CLOSE ENOUGH FOR GOVERNMENT WORK: THE COMMITTEE RULEMAKING GAME

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PROCEDURAL rules in U.S. courts often have predictable and systemic substantive consequences. Yet the vast majority of procedural rules are drafted, debated, and ultimately enacted by a committee rulemaking process substantially removed from significant legislative or executive supervision. This Article explores the dynamics of the committee rulemaking process through a game-theoretical lens. The model reveals that inferior players in the committee rulemaking game—advisory committees, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court—are sometimes able to arbitrage congressional transaction costs to obtain results at odds with the results Congress would prefer in a world without transaction costs. This Article presents two real-world examples of possible transaction-cost arbitrage, one involving the 1993 adoption of the “initial disclosures” requirement under the Federal Rules of Civil Procedure, and one involving the implementation of the “means test” requirement of the 2005 bankruptcy reform statute. Though the normative implications of committee rulemaking are ambiguous, the dynamics of the game suggest that a better preference fit between Congress and the membership of the various advisory committees would mitigate the risks of transaction cost arbitrage substantially, while retaining most of the advantages of the committee rulemaking system.

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INTRODUCTION

Procedure is substance. A slight exaggeration, perhaps, but few would dispute that rules of practice and procedure can, and often do, have predictable and systemic substantive effects. For example, a rule awarding class action defendants their reasonable attorney’s fees if the court refuses to certify a plaintiff class would eviscerate the class action as a social policy tool.\(^1\) Liberalization of criminal discovery rules would reduce plea bargains and overall criminal conviction rates as defendants obtained additional information from which reasonable doubt might emerge.\(^2\) Elimination of summary judgment in civil cases would change the game for defendants, who could then be legally vindicated only at trial.\(^3\) Even the adoption of shorter time limits for motion responses could disproportionately harm litigants with fewer resources.\(^4\)

And yet Congress continues to entrust rulemaking authority to the committee rulemaking (“CR”) process.\(^5\) Though the CR process has evolved somewhat since its genesis in the 1930s—a time when most still believed in a clear divide between the substantive

\(^1\) Cf. Fed. R. Civ. P. 23 (mentioning attorney’s fees only in the case of a certified class action).
\(^3\) Cf. Fed. R. Civ. P. 56(b) (permitting defendants to move for summary judgment).
\(^4\) Cf., e.g., Id. 4(m) (giving plaintiffs 120 days to serve defendants with process and notice of suit).
and the procedural—its essential character remains the same. The CR process depends heavily upon inferior actors—area-specific advisory committees, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference, and the Supreme Court—to develop, refine, and approve procedural rules. Congress trusts this process to yield procedural systems that benefit from committee expertise without crossing the line into substantive policymaking. Congress also implicitly trusts itself to correct any missteps those inferior actors may make. Congress’ trust may be misplaced in both cases.

Committee rulemaking is a game, and the game theory of committee rulemaking suggests that these inferior, non-congressional players sometimes have substantial ability to enact their own preferences into law, notwithstanding Congress’ nominal right to veto rules it regards as undesirable. Game-theoretical analysis of the CR process specifically demonstrates that the committee rulemaking game presents opportunities for “transaction-cost arbitrage” in a variety of circumstances.

Though Congress ostensibly retains the right to reject the results of committee rulemaking, its practical ability to do so is constrained substantially by the costs associated with active congressional oversight. Inferior players in the committee rulemaking game can and sometimes do take advantage of these costs by proposing rules that diverge from congressional preference but fall just short of goading Congress into affirmative action. More troubling, the dynamics of committee rulemaking suggest that the advisory

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3 The term “transaction-cost arbitrage” refers to the ability of well-informed players to predict and to take advantage of other players’ total costs of action. For example, a busy Congress may find the opportunity costs of self-informing quite high for a given proposed rules change. Well-informed inferior players may be able to arbitrage those costs by proposing a change that diverges from Congress’ fully-informed preferences by an amount insufficient to prompt congressional self-education and affirmative action.

committees—which occupy the lowest rung on the CR ladder—may often dictate the outcome of the CR process. This is not an abstract problem. In April 1993, inferior players in the CR process proposed radical changes to the discovery process in federal civil cases, including a hotly disputed “initial disclosures” requirement. For the first time, litigants would disclose significant amounts of relevant information to their adversaries at the outset of litigation, without first being asked for that material by their opponents. The general public reaction to this proposal was overwhelmingly negative: the initial disclosures requirement attracted unprecedented public commentary, and more than 95% of those comments opposed the proposal. The House of Representatives even passed a bill explicitly rejecting the initial disclosures requirement. Even so, the initial disclosures requirement became law on December 1, 1993.

And in early 2005, Congress passed bankruptcy reform legislation intended to increase the costs associated with filing for bankruptcy protection and to thereby reduce the number of “abusive” filings. When subordinate CR players generally hostile to the legislation were given the task of drafting rules to implement Congress’ reforms, they proposed requirements that mitigated the cost-increasing effects of the law by limiting the amount of information many debtors were required to collect and then disclose to the court. Despite public protests from highly influential members of Congress, the more debtor-friendly rules went into effect on December 1, 2005 without change. Neither the initial disclosures requirement nor the bankruptcy reform rules have been overridden by Congress.

Both of these high-profile disputes are consistent with transaction-cost arbitrage by the relevant rules advisory committees and other inferior players in the CR game.

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10 See infra Section III.A.
11 See id.
12 See id.
13 See id.
14 See id.
15 See infra Section III.B.
16 See id.
17 See id.
The CR process is generally understudied and undertheorized, and the handful of scholars who have addressed committee rulemaking typically have not examined the potentially conflicting incentives facing the various players in any comprehensive way. But there is substantial value in this exercise.

Formal analysis of the intuitions that inform our understanding of committee rulemaking is independently valuable, and the analysis in this Article goes well beyond highlighting the common-sense intuition that delegation carries agency risks. The model presents a more complete and more precise picture of the complicated dynamics of committee rulemaking. The process has many moving parts, and formal modeling demonstrates that those parts can interact in surprising and often counterintuitive ways. Modeling also allows us to form a more complete assessment of the good and the bad in committee rulemaking, and provides important insights in how to (and how not to) fix the problems we find. Finally, the model presented in this Article may generate empirically testable hypotheses for future work.

Part I will offer a brief overview of the CR process, identifying both the procedural regimes subject to the CR norm and the nominal veto gates present in the current formulation.

Part II will recast the CR process in game theoretic terms, conceptualizing rulemaking as a dynamic interaction between the

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18 For a representative sampling, see, e.g., Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 Geo. L.J. 887 (1999); Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673 (1975); Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 Brook. L. Rev. 761 (1993); Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am. U. L. Rev. 1655 (1995); Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 Minn. L. Rev. 375 (1992) [hereinafter Mullenix, Counter-Reformation]; Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283 (1993) [hereinafter Mullenix, Unconstitutional Rulemaking]; Walker, supra note 6; Jack B. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905 (1976). Among the few scholars who have studied the issue, Professor Walker comes closest to expressing the intuitions behind this Article’s analysis. Walker specifically identifies and criticizes the significant power invested in advisory committees, see, e.g., Walker, supra note 6, at 462–63 (criticizing “vast discretion exercised by the Advisory Committee”), but fails to account properly for the incentives of other players or the ability of inferior players to anticipate and preempt rejection by superior players. See Part II, infra.
preferences of the five groups of players involved in the process. Incorporation of the players’ transaction costs (including their information and opportunity costs) alters these interactions in an important way: because Congress (and to a lesser extent, other players) must expend time and resources to take action, inferior players may be able to arbitrage these costs to obtain results inconsistent with the preferences superior actors would express in a world without transaction costs. And different initial distributions of preferences and transaction costs can yield dramatically different outcomes.

The model also has surprising implications for the relative importance of interest groups in the rulemaking process. In particular, whatever its negative democratic implications, the CR game may mitigate the influence of interest groups relative to traditional legislative processes.

Part III will explore the implications of the model in a real-world context, focusing on two separate real-world examples. I first discuss the 1993 rulemaking process in connection with the adoption of the “initial disclosures” requirement of Federal Rule of Civil Procedure 26(a)(1). I next examine the rulemaking process attendant to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). In both examples the available evidence is consistent with successful transaction-cost arbitrage by subordinate actors playing the committee rulemaking game.

Part IV will ask whether and how the procedural rulemaking process might be improved such that outcomes better reflect congressional preferences. The prescriptive question is a difficult one because the efficiency and expertise advantages that justify the CR approach are real. Given the inherent and likely insurmountable information deficits associated with direct congressional action in most rulemaking scenarios, it may be advisable to retain the basic structure of the CR process, but to revise the selection rules for the membership of rulemaking committees such that they are more re-

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19 The five institutional players in the current version of the CR game are: advisory committees, the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. But see infra notes 47–48 and accompanying text (explaining that the term “Congress” in this case actually denotes a potentially complex set of interactions between the House, the Senate, and the Executive Branch).
liably reflective of the bodies with constitutional responsibility for setting substantive policy.

I. THE COMMITTEE RULEMAKING PROCESS

Expert committees are the primary architects of virtually all rules of practice and procedure affecting federal courts. The committee rulemaking process as we know it dates to the procedural revolution spearheaded by Professor Charles Clark in the 1920s and 1930s. Professor Clark and other proponents of a rules-driven approach to procedure envisioned expert rulemaking as an integral component of their project to simplify and demystify court practice. The following briefly summarizes the current structure of the committee rulemaking process in federal courts.

A. Summary of Process

Committee rulemaking is governed by the Rules Enabling Act (REA). First passed in 1934 in anticipation of the adoption of the inaugural version of the Federal Rules of Civil Procedure, the current version of the REA expressly authorizes the Supreme Court to prescribe rules of practice, procedure, and evidence in connection with the operation of the federal courts. Though the Supreme Court’s discretion in prescribing rules under the REA is substantial, the rules prescribed may not “abridge, enlarge or modify any substantive right.”

Congress does not expect the justices of the Supreme Court to draft and promulgate rules themselves. Rather, 28 U.S.C. § 2073 authorizes the Judicial Conference of the United States (created by statute at 28 U.S.C. § 331) to “prescribe and publish the procedures

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23 Id. § 2072 (2006).
24 Id. § 2072(b) (2006).
for the consideration of proposed rules.”

This statute authorizes, but does not require, the Judicial Conference to appoint advisory committees assigned to “assist the Conference by recommending rules to be prescribed.” Advisory committee membership is to be drawn from the judiciary and practicing bar.

The REA further requires that the Judicial Conference authorize the appointment of a “standing committee on rules of practice, procedure, and evidence,” whose functions are to review suggestions made by any advisory committees and to recommend new rules and rules changes to the Judicial Conference as necessary.

The Judicial Conference in turn recommends proposed changes to the Supreme Court. The REA requires that every recommendation be accompanied by (1) a proposed rule; (2) an explanatory note; and (3) “a written report explaining the body’s action.”

Once the Supreme Court has approved a proposed rule change, 28 U.S.C. § 2074 requires the Court to transmit that proposal to Congress no later than May 1 of the year in which the rule is to become effective. Congress then has a minimum of seven months to

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25 Id. § 2073(a)(1) (2006). The Judicial Conference of the United States consists of the Chief Justice of the United States Supreme Court, the chief judges of each judicial circuit, the chief judge of the Court of International Trade, and a single district judge from each of the judicial circuits. See 28 U.S.C. § 331 (2006). District judges are selected by the circuit and district judges within their circuit, and serve terms of between three and five years. Id. Among other things, the Judicial Conference is tasked with reviewing the business of the federal courts, including review of rules of practice and procedure. Id. The Judicial Conference is expressly authorized to propose rules to the Supreme Court, but as a practical matter, these proposals are nearly always vetted through the Standing Committee and the relevant advisory committee before transmission to the Supreme Court. See http://www.uscourts.gov/rules/procedurejc.htm.


27 Id. § 2073(a)(2) (2006).

28 Id. § 2073(b) (2006).

29 Id. § 2073(d) (2006). This requirement is one of several checks on advisory committee power enacted in 1988. See Rules Enabling Act Amendments, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4649 (1988). Though these amendments likely decreased transaction costs for superior players (especially Congress) by providing basic information regarding proposed rules changes, they certainly did not eliminate them.

