the fact that judges do not, as a matter of law or practice, engage in formal reason giving, their role in the common law system as the writers of justificatory opinions makes them well suited for using reason-giving rules.

III. NEW DIRECTIONS FOR RULE DESIGN

In the abstract, making the case for the project of a reason-giving requirement is fairly straightforward. Insofar as "[a] decision-maker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decision-maker able to proceed by simple fiat,"[128] it hardly seems controversial to suggest that judges justify their decisions with meaningful reasons. The challenge in designing an effective reason-giving requirement lies in specifying *how* judges should engage in a project of reason giving that improves upon the existing norm of justificatory opinion writing and in choosing the *form* of reason giving so that it is effective without becoming inefficient or onerous.[129]

A. Sketching the Contours of a Reason-Giving Requirement

Part I of this Article showed the deficits in current formulations of some procedural rules, particularly some of the rules of joinder. That analysis, however, also forms the basis for the strength of a reason-giving approach. Rulemakers should deploy the tools of reason giving to regulate devices that have such deficits. In determining the "how" of reason giving, rulemakers would need to decide what sorts of reasons judges ought to be giving, and how a rule would best promote this project. This Article proposes that reason-giving rules for procedure take the following form: (1) The rule should make an *explicit grant of discretion* to the trial court; and (2) the rule should contain an *explicit list of policies* that the trial court must use to give reasons on the record for its decision. This style of rule closely resembles the *Chenery* model from administrative law in which

128. Shapiro, *supra* note 122, at 180.

129. Discussion of the form that reason-giving rules should take is deferred to Part III.C.

(nearly) any outcome of an agency rule or decision is permissible, so long as the decisionmaker has supplied adequate reasons for decision.[130]

The explicit grant of discretion serves a few important functions. First, it clarifies the nature of the discretion that a judge exercises in these aspects of managing litigation. As currently drafted and applied, some rules convey an ambiguous or mixed message about the type of discretion they may (or may not) grant.[131] To the extent that the rules are drafted as standards that are subject to a healthy dose of interpretive discretion, the present range of interpretations and applications resemble the unchecked or chaotic power by the judge. And to the extent that the rules are meant to convey a certain degree of managerial flexibility, the formulations of the standards do not suggest meaningful criteria or boundaries within which a judge should exercise discretion.

Moreover, if a rule explicitly grants discretion to the trial judge, it signals that a certain type of reason giving is in order. Such a grant would indicate that the judge has the expertise and knowledge to come to a conclusion that cannot be anticipated in detail ex ante by the rulemakers, and that there is a range of permissible reasons that a judge may examine and apply in order to justify her decision. An explicit grant of discretion would be admission by the rulemakers that, not only can they not anticipate all possible factual scenarios in advance, but that a vague standard that has a façade of uniformity[132] covering an implicit grant of interpretive discretion does not convey meaningful information about the content of a directive. An explicit grant of discretion would reinforce the idea that the procedural device is being regulated *both* by the content of the rule *and* by the way the judge applies it to a given situation. In other words, the regulation is found as much in the reasoning as it is in the content of the standard.

Having made a grant of discretion explicit, the rule must also communicate the contours of the reasons to be given. The FRCP as currently crafted manifest an "avoidance of prospective policy choices."[133] This need not always be the case. Rulemakers could do a more comprehensive job ex ante of defining the purposes and goals of procedural devices, incorporating these standards or factors into the rules, and specifying how judges should consider each factor.

Procedural rules vary in how explicitly the rulemakers have stated the purposes of a procedural device, the policy choices embodied, or how a

130. *See Chenery I*, 318 U.S. 80, 93–95 (1943).

131. Short, *supra* note 8, at 1815.

132. As Professor Burbank has observed, "[r]ules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform . . . in only the most trivial sense." Burbank, *supra* note 24, at 715.

133. *Id*.

judge should resolve a conflict between the multiple values or goals encompassed by a single procedural device. Consider the example of Rule 15(c), which states that "amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ." As I have argued above and in my previous work, the rationale behind the relation-back doctrine does not appear in the text of the directive. More importantly, it does not convey the policies and values behind relation back, nor is it clear that the rulemakers themselves have even made any such definitive policy decisions. The rule does not dictate what policies or factors a court should consider; however, judges have approached the rule like many other rules or statutes and supplied the rationales by looking to prior interpretations of the rule and appealing to common sense equitable arguments regarding the fairness of permitting a party to amend its pleading. Even so, the policies behind relation-back doctrine decisions interpreting and applying 15(c) have produced a confusing landscape of conflicting decisions.[134]

