

# TAILORED PROCEDURES

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*Over the last few decades, uniform rules have come to govern only a fraction of cases in state courts. Instead, pleading standards vary by case type, discovery limits hinge on amount in controversy, and rules flex based on party type, representation status, and other factors. Quietly, tailored procedures have come to dominate state court civil litigation, impacting millions of cases each year—from consumer debt to personal injury to complex commercial.*

*This Article analyzes the rise of tailored procedures in state courts and the implications for access to justice, separation of powers, and court legitimacy. Through a case study of Arizona's procedural evolution that draws on an original dataset of over 6,600 administrative and rulemaking orders, I trace how such tailoring developed, create a typology that can serve as a menu of design options for courts, and evaluate tailoring's tradeoffs. Without transsubstantivity as a rulemaking backstop in state courts, I also propose three new safeguards to ensure that tailored rules maximize benefits and minimize harms: proportional design, reason-giving, and iterative review.*

*Tailoring, however, is about more than just gains and losses in fairness or accuracy. It is about a profound shift in who makes procedure and the goals it might achieve. As state courts have centralized authority and expanded their use of tailoring, they have displaced local rulemaking and narrowed judicial discretion. As rulemakers have grown more ambitious, they have expanded the values that procedure has traditionally advanced. These shifts raise important questions about who should make what procedure, the relationship between procedure and substance, and the role of courts in society.*

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INTRODUCTION

During the COVID-19 pandemic, the Michigan Supreme Court enacted emergency orders that significantly changed eviction proceedings in the Great Lakes State. These included a thirty-day mandatory stay of all nonpayment cases to give tenants time to apply for subsidized rental relief.<sup>1</sup> When the Court later moved to make versions of these orders permanent, it received hundreds of comments and held a lengthy and heated public hearing.<sup>2</sup> Tenants spoke about how the extra time was critical to access resources and defend rights<sup>3</sup>—and reduced social harm by keeping tenants in their homes. Landlords argued that the extra process costs were disproportionately borne by them, would

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<sup>1</sup> Amendment of Administrative Order No. 2020-17, Priority Treatment and New Procedure for Landlord/Tenant Cases, ADM File 2020-08, at 2 (Mich. Mar. 22, 2021) [hereinafter Mich. Mar. 2021 Ord.], [https://www.courts.michigan.gov/4a71a8/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08\\_2020-06-09\\_formattedorder\\_ao2020-17withamendments.pdf](https://www.courts.michigan.gov/4a71a8/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2020-06-09_formattedorder_ao2020-17withamendments.pdf) [https://perma.cc/D925-5W99] (noting that the stay is lifted if eligibility determination is not conducted within thirty days).

<sup>2</sup> Amendments of Administrative Order No. 2020-17 and Rules 2.408 and 4.201 of the Michigan Court Rules, ADM File 2020-08, at 16 (Mich. Sep. 7, 2023) [hereinafter Mich. Eviction Ord.] (Welch, J., concurring), [https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08\\_2023-09-07\\_formor\\_amdao2020-17.pdf](https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2023-09-07_formor_amdao2020-17.pdf) [https://perma.cc/J35B-7N9N]; see Transcript of Public Hearing at 11–59 (Mich. Nov. 16, 2022), [https://www.courts.michigan.gov/4adf1a/siteassets/rules-instructions-administrative-orders/public-hearing-transcriptsnotices/public-hearing-tr\\_11-16-2022.pdf](https://www.courts.michigan.gov/4adf1a/siteassets/rules-instructions-administrative-orders/public-hearing-transcriptsnotices/public-hearing-tr_11-16-2022.pdf) [https://perma.cc/6QAA-KWA8].

<sup>3</sup> See, e.g., Letter from Megan Morrison & Nicholas Mathews, Student Att’ys, Mich. St. U. Coll. L. Hous. Just. Clinic, to Larry S. Royster, Clerk of the Ct., Mich. Sup. Ct. 9–11 (Nov. 1, 2022), [https://www.courts.michigan.gov/4aa586/contentassets/ee4113df1d2343ecbdf2073d0560543/approved/2020-08\\_2022-11-01\\_commentfrommsuhousingjusticeclinic.pdf](https://www.courts.michigan.gov/4aa586/contentassets/ee4113df1d2343ecbdf2073d0560543/approved/2020-08_2022-11-01_commentfrommsuhousingjusticeclinic.pdf) [https://perma.cc/ZM9P-SLRZ] (identifying benefits of rental assistance and noting the stay allows tenants to search for rental assistance programs).

put mom-and-pop landlords out of business,<sup>4</sup> and exceeded the court's rulemaking authority.<sup>5</sup>

The Michigan Supreme Court adopted the amendments in 2023.<sup>6</sup> They mandate a seven- to fourteen-day stay for nonpayment evictions, extendable for up to twenty-eight days if an application for rental assistance is pending.<sup>7</sup> They suspend local rules that require tenants to file a written answer;<sup>8</sup> provide for presumptive virtual hearings;<sup>9</sup> require landlords to certify compliance with health and safety laws;<sup>10</sup> condition faster defaults on heightened service and notice methods;<sup>11</sup> and create safeguards for unrepresented litigants entering consent judgments.<sup>12</sup> These special procedures have already greatly impacted the nearly 200,000 evictions filed each year in Michigan.<sup>13</sup> They are important, however, not only for what they do, but as representative of a broad transformation in state court civil litigation: the death<sup>14</sup> of uniform

<sup>4</sup> See, e.g., Memorandum from John J. Bursch, Att'y, Bursch L. PLLC, to Larry S. Royster, Clerk of the Ct., Mich. Sup. Ct. 3-4 (Oct. 31, 2022), [https://www.courts.michigan.gov/4ab7ea/contentassets/ee4113df1d2343ecbdff2073d0560543/approved/apartment-assoc-of-mi-comments-on-proposed-amendment-of-adm-order-no.-2020-17-and-mcr-4.201\\_10-31-2022.pdf](https://www.courts.michigan.gov/4ab7ea/contentassets/ee4113df1d2343ecbdff2073d0560543/approved/apartment-assoc-of-mi-comments-on-proposed-amendment-of-adm-order-no.-2020-17-and-mcr-4.201_10-31-2022.pdf) [<https://perma.cc/S5L8-Z3U2>] (arguing that the proposed rules would bankrupt many small landlords who bear the costs of mortgages, property taxes, and maintenance).

<sup>5</sup> *Id.* at 4-5 (stating that the court's proposed rule was trading on legislative authority).

<sup>6</sup> See Mich. Eviction Ord., *supra* note 2, at 1.

<sup>7</sup> MICH. CT. R. 4.201(K)(1)(a) (providing that if a court adjourns a trial after the initial hearing, it must be scheduled at least seven days but not more than fourteen days after the initial date); *id.* at (I)(3) (providing that the court must adjourn any case filed for nonpayment of rent under subrule K, that such stay is automatically lifted after fourteen days unless the defendant proves that a rental assistance application is pending, and that the total stay must not extend beyond twenty-eight days).

<sup>8</sup> MICH. CT. R. 4.201(C)(1)(a).

<sup>9</sup> MICH. CT. R. 4.201(F) (providing that a virtual hearing is presumed when providing the advice of rights information required under subrule (K)(2)(a)).

<sup>10</sup> MICH. CT. R. 4.201(B)(3)(c).

<sup>11</sup> MICH. CT. R. 4.201(G)(5)(a)(i) (providing that a court may not enter default against a residential defendant absent at the initial hearing unless the landlord personally served the defendant or requested the court mail a second copy of the summons and complaint); *id.* at (D) (describing the process for requesting that the court mail a second copy).

<sup>12</sup> MICH. CT. R. 4.201(K)(2)(e)(iii)-(iv).

<sup>13</sup> See MICH. JUST. FOR ALL COMM'N, IMPROVING EVICTION PROCEEDINGS IN MICHIGAN: REPORT & RECOMMENDATIONS 15 (2024), <https://www.courts.michigan.gov/49f7cb/siteassets/reports/special-initiatives/justice-for-all/improving-evictions-in-michigan-report-and-recs.pdf> [<https://perma.cc/P34Y-29Z4>] (reporting that prior to March 2020, between 170,000 and 190,000 eviction cases were filed each year).

<sup>14</sup> See, e.g., Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 71 (2019) (“[T]hough many continue to insist that our procedural rules are transsubstantive, the reality is that the transsubstantive ship has, for better or worse, sailed.”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013) (contending that transsubstantivity exists “in name only”); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2131 (1989) (contending that

rules across all civil claims, regardless of their substantive subject matter (what civil procedure scholars refer to as transsubstantivity),<sup>15</sup> the encroachment of procedure into substance,<sup>16</sup> and the centralization of power in court-supervised rulemakers at the expense of legislatures, local courts, and individual judges.<sup>17</sup>

The civil justice system is in the throes of a seismic shift about who makes procedure and how it works for most Americans. For most of the last century, state courts of last resort generally promulgated uniform rules, leaving substance-specific procedures to legislatures and implementation discretion to local courts and judges.<sup>18</sup> In the last few decades, however, court rulemakers in many enterprising states have occupied more and more of the procedural field by issuing not only lots of new rules, but rules that tailor by case type, party characteristics, amount in controversy, and other factors. As a result, civil procedures today systematically differentiate how courts resolve most disputes in America. Tailored rules are the norm, not the exception.<sup>19</sup>

Arizona, which I use as a case study throughout the Article, is emblematic of this approach. In 2024, Arizona state courts handled 1.3 million non-criminal filings. Yet, by my estimate,<sup>20</sup> less than five percent of those cases were primarily governed by the Arizona Rules of Civil Procedure,<sup>21</sup> with the rest governed by more than two dozen bodies of court-made rules applicable to specific case types or courts.<sup>22</sup> Even within that sliver, procedure was sliced and diced based on factors like

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“trans-substantive rulemaking in fact has been eroded”); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1508 (1992) (arguing that “the trans-substantive center will not hold”).

<sup>15</sup> For a discussion of the rise and fall of transsubstantivity in civil procedure, see David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2489–90 (2021) (defining transsubstantivity as the uniform application of rules despite case type).

<sup>16</sup> See *infra* Section II.A and Part III (describing how procedural rulemaking increasingly functions as a vehicle for substantive policymaking).

<sup>17</sup> See *infra* Part I (discussing that the Arizona Supreme Court has absorbed the procedural rulemaking power historically exercised by legislatures and local courts).

<sup>18</sup> See *infra* Part I (centering the historical development of Arizona’s civil procedure in the broader arc of procedure making in U.S. courts).

<sup>19</sup> In this Article, I focus primarily on upstream tailoring (tailoring done by statute or statewide rule) and its effects on downstream tailoring (tailoring done by local courts or individual judges). This is, of course, only a part of the larger story. For excellent examples and analysis of downstream tailoring, see David Freeman Engstrom, David Marcus & Elliot Setzer, *Managerial Courts*, 135 YALE L.J. 1296, 1342–48 (2026) (describing court managerialism as systemic administration).

<sup>20</sup> See *infra* Section I.B.

<sup>21</sup> Compare this to a survey of federal district courts showing that only five percent of local rules are substance-specific. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 414, app. A (2010).

<sup>22</sup> See *infra* Section I.A.

case type, amount in controversy, party characteristics, and court, judge, and litigant choice. There is no longer any standard procedural path in civil adjudication.

Arizona is no outlier. Many states have special rules for the largest civil case types—traffic,<sup>23</sup> eviction,<sup>24</sup> consumer debt,<sup>25</sup> family law,<sup>26</sup> and probate.<sup>27</sup> Almost all states use amount in controversy to route cases to procedural tracks—most commonly to small claims tracks<sup>28</sup> but also to commercial tracks<sup>29</sup>—which often also consider factors such as case type, representation status, or party characteristics.<sup>30</sup> Many litigants are directed to (or can choose) differentiated case management tracks with tailored discovery rules and case timelines based on case complexity.<sup>31</sup> At least eight states either vary procedure in family law based on whether litigants are represented or choose an informal procedural track.<sup>32</sup> Moreover, the lion's share of recent tailoring has been done by courts, not legislatures.

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<sup>23</sup> See Justin Weinstein-Tull, *Traffic Courts*, 112 CALIF. L. REV. 1183, 1207–08 (2024) (describing procedural variation in traffic courts). For specific examples of distinct procedural rules in traffic courts, see FLA. R. TRAFFIC CT. 6.010; HAW. CIV. TRAFFIC R.; ARK. SUP. CT. ADMIN. ORD. 18.

<sup>24</sup> See *supra* notes 1–13 and accompanying text; ARIZ. R. P. EVICTION ACTIONS; ALASKA R. CIV. P. 85.

<sup>25</sup> See, e.g., MASS. UNIF. SMALL CLAIMS R. 2(b); TEX. R. CIV. P. 508.2; CAL. CIV. CODE § 1788.50–.66 (West 2014); N.Y. R. UNIF. TRIAL CTS. §§ 212.14-a to -b; MD. R. CIV. P. 3-509; N.M. R. CIV. P. DIST. CT. 1-009; ILL. S. CT. R. 282; ME. REV. STAT. ANN. tit. 32, § 11019 (2018).

<sup>26</sup> See, e.g., ALASKA R. CIV. P. 90.1–90.7; FLA. ST. FAM. L.R.P. 12.003; KY. FAM. CT. R.P. & PRAC.

<sup>27</sup> See, e.g., COLO. R. PROB. P.; CONN. PROB. CT. R.P.; GA. UNIF. PROB. CT. R.

<sup>28</sup> See Victoria J. Haneman, *Bridging the Justice Gap with a (Purposeful) Restructuring of Small Claims Courts*, 39 W. NEW ENG. L. REV. 457, 460–61, tbl. 1 (2017) (identifying the amount-in-controversy threshold for small claims courts in all states).

<sup>29</sup> See Lee Applebaum, Mitchell Bach, Eric Milby & Richard L. Renck, *Through the Decades: The Development of Business Courts in the United States of America*, 75 BUS. LAW. 2053, 2054–55 (2020) (describing how some business courts set threshold limits on amount in controversy).

<sup>30</sup> See, e.g., *id.* at 2055 (describing how some business courts use case and entity type, in addition to amount in controversy, to select eligible cases); COLO. REV. STAT. § 13-6-403(2) (2024) (excluding unlawful detainer, slander, and other case types); *id.* § 13-6-407(2)(a) (II) (excluding attorneys from small claims courts); *id.* § 13-6-411 (restricting small claims plaintiffs from filing more than two claims per month or eighteen claims per year); CAL. CIV. CODE §§ 116.220–221 (West 2025) (basing small claims court filing limits on entity type: \$12,500 for individuals and \$6,250 for corporations).

<sup>31</sup> See, e.g., KY. REV. STAT. ANN. § 24A.230 (West 2025) (noting that the state's small claims court has concurrent jurisdiction with the District Court for certain claims with amounts in controversy below \$2,500); COLO. REV. STAT. § 13-6-401 (2024) (establishing the small claims court is in the public interest to encourage small civil claims that are otherwise difficult to bring due to disproportionate expense or technical rules around evidence).

<sup>32</sup> Michael Houlberg & Geneva Heffernan, *Simplifying Divorce with Informal Domestic Relations Trials*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (May 28, 2024), <https://>

Tailoring is important both to individual litigants and to the broader justice system. To litigants, tailoring means that some people may get different procedure than others—which may impact accuracy, fairness, and even legitimacy. There are tradeoffs all the way down. Giving two plaintiffs with the same employment law claim different discovery because one makes less money than the other<sup>33</sup> might ensure that the cost of litigation does not exceed expected litigation value. But, at the same time, such differentiation risks creating a perception of second-class justice and may fail to elicit important facts. Heightened pleading requirements for debt-buyer plaintiffs might recalibrate the current uneven error risk, where many defendants default because they don't recognize the legitimacy of the debt and where many claims are time-barred or procedurally void for other reasons like fraudulent service.<sup>34</sup> But targeting case types or industries might risk creating the appearance of bias. Shifting evidence requirements so that personal injury plaintiffs bringing low-value claims no longer need to prove the reasonableness of medical bills might help realize the right to trial, but it also creates a double standard.<sup>35</sup> Creating an expedited process for simple divorces<sup>36</sup> can cure the harm everyday Americans experience when they can't easily get divorced<sup>37</sup> and recognizes how the misalignment between adversarial processes and substantive principles creates a kind of family law exceptionalism that merits

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iaals.du.edu/blog/simplifying-divorce-informal-domestic-relations-trials [https://perma.cc/9Q45-GG3V].

<sup>33</sup> ARIZ. R. CIV. P. 26.2(c)(3) (describing how cases are divided into different tiers based on amount in controversy); ARIZ. R. CIV. P. 26.2(f) (placing limits on discovery based on tier).

<sup>34</sup> See DAVID FREEMAN ENGSTROM, MARGARET HAGAN, DANIEL BERNAL, AVIV CASPI, NATALIE KNOWLTON & AYELET SELA, A BLUEPRINT FOR EXPANDING ACCESS TO JUSTICE IN LOS ANGELES SUPERIOR COURT'S EVICTION DOCKET 8, 94 nn.10–11 (2025) [hereinafter BLUEPRINT], <https://law.stanford.edu/publications/a-blueprint-for-expanding-access-to-justice-in-los-angeles-superior-courts-eviction-docket> [https://perma.cc/H9JF-S5BE] (surveying literature on debt collection plaintiffs); David Freeman Engstrom, Daniel W. Bernal & Aviv Caspi, Compliance Courts 61–68 (Feb. 18, 2026) (unpublished manuscript) (on file with the New York University Law Review) (reporting on a 200-case audit and finding that twenty-six percent of debt-buyer default judgments entered by the largest trial court in the country are afflicted by major errors that should preclude entry of judgment and another fourteen percent improperly awarded excess damages).

<sup>35</sup> See ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 117(d)(1). I explore the complexities of this program in Sections II.B.2 and IV.C.

<sup>36</sup> Arizona adopted such an expedited process in 2022. See ARIZ. R. FAM. L.P. 45.1, 78.1.

<sup>37</sup> See Laurie S. Kohn, *Justice Delayed by Design: The Harms of Our Protracted Divorce System*, 70 VILL. L. REV. 169 (2025) (describing impact and harms of divorce procedural barriers); Melanie A. Zaber, Jessie Coe & Marwa AlFakhri, *The Impact of Access to Legal Services on Divorce Outcomes*, 23 REV. ECON. HOUSEHOLD 763 (2025) (showing that access to legal services increases the number of divorces).

different treatment.<sup>38</sup> But fewer procedural safeguards can risk errors such as an unfair division of assets.

State courts are shot through with exceptional case types and procedural problems that vary by litigant characteristics or other factors. As a result, procedural reforms have grown increasingly bespoke. When tailoring, courts have lots of design options—from advancing different goals to bending diverse norms to layering on implementation flexibility. Without a much richer vocabulary and a more nuanced understanding of how procedure works on the ground, scholars cannot describe the design choices state courts make every day—much less offer guidance to choose between options. My typology attempts to provide a useful point of entry, and my analysis can preview some of the tradeoffs.

Stepping back, however, tailoring reveals two larger lessons about procedure-making in state courts. *First*, tailoring reveals a profound shift in who makes procedure in state courts. Someone—often an individual judge—has always made the granular decisions about the guts of litigation.<sup>39</sup> Tailoring is a way for state-court rulemaking bodies to take that power for themselves. A criticism of “general” rules has always been that the veneer of uniformity covers a patchwork of ad hoc decisionmaking.<sup>40</sup> By occupying more and more of the field and clawing back implementation discretion that traditionally rested with individual judges, tailoring by state-court rulemakers, perhaps counterintuitively, provides greater consistency. Such efforts may also reflect an effort to rein in (or, in some cases, to formalize) a type of local-court and individual-judge managerialism that has come to define state courts in recent decades,<sup>41</sup> which lacks the expertise, public ventilation, and legitimacy of formal court rulemaking.

Michigan’s new rules exemplify this shift. They constrain local-court rulemaking by preempting local answer filing requirements and conditioning default judgment entry on heightened service and notice

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<sup>38</sup> See Rebecca Aviel, *Access to Advice as a Linchpin of Family Justice*, in *RETHINKING THE LAWYER’S MONOPOLY* 370, 373–76 (David Freeman Engstrom & Nora Freeman Engstrom eds., 2025) (describing, for example, how the best interests of the child conflict with an adversarial model of truth seeking).

<sup>39</sup> See, e.g., *id.* at 375.

<sup>40</sup> See, e.g., Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471–86 (1987) [hereinafter Burbank, *The Costs of Complexity*] (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)); see also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929–41 (1989) [hereinafter Burbank, *The Transformation of American Civil Procedure*] (criticizing transsubstantivity for relying on discretion to tailor general rules to individual cases).

<sup>41</sup> See Engstrom, Marcus & Setzer, *supra* note 19, at 1333–79 (describing an anatomy of the “new managerialism”).

methods.<sup>42</sup> They narrow judicial discretion by dictating how and where to conduct an initial hearing, how to grant continuances, and how to evaluate consent judgments.<sup>43</sup> Time will tell how this power grab (and judges have perceived it as such)<sup>44</sup> shapes the civil litigation landscape and perceptions of court neutrality and legitimacy.

*Second*, tailoring in state courts throws off the usual braking mechanisms of court-supervised rulemaking. In the 1930s, federal rulemakers leveraged transsubstantivity to signal that procedure was value neutral and would not encroach on the legislative sphere.<sup>45</sup> Indeed, scholars continue to advocate that transsubstantivity can “operat[e] as an institutional restraint on court-supervised rulemakers” and “strengthen their legitimacy to craft procedural rules.”<sup>46</sup> But state courts are not like federal courts. At the state level, rulemakers have not only greater (often, constitutional) rulemaking authority, but also greater incentive to tailor<sup>47</sup>: In state courts, general rules are insufficient to optimize error risks and ensure participation across diverse courts, subject matter jurisdictions, and acute litigant asymmetries.<sup>48</sup> Transsubstantivity is no practical constraint.

Again, the Michigan eviction rules provide a helpful example. Under the transsubstantivity norm that guides federal court-supervised rulemakers, each of these rules, because they are substance-specific, might exceed the scope of a court rulemaker’s institutional authority. That broad brush, however, conflicts with the far greater rulemaking authority of the Michigan Supreme Court<sup>49</sup> and ignores the risks and benefits of rules designed for specific circumstances. Still, some of these

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<sup>42</sup> MICH. CT. R. 4.201(C)(1)(a) (preempting local answer requirements).

<sup>43</sup> MICH. CT. R. 4.201(F) (setting the initial hearing as virtual by default and describing mandatory disclosures); MICH. CT. R. 4.201(I)(3) (describing stay requirement).