30 28 U.S.C. § 2074(a) (2006). For an example of a transmittal letter from the Supreme Court to Congress, see Letters from Chief Justice John G. Roberts, Jr. to J. Dennis Hastert, Speaker of the House of Representatives, and Dick Cheney, Presi-
review the proposed changes, which generally become effective on December 1 of that year unless Congress takes affirmative action to reject the rules.\footnote{28 U.S.C. § 2074(a) (2006).} This “negative option” approach applies to all REA rules except rules “creating, abolishing, or modifying an evidentiary privilege,” which “shall have no force or effect unless approved by Act of Congress.”\footnote{Id. § 2074(b) (2006).}

At a rudimentary level, the CR process is linear, with each superior nexus along the line enjoying veto rights over inferior decision modes.\footnote{See Appendix A for a graphical depiction of the federal committee rulemaking process.} In practice, the CR process is often recursive at its lowest levels; proposed rules are sometimes returned to the advisory committee for revision or further consideration by the Standing Committee or, less frequently, by the Judicial Conference or Supreme Court.\footnote{For an excellent and detailed description of the CR process, see McCabe, supra note 18.}

As a practical matter, Congress involves itself in the CR process only infrequently. From the inception of the Federal Rules of Civil Procedure in the late 1930s until 1972, the Supreme Court transmitted new rules or rules amendments to Congress fourteen times, and Congress allowed each proposed change or amendment to become law without comment.\footnote{See id. at 1660 & n.29.} Even after the infamous showdown between the Court and Congress in connection with the adoption of the Federal Rules of Evidence, Congress rarely rejects rules changes proposed by the Supreme Court as a result of the CR process.\footnote{For a list of the handful of congressional interventions in the CR process from 1973 to 1985, see H.R. Rep. No. 99-422, at 8–9 n.20 (1985). Most involved changes to the Rules of Evidence, and some of these were clean-up from the fallout of the 1973 dispute regarding the Federal Rules of Evidence. Several of the very few changes...}
B. Why Delegate?

Congress’ decision to delegate rulemaking authority to the courts under the Rules Enabling Act is likely the product of at least two separate influences. First, as other commentators have documented, Congress in 1934 almost certainly accepted the conventional wisdom that procedure and substance existed in almost wholly separate spheres. Thus, in passing the REA, Congress would have seen itself as doing nothing more than delegating pedestrian administrative responsibilities to the courts, while expressly reserving to itself all authority to make substantive policy.

Second, Congress likely delegated rulemaking authority as it did because the CR process provides substantial expertise and efficiency advantages relative to nondelegation. Congressional delegation of authority to committees is often rational and expected-utility-maximizing even when Congress is aware, ex ante, of the risk that committee preferences may differ from floor preferences writ large.

The real expertise advantages offered by delegation to committees may, in some circumstances, offset the agency costs imposed by the system. But they do not eliminate them. In addition, the transaction-cost arbitrage problems identified in this Article can, to some degree, be mitigated without sacrificing those expertise advantages. The game-theoretic model of the rulemaking process developed in Part II both demonstrates the potential problems associated with the current system and hints at possible solutions.

overruled by Congress in connection with the Federal Rules of Civil Procedure also appeared to relate to the 1973 dispute (e.g., changes to civil procedure rules regarding taking of testimony, admission of evidence, etc.), as did several of the congressional overrides of the Federal Rules of Criminal Procedure.

37 See, e.g., Redish & Amuluru, supra note 6, at 1310–14.
39 See generally Bone, supra note 18, at 917–46.
40 See, e.g., Thomas W. Giligan & Keith Krehbiel, Collective Decisionmaking and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures, 3 J. L. Econ. & Org. 287 (1987) (modeling expertise advantages of congressional delegation to committees); see also Bone, supra note 18, at 917–46 (summarizing advantages of CR process over other possible forms of procedural rulemaking).
41 See infra Part IV.
II. A GAME-THEORETIC MODEL OF COMMITTEE RULEMAKING

The rhetoric surrounding the creation, implementation, and evolution of the CR process suggests that Congress adopted the CR model in large part to take advantage of the expertise judges, practitioners, and academics can bring to bear in designing rules of practice and procedure. The negative option character of most CR further implies that Congress was aware that it was surrendering at least some ability to enact its absolute procedural preferences. The negative option expressly allows Congress to defer to the results of the CR process when the CR process yields results acceptable to Congress, or when CR results at odds with Congress’ zero-transaction-cost preferences are insufficiently important to draw congressional fire.

This approach is not accidental; Congress is busy, and Congress is filled with policy generalists poorly suited for the painstaking task of procedural system design. To some degree, adoption of the negative option CR process must be interpreted as an explicit and deliberate tradeoff between Congress’ interest in obtaining procedural regimes consistent with its own preferences on one hand and the opportunity costs associated with congressional expression of those preferences on the other.

But at the same time, there is little evidence that Congress has ever programmatically considered the substantive implications of ostensibly procedural rules in the context of rulemaking system design. Prior scholarship has similarly left the policy implications of the preference tradeoffs inherent in a negative option regime largely unexplored. This Article explores those tradeoffs and the likely preference equilibria arising out of the current CR system using a game-theoretical lens.

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42 See, e.g., Redish & Amuluru, supra note 6, at 1308–10.
43 For the obvious exception, involving evidentiary rules, see 28 U.S.C. § 2074(b) (2006).
44 See, e.g., Mullenix, Counter-Reformation, supra note 18, at 376–82 (lamenting alleged usurpation of judicial authority without considering potential substantive impact of ostensibly procedural rules).
A. The Parameters of the Game

The CR process can be modeled as a sequential game mapping the incentives of the five relevant players. The game introduced below analyzes the incentives of (1) the relevant advisory committee, (2) the Standing Committee, (3) the Judicial Conference, (4) the Supreme Court, and (5) “Congress.” The structure of the game is adapted from a similar analysis of legislative incentives developed by William Eskridge and John Ferejohn.45 Eskridge and Ferejohn map the preferences of various constitutional actors (including members of the House, Senate, the Executive Branch, and the Federal Judiciary) along a single axis to predict statutory equilibria.

This Article provides a similar analysis for CR players, mapping their preferences and transaction costs along a preference continuum to predict rulemaking equilibria. For inferior CR players, the Eskridge/Ferejohn point-preference approach is sufficient; the preferences of an advisory committee or the Standing Committee can be described by a single point on a preference continuum. It is substantially more difficult to map “congressional” preferences. In order for Congress to veto negative option rulemaking, it must enact legislation and then present that legislation to the President. The President must then sign that legislation into law.47 In other words, defining congressional preferences in the CR context requires an additional game theoretical analysis of the “Article I, Section 7 game” that drives the parties’ understanding of how Article I and Article II actors would combine to generate “congressional” preferences. Moreover, there are no guarantees that Congress and the President will actually play the Article I, Section 7 game with respect to any given procedural question; the transaction costs associated with doing so may be too high. Thus, the important question with regard to Congress and the President is not

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46 See, e.g., id. at 529–32.
what their collective preference is, but rather what it would be in a world without transaction costs.

Therefore, unless otherwise noted, this Article will use the term “congressional preferences” or the variable “C” to refer to the outcome of a complete Article I, Section 7 subgame in a world without transaction costs. I refer to “congressional” preferences for convenience only; the “congressional” preferences reflected in the CR game represent what Congress and the President would come up with if they were locked in a room and forced to express their preferred outcome.

The starting point for the game is the status quo, which prevails in the absence of additional rulemaking. If the median committee member of the advisory committee desires a change to the status quo, the advisory committee will have an incentive to propose an amendment to existing rules, assuming the advisory committee believes that its preferences ultimately will be implemented.

If the advisory committee had the final say on the adoption and implementation of procedural rules, this would be the end of the game. But in the U.S. committee rulemaking system, superior actors each have some form of veto power over the advisory committee’s proposals. The final outcome of the CR game is thus dependent upon the preferences and interactions of each of these players.

As Eskridge and Ferejohn note, the Article I, Section 7 game does not always yield a change from the status quo. Eskridge & Ferejohn, supra note 45, at 530–31. Sometimes the preferences of Article I and Article II actors result in legislative impasse. See id. In the CR model, this “congressional” impasse is denoted by placing “C” in the same place as the status quo on the continuum. The fact that C is collocated with the status quo, however, does not necessarily imply congressional impasse; it can also denote genuine preference for retention of the status quo.

This Article adopts a traditional “median preference” model to predict policy outcomes. See generally Anthony Downs, An Economic Theory of Democracy 11 (1957); Howard R. Bowen, The Interpretation of Voting in the Allocation of Economic Resources, 58 Q.J. Econ. 27, 34–36 (1943). These models employ the simplifying assumption that each actor within a group has perfect and complete information regarding her colleagues’ preferences. The intuitive appeal of such models is obvious: the member of any democratic body whose preferences represent the body median as to any issue exercises enormous influence over that body’s action. But median preference decisionmaking is not necessary for the model to function. Rather, the inferior players must simply have some mechanism by which a group preference can be identified. At the advisory committee level, intra-committee deference to members with particular issue expertise may often drive group preferences. See, e.g., infra note 120 (noting that development of bankruptcy form was delegated to an internal working group within the advisory committee).
Positive political theory suggests a formal model for this sequential game. For purposes of constructing the model, I assume that information is complete, in that the preferences of the players, the structure of the game, and the rationality of the actors are all common knowledge. I also assume that the players can, by backward induction, perfectly anticipate the future course of play. Finally, the game assumes that no one can commit to future courses of action, and thus that each rules decision is reached on its own “merits” without logrolling.\textsuperscript{50} I employ the following notation:

For any given question of procedural policy:

\begin{align*}
\text{SQ} &= \text{Existing rule (status quo), the default position if no change is enacted} \\
\text{AC} &= \text{Preference of the median member of the appropriate advisory committee} \\
\text{AC}^{*} &= \text{Indifference point beyond which advisory committee prefers status quo to amendment} \\
\text{C} &= \text{Zero-transaction-cost preference of “Congress”}\textsuperscript{55} \\
\text{C}^{*} &= \text{Indifference point beyond which Congress will reject a change}\textsuperscript{52} \\
\text{SCom} &= \text{Preference of the median member of the Standing Committee on Rules of Practice and Procedure} \\
\text{SCom}^{*} &= \text{Point at which the Standing Committee is indifferent between vetoing and accepting the proposed change}\textsuperscript{53}
\end{align*}

\textsuperscript{50} The introduction of logrolling—the mutual exchange of favors—complicates the game, but does not render it meaningless; rather, preference-trading of this sort takes place in the shadow of the CR game and is thus informed by it.

\textsuperscript{55} Because Congress can only veto even negative option rulemaking through the enactment and presentment of positive legislation, “C” is itself a product of a separate Article I, Section 7 game that ultimately incorporates the preferences of the President, veto-proof congressional majorities, and, occasionally, Article III courts engaged in judicial review. Though a deep examination of the phenomenon is beyond the scope of this Article, the CR process can become quite complicated when certain conditions obtain in connection with this Article I, Section 7 game. See Eskridge \& Ferejohn, supra note 45, passim.

\textsuperscript{52} When necessary, the terms $C^{*R}$ and $C^{*L}$ denote congressional indifference points to the right or to the left of the zero-transaction-cost preference of Congress “C” respectively. In general, only the congressional indifference point lying to the side opposite the status quo will be relevant; in such cases, the term $C^{*}$ is used.

\textsuperscript{53} Functionally, the transaction-cost-adjusted preferences of the Standing Committee and, to a slightly lesser extent, the transaction-cost-adjusted preferences of the Judicial Conference and even the Supreme Court, are unlikely to lie far from their abso-
JC = Preference of the median member of the Judicial Conference
JC* = Point at which the Judicial Conference is indifferent between vetoing and accepting the proposed change
SCt = Preference of the median member of the Supreme Court
SCt* = Point at which the Supreme Court is indifferent between vetoing and accepting the proposed change
x = Rules policy resulting from the game.

In determining whether any change will be enacted and where rules policy will be set in this game, the critical factor is the relationship of the status quo to the other variables along the continuum.

B. The Transaction Costs of Congressional Action

The transaction-cost-adjusted point C* is the most important point in the economic analysis of committee rulemaking. The difference and distance between zero-transaction-cost congressional preferences and the outcomes Congress will accept on transaction-cost-avoidance grounds creates the opportunity for opportunistic behavior by subordinate actors.

In this model, for any given procedural policy, point C represents the hypothetical outcome of the Article I, Section 7 game in a world without transaction costs. In other words, “C” is where Congress and the President would end up if they were forced to conclude preferences. Given these bodies’ generally lower expected opportunity costs, lower information costs, and lower transaction costs, it is generally likely that the absolute preferences of the median member of each of these groups is an acceptable proxy for their adjusted preferences. Nonetheless, there are scenarios in which transaction-cost arbitrage of intermediate-player preferences is possible. See, e.g., Friedenthal, supra note 18, at 677 (accusing Supreme Court of exercising insufficient supervision over CR in the 1970s).

Among the myriad possible permutations of preference distributions are many in which the preferences and indifference points of intermediate actors drive the outcome. Though several such scenarios are presented for demonstration purposes, the Article primarily focuses upon the advisory committee/Congress interaction for two reasons. First, intermediate actors face substantially lower transaction costs than Congress. See Subsection II.E.3. Thus, their indifference points will likely lie far closer to their absolute preferences. Second, the general principles of the model are well-demonstrated by the advisory committee/Congress dance, which has the added advantage of highlighting the tension between the CR process and society’s democratic commitments.
sider the issue.\textsuperscript{55} $C^*$ in turn represents the largest departure from $C$ that Congress would accept without taking affirmative action.\textsuperscript{56} The gap between $C$ and $C^*$ is best understood in terms of the transaction costs imposed by the real world. Hypothetical point $C$ assumes these costs away, but real-world constitutional actors would have to make substantial investments to discover and then express their preferences.