A relation-back rule that promotes reason giving would grant discretion to the judge to permit amendment of a pleading so long as the court has considered, and perhaps weighed, certain factors. One of the policies behind the relation-back doctrine is that it should only be applied when the adverse party has adequate notice of the amended claims.[135] The "conduct, transaction, or occurrence" standard is supposed to further this policy by ensuring that only "related" claims can be added if time-barred, the relatedness serving as a proxy for notice.[136] If the claim is sufficiently related, so the logic goes, then the adverse party is charged with notice that additional claims might be asserted against him. The problem with using "notice" as the touchstone policy behind the interpretation of "conduct, transaction, or occurrence" is that it adds little or nothing of value to the relatedness standard in the directive. It also smacks of circularity: a party must have had notice if the claims were related, and relatedness is defined by notice. In other words, just adding more descriptive policy language to the text of a rule does not necessarily ensure that the rule will become clearer, or that judges would engage in targeted policy-oriented reason giving.[137]

A better approach would be to look behind the notice concept, find distinct policies, and bring them forward as part of the standard. In my

134. *See* Effron, *supra* note 7, at 785–89.

135. *Id*.

136. *Id*.

137. The "notice" standard for Rule 15(c) is standard across all circuits, but has not resulted in uniformity or predictability in 15(c) decisions. *See id*. at 783–89.

previous work, I showed how judges engage in a practice of "redescription" to utilize the categories of fact and law to shore up claims they believe to be related or break apart claims they believe to be inappropriate candidates for joinder, even if they appear nominally related. In the context of Rule 15(c) decisions, this practice is more than an example of judges applying a malleable standard in a haphazard fashion. Rather, it shows that judges are struggling with a number of underlying and sometimes conflicting policies, namely: (1) whether it is fair or efficient to allow a party to change her legal theory when it is based on the same factual scenario as the original complaint; (2) whether it is fair or efficient to allow a party to describe a factual scenario in general terms, and then add claims that depend on more specific facts that fall within the original factual scenario but have not been included in the original complaint; (3) whether it is fair or efficient to allow a party to define a factual scenario by reference to the type of claim asserted, for example, by adding additional instances of discriminatory conduct to a complaint that initially pled a discrete or narrowly defined instance of discrimination.[138]

Each of those factors represents the genuine policy interests that are at stake when a judge is deciding whether to permit the amendment of a complaint to include a time-barred element. Some of these concerns involve notice, but others appear to be related to more general concerns about the fairness or efficiency of adding additional claims or defenses well into the litigation process.[139] The current standard does not explicitly condone an honest examination of these factors, how they might conflict, and how one policy might be more compelling in some cases than others. Instead, judges are left to use shadow tools such as redescription in order to appeal to these policy goals. The decisions then lack a common metric and appear to form an inconsistent and frustratingly opaque area of law.

Suppose that Rule 15(c) were written with the promotion of reason giving in mind. Following the model of explicit discretion coupled with factors for consideration, the rule might read as follows:

138. For a longer explication of each of these policies, see *id*.

139. This concern is somewhat in conflict with the otherwise liberal policy of Rule 15 to allow amendments of complaints where the claims are not time-barred. *See* FED R. CIV. P. 15(a)(2) (Judges should "freely give leave" to amend a complaint "when justice so requires.").

Current Rule 15(c)	*Sample Rule 15(c)*
RELATION BACK OF AMENDMENTS. (1) *When an Amendment Relates Back*. An amendment to a pleading relates back to the date of the original pleading when: . . . (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading	RELATION BACK OF AMENDMENTS. (1) An amendment to a pleading relates back to the date of the original pleading when: (A) the amendment asserts a claim or defense that is related to the claims or defenses set out—or attempted to be set out—in the original pleading. The court may find that a claim or defense relates back after considering: (i) Whether the addition of a novel legal theory would cause undue delay or hardship to the adverse party; (ii) Whether the pleading contains new facts, the investigation and litigation of which would cause undue delay or hardship to the adverse party; (iii) Whether the factual scenario, liberally construed, allows the party to assert additional claims on similar legal theories.

The purpose of such a rule would not be to force a judge to decide between the policies, or even to specify that one is more important than the others. Rather, it acknowledges that each of these factors may be more or less salient in any given case and that the trial judge has the expertise to make the determination, both as a matter of fact and as a matter of policy.[140]

To be clear, a rule that simply provides a list of factors does not necessarily function as a reason-giving rule. Take, for example, Rule 23. Rule 23 is long. It contains significant detail regarding how class actions should be certified, maintained, settled, appealed, and how notice must be

140. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 3 (2005) ("In filling those gaps with case-specific interpretive responses, federal courts perform an important policymaking function.").

given to class members. Rule 23(a) famously gives a list of factors that a judge must consider as prerequisites to certifying a class: numerosity, commonality, typicality, and adequacy of representation.[141]

Just because this is a list of factors, however, does not mean that the list is useful, particularly as a reason-giving exercise. Each of those four factors is very broad (if not vague), and the meaning of each is hotly contested. Indeed, some judges and scholars question whether some of the factors such as typicality and adequacy are even distinct.[142] A reason-giving element would specify, within each of these categories, further factors that a judge should consider. For example, the factor of numerosity might state that a judge should consider explicitly *why* or *how* joinder is impracticable. The typicality and adequacy factors might require a judge to consider a set number of different arrangements of lead plaintiff and counsel in order to articulate and conclude why the chosen parties fulfill one or both of these factors.