<sup>44</sup> See Mich. Eviction Ord., *supra* note 2, at 21–23 (Zahra, J., dissenting) (arguing that the court has “seen fit to strip trial courts of discretion” about the selection of a remote venue, has “strip[ped] the district courts of the ability to implement a local rule requiring a written answer,” and has “strip[ped] the trial courts of the ability to enter a default judgment”).

<sup>45</sup> See Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006) (noting that the Federal Rules authors “viewed the design of procedural rules as primarily an engineering task devoid of substantive policy choice”).

<sup>46</sup> Marcus, *supra* note 21, at 375.

<sup>47</sup> See *infra* Section III.B.1 (describing how state courts generally have more extensive rulemaking authority than federal courts, relaxing separation of powers concerns undergirding procedural transsubstantivity in federal courts).

<sup>48</sup> See *infra* Section III.A (describing how state courts stray from a uniform procedural code due to high case volume, diverse breadth of case types, and concerns over access to justice).

<sup>49</sup> MICH. CONST. art. VI, § 5 (“The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.”); see also *People v. Jones*, 860 N.W.2d 112, 118–19 (Mich. 2014) (describing the constitutional division of authority between the legislature and judiciary).

rules appear to drift towards the type of substantive policy decisions court-supervised rulemakers have traditionally avoided. For example, both heightened pleading requirements, meant to surface affirmative defenses, and mandated continuances, implemented to facilitate eviction diversion,<sup>50</sup> represent an expansion of the traditional role of court procedure-making.<sup>51</sup>

Without transsubstantivity as a rulemaking backstop, state courts need other safeguards to ensure that tailoring maximizes benefits and minimizes harms. Such safeguards are increasingly important as the reasons that courts engage in such tailoring grow more ambitious: While the focus a decade ago was purely on case management, there is now a greater willingness to mitigate social harms.<sup>52</sup> By January 2025, at least twenty-four courts had created eviction diversion programs like the recent rule changes in Michigan.<sup>53</sup> Such programs are of immense social importance and likely advance many legitimate procedural values. But those values are not always disclosed or explained, leading to allegations that tailoring, at best, “is a solution in search of a problem,”<sup>54</sup> or, at worst, violates separation of powers.<sup>55</sup>

In the place of transsubstantivity, I sketch the contours of three new safeguards to help court-supervised rulemakers harness advantages of tailoring while mitigating harms: (1) proportional design; (2) reason-giving; and (3) iterative review. Consider just Michigan’s mandatory continuance rule. Proportional design means that before issuing a rule that tailors procedure by requiring judges to issue

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<sup>50</sup> MICH. CT. R. 4.201(K)(2)(e)(iii)–(iv) (consent judgments); MICH. CT. R. 4.201(B)(3)(c) (pleading requirements); MICH. CT. R. 4.201(I)(3) (stay of proceedings).

<sup>51</sup> Indeed, other states have enacted such mandatory requirements through legislation. *See, e.g.*, WASH. REV. CODE § 59.18.660 (2022) (expired 2023) (creating a mandatory eviction resolution pilot program).

<sup>52</sup> Compare NAT’L CTR. FOR STATE CTS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 19 (2016), <https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf> [<https://perma.cc/8L5L-HDBT>] (recommending “a mandatory pathway-assignment system to achieve right-sized case management”), with CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM’RS, RESOLUTION 3-2024 IN SUPPORT OF GUIDING PRINCIPLES FOR CIVIL DIVERSION PROGRAMS 1 (2024) [hereinafter C CJ/COSCA RESOLUTION 3-2024], [https://ccj.ncsc.org/sites/default/files/media/document/RESOLUTION-3-2024-Civil-Diversion-Principles\\_0.pdf](https://ccj.ncsc.org/sites/default/files/media/document/RESOLUTION-3-2024-Civil-Diversion-Principles_0.pdf) [<https://perma.cc/5ZDK-UJND>] (advocating for court-created programs “to resolve disputes in a less harmful way”).

<sup>53</sup> NAT’L CTR. FOR STATE CTS., EVICTION DIVERSION INITIATIVE, REIMAGINING HOUSING COURT: A FRAMEWORK FOR COURT-BASED EVICTION DIVERSION 2 (2024) [hereinafter EVICTION DIVERSION], [https://www.ncsc.org/sites/default/files/media/document/EDI\\_Interim\\_Report\\_2024\\_3-18-25.pdf](https://www.ncsc.org/sites/default/files/media/document/EDI_Interim_Report_2024_3-18-25.pdf) [<https://perma.cc/SV5N-WKX6>].

<sup>54</sup> Mich. Eviction Ord., *supra* note 2, at 24 (Zahra, J., dissenting).

<sup>55</sup> *See* Mich. Mar. 2021 Ord., *supra* note 1, at 4 (Viviano, J., dissenting) (“The changes . . . upend the statutory scheme . . .”); *see also id.* at 3 (Zahra, J., dissenting) (“This raw exercise of judicial power violates a fundamental tenet of our democracy: the separation of powers.”).

mandatory continuances in nonpayment evictions, rulemakers should identify the procedural values at risk by the procedural default (i.e., issuing continuances on a case-by-case basis for good cause), analyze the likely effect of tailoring, and analyze whether other design options might similarly advance these values with fewer collateral effects (e.g., a mandatory regime rather than a voluntary one). Sharing that analysis publicly could provide transparency and accountability. Iterative review could help to determine whether tailoring is achieving those goals and at what costs. Together, these strategies can determine what is working in Michigan and construct an evidence base upon which other courts, especially those constrained by more traditional conceptions of the role of procedure, might build.

The remainder of this Article proceeds in four parts.

Part I describes how we got here. Leveraging Arizona as a case study, I analyze archival documents and an original dataset of over 6,600 administrative and rulemaking orders to describe the evolution of tailoring in U.S. state civil courts and the expanding role of court-based rulemakers at the expense of legislators, local court rulemakers, and individual judges.

Part II maps the complex procedural landscape in three ways. First, I examine five common and overlapping motivations for tailoring (the “why”): tailoring for court access, speedy resolution, information exchange, substantive alignment, and harm reduction. Second, I identify the common norms of procedural uniformity that tailoring flexes to achieve procedural goals (the “what” and “who”)<sup>56</sup>: case type, claim type, remedy sought, case complexity, contested status, representation status, and party characteristics. Third, I analyze whether local courts, individual judges, or litigants have flexibility in implementing tailoring (the “how”).<sup>57</sup>

Part III leverages this descriptive and conceptual framework to complicate past debates over procedural design. At every significant advancement in American civil procedure, scholars have debated the risks and benefits of specialized procedure<sup>58</sup>—from the Field Codes<sup>59</sup>

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<sup>56</sup> For the best theorization of procedural norms, see Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 NW. U. L. REV. 853, 855–56 (2024) (“Civil procedure is thus a code-based field that is everywhere suffused by unwritten norms.”).

<sup>57</sup> See Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 936–42 (2020). I extend this scholarship by accounting for flexibility by courts and by analyzing the choices that inform the patchwork of tailoring under the modifications.

<sup>58</sup> See Marcus, *supra* note 21, at 383–86 (surveying history and noting that transsubstantivity can be tracked back to the jurisprudential boundary between substance and procedure set by Jeremy Bentham in the late 1700s).

<sup>59</sup> *Id.* at 387–90.

to the Federal Rules<sup>60</sup> to special rules for securities, prisoner litigation, and medical malpractice<sup>61</sup> to mandatory arbitration<sup>62</sup> and specialized business courts.<sup>63</sup> These many debates, however, have largely neglected state courts. Indeed, the civil procedures of state courts—where the real action is—remain woefully understudied.<sup>64</sup> In this Part, I analyze how the risks and benefits of these past debates apply.<sup>65</sup>

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<sup>60</sup> *Id.* at 392–95.

<sup>61</sup> *Id.* at 404–09.

<sup>62</sup> See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249–50 (2009) (describing academic and political debates as to the fairness and efficacy of mandatory arbitration).

<sup>63</sup> See Applebaum, Bach, Milby & Renck, *supra* note 29, at 2055–56 (noting the various models for assigning jurisdiction to specialized business courts).

<sup>64</sup> For a sampling of scholars lamenting the dearth of study of state court civil procedures, see Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, DAEDALUS, Summer 2014, at 129; Zachary D. Clopton, *Making State Civil Procedure*, 104 CORN. L. REV. 1, 1 (2018); Alex Carver & Susanna Rychlak, *Symposium: The Least Understood Branch: The Demands and Challenges of the State Judiciary*, 70 VAND. L. REV. 1701 (2017); Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1486, 1493–94, 1496–97, 1501 (2022); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1184–87 (2022). A small but growing set of scholars have focused on the inequities created by procedure in lawyerless state courts, see, for example, Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 754–55 (2015); Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 509–10 (2022), and on variation in certain case types, see, for example, Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 359–60 (2022), or litigation junctures, see, for example, Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1434–48, 1458–61 (2022) (surveying discovery tailoring in state courts); Pamela K. Bookman, *Default Procedures*, 173 U. PA. L. REV. 1419, 1432–51 (2025) (describing variance in default procedures). This Article offers the first comprehensive account of tailoring writ large in the state courts.

<sup>65</sup> So far, much of this work has been done by either judges, see, for example, Carolyn B. Kuhl & William F. Highberger, *A Unified Theory of Civil Case Management*, 107 JUDICATURE 35, 37 (2023) (recommending “differential case management”), or national organizations, see, for example, NAT’L CTR. FOR STATE CTS., *supra* note 52; BRITTANY K.T. KAUFFMAN & NATALIE ANNE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *REDEFINING CASE MANAGEMENT* (2018), [https://iaals.du.edu/sites/default/files/documents/publications/redefining\\_case\\_management.pdf](https://iaals.du.edu/sites/default/files/documents/publications/redefining_case_management.pdf) [<https://perma.cc/6R4L-WL5W>]; PEW CHARITABLE TRS., *HOW TARGETED CASE MANAGEMENT CAN IMPROVE FAIRNESS IN CASE OUTCOMES* (2023), <https://www.pew.org/en/research-and-analysis/fact-sheets/2023/12/how-targeted-case-management-can-improve-fairness-in-case-outcomes> [<https://perma.cc/LBV3-Z6B3>]; PRINCIPLES OF THE L. OF HIGH-VOLUME CIV. ADJUDICATION (A.L.I. 2025), <https://www.ali.org/project/high-volume-civil-adjudication> [<https://perma.cc/2Y4D-FVY8>]. Only a few scholars have focused on this growing phenomenon in the state courts. See, e.g., Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 402–05 (2010) (discussing the advantages of tailoring in both federal and state courts); Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859, 860 (2012) (describing the widespread adoption of differentiated case management in state courts); Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 876 (2013) (observing how tailoring can

Part IV steps back to describe lessons learned and propose paths forward. In short, I argue that before tailoring, courts should consider: (1) the procedural value(s) put at risk by the procedural default; (2) the likely effect of tailoring on the identified procedural value and civil litigation broadly; and (3) whether other design options can similarly advance the targeted value(s) with fewer collateral effects or less erosion of procedural norms. Then, when tailoring presents a significant risk of bias, or threatens court neutrality or substantive rights, I argue that courts will benefit from sharing these considerations publicly to enhance legitimacy, promote accountability, and require decisionmakers to commit themselves in ways that provide uniformity for subsequent decisions and allow for revision. Finally, because tailored procedures inherently involve prejudgment that may dictate results in ways that are self-fulfilling, I argue that proceduralists should build in feedback loops to avoid entrenchment.

## I

### THE RISE OF COURT-BASED TAILORING

In this Part, I place Arizona within the broader arc of procedure-making in U.S. courts. This expansive view can help us observe two major shifts: the transfer of rulemaking authority from legislatures to court-supervised rulemakers and the narrowing of local court rulemaking and judicial discretion. For much of the last century, court-supervised rulemakers promulgated general, transsubstantive civil rules, leaving lots of pools of discretion for local courts and judges to apply them. In the last few decades, however, Arizona court-supervised rulemakers have leveraged tailoring to occupy more and more of the field. As a result, general civil rules now govern only a fraction of state-court litigation.

#### A. *The Evolution of Tailoring in Arizona*

Arizona is instructive for two reasons: (1) its twentieth-century evolution of rulemaking authority mirrors broader national trends; and (2) the Arizona Supreme Court is a recent leader in its willingness to experiment with new ambitious and innovative forms of tailoring. As one scholar noted, Arizona's "role reversal from procedural follower [of the Federal Rules] to leader dramatically symbolizes the emerging confidence of state jurisdictions to engage in procedural

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create simplicity and advocating for "reworking the rules"); Rebecca Aviel, *Family Law and the New Access to Justice*, 86 *FORDHAM L. REV.* 2279, 2282 (2018) (describing examples of tailoring in family law).

experimentation . . . [and] set[s] a tone for state court rulemaking that manifests a heightened awareness of the differences between state and federal courts.”<sup>66</sup>

### 1. Pre-1928: Legislative Authority

In the mid-nineteenth century, faced with a complex patchwork of common law forms of action,<sup>67</sup> state legislatures took power over procedure.<sup>68</sup> The “Field Code”<sup>69</sup> simplified procedure into a single mode and claimed it as separate and apart from substance.<sup>70</sup> The Arizona territorial laws of 1887 resembled the Field Code, with one set of rules governing general-jurisdiction district courts<sup>71</sup> and another governing justice of the peace courts (which heard cases seeking less than \$300).<sup>72</sup> A litigant’s experience of civil justice differed by court and case type. For example, while defendants in most lawsuits had to answer within twenty days of filing, eviction defendants had to answer within three to six days.<sup>73</sup> District courts required written pleadings;<sup>74</sup> justice of the peace courts (presided over by non-lawyers who were also de facto coroners) defaulted to oral pleadings.<sup>75</sup> In short, lawmakers created the

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<sup>66</sup> Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1185–86 (2005).

<sup>67</sup> These forms of action—from assumpsit to detinue, trover, and trespass—required the pleader to make specific and technical allegations based on remedy, and the procedures varied widely. Marcus, *supra* note 21, at 381–82.

<sup>68</sup> See Charles H. Paul, *The Rule-Making Power of the Courts*, 1 WASH. L. REV. 163, 167 (1926) (describing Field Codes as “a practically complete transfer of procedural regulation from the courts to the legislature” (quoting Edmund M. Morgan, *Judicial Regulation of Court Procedure*, 2 MINN. L. REV. 81, 82 (1918))).

<sup>69</sup> See Marcus, *supra* note 21, at 388 (analyzing how the Field Codes were modeled after the code developed in New York by David Dudley Field).

<sup>70</sup> *Id.* at 389–90 (citing DAVID DUDLEY FIELD, *What Shall Be Done with the Practice of the Courts?* (1847), reprinted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226, 249 (A.P. Sprague ed., 1884)).

<sup>71</sup> See ARIZ. REV. STAT. tit. 15 (Prescott Courier Print 1887), <https://azmemory.azlibrary.gov/nodes/view/38232> [<https://perma.cc/Z9UT-JGLH>] (setting out the Code of Civil Procedure).

<sup>72</sup> See *id.* tit. 18 (describing the rules for practice in justice of the peace courts); *id.* tit. 14, ch. 5, § 1 (limiting jurisdiction for justice of the peace courts to cases contesting less than \$300).

<sup>73</sup> Compare *id.* tit. 15, ch. 6 § 68 (twenty days), with *id.* tit. 29, § 5 (three to six days).

<sup>74</sup> *Id.* tit. 15, § 6.

<sup>75</sup> See *id.* tit. 13, ch. 11 § 1 (“Justices of the peace shall also act as coroners *ex officio*.”); ARIZ. TERRITORY REV. STAT. tit. 14, § 121 (E.W. Stephens 1901), <https://arizona.app.box.com/v/Revised-Statues-Arizona-1901>; Nicol v. Superior Ct., Maricopa Cnty., 473 P.2d 455, 456 (Ariz. 1970); State v. Lynch, 489 P.2d 697, 698 (Ariz. 1971) (finding no statutory requirement that justices of the peace be attorneys); ARIZ. REV. STAT. tit. 18, ch. 7 § 25 (Prescott Courier Print 1887) (“The pleadings . . . shall be oral, except where otherwise provided . . .”).

general rules of procedure and left large pools of discretion to local courts and judges to apply those general rules in specific cases.

## 2. 1928–1960: Concurrent Authority

In the early twentieth century, lawmakers ceded a measure of procedural power to courts of last resort.<sup>76</sup> But concurrent authority required clear institutional boundaries and norms for power sharing. The Rules Enabling Act of 1934 (REA) reflected the substance/procedure dichotomy<sup>77</sup> by providing that the U.S. Supreme Court can publish “general” rules that do not “abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>78</sup> Indeed, to signal that procedural reform was value-neutral and assuage fears that rulemakers might exceed their institutional authority, the Federal Rules of Civil Procedure of 1938 (Federal Rules) were largely transsubstantive.<sup>79</sup>

The Arizona Legislature conferred authority on the Arizona Supreme Court to make rules for the superior courts in 1928<sup>80</sup> and later expanded this authority to all courts and enacted a state counterpart to the REA.<sup>81</sup> Still, the first rulemaking by the Supreme

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<sup>76</sup> I use the term “courts of last resort” rather than supreme courts as some state supreme courts, like those in New York, do not represent the court of last resort. This trend was preceded by a steady stream of scholars that challenged the notion that power over procedure was inherently judicial. See, e.g., Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601 (1926) (arguing that for centuries prior to adoption of American constitutions, the King’s courts at Westminster had the authority to make rules of procedure governing courts); John H. Wigmore, Editorial Note, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276 (1928) (arguing that “the legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary’s duties” (emphasis omitted)). For another example of expanding court authority at the expense of legislatures during the same period, see Nora Freeman Engstrom & James Stone, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, 134 YALE L.J. 123, 172–79 (2024) (describing the transfer of authority from legislatures to courts to regulate the practice of law).

<sup>77</sup> See, e.g., Charles E. Clark & Charles Alan Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 364 (1950) (describing this dichotomy).

<sup>78</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1072–73, 1073 n.260 (1982) (quoting a letter to Chief Justice Taft in 1923 that described the fear during the promulgation of the REA that rulemakers might use it to exceed their institutional authority).

<sup>79</sup> See Marcus, *supra* note 21, at 416 (describing the history of the development of the federal rules); Bone, *supra* note 45, at 1170 (same).

<sup>80</sup> ARIZ. REV. CODE § 3652 (Mfg. Stationers Inc. 1928), <https://azmemory.azlibrary.gov/nodes/view/38235> [<https://perma.cc/S6QJ-36BH>].

<sup>81</sup> Act of Feb. 4, 1939 ch. 8, § 1, 1939 Ariz. Laws 12, <https://azmemory.azlibrary.gov/nodes/view/20964> [<https://perma.cc/ZEY5-RCQD>] (providing that these rules “shall not abridge, enlarge, or modify the substantive rights of any litigant”).

Court, in 1932, was small-bore: just eleven uniform rules for the superior courts, totaling nine pages.<sup>82</sup> In 1940, when the Arizona Supreme Court became the first state court to adopt the Federal Rules,<sup>83</sup> these rules applied only to the superior courts<sup>84</sup> and didn't apply to the bulk of case types that appeared in lower state courts. Local court rules and judicial discretion filled the gap. In 1941, local court rules were tailored by representation and contested status—requiring, for example, notarization of waivers in default divorces absent representation by counsel<sup>85</sup> and assigning uncontested divorce proceedings to different dockets.<sup>86</sup> By 1960, these local rules had ballooned in size and complexity, including, for example, approved forms for summary probate and child support.<sup>87</sup>

### 3. *Post-1961: Expansion & Centralization of Court Authority*

In 1962, the American Bar Association (ABA) approved a model article for state constitutions conferring exclusive rulemaking authority in the state's highest court,<sup>88</sup> consolidating power in a chief justice, and

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<sup>82</sup> UNIF. R. SUPER. CT. ST. ARIZ. (1932), <https://azmemory.azlibrary.gov/nodes/view/263670> [<https://perma.cc/P9YR-HWKH>].

<sup>83</sup> See ARIZ. CODE §§ 21-201, 21-2013 (Bobbs-Merrill Co. 1939), <https://azmemory.azlibrary.gov/nodes/view/38238> [<https://perma.cc/S847-R64T>] (defining the scope of Arizona's civil procedure rules effective January 1, 1940); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1381 (1986) (describing Arizona as the first state to adopt the Federal Rules in 1940); see also Daniel J. McAuliffe & Shirley J. McAuliffe, ARIZONA PRACTICE SERIES: CIVIL LITIGATION PRACTICE § 2.4 (2025).

<sup>84</sup> See ARIZ. SUPER. CT. R. CIV. P. 1 (1940), <https://azmemory.azlibrary.gov/nodes/view/102256> [<https://perma.cc/XF3J-E6KC>].

<sup>85</sup> SUPP. R. SUPER. CT. PIMA CNTY. 10 (1941), <https://azmemory.azlibrary.gov/nodes/view/276778> [<https://perma.cc/PF95-RKTN>].

<sup>86</sup> SUPP. R. SUPER. CT. MARICOPA CNTY. 3 (1943) (amended 1947), <https://azmemory.azlibrary.gov/nodes/view/276784> [<https://perma.cc/664M-P44E>]. Rule changes in 1952 also differentiated based on “contest[ed]” status for eviction cases. SUPP. R. SUPER. CT. MARICOPA CNTY. 3(8) (1952), <https://azmemory.azlibrary.gov/nodes/view/276786> [<https://perma.cc/AKX4-S9XJ>].

<sup>87</sup> SUPP. R. SUPER. CT. MARICOPA CNTY., Supp. Order (Jan. 1960) (amended Feb. 1960), <https://azmemory.azlibrary.gov/nodes/view/276788> [<https://perma.cc/6YDG-7BUA>] (providing summary forms for probate and child support). Compare SUPP. R. SUPER. CT. MARICOPA CNTY. (1943) (amended 1947), <https://azmemory.azlibrary.gov/nodes/view/276784> [<https://perma.cc/664M-P44E>] (sixteen rules in Maricopa County in 1943), with SUPP. R. SUPER. CT. MARICOPA CNTY. (Jan. 1960) (amended Feb. 1960), <https://azmemory.azlibrary.gov/nodes/view/276788> [<https://perma.cc/6YDG-7BUA>] (twenty-seven rules in Maricopa County in 1960).