As the model suggests, it may be possible for subordinate players in the Committee Rulemaking game to arbitrage this transaction cost gap by proposing procedural policies that differ from informed congressional preferences by amounts insufficient to draw congressional fire. Three specific types of transaction costs comprise the transaction cost gap: (1) traditional collective action transaction costs associated with eliciting affirmative action out of a large and complex institution; (2) information or search costs associated with Congress informing itself of the full implications of a given rules outcome; and (3) the opportunity costs of congressional action at the time a particular rule is proposed.

1. Collective Action Costs

It is difficult to get even a fully informed Congress to act. The U.S. lawmaking process is, in fact, \textit{designed} to have high transaction costs as a check against tyrannous majorities; the legislative committee process, bicameral conference and approval, and presidential execution all combine to make the passage of legislation intentionally costly.\textsuperscript{57}

Thus, when Congress chooses to delegate responsibility to an agent, that agent will have some ability to express its own preferences simply because it is costly to get the congressional machinery moving. Even if each member of Congress (and the President) knew exactly what they wanted a given procedural policy to be, such that a congressional equilibrium preference $C$ could be identi-

\textsuperscript{55} It is of course possible that preference dynamics would yield the status quo rather than any change.

\textsuperscript{56} There are in fact likely to be \textit{two} congressional indifference points for each point $C$: one to the left of $C$ and one to the right of $C$. Only one such point is typically in play for any particular policy question.

\textsuperscript{57} See, e.g., The Federalist No. 51 (James Madison) (explaining benefits of separation of powers).
fied, it is possible that subordinate actors could substitute their own preferences to at least some degree based upon the costs associated with simply prompting Congress to move.

2. Search/Information Costs

Moreover, legislators do not necessarily know exactly what they want any given procedural policy to be. Rather, legislators are usually rationally ignorant of both the details of procedural regimes and of their broader policy implications. This is in many ways the flip side of the “committee expertise” coin; it would take an enormous amount of work for Congress to even figure out where “C” is for many procedural issues.

We would not expect Congress to expend significant resources to investigate the implications of any given procedural rule unless that rule obviously and significantly differed from Congress’ intuitive sense of the right. For example, consider a potential amendment to Federal Rule of Civil Procedure 56(c)(1)(B) changing the allotted time for responding to a summary judgment motion. If subordinate players proposed to change the deadline from the current 21 days to 20 days, it is far less likely that Congress would self-educate than if the proposed change were from 21 days to 5. Information costs are a very real component of the legislative process.

Subordinate actors in the CR process do not face the same information deficits. Rather, these subordinate players are often far better informed as to the implications of a particular outcome by dint of their professions and their developed expertise. Article III judges and experienced practitioners are likely to have a good sense of the ways in which a proposed rule or standard will work, and of how it will interact with other rules and standards, even if Congress does not. Information costs are a critical component of the transaction costs associated with active congressional involve-

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58 Subordinate players may be able to arbitrage congressional information costs even further by proposing standards in lieu of rules. Standards do have real-life advantages over rules in certain situations; in particular, they allow greater flexibility in particularly difficult or fact-intensive contexts. Nevertheless, the net effects of a standard may be more difficult for Congress to ferret out than a rule, since subordinate actors will be relatively better informed. See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992).
ment in committee rulemaking, and the information cost differential between Congress and inferior CR players often drives the result.

3. Opportunity Costs

Congressional transaction costs in the rulemaking context are dynamic rather than static. That is, the absolute costs associated with congressional self-education and action may be constant for any given policy issue, but we must also consider those costs relative to other congressional priorities. When Congress is not particularly busy, we would expect to see an increase in its willingness to monitor and supervise the rulemaking process. By contrast, when Congress is overwhelmed with work, we would expect to see relatively less supervision of subordinate players in the CR game.

The opportunity cost of congressional intervention is a critical component of the CR game calculus. Using our model’s terminology, all else being equal, higher opportunity costs at a specific point in time will tend to increase the distance between C and C* relative to lower opportunity cost periods.

And congressional opportunity costs are relevant even if we expect interest groups to attempt to fill congressional information gaps (however imperfectly or one-sidedly). Interest groups that would benefit or suffer disproportionately from a given procedural outcome of course have an incentive to provide information to legislators in an attempt to overcome the information cost problem and shift the game in their favor. But the provision of that information does not occur in a vacuum.

Rather, lobbyists for a given procedural outcome are competing for an enormously valuable resource—legislative attention—with myriad other parties. One cannot therefore simply dismiss the information cost component of C* by claiming that interest groups will incur the necessary costs on behalf of Congress. Even for procedural changes where interest group formation and activity is likely, there is no guarantee that anyone on Capitol Hill will have time to listen.

C. The Positive Option/Negative Option Distinction

Before setting out the model, it is worth explaining why the two competing approaches to committee rulemaking—positive-option rulemaking and negative-option rulemaking—are really just variants of the same game. First consider likely policy outcomes in a mostly counterfactual “positive-option” world in which Congress must affirmatively approve any rules change through formal legislation. In a positive-option world, transaction-cost-adjusted preferences are arguably less relevant than in a negative-option context; Congress will act, after all, either affirmatively or through its very inaction. But even in positive-option rulemaking, transaction costs matter to some degree, because each participant in the process must decide whether a given proposal is worth accepting despite potential divergence from that participant’s absolute preferences. It is certainly possible to imagine Congress accepting and affirmatively approving a proposal some distance away from its own preferences if (a) that proposal nonetheless represents an improvement upon the status quo and (b) it would be too costly for Congress either to incur the soft-but-real costs associated with rejection-by-inaction or to legislate its absolute preferences directly.

In other words, even positive-option rulemaking will have a transaction cost component, and thus a separate point \( C^* \) that represents the farthest subordinate players can diverge from absolute congressional preference \( C \) without drawing a congressional veto instead of affirmative congressional approval.

That said, it is likely that the relative distance between \( C \) and \( C^* \) will be lower in positive-option rulemaking than in negative-option rulemaking. In order for subordinate players to arbitrage transaction costs successfully in a positive-option regime, they must chart a careful course between the Scylla of congressional inaction and the

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60 As discussed above, rulemaking regarding evidentiary privileges is positive-option; see 28 U.S.C. § 2074(b) (2006). But the remainder of the CR process is negative-option.

61 All intermediate levels of the CR process are effectively positive-option for all types of rulemaking because the Standing Committee, the Judicial Conference, and the Supreme Court must each approve a given change for it to be presented to Congress; the label “positive-option” in this context refers to the congressional veto gate only.

62 Congressional inaction in such cases is functionally equivalent to affirmative rejection of the proposed policy.
Charybdis of full congressional consideration of the issue. The former will yield the status quo; the latter will produce “C.” Since Congress will have to overcome its collective action challenges to a great degree even simply to approve of a positive-option proposal, the transaction costs inferior players can arbitrage in a positive-option world are effectively limited to the information acquisition costs facing Congress if it chooses to self-educate.

But the differences in incentives between the two forms of CR are differences of degree only, not kind. In negative-option rule-making, the results of the subordinate CR process become law unless Congress affirmatively objects by a certain date. Despite this difference in execution, the relevant variables are the same as in positive-option CR: we care about Congress’ absolute preferences, its transaction-cost-adjusted indifference points, and those same data points for the other players in the game.

In negative-option CR, it is possible that the distance between C and C* will be greater than in the positive-option alternative. Transaction costs associated with mustering up the energy to reject a given proposal affirmatively are likely to be higher than in the positive-option context, and the externalities associated with congressional inaction are likely to be lower (in the positive-option context, congressional failure to act preserves a status quo that is prima facie unacceptable, at least from the perspective of subordinate players). Thus, it is possible that subordinate players might be able to arbitrage transaction cost differences more successfully in a negative-option world than in its positive-option counterpart; there is simply more space to arbitrage. But the form of the game is the same.

D. Modeling Rulemaking

Consider the following four cases involving different preference distributions among the relevant actors in a CR game.

Case 1: AC < SCom, SCt, JC, C < SQ.

I start with a case in which the status quo is objectionable to all relevant actors in the same direction. All players in the CR game would like to see the policy shift to the left of the status quo. In this

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63 This assumes that there exists an Article I, Section 7 game value of C divergent from the SQ.
case, the advisory committee’s preference is more radical than any other actor’s, and Congress’ preference is closest to the status quo. Figure 1 maps the relevant preferences:

![Figure 1: All prefer change to left of status quo: advisory committee and intermediates left of Congress](image)

There will be a rules change in this situation, since every relevant actor prefers an outcome to the left of the status quo and all subordinate players’ preferences lie to the left of C. But it is congressional indifference point C*, not the hypothetical zero-transaction-cost congressional preference point C that drives the outcome. C* represents the transaction-cost-adjusted congressional indifference point for any given policy change. That is, C* represents the policy equilibrium beyond which Congress would be willing to reject the CR proposal, either through inaction in the positive option context, or affirmatively in the more common negative-option environment. The equilibrium in this simple case is likely to be at or near C*.

The intuition surrounding the placement of C* is important. Congress will always incur transaction costs in connection with implementation of its own absolute preferences. Less obviously, Congress will also incur transaction costs in the positive-option context if it fails to act. By contrast, a fully developed CR proposal offers Congress an extremely low-cost alternative to independent legislation: enactment-by-inaction for negative-option CR or verbatim approval of the CR output in the positive-option context.  

Further permutations of the analysis in this Article might consider a hybrid or continuum-driven indifference model in which congressional “tweaking” of CR outputs would be possible depending upon the transaction costs of any given “tweak.” Thus, one could envision a scenario in which Federal Rule of Civil Procedure 56 was revised through the CR process to require, among other more substantive changes, a waiting period of only one week between filing of a summary judgment motion and the hearing date. Congressional approval or acquiescence may be the order of the day as to the more substantive changes, which would require substantial effort to alter, but Congress may well step in to preserve the existing ten-day waiting period because
ternalized transaction costs will always give Congress an incentive to accept changes that diverge from absolute congressional preference as long as they (1) change the status quo in Congress’ preferred direction and (2) do not go too far. C* denotes “too far” in the model.

If the advisory committee tries to set an equilibrium to the left of C* in Case 1, Congress will reject that equilibrium. Though a move to the left of SQ is initially a move in the right direction from Congress’ perspective, any move beyond C* goes too far. There is, however, an “arbitrage range” in between points C and C* where Congress will not act, and within which subordinate players can nudge the outcome even farther in their desired direction.\textsuperscript{65}

Given that the advisory committee and all intermediate actors would prefer an outcome to the left of C*, this particular version of the CR game will yield an equilibrium at or very near C*, just short of a proposal that would produce congressional rejection either by inaction or by affirmative legislation.\textsuperscript{66}

Of course, opportunities for arbitrage only exist if the actors’ relevant preferences lie on the correct side of the status quo. Consider Case 2:

\textbf{Case 2: }AC < SCom, JC, STc < SQ < C.

This case presents a scenario in which congressional preference lies to the right of the status quo, while all other actors’ preferences lie to the left. In Figure 2A, the congressional transaction-cost-adjusted indifference point also lies to the right of the status quo:

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\textsuperscript{65} It is possible that Congress could persuade lower rungs on the CR ladder that C and C* are identical; at the very least, in the positive option world we would expect to see relatively little space between the two points relative to the negative option world. In this analysis, the location of C* fully internalizes all costs of congressional rejection. Even if Congress “wants what it wants,” however, there is some deviation from its preferences that Congress will find too de minimis to reject or correct. C* represents that deviation. The same analysis obtains for each of the intermediate actors.

\textsuperscript{66} All else being equal, the distance between C and C* will increase whenever Congress faces higher opportunity costs relative to its baseline level of activity. See infra Subsection II.B.3. In addition, we would expect to see greater distance between C and C* in negative-option rulemaking than in positive-option rulemaking. See infra Section II.C.
Here, the answer is obvious. No equilibrium acceptable to the advisory committee and intermediate players would also be acceptable to Congress. Congress would reject every proposal generated by the CR process, since none of them would be, from Congress’ perspective, an improvement over the status quo. Put another way, inferior players cannot arbitrage congressional transaction costs without making things *worse* from their perspective; any change acceptable to Congress would lie right of the status quo, in the opposite direction of the inferior players’ collective preferences.

But what if Congress’ transaction-cost-adjusted indifference point lies to the *left* of the status quo? Figure 2B describes the equilibrium in that case:

Here, even though Congress nominally prefers an outcome to the right of SQ, it is willing to accept a slight move to the left without acting; inferior players would arbitrage the transaction cost gap to move the equilibrium closer to their own preferences.