Other rules in the FRCP come closer to filling in some of these details. For example, the rule for permissive intervention in federal courts, Rule 24(b) states that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."[143] Like the "transaction or occurrence" standard, the fairly generic "common question of law or fact" standard does not give any further direction as to the application of the rule or the policies that judges should be fulfilling when permitting an intervenor. Is a "common question of law or fact" the same standard, policy, and concerns that a judge should consider when interpreting and applying Rules 20, 23, and 42? A survey of decisions shows that judges will sometimes, but not always, consider the policies and goals of other joinder devices using the same language in interpreting the phrase.[144] Thus, the reasons articulated for one application of the rule may not be comparable to or consistent with other uses of the phrase.

Rule 24(b) does, however, contain some additional elements that move it toward a reason-giving model. Rule 24(b)(3) directs that the judge, in exercising her discretion, should consider "whether the intervention will

141. FED. R. CIV. P. 23(a).

142. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 n.5 (2011) ("[T]he commonality and typicality requirements of Rule 23(a) tend to merge.") (internal quotation marks omitted); *see also* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1060 (2005) (stating that the Supreme Court has "collapse[d] the commonality, typicality, adequacy, and predominance inquiries"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 62 (1991) ("There is some conceptual and factual overlap between the typicality and adequacy requirements.").

143. FED. R. CIV. P. 24(b)(1).

144. *See* Effron, *supra* note 7.

unduly delay or prejudice the adjudication of the original parties' rights."[145] In combination with 24(b)(1)'s requirement that the motion be "timely," this rule could be effective in promoting reason giving. This might in fact be true—in my original study of joinder rules, I did not find the same complications in the interpretation and application of Rule 24(b)(1)'s "common question" as I did in other rules such as Rule 20. Rule 24(b), however, suffers from another and rather curious problem: its proximity to Rule 24(a). Rule 24(a) governs intervention as of right, and as a practical matter, parties seeking to intervene in an action will seek to intervene under Rule 24(a) and use Rule 24(b) as a backup or alternative basis for intervention. Typically, a court considering such motions will make a detailed analysis of the standard in Rule 24(a) and then grant or deny the Rule 24(b) motion for "similar reasons" that the court has already recited for the 24(a) motion.[146]

Given the frequency of this practice, one would assume that the standards, factors, and policies of the two rules are fairly similar. In fact, the "interests" analysis of Rule 24(a)(2) is quite different from the relatedness analysis that 24(b)(1) purports to demand. Rule 24, then, illustrates another facet of the difficulty in designing rules to promote reason giving: the fact that the availability of alternative procedural devices can affect how parties frame an issue and how judges relay decisions. A rule for a device like permissive intervention might need special language to alert judges to the fact that separate reasoning is needed from that of intervention as of right.

A keen focus on a well-designed list of factors encourages the production of useful information.[147] Many of the procedural devices associated with managerial judging are intertwined with thorny questions of litigation costs. A reason-giving process that encourages judges to both consider and disclose the actual or projected costs to the parties and to the court of the use of a procedural device would be a useful tool in illuminating the shadowy areas of procedural costs. Judges, lawyers, and commentators often invoke the high costs of some pretrial devices to the parties and the court. The exact costs, however, are little known. Judges are not operating in a black box when making such cost calculations. Indeed, their special knowledge and expertise of the realities of how devices are used and how much they cost is precisely the reason that rulemakers can or do delegate authority to trial judges to make such decisions. What is

145. FED. R. CIV. P. 24(b)(3).

146. Analysis of Rule 24 decisions collected from Westlaw on file with the author.

147. *See* Davis & Hershkoff, *supra* note 93, at 541 ("[A]djudication is an important source of information, the classic public good. In the course of adjudicating a dispute, a court generates information about (1) the dispute and (2) the process of adjudication. The procedural rules employed by the court influence the production and dissemination of both kinds of information.").

missing, however, are basic facts about the costs of such devices across parties, districts, or types of cases, so that judges could ensure that decisions regarding costs are made according to a determinable and articulable baseline. The disclosure of the factual information behind the organized reasoning of courts could form the beginning of such a dialogue and inquiry.