<sup>88</sup> *Text of the Model State Judicial Article*, 47 J. AM. JUDICATURE SOC'Y 8, § 9 (1963). This was a reversal of the ABA's 1942 recommendation that legislatures could “repeal, alter, or supplement any rule of procedure.” *Model Judiciary Article and Comment Thereon*, 26 J. AM. JUDICATURE SOC'Y 51, § 607, at 58 (1942).

creating a supporting administrative officer.<sup>89</sup> By 1970, at least twenty-one state courts of last resort had primary rulemaking authority.<sup>90</sup> And between 1959 and 1978, thirty-three state courts of last resort gained administrative authority over state court systems.<sup>91</sup>

Arizona was an early adopter. It amended its constitution<sup>92</sup> to implement both recommendations in 1960 even before they were formally adopted by the ABA.<sup>93</sup> When promoting the amendments, the Arizona lawmaker and politician Morris Udall argued that presiding superior court judges “will now be able to have the backing, prestige, and help of the chief justice in meeting local problems,”<sup>94</sup> and that the chief justice and court administrator “can do much to help the magistrates upgrade the performance” of “the justice of the peace and police magistrate [courts] . . . the forgotten men in our judicial system,” including by developing “rules of court.”<sup>95</sup> Indeed, one of the first actions the Arizona Supreme Court took, in 1962, was

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<sup>89</sup> *Text of the Model State Judicial Article*, *supra* note 88, § 8(2). For a more comprehensive review of this trend towards consolidation, see Engstrom, Marcus & Setzer, *supra* note 19, at 1311–29.

<sup>90</sup> AM. JUDICATURE SOC’Y, THE JUDICIAL RULE-MAKING POWER IN STATE COURT SYSTEMS 1 (1970) (on file with the New York University Law Review) (surveying authority). Some of these states have primary rulemaking authority conferred by statute. *Id.* at 4.

<sup>91</sup> William Raftery, *Unification and “Bragency”*: A Century of Court Organization and Reorganization, 96 JUDICATURE 337, 342 (2013). Prior to this time, an ABA Survey found that only four state supreme courts had full control. LAW CTR. OF N.Y. UNIV. FOR NAT’L CONF. OF JUD. COUNCILS, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 57 (Arthur T. Vanderbilt ed., 1949). For a comprehensive review of the strands of court unification literature in 1978, see SUSAN CARBON & LARRY BERKSON, NAT’L INST. OF L. ENF’T & CRIM. JUST., LITERATURE ON COURT UNIFICATION: AN ANNOTATED BIBLIOGRAPHY (1978), <https://www.ojp.gov/pdffiles1/Digitization/47169NCJRS.pdf> [<https://perma.cc/94T9-DC27>].

<sup>92</sup> ARIZ. CONST. art. VI, § 5(5) (providing the Arizona Supreme Court the “[p]ower to make rules relative to all procedural matters in any court”); *id.* § 7 (providing for Arizona Supreme Court to have administrative supervision and ability to appoint administrative director). The amendments were approved during the election held November 8, 1960, and were effective December 9, 1960. See ARIZ. CONST. art. VI, §§ 5, 7 (West, Westlaw through Feb. 12, 2026).

<sup>93</sup> See William O. Douglas, *Arizona’s New Judicial Article*, 2 ARIZ. L. REV. 159, 159 (1960) (“The newly proposed article . . . follows to a large extent the model Judiciary Article which the Section of Judicial Administration of the American Bar Association recommended in July of this year.”); see also Glenn R. Winters, *A.B.A. House of Delegates Approves Model Judicial Article for State Constitutions*, 45 J. AM. JUDICATURE SOC’Y 279 (1962) (reprinting the final model judicial article and noting that it was developed and finalized by the Section of Judicial Administration).

<sup>94</sup> Morris K. Udall, *Modern Courts—Where Do We Go From Here*, 2 ARIZ. L. REV. 167, 173 (1960).

<sup>95</sup> *Id.* at 175–76. Concern over the lack of uniform rules in lower courts drove Arizona to adopt the rules. See ARIZ. LEGIS. COUNCIL, REPORT ON JUSTICE OF THE PEACE COURTS IN ARIZONA 10 (1958) [hereinafter JP COURT REP.], <https://azmemory.azlibrary.gov/nodes/view/287658> [<https://perma.cc/M7ZP-RL2N>]. An investigation found that the lack of professionalism in justice courts (one justice of the peace had to be tracked down at his other

to issue the Uniform Rules of Practice of the Superior Court, which created new, standardized rules of practice in the superior courts and foreshadowed the centralization of court procedure-making in the decades to come.<sup>96</sup>

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It has been over sixty years since the Arizona Supreme Court got constitutional rulemaking and administrative authority. Since then, the Court's exercise of that power has only grown. To visualize this expansion, I analyzed the more than 4,000 administrative orders and 2,000 rule changes promulgated since the Arizona Supreme Court started recording them.<sup>97</sup> Figure 1 tracks the administrative orders issued each year since 1956. From appointing committees to adopting sentencing guidelines, these orders provide a rough heuristic of the expansion of the Arizona Supreme Court's administrative authority.

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job as a garbage collector) was causing a lack of compliance with traffic laws—and leading to highway fatalities. *Id.* at 8, 11–12.

<sup>96</sup> See UNIF. R. PRAC. & LOC. R. PRAC. SUPER. CT. ARIZ. (1962), <https://azmemory.azlibrary.gov/nodes/view/276777> [<https://perma.cc/DY7C-NC2D>].

<sup>97</sup> Administrative orders are publicly available online and total 4,445 during the study period. See *Administrative Orders Index*, ARIZ. JUD. BRANCH, <https://orders.azcourts.gov/Administrative-Orders-Index> [<https://perma.cc/7LAY-XPP5>] (last visited July 30, 2025). The rulemaking orders were provided by court staff, up through the end of 2024. E-mail from John W. Rogers, Staff Att'y, Ariz. Sup. Ct., to Daniel W. Bernal, Assoc. Dir. of Rsch., Deborah L. Rhode Ctr. on the Legal Pro., Stan. L. Sch. (May 28, 2025, at 08:57 PT) (on file with the New York University Law Review). With significant technical support from Othman Bensouda Koraichi, using OCR and an LLM, I extracted information from these files, disaggregated local rules submitted for Court approval under Arizona Supreme Court Rule 28.1 from rules promulgated by the Court under Rule 28, and parsed orders that combined rule changes to more than one body of rules to provide consistency across years. Based on this methodology, we calculate a total of 2,176 rule changes made during this period. I conducted a manual validation of 105 source entries due to the inaccuracies and inconsistencies LLM data extraction can introduce. See Gerald Gartlehner et al., *From Promise to Practice: Challenges and Pitfalls in the Evaluation of Large Language Models for Data Extraction in Evidence Synthesis*, 30 *BMJ EVIDENCE-BASED MED.* 385, 386 tbl.1 (2025). The sample of 105 source entries was selected by taking the first fifteen cases listed in the source documents for each of the seven decades studied. Of the 105 source entries checked, only two contained errors—a 1.9% error rate. Data and replication code available at <https://github.com/OthmanBensoudaKoraichi/Tailored-Procedures/tree/main>.

FIGURE 1: ADMINISTRATIVE ORDERS ISSUED PER YEAR BY THE ARIZONA SUPREME COURT

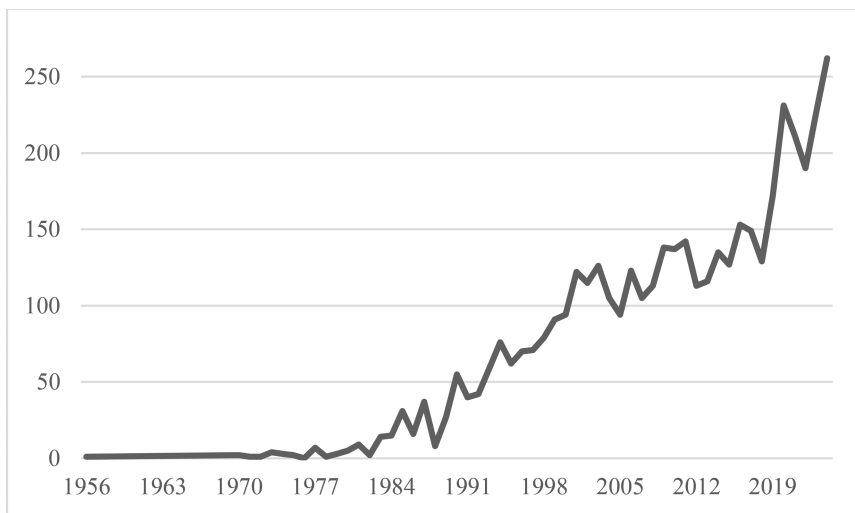
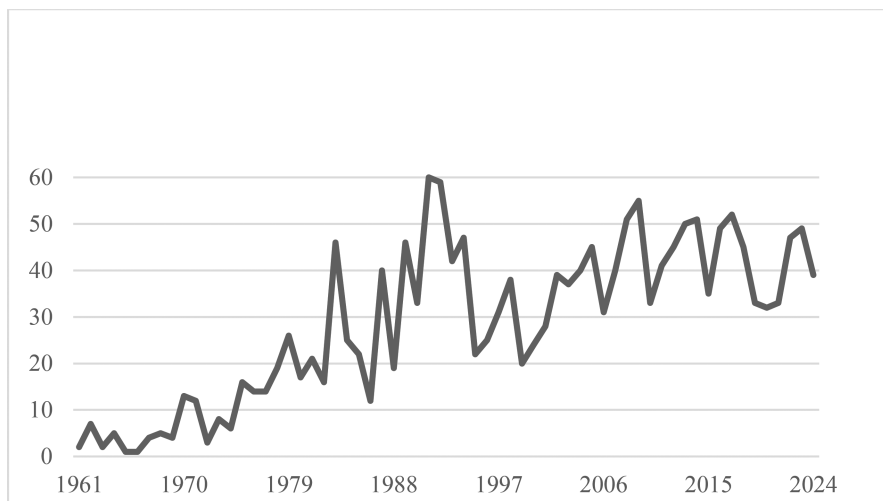


Figure 2 tracks the number of statewide rule changes issued by the Arizona Supreme Court per year.<sup>98</sup> It shows a similar upward trend.

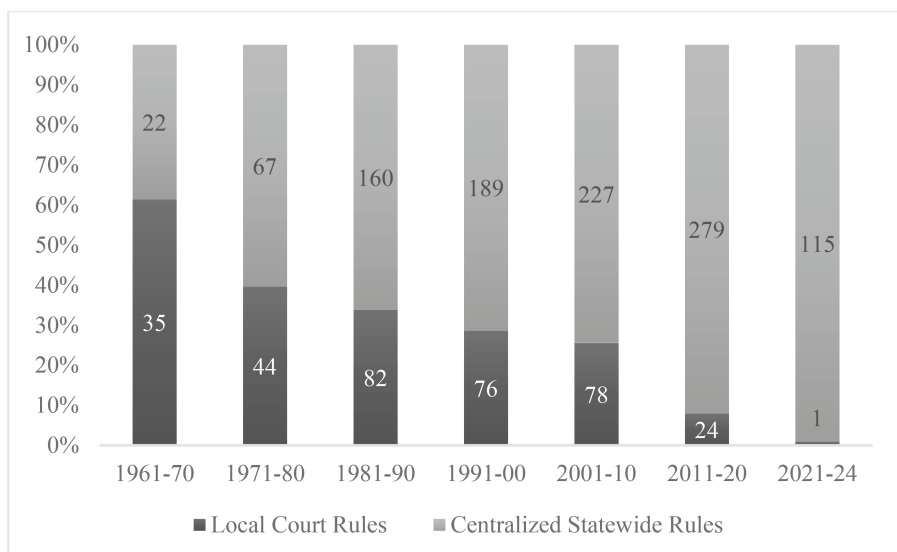
FIGURE 2: STATEWIDE RULE CHANGES ISSUED PER YEAR BY THE ARIZONA SUPREME COURT



<sup>98</sup> By “statewide” rules, I refer only to rules that were promulgated by the Arizona Supreme Court. This excludes local rules, which were merely approved by that body.

In conducting this analysis, I made an unexpected discovery: As the Arizona Supreme Court is increasingly occupying the procedural field through top-down statewide rules, the share of its work that is dedicated to approving local rules is declining. In Arizona, there are two ways for the Supreme Court to pass court rules: The first is a bottom-up process that involves approving rules designed by local courts. The second is by designing rules from the top down through statewide notice-and-comment rulemaking.<sup>99</sup> Figure 3 reports on the shift towards centralized rulemaking in recent decades. For example, while in the 1960s approving local rules accounted for over half of the Arizona Supreme Court's rulemaking work related to trial courts, it accounted for less than one percent in the period from January 2021 through December 2024.<sup>100</sup>

FIGURE 3: THE DECLINING SHARE OF LOCAL COURT RULES BY DECADE



<sup>99</sup> Compare ARIZ. SUP. CT. R. 28 (describing the process for promulgating statewide rules), with ARIZ. SUP. CT. R. 28.1 (describing process for requesting approval of local rules).

<sup>100</sup> To ensure comparability between local and statewide rules, I omitted rules that related entirely to the functioning of the supreme court or the state bar.

The role of state legislators is waning, too. To be clear, the Arizona Legislature still channels jurisdiction, sometimes tinkering with jurisdictional amounts in controversy,<sup>101</sup> creating specialized divisions,<sup>102</sup> and authorizing problem-solving courts.<sup>103</sup> And it still passes special rules, including ones requiring fact sheets in asbestos personal injury claims,<sup>104</sup> statements about expert opinions in medical malpractice claims,<sup>105</sup> evidence in uncontested debt collection cases,<sup>106</sup> and prohibitions on mandated pleading forms in eviction proceedings.<sup>107</sup> But, while most major examples of tailoring in the 1970s—for example, rules for mandatory arbitration and medical liability review panels—were introduced by statute,<sup>108</sup> procedural innovation today is primarily driven by the Arizona Supreme Court. Some changes may even conflict with legislative policy preferences.<sup>109</sup>

The expansion of court rulemaking ambition over the last half-century is the result of several significant factors. Chief among these has been the rise of managerial attitudes by judges and courts—which both trickled up from trial court judges and administrators and filtered down from state courts of last resort. Judith Resnik and others have demonstrated how, starting in the 1970s and 1980s, trial court judges took an increasingly active approach to case management, particularly in large, unwieldy multi-district litigation.<sup>110</sup> This new “activist” approach to judging often resulted in “ad hoc” procedures

<sup>101</sup> See Heinz R. Hink, *Judicial Reform in Arizona*, 6 ARIZ. L. REV. 13, 13–19 (1964).

<sup>102</sup> ARIZ. REV. STAT. ANN. § 8-202 (2025) (conferring original jurisdiction on the juvenile court); *id.* § 22-503 (creating a small claims division); *id.* § 12-161 (creating a tax court division).

<sup>103</sup> *Id.* § 22-601 (authorizing homeless, veterans, and mental health courts).

<sup>104</sup> *Id.* § 12-783(A) (requiring a plaintiff to submit a “sworn statement” that provides the basis for the claims).

<sup>105</sup> *Id.* § 12-2603(B).

<sup>106</sup> *Id.* § 44-7804.

<sup>107</sup> *Id.* § 33-361(F). For a review of the legislative history of this change, see Daniel W. Bernal, *Pleadings in a Pandemic: The Role, Regulation, and Redesign of Eviction Court Documents*, 73 OKLA. L. REV. 573, 641–42 (2021).

<sup>108</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-133(A)(1) (2012) (added by 1971 Ariz. Sess. Laws, Ch. 142, § 1) (legislative directive to superior courts to establish mandatory arbitration procedural track); 1976 Ariz. Sess. Laws, ch. 1, sec. 4, §§ 12-561 to -569 (§ 12-564 repealed 1985, § 12-567 repealed 1989) (statute requiring all medical malpractice suits to be referred to a review panel); Jona Goldschmidt, *Where Have All the Panels Gone? A History of the Arizona Medical Liability Review Panel*, 23 ARIZ. ST. L.J. 1013, 1014 (1991).

<sup>109</sup> See *infra* notes 353–56 (contrasting stated goals of the FASTAR program with the legislature’s stated policy preference of arbitration).

<sup>110</sup> For the foundational account of managerialism, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386–91 (1982). For more recent accounts, see, for example, Engstrom, *supra* note 14, at 60–65 (describing managerialism as applied in *Lone Pine* orders); Engstrom, Marcus & Setzer, *supra* note 19, at 1333–57 (describing managerialism as personnel management, systemic administration, and quality control in state courts).

under which a litigant's draw of judge might result in a vastly different dispute resolution process.<sup>111</sup> It also manifested as a transformation of the systemic administration of courts through sophisticated case management systems.<sup>112</sup>

At the same time, the constitutional and legislative changes that conferred primary rulemaking authority on state supreme courts "incentivized courts to develop identities that accounted for both their institutional interests as an independent branch of government, as well as the interests of the public, the primary source of accountability."<sup>113</sup> By 1978, scholars noted the "emerging societal consensus that state supreme courts should not be passive, reactive bodies, which simply applied 'the law' to correct 'errors' . . . in individual cases, but . . . policy-makers and . . . legal innovators."<sup>114</sup>

Statewide tailoring was a way to flex that new authority and vision and legitimize, rein in, and build on expanding local court and judge managerialism that had previously filled in gaps left by general rules. Such innovations became possible at scale as the Arizona Supreme Court developed a more robust rulemaking infrastructure, collaborated with other states through organizations such as the Conference of Chief Justices (CCJ)<sup>115</sup> and the Conference of State Court Administrators

<sup>111</sup> See Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 781–92 (2017) (creating a typology of ad hoc procedure); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1275–87 (2010) (describing managerialism at the trial phase); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 872–81 (2018) (analyzing how judges apply bespoke ordering to lawsuits based on case type and other factors); David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2246 (2021) (theorizing role of judges in tailoring existing rules to new digital contexts).

<sup>112</sup> See Engstrom, Marcus & Setzer, *supra* note 19, at 1311–29 (describing the managerial turn from ad hoc efforts by judges to systemic processes by administrators).

<sup>113</sup> Adam B. Sopko, *The Supervisory Power of State Supreme Courts*, 98 S. CALIF. L. REV. 1543, 1564 (2025); see also Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1006 (2003–2004) (tracking the development of state courts' constitutional, not just adjudicatory, independence). For an example of these changing judicial attitudes in the Arizona context, see *Cronin v. Sheldon*, 991 P.2d 231, 237–38 (Ariz. 1999) (finding that a statutory definition of public policy was not the exclusive definition of public policy because "[c]ourts do make [common law]. . . . Courts also participate in the development of public policy . . . . The judicial mandate, intended to secure equal and substantial justice under the rule of law, is delegated to the judiciary by the constitution, not the legislature").

<sup>114</sup> Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 983 (1978); see also Frank V. Williams III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 592 (2007) (noting that this "new type of judge . . . together with a new role for the courts in society" came from the new "judicial power" conferred by state constitutions).

<sup>115</sup> See CONF. OF CHIEF JUSTS. & NAT'L CTR. FOR STATE CTS., *THE HISTORY OF THE CONFERENCE OF CHIEF JUSTICES* (2009), <https://ccj.ncsc.org/sites/default/files/media/>

(COSCA),<sup>116</sup> and partnered with the National Center for State Courts (NCSC) to perform rigorous evaluations.<sup>117</sup>

Arizona did not have a formal judicial rulemaking process until 1988.<sup>118</sup> Before then, rule amendments that came from outside the court commonly started with proponents sending a letter to the chief justice, who had the discretion to open a court file, circulate the proposal for comment, and convene a committee.<sup>119</sup> The 1988 rules provided a formal petition process and an opportunity for written and public comments.<sup>120</sup> And, although the Arizona Supreme Court has relied on committees and working groups since the 1960s,<sup>121</sup> the number of these groups has recently grown to thirty-four active committees.<sup>122</sup> Finally, many of the most impactful rules involve pilot studies and rigorous evaluation, often by partners like NCSC.<sup>123</sup>

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document/ccj-history-61709%20%281%29.pdf [https://perma.cc/2JAX-ZR9S] (describing history of CCJ).

<sup>116</sup> See generally THEODORE J. FETTER & ROBERT L. DOSS, A HISTORY OF THE CONFERENCE OF STATE COURT ADMINISTRATORS: 1955–2005 (2005), <https://cosca.ncsc.org/sites/default/files/media/document/history-of-cosca-compressed.pdf> [https://perma.cc/VPQ5-DQHX] (describing history of COSCA).

<sup>117</sup> See CONF. OF CHIEF JUSTS. & NAT’L CTR. FOR STATE CTS., *supra* note 115, at 11–12 (describing NCSC’s role as a secretariat to CCJ and collaboration with those CCJ/COSCA); Jesse Rutledge & Charles Campbell, *The NCSC Marks 50 Years of Service to State Courts*, 105 JUDICATURE 2 (2021) (surveying history and accomplishments of NCSC). For an example of a rigorous evaluation of a state court procedure, see PAULA HANNAFORD-AGOR, NAT’L CTR. FOR STATE CTS., SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY COMMERCIAL COURT EVALUATION: FINAL REPORT (2018), [https://iaals.du.edu/sites/default/files/documents/publications/az\\_commercial\\_court\\_ncsc\\_evaluation\\_12-12-18.pdf](https://iaals.du.edu/sites/default/files/documents/publications/az_commercial_court_ncsc_evaluation_12-12-18.pdf) [https://perma.cc/9ZB6-8AQS] (describing NCSC’s empirical review of the success of Arizona’s commercial court pilot).

<sup>118</sup> See ARIZ. SUP. CT. R. 28 (outlining judicial rulemaking processes, effective in 1988).

<sup>119</sup> E-mail from John W. Rogers, *supra* note 97.

<sup>120</sup> ARIZ. SUP. CT. R. 28(3).

<sup>121</sup> See, e.g., Hink, *supra* note 101, at 15, 26 (describing advice from the Maricopa County Bar Association to the courts in 1959); Carl W. Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 622–23 (2002) (observing inclusion of Arizona State Bar Committee notes along with 1970 court rule changes). Although committees are appointed by the Supreme Court, Arizona law requires that the Arizona bar, or a bar committee, advise the court on rules. See ARIZ. REV. STAT. ANN. § 12-110 (2025); Thomas Main, *Civil Rulemaking in Nevada: Contemplating a New Advisory Committee*, 14 NEV. L.J. 852, 860 (2014) (describing process). Members are appointed by the president of the bar, with notice to the board of governors. See State Bar of Ariz. Bylaws, art. IV, § 4.03.

<sup>122</sup> *Committees*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/cscommittees> [https://perma.cc/8ZZ7-2NB9] (last visited July 30, 2025) (listing thirty-four active committees).