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67 This preference distribution does not necessarily imply affirmative congressional action. In the absence of a proposed amendment from subordinate players, it is still quite possible that Congress will not be sufficiently interested in the issue to act.
Unity of transaction-cost-adjusted directional preference is not a sufficient condition for a policy change; it is a necessary condition. Cases 3 and 4 demonstrate this reality:

*Case 3: AC < C < intermediate player preferences < SQ.*

In this case, as in Case 1, all actors’ preferences lie to the left of the status quo. But in Case 3, congressional preference lies to the left of all but the Advisory Committee’s preference. Figure 3 maps these preferences:

Here there may also be a rules change, but in order to ascertain whether a change will occur and the likely equilibrium point, we must consider several additional variables. Because congressional preference lies to the left of the preferences of the Standing Committee, Judicial Conference, and Supreme Court, any proposed rule change under a CR process with mandatory congressional action must account for both the indifference points of the intermediate actors and for $C^*$ as well.

An advisory committee facing the preference map described in Figure 3 would have to consider a variety of factors in proposing a new policy. Because each intermediate actor enjoys veto power over advisory committee proposals, the advisory committee would have to set the new policy enough to the right of AC such that the intermediate actors would not prefer the status quo to the proposed change. Thus the advisory committee’s proposal would have to be inside each intermediate actor’s indifference point beyond which that intermediate actor would prefer to leave things as they lie.

The advisory committee must simultaneously consider congressional desires as well. If the advisory committee’s proposal can thread the needle between the intermediate actors’ indifference points vis-à-vis the status quo and Congress’ transaction-cost-adjusted indifference point $C^*$, a new equilibrium can be reached.
Figure 3A describes such a scenario, with the equilibrium lying somewhere between the relevant indifference points.\footnote{Recall that for any value of C, there are two values of C*, one in either direction along the continuum. For a variety of reasons, only one such value is generally relevant to any given problem; thus the Article typically uses the generic term C* to refer to the relevant indifference point. The terms C*\textsuperscript{R} and C*\textsuperscript{L} denote the rightward and leftward congressional indifference points on occasions where it is useful to acknowledge that the acceptable outcome range extends in both directions from C.}

In Figure 3A, the relevant preferences suggest equilibrium at or near the intermediate actors’ indifference points; anything to the right of this gives up ground that neither the advisory committee nor Congress would be willing to surrender.\footnote{A preference distribution of this sort would be relatively uncommon in real life, limited perhaps to circumstances involving particularly complex rulemaking issues. When the inferior players’ preferences all lie to the same side of the status quo as congressional preference, one would expect C*\textsuperscript{R} (the point farthest to the right of “C” Congress would be willing to accept in lieu of affirmative congressional action) to lie close to SQ, since any move to the left would be an improvement from Congress’ perspective. The closer C*\textsuperscript{R} is to C, the more likely Congress is to act independently from the CR process. The location of C*\textsuperscript{L} is irrelevant in this case because it will by definition lie outside the intermediate actors’ transaction-cost-adjusted indifference points.}

But even when all actors’ preferences lie to the same side of the status quo, the expanded version of Case 3 implies that neither committee rulemaking nor successful arbitrage is inevitable. Consider a variation on Figure 3A where C*\textsuperscript{R} lies to the left of any or all of the intermediate players’ indifference points as in Figure 3B below:
In this case, the advisory committee will not propose a change. If it were to propose any policy to the left of the intermediate players’ indifference points, those intermediate players would simply veto the proposal in favor of the status quo. If the advisory committee were to propose anything to the right of the intermediate players’ indifference points, that proposal would lie well above the transaction-cost-adjusted policy indifference threshold represented by $C^*$. Congress would simply reject the results of such committee rulemaking. Anticipating this, the advisory committee would take no action.

A final hypothetical preference distribution illuminates a scenario in which a new equilibrium is also dependent upon the advisory committee’s indifference point. Consider Case 4:

Case 4: $C < AC < SCom, JC, SCt < SQ$.

This case presents a slight twist on Case 3, in that here Congress would ultimately prefer a more radical departure from the status quo than any of the other actors. Figure 4 describes these preferences:

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Footnote: There is yet another layer to this and other situations in which the end result deviates from absolute congressional preference: whether Congress will incur the further transaction costs associated with affirmative legislation of its procedural preferences. A full discussion of this topic is beyond the scope of this Article, but the mere existence of a status quo divergent from $C$ for any given issue generally implies that the answer is “no” for that particular issue. Moreover, even if SQ and C are identical, it may still be possible for inferior players to arbitrage congressional transaction costs.
Here, as in Case 3, the outcome is ultimately dependent upon indifference points. But this time, the relevant advisory committee indifference point also comes into play along with the indifference points associated with Congress and intermediate actors. The advisory committee again must thread a needle in order to move the rule from the status quo. Specifically, the advisory committee can only propose a change (1) that the intermediate actors would prefer to the status quo, (2) without crossing the threshold beyond which Congress will exercise its positive option veto, and (3) that remains within the advisory committee’s own indifference curve relative to the status quo.

Figure 4A provides an example of a preference set in which a change is possible:

![Figure 4A](image)

In this case, the advisory committee can successfully propose a new equilibrium because there is space between the intermediate indifference points beyond which intermediate actors would prefer the status quo, the congressional indifference point C* that would prompt a congressional veto, and the advisory committee’s own indifference curve. Note that there are likely to be two points C* on either side of C in this case, but that only the point C* to the right of C comes into play. That is, Congress would also be willing to go some distance to the left of its absolute preferences, without vetoing the change, but since no actor’s preferences are to the left of Congress’, the leftward indifference point is irrelevant. Here, the rightward point C* in effect represents the
indifference point beyond which it prefers the status quo to a move to the left. The equilibrium point will fall just within $C^*$ because the advisory committee does not want to move any farther left beyond its own median member’s preferences than necessary. But a rules change will not always result from this basket of absolute preferences, as Figure 4B demonstrates:

![Figure 4B: No change from status quo](image)

Here, the advisory committee will not propose a change, because it would prefer the status quo to any policy change that Congress would accept. That is, any proposal to the right of $AC^*$ will prompt a congressional veto, and any point to the left of $AC^*$ is inferior to the status quo in the advisory committee’s view. Thus, this basket of preferences yields no change from the CR process.

There are myriad additional possible permutations and combinations of preference patterns we could analyze using this method. Variations in the relative positions of absolute preferences and indifference points abound, and matters could be complicated exponentially by disaggregating the intermediate actors’ preferences and indifference points from one another. Nonetheless, the sample cases above provide a useful sketch of the game theoretical implications of the CR process under a variety of different initial preference distributions.

**E. Implications of the Model**

The implications of the model are significant, if arguably normatively ambiguous. The model identifies a significant risk associated with congressional delegation of rulemaking authority to inferior actors: that those inferior actors will arbitrage congressional trans-

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point beyond which Congress believes that the CR process isn’t doing enough to move the rule in the right direction.
action costs to obtain outcomes divergent from congressional preference. But the same dynamic also suggests a possible advantage of the CR process as currently constituted: to the extent we are concerned that congressional transaction costs are also arbitrated by interest groups, the outcome of the committee rulemaking game may be no less intrinsically valid than congressional legislation. Finally, the model suggests that the intermediate players, while important, are not central to the analysis. Committee rulemaking is in some ways a two-player game between the advisory committees and Congress.

1. The Risks of Delegation

The normative and prescriptive implications of the game theoretic model described above depend on several factors. First, it matters substantially whether real-world distances between $C$ and $C^*$ are sufficiently large to raise concerns that well-informed subordinate players are arbitraging these differences into policy outcomes that differ substantially from what would be the Article I, Section 7 game outcome in a world without transaction costs. Part III of this Article presents two real-world CR stories consistent with the model that display troubling gaps between congressional preference and the final outcome. In both examples, subordinate players arguably obtained policy outcomes substantially at odds with congressional desires by arbitraging congressional transaction costs.

Committee expertise is a double-edged sword. Expert committees enjoy real and generally desirable advantages over non-experts with respect to designing workable procedural systems. They are acutely aware of the challenges facing the judicial system, and are likely to have a far better sense of how any given proposed solution will work in practice. But experts also know the system’s pressure points. The same expertise that can help build a better mousetrap can also be used to tip the balance in favor of the experts’ systemic substantive preferences.

Thus, one significant implication of the model is that the composition of subordinate institutions (the advisory committees, the Standing Committee, the Judicial Conference, and the Supreme Court) matters. In particular, to the extent we value rules that accurately reflect the preferences of constitutional legislative actors,
the “fit” between subordinate actors and Article I, Section 7 players is important. But the ways in which subordinate actors are currently selected suggest that a good “fit” may be difficult to obtain. In essence, the entirety of the subordinate player framework comes directly or indirectly from the judicial branch. Article III judges control every veto gate in the CR game until play moves to Congress. Their control is direct in the case of the Supreme Court and the Judicial Conference, and the Chief Justice, acting as the chair of the Judicial Conference, appoints members of the Standing Committee and the various advisory committees (many of whom are Article III judges themselves). Given the real expertise advantages of the CR process as currently constituted, it may be inadvisable to change the underlying structure of the CR process. But it may be both feasible and desirable to change the manner in which at least some committees are selected.

Left alone, the current Article III-dominated rulemaking apparatus is subject to at least two potential risks. First, the federal judiciary as a whole largely reflects the dead hands of past presidential administrations. The Framers clearly intended this dead hand effect as part of the original constitutional compromise. It is less clear, however, whether they intended the judiciary to have such power in the rulemaking process, especially to the extent rulemaking can be used to defy or dilute the otherwise constitutional substantive policy preferences of the legislative and executive branches.

The Chief Justice’s appointment power exacerbates this risk. Though the memberships of the Judicial Conference and Supreme Court will almost certainly reflect different presidential administrations and thus different underlying ideologies, the same is not necessarily true for the Standing Committee or the Advisory Committees. Members of both are appointed by the Chief Justice, and can


73 See infra Part IV.

74 See U.S. Const. art. III, § 1 (stating that there shall be life tenure for Supreme Court Justices and inferior federal judges on good behavior).
be expected to share the Chief Justice’s preferences to some degree.  

Second, Article III domination of CR presents some risk that the evil alter ego of institutional expertise—self-dealing—may rear its ugly head. There is a sort of “foxes guarding the henhouse” aspect to the current system. That is, judges face at least some incentive to pursue rules that balance efficiency and justice in ways contrary to congressional intent, but attractive to the judiciary for other reasons.

2. An Underappreciated Benefit?

In addition to the risks associated with the current CR process, it may also offer at least one benefit: it may make the committee rulemaking process less susceptible to interest group pressure than its legislative cousin. That is not to say that interest groups will be absent from the CR process. Far from it—the list of entities testifying at any advisory committee hearing demonstrates that interest groups are present in force when CR infringes upon their interests.

But by giving substantial power to subordinate actors, the CR game to some degree insulates the CR process from the most brazen and effective forms of interest group influence. Subordinate CR game players do not need campaign contributions. Furthermore, these subordinate actors, from the Supreme Court on down to the advisory committees, are far better informed than their congressional counterparts. A member of Congress may and perhaps should be rationally ignorant of many details of our procedural systems. This information deficit creates an opportunity for interest groups. By contrast, the typical member of a rulemaking committee, the Judicial Conference, or the Supreme Court is at worst well-acquainted with and at best a genuine expert in the subject matter over which they have authority. Interest groups will talk to the advisory committees, but the advisory committees have less need to listen.

Thus, if we are at all worried that the efforts of interest groups can affect the location of “C” on our continuum, then perhaps the

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75 See Chutkow, supra note 72, at 4, 6.
implications of the CR game are somewhat more ambiguous. It may be that in some cases the “arbitrage” possible is not really arbitrage at all, but the CR game equilibrium represents an outcome somewhat closer to “untainted” congressional preferences than could be obtained if Congress were making the rules itself.

3. The Last Shall Be First?

To a certain degree, intermediate players in the CR game get short shrift throughout this Article. I map these actors’ preferences to demonstrate the effect that various preference distributions might have on the equilibrium, but they rarely take center stage in discussion of the model or its implications.

This is as it should be. In many ways, the CR game is probably best conceptualized as a two-player game played between the relevant advisory committee and Congress, with the intermediate players (the Supreme Court, the Judicial Conference, and the Standing Committee) exercising influence primarily on the margins. More accurately, because the distance between intermediate actors’ absolute preferences and transaction-cost-adjusted preferences is likely to be relatively small, there often will be little or no opportunity for the advisory committee to arbitrage those costs into a game-theoretically interesting outcome.

The distance between absolute and transaction-cost-adjusted preferences is likely to be smaller for intermediate actors than for Congress because intermediate actors’ collective action costs, information costs, and opportunity costs are all likely to be lower than Congress’ for virtually every imaginable procedural rules change. The intermediate bodies are smaller than Congress, more focused than Congress, and have significantly more expertise in the relevant subject matter than does Congress. Each intermediate actor has an obligation to consider all proposed rules and must affirmatively move them forward in order for them to reach the next stage. Moreover, each intermediate actor can send an objectionable rule back to an earlier stage at very low cost, especially compared to the costs Congress incurs to reject a proposal in a negative-option environment.