Not every procedural device is an appropriate candidate for a rule that couples an explicit delegation of discretion with a reason-giving element. In addition to narrowing the group of suitable devices to those closely associated with the managerial tasks of judging,[148] one must consider carefully whether certain devices should be subject to the exercise of judicial discretion. One such device, for example, is the compulsory counterclaim. Although the compulsory counterclaim is a joinder device that implicates emblematic managerial concerns about packaging and organizing a lawsuit, its function is primarily to assist courts in determining whether a future claim may be barred or whether a present claim makes possible federal subject matter jurisdiction.[149]

"Claim-determinative" devices like compulsory counterclaims do not manifest as strong of a tension between regulation and discretion because the values of predictability and of starkly delineating federal authority are particularly high. A rule of compulsory counterclaims that hinges on an explicit grant of discretion seems a contradiction in terms, and would not signal to litigants the sort of finality and predictability that such a procedural device is meant to convey. Compelling as these concerns might be, Rule 13(a) at present can already be characterized as a discretionary standard cloaked in the form of a mandatory rule.[150] Despite this observation, I believe that with a device such as the compulsory counterclaim, it is wiser to continue to strive toward better accuracy and precision in the standard itself, rather than turning to the second-best solution of explicitly delegated discretion and promotion of reason giving.

B. Requiring Reasons?

Should judges be *required* to give reasons? If so, must these reasons be in writing? These questions encompass the functions of judicial decisionmaking far beyond the narrow slice of procedural law with which this Article is concerned.[151] To the extent that I am advocating an

148. *See supra* notes 57–62 and accompanying text.

149. *See supra* notes 8–9 and accompanying text.

150. *See id*.

151. *See* Oldfather, *supra* note 121, at 1318–20; *see also* SCHAUER, *supra* note 123, at 140–42; Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 1002–05 (2008).

administrative law approach for the rules covering select procedural devices, I must also explain why reason giving should be required, as opposed to merely suggested or encouraged, and how such a requirement might be enforced.

1. A Preliminary Argument for a Mandatory Rule

Reason-giving rules could take two forms. One would require reason giving. The other would merely promote or encourage reason giving. *Chenery*-style rules and the APA take the requirement path. But before automatically assigning that requirement to judges, one must consider whether a rule can or should make this requirement and whether the requirement is preferable to the alternative.

The reason-giving requirement in administrative law stems from the Supreme Court's decision in *Chenery*, which held that an administrative agency's actions may only be upheld when the agency has provided valid reasons for its decision.[152] Congress delegates discretion to an administrative agency to maximize an agency's flexibility to exercise its special knowledge. A similar delegation of discretion to judges—persons with special expertise in administering litigation—can be seen in some procedural rules. As Professor Watts has noted of the Supreme Court, "Congress's willingness to give the Court broad discretion can be explained largely by functional concerns relating to expertise and flexibility."[153] Thus, the reason-giving requirement of administrative law is an apt analogy to the procedural context when the judge is cast as an administrator of dispute resolution.

When a procedural rule is the product of the tension between regulation and discretion, it does not wear its rationale on its face. When rulemakers do not state or even agree upon policies and reasons for a device and its associated directive,[154] this task either falls to the judges applying the rules or results in chaotic doctrine. Similarly, when trial court decisions are insulated from appellate review, the result can be both a lack of reason giving, or a lack of an organized reason-giving framework that might have resulted from regular appellate review of such decisions.

To suggest that some procedural rules should incorporate a reason-giving element is not to say that judges currently operate in a chaotic, unbounded, completely arbitrary, or totally opaque universe. Judges are keenly aware of the need to provide public and serious explications of their

152. *Chenery I*, 318 U.S. 80, 93–94 (1943).

153. Watts, *supra* note 105, at 24.

154. The official Advisory Committee Comments to the FRCP sometimes fill this function.

decisions, both out of an internal sense of the public interest,[155] a constraint against arbitrary decisionmaking,[156] and out of an understanding that the parties as well as the larger audience of the legal community demand explanations,[157] whether they come in the form of lengthy opinions, short written memoranda, or short verbal statements on the record. However, "[s]ometimes, federal courts fail to explain procedural decisions" because "it is often difficult to specify the conditions for many routine managerial decisions, even those with significance for the parties."[158] This argument should not be taken as a criticism of judges for ruling without articulated or articulable reasons. Rather, it is a suggestion that the current structure of some procedural rules does not fully harness the power of directed and organized reason giving as a tool for the development of procedural regulation.

The difficulty of moving from extreme factual particularity to more general reason giving has stymied the ability of courts to create a workable body of applicable rules or joinder devices. But it would be unfair to lay the blame at the feet of judges, as if they are unwilling or incapable of giving reasons. Rather, the fault lies in rules that have been designed to block rather than foster reason giving.

The Supreme Court has formulated the reason-giving requirement as one that establishes a "rational connection between the facts found and the choice made."[159] The problem with some of the procedural decisions identified in Part I is not that they lack reasons, but that the reasons are often a recitation of facts followed by a recitation of the legal standard.[160] Such recitations, even if detailed and thoughtful, do not necessarily mean that a judge has engaged in reason giving. Professor Schauer, in his exploration of reason giving, has argued that extreme specificity and

155. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14 (1993) (discussing the judicial sense of public interest); *see also* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1285 (2009) ("Social scientists and philosophers have recognized that reason-giving is an innate characteristic of human beings that is associated with our ability to rationally evaluate and justify our actions.").