<sup>123</sup> Commercial courts are an example of how partnerships with CCJ/COSCA and NCSC and other court partner organizations have influenced tailoring. In 2007, CCJ/COSCA “encourage[d] states to study and, where appropriate, establish business courts or their equivalents for the effective management of complex corporate, commercial and business cases.” BUS. CTS. COMM. OF THE CONF. OF CHIEF JUSTS., RESOLUTION 6: IN SUPPORT OF CASE MANAGEMENT OF COMPLEX BUSINESS, CORPORATE AND COMMERCIAL

A shift in docket composition also accelerated changes. From the 1980s to 2010, the rates of self-represented litigants skyrocketed,<sup>124</sup> and the bulk of state court filings shifted from torts to small-scale but high-stakes contracts cases—for example, debt collection and eviction<sup>125</sup>—which often pit an institutional plaintiff against an unrepresented litigant.<sup>126</sup> While past state-court rulemakers might have shied away from the type of targeted tailoring likely to remedy these new procedural problems (such as substance-specific rulemaking), new rulemakers, encouraged by their own expanding powers, CCJ/COSCA Resolutions,<sup>127</sup> and reports and support from NCSC and other partner organizations,<sup>128</sup> have jumped into the fray.

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LITIGATION (2007), <https://ccj.ncsc.org/resources-courts/support-case-management-complex-business-corporate-and-commercial-litigation> [<https://perma.cc/9XHD-65Q3>]. The Arizona Supreme Court took up the call in 2014, by appointing a Business Court Advisory Committee, which, in turn, proposed a pilot study in Maricopa County with experimental rules and voluntary procedures for business organizations that either met a certain amount-in-controversy requirement or contained certain “business” claims. Authorizing a Commercial Court Pilot Program in the Superior Court in Maricopa County, Admin. Ord. No. 2015-15 (Ariz. Feb. 18, 2015), <https://www.azcourts.gov/Portals/0/22/admorder/Orders15/2015-15F.pdf> [<https://perma.cc/K3C8-LCN8>]. After years of interim reports, the Court contracted with the NCSC to conduct an evaluation. See HANNAFORD-AGOR, *supra* note 117. Finally, it adopted the rules in 2018. ARIZONA COURT SERVICES DIVISION, ADMINISTRATIVE OFFICE OF THE COURTS, 2018 RULES SUMMARY 4 (2018), <https://www.azcourts.gov/Portals/0/69/2018RulesSummary.pdf> [<https://perma.cc/PP6H-KYNB>].

<sup>124</sup> See Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. 146, 149–52 (2024) (explaining changes); PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT’L CTR. FOR STATE CTS., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS*, at iv (2015) [hereinafter *LANDSCAPE STUDY*] (finding that most state court cases feature an unrepresented party).

<sup>125</sup> *LANDSCAPE STUDY*, *supra* note 124, at 6–9 (finding that contract cases went from 48 to 61% of all state court civil cases from 1992 to 2010); see also, e.g., Steinberg, *supra* note 64, at 751–52 (describing the dramatic increase in pro se litigants driven by issues such as foreclosure and debt collection).

<sup>126</sup> See PEW CHARITABLE TRS., *HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 1* (2020) (noting how state court dockets are dominated by suits on behalf of corporate entities); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1711 (2022) (describing the trend of better-resourced institutional plaintiffs pursuing state-court claims).

<sup>127</sup> See, e.g., CCJ/COSCA RESOLUTION 3-2024, *supra* note 52, at 2 (recommending eviction diversion). See generally PRINCIPLES OF THE L.: HIGH-VOLUME CIV. ADJUDICATION, pt. 2 (A.L.I., Council Draft No. 4, Dec. 2025) (on file with the New York University Law Review) (recommending procedural changes to high-volume dockets).

<sup>128</sup> PAULA HANNAFORD-AGOR & BRITTANY KAUFFMAN, NAT’L CTR. FOR STATE CTS., *PREVENTING WHACK-A-MOLE MANAGEMENT OF CONSUMER DEBT CASES: A PROPOSAL FOR A COHERENT AND COMPREHENSIVE APPROACH FOR STATE COURTS* (2020), <https://iaals.du.edu/publications/preventing-whack-mole-management-consumer-debt-cases> [<https://perma.cc/F8U7-JFZ4>]; JULIA F. WEBER & NATALIE ANNE KNOWLTON, INST. FOR ADVANCEMENT OF THE AM. LEGAL SYS., *GUIDANCE ON DEVELOPING PROBLEM-SOLVING APPROACHES FOR FAMILIES IN COURT* (2019), <https://iaals.du.edu/sites/default/files/documents/publications/>

As a result, the kind of innovation I analyze in the remainder of this Article, although a culmination of more than a century of expanding state court authority, is also a new thing. The most path-breaking examples are from the last two decades. Between 2006 and 2013, the Arizona Supreme Court issued new bodies of rules for family law, eviction disputes, probate claims, protective orders, and justice courts; created a complex civil litigation docket; and mandated early resolution conferences for some family law disputes. Since 2014, it has created a commercial court, issued rules governing the small claims court, mandated tiered discovery in superior court, set separate rules for “complex” family law cases, created one simplified track for some child support orders and another for expedited divorce proceedings, required plaintiffs in superior courts to elect mediation or fast trial, and created separate procedures for informal family law trials.

### *B. A Snapshot of Tailoring in Arizona Today*

Uniform transsubstantive rules now govern only a fraction of civil litigation in Arizona. Instead, over thirty separate bodies of rules govern procedure.<sup>129</sup> Procedure may be tailored by jurisdictional limits (Arizona has one superior court system, with locations in fifteen counties, eighty justice of the peace courts, and eighty-two municipal courts),<sup>130</sup> separate bodies of rules, and variation within them. Figure 4 shows how tailoring can work within these three verticals. In the final column, it provides examples of intra-rule variation by focusing only on the five percent of cases nominally governed by the Arizona Rules of Civil Procedure.

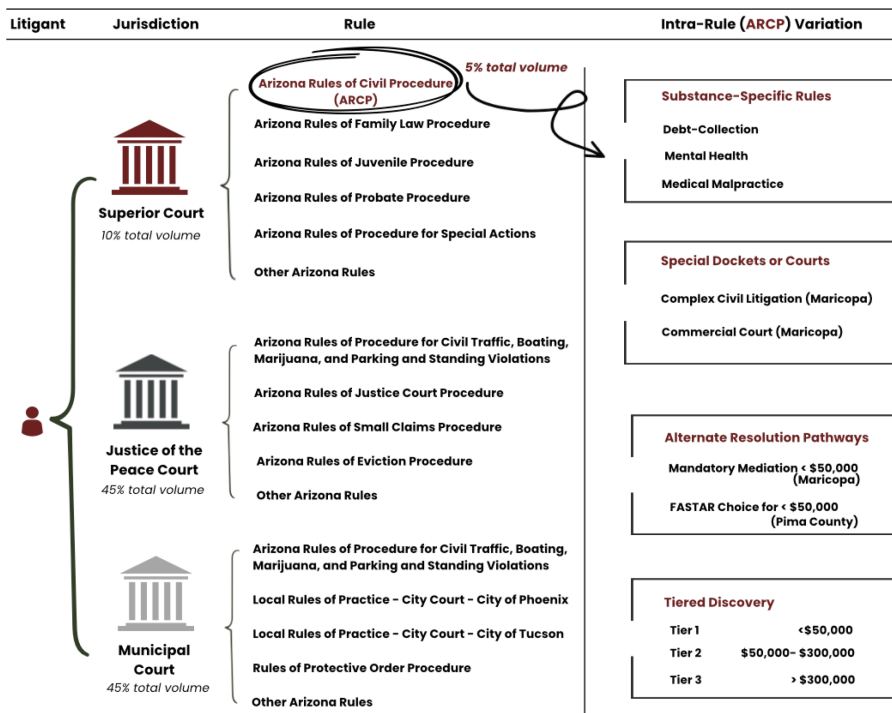
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guidance\_on\_developing\_problem-solving\_approaches\_for\_families\_in\_court.pdf [https://perma.cc/R7AG-9ZMD].

<sup>129</sup> See ARIZ. CT. RULES, <https://govt.westlaw.com/azrules/Index> [https://perma.cc/EST4-CKQA] (last visited Nov. 9, 2025) (including several sets of local rules). Twenty-two apply to non-criminal proceedings in trial courts. *Id.*

<sup>130</sup> ARIZ. SUP. CT., 2023 JUDICIAL DATA REPORT 2 (2023), <https://online.fliphtml5.com/qkryw/wgkv> [https://perma.cc/8Y6U-BX34].

FIGURE 4: EXAMPLES OF TAILORING IN ARIZONA COURTS



To understand this variation, start in superior court, which has exclusive jurisdiction over certain case types and cases seeking more than \$10,000.<sup>131</sup> The Arizona Rules of Civil Procedure, still largely modeled after the Federal Rules,<sup>132</sup> nominally apply to all civil actions in superior courts.<sup>133</sup> But most cases filed in superior courts follow entirely separate substance-specific bodies of procedural rules,<sup>134</sup> including the Rules of Family Law Procedure,<sup>135</sup> Probate Procedure,<sup>136</sup> and Juvenile

<sup>131</sup> ARIZ. CONST. art. VI, § 14 (conferring authority to the superior courts of all “cases and proceedings in which exclusive jurisdiction is not vested by law in another court”); ARIZ. REV. STAT. ANN. § 22-201 (2025) (conferring exclusive original jurisdiction over claims of less than \$10,000 to the justice courts).

<sup>132</sup> Oakley & Coon, *supra* note 83, at 1381.

<sup>133</sup> ARIZ. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the superior court of Arizona.”).

<sup>134</sup> In these case types, the Arizona Rules of Civil Procedure only apply if expressly incorporated. *See, e.g.*, ARIZ. R. FAM. L.P. 1(c) (“The *Arizona Rules of Civil Procedure* apply only when these rules expressly incorporate them.”).

<sup>135</sup> ARIZ. R. FAM. L.P. 1.

<sup>136</sup> ARIZ. R. PROB. P. 1 (“These rules govern procedures in all probate proceedings in the superior court.”).

Court Procedure.<sup>137</sup> Other complexities overlay. There are substance-specific rules, including some of those addressing consumer debt (which prescribe special evidentiary requirements for establishing the amount owed)<sup>138</sup> and medical malpractice (where certificates of merit are required).<sup>139</sup> There are special dockets—for example, the complex civil litigation docket for cases that require “continuous judicial management,”<sup>140</sup> and the commercial court for disputes between “business” entities, involving certain claims of more than \$300,000.<sup>141</sup> There are even tiered discovery tracks where the presumptive scope of discovery is based on amount in controversy, unless the judge finds good cause to route the case to a different track based on its complexity.<sup>142</sup> For instance, absent good cause otherwise, a plaintiff seeking \$50,000 is entitled to five hours of fact witness depositions; while a plaintiff seeking \$51,000 is entitled to fifteen hours.<sup>143</sup>

There are also alternate resolution pathways—both mandatory and voluntary—which the fifteen local superior courts have discretion to adopt. Consider three examples. In family law cases, parties in pilot jurisdictions may consent to the Informal Family Law Trial (IFLT) track, under which the court adopts an inquisitorial role, the rules of evidence are suspended, and non-party witnesses are only allowed by leave of court.<sup>144</sup> The idea is that, with the rules relaxed, family law courts can be more client-centric, less confrontational, and more accessible—especially for the eighty percent of cases that involve at least one self-represented litigant.<sup>145</sup> For low-dollar civil cases, superior courts can choose at least two different alternate resolution pathways. They can either mandate mediation for claims below a certain amount

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<sup>137</sup> ARIZ. R.P. JUV. CT. 101 (describing scope of the rules in all juvenile court proceedings, including delinquency and civil cases).

<sup>138</sup> ARIZ. REV. STAT. ANN. § 44-7804 (2025).

<sup>139</sup> See, e.g., ARIZ. REV. STAT. ANN. § 12-2603 (establishing the affidavit of merit requirement in medical malpractice cases).

<sup>140</sup> SUPER. CT. LOC. PRAC. R., MARICOPA CNTY. 3.12.

<sup>141</sup> ARIZ. R. CIV. P. 8.1.

<sup>142</sup> ARIZ. R. CIV. P. 26.2(c)(3).

<sup>143</sup> ARIZ. R. CIV. P. 26.2(f).

<sup>144</sup> See Authorizing the Establishment of an Informal Family Law Trial Pilot Program in the Superior Courts of Graham, Maricopa, and Pima Counties, Admin. Ord. No. 2022-159, at 1, 3–5 (Ariz. Nov. 16, 2022), <https://www.azcourts.gov/Portals/0/22/admorder/Orders22/2022-159.pdf> [<https://perma.cc/YC4A-5FCG>].

<sup>145</sup> See Greg Sakall, Michael Peterson & Bruce Cohen, Petition to Amend Rule 77 and Adopt Rule 77.1 of Arizona Rules of Family Law Procedure, No. R-22-0007, at 2–3 (Ariz. Jan. 10, 2022) [hereinafter Original IFTL Rules Petition], <https://rulesforum.azcourts.gov/Rules-Forum/aft/1290> (click on attachment “Rule Change Petition-Rule 77 77.1 (final2).pdf”) [<https://perma.cc/YDQ5-56K2>].

in controversy<sup>146</sup> or adopt the Fast Trial and Alternative Resolution (FASTAR) Rules, where the plaintiff must elect either (1) a fast trial, with streamlined discovery, or (2) alternative resolution.<sup>147</sup>

In the justice courts, which have exclusive jurisdiction of claims less than \$10,000 (excluding substance-specific carve-outs), the Justice Court Rules of Civil Procedure apply,<sup>148</sup> and cases proceed in front of justices of the peace, who are not required to be attorneys.<sup>149</sup> Separate rules apply for certain case types, including rules governing eviction procedure,<sup>150</sup> civil traffic, boating, marijuana, parking and standing violations,<sup>151</sup> and protective orders.<sup>152</sup> If the amount in controversy is less than \$5,000, a plaintiff can file in the small claims division, where other rules apply, including a ban on lawyers (absent consent) and a waiver of the right to a jury or appeal.<sup>153</sup> The municipal courts, with exclusive jurisdiction over ordinance violations and concurrent jurisdiction of certain civil claims,<sup>154</sup> are governed by yet other rules.<sup>155</sup>

In 2024, over 1.3 million non-criminal cases were filed in Arizona courts.<sup>156</sup> Figure 5 describes the share of cases governed by each body of procedural rules.

<sup>146</sup> ARIZ. REV. STAT. ANN. § 12-133 (2025). For example, Maricopa County has set the limit of \$50,000. *See* SUPER. CT. LOC. PRAC. R., MARICOPA CNTY. 3.10.

<sup>147</sup> ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 103; ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 112.

<sup>148</sup> ARIZ. JUST. CT. R. CIV. P. 101(b) (“These rules apply to civil lawsuits in justice courts in Arizona. These rules do not apply to evictions, small claims, [or] civil traffic [proceedings]. . . .”); ARIZ. JUST. CT. R. CIV. P. 101(d) (“These rules replace the Arizona Rules of Civil Procedure . . . .”); ARIZ. REV. STAT. ANN. § 22-201 (2025) (defining the maximum amount in controversy as \$10,000).

<sup>149</sup> ARIZ. REV. STAT. ANN. § 22-122(C) (2025).

<sup>150</sup> ARIZ. R.P. EVICTION ACTIONS 1 (“These rules shall govern the procedure in the superior courts and justice courts involving forcible and special detainer actions, which are jointly referred to in these rules as ‘eviction actions.’”).

<sup>151</sup> ARIZ. R. CT. P. CIV. TRAFFIC, BOATING, MARIJUANA, AND PARKING AND STANDING VIOLATIONS 1 (“These rules apply in all court cases involving the adjudication and appeal of civil traffic, civil boating, [and] civil marijuana [violations] . . . .”).

<sup>152</sup> ARIZ. R. PROTECTIVE ORD. P. 1 (“Rules 2 through 42 govern procedures in Arizona courts for any case brought under [ARS] § 13-3602, Order of Protection . . . .”).

<sup>153</sup> ARIZ. R. SMALL CLAIMS P. 1 (stating claim limit and voluntariness requirement).

<sup>154</sup> ARIZ. REV. STAT. ANN. § 22-402(B) (2025) (setting forth the establishment and jurisdiction of city courts).

<sup>155</sup> *See, e.g.*, ARIZ. ST. PHX. CITY CT. R. (setting out the local rules for Phoenix City Court).

<sup>156</sup> *Limited Jurisdiction Filings and Terminations 2024*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/statistics/Interactive-Data-Dashboards/Limited-Jurisdiction-Filings-and-Terminations> (choose “5. Case Type by Court Level”; then choose “2024” from dropdown under “Select Fiscal Year”; then deselect “Felony,” “Misdemeanors,” and “Criminal Traffic” under “Case Type Category”) (on file with the New York University Law Review) (last visited Jan. 2, 2026); *Superior Court Filings and Terminations 2024*, ARIZ. JUD. BRANCH [hereinafter Arizona Superior Court Dashboard], <https://www.azcourts.gov/statistics/Interactive-Data-Dashboards/Superior-Court-Filings-and-Terminations> (choose “5. Filings & Terminations

FIGURE 5: SHARE OF CIVIL CASES GOVERNED BY DIFFERENT BODIES OF PROCEDURAL RULES IN ARIZONA STATE COURTS (2024)

Court	Rules	Filing	Share
<b>Superior Court</b>  (11% total volume)	Rules of Civil Procedure	67,611	5%
	Rules of Family Law Procedure	55,554	4%
	Rules of Probate Procedure	18,270	1%
	Rules of Juvenile Procedure	11,293	1%
<b>Justice Court</b>  (44% total volume)	Rules of Procedure for Civil Traffic, Boating, Marijuana, and Parking and Standing Violations.	334,197	25%
	Justice Court Rules of Civil Procedure	132,122	10%
	Rules of Eviction Procedure	106,587	8%
	Rules of Small Claim Procedure	11,494	1%
	Rules of Protective Order Procedure	14,458	1%
<b>Municipal Courts</b>  (45% total volume)	Rules of Procedure for Civil Traffic, Boating, Marijuana, and Parking and Standing Violations	518,093	38%
	Local Rules of Practice and Procedure—City Court	70,590	5%
	Rules of Protective Order Procedure	17,740	1%

Although as many as five percent (67,611) of all non-criminal cases filed in Arizona courts remain nominally governed by the Arizona Rules of Civil Procedure, this figure masks much of the internal procedural variation discussed above. For example, almost 18,000 of those are debt collection cases<sup>157</sup> and 15,000 are “Mental Health” cases.<sup>158</sup> In addition,

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by Case Type”; then choose “2024” from dropdown under “Select Fiscal Year”; then deselect “Criminal Felony,” “Criminal Misdemeanor,” and “Probate” under “Select Case Category”) (on file with the New York University Law Review) (last visited Jan. 2, 2026).

<sup>157</sup> Arizona Superior Court Dashboard, *supra* note 156 (choose “5. Filings & Terminations by Case Type”; then choose “2024” from dropdown under “Select Fiscal Year”; then select “Civil” from dropdown under “Select Case Category”; then see data under “Seller Plaintiff (Debt Collection)”).

<sup>158</sup> *Id.* (choose “5. Filings & Terminations by Case Type”; then choose “2024” from dropdown under “Select Fiscal Year”; then deselect all options under “Case Category” except for “Mental Health”). Civil mental health cases include a court-ordered evaluation or treatment pursuant to Sections 36-520 to 36-544 of the 2025 Arizona Revised Statutes Annotated.

in Maricopa County alone, over 16,000 cases, because they fell below the \$50,000 threshold, were subject to mandatory arbitration.<sup>159</sup> The upshot is that no standard procedural path exists in Arizona civil procedure.

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More research is needed to understand how tailoring works in state courts across the country and whether the trends I observe in Arizona—such as the centralization of rulemaking authority in courts of last resort<sup>160</sup> and the specialization of procedure—apply broadly. Certainly not all states have dozens of bodies of procedural rules like Arizona. But all state court civil rules, even those that appear unified, contain significant internal variation. In California, for example, primary rulemaking authority remains vested in the legislature and the state publishes only a single volume of court rules.<sup>161</sup> But these rules include important tailoring: titles for family and juvenile<sup>162</sup> and probate and mental health;<sup>163</sup> divisions for eviction<sup>164</sup> and small claims;<sup>165</sup> a division for case management, including special rules for collections cases, complex cases, and class actions<sup>166</sup> and a requirement that courts “adopt local rules on differential case management.”<sup>167</sup> The Code of Civil Procedure provides other variation, including discovery tracks that distinguish “limited civil cases” from others based on amount in controversy<sup>168</sup> and special rules like arbitration of medical malpractice.<sup>169</sup> Finally, there are statutory rules—for example, debt

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<sup>159</sup> See JUD. BRANCH OF ARIZ. IN MARICOPA CNTY., FY2024 ANNUAL REPORT 67 (2024), <https://superiorcourt.maricopa.gov/media/titbicsg/fy2024-judicial-branch-annual-report.pdf> [<https://perma.cc/MJ9E-EG5W>]; SUPER. CT. LOC. PRAC. R., MARICOPA CNTY. 3.10 (noting the \$50,000 jurisdictional threshold for mandatory arbitration).

<sup>160</sup> For example, although forty-one states have a court-rulemaking model, nine states still vest primary rulemaking authority in the hands of legislators. See Clopton, *supra* note 64, at 9–10.

<sup>161</sup> In 1962, the California Judicial Council compiled all separate rules into one publication. See 2 B.E. WITKIN, CALIFORNIA PROCEDURE § 239 (6th ed. 2025). Alabama also shows how codification is largely irrelevant. Although Alabama’s Rules of Civil Procedure apply to circuit and district courts, many include a subrule denoted as “(dc)” with variations for district court. ALA. R. CIV. P. 1 (“These rules govern procedure . . . in the district courts as provided in subparagraph ‘(dc)’ . . .”).

<sup>162</sup> CAL. R. CT. 5.1–5.906.

<sup>163</sup> CAL. R. CT. 7.1–7.1105 (probate); CAL. R. CT. 7.2201–7.2303 (mental health).

<sup>164</sup> CAL. R. CT. 3.2000–3.2005.

<sup>165</sup> CAL. R. CT. 3.2100–3.2120.

<sup>166</sup> CAL. R. CT. 3.740–3.771.

<sup>167</sup> CAL. R. CT. 3.711.

<sup>168</sup> CAL. CIV. PROC. CODE § 85 (West 2025). Discovery in “limited” civil cases is otherwise constrained and requires use of standardized forms. *Id.* §§ 94–95.

<sup>169</sup> *Id.* § 1295.

collection<sup>170</sup>—and local rules and orders. The very visible tailoring in Arizona, therefore, might also inform our understanding of the less visible procedural variation in other state courts around the country and help to surface important tradeoffs about who should make what procedure.