Thus, while each intermediate actor may still be willing to accept small deviations from their absolute preferences in the name of transaction-cost-minimization, the arbitrage opportunity will be
quite small. In general, we should expect advisory committees to treat absolute intermediate preferences as both given and outcome-determinative, leading them to propose only rules that account for those absolute preferences.\textsuperscript{77}

4. Institutional Paralysis

Finally, the model suggests that institutional paralysis is likely to be a defining characteristic of the committee rulemaking process. There are myriad preference distributions—including many in which all of the relevant actors would prefer change in the same direction—that will nonetheless result in retention of the status quo.

Institutional paralysis will primarily be a function of inferior player preferences. There are multiple possible choke points during the initial stages of the process, and disagreement between and among any of the inferior players can yield a stalemate.\textsuperscript{78} The normative implications of this feature of the CR process are ambiguous, but the model highlights just how perfectly the stars must align in order for rules changes to occur.

III. The Committee Rulemaking Game in the Real World

In assessing the utility of the CR model described above, the most important issue may be whether the incentives identified interact in real life as predicted in the model. The hidden nature of much of the rulemaking process makes concrete examples hard to find. Two separate rulemaking controversies, however—one in the area of civil procedure and one in the context of bankruptcy law—

\textsuperscript{77} In decrying the excessive influence of the advisory committees (a conclusion largely supported by this Article’s analysis), Professor Walker seems to assume that the advisory committee acts without regard for the preferences of superior players. See Walker, supra note 6, at 465–69 (confusing minimal Supreme Court review and rejection of proposed rules with “nearly absolute” discretion on the part of advisory committees). But Supreme Court inaction is equally plausibly explained by the model: subordinate players accurately anticipate and preempt superior players’ preferences.

\textsuperscript{78} In negative-option rulemaking, the presence of a full-blown Article I, Section 7 game atop the CR process actually reduces the likelihood of paralysis, at least relative to positive-option rulemaking. For negative-option CR, anticipated congressional impasse actually increases arbitrage opportunities. For positive-option CR, the same Article I, Section 7 game preferences would create an additional hurdle to rulemaking reform.
are consistent with skillful play of the committee rulemaking game by inferior players, to Congress’ detriment.

A. The Initial Disclosures Controversy

Broad discovery was one of the chief innovations of the Federal Rules of Civil Procedure. By the early 1990s, however, many observers believed that the discovery process in civil cases was in serious need of reform. In response to this perceived crisis, subordinate CR players in 1993 proposed radical changes to the discovery system in place for federal civil cases. The outcome of this rulemaking bears the earmarks of a successful attempt to play the committee rulemaking game.

1. Framing the Dispute

Throughout the 1980s, judges, practitioners, and other commentators sounded the alarm: discovery in civil cases was out of control. Critics of the discovery system decried the gamesmanship of the parties and the evasiveness of discovery responses. They also lamented the extraordinary expense of discovery in many cases.

By the early 1990s, subordinate players in the CR process were evaluating possible responses to this perceived discovery crisis. In August, 1991, the Advisory Committee on Civil Rules gave notice and solicited public comment on a radical solution: a revised Rule 26(a)(1) that would have required all parties to civil litigation to disclose to their adversaries various information that “bears significantly on any claim or defense.” As envisioned by the Advisory

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80 See, e.g., Brazil, supra note 79, at 451.
Committee, this disclosure requirement would exist exclusive of any formal discovery request from a party’s adversary; rather, the disclosing party would have an affirmative obligation to disclose the information at the outset of the case.

At public hearings in November of 1991 and February of 1992, 76 witnesses testified against the proposed rule; in addition, the Advisory Committee received over 200 written statements of opposition to the proposal.\(^{83}\) At the close of the February 1992 public hearing, the Advisory Committee voted to withdraw the proposal from the package of proposed amendments it was preparing for submission to the Standing Committee.\(^{84}\)

Shortly before the Advisory Committee’s April 1992 meeting, committee members circulated a memorandum calling for the re-examination of the initial disclosures concept.\(^{85}\) At the April 1992 meeting, the committee approved a substantially revised version of the rule that replaced the “likely to bear significantly” standard with a standard requiring disclosure only of material “relevant to disputed facts alleged with particularity in the pleadings.”\(^{86}\) In addition, the revised proposed disclosure rule eliminated a system of mandatory sanctions that many commentators criticized.\(^{87}\)

The Advisory Committee forwarded these revised proposed amendments on to the Standing Committee without suggesting that additional notice or comment was necessary. The Standing Committee then forwarded the proposed revisions to the Judicial Conference without seeking additional public comment, concluding that because the revised amendments were either “technical and clarifying in nature, or represent less of a modification of the current Rule 26 than had been proposed in the published draft,” a new notice and comment period was unnecessary.\(^{88}\)

On April 22, 1993, the Supreme Court transmitted revised proposed initial disclosures rules to Congress in the form of a signifi-

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\(^{83}\) Initial Disclosures Hearing, supra note 82, at 273.

\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id.

\(^{87}\) Ann Pelham, Panel Flips, OKs Discovery Reform, Legal Times, Apr. 20, 1992, at 6, reprinted in Initial Hearings Disclosure, supra note 82, at 311.


\(^{89}\) Id. at 126.
cantly revised Federal Rule of Civil Procedure 26. Under the proposed Rule 26(a)(1), civil litigants would for the first time be required to disclose a variety of information to their opponents at the outset of litigation. According to its supporters, the “initial disclosures” requirement would mitigate discovery costs, discovery games, and ultimately discovery abuse by requiring parties to exchange the most important information at the beginning of a case.

2. Congressional and Public Criticism

Even in its revised form, the proposed rule elicited a firestorm of criticism from the bar and from members of Congress. The Advisory Committee on Civil Rules recorded over one hundred formal comments on the revised proposed initial disclosures rule, of which 95% were again negative. These critics claimed that the initial disclosures standard was too vague, that it would spawn additional satellite litigation and discovery disputes, and that it would prove unworkable in practice under the notice pleading system as litigants struggled to interpret their disclosure obligations in light of their duties to clients.

On June 16, 1993, the House Judiciary Committee held hearings on several proposed amendments to the Federal Rules of Civil Procedure. Though several witnesses (primarily individual members of subordinate rulemaking committees) testified in favor of the changes, other witnesses criticized the proposed amendments.

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90 See Fed. R. Civ. P. 26(a)(1) (requiring initial disclosure of names and addresses of likely witnesses, documents supporting the party’s claims or defenses, damages computations, and relevant insurance agreements).
91 See Initial Disclosures Hearing, supra note 82, at 30–51 (testimony of Judge William W. Schwarzer, Director, Federal Judicial Center).
92 Id. at passim.
93 Id. at 303.
94 Id.
95 See generally id.
96 See generally id. at 5–61.
97 See generally id. at 63–160.
3. Congressional Action (and Inaction)

On November 3, 1993, the full House of Representatives briefly debated and then passed a bill rejecting the proposed initial disclosures requirement.98 H.R. 2814 generally adopted the majority of amended rules proposed by the Supreme Court, but would have enacted specific amendments to rule 26 eliminating the initial disclosures requirement entirely.99

But H.R. 2814 never became law. On November 4, 1993, the day after H.R. 2814 passed in the House, then-Senator Joe Biden sought and received unanimous consent that the bill be placed on the Senate calendar for consideration. The bill never made it out of committee. Almost four months after the Civil Rules Amendments Act of 1993 was introduced in the Senate, Alabama Senator Howell Heflin referred to the Senate’s failed effort to pass a companion bill. During debate on proposed statutory revisions to Federal Rule of Civil Procedure 11, Heflin stated, “There was some effort to make some changes to rule 26(a)(1), which deals with discovery, and rule 30(b)(2) relating to the taking of depositions. The House did make some changes in those areas, but it was not passed here in the Senate.”100

Because Congress failed to reject the initial disclosures rule proposed by the Supreme Court, the initial disclosures rule resulting from the CR process became law on December 1, 1993.101 Initial disclosures are still a part of the discovery landscape today.102

4. The Game Theory of the Initial Disclosures Controversy

The outcome of the initial disclosures debate provides additional evidence that the game theoretical approach adopted in this Article is usefully descriptive of real-world situations. Though it is im-

99 The same set of proposed amendments featured another controversial proposal, Rule 30(b)(2), that would allow audio or audiovisual recording of depositions in lieu of stenographic recording at the deposing party’s option. H.R. 2814 also would have rejected this change, substituting instead a rule that created a presumption of stenographic recording that could be overcome only by written agreement of the parties or by court order. Id. at 3. The dispute over Rule 30 also could be characterized as an example of the problematic implications of the committee rulemaking game.
possible to identify the precise preferences of all actors in that drama with any specificity, several different preference distributions are consistent with the outcome. For example, given House passage of a bill that essentially maintained the status quo, and given the tenor of the vast majority of public comment on the proposed amendment, it is reasonable to assume that Congress’ absolute preference lay at or near the status quo under which there would be no disclosure requirement.

In addition, because three Supreme Court Justices took the unusual step of dissenting from the Court’s decision to forward the rule to Congress,\textsuperscript{103} it is at least plausible that the median member preference of the Supreme Court lay somewhat closer to the status quo than the preferences of the other inferior players.\textsuperscript{104} Recall, however, that the Supreme Court’s transaction costs in connection with rejection of a rule proposed by inferior players are very low relative to those faced by Congress. Even though the Supreme Court’s preferences may have been closer to the status quo than other inferior actors’ preferences, it is unlikely that the transaction cost gap was significant for the Court.

In the absence of additional evidence, it is impossible to make more than an educated guess about the precise distribution of preferences among the other inferior players, but we do know two things. First, an initial proposal by the advisory committee garnered universally horrible reviews, generating unprecedented levels of negative public comment.\textsuperscript{105} Second, the CR process ultimately yielded a somewhat less ambitious revised proposal

\textsuperscript{103} A copy of Justice Scalia’s dissent, which was joined in relevant part by Justices Thomas and Souter, can be found in the congressional hearing materials. See Initial Disclosures Hearing, supra note 82, at 211–15.

\textsuperscript{104} This does not have to be the case, of course. Justices Scalia et al. could have been outliers, and the Supreme Court’s median member preference might have been consistent with the preferences of other inferior players. But it is at least possible given the evidence that the Supreme Court’s inaction was transaction-cost-driven.

\textsuperscript{105} The model adopted in this Article assumes perfect and complete information is available to all parties. Had the Advisory Committee possessed perfect and complete information regarding the preferences of superior actors, it would not have issued its initial proposal. In the real world, we would expect inferior actors to be relatively well-informed regarding the preferences of superior players, but we would not expect them to have perfect and complete information. The Advisory Committee’s misstep in this case does demonstrate, however, that players do invest in the acquisition of information that moves them closer to the model’s ideal over time.
forwarded from the Standing Committee to the Judicial Conference to the Supreme Court to Congress. Given that the Standing Committee did submit the initial proposal for notice and comment, it is reasonable to assume that the Standing Committee’s preferences matched the advisory committee’s preferences.\textsuperscript{106} Thus, it is possible that the preference distribution was as follows:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure5.png}
\caption{Initial disclosures final proposal. Disclosure required of materials “the disclosing party may use to support its claims or defenses.” New equilibrium possible.}
\end{figure}

Note that \( x \) lies some distance from the status quo, and thus from absolute congressional preference. This is broadly consistent with the real-world dispute. Given the House’s passage of H.R. 2814 and the near-miss result in the Senate, it is plausible that the Advisory Committee arbitrated congressional transaction costs to obtain a result closer to its own absolute preferences.\textsuperscript{107}

In Figure 5, the intermediate players do not constrain the Advisory Committee in any meaningful way with respect to the final

\textsuperscript{106} The Judicial Conference preference in this situation remains unknown; I place it with the Advisory Committee’s and Standing Committee’s both for convenience and because there is no evidence to the contrary. I also assume for illustrative purposes that the Supreme Court’s absolute preferences lie to the right of the Advisory Committee’s initial proposal, and that the Supreme Court faces essentially no transaction costs in connection with vetoing an unacceptable proposal (that is, SCt=SCt*). We of course do not know what the median member of the Supreme Court thought of the first initial disclosures proposal because the Advisory Committee revised the proposal before it reached the Supreme Court veto gate. But the fact that the revised proposal garnered three dissents provides some support for a median preference to the right of the advisory committee preference.

\textsuperscript{107} Recall that congressional transaction costs can also involve congressional impasse; a split of opinion between the Senate and the House moves \( C* \) even further away from \( C \). In some cases, there simply is no “\( C \)” because the Article I, Section 7 game will not yield a change. In those cases, it is appropriate to locate “\( C \)” at point SQ. Even if Congress and the President would be unable to express a preference for any particular point “\( C \)”, they would nonetheless be able to act to reject a rule that deviates too much from the status quo. Thus, while predicted congressional impasse does expand inferior players’ transaction-cost arbitrage opportunities, it does not give subordinate players carte blanche to impose their own preferences.
equilibrium. Rather, the Advisory Committee’s final proposal takes account only of congressional preferences. But intermediate players’ preferences did play a role in forcing the Advisory Committee to revise its initial proposal.\(^\text{108}\)

One can generate numerous additional preference distributions consistent with the information available in the public record regarding the initial disclosures dispute. For example, the advisory committee’s absolute preferences may have been even more extreme than those reflected in its initial proposal, but its ability to express those preferences may have been tempered by the less radical preferences of the Standing Committee or Judicial Conference. Regardless, the implication of the 1993 initial disclosures dispute is clear: inferior actors’ skillful play of the committee rule-making game plausibly explains the outcome.