156. *See* Maltz, *supra* note 79, at 1400–02; Schauer, *supra* note 123.

157. *See* Tracey E. George et al., *The New Old Legal Realism*, 105 NW. U. L. REV. 689, 690–91 (2011) ("[J]udicial opinions . . . tell consumers of law what they should expect courts to do in the future."); Maltz, *supra* note 79, at 1397 (describing arguments for the legitimating function of Supreme Court opinions).

158. Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 651 (2011).

159. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

160. *See* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1394–95 (1995) ("The mere recitation of a Rule . . . adds an air of legitimacy to decisions concerning procedure."); Schauer, *supra* note 123, at 637 ("Trial judges sometimes employ [a non-reason-giving] approach, coupling a narrative of their conclusions of fact with a quite uninformative list of their conclusions of law.").

particularity defeat the project of giving reasons because "if a reason were no more general than the outcome it purports to justify, it would scarcely count as a reason."[161] This sort of extreme particularity and factual specificity dots the landscape of allegedly disparate joinder decisions. Although the opinions may look as if the judges are giving reasons, the nature of the writing and conclusions makes the decisions difficult to amalgamate into a set of coherent principles. Thus, a reason-giving system would be one that "promotes accountability by limiting the scope of available discretion."[162] These are rules that would move toward a seemingly paradoxical world in which judges' decisionmaking discretion is constrained while their managerial discretion remains intact.

Although the situation of a judge managing litigation is analogous to that of a regulator in the administrative state, they belong to fundamentally different institutions of government. The fact that judges are hardly ever mandated to give any explanation or particular reasons for their decisions is often cited as a feature of the judiciary that distinguishes it from agencies.[163] Thus, there are serious reasons to consider crafting these rules as simply "reason promoting" rather than as full-fledged reason-giving requirements in the style of *Chenery* or the APA.

As a technical matter, the reason-giving rules that I describe would not necessarily have to come in the form of a reason-giving requirement. A procedural rule could be crafted with an eye toward promoting reason giving without mandating it. Take, for example, the mechanism for remand of supplemental jurisdiction cases to state court under 28 U.S.C. § 1367(c). This Section allows a judge to remand a claim to state court, even if the supplemental jurisdiction requirements of § 1367(a) are met. The text of § 1367(c) follows the form that I recommend above. It begins with an explicit grant of discretion,[164] and then presents a list of four factors that the judge should consider when making her decision.[165] At no point, however, does this statute *require* that a judge state her reasons for decision. Review of decisions under § 1367(c) is made under an "abuse of discretion"

161. Schauer, *supra* note 123, at 635. For a criticism of the "particularism" argument, see Gerald J. Postema, *A Similibus ad Similia: Analogical Thinking in Law*, *in* COMMON LAW THEORY 108–110 (Douglas Edlin ed., 2007).

162. Staszewski, *supra* note 155, at 1279.

163. *See* Watts, *supra* note 105, at 25–26.

164. 28 U.S.C. § 1367(c) (2006) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . ."); *see also* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009) ("A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary.").

165. 28 U.S.C. § 1367(c) ("(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.").

standard[166] which requires the appeals court to reverse only if there has been an error in *judgment*, and not merely an error in reasoning or reason giving.[167] Despite the apparent lack of a reason-giving requirement, district judges remanding (or retaining) supplemental claims under § 1367(c) have produced a rich body of justificatory decisions[168] with reasons that closely align with the factors in the statute and the gloss given by the Supreme Court.[169] Thus, it is possible for a rule to nudge judges in the direction of organized reason giving without imposing a strict reason-giving "requirement."

A rule that merely promotes reason giving, however, still might not be as effective as a reason-giving requirement. Such a rule runs the risk of simply encouraging a judge to list factors and state conclusions without really stating reasons that identify relevant facts and articulate their relevance to a discretionary decision.[170] Moreover, a reason-giving requirement furthers the goal of regulating the *process* by which judges handle managerial problems, solicit information from litigants, and assess possible solutions.[171] A *Chenery*-style rule would require the judge to disclose more than a mere statement of conclusory reasons,[172] thus affecting the process of decisionmaking itself.[173]

One of the benefits of this process is that information disclosure is a byproduct of reason giving. Information-disclosure theory can itself be a powerful regulatory tool and has been cited as a basis for some models of

166. *See, e.g.*, Henderson v. Nat'l R.R. Passenger Corp., 412 F. App'x 74, 79 (10th Cir. 2011); Gamel v. City of Cincinnati, 625 F.3d 949, 951 (6th Cir. 2010).

167. Although the Supreme Court at one point suggested that "a district court may not remand a case to a state court on a ground not specified in the removal statute," Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 355 (1988) (citing Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 339 (1976), *overruled on other grounds by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)), it has expressly disclaimed this language. *Id*. at 356 (limiting *Thermtron* to cases of "clearly impermissible remand" rather than cases of discretionary remand under § 1367(c)).