## II TAILORING: A TYPOLOGY

Above, I provided evidence of just how much our civil procedures deviate from any imagined uniform or transsubstantive norm. This Part continues the descriptive work by mapping the complex procedural landscape in three ways—first, by examining five common and overlapping motivations for tailoring (the “why”); second, by identifying the norms of procedural uniformity that tailoring commonly flexes to achieve procedural goals (the “what” and “who”);<sup>171</sup> and third, by describing whether local courts, individual judges, or litigants will have flexibility in implementing the tailoring (the “how”).<sup>172</sup>

This analysis is complex, but necessary to understand our post-transsubstantive world and help courts choose appropriate design solutions. Figure 6 provides an overview.

FIGURE 6: A MENU OF TAILORING DESIGN DECISIONS

“Why”						
Court Access	Speedy Resolution	Information Exchange	Substantive Alignment	Harm Reduction		
“What” and “Who”						
Case Type	Claim Type	Remedy Sought	Case Complexity	Contested Status	Representation Status	Party Characteristics
“How”						
Centralized Rule, No Flex	Local Court Control	Individual Judge Discretion	Mutual Party Control	Unilateral Party Control		

<sup>170</sup> CAL. CIV. CODE §§ 1788.58–.60 (2025).

<sup>171</sup> See Zambrano, *supra* note 56, at 855–56.

<sup>172</sup> See Avraham & Hubbard, *supra* note 57, at 936–42.

### A. *The “Why” of Tailoring*

Although any tailoring may serve multiple goals, my survey of the evolution of tailoring in Arizona courts reveals five common and overlapping motivations: (1) court access, (2) speedy resolution, (3) information exchange, (4) substantive alignment, and (5) harm reduction. Below, I provide examples from Arizona.

#### 1. *Tailoring for Court Access*

The key motivation of “access” tailoring is that certain people or cases need different procedure to successfully access the courts.<sup>173</sup> In the early twentieth century, citing the “wide disparity between the ability of the richer and poorer classes to utilize the machinery of the law,”<sup>174</sup> reformers advocated for various forms of “access” tailoring so “justice [could] be . . . faithfully, more satisfactorily” dispensed,<sup>175</sup> including informal procedural tracks for small claims. The small-claims model has become widely adopted across state court systems,<sup>176</sup> including Arizona, and the logic of creating informal procedural tracks to ensure access has been imported to many other case types such as family law.<sup>177</sup>

In Arizona, the proposed IFLT rules exemplify this model.<sup>178</sup> The 2025 proposed revisions to Rule 77 of the Family Law Rules of Procedure create a separate procedural track that relaxes evidentiary rules and conducts an informal trial. Proponents see IFTL as “one tool that make[s] the court processes more client-centric,” reduces

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<sup>173</sup> By the problem of “access to justice,” I adopt Rebecca L. Sandefur’s definition that access is both *restricted* (“[O]nly some people, and only some kinds of justice problems, receive lawful resolution.”) and *unequal* (some people are consistently more likely to get access than others). See Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS, Winter 2019, at 49, 51.

<sup>174</sup> REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 15 (1919).

<sup>175</sup> *Id.* at 70.

<sup>176</sup> Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC’Y REV. 219, 220 (1975) (surveying history of small claims courts).

<sup>177</sup> For example, certain family law courts allow litigants to opt-in, or force them to opt-out, of informal trials. See Houlberg & Heffernan, *supra* note 32. “Access” tailoring can take on many other forms, such as keeping certain dockets open at nights or on weekends, or available at different community locations. See Daniel Bernal, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547, 566–70 (2017) (surveying the success of night court in Pima County Consolidated Justice Court and citing other studies).

<sup>178</sup> See Greg Sakall, *Petition to Amend Rule 77 and Adopt Rules 77.1 and 77.2*, Arizona Rules of Family Law Procedure, No. R-24-0060 (Ariz. Dec. 18, 2024) [hereinafter *Amended IFTL Rules Petition*], <https://rulesforum.azcourts.gov/Rules-Forum/aft/1674> (click on attachment “Rule Change Petition – Rule 77.pdf”) [<https://perma.cc/QY72-HLT9>].

conflict, and improves procedural justice.<sup>179</sup> Under the new rules, local superior courts would choose to adopt either an opt-in or opt-out IFLT program.<sup>180</sup> All family law cases, except for certain child support hearings and cases designated as “complex” under Rule 50, are eligible.<sup>181</sup> Though a local court’s choice of an opt-out or opt-in model is likely to influence party uptake, both models still allow parties to choose a traditional trial and provide judges with discretion to force parties to revert to those procedures.<sup>182</sup>

## 2. Tailoring for Speedy Resolution

A second motivation for tailoring that routes cases to different procedural tracks is to promote speedy resolution, reduce litigation costs, and maximize court time and resources. Concerns about rising docket pressures and trial delay in the latter half of the twentieth century motivated the push for differentiated case management in the Civil Justice Reform Act of 1990<sup>183</sup> and similar state court reforms.<sup>184</sup> Courts often assign cases to a streamlined, general, or complex track,<sup>185</sup> or create specialized divisions for complex cases<sup>186</sup> or “expedited” or “economical” dockets for “simple” cases.<sup>187</sup> Or, courts may offer

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<sup>179</sup> Original IFTL Rules Petition, *supra* note 145, at 2, 4.

<sup>180</sup> Amended IFTL Rules Petition, *supra* note 178, at 3, 6 (proposed amendments to Rule 77.1(a); 77.2(a)).

<sup>181</sup> *Id.* at 3–4, 6–7 (proposed amendments to Rule 77.1(b)–(c); 77.2(b)–(c)).

<sup>182</sup> *Id.* at 4 (proposed amendments to Rule 77.1(c)(3)).

<sup>183</sup> 28 U.S.C. §§ 471–82. The Civil Justice Reform Act of 1990 was motivated both by a desire to ensure “prompt disposition and adjudication of cases” and by a concern that “[l]itigation transaction costs . . . in complex as well as in relatively routine cases” are “high and are increasing.” H.R. Rep. No. 101-732, at 9 (1990). For additional concerns, see for example, Thomas W. Church, Jr., *The “Old and the New” Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395 (1982) (surveying delay reduction studies from the 1950s through the 1970s).

<sup>184</sup> For example, the California legislature also charged the Judicial Council to adopt rules, effective 1991, establishing a case differentiation system based on relative complexity. CAL. GOV’T CODE § 68603 (West 2025); CAL. R. CT. 3.711 (“Each court must adopt local rules on differential case management as provided in this chapter . . .”).

<sup>185</sup> *See, e.g.*, FLA. R. CIV. P. 1.200 (creating differentiated tracks).

<sup>186</sup> *See* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1690 (1992) (describing the difficulty of defining complex litigation, the possibility of sliding into a “procedural hell” by breaking the transsubstantive norm, and the benefits of complex litigation).

<sup>187</sup> In 1982, the Kentucky Supreme Court created an “economical litigation docket” for certain case types. KY. R. CIV. P. 89 (adopted by Administrative Order 82-3; effective Oct. 1, 1982). By 2013, at least 21 state courts offered (or required) an “expedited” procedural track for some claims. Michael Morrison, James Wren & Chris Galeczka, *Expedited Civil Actions in Texas and the U.S.: A Survey of State Procedures and a Guide to Implementing Texas’s New Expedited Actions Process*, 65 BAYLOR L. REV. 824, 832–33 (2013).

(or incentivize) an expedited track<sup>188</sup> but allow litigants to choose the slower, more-expensive track with greater procedural protections.<sup>189</sup>

In Arizona, the FASTAR Rules exemplify this model. For all civil cases in which the plaintiff seeks only monetary damages of less than \$50,000 and no defendant is in a foreign country, FASTAR requires the plaintiff to elect either (1) a fast trial, with streamlined discovery, or (2) alternative resolution.<sup>190</sup> The rules for each procedural track further tailor procedural norms by, for example, setting sharper service timing deadlines and allowing the admission of medical bills without proof.<sup>191</sup> Effective July 2025, each local superior court can determine whether to adopt the FASTAR Rules.<sup>192</sup> The logic here is similar to any voluntary small-claims process: the plaintiff can choose to pay the costs associated with an expedited (but still expensive) trial, or resolve the case via mediation.

### 3. *Tailoring for Information Exchange*

A third reason for tailoring is to facilitate better information exchange between parties, often by requiring initial disclosures or translating proportional discovery standards to administrable rules. In 1983, the Federal Rules responded to “the problem of over discovery” by adding a proportionality provision to Rule 26.<sup>193</sup> The advisory committee note to that amendment cautioned against overreliance on amount in controversy, noting that “many cases in the public policy spheres, such as employment practices . . . may have importance far beyond the monetary amount involved.”<sup>194</sup> The states, however, have gone far beyond proportionality standards. In 1992, Arizona introduced mandatory disclosure requirements.<sup>195</sup> In 2011, Utah began assigning

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<sup>188</sup> See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70.9 (2025) (setting out a separate track for accelerated adjudication actions in the commercial division).

<sup>189</sup> For a thorough assessment of cost internalization, see Avraham & Hubbard, *supra* note 57, at 916–18.

<sup>190</sup> ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 103.

<sup>191</sup> ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 104 (service); ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 117(d)(1) (medical bills).

<sup>192</sup> Order Adopting Rules for the Fast Trial and Alternative Resolution (“FASTAR”) Program, No. R-24-0004, at 2 (Ariz. Dec. 3, 2024) [hereinafter FASTAR Rules Order], <https://www.azcourts.gov/rules/rule-amendments-from-recent-rules-agenda-s> (click on “R-24-0004”) [<https://perma.cc/4DTT-CSMA>].

<sup>193</sup> Linda Sandstrom Simard, *Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules*, 71 VAND. L. REV. 1919, 1928 (2018) (quoting the Advisory Committee’s note to 1983 amendment and describing history).

<sup>194</sup> *Id.* at 1928 n.54 (citing FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment).

<sup>195</sup> ARIZ. R. CIV. P. 26.1; see also Andrew D. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*, 43 ARIZ. ST. L.J. 461, 462, 469, 479 (2011) (describing the success of these reforms in Arizona).

cases to discovery tiers, which limit the extent and timeframe of discovery based on amount in controversy.<sup>196</sup>

Arizona adopted its own “tiered discovery” system in 2018.<sup>197</sup> This regime seeks to “limit the parties to particular levels of discovery corresponding to what is at issue in their suit, consistent with the guiding principle of proportionality that is now part of both the federal and Arizona Rules of Civil Procedure.”<sup>198</sup> The rules presumptively sort cases to a track based on amount in controversy while providing a vehicle for moving a case to another tier. While a case seeking \$299,000 presumptively gets fifteen hours of depositions, ten interrogatories, ten requests for production, and ten requests for admission,<sup>199</sup> a case seeking an additional \$1,000 by default is allowed double each of those limits.<sup>200</sup> Judges may allow parties to “tier” themselves for good cause<sup>201</sup> or can do so *sua sponte*.<sup>202</sup>

#### 4. Tailoring for Substantive Alignment

A fourth justification for tailoring procedure is to better fit the unique aspects of a specific body of substantive law. Although this form of tailoring may seek to create access, or speed, or better information exchange, it does so by transgressing transsubstantive norms that have historically constrained court rulemaking. Consider consumer debt, where “alignment” procedural reforms are now commonplace. When an Arizona committee set out to make rules for justice courts in 2011, a core focus was the “large percentage of civil cases [that] involve assigned debts where the defendant-debtors do not recognize the names of the assignee-plaintiffs.”<sup>203</sup> Adopted after extensive debate, including over the legality and wisdom of “creating a different standard

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<sup>196</sup> UTAH R. CIV. P. 26(c)(5) (providing three discovery tiers based on amount in controversy). See generally CIVIL JUST. INITIATIVE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (2015), <https://www.actl.com/wp-content/uploads/legacy/judiciary-committee/rules-policies-practices/8-utah—impact-of-the-revisions-to-rule-26-on-discovery-practice.pdf> [<https://perma.cc/X4CB-LTBS>] (describing the impact of the new system).

<sup>197</sup> ARIZ. R. CIV. P. 26.2.

<sup>198</sup> Don Bivens, Petition to Amend the Arizona Rules of Civil Procedure, No. 17-0010, at 5 (Ariz. Jan. 10, 2017), <https://rulesforum.azcourts.gov/Rules-Forum/aft/680> (click on attachment “1. CCJR Petition.final\_1.pdf”) [<https://perma.cc/2UHZ-X9TE>].

<sup>199</sup> ARIZ. R. CIV. P. 26.2(c), (f).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* 26.2(c)(1).

<sup>202</sup> *Id.* 26.2(c)(2).

<sup>203</sup> REPORT OF THE COMM. ON CIVIL R. PROC. FOR LIMITED JURISDICTION CTS. TO THE ARIZ. JUD. COUNCIL (2011).

for a specific type of plaintiff[],”<sup>204</sup> the new rules heightened pleading requirements for debt-buyers but stopped short of requiring additional documentation upon filing.<sup>205</sup>

Perhaps the best example of this in Arizona was the 2009 Rules of Eviction Procedure. A task force found “that the Rules of Civil Procedure, which nominally apply in eviction actions, were not designed for eviction actions,” resulting in inconsistency and unfairness.<sup>206</sup> In their opposition to the proposed rules, landlord lawyers referenced the break with transsubstantivity: “[T]he Court will be going beyond the normal process of adopting procedures applicable to a wide variety of litigants . . . . These rules will be limited to one kind of procedure, evictions, and targeted at one specific industry.”<sup>207</sup> Balancing these competing interests, Arizona rulemakers implemented heightened pleading requirements to ensure that tenants understood the allegations against them and judges had sufficient information to evaluate default judgment motions.<sup>208</sup> Moreover, courts now required the disclosure, upon request, of “information the Task Force believes to be critical, reasonably necessary in most instances,” such as a copy of the lease.<sup>209</sup> Ultimately, the new rules were designed to not only resolve the “great diversity of practice from courtroom to courtroom,”<sup>210</sup> but to correct informational asymmetries unique to landlord/tenant disputes.

## 5. Tailoring for Harm Reduction

A final model of tailoring seeks to mitigate harm to litigants and to address underlying social issues by fostering “collaborative relationships

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<sup>204</sup> Comm. on Civ. Rules of Proc. in Ltd. Jurisdiction Cts., ARIZ. SUP. CT., *Minutes: October 25, 2011*, at 4 (Oct. 25, 2011), <https://www.azcourts.gov/Portals/0/74/Archive/RCIP/RCiPMinutes.pdf> [<https://perma.cc/779H-4A98>].

<sup>205</sup> ARIZ. JUST. CT. R. CIV. P. 121(a)(3) (requiring proof that the plaintiff is in fact the owner of the debt, if it has been assigned). For a discussion of a similar change in New York that resulted in lower filing rates, see Sandefur, *supra* note 173, at 53.

<sup>206</sup> Robert B. Van Wyck, Petition for Rules of Procedure for Eviction Actions, No. R-07-0023, at 3 (Ariz. Dec. 7, 2007) [hereinafter Eviction Rules Petition], <https://rulesforum.azcourts.gov/Rules-Forum/aft/150> (click on attachment “112122439071.pdf”) [<https://perma.cc/BWN5-MJVK>].

<sup>207</sup> Michael A. Parham, Comment to Petition for Procedure for Eviction Action, Ariz. Sup. Ct. No. R-07-0023, at 2 (May 20, 2008), <https://rulesforum.azcourts.gov/Rules-Forum/aft/150> (click on attachment “1520485543858.pdf”) [<https://perma.cc/7YME-4VM6>].

<sup>208</sup> Eviction Rules Petition, *supra* note 206, at 4–5; *see also* ARIZ. R. P. EVICTION ACTIONS 5(a) (heightened pleading); *id.* at 5(b)(6) (service of the information sheet clearly identifying the eviction suit); *id.* at 5(b)(7) (attachment of copy of the termination notice to complaint); *id.* at 5(b)(8) (certification that action involves terminating a subsidized tenancy).

<sup>209</sup> Eviction Rules Petition, *supra* note 206, at 6; ARIZ. R. P. EVICTION ACTIONS 10 (disclosure requirements upon request).

<sup>210</sup> Eviction Rules Petition, *supra* note 206, at 3.

between legal actors and the integration of extra-legal services.”<sup>211</sup> Although problem-solving criminal courts are better known,<sup>212</sup> civil diversion programs, defined as “[p]rograms that operate within or adjacent to the formal court process to provide litigants with the time, information, and resources to resolve disputes in a less harmful way,”<sup>213</sup> have exploded in popularity since the COVID-19 pandemic.<sup>214</sup> In eviction proceedings, civil diversion often refers to programs that encourage mediation and connect behind-on-rent tenants with financial resources.<sup>215</sup> This sort of “reform” tailoring envisions a significantly more expansive view of courts in American society than “alignment” tailoring—one that may go beyond the traditional role of case dispute resolution.<sup>216</sup>

In Arizona, an example of this is a diversion-adjacent procedure currently under review by the Rules Committee.<sup>217</sup> The rule would mandate that judges grant a three-day continuance for “good cause,” including a “good faith belief” that a rent default will be cured.<sup>218</sup> The Maricopa County (Phoenix metropolitan area) Justices of the Peace filed a comment unanimously opposing the rule and arguing, among other things, that “judges have no legal authority to delay an eviction action to give a tenant additional time to pay a past due balance.”<sup>219</sup>

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<sup>211</sup> Tonya L. Brito & Daanika Gordon, *Family Court as Problem Solving?*, 2023 WIS. L. REV. 1537, 1538.

<sup>212</sup> See Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 35 (2005) (noting that these courts, including drug courts, exploded in popularity in the 1990s).

<sup>213</sup> CCI/COSCA RESOLUTION 3-2024, *supra* note 52, at 3. For another example, consider family court treatment programs. See Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE RELIGION, GENDER & CLASS 113, 114 (2010) (describing the Family Court Treatment Part in New York that incorporates problem-solving structures).

<sup>214</sup> See EVICTION DIVERSION, *supra* note 53, at 5–7 (surveying twenty-four eviction diversion programs).

<sup>215</sup> See *id.*

<sup>216</sup> See generally Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004) (arguing that problem-solving courts challenge the traditional bases of court legitimacy); Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS, Winter 2019, at 128, 132 (arguing that civil courts are ill-suited to address socio-economic inequality and that “[p]roblem-solving courts create miniature or partial versions of executive branch functions in the court systems”).

<sup>217</sup> See Andrew P. Schaffer, Pamela Bridge, Charles W. Doughty & Alan R. Solot, Petition to Amend Rules 11(d) and 18(d), Arizona Rules of Procedure for Eviction Actions, No. R-25-0020, at 4–5 (Ariz. Jan. 10, 2025) [hereinafter 2025 Eviction Petition], <https://rulesforum.azcourts.gov/Rules-Forum/aft/1706> (click on attachment “Petition to Amend Rules 11(d) and 18(d) of the Rule of Procedure for Eviction Actions 1.10.25\_2.pdf”) [<https://perma.cc/7BYN-H3ER>].

<sup>218</sup> *Id.*

<sup>219</sup> Gerald A. Williams, Comment in Opposition to Petition to Amend 11(b)(1) of the Rules of Procedure for Eviction Actions, No. R-25-0020, at 6 (Feb. 14, 2025),

## B. *The “What” and “Who” of Tailoring*

Tailoring accomplishes one or more of the above goals by flexing some norm of procedural uniformity. This is the “what” or “who” of tailoring.<sup>220</sup> As two examples, when a court tailors by case type (a “what”), it violates the transsubstantive norm;<sup>221</sup> when it tailors by party characteristics (a “who”), it violates the transpersonal norm.<sup>222</sup> These norms vary in strength. For example, courts balance the transrepresentational norm (rules should apply despite representational status) with a duty to support pro se litigants,<sup>223</sup> making the norm somewhat weaker. I identify below a non-exhaustive list of seven common design choices—case type, claim type, remedy sought, case complexity, contested status, representation status, and party characteristics—all of which challenge some norm of procedural uniformity.

### 1. *Case Type*

The transsubstantive norm, historically the lodestar for federal court procedural design,<sup>224</sup> is weaker in state courts. Arizona court rules often differentiate based on case type by enacting separate substance-specific bodies of procedure, such as the Rules of Eviction Procedure, the Rules of Family Law Procedure, and the Rules of Probate Procedure,<sup>225</sup> or by using case type as a factor in designing a special procedural track—for example, specifying which case types are eligible for commercial courts.<sup>226</sup>

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<https://rulesforum.azcourts.gov/Rules-Forum/aft/1706> (click on attachment “Comment to R-25-0020.pdf”) [<https://perma.cc/YW29-XU7E>].

<sup>220</sup> See Zambrano, *supra* note 56, at 856.

<sup>221</sup> Marcus, *supra* note 21, at 376 (defining the transsubstantive norm).

<sup>222</sup> See Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321, 325 & n.11 (2014) (describing the transpersonal norm).

<sup>223</sup> See Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2702 (2022) (describing this norm). Individual states may conduct this balancing quite differently. Compare *Zhi Gang Zhang v. Rasmus*, 932 N.W.2d 153, 164 (S.D. 2019) (“[S]elf-represented litigants are . . . held to the same standard as attorneys, including the obligations to comply with rules of procedure and evidence.”), with *Bush v. Elkins*, 342 P.3d 1245, 1253 (Alaska 2015) (finding that courts have a duty to “inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish” (quoting *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987))).

<sup>224</sup> See, e.g., Marcus, *supra* note 21, at 376.

<sup>225</sup> See *supra* Part I. Transsubstantivity is itself a poor classifier. See David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1197 (2013) (noting that even tort law arguably qualifies as “transsubstantive” because it applies to a variety of different case types, from surgical mishaps to car crashes). In subsequent work, it may be productive to provide a level of specificity for “case type,” which would allow scholars to more precisely identify transsubstantive and intra-substantive variation.

<sup>226</sup> ARIZ. R. CIV. P. 8.1.

## 2. *Claim Type*

A court might also tailor based on the type of claim raised.<sup>227</sup> The underlying norms here are that litigants must (or at least may) bring any claim that arises from the same transaction or occurrence<sup>228</sup> and that different claims should get the same process (a variation of the transsubstantive norm). But many state courts have heightened requirements for some claims, like fraud, regardless of case type.<sup>229</sup> And, many states, including Arizona, have rules that prohibit a litigant from raising claims in certain actions. For example, to ensure the “summary” nature of an eviction proceeding, Arizona limits the types of counterclaims a tenant can bring in an eviction action.<sup>230</sup>

## 3. *Remedy Sought*

A court might also tailor based on the remedy sought. This is typically done in one of two ways: either by setting an amount-in-controversy threshold or by prohibiting parties from seeking non-monetary remedies. The underlying norms here are that a case should resolve a whole dispute, including matters of both law and equity,<sup>231</sup> and should not discriminate based on litigant wealth.<sup>232</sup> Arizona procedure tailors on both grounds. The FASTAR program, for example, is limited to cases seeking less than \$50,000 where the party does not request injunctive or non-monetary relief.<sup>233</sup> Rules for small claims, justice court, and the commercial court also set a monetary threshold (and

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<sup>227</sup> See Thomas M. Clarke & Victor E. Flango, *Case Triage for the 21st Century*, in NAT'L CTR. FOR STATE CTS., *FUTURE TRENDS IN STATE COURTS 2011*, at 146, 147 (2011) (describing tailoring by the types of issues raised).