The final equilibrium in the initial disclosures case is particularly interesting given the composition of the inferior committees and their incentives. Article III judges effectively control the lower rungs of the CR process, and it is no secret that judges dislike discovery disputes. While much of their opposition to discovery battles is likely grounded in a genuine and accurate belief that such disputes are inefficient and wasteful, it is also plausible that committee members were at least in part motivated by the understandable desire to reduce the annoyances and frustrations attendant with presiding over discovery fights.\(^\text{109}\) It is another question en-

\(^{108}\) Another possible explanation for the revision is that the Advisory Committee, Standing Committee, Judicial Conference, and Supreme Court (less its dissenters) were all on the same page, but they misconstrued the location of \(C\) and/or \(C^*\). In this scenario, the notice-and-comment period for the initial proposal provides the Advisory Committee with new information regarding public preferences that it then strategically incorporates into its revised proposal.

\(^{109}\) See Frank H. Easterbrook, Discovery As Abuse, 69 B.U. L. Rev. 635, 636–41 (1989); see also Posner, supra note 76. Notably, the final proposed rule drew three dissents from the Supreme Court, the sole layer of the inferior CR process whose members are not routinely exposed to discovery disputes. Recall that the Judicial Conference is composed of almost half District Court trial judges. See 28 U.S.C. § 331 (2006). The Standing Committee currently has thirteen voting members, of which only five (three Circuit Court of Appeals Judges, one state supreme court justice, and one academic) are not routinely involved in litigation as either counselor or judge. See U.S. Courts, Committee on Rules of Practice and Procedure (2009), http://www.uscourts.gov/rules/Committee_Membership_Lists/ST_Roster_2009.pdf.
tirely whether the initial disclosures requirement actually reflected democratic preferences.

B. The Bankruptcy Means Test Dispute

Congress recently substantially revised the Bankruptcy Code to limit purportedly “abusive” filings. This controversial statute instituted a “means test” designed to limit access to discharge of debts. Debtors who genuinely lacked the ability to repay could seek discharge, but those who could repay would be diverted into different types of bankruptcy filings.

The statute provides a list of considerations relevant to determining whether a debtor has “passed” the means test, but the statute is not self-executing. Instead, Congress chose to delegate much of the implementation of its new scheme to a committee rulemaking apparatus generally hostile to the aims of the reform legislation. The rulemaking associated with the new requirements arguably provides an additional example of successful transaction-cost arbitrage by inferior CR players.

1. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

In 2005, a Republican Congress and President enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). The centerpiece of this long-debated and controversial bankruptcy reform legislation was a “means test” designed to increase the transaction costs associated with filing for bankruptcy, and to limit allegedly unworthy debtors’ access to discharge of debts under Chapter 7 of the Bankruptcy Code. The BAPCPA means test requirement was intended to funnel debtors with more significant resources into “Chapter 11” or “Chapter 13” bankruptcies instead; those proceedings favor reorganization of debts and the development of payment plans over full discharge of debts.

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The stated goal of BAPCPA is to eliminate, or at least limit, “abusive” Chapter 7 filings by debtors whose resources suggest at least some ability to repay their debts. Among other things, the statute specifically requires debtors seeking Chapter 7 protection to provide a “schedule of current income and current expenditures” that includes a statement of the “debtor’s current monthly income, and the calculations that determine whether a presumption” of abuse arises.

But as the text of Section 707(b)(2)(C) suggests, not all debtors are subject to the means test presumptions. In particular, no presumption of abuse attaches if the filer’s household income is below the median income in the debtor’s home state. If the filer’s income exceeds the state median, then a full-blown means test must be performed.

2. Rulemaking on the Means Test Disclosures

Under BAPCPA’s statutory framework, a debtor filing for bankruptcy protection is apparently required to detail her current monthly income and more: “As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor’s current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.”

113 See, e.g., Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 1 Pub. Papers 639, 639–40 (April 20, 2005) (highlighting alleged “abuse” of old bankruptcy regime and noting that under new bill, “Americans who have the ability to pay will be required to pay back at least a portion of their debts”).
117 If the debtor’s income is above the state median, abuse is presumed if the debtor’s aggregate current monthly income over five years, net of certain statutorily allowed expenses, is more than (i) $10,950; or (ii) 25% of the debtor’s nonpriority unsecured debt, as long as that amount is at least $6,575. See U.S. Courts, Bankruptcy Basics, Chapter 7, http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter7.html (last visited Jul. 30, 2009). The original amounts set in the statutory text at the time of its enactment were $10,000 and $6000. 11 U.S.C. § 707(b)(2)(A) (2006). These amounts are subject to an automatic inflation adjustment. Id. § 104(b) (2006).
But the bankruptcy statute does not explain how this information is to be collected. Instead, Congress expressly delegated development of the procedural details to the CR process by amending the Rules Enabling Act to require the promulgation of a statute-compliant form.\textsuperscript{119}

Shortly after BAPCPA became law, the Advisory Committee on Rules of Bankruptcy Procedure established a “means test working group” tasked with crafting the new form and rules.\textsuperscript{120} In August 2005, the Judicial Conference approved an interim set of rules and forms for transmission to the courts in advance of BAPCPA’s October 15, 2005 effective date.\textsuperscript{121} Among other provisions, this set of materials included Form B22A,\textsuperscript{122} which requires the disclosures that courts may use to determine a debtor’s eligibility for Chapter 7 liquidation and discharge.

One aspect of Form B22A proved surprisingly controversial in a way that may demonstrate the descriptive power of this Article’s game-theoretical analysis of committee rulemaking. Specifically, the form did not require each and every debtor to detail both her income and expenses. Rather, it employed a “flow chart” style of reporting that required disclosure of expenses and “presumption of abuse” calculations if and only if the debtor’s income exceeded the median income in the debtor’s home state for the debtor’s given household size.\textsuperscript{123} If the debtor’s income was less than the state-median threshold, then the form required no further disclosure.\textsuperscript{124}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{119} See 28 U.S.C. § 2075 (2006) (“The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement.”).
\item \textsuperscript{121} Id. at 8.
\item \textsuperscript{123} Id. at Part III, Items 13–15.
\item \textsuperscript{124} Id. Debtors whose incomes are less than the state median are directed to skip Parts IV, V, VI, and VII of the form, and to complete only Part VIII of the remainder of the form, which is nothing more than a verification section.
\end{itemize}
\end{footnotesize}
3. A Congressional Controversy?

Form B22A drew criticism from several prominent members of Congress. On March 13, 2006, Republican Senators Chuck Grassley (chief architect and primary Senate sponsor of BAPCPA) and Jeff Sessions (another important sponsor of the legislation) sent a letter to the Supreme Court objecting to Form B22A as proposed by the Advisory Committee and implemented by the Judicial Conference.\textsuperscript{125} From the Senators’ perspective, BAPCPA’s exemption of below-median-income debtors from the presumption of abuse did not imply an exemption from income and expense reporting requirements: “[BAPCPA] does not exempt any debtor from the information filing requirement. Congress specifically chose not to create such an exemption. The Senate Judiciary Committee, on which we serve, specifically rejected such an exemption; the Judicial Conference should not create an exemption already rejected by Congress.”\textsuperscript{126}

The Grassley/Sessions interpretation of the statute is not illogical; in fact, the plain language of the statute arguably supports their claim because the statute apparently requires all Chapter 7 debtors, without exception, to perform “the calculations that determine whether a presumption arises under subparagraph (A)(i).”\textsuperscript{127} If Senators Grassley and Sessions carried the day with their interpretation, every debtor filing for Chapter 7 bankruptcy would be required to submit detailed monthly expense information in addition to their monthly income information.\textsuperscript{128} In addition, every debtor would perform “presumption of abuse” calculations and would be


\textsuperscript{126} Letter from Chuck Grassley and Jeff Sessions, U.S. Senators, to John Roberts, Chief Justice of the U.S. Supreme Court (Mar. 13, 2006).


required to certify that a presumption of abuse either did or did not arise under the statute.\textsuperscript{129}

4. Normative Implications of Expense Disclosure Requirements

The Grassley/Sessions interpretation of the statute’s means testing requirement is more politically conservative (or at least more “anti-debtor”) than the Advisory Committee’s interpretation in at least two ways: (1) the Grassley/Sessions interpretation would further raise debtor transaction costs in connection with filing for bankruptcy protection; it would take time and money to assemble the requisite information, and the additional cost of assembling expense information could deter below-median-income debtors from filing on the margins; (2) under the Grassley/Sessions interpretation it is possible that a below-median-income debtor statutorily exempted from the presumption by virtue of sections 707(b)(6) and (7) would nonetheless be required to check the box entitled “The presumption [of abuse] arises.”\textsuperscript{130}

Consider, for example, a debtor whose income is just barely below the state median. If her monthly expenses are also relatively low, it is possible that her net aggregate monthly income over the next five years (adjusted for allowable expenses) would exceed $10,000.\textsuperscript{131} That is, one can imagine a debtor who earns below-median income but would nonetheless have in excess of $166.67 available each month with which to pay down her debts. But for the median-income exemption of section 707(b)(7), that debtor’s Chapter 7 filing would be presumed abusive, because she would be seeking discharge of debts despite having some real ability to repay.\textsuperscript{132}

By statute, however, that debtor could never be subject to a motion to dismiss or convert her Chapter 7 filing to a reorganization proceeding solely on the basis of the presumption of abuse; under BAPCPA, no party has the right to challenge a filing on the basis of the presumption alone if the debtor’s income is below her state’s median.\textsuperscript{133} In fact, if a debtor’s income is below the state median,

\textsuperscript{129} See id.
\textsuperscript{130} See id.
\textsuperscript{131} See supra note 117.
\textsuperscript{132} At least, this would be “abusive” according to the statute.
only the judge, U.S. trustee, or bankruptcy administrator can move to dismiss or file a motion to convert the filing on “abuse” grounds of any sort.\textsuperscript{134} Moreover, in such a case, the judge, U.S. trustee, or administrator would be required to demonstrate abuse under the “bad faith” or “totality of the circumstances” requirements of section 707(b)(3),\textsuperscript{135} they could not rely on the presumption created under section 707(b)(2), nor could they take advantage of the burden-shifting that presumption generates.\textsuperscript{136}

Recall that Senators Grassley and Sessions interpreted the law to require disclosure by all Chapter 7 debtors of (1) monthly income; (2) presumption of abuse calculations; and (3) by extension, the monthly expense data necessary to perform those calculations. Thus, even with the below-median-income “safe harbor,” the Grassley/Sessions interpretation of BAPCPA’s disclosure requirements is “anti-debtor” relative to the form proposed by the Advisory Committee.

If a below-median-income debtor is required to submit expense information and to perform presumption of abuse calculations, and if those calculations suggest an ability to pay notwithstanding her low-income status, those disclosures have at the very least lowered transaction costs for a judge, U.S. trustee, or bankruptcy administrator interested in ferreting out additional “abuse” of the system. By flagging “the presumption arises,” the debtor has signaled to those parties that her case may be worthy of additional scrutiny. In the absence of such disclosures, search costs for the judge, U.S. trustee, or administrator would remain relatively high, and the likelihood that they would invest substantial resources to sniff out purportedly abusive filings among below-median-income debtors would be correspondingly low.\textsuperscript{137}

\textsuperscript{134} See id. § 707(b)(6) (2006).
\textsuperscript{135} Id. § 707(b)(3) (2006).
\textsuperscript{136} See, e.g., id. § 707(b)(2)(B) (2006) (establishing rebuttal burdens). If a debtor’s income is above the state median and that debtor passes the means test, the presumption of abuse applies, and any party in interest can challenge the filing. Id. § 707(b)(1) (2006).
\textsuperscript{137} In addition, it is possible that the Grassley/Sessions interpretation would yield subtler pressures in the negotiation of the liquidation itself; various parties in interest might bring more pressure to bear on the debtor to, for example, reaffirm certain debts if it appeared that the debtor had some real ability to repay.
5. The Game Theory of the Bankruptcy Means Test Dispute

Notwithstanding Senator Grassley’s and Senator Sessions’ objections to the initial Form B22A, none of the subordinate actors in the CR process acted to change the form as requested. More important, neither did Congress: the current Form B22A retains flowchart-style organization and does not require debtors exempt from presumption of abuse proceedings under 11 U.S.C. §707(b)(7) to complete the “Deductions from Income” (that is, expenses) portions of the form or to perform the “determination of §707(b)(2) presumption” calculations in Part VI.  