168. See Westlaw Notes of Decisions for § 1367(c) for a sampling and summary of such decisions.

169. *See Cohill*, 484 U.S. at 350 ("[A] federal court should consider and weigh in each case, at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.").

170. *See* Macey & Miller, *supra* note 142, at 61–62 (describing problems with Rule 23).

171. *See* Shapiro, *supra* note 122, at 182 (noting how reason-giving requirements are tied to the growth of developing a record).

172. *Id*. at 183 ("[A] giving reasons requirement inevitably imposes some pressure on the administrator to offer at least summary findings of fact."); *see also* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1435–45 (1992).

173. *See* Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 821–23 (stating that reason-giving requirements, as implemented through judicial hard look review, force agencies to deliberate in a democratically accountable way).

reason giving in administrative law.[174] This Article does not advocate a formal information disclosure regime, insofar as it does not target judges as regulatory subjects who are "withholding" important information, the disclosure of which would promote a regulatory end in and of itself.[175] Moreover, mandated information disclosure and sharing have been criticized as a stand-alone regulatory technique.[176] However, the idea of information disclosure shares with reason giving the idea of "[using] communication as a regulatory mechanism."[177] It bolsters reason giving because it helps build the body of information that judges can use, and thus heightens the expertise upon which the delegation of discretion is based.[178] Reason giving and information disclosure go hand-in-hand because "when an official's explanation for her decision is based on empirical claims, they should be based upon reliable methods of inquiry and consistent with available information."[179] It is the absence of this particularized information that renders ineffective a multi-factored or balancing test rule that does not carry with it a reason-giving requirement.

2. Stopping Short of a Writing Requirement

Although I have argued here for a reason-giving requirement in certain procedural rules, I have couched this as a "preliminary" suggestion because significant changes or increases to judges' procedural and substantive workload must be carefully evaluated. Moreover, it is unusual to disturb the basic assumption that judges need not state particular reasons for their

174. *See* Short, *supra* note 8, at 1844 (attributing information-disclosure theories to scholars promoting political reason giving).

175. *Id*. at 1846 (summarizing the five characteristics of an information disclosure regime).

176. *See* Ryan W. Scott, *The Skeptic's Guide to Information Sharing at Sentencing*, 2013 UTAH L. REV. (forthcoming); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 681 (2011).

177. ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 47 (2008). Some scholars have investigated whether procedural rules can serve an information-forcing function for the *parties* about the values of their claims and the costs of litigating. *See* Nagareda, *supra* note 95, at 653 ("A world of vanishing trials invites exploration of whether procedural doctrine might benefit from the development of additional pretrial motions that are not dispositive but, rather, informative—motions that do not speak to whether trial may occur but seek instead to inform directly the pricing of claims via settlement."); Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 1 (arguing that the *Twombly/Iqbal* interpretation has turned Rule 8(a) into an information-forcing rule for parties).

178. The choice between rules and standards, for example, is often couched as one involving the government's acquisition and dissemination of information about the appropriate content of the law. Whether a law should be given content ex ante or ex post involves determining whether information should be gathered and processed before or after individuals act. *See* Kaplow, *supra* note 3, at 585.

179. Staszewski, *supra* note 155, at 1282.

decisions.[180] For this reason, I resist concluding that a reason-giving requirement should always take the form of a written opinion.

Judges' decisions can take the form of oral rulings from the bench, short memoranda and orders or minute entries memorializing a ruling in a docket, or longer written opinions. Written opinions are a natural fit for reason-giving rules insofar as the *process* of writing may enhance and refine judicial reasoning[181] and the *existence* of written opinions serve a valuable publicity function.[182] This Article stops short, however, of recommending that rulemakers codify a writing obligation as part of a reason-giving directive.

There are good reasons to view a writing requirement with a healthy degree of skepticism. First, writing opinions is a time-consuming process. Any procedural rule that places additional burdens on an already resource-strained judiciary is unlikely to be met with great enthusiasm. This, in and of itself, is not a reason to jettison a pursuit of written opinions. If the project of giving reasons can substantially improve outcomes in a particular area of law, then it is worth imposing on the judiciary to garner those benefits. The concern about limited judicial resources, however, should be taken seriously. The procedural devices that this Article considers are, almost by definition, those that rarely involve direct engagement with the merits of a lawsuit. A reason-giving rule that required a judge to provide a written statement of reasons for every single joinder or discovery decision would likely prove too onerous a burden, especially if a judge's managerial tasks should play a secondary role in a system that should be advancing the cause of dispute resolution.[183]

Second, while the idea that the process of writing augments reasoning abilities has intuitive appeal, that claim has not been empirically verified. In his careful survey of psychological research on this subject, Professor Oldfather has concluded that "the common understanding concerning the

180. Although this is the default position, there are a few instances where federal judges are or have been subject to a reason-giving requirement. *See* AEDPA, 28 U.S.C. § 2253(c)(3) (2006); FED. R. CIV. P. 59 (when granting an order for a new trial on its own initiative, "the court must specify the reasons in its order"); U.S. SENTENCING GUIDELINES MANUAL; *see also* Ryan W. Scott, *The Skeptic's Guide to Information Sharing at Sentencing*, 2013 UTAH L. REV. (forthcoming) (summarizing information disclosure and reason-giving requirements in state and federal sentencing schemes).

181. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L REV. 1421, 1447 (1995) ("In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it."); Schauer, *supra* note 123, at 652 (suggesting and questioning whether "the very fact of writing . . . serves as a constraint").

182. Schwartzman, *supra* note 151, at 1008–12 (explaining the value of publicity of judges' reasons).

183. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012) (criticizing pretrial rules of procedure that fail to advance dispute resolution in the modern reality of vanishing trials and frequent settlement).

utility of [written] judicial opinions *usually* holds true,"[184] but that there are certain situations in which verbalizing or writing opinions would not improve—or could even worsen—reasoning.[185] The situations that Oldfather identifies are those in which "judges must make decisions based on complex, multifaceted inputs, subject to a host of competing considerations."[186] Oldfather's summary of the psychological research is that these types of decisions depend on both articulable and inarticulable reasons, and that a writing (or verbalization) requirement will lead a judge "to overweigh the articulable components of his analysis relative to other factors."[187]

Many of the procedural devices described in Part I of this Article fit Oldfather's description of situations where one should be wary of privileging written opinions—they are "complex, fact-intensive situations" that require "context-based judgments."[188] One of Oldfather's important insights, however, is that it is difficult to discern the boundaries between cases where opinion writing improves, worsens, or has no effect on reasons, and that "there may be no reliable way to make an ex ante determination of which category a particular case falls into."[189] It is the judge herself who is in the best, albeit imperfect, position to gauge whether a written opinion would worsen reasoning through a fact-specific situation, or whether a written opinion would in fact force a more careful consideration of the complex facts that contribute to the difficulty of the decision.

The concerns I have outlined regarding a mandate to write opinions should not distract from the overall utility of the project of reason giving. The reason-giving rules that I have described would not necessarily be aimed at changing the *number* or even the length of written decisions, but in changing the *quality* of the opinions that trial judges are already writing on these subjects, and perhaps by encouraging judges at the margins to choose a written opinion or verbalized statement over a summary order. As detailed earlier, a well-crafted reason-giving rule would improve the overall quality and usefulness of judicial opinions in these areas by encouraging greater transparency in reasoning, as well as greater comparability by unifying and aligning the factors and policies that a judge should consider.

Finally, as documents such as transcripts of oral arguments and rulings from the bench become increasingly available to parties and easily

184. Oldfather, *supra* note 121, at 1286.
185. *See id*. at 1303–17.
186. *Id*. at 1321.
187. *Id*. at 1322.
188. *Id*. at 1286–87.
189. *Id*. at 1324.

searchable, the reason-giving exercise remains valuable even when it is not a written opinion. Although the advent of costless and hassle-free access to court documents has not fully arrived,[190] it is only a matter of time before verbal rulings can contribute to the information base of judicial decisions. Whether or not these rulings would have the same *precedential* value as written opinions, the transparency of readily available and well-reasoned orders might change the lawyering landscape in the way that "unpublished" but easily accessible written opinions once did.

3. Appellate Review

Enforcement of the *Chenery* principle depends heavily on the judicial review policing the reasoning given in agency decisions.[191] Because the reason-giving principles and judicial review of agency action have developed in tandem,[192] it is difficult to disentangle the project of reason giving from the role of the federal courts in supervising agency action. This raises two issues for my proposal. First, it suggests that any reason-giving requirement must also incorporate an ideal standard of review. Second, it means that the success of this project must account for the fact that many of these decisions are insulated from appellate review—a fact that causes some of these problems in the first place.[193]

The current standard of review for most procedural decisions is de novo review—the standard of review for most questions of law. That being said, appellate courts often defer to trial court decisions about matters such as joinder when they are heavily fact-contingent and implicate managerial concerns. One positive consequence of making an explicit grant of discretion in a reason-giving rule is that it could clarify the standard of review by making it into an abuse of discretion standard.

There are many procedural rules for which direct enforcement via de novo review is desirable. These are the rules that fit comfortably within categories described in Part I, rules where regulation and uniformity trump a desire for discretion and where the opportunities for appellate review are not muffled through the structural features of the final judgment rule. These

190. *See* John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N.Y. TIMES, Feb. 13, 2009, at A16, *available at* http://www.nytimes.com/2009/02/13/us/13records.html?r=0.

191. Enforcement of the *Chenery I* doctrine is achieved through "hard look" review, which has been a major tool in policing the processes of agency decisionmaking. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 529–31 (1985) (describing the hard look doctrine and its uses); *see also* Stack, *supra* note 110, at 973 ("[I]nadequate explanation [by agencies] is still among the most common grounds for judicial reversal and remand.").