<sup>228</sup> See ARIZ. R. CIV. P. 13(a)(1)(A); see also 6 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1410 (3d. ed. 2025) (describing norm).

<sup>229</sup> See, e.g., FED. R. CIV. P. 9(b); N.Y. C.P.L.R. 3016(b) (CONSOL. 2025); FLA. R. CIV. P. 1.120(b); S.C.R. CIV. P. 9(b); OHIO R. CIV. P. 9(b); KY. R. CIV. P. 9.02.

<sup>230</sup> See *Mead, Samuel & Co. v. Dyar*, 622 P.2d 512, 516 (Ariz. Ct. App. 1980) (prohibiting counterclaims not explicitly allowed under ARIZ. REV. STAT. ANN. § 33-1365(A) (2025)). Other states go much further to tailor by claim type. For example, Michigan's mandatory stay in eviction actions applies only to tenants where a claim of unpaid rent is at issue. MICH. CT. R. 4.201(I)(3). New York automatically sets a hearing for most eviction claims but requires nonpayment defendants in New York City to file an answer in ten days. N.Y. REAL PROP. ACTS. LAW §§ 732, 743 (McKinney 2025).

<sup>231</sup> See *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 507 (1928) (describing rule that courts “may administer complete relief between the parties”); see also KELLEN R. FUNK, *LAW'S MACHINERY: REFORMING THE CRAFT OF LAWYERING IN AMERICA'S INDUSTRIAL AGE* 266 (2025) (describing transition to law and equity).

<sup>232</sup> Indeed, each federal judge must pledge to “do equal right to the poor and to the rich.” 28 U.S.C. § 453. For an analysis of this norm, see generally Richard M. Re, “*Equal Right to the Poor*,” 84 U. CHI. L. REV. 1149 (2017).

<sup>233</sup> ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 101(b).

limit non-monetary relief).<sup>234</sup> And in superior court, if the judge does not assign a case to a discovery track based on complexity, or the parties do not stipulate, the case is assigned based on damages sought.<sup>235</sup>

#### 4. Case Complexity

Courts also sometimes tailor based on case complexity. The (quite weak) norm here is that all cases should get the same process despite perceived complexity—perhaps because to do otherwise involves prejudgment in ways that may be self-fulfilling.<sup>236</sup> For example, as discussed *supra*, Arizona superior court judges can redirect cases to different discovery tiers than the amount in controversy would suggest based on case attributes. Tier 1 cases, getting five hours of total deposition time, have “minimal documentary evidence and few witnesses,” a category which typically includes “[a]utomobile tort, intentional tort, premises liability, and insurance coverage claims arising from those types of claims.”<sup>237</sup> In contrast, Tier 3 cases, getting thirty hours of deposition time, are “logistically or legally complex,”<sup>238</sup> and typically include “[c]lass actions, antitrust, [and] multi-party commercial [cases].”<sup>239</sup> Maricopa County, Arizona, has also created a complex civil litigation program for any “civil action that requires continuous judicial management to avoid placing unnecessary burdens on the court,”<sup>240</sup> and allows parties in family law cases to seek designation of a case as “complex.”<sup>241</sup>

#### 5. Contested Status

Courts might also tailor based on whether a case is “contested,” that is, whether any response to the lawsuit has been raised. The norm here is that like cases should be treated alike, and a court still has a duty to manage error risk fairly if only one party comes to court.<sup>242</sup> But

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<sup>234</sup> ARIZ. R. SMALL CLAIMS P. 1(a); ARIZ. JUST. CT. R. CIV. P. 110(b)(5); ARIZ. R. CIV. P. 8.1.

<sup>235</sup> ARIZ. R. CIV. P. 26.2(c)(3).

<sup>236</sup> For an excellent analysis of the unintended effects of complex treatment, such as creating complexity, see Curtis E.A. Karnow, *Complexity in Litigation: A Differential Diagnosis*, 18 U. PA. J. BUS. L. 1, 31–32 (2015).

<sup>237</sup> ARIZ. R. CIV. P. 26.2(b)(1), (c)(3)(A), (f)(1).

<sup>238</sup> *Id.* at 26.2(b)(3), (c)(3)(C), (f)(3).

<sup>239</sup> *Id.* at 26.2(b)(3).

<sup>240</sup> SUPER. CT. LOC. PRAC. R., MARICOPA CNTY. 3.12(a)(1). As another example, see FLA. R. CIV. P. 1.200(b) (differentiating procedure not “on the financial value of the case but rather the amount of judicial attention required for resolution”).

<sup>241</sup> ARIZ. R. FAM. L.P. 50(a).

<sup>242</sup> Bookman, *supra* note 64, at 1486–87 (describing the duty); see also, e.g., Grappo v. McMillis, 240 Cal. Rptr. 3d 164, 177 (Cal. Ct. App. 2017) (finding that because “there is no opposing party in a default judgment situation . . . it is the duty of the court to act as

this norm is counterbalanced with the norm that an absent defendant admits all well-pleaded allegations<sup>243</sup> and the practical reality that a court's job of resolving cases according to the substantive law (and the amount of judicial attention required to do it) is quite different if a case is uncontested.<sup>244</sup> Arizona's probate and family law rules, for example, provide separate process for uncontested cases.<sup>245</sup> And, if a debt collection action in Arizona is uncontested, the creditor must establish the amount owed with certain evidence; if a case is contested, the evidence must be weighed following standard procedural rules.<sup>246</sup>

## 6. Representation Status

A court might also tailor based on one or both parties' representation status.<sup>247</sup> In Arizona, although litigants without lawyers are generally "held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer,"<sup>248</sup> the rules often consider representation status. For example, Arizona's small claims court prohibits the use of lawyers (except by written consent of all parties) to protect against litigant asymmetries,<sup>249</sup> and the civil procedure rules allow for attorneys to assist filings by self-represented litigants without fear of liability.<sup>250</sup> One recently adopted rule change for family law matters provides that the court itself will conduct the direct examination of a self-represented party.<sup>251</sup>

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gatekeeper, ensuring that only the appropriate claims get through" (Heidary v. Yadollahi, 121 Cal. Rptr. 2d 695, 703 (Cal. Ct. App. 2002))).

<sup>243</sup> See 10A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2681 (4th ed. 2025) (summarizing historical justifications); Thomson v. Wooster, 114 U.S. 104, 110–11 (1885) (providing that the defaulting party admits to well-pleaded allegations in the complaint, but the court may conduct a hearing and use other fact-finding devices, especially in regard to damages).

<sup>244</sup> See Bookman, *supra* note 64, at 1440–47.

<sup>245</sup> ARIZ. R. PROB. P. 5, 15; see ARIZ. R. FAM. L.P. 44.

<sup>246</sup> ARIZ. REV. STAT. ANN. § 44-7804 (2025). Special default rules apply in many other case types in Arizona, such as family law.

<sup>247</sup> See Hammond, *supra* note 223, at 2689, 2692 (noting that all but three of the ninety-four district courts have at least one procedural rule that is specific to pro se litigants). Although pro se status is by far the most common type of tailoring by representation status, this category could also include limited-scope agreements, contingency fee arrangements, and other models.

<sup>248</sup> Higgins v. Higgins, 981 P.2d 134, 138 (Ariz. Ct. App. 1999).

<sup>249</sup> ARIZ. R. SMALL CLAIMS P. 1(c).

<sup>250</sup> ARIZ. R. CIV. P. 11(d) (allowing attorneys to rely on a self-represented person's statement of facts when they assist them in conducting a filing).

<sup>251</sup> Order Amending Rules 22 and 77 of the Rules of Family Law Procedure, No. R-24-0060, at 5 (Ariz. Aug. 28, 2025), <https://www.azcourts.gov/rules/rule-amendments-from-recent-rules-agenda-s> (click on link "R-24-0060" under the header "Recent Amendments from the August 26, 2025 Rules Agenda") [<https://perma.cc/J9RG-PWSB>]. Other courts tailor further by representation status. In Boston, a judge or clerk must endorse any stipulated

## 7. Party Characteristics

A court might also violate the transpersonal norm to tailor based on party characteristics, including whether the party is a person or an entity.<sup>252</sup> Arizona courts differentiate by party characteristics when setting pleading,<sup>253</sup> service,<sup>254</sup> and representation<sup>255</sup> requirements—and condition eligibility requirements for the commercial court on party identity (e.g., claims must be brought by a business organization, not an individual).<sup>256</sup>

### C. The “How” of Tailoring

When tailoring, a final major decision is which (if any) court, judge, or litigant should have the opportunity to flex a tailored procedure. This section adopts Avraham and Hubbard’s framework<sup>257</sup> to analyze how tailoring builds in discretion for courts, judges, and litigants to apply a different procedure or route a case to a different procedural track. For example, if the Arizona Supreme Court wants to bend the transpersonal norm by introducing a “commercial” court for certain business entities, what options does it have to build flexibility into the system? Will local

judgment with an unrepresented party to ensure it is voluntary and reasonable. Continuation of Temporary Modifications for Summary Process Cases, Standing Ord. 1-23 (Bos. Mun. Ct., June 5, 2023). In Florida small claims court, a represented party has no right to initiate discovery against an unrepresented party unless that party has already initiated discovery, or the represented party has sought leave of court. FLA. SMALL CLAIMS R. 7.020.

<sup>252</sup> For an extensive discussion of party-specific variation in federal court, see Michalski, *supra* note 222, at 338–54.

<sup>253</sup> See ARIZ. JUST. CT. R. CIV. P. 121(a)(3) (heightened pleading for debt-buyers); ARIZ. R. P. EVICTION ACTIONS 5 (heightened pleading for eviction landlords).

<sup>254</sup> See, e.g., ARIZ. R. CIV. P. 4.2(e) (service on a nonresident); *id.* at 4.2(h) (service on certain business entities located outside Arizona but within the United States).

<sup>255</sup> See *Boydston v. Strole Dev. Co.*, 969 P.2d 653, 656 (Ariz. 1998) (providing that, unlike an individual, a corporation generally “cannot appear without a lawyer”) (citing *Ramada Inns, Inc. v. Lane & Bird Advert., Inc.*, 426 P.2d 395, 396 (Ariz. 1967)).

<sup>256</sup> See ARIZ. R. CIV. P. 8.1(a)(1). These changes, however, are minor compared to party-type variations in other courts, which, for example, condition small claims use on party identity, or change eviction notice requirements by landlord size. For example, several states lower the monetary threshold or number of allowed claims for corporations seeking to sue in small claims court. See, e.g., CAL. CIV. PROC. CODE §§ 116.220–21 (West 2025) (setting the limit at \$12,500 for individuals and \$6,250 for corporations); COLO. REV. STAT. § 13-6-411 (2025) (prohibiting plaintiffs from filing more than two claims per month or eighteen claims per year in small claims). This is to avoid overuse of that tailored procedure by corporations. Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1591, 1601–03 (2018) (showing that eighty-five percent of small claims in Boston were brought by debt collectors). In Colorado, small landlords (who own five or fewer single-family rentals) can give five days less notice than large landlords before filing for eviction and are exempted from protections for subsidized tenants (including pre-filing mediation and longer wait periods before issuing a writ of restitution). COLO. REV. STAT. § 13-40-104(1)(d), 104(5) (2025); *id.* § 13-40-110(1)(a)(I).

<sup>257</sup> Avraham & Hubbard, *supra* note 57, at 936–42.

courts have discretion to adopt the program? Can parties opt in or out? Will judges have discretion to pick cases and rules? Since tailoring can introduce flexibility at many levels, these choices can build on one another and, in some cases, are not mutually exclusive.<sup>258</sup>

### 1. *Centralized Tailoring Without Flex*

The first option is for state-level rulemakers to impose tailoring without any implementation discretion for local courts, individual judges, or litigants. So, for example, when the Arizona Supreme Court imposed new requirements for “assigned debt” cases in justice courts, it did not confer any discretion on local courts to choose to adopt those specialized procedures or for individual judges to allow plaintiffs to opt-out for good cause or for assigned-debt plaintiffs to choose the generally applicable civil rules.<sup>259</sup>

### 2. *Local Court Control*

Another option is for state-level rulemakers to promulgate a tailored track but confer some measure of discretion on local courts to either adopt or modify it. For example, Arizona allows for local superior courts to decide if they want to adopt the FASTAR Rules.<sup>260</sup> Arizona also allows justice court precincts to establish a mediation program.<sup>261</sup> Finally, local superior courts may soon have the option to adopt informal dispute resolution rules for family law cases (and to choose whether those will be opt-in or opt-out).<sup>262</sup>

### 3. *Individual Judge Discretion*

A third option is that a tailored procedure might bake in judicial discretion. For example, one of the three ways that cases get sorted into discovery tiers is through a determination by a judge of case complexity.<sup>263</sup> Judges also have discretion in choosing which cases to take at the commercial court or the complex litigation division.<sup>264</sup>

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<sup>258</sup> This recognition has required me to shift Avraham and Hubbard’s model somewhat, which treated the choices as separate.

<sup>259</sup> ARIZ. JUST. CT. R. CIV. P. 121(a)(3).

<sup>260</sup> ARIZ. R. CIV. P. 72.

<sup>261</sup> ARIZ. JUST. CT. R. CIV. P. 130.

<sup>262</sup> See Amended IFTL Rules Petition, *supra* note 178, at 3, 6.

<sup>263</sup> See ARIZ. R. CIV. P. 26.2(d) (separating cases into tiers based on relief requested, court’s evaluation, or request by parties).

<sup>264</sup> See, e.g., *id.* at 8.1(d)(5)–(7) (providing mechanisms for judges to exercise discretion in assignment to the commercial court); SUPER. CT. LOC. PRAC. R., MARICOPA CNTY. 3.12(a)(6) (conferring on the judge the determination as to whether a case is complex, which is not appealable).

#### 4. *Mutual Party Choice*

A rule might also require both parties to agree to a tailored procedure.<sup>265</sup> This category includes a spectrum of design options as to the timing and method of consent: Agreement can happen pre-dispute (e.g., as a contract term)<sup>266</sup> or post-dispute (e.g., by agreeing to settle or take a separate procedural track).<sup>267</sup> And one or both parties may indicate agreement by opting in (e.g., by signing a settlement) or by failing to opt out. For example, in Arizona, both parties must agree to proceed via the small claims track—which has no jury or appeal.<sup>268</sup> But, while a plaintiff must make an affirmative choice to opt-in and file on the small claims docket, the defendant need only fail to opt-out within ten days before the hearing date.<sup>269</sup> For the vast majority of litigants in Arizona courts, “voluntary” agreement to participation in a procedural track therefore results from a plaintiff’s unilateral decision.

#### 5. *Unilateral Party Choice*

Rulemakers, however, can also explicitly allow one party to choose procedure.<sup>270</sup> For example, the FASTAR Rules require plaintiffs to elect fast trial or alternative resolution.<sup>271</sup>

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<sup>265</sup> There is a rich literature describing the layering of party-choice on procedural rules. For an overview ranging from forum choice and pretrial procedure to remedies and appeals, see Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1342–51 (2012).

<sup>266</sup> Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 511 (2011) (defining “contract procedure” as “the practice of setting out procedures in contracts to govern disputes that have not yet arisen, but that will be adjudicated in the public court when they do arise”); see also David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607 (2010) (“[P]rivate actors create procedural rules . . . and rather than marching in lockstep, cases follow their own ‘mini-codes of civil procedure.’” (quoting Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005))).

<sup>267</sup> See Bone, *supra* note 265, at 1350–51; Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 498 (1991) (“Most cases are resolved through settlement.”).

<sup>268</sup> ARIZ. R. SMALL CLAIMS P. 1(d).

<sup>269</sup> Compare ARIZ. R. SMALL CLAIMS P. 4 (requiring plaintiff to file a complaint to commence a small claims lawsuit), *with id.* at 11 (allowing either party to request a transfer no later than ten days before the hearing).

<sup>270</sup> See, e.g., HAW. REV. STAT. ANN. § 633-27 (West 2025) (providing that a plaintiff can elect to file a civil claim in the small claims division of Hawaii’s district court if that claim is for less than \$5000 and that a defendant can only remove the case to the general civil docket if *consented to by the plaintiff*) (emphasis added).

<sup>271</sup> ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 103.

Stepping back, we can now dissect the major design choices in the examples I used in subsection A, as shown in Figure 7.

FIGURE 7: TAILORING ARCHETYPES

Example	Why	What/Who	How
Informal Family Law Trial (2025)	Court Access	Complexity, case type, representation status	Centralized rule with implementation flexibility for local courts, individual judges, and parties
Tiered Discovery (2018)	Information Exchange	Remedy, case complexity, case type	Centralized rule with implementation flexibility for individual judges and parties
FASTAR (2025)	Speedy Resolution	Remedy, case type	Centralized rule with flexibility for local courts and plaintiffs
Eviction Rules (2008)	Substantive Alignment	Case type, claim type, party characteristics	Centralized rule
Eviction Diversion (2025)	Harm Reduction	Case type and claim type	Centralized rule

Uncovering design choices, however, only gets us so far. Next, I consider the normative impact of tailoring and provide guidance for courts choosing between options.

### III

#### TAILORING: NEW BENEFITS & RISKS

Scholars have debated the benefits and risks of bespoke procedures for over a century. Proponents argue that tailoring can improve accuracy, enhance participation and fairness, reduce process costs, and promote consistent outcomes.<sup>272</sup> In contrast, critics warn that tailoring can violate separation of powers, compromise court neutrality, create second-rate justice, and impose significant administrative burdens.<sup>273</sup> These same themes echo at each new procedural frontier—from the

<sup>272</sup> See *infra* Section III.A (surveying literature).

<sup>273</sup> See *infra* Section III.B (surveying literature).

Federal Rules<sup>274</sup> to complex litigation rules<sup>275</sup> to prisoner litigation reform<sup>276</sup> to alternate dispute resolution.<sup>277</sup>

This Article complicates these debates. The risks and benefits of tailoring are different in state courts than at the federal level and may be exacerbated or blunted depending on *how* and *why* courts tailor procedure. In this Part, I revisit the most common risks and benefits of tailoring from the perspective of state courts today. Then, in Part IV, I provide a few considerations for state courts deciding between design options to advance benefits and mitigate risks.

### A. *The Benefits of Tailoring*

The central promise of tailoring is improved closeness of fit between a dispute and procedural values. Such values are elastic, but not endless.<sup>278</sup> For simplicity, I analyze four common benefits.

#### 1. *Manage Error Risk*

The first major advantage of tailoring is that it can better manage error risk. Because civil adjudication's primary purpose is to resolve cases according to the substantive law, Robert Bone argues that the primary goal of civil procedure is to manage the risk of outcome error in an optimal way,<sup>279</sup> including by weighing the frequency and distribution

<sup>274</sup> See generally Burbank, *supra* note 78, at 1106–37 (describing debates around the Rules Enabling Act and the Federal Rules).

<sup>275</sup> See Tobias, *supra* note 14, at 1504–05 (describing techniques and rules, including the Manual for Complex Litigation, that allow judicial tailoring).

<sup>276</sup> See Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1776–79 (2003) (surveying the substantive and procedural goals of the Prison Litigation Reform Act).

<sup>277</sup> See generally Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 66–67 (1994) (surveying the forums and fuss debate); Tia Schneider Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, 49 DISP. RESOL. J., June 1994, at 48, 48, 57 (advocating for appropriate dispute resolution processes to make “the forum fit the fuss”); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in HOW ADR WORKS 915, 926 (Norman Brand ed., 2002) (ebook) (“The greatest strength of arbitration is that the average person can afford it.”).

<sup>278</sup> For a review of the theories of value that animate civil procedure, see Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1, 13–16 (2022); see also Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (listing goals of dispute resolution systems); Judith Resnik, *Precluding Appeals*, 70 CORN. L. REV. 603, 609–12 (1985) (listing features of procedural systems).

<sup>279</sup> ROBERT G. BONE, JUSTIFYING LITIGATION REFORM (forthcoming 2027) (manuscript at 70, 86, 89) (on file with the New York University Law Review). For simplicity, I do not untangle the general normative frameworks—for example, utilitarian, rights-based, or

of error with the seriousness of harm.<sup>280</sup> For example, pleading standards must balance the rights of plaintiffs to bring a meritorious claim against the rights of defendants to be free from meritless claims and to have notice to raise a defense.<sup>281</sup> A rule that ratchets up pleading standards will lower the risk of false positives (meritless suits a defendant must defend) but increase the risk of false negatives (meritorious suits a plaintiff is unable to bring).<sup>282</sup>

Tailoring can manage error risk more efficiently than generalized procedures because it can adjust based on the significance, frequency, and distribution of harm.<sup>283</sup> In fact, procedure's reliance on the social value of substantive interests is why Bone concludes that transsubstantivity, at least as a general principle, "makes absolutely no sense."<sup>284</sup> When the social value varies, so must optimal procedure.<sup>285</sup> Sticking with the pleading example, courts often leverage substantive alignment tailoring<sup>286</sup> to vary pleading requirements by case type (often through the use of standardized forms) to get this balance right.<sup>287</sup>

This benefit of tailoring increases in state courts, which have broader subject matter jurisdiction than federal courts and may risk higher rates of unjust resolution if uniform rules must stretch to cover them all: No one thinks that the best way to manage risk is to treat a divorce like an eviction. State courts, therefore, for the most part, don't.<sup>288</sup> Tailoring is a critical tool for aligning procedures with different substantive values. For example, in arguing for separate protective order rules, an Arizona committee found that "the laudable goal" of the family law rules to eliminate adversarialism "is out of place in domestic violence orders of protection," and "can

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process-based—that underlie these process values. For a discussion of how such general theories give procedural values normative force, see *id.* (manuscript at 45).

<sup>280</sup> *Id.* (manuscript at 91–105). For example, a proceduralist might focus on the aggregate effects of error risk when a loss is purely economic but consider the effect on individual litigants when a substantive moral right is at stake.

<sup>281</sup> *Id.* (manuscript at 97–99).

<sup>282</sup> *Id.* (manuscript at 99).

<sup>283</sup> *Id.* (manuscript at 92–93). Though line-drawing can be difficult, substantive interests have different degrees of value. A parking fine implicates significantly different values (public safety, preventing congestion, revenue collection) than a child-custody dispute (best interests of the child, parental rights). An assault is generally worse than having minor property stolen. See FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* 195–96 (2019).