One might tell several stories to explain this result. Perhaps Senators Grassley and Sessions were outliers whose preferred outcome lay to the right of Congress’ as a whole. Perhaps their own opinions changed because of lobbying after the fact by the Financial Services Roundtable to tighten the noose even further on potentially undeserving Chapter 7 debtors. But given the prominent roles these Senators played in obtaining passage of BAPCPA, it is at least plausible that the Grassley/Sessions interpretation represented something close to the congressional median.

This contention is bolstered somewhat by the text of the statute itself, which appears to require the disclosure of presumption of abuse calculations without exception. Thus, it is plausible that the final CR outcome embodied in Form B22A represents an equilibrium point to the left of Congress’ preferred outcome as to the means test requirement.

Of equal importance is the fact that bankruptcy experts and especially bankruptcy judges generally opposed most of BAPCPA’s provisions. Because the bankruptcy rules advisory committee membership was drawn from this general population, it is not a

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139 Senator Grassley chaired the subcommittee that drafted the bill and is widely regarded as the chief Senate architect of the legislation. Senator Sessions was also on the subcommittee. Both Senators are Republicans, and the Republican Party controlled Congress at the time.
140 See 11 U.S.C. § 707(b)(2)(C) (“[T]he debtor shall include . . . the calculations that determine whether a presumption arises . . . .”) (emphasis added).
stretch to imagine that the advisory committee was similarly hostile to BAPCPA, a perception that was widely shared by other bankruptcy professionals.

Or, rendered graphically, it is possible that the preference set for means test disclosure requirements resembled the following:

![Preference Map](image)

In Figure 6, the advisory committee, Standing Committee, and Judicial Conference all prefer to preserve the status quo, which would not require means-testing of debtors at all.\footnote{142} Congress’ zero-transaction-cost preference lies far to the right, and would require full monthly expense disclosure by all Chapter 7 filers. But the advisory committee did not have to propose “C” as the equilibrium because Congress’ transaction-cost-adjusted indifference point lay substantially to the left of its zero-transaction-cost preference. Thus, the advisory committee could propose an equilibrium exempting sub-median-income debtors from expense disclosure requirements, knowing that Congress would not expend the resources necessary to “correct” the result.

\section*{C. Dynamic Rulemaking and Opportunity Costs}

Looking back, it is not possible to say with any certainty whether inferior players timed their rulemaking in either case to coincide with high-opportunity-cost periods in Congress.\footnote{143} Congress, to some degree, anticipated the general risk by mandating a seven-month waiting period before negative-option rules become law.\footnote{144}

\footnote{142} Because the change was to a bankruptcy form rather than a full-blown rule, Supreme Court approval was not required, nor was formal presentment to Congress. Thus, the Supreme Court’s preferences are not reflected on the preference map.

\footnote{143} For an explanation of opportunity costs, see supra Subsection II.B.3.

\footnote{144} See 28 U.S.C. § 2074.
Moreover, the Form B22A dispute arose out of a congressional directive that started the rulemaking machinery in motion. And yet an opportunity cost story is consistent with the adoption of the initial disclosures requirement. Throughout the summer and fall of 1993, Federal legislators on both sides of the aisle were consumed with a raging debate on health care reform. President Clinton, the first Democrat to hold the office in twelve years, made health care reform the centerpiece of his initial legislative agenda. By the fall of 1993, the health care debate consumed huge chunks of congressional resources, as legislators dug in for a bitter fight.

It is not possible to get into the heads of then-Chief Justice Rehnquist or the other inferior players. We do not know whether the final position taken in the proposed amendment of Rule 26 was more radical than it otherwise would have been because inferior actors anticipated a distracted Congress. But it is at least possible. Inferior players were undoubtedly aware of the change in their presidential administration, and were aware of the fact that President Clinton had both ambitious plans and control of both houses of Congress. If nothing else, the spring of 1993 wasn’t a particularly bad time to propose a controversial rules change in a negative-option system.

Even if inferior players did time the proposed initial disclosures requirement to take advantage of Congress’ preoccupation with President Clinton’s ambitious legislative agenda, this did not guarantee their success. The proposal still came within a hairsbreadth of failing. But it is at least plausible that the remarkably full congressional agenda during 1993 moved C* even further from C, giving inferior players additional room to arbitrage congressional transaction costs.

IV. PRESCRIPTIVE IMPLICATIONS OF THE MODEL

The prescriptive implications of the model are at first glance ambiguous for two reasons. First, one might argue that partial insulation from interest groups is worth the distributive losses associated with the imperfect agency of inferior players. Second, the arbitrage risks demonstrated by the model may to some degree be

counterbalanced by the expertise advantages conferred by the current structure of the rulemaking process.

But there is reason to believe that the selection process for inferior committee membership (especially for the Standing Committee and advisory committees) is more likely to yield committees for whom transaction-cost-arbitrage risks outweigh expertise benefits. Moreover, if Congress reserved to itself the authority to select advisory committee membership from among the same pool of participants the Chief Justice currently taps for service, it could substantially mitigate arbitrage risk without dramatically increasing interest group risk or losing the expertise advantages of the CR structure.

A. Is There a Problem?

Whether the model developed in this Article has any significant prescriptive implications is a difficult question. The model does suggest that there are sometimes disconnects between democratic/republican rulemaking preferences and the outcomes of the CR process. And rules often have systemic substantive consequences; we should care about procedural system design for that reason alone.

To the extent we look to traditional democratic/republican theory to supply our preferences, the model is thus deeply troubling. At the same time, committee rulemaking enjoys substantial advantages over other potential forms of procedural system design in the form of expertise advantages and insulation from interest group risk. Any prescriptive solution to the arbitrage risks identified by

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\(^{146}\) Or, more accurately, what those preferences would be under conditions of perfect and complete information.

\(^{147}\) See, e.g., Redish & Amuluru, supra note 6, at 1319–27 (questioning constitutionality of Rules Enabling Act on substantive impact grounds).

\(^{148}\) See generally Bone, supra note 18, at 896; see also Gilligan & Krehbiel, supra note 40 (modeling congressional delegation of power to committees and finding the delegation rational when expertise advantages offset agency costs). There is substantial literature exploring the proper role of courts and Congress in rulemaking. See generally Friedenthal, supra note 18; Mullenix, Unconstitutional Rulemaking, supra note 18; Redish & Amuluru, supra note 6; Walker, supra note 6; Weinstein, supra note 18. I will not rehearse those arguments here except to note my general agreement with the “delegation theory” proposed by Professor Weinstein. See Weinstein, supra note 18, at 906. In Weinstein’s view, the majority of rulemaking authority derives from legislative delegation of authority. Id. at 927. As discussed below, however,
the model must not come at a net loss once those benefits are included in the calculus. Taking each in turn:

I. The Committee Rulemaking Process May Mitigate Interest Group Risk

Congress is far more subject to interest group pressure than the other components of the CR system for at least two reasons. First, Congress is too busy—it must remain rationally ignorant or at least under-informed regarding judicial procedures and their broader implications. For better or worse, Congress relies upon third parties for information, especially as to more esoteric or technical matters.\(^{149}\) Third parties will fill the information vacuum, but they will fill it with information supportive of their own interests.

Second, Congress faces reelection incentives that provide interest groups with potential levers that simply are not present as to most of the individuals involved in the lower levels of the CR process. The judges, professors, and private individuals that make up the various rulemaking committees are not collecting campaign contributions, and are not beholden to contributors in the same way members of Congress might be.

In fact, depending on one’s level of skepticism regarding the republican reliability of Congress, one might go even further: perhaps the relative insulation of the CR process from interest group pressure suggests that “transaction-cost arbitrage” by CR actors is a reasonable price to pay to prevent interest groups’ attempts to perform similar arbitrage at the congressional level.\(^{150}\) If the point “C” on our preference maps is informed by interest group activity,

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\(^{150}\) This is not to say that interest groups are uninvolved in the CR process. Interest groups actively lobby advisory committees and Congress in favor of their preferred outcomes. Rather, the point is that direct congressional rulemaking would be relatively more susceptible to interest group influence than the CR process as currently constituted.
and especially if we have reason to believe that Congress’ conversations with interest groups will be one-sided, then perhaps the outcome of the CR process, pursued by committee members acting in good faith at multiple subordinate levels, is closer to the unadulterated “C” that would be obtained in the presence of full information and the absence of self-serving interest group activity.

At the very least, any attempt to mitigate the risks identified by the model must account for the possible advantages conferred by inferior players’ relative insulation from interest group pressures.

2. The Committee Rulemaking Process and the Expertise/Agency Risk Conundrum

Even if we could somehow insulate Congress from interest group pressure entirely, it would nonetheless still be true that Congress is particularly ill-suited for the painstaking task of procedural system design. Its attention is horribly divided, and it lacks institutional expertise necessary to ensure that its amalgamation of procedural outcome preferences can be expressed in a workable whole.

In fact, Congress’ one prior large-scale attempt to craft procedural rules itself—its legislation of Federal Rules of Evidence in the 1970s—required several rounds of committee rulemaking and additional legislative “fixes” just to get all the moving parts working together. Whatever its other flaws, the committee rulemaking process does put procedural system design in the hands of committees with the ability and incentive to invest heavily in expertise. It is difficult to ascertain the net advantages and disadvantages of an expert-driven process. But it is certainly plausible that the advantages associated with letting subject-matter experts design complex procedural systems might sometimes outweigh any concomitant self-interest risks.

Professors Gilligan and Krehbiel have formalized the intuition that the expertise advantages inherent in congressional delegation of authority to committees can more than offset the agency risks

\[151\] That is, that there is no equal and opposite interest group in play in a given context. See generally Stancil, supra note 149.

associated with such delegation. Gilligan and Krehbiel focus on congressional legislation and the relationship between the houses of Congress, their standing committees and floor amendment procedures. They ultimately conclude that it is often in Congress' interest to delegate real authority to committees by adopting restrictive amendment procedures limiting congressional ability to second-guess its committees, because the social gains from the committees' subsequent investment in expertise will offset the agency costs associated with the committees' enactment of their own preferences.

Simplifying only a little, Gilligan and Krehbiel find that if a given committee’s views are “moderate” in relation to Congress’ (“moderate” in this case being defined as some maximum deviation between the committee's ideal outcome and the floor’s ideal outcome), it is always preferable to adopt restrictive amendment rules. They further show that public policy may be served by restrictive amendment rules even for more “extreme” committees whose preferences further diverge from the floor’s preferences, provided that the cost of specialization is high enough that the committee will invest in information only if it knows that Congress’ hands are more or less tied. In the Gilligan and Krehbiel model, nondelegation (in the form of unrestrictive amendment rules) is preferable only for “very extreme” committees whose preferences diverge significantly from the floor’s preferences.

Gilligan and Krehbiel’s model of committee work suggests that, at least in the legislative context, the costs of self-dealing will frequently be overcome by the benefits of letting experts craft policy. But there are a number of important differences between the floor/standing committee relationships Gilligan and Krehbiel model and the relationships involved in the committee rulemaking game. First, Congress’ pre-commitment in the CR context is substantially more general and more final than in the standing committee/floor context. As Gilligan and Krehbiel document, in the legislative context, Congress enacts “restrictive” amendment rules

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153 See Gilligan & Krehbiel, supra note 40, passim.
154 See id. at 324–25 for a formal discussion of the way in which the authors segment committee types in relation to preference divergence from the floor.
155 Id.
156 Id. at 325.
in a variety of ways and retains substantial case-by-case flexibility to handle individual pieces of legislation differently. Decisions regarding the restrictiveness of amendment and debate procedures are often made by “special orders” specific to a given bill.

By contrast, the committee rulemaking process is a creature of statute, with all the relative permanence and inflexibility that status implies. No matter how potentially “substantive” a proposed rules amendment may be and no matter how divergent the subsidiary players’ preferences from those of Congress, committee rulemaking on virtually every issue is effectively subject to “restrictive” procedures under the Gilligan and Krehbiel taxonomy. Though this rather extreme pre-commitment strategy may well encourage maximum committee investment in expertise, it is strikingly different from the flexible approach Congress uses when considering more obviously substantive legislation. As a result, leaving evidentiary privilege rules to one side, it could be argued that Congress has decided, definitively and universally, that the benefits of restrictive procedures outweigh the costs as to all procedural rules changes. The wisdom of such a categorical decision depends in large part upon the expected “preference fit” between Congress and inferior CR committees.

If CR committees are more likely to be “moderate” in the Gilligan and Krehbiel sense of the term, then perhaps the expertise advantages associated with CR in its current form outweigh the transaction-cost arbitrage risks. But if CR committees trend toward the “very extreme,” then change may be in order, especially given the rather elaborate hand-tying to which Congress has subjected itself by way of the Rules Enabling Act.