192. Shapiro, *supra* note 122, at 184–89.

193. *See id*. at 182–84.

are rules where rulemakers have not (or should not have)[194] delegated the development and interpretation of the rules to trial judges. In other words, delegation, reason giving, and deference go together. Although the lack of appellate review might seem to lessen the incentives for judges to adhere to the letter and spirit of reason-giving rules,[195] this type of rule design is, in part, a response to the absence of appellate review for some devices in the first place.

If reason-giving rules are designed to *accommodate* rather than *resist* a lack of appellate review, then their success does not depend on heavy appellate supervision.[196] Such a system relies on the *process* of reason giving rather than on outside enforcement. Thus, reason giving is a second-best solution—a recognition of the real-world constraints of the futility of dictating meaningful standards, as well as the institutional difficulties of policing the reasoning of judges as if they were administrators. Recognizing the limitations of a judicial reason-giving project does not detract from its appeal as a practical solution where other approaches have come up short. After all, "deliberative accountability is self-consciously aspirational in nature."[197]

Moreover, promoting reason giving without strict enforcement via appellate review might help ward off some of the problems that scholars have identified with the hard look doctrine in the administrative state, namely that constant scrutiny and remands of agency decisions have led to "ossification" of the administrative process.[198] The analogous concern here is that an overly burdensome reason-giving structure would slow litigation and make judges overly cautious and unwilling to pursue procedural innovations in difficult cases. The absence of appellate review might promote the right amount of reason giving without chilling the willingness of judges to make a few bold policy decisions in the managerial arena. The success of any reason-giving rules will depend on a delicate balance

194. *See* Mulligan & Staszewski, *supra* note 99, at 1192 (arguing that rules such as those governing pleading standards should be amended by a formal rulemaking process and not subject to development through Supreme Court or lower court adjudication).

195. Commentators are skeptical that avoiding reversal is a large factor in how judges make decisions. *See* Kim, *supra* note 37, at 398 (noting the difficulties in determining how district judges would act in order to avoid reversal); Posner, *supra* note 155, at 14–15 (arguing that avoiding reversal plays a small role in the utility function representing what judges maximize); Short, *supra* note 8, at 1854 ("[D]isclosers often simply resist or ignore mandates, especially when enforcement mechanisms are weak or uneven.").

196. *See* Watts, *supra* note 105, at 38–39 (noting the lack of judicial review as a constraint on Supreme Court certiorari decisions).

197. Staszewski, *supra* note 155, at 1297.

198. *See* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 271–74 (1987) (arguing that intrusive judicial review leads to reduced rule making and increased vehicle recalls at the National Highway Traffic Safety Administration); McGarity, *supra* note 172, at 1400–03 (arguing that agencies will avoid new rulemaking if hard look review makes the process too burdensome).

between burdening judges with onerous writing requirements and encouraging better and more useful opinions concerning the use of certain procedural devices. Avoiding stringent standards of appellate review would lessen these burdens and avoid a trend toward ossification in procedural law.

CONCLUSION

The purpose of using a reason-giving approach in designing certain procedural rules is to regulate some procedural devices through the process of organized reasoning by judges rather than through the direct use of global but vague standards governing a device's application. This type of procedural rule calls for rethinking the role that common law reasoning plays in the development of such procedural rules.

Traditionally, the holdings and reasoning of judicial opinions play a front-and-center role in the development of the law in a common law system. In a common law system, judicial opinions exist not only to set forth a systematic and transparent account of how and why a judge has reached a particular conclusion, but also to create, elucidate, and solidify legal principles. Although courts of appeals are a cornerstone of the law-giving function of courts, trial court judges also participate in the development of legal principles.

Because developing the law is such a central function of judges in a common law system, it is natural to assume that "something" should happen with all of the reasoning processes and accretions of information that judges will be producing in opinions.

I believe that we should resist the urge to think of a body of judicial opinions as automatic fodder for common-law rule making. Just as unpublished appellate court opinions can furnish information about how judges understand and process particular factual and legal scenarios, procedural decisions based on reason giving and process can provide meaningful data to future judges and litigants. In other words, the purpose of reason-giving rules has been fulfilled once the judge has taken the appropriate steps in transparent reasoning, and once information about the costs, burdens, and benefits of the use of a particular procedural device in a given case has been revealed. Where commentators and rulemakers have gone wrong is by trying to shoehorn a potential wealth of judicial knowledge and experience concerning procedural devices into a common law mold of precedential and binding authority. A more realistic picture of the corpus of these written decisions is that they would constitute a "*dialogue* [that] would engage and draw upon a set of fact patterns" to

"facilitate the development of the law."[199] These rules—rich in information but freed from the constraints of strict precedent—are the beginning of that conversation.

199. Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2040 (1999) (emphasis added) (discussing the value of citable unpublished opinions for the development of law in appellate courts).