<sup>284</sup> BONE, *supra* note 279 (manuscript at 93).

<sup>285</sup> For more on this point, see Bone, *supra* note 45, at 1160–63.

<sup>286</sup> See *supra* Part II.A.4.

<sup>287</sup> Bernal, *supra* note 107, at 635–40.

<sup>288</sup> See Kohn, *supra* note 37, at 183–93 (surveying which states have specialized divorce rules and which states apply general civil procedures).

present confusion for the litigant and the judiciary” or even “be dangerous.”<sup>289</sup>

In state courts, tailoring can also mitigate the high rates of unjust resolution in cases that routinely pit an individual, unrepresented defendant against a repeat-player plaintiff.<sup>290</sup> For example, many collection cases involve debts that were paid off, never incurred, inflated, time-barred, or discharged in bankruptcy.<sup>291</sup> Landlord-tenant cases often resolve in ways that do not conform to lease agreements and housing law, largely because tenants routinely fail to raise defenses or counterclaims.<sup>292</sup> Some cases are procedurally void for other reasons, such as “sewer service.”<sup>293</sup>

## 2. Enhance Participation

Another major advantage of tailoring, primarily associated with “access” tailoring, is the ability to enhance participation and advance procedural justice. Scholars from Roscoe Pound<sup>294</sup> to Marc Galanter<sup>295</sup> have lamented how formally equal rules have inequitable participatory

<sup>289</sup> William J. O’Neil, Petition for Adoption of Arizona Rules of Protective Order Procedure, No. R-06-0032, at 6 (Ariz. Oct. 30, 2006) [hereinafter Protective Order Petition], <https://rulesforum.azcourts.gov/Rules-Forum/aft/104> (click on attachment “111243283571”) [<https://perma.cc/6MW3-N2SC>].

<sup>290</sup> I define unjust resolution as “[w]hen the relevant substantive and procedural norms [do not] govern resolution.” See Sandefur, *supra* note 173, at 51. The American Law Institute recommends tailoring to solve this issue. See PRINCIPLES OF THE L.: HIGH-VOLUME CIV. ADJUDICATION, *supra* note 127, at pt. 2 § 2.02. To be sure, tailoring can also tip the scales in the other direction. For example, special rules in medical malpractice cases often impose extra requirements on one-shot plaintiffs facing off against repeat-player defendants. See, e.g., ARIZ. REV. STAT. ANN. § 12-2603 (2025) (imposing certificate of merit requirements on plaintiffs).

<sup>291</sup> See Bookman, *supra* note 64, at 1440–47 (providing examples of state procedures in debt collection cases); Engstrom et al., *supra* note 34 at 65–66 (finding that a quarter of all debt-buyer default judgments issued by the largest trial court in the U.S. contain a legal error that should have prohibited judgment); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 74–83 (2015).

<sup>292</sup> Eviction defendants regularly fail to receive an offset, even when there is evidence of defective conditions. See Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 5 (2016) (tenants asserted a warranty of habitability claim in 80 of 40,000 cases).

<sup>293</sup> See, e.g., Engstrom & Stone, *supra* note 76, at 182 & n.287 (describing sewer service as the practice of debt collectors intentionally failing to serve consumers properly but averring to the court that service has been completed); Steinberg, *supra* note 256, at 1602–03 (same).

<sup>294</sup> See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 395–97 (1906) (describing the effect of procedure on the poor).

<sup>295</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–103 (1974) (describing how the rules can advantage the repeat players and disadvantage the one-shotters).

effects.<sup>296</sup> This inequity erodes litigant dignity<sup>297</sup> and can implicate core constitutional rights.<sup>298</sup> Participation also has secondary effects like increasing accuracy<sup>299</sup> and improving and creating precedent,<sup>300</sup> increasing democratic participation,<sup>301</sup> and enhancing perceptions of fairness and legitimacy.<sup>302</sup>

Tailoring can ensure that the substantive law, rather than imbalances in party information and resources, wins out. Indeed, the Supreme Court has explicitly endorsed tailored procedures as a way to satisfy constitutional participation requirements: *Mathews v. Eldridge* held that due process requires that “procedures be tailored, in light of the decision to be made, to ‘the capacities and circumstances of those who are to be heard.’”<sup>303</sup> *Turner v. Rogers* found that although due process did not require appointed counsel in a civil contempt proceeding, it did

<sup>296</sup> See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1888–92 (2002) (describing how general rules can have unequal effects and discussing different models of equality in civil procedure).

<sup>297</sup> See Lauren Sudeall, *Self-Determination and Self-Represented Litigants*, 106 B.U. L. REV. (forthcoming 2026) (manuscript at 26–29) (on file with the New York University Law Review) (surveying the literature on the impact of procedural justice on the dignity and self-determination of self-represented litigants).

<sup>298</sup> This includes due process, see *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (“The fundamental requisite of due process of law is the opportunity to be heard’ . . . ‘at a meaningful time and in a meaningful manner’” (first quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); then quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))), privileges and immunities, see *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) (finding the “right to sue and defend in the courts” to be “one of the highest and most essential privileges of citizenship”), free speech, see *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 578–79 (1971) (“First Amendment guarantees . . . give railroad workers the right to . . . act collectively to secure good, honest lawyers to assert their claims . . .”), and equal protection, see *Williams v. Dist. Ct. of Eighth Jud. Dist.*, 417 P.2d 496, 501 (Colo. 1996) (holding that the Equal Protection Clauses of the United States and Colorado Constitutions “require that rich and poor be afforded equal access to established court procedures”). See generally Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

<sup>299</sup> Adversarial testing requires participation to surface contested issues. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM 2* (1984). For practical examples in the eviction context, see *supra* note 292.

<sup>300</sup> See Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 812 (2018).

<sup>301</sup> Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697 (2014).

<sup>302</sup> See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 111–19 (Princeton Univ. Press 2006) (1990) (ebook) (advancing procedural justice as a measurable outcome); see Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 184–86 (2005) (conducting a meta-analysis of procedural justice scholarship). See generally Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5, 5–9, 17–18 (2017) (surveying empirical studies connecting perception of legitimacy, procedural justice, and compliance).

<sup>303</sup> *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (quoting *Goldberg*, 397 U.S. at 268–69); see also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

require a set of “substitute procedural safeguards.”<sup>304</sup> “Access” tailoring is an administrable alternative to case-by-case decisions, allowing courts to develop such substitute procedural safeguards that cut closer to litigant capacities and circumstances.

This factor is different in state courts for at least three reasons. First, constitutional minimums may be greater in state courts under “open court”<sup>305</sup> provisions or independent interpretation of “due process” and other clauses.<sup>306</sup> In any event, state courts have proven to be much more willing to use their supervisory and rulemaking authority to raise access ceilings, not merely to police constitutional floors.<sup>307</sup> Second, although access-to-justice reforms in federal courts have centered on plaintiffs,<sup>308</sup> state courts, at least in their high-volume civil dockets, have been increasingly concerned about alarmingly low rates of defendant participation.<sup>309</sup> Third, tailoring has the potential to chip away at the significant participatory (and error) risks that come from the millions of Americans who do not use state courts to resolve their disputes.<sup>310</sup>

### 3. Reduce Process Costs

A third major benefit of tailoring is reduction in process costs—including efficiency, speed, and expense,<sup>311</sup>—by right-sizing procedure.<sup>312</sup>

<sup>304</sup> 131 S. Ct. 2507, 2518 (2011) (quoting *Mathews*, 424 U.S. at 335).

<sup>305</sup> See, e.g., FLA. CONST. art. I, § 21 (“The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”); WASH. CONST. art. I, § 10 (“Justice in all cases shall be administered openly, and without unnecessary delay.”).

<sup>306</sup> For a discussion about the independent interpretation of state court rights, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977). See also Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017).

<sup>307</sup> For example, although the Supreme Court has found that summary eviction procedures meet federal constitution minimums, *Lindsey v. Normet*, 405 U.S. 56, 65–69 (1972), courts can (and increasingly do) reach above these minimums. See, e.g., *supra* notes 7–12 and accompanying text (describing Michigan’s new eviction rules that go far beyond the basic requirements of due process by, for example, mandating a continuance in nonpayment cases to give tenants time to seek third party resources and conditioning faster defaults on heightened notice and service methods).

<sup>308</sup> See Wilf-Townsend, *supra* note 126, at 1711.

<sup>309</sup> In consumer debt cases, multiple jurisdictions report default judgment rates as high as 90–95%. BLUEPRINT, *supra* note 34 at 8 & 94 n.10. In eviction, several jurisdictions report rates from 20–40%. *Id.* at 8 & 94 nn.11–12.

<sup>310</sup> See Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 126–27 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007).

<sup>311</sup> See, e.g., FED. R. CIV. P. 1 (providing that the purpose of the rules is a “just, speedy, and inexpensive determination” (emphases added)).

<sup>312</sup> See, e.g., AM. COLL. OF TRIAL LAWS. TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 4 (2009), <https://iaals.du.edu/sites/>

Indeed, even Charles Clark, when spearheading the drafting of the Federal Rules, did not believe that all cases would require the full legal process of those rules.<sup>313</sup> Or, as Maurice Rosenberg put it: “Cadillac-style procedures are not needed to process bicycle-sized lawsuits . . . .”<sup>314</sup> Although process costs are secondary procedural values,<sup>315</sup> they can also influence participation and error rates—by, for example, making cases too costly to litigate or delaying case resolution.<sup>316</sup>

State courts have greater variance in process costs than federal courts because they have both the “big case” problems of federal courts—e.g., class actions, MDLs and commercial cases<sup>317</sup>—and millions more of the “small case” problems of workaday litigation.<sup>318</sup> After more than a century of experimentation (and frustration) with limited jurisdiction courts,<sup>319</sup> state courts have recently accelerated innovations

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default/files/documents/publications/actl-iaals\_final\_report\_rev\_8-4-10.pdf [https://perma.cc/8PVD-GF6X] (“The ‘one size fits all’ approach of the current federal and most state rules is useful in many cases but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.”).

<sup>313</sup> Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 148–49 (Peninah Petruck ed., 1991); see also Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975) (“It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, [and] a hard-fought school integration suit . . . are sufficiently identical to be usefully encompassed in a single set of rules.”).

<sup>314</sup> Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 247 (1984).

<sup>315</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance . . . . But the Constitution recognizes higher values than speed and efficiency.”); *Spitz v. Iowa Dist. Ct. for Mitchell Cnty.*, 881 N.W.2d 456, 467 (Iowa 2016) (“[T]he court’s power to manage the cases in its docket ‘while economizing on time and effort must be consistent with the Constitution and statutes’ . . . . [C]rowded dockets and administrative efficiency cannot deprive litigants of their day in court.” (quoting 88 C.J.S. Trial § 80 (2012))); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1779 (2015) (arguing that minimizing financial costs can lead to an increase in dismissals of meritorious claims or lack of meaningful participation by parties).

<sup>316</sup> For example, when the asbestos crisis of the 1990s caused an uneven level of error risk (i.e., discounting reduced the value of recovery), courts experimented with procedural innovations like case sampling. See BONE, *supra* note 279, at 116–25.

<sup>317</sup> See, e.g., Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1663–68 (2021) (surveying state court multidistrict litigation (MDL) institutional design).

<sup>318</sup> See LANDSCAPE STUDY, *supra* note 124, at 14–17 (surveying caseload and type across various states).

<sup>319</sup> Indeed, when future Supreme Court Justice Sandra Day O’Connor was a superior court judge in Arizona, she recommended abolishing the justice courts. See Anne E. Nelson, *Fifty-Eight Years and Counting: The Elusive Quest to Reform Arizona’s Justice of the Peace Courts*, 52 ARIZ. L. REV. 533, 546 (2010).

in intra-court information exchange<sup>320</sup> and speedy resolution<sup>321</sup> tailoring to control mounting docket pressures. Moreover, courts are increasingly experimenting with party-choice to control costs because, as the better-informed participants in disputes, parties can determine if extra procedure is worth it in their case.<sup>322</sup>

#### 4. Increase Consistency

Finally, tailoring can promote consistent outcomes by transforming discretionary standards into uniform and administrable rules. As Stephen Burbank argues, “[m]any of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense.”<sup>323</sup> Due to this discretion, “similar cases and situations are apt to be treated quite differently, depending on the judge. Since we now know that procedural decisions can, and often do, materially influence substantive application, the rules cannot provide uniformity of result.”<sup>324</sup> As but one example, decisions about discovery are often exercised on an ad hoc basis.<sup>325</sup>

There are significant reasons why the need for consistency is heightened in state courts. For starters, many of the judicial officers in thirty-two states who process claims for most litigants are not lawyers and may have very little training.<sup>326</sup> As a result, in some courts, repeat-player plaintiff lawyers may possess greater legal knowledge about a substantive area, like eviction, than the judges hearing their

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<sup>320</sup> See *supra* Section II.A.3.

<sup>321</sup> See *supra* Section II.A.2.

<sup>322</sup> See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (“A judicial officer does not know the details of the case the parties will present and in theory cannot know the details. Discovery is used to find the details. The judicial officer always knows less than the parties . . .”).

<sup>323</sup> Burbank, *The Costs of Complexity*, *supra* note 40, at 1474; *id.* at 1471–86; see also Burbank, *The Transformation of American Civil Procedure*, *supra* note 40, at 1929–41 (criticizing transsubstantivity for relying on discretion to tailor general rules to individual cases); Cover, *supra* note 313, at 736 (describing how the Federal Rules have led to lots of case-by-case discretion); Subrin, *supra* note 65, at 389 (“[W]ith . . . the transsubstantive . . . system, comes the legitimate desire of judges and rulemakers to constrain that system. But the cures exacerbate the disease.”); Silberman, *supra* note 14, at 2131 (“[T]rans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules.”).

<sup>324</sup> Subrin, *supra* note 65, at 391; Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 41 (1994) (“The failure to provide guidance for particular types of cases requires judges or magistrates to micro-manage each case, largely on an ad hoc basis.”).

<sup>325</sup> See Silberman, *supra* note 14, at 2136–37.

<sup>326</sup> Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1291, 1311–15 (2022) (identifying states that allow non-lawyer judges and describing deficiencies in training).

claims.<sup>327</sup> Less discretion can minimize that influence. Robust tailoring through a formal rulemaking process can ensure expertise and provide accountability. In addition, many state court judicial officers hold elected positions and therefore may have different incentive structures than federal judges.<sup>328</sup> A justice of the peace facing a retention election may not want to offend lobbying groups for powerful institutional plaintiffs (e.g., landlords or debt collectors).<sup>329</sup> Not surprisingly, many of the recent changes involving court choice in Arizona are available only to the superior courts, which have higher standards for judges and, because of their generalist nature, may be less susceptible to capture.<sup>330</sup>

## B. *The Risks of Tailoring*

### 1. *Separation of Powers*

Since the Federalist Papers, a core ideal of American democracy has been that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”<sup>331</sup> Tailoring can threaten this separation. The history of federal rulemaking (including the Federal Rules submitted to Congress under the REA),<sup>332</sup> the decisions of the Supreme Court,<sup>333</sup> and the use of legislated procedure to achieve policy goals,<sup>334</sup> all reflect the federal judiciary’s recognition that the legislature

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<sup>327</sup> See *id.* at 1289–91 (describing how empirically, thirty-two states allow some low-level state judges to adjudicate without a law degree).

<sup>328</sup> Jeffrey Rosinek, *Some Thoughts on the Problems of Judicial Elections*, 41 CT. REV., Summer 2004, at 20, 20–24 (finding that the vast majority of judges in state courts face either appointment or retention elections).

<sup>329</sup> See Greene & Renberg, *supra* note 326, at 1292 (describing how landlords and debt collectors bring millions of Americans to low-level state court systems, which are designed so that those with power prevail).

<sup>330</sup> This includes mandatory mediation, FASTAR, and IFLT. See *supra* Part II.

<sup>331</sup> THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (quoting 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 173 (Thomas Nugent, trans., Batoche Books 2001)).

<sup>332</sup> Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064 (as amended at 28 U.S.C.A. § 2072).

<sup>333</sup> See, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (“Congress . . . may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.”); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (“Congress has undoubted power to regulate . . . [federal] practice and procedure . . . and may exercise that power by delegating to [the courts] authority to make rules not inconsistent with statutes or Constitution of the United States . . .”).

<sup>334</sup> See Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1706 (2004) (“Congress holds the cards—that it has virtually plenary power over federal procedure.”); e.g., Marcus, *supra* note 21, at 406–07 (arguing that the Prisoner Litigation Reform Act and the Private Securities Litigation Reform Act “treat[] nominally substantive and procedural reforms as functionally indistinct tools used to achieve a single set of substantive policy goals”). To be sure, legislators must comply with Due Process minima, Equal Protection rights, and state-specific “open court” or “special legislation” protections. See, e.g., Justin R. Long, *State Constitutional Prohibitions on Special Laws*,

has a major role in delegating procedural authority and in creating and vetoing procedure.<sup>335</sup>

Not so in all state courts. Unlike federal courts, state courts are common-law courts, with inherent authority to develop substantive law.<sup>336</sup> Moreover, almost all state courts have greater rulemaking authority than federal courts, whether through constitutional grant,<sup>337</sup> legislative enactment,<sup>338</sup> or the court's interpretation of its inherent powers.<sup>339</sup> This power is bolstered by the explicit separation-of-powers provisions in many state constitutions.<sup>340</sup> Although a few states constitutionally confer rulemaking authority on legislatures,<sup>341</sup> and some allow legislatures to veto court rules,<sup>342</sup> the power generally

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60 CLEV. ST. L. REV. 719, 726 (2012) (detailing how the passing of "private bills" motivated delegates in Indiana's constitutional convention to constrain special legislation). These constraints, however, have had "little impact on the field of civil procedure." Rubenstein, *supra* note 296, at 1869.

<sup>335</sup> See 28 U.S.C.A. § 2074 (West 2025) (requiring submission of rules to Congress). For a comprehensive review of sources, see 4 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1001 (3d ed., 2002).

<sup>336</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (holding that there is no general federal common law and blessing state court lawmaking power); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."); Zachary B. Pohlman, *Stare Decisis and the Supreme Court(s): What States Can Learn from Gamble*, 95 NOTRE DAME L. REV. 1731, 1745–47 (2020) (describing history of state courts as common-law courts and collecting sources).

<sup>337</sup> See, e.g., ARIZ. CONST. art. VI, § 5(5). This power may be based on a court's "supervisory" powers or explicit rulemaking authority. See Sopko, *supra* note 113, at 1546–48 (surveying "supervisory" powers in state courts).

<sup>338</sup> See, e.g., 8 R.I. GEN. LAWS ANN. § 8-6-2 (West 2025) (giving state courts rulemaking power, which can supersede conflicting statutes); N.H. REV. STAT. ANN. § 490:4 (2025) (giving the supreme court the authority to approve rules of the court).

<sup>339</sup> See, e.g., *Ammerman v. Hubbard Broad., Inc.*, 551 P.2d 1354, 1360 (N.M. 1976) (finding that the constitutional grant of superintending control over all inferior courts carries with it the power to promulgate the rules); *People v. Jackson*, 371 N.E.2d 602, 602–05 (Ill. 1977) (finding that the Illinois Supreme Court had exclusive rulemaking powers in practice and procedure despite any provision in Illinois Constitution conferring this power). For a review of the contrasting interpretations that courts have about their inherent rulemaking authority, see generally James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIA. L. REV. 507, 528–36 (2002).

<sup>340</sup> See, e.g., ARIZ. CONST. art. III ("[T]he legislative, the executive, and the judicial [departments] . . . shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); MICH. CONST. art. III, § 2 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

<sup>341</sup> See, e.g., CAL. CONST. art. VI, § 6(d); N.Y. CONST. art. VI, § 30.

<sup>342</sup> See, e.g., MONT. CONST. art. VII, § 2(2) (providing that the supreme court "may make rules governing appellate procedure, practice and procedure for all other courts" but that such "[r]ules . . . shall be subject to disapproval by the legislature in either of the two sessions following promulgation."); TENN. CODE ANN. § 16-3-404 (2018) (conferring rulemaking power on the Tennessee Supreme Court but providing that "the rules shall not take effect . . .

resides in the courts. Even many states with legislative vetoes require supermajorities.<sup>343</sup>

As a result, the institutional authority analysis varies significantly among state courts,<sup>344</sup> and the central issue is often the inverse of the federal courts analysis: Has *the legislature* usurped the judiciary's rulemaking power?<sup>345</sup> Although courts often seek to harmonize alleged intra-branch conflicts,<sup>346</sup> or exercise judicial restraint to avoid a conflict,<sup>347</sup> they also vigorously defend their primacy in this arena. For example, in striking down a statute regarding hearsay evidence, the Mississippi Supreme Court found that the statute “lies on judicial turf” and that “this Court’s rulemaking power is a function of our constitution’s command that the three great governmental powers be separate.”<sup>348</sup> But courts with primary rulemaking authority and no legislative veto raise another separation-of-powers concern that counsels restraint: The very court that promulgates a rule is ultimately responsible for reviewing its constitutionality.

The content-based separation-of-powers analysis remains similar in state and federal courts. It asks whether any court-based tailoring trespasses the murky border between procedure and substance. Just

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until they have been approved by resolutions of both the house of representatives and the senate”); IOWA CODE ANN. § 602.4202 (2025) (providing that the Iowa Supreme Court must submit proposed rules to the legislative council, to take effect within sixty days unless the legislative council, by majority vote, delays the effective date or the general assembly enacts a bill changing a rule or form).

<sup>343</sup> See, e.g., ALASKA CONST. art. IV, § 15 (“The supreme court shall make and promulgate rules governing the administration of all courts . . . [and the] practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.”); S.C. CODE § 14-3-950 (2024) (requiring three-fifths of the legislature to disapprove a court rule); FLA. CONST. art. V, § 2(a) (requiring two-thirds of the legislature to repeal a court rule); UTAH CODE ANN. § 78A-3-103 (2008) (requiring two-thirds of the legislature to amend a court rule).

<sup>344</sup> For example, California courts found a court rule about filing opposition papers in five court days was inconsistent with a statute requiring filing in five calendar days. *Iverson v. Superior Ct.*, 213 Cal. Rptr. 399, 402 (Cal. Ct. App. 1985). A New Mexico court reviewing a similar time limitation came to the opposite conclusion. *State v. Doe*, 566 P.2d 117, 121 (N.M. Ct. App. 1977).

<sup>345</sup> See *State v. Hansen*, 160 P.3d 166, 168 (Ariz. 2007) (“[T]he legislature lacks authority to enact a statute ‘if it conflicts with or ‘tends to engulf’ this court’s rulemaking authority.” (quoting *State ex rel. Napolitano v. Brown*, 982 P.2d 815, 817 (1999))).