Unfortunately, inferior players in the CR process are systematically more likely to be “extreme” or “very extreme” rather than “moderate” relative to Congress. Gilligan and Krehbiel study in-
ternal congressional committees. By definition, these committees are composed of members of Congress and their staffers. They are thus subject to a number of constraining influences. Members of Congress interact with one another regularly, both professionally and socially. They are subject to discipline by party leadership if they go too far afield. And most Members of Congress’ legislative interests and desires extend well beyond the work of their own committees. Congressional committee members thus are arguably constrained to a substantial extent by their external legislative agendas and the knowledge that excessive defection from floor preferences in committee will likely limit their success elsewhere. Finally, committees are controlled by the majority party; the risk that committee preference will be substantially misaligned with floor preference is therefore somewhat mitigated. 161

The CR process offers few assurances of faithful agency by comparison. The selection of CR committee members is driven exclusively by the Chief Justice and other judicial actors, who themselves comprise a plurality of all procedural standing committees and are the exclusive members of the Judicial Conference and Supreme Court nodes in the CR process. Article III judges enjoy lifetime tenure on good behavior, and even the “civilian” members of subordinate committees are generally private persons without strong social or professional connections encouraging conformity to congressional preference.

As important, because inferior committee membership is determined by the Chief Justice, there is a potential “transitive dead hand” problem; committees will routinely be selected by Chief Justices appointed by departed presidential administrations. When procedural rules have substantive consequences, this ideological disconnect is troubling.

In sum, there is essentially no connection between Congress and the committees to which it has delegated rulemaking authority. Thus, while we might expect the various inferior CR players to be

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161 Some political science commentators have claimed that committees attract ideological outliers. See Keith Krehbiel, Are Congressional Committees Composed of Preference Outliers?, 84 Am. Pol. Sci. R. 149, 159 (1990) (refuting the assertion). Even if the claim were true, majority party control of committees suggests that any committee deviation from floor preference will usually stop short of adopting minority ideology. The same cannot be said for committee rulemaking.
“moderate” in the more general sense of the word, there is little reason to believe that inferior CR players will be “moderate” in Gilligan and Krehbiel’s sense; that is, that their preferences will lie close to Congress’. In a world where ostensibly procedural rules have substantive consequences, this disconnect is of significant concern.

B. Moving the Median: Congressional Appointment of Advisory Committees

One possible approach to the CR game problem would leave the essential structure of the CR process intact, and would instead focus upon “moving the median” to be more responsive to the democratic/republican process. In particular, greater congressional involvement in the selection of advisory committee members could help shift the median preferences of the most important committees so that they are more immediately and directly responsive to overarching political preferences.

For example, if Congress were to select the members of each advisory committee, those committees would be more attuned to current congressional desires, and at least somewhat less subject to the legacy administration problems occasioned by the current system. It would no doubt be preferable in such a world to delineate more concretely the criteria for advisory committee membership (for example, a statutory mandate for x% Article III judges, y% private practitioners, etc.), but once in place, such a system could theoretically provide many of the benefits of the CR system while simultaneously diminishing the threat of transaction-cost arbitrage by more closely aligning the preferences of those committees with the preferences of Congress.

But what, precisely, would such a system look like? As is often the case, the devil is in the details. Congressional selection of advisory committee members creates a greater risk of strategic behavior than the current model, and countervailing concerns regarding institutional expertise and responsiveness to congressional preference present problems of their own.

Recall that the Rules Enabling Act authorizes the Judicial Conference to create such committees. Moving appointment authority to Congress would require amendment of the REA.
Specifically, once we have decided that Congress should appoint all advisory committee members, a number of questions remain: How many members should each advisory committee have? Who should fill those positions and in what proportions? How long should each member serve, and should terms be staggered?

There is, of course, no clear answer to these questions, but common sense and experience suggests a few guidelines. First, there is no indication that the current membership numbers are causing any problems. In addition, the advisory committees regularly subdivide into issue-specific working groups and subcommittees to tackle their substantial workloads. Thus, it may be preferable to leave the advisory committees more or less alone with respect to membership numbers, though it may be necessary to codify the status quo to avoid “committee packing” risks.

Second, while the selection process itself is suspect, the current prominence of Article III judges on the advisory committees is not likely problematic. While it is true that those judges may face incentives to decrease their own workloads by adopting restrictive rules of procedure, it is likely that this systemic risk can be counterbalanced through appointment of ideologically diverse judges without losing the special advantages obtained by appointing those closest to the system. In addition, assuming ideological balance (or perhaps rough ideological congruence with congressional preference) can be obtained, the dominance of judges on advisory committees provides substantial protection against undue political influence. A federal judge appointed by Congress to serve on an advisory committee is still a federal judge, with lifetime tenure during good behavior. She will bring the preferred ideological overlap with her, but she is less likely subject to other forms of political pressure than other actors would be.

This is not to say that judges leave their personal ideologies at home when they perform committee work. To the contrary, common sense and recent political science research both suggest otherwise. But the answer is not necessarily to remove judges from

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163 The same can be said of bankruptcy judges on the bankruptcy advisory committee.
164 See Chutkow, supra note 72, at 12–15 (quantitative empirical analysis finding that partisan alignment with the Chief Justice is significant in predicting appointment to Judicial Conference committees).
the process. Rather, the research itself suggests a response: give the appointment power to someone else. The problem is not that judges or other groups come to the committee table with their ideological preferences. The problem is which judges come to the table.

Given the real expertise advantages of the federal judiciary with respect to a number of procedural issues vis-à-vis the general population, and given the perverse incentives to which other potential members of rulemaking committees (especially members of Congress or congressional staffers) might be subject, it would be foolhardy to reduce the judicial role in rulemaking. But it would be wise to choose those judges carefully, with an eye toward obtaining committees with preferences more in line with Congress’.

Third, it is likely preferable to retain the current three-year default terms for advisory committee members, staggering those terms in corporate board fashion such that one-third of each advisory committee turns over every year. The three-year term is probably necessary to ensure continuity, especially given the long time horizons associated with many procedure projects. Three-year terms will necessarily decrease committee responsiveness to current congressional preferences that can change radically every two-year federal election cycle, but that problem can be addressed, in part, by staggered terms; Congress will be able to move the committee median incrementally every year, and to obtain wholesale replacement every four years.

In short, it may be advisable to keep things more or less exactly as they are, save that Congress should appoint advisory committee members instead of the Judicial Conference. If Congress were to appoint the members of each advisory committee, those members could be expected, at the very least, to match congressional ideology more closely.

**C. Intermediate Actor Vetoes and the Game Theory of Congressional Appointment**

If Congress were to appoint the members of each advisory committee on a three-year, staggered-term basis, this would reduce but not necessarily eliminate the gap between congressional preference C and advisory committee preference AC in most cases. We would thus expect to see better alignment of congressional and advisory
committee preferences, and fewer attempts to arbitrage transaction costs coming from the advisory committees.

But the structure this Article envisions leaves the intermediate actors’ veto powers intact. Those actors are, either directly or indirectly, Article III actors—the Supreme Court and Judicial Conference consist entirely of Article III judges, and the Standing Committee is appointed by the Chief Justice and itself primarily consists of federal judges. The game theoretical implications of the structure proposed above are therefore somewhat complicated; greater congruence between AC and C may still be insufficient to ensure policy equilibria acceptable to Congress if the intermediate players’ preferences lay elsewhere.

This problem is partially captured by Case 4 in Section II.D above. In that case, congressional and advisory committee preferences are both to one side of the intermediate actors’ preferences. As the model indicates, the outcome there depends upon the intermediate actors’ indifference points; if there is significant spread between absolute intermediate preferences and intermediate indifference points, the advisory committee may be able to effect a change in the desired direction (at least out to the intermediate indifference points). By contrast, if, as we often expect, there is little distance between absolute intermediate actor preferences and their related indifference points, the advisory committee may be unable to effect any change from the status quo despite its sharing Congress’ belief that such a change is desirable in the abstract. Figure 7 provides a starker depiction of the problem:

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165 See supra note 71 and accompanying text.
166 See supra Subsection II.E.3.
167 Of course, if Congress cares enough about a given procedural change, it can always act directly to amend the relevant rules by statute.
Thus a threshold question arises: should the intermediate actors retain their veto rights, or should they be written out of the CR process entirely? One could imagine a CR process in which Congress delegates negative-option authority to an advisory committee alone.

I tentatively support retention of the intermediate actors, complete with full veto rights, notwithstanding the risk that they might from time to time frustrate congressional preference. First, intermediate actor review and veto rights constitute a sort of informal, anticipatory *Marbury v. Madison* review of procedural rules, and it is likely that this form of review entails substantially lower net social costs than the alternative of full litigation.

The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee that no person can be deprived of “life, liberty, or property, without due process of law.” The definition of “due process” is necessarily implicated with every procedural rule. For example, an amendment to Federal Rule of Civil Procedure 12 changing a defendant’s answer time from twenty days after service before potential default to, say, two days after service would likely be unconstitutional, even if such a rule accurately reflected a liberal Congress’ desire to tilt the litigation playing field in plaintiff’s favor.

Similarly, an amendment to Rule 11(c) providing for “treble damages” sanctions for Rule 11 violations (that is, three times the costs incurred by the prevailing party including attorneys’ fees) might well run afoul of the Constitution even if a conservative Congress desired such a change to deter purportedly frivolous lawsuits.

Intermediate actor vetoes do present the risk that some otherwise legitimate congressional procedural preferences will not be enacted, but they also provide ex ante assurance that new or amended rules are at least facially constitutional. Moreover, this ex ante assurance likely comes at lower net social cost than ex post review. Under the current process, every new procedural rule carries the implicit constitutional imprimatur of the Supreme Court. In the absence of intermediate actor review and sign-off, it is not implausible to assume that the constitutionality of virtually every new or amended procedural rule would be litigated.

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In addition, retention of the intermediate player veto substantially mitigates any separation of powers concern arising out of congressional selection of advisory committee members. The revised structure would still be dominated by Article III judges at every level; more important, the judicial branch would retain an absolute veto over new procedural rules at three separate levels of the process: the Standing Committee, the Judicial Conference, and the Supreme Court. These three sequential vetoes should be sufficient to ensure that the judicial branch retains effective control over matters genuinely committed to its discretion by the Constitution.\(^{169}\)

Finally, the universe of potential problems arising from retention of the intermediate player veto is quite small. Congress retains and occasionally exercises the right to enact procedural rules by statute.\(^{170}\) Thus, assuming relative congruence of preferences between an advisory committee and Congress, the only context in which congressional preference could be frustrated by intermediate player vetoes is one in which the strength of congressional preference is insufficient to generate affirmative legislation.

In such a scenario, the relevant advisory committee would propose a new rule consonant with congressional desires, the rule would be vetoed by intermediate players who refused to forward the rule up the chain, and Congress simply would not care enough to enact its preferences into law. Such situations are likely to be quite rare, especially because the congressional transaction costs

\(^{169}\) But see Mullenix, Unconstitutional Rulemaking, supra note 18, at 1286–87 (arguing that the Civil Justice Reform Act of 1990 (CJRA) unconstitutionally usurped judicial branch authority by delegating rulemaking authority to local advisory committees and by “declaring procedural rules to be substantive law”). Given Professor Mullenix’s general hostility to congressional involvement in judicial affairs, it seems unlikely that she would be willing to accept the reforms I propose. But the structure this Article envisions does less actual harm to separation of powers than the CJRA, insofar as it retains a traditional, centralized rulemaking structure with genuine judicial branch vetoes at intermediate levels. This Article’s structure at least partially addresses Professor Mullenix’s concern that “the power to prescribe internal rules of procedure for the federal courts” is authority that “uniquely bears on the judicial function.” Mullenix, Counter-Reformation, supra note 18, at 379.

associated with enactment of a sympathetic advisory committee’s proposals would be substantially lower than those associated with any congressional attempt to create a rules regime out of whole cloth.

CONCLUSION

Game theory suggests that for all its advantages, the current incarnation of the committee rulemaking process may be susceptible to transaction-cost arbitrage risk. A rationally under-informed Congress may be willing to accept procedural equilibria some distance away from its “real” preferences simply to avoid incurring the costs associated with informing itself and then acting. But at the same time, the CR structure may reduce certain other risks of strategic behavior, most notably interest group hijacking of the rulemaking process.

The best way to mitigate transaction-cost-arbitrage risk without surrendering the benefits of CR may be for Congress to retain the basic CR structure, but to retain authority to appoint advisory committees itself. Though this solution is incomplete and is not without its own risks, it would mitigate the most significant transaction-cost-arbitrage risks without eviscerating an otherwise valuable process.
APPENDIX A: DIAGRAM OF THE FEDERAL RULE MAKING

Negative Option Rulemaking
(Most Federal Rules)

Advisory Committee

Standing Committee

Judicial Conference

Supreme Court

Congress

Defers or Rejects by Statute

Effective December 1

6-month comment period

Approves for public notice and comment

Approves and forwards to Supreme Court

Approves and forwards to Congress by May 1 of effective year

7-month waiting period

Considers and drafts amendments
Close Enough for Government Work

PROCESS

Positive Option Rulemaking
(Evidentiary Privileges Only)

Advisory Committee
- Considers and drafts amendments

Standing Committee
- Approves for public notice and comment

Judicial Conference
- Approves and forwards to Supreme Court

Supreme Court
- Approves and forwards to Congress by May 1 of effective year

Congress
- Adopts By Statute
- Not Enacted