<sup>346</sup> *Id.* (“Rules and statutes ‘should be harmonized whenever possible . . . .’” (quoting *Phoenix of Hartford v. Harmony Rests.*, 560 P.2d 441, 442 (Ariz. Ct. App. 1977))).

<sup>347</sup> See, e.g., *State v. Johnson*, 514 N.W. 2d 551, 554 (Minn. 1994) (“[D]ue respect for coequal branches of government requires this court to exercise great restraint in considering . . . what is a legislative function and what is a judicial function.”).

<sup>348</sup> *Hall v. State*, 539 So. 2d 1338, 1345–46 (Miss. 1989) (citing MISS. CONST. art. I, §§ 1, 2); see also, e.g., *State v. Raymond*, 906 So. 2d 1045, 1049 (Fla. 2005) (striking down a statute affecting the timing of a defendant’s eligibility for a pretrial release because it “is an unconstitutional invasion of this Court’s rulemaking authority conferred by the Florida Constitution”).

as the debates over the REA and the Federal Rules hinged on this distinction,<sup>349</sup> the substance/procedure dichotomy pervades state court regimes.<sup>350</sup> But the transsubstantivity constraint that has proven useful in the federal, concurrent-rulemaking context<sup>351</sup> doesn't transfer well to state courts, especially those with primary rulemaking authority. If procedural problems are concentrated in a subset of cases, state courts have the legal authority to enact substance-specific rules to solve them—and they routinely do.<sup>352</sup>

The more interesting question may be whether, without violating bedrock separation of powers principles, state courts can use procedure to advance a wider array of values than federal courts (e.g., to maximize social welfare) or even values that contrast with those of litigants or the legislature. As to the latter, the Arizona Supreme Court created the FASTAR pilot, in part, to avoid the “downsides of compulsory arbitration” such as depriving attorneys of valuable experience in the “art of trying civil cases.”<sup>353</sup> This view of arbitration conflicts with Arizona Legislature’s “strong public policy favoring arbitration.”<sup>354</sup> Indeed, to enact a FASTAR program, local superior courts must functionally

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<sup>349</sup> Marcus, *supra* note 21, at 397–98 (describing history of the Federal Rules); Burbank, *supra* note 78, at 1024–26 (describing history of the REA).

<sup>350</sup> For some examples, see Seisinger v. Siebel, 203 P.3d 483, 490 (Ariz. 2009) (finding that although “the precise dividing line between substance and procedure ‘has proven elusive’ . . . ‘the substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion’” (first quoting *In re Shane B.*, 7 P.3d 94, 97 (Ariz. 2000); then quoting *State v. Birmingham*, 392 P.2d 775, 776 (Ariz. 1964)); *McDougall v. Schanz*, 597 N.W.2d 148, 158–59 (Mich. 1999) (defining procedure as the “dispatch of judicial business” and “appreciat[ing] the difficulty that attends the drawing of the line between ‘practice and procedure’ and substantive law”). This is, in part, due to the widespread adoption of the REA by state courts. *See, e.g.*, COLO. REV. STAT. ANN. § 13-2-108 (West 2025) (“The supreme court has the power to prescribe, by general rules . . . the practice and procedure in civil actions . . . . Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants.”); HAW. REV. STAT. § 602-11 (2025) (similar); MINN. STAT. § 480.0591(1) (2025) (similar); MONT. CODE ANN. § 3-2-701 (2023) (similar); NEB. REV. STAT. ANN. § 25-801.01 (West 2025) (similar); WIS. STAT. ANN. § 751.12(1) (West 2025) (similar).

<sup>351</sup> Marcus, *supra* note 21, at 398 (describing how the “supposed value-neutrality [of procedure] enabled the distinction between [federal] rulemaking and legislation” because “[s]o long as court-supervised rulemakers stayed within the bounds of trans-substantivity, they could appropriately generate procedural rules.”). For an early example of criticism of procedural overreach, see Sam Bass Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441, 447 (1937) (“Some of the problems of procedural reform touch too closely the liberties of citizens to be decided in a democracy by any body not subject to the popular will.”).

<sup>352</sup> *See supra* Part II.

<sup>353</sup> ARIZ. SUP. CT., COMM. ON CIV. JUST. REFORM, A CALL TO REFORM 19 (2016) [hereinafter CALL TO REFORM], <https://www.azcourts.gov> [<https://perma.cc/3VNZ-F7ZV>].

<sup>354</sup> *N. Valley Emergency Specialists, LLC v. Santana*, 93 P.3d 501, 504 (Ariz. 2004).

ignore a statutory arbitration requirement by reducing its application to cases involving a *de minimis* amount.<sup>355</sup> Though the FASTAR Rules skillfully avoid any direct conflict with the legislature, make no mistake: The Arizona Supreme Court is elevating its own policy preference about arbitration over that of the legislature.<sup>356</sup> What's more, by incentivizing trials over arbitration, the FASTAR Rules may prioritize the system's stakeholders' values (e.g., for lawyer trial experience) over litigants' values (e.g., a desire for speedy resolution).<sup>357</sup> Although state-court common-law decisions are frequently based on substantive policy considerations,<sup>358</sup> it is unclear to what extent *ex ante* decisions about procedure should be.

## 2. *Neutrality*

While the separation-of-powers analysis focuses on legal legitimacy, neutrality centers on sociological legitimacy—that is, whether “the relevant public regards [the procedure] as justified, appropriate, or otherwise deserving support for reasons beyond fear of sanctions or mere hope for personal reward.”<sup>359</sup> There are two issues: First, rulemaking might be infused with bias or captured by public-interest politics. Second, because procedure impacts substantive rights,<sup>360</sup> some

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<sup>355</sup> ARIZ. REV. STAT. ANN. § 12-133(A)(1) (2025) (requiring superior courts to establish jurisdictional limits not to exceed \$65,000 for submission of dispute to mandatory dispute resolution). Prior to the implementation of the FASTAR program, the jurisdictional limit for mandatory arbitration had been \$50,000 in Pima County. Implementation of the Fast Trial and Alternative Resolution (FASTAR) Pilot Program in Pima County, Admin. Ord. No. 2017-116 (Ariz. Oct. 26, 2017), [hereinafter Original FASTAR Order] <https://www.azcourts.gov/Portals/0/22/admorder/Orders17/2017-116.pdf> [<https://perma.cc/5HK3-NKP8>].

<sup>356</sup> This was one of the issues at the heart of *Duff v. Lee*, 476 P.3d 315, 317–18 (Ariz. 2020), *modified*, No. CV-19-0128-PR, 2021 WL 4715133 (Ariz. Jan. 26, 2021). The Arizona Supreme Court found no conflict with the mediation statute. For a contrasting view, see D. Greg Sakall & Julie A. Pack, *Short Trials: An Appropriate Replacement for Compulsory Arbitration in Arizona?*, 59 ARIZ. L. REV. 485, 497 (2017) (arguing that this provision violates separation of powers).

<sup>357</sup> This contrast was heightened during the pilot, when plaintiffs choosing arbitration had to waive their right to appeal. *See Duff*, 476 P.3d at 317–18 (noting argument that conditioning appeal rights on fast trial selection biased plaintiffs).

<sup>358</sup> *See* Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 76 (1928) (observing that Anglo-American common-law courts necessarily make decisions rooted in “public policy”).

<sup>359</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) (defining sociological legitimacy).

<sup>360</sup> Many scholars and courts have concluded that procedural rules can determine substantive outcomes. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 57–69 (1985); LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 9–10 (1985); *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

choices that involve weighing substantive values might be best left to a more politically accountable process.<sup>361</sup>

Because “procedure is power,” its design always carries a risk of bias.<sup>362</sup> Heightened pleading standards and tightened discovery limits create winners and losers—and thus threaten to politicize the rulemaking process. Lawmakers and lobbyists know this<sup>363</sup> and have pushed special legislation combining both substantive and procedural changes to enact policy preferences from securities litigation<sup>364</sup> to medical malpractice<sup>365</sup> and prisoner litigation.<sup>366</sup> As Pound argued, “[o]nly matters of procedure urged in the interest of some group with political backing or some member with a particular case in mind and much influence in the house or senate is likely to get a hearing.”<sup>367</sup>

Courts and their rulemaking partners are generally better insulated from capture than legislatures or individual judges. Although court rulemakers certainly have biases,<sup>368</sup> “[t]o believe that abuse is serious, one would have to be extremely skeptical about the good faith of judges

<sup>361</sup> For a similar separation of the concepts, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 950–52 (1999).

<sup>362</sup> Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008).

<sup>363</sup> See *id.* at 1441 (describing lobbying efforts in the Class Action Fairness Act); Peter Charles Hoffer, *Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 425 (1993) (describing the efforts of insurance companies and labor unions in rules providing for broad discovery and injunctions in the Federal Rules); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 718–19 (1998) (mapping industry lobbying on procedural matters); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (same).

<sup>364</sup> Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; see also Marcus, *supra* note 21, at 406–07 (describing the mix of substantive and procedural reforms in the Act).

<sup>365</sup> Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 982–88 (2005) (surveying state law statutes).

<sup>366</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66.

<sup>367</sup> Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 32 (1952); see also Koppel, *supra* note 66, at 1205 (“Too often, the vacuum left by the absence of empirical data [regarding procedural reform] is partly filled by political influence of the plaintiff’s or defense bar on policymakers, leaving unrepresented the interests of potential litigants who lack direct access to the rulemaking process.”).

<sup>368</sup> See, e.g., Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 930 (2020) (“[T]he rarified air in which Committee members operate might make them even more susceptible to groupthink dynamics . . .”).

and lawyers.”<sup>369</sup> Indeed, the public ventilation of the rulemaking process itself<sup>370</sup> functions as a significant safeguard. And, as we will see in Part IV, the threat of capture may vary by design choice—for example, a specialist court or judge who has no discretion in applying a tailored procedure will be at less risk of capture than a generalist court or judge who can pick and choose between them. Taking Arizona eviction as one example, the turn from legislative to court-based rulemaking appears to have, at least in this case, counterbalanced more than a century of bias in favor of politically connected landlords and led to procedures that consider perspectives on both sides of the dispute.<sup>371</sup>

The second issue of sociological legitimacy provides guidance as to why we might care if certain kinds of tailoring are done by courts as opposed to lawmakers. When discussing the federal model, Stephen Burbank contrasts the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA) with those of *Bell Atlantic Corp. v. Twombly*.<sup>372</sup> He argues that because only the former “resulted from a democratic process that is acknowledged as appropriate for the creation of policy on important social issues,” if the latter’s “policy choices . . . are buried, the concern may be democratic accountability in both the weak sense and in the strong sense of separation of powers.”<sup>373</sup>

State court tailoring changes this analysis in several ways. Because state supreme court justices in thirty-eight states face voters in either selection or retention elections,<sup>374</sup> there is a degree of democratic accountability in state courts that is absent from the federal model. The robust rulemaking process also provides lots of opportunities to surface and socialize hidden policy issues, reducing the danger that rulemakers might hide the ball.<sup>375</sup> Moreover, because advisory committees are quite

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<sup>369</sup> Bone, *supra* note 361, at 910 n.125.

<sup>370</sup> Arizona’s rulemaking process is far more transparent than many states. For a review of state-court rulemaking processes that emphasizes variance in transparency and accessibility, see Clopton, *supra* note 64, at 35–36, app. tbl. B.

<sup>371</sup> For an excellent example of bias in the eviction context, see Ashby Richbourg Scott, *The Tennessee Uniform Residential Landlord and Tenant Act—“A Hodge-Podge of Statutory Exclusions,”* 34 U. MEM. L. REV. 903, 918–19 (2004) (documenting how when the Tennessee Legislature promulgated the Uniform Residential Landlord and Tenant Act, which significantly expanded tenants’ rights, it exempted certain jurisdictions because legislators asked to “take[] my district out”).

<sup>372</sup> 550 U.S. 544 (2007).

<sup>373</sup> See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 Wis. L. REV. 535, 536–37.

<sup>374</sup> Alicia Bannon, *State Judicial Selection: Reforms to Promote a Fair and Independent Judiciary*, 103 JUDICATURE 19, 19 (2019).

<sup>375</sup> See, e.g., ARIZ. SUP. CT. R. 28 (describing rulemaking process); but see *infra* Part IV (describing additional recommended safeguards).

diverse<sup>376</sup> and working groups are specialized and localized,<sup>377</sup> there may be significantly fewer barriers to public participation in some state-court rulemaking.<sup>378</sup> The analysis, of course, is more complex when judicial actors tailor procedure outside of the formal rulemaking process—by, for example, administrative or standing orders.<sup>379</sup>

Still, the core question remains: Is state-court rulemaking an appropriate way to create policy on important social issues? Friedrich Hayek argued that the state only acts legitimately when it acts through formal, *ex ante* rules that blind it to their distributive effect, rather than addressing problems via “ad hoc” action that picks winners and losers.<sup>380</sup> Moreover, research has repeatedly shown that perceptions of procedural fairness influence perceptions of institutional legitimacy.<sup>381</sup> “Procedur[al] rules that are, or are even seen to be, designed to favor one set of litigants produce outcomes that are less acceptable to their adversaries.”<sup>382</sup>

Tailoring, even in state courts, risks this threat to legitimacy. Consider a practical example from eviction. For most tenants, the harm of an eviction is catastrophic, including loss of home, wage garnishment, and adverse health effects.<sup>383</sup> Courts, engaging in alignment tailoring, have a clear mandate to avoid unlawful evictions. But to what extent

<sup>376</sup> Clopton, *supra* note 64, at 1–2.

<sup>377</sup> See, e.g., *Arizona Commission on Access to Justice, Membership List*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/cscommittees/Arizona-Commission-on-Access-to-Justice> (click on “Members”) [<https://perma.cc/9VBF-WXLR>] (last visited Mar. 11, 2026) (membership includes judges, lawyers, law professors, sociologists, legal aid service providers, private attorneys, and law librarians); *Task Force on Rule 11 Arizona Rules of Criminal Procedure and Related Matters* app. A, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/Portals/0/74/Appendix%20A%20Amended.pdf> [<https://perma.cc/Z2VZ-QTUP>] (last visited Feb. 24, 2026) (membership includes judges, local nonprofits, mental health providers, police department, prosecutors, public defenders, and court administrators); *Task Force on the Arizona Rules of Family Law Procedure, Membership List*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/Portals/0/74/FamilyRulesTF/PublicMembershipListREVISED6.23.17.pdf> [<https://perma.cc/2JYW-ZB3N>] (last visited Feb. 24, 2026) (including two former Supreme Court Justices as chairs, several judges, several private attorneys, and a representative from the Office of the Attorney General).

<sup>378</sup> Consider the hundreds of comments that the new eviction rules in Michigan solicited. See *supra* notes 2–3 and accompanying text.

<sup>379</sup> See Engstrom, Marcus & Setzer, *supra* note 19, at 1378–79.

<sup>380</sup> F.A. HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed., Routledge, 2014) (1944).

<sup>381</sup> Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 376, 379 (2006); see also Bookman & Noll, *supra* note 111, at 781 (“[H]ow procedure is made affects whether courts’ work product is accepted as fair and legitimate.” (emphasis in original)).

<sup>382</sup> Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074 (1989).

<sup>383</sup> Sabbeth, *supra* note 64, at 365.

should courts tailor procedure to avoid the harm of even a lawful eviction by connecting breaching tenants with social resources? Michigan's mandatory stay so a tenant can apply for rent assistance—extendable for twenty-eight days for a pending application—would appear to take the more expansive view. More research is needed to understand the scope of procedural values that state courts can (and should) legitimately advance. The traditional view, that “[n]either judges nor procedural reformers have a general charter to reform society,”<sup>384</sup> would suggest that using procedure to maximize social welfare risks politicizing the courts and eroding their legitimacy. Some have argued, though, that bold procedural reform in high-volume courts like debt collection and eviction might “reestablish[] the democratic legitimacy of state civil courts by increasing social provision to defendants economically ravished by assembly-line litigation.”<sup>385</sup>

### 3. *Second-Rate Justice*

Another longstanding fear is that tailoring might create tiered access to justice, with some cases (or litigants) getting second-class procedure.<sup>386</sup> In 1906, Pound lamented that “modern . . . judicial administration is . . . distrusted by . . . people on the time-worn ground that there is one law for the rich and another for the poor.”<sup>387</sup> Because of subject matter and diversity jurisdiction requirements, and multiplicity of courts, state courts have always been more susceptible to this critique.<sup>388</sup> Indeed, a frequent criticism throughout the history of Arizona civil procedure has been that justice courts that handle low-value claims provide lower-quality justice.<sup>389</sup> Today, if you bring an employment dispute in Arizona, the amount of process you’ll get will be tied to how much money you make: The lowest wage earners

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<sup>384</sup> Burbank, *The Costs of Complexity*, *supra* note 40, at 1473; *see also* BONE, *supra* note 279, at 83 n.147 (“[F]ormulat[ing] the goal of procedure as maximizing social welfare . . . is [not] normatively attractive. Focusing on substantive law enforcement respects democratic values by leaving the lawmaking function to those institutions assigned the role . . . . Lawmaking institutions can tinker with procedure . . . but courts . . . [without] substantive [rulemaking authority] should not do so.”).

<sup>385</sup> Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359, 362 (2022).

<sup>386</sup> Marcus, *supra* note 21, at 379–80.

<sup>387</sup> Pound, *supra* note 294, at 397.

<sup>388</sup> For example, because of federal diversity jurisdiction requirements, *see* 28 U.S.C. § 1332, the vast majority of civil disputes below \$75,000 will be filed in state courts—and therefore it is the state courts that will handle the vast majority of civil cases that involve poor litigants who may be lawyerless and more likely to struggle to navigate uniform rules of civil procedure.

<sup>389</sup> JP COURT REP., *supra* note 95, at 7–12.

will likely be heard in justice courts, often before non-lawyer judges;<sup>390</sup> slightly higher earners might make it to superior court, but then might be forced to arbitrate;<sup>391</sup> and even those who make it to discovery in superior court will presumptively get discovery that corresponds to their salary.<sup>392</sup>

Mitigating the risk of second-rate justice in state courts requires delicate balancing: If process costs exceed expected benefits, litigants might skip court altogether. As a result, courts increasingly leverage choice of procedure (whether by court, judge, or party) to offer an accessible forum without foreclosing more robust procedural entitlements. A low-wage plaintiff can choose to file in small claims court and get an informal process, or proceed to a formal trial in justice court.<sup>393</sup> The FASTAR program, as opposed to mandatory mediation, allows the plaintiff to choose either mediation or fast trial.<sup>394</sup> If a low-wage plaintiff in superior court has good cause for more discovery, the Arizona rules provide discretion for the judge to grant it.<sup>395</sup> However, such choices do not always exist or might not be salient to less savvy litigants. And because plaintiffs often can choose procedural defaults through forum shopping or opt-in procedural regimes, defendants may be less likely to have the meaningful opportunity to opt-out of a second-rate tier.

#### 4. *Administrability*

A final fear of defenders of transsubstantivity has been that substance-specific rules will lead to an unworkable system, with litigants, lawyers, and judges needing to master multiple procedures and satellite litigation skyrocketing.<sup>396</sup> As Stephen Subrin wrote, “to create a different procedural system for every area of law seems impractical in

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<sup>390</sup> ARIZ. REV. STAT. ANN. § 22-201(B) (2025) (providing exclusive original jurisdiction over claims less than \$10,000 in justice of the peace courts).

<sup>391</sup> SUPER. CT. LOC. PRAC. R., MARICOPA CNTY. 3.10(a) (requiring mandatory mediation for all claims below \$50,000).

<sup>392</sup> ARIZ. R. CIV. P. 26.2(c)(3)(A)–(C) (setting tiered discovery presumptively by amount in controversy).

<sup>393</sup> ARIZ. R. SMALL CLAIMS P. 1(a).

<sup>394</sup> ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 103(a).

<sup>395</sup> ARIZ. R. CIV. P. 26.2(c)(1).

<sup>396</sup> Jeffrey C. Dobbins, *Legislative Transsubstantivity*, 12 NE. U. L. REV. 707, 722 (2020) (“[H]aving a multiplicity of procedural systems—not to mention different language and relevant rules regarding those systems—costs participants time and energy, undermines consistency, and ultimately threatens a return to the complexity that spurred the rise of procedural reform in the first instance.”); see also Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246 (1989) (arguing that the simplicity of the transsubstantive federal rules leads to greater court access).

the extreme.”<sup>397</sup> Indeed, David Marcus argued that substance-specificity presented a slippery slope<sup>398</sup> and might end in “ecosystem-specific rules,” such as different procedure for Section 1983 police-misconduct litigation in Philadelphia and Houston, because the harm and frequency of error will vary by geographical region in consideration of factors such as the local plaintiff bar.<sup>399</sup>

U.S. state courts in 2026 embody the impractical, ecosystem specific, procedural reality that proceduralists feared. A plaintiff in Arizona superior court may get different procedures than another, based, in part, on how local judges weigh ecosystem specific factors.<sup>400</sup> Certain cases will have mandatory mediation or diversion or limited discovery or extra pleading requirements.<sup>401</sup> This variation creates process costs: Judges need to learn new rules when they get new assignments; lawyers and parties litigating in different courts or divisions may be surprised to discover that their familiarity with one system does not transfer to another. It creates forum shopping: State courts are riddled with concurrent jurisdiction and well-heeled litigants will be strategic about where they file.<sup>402</sup> And it brings satellite litigation: Litigants, for example, will not just fight over whether a case should be remanded

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<sup>397</sup> Subrin, *supra* note 65, at 388. He summarized the argument that transsubstantivity “does not require learning large numbers of different procedural rules, nor does it necessitate that lawyers and judges decide which rules will apply to which cases.” *Id.* at 387.

<sup>398</sup> *Accord Hazard, supra* note 396, at 2244 (“This critique contemplates separate sets of rules for civil rights cases, antitrust cases, routine automobile cases, and so on.”).

<sup>399</sup> David Marcus, *Substance In and Out of Procedure*, 102 TEX. L. REV. ONLINE 78, 90–91 (2023) (“If they pursue error risk-management with single-minded focus, the same principle that requires trans-substantivity’s demise should likewise require rule-makers to consider the many ecosystem-specific factors that have significant impacts on case selection and outcomes.”). Marcus draws the term “ecosystem-specific” and the Section 1983 example from Joanna Schwartz. See Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1550–52 (2020).

<sup>400</sup> See *supra* note 192 and accompanying text (describing how local superior courts can elicit Arizona FASTAR Rules).

<sup>401</sup> See *supra* notes 237, 253, and 390 and accompanying text.

<sup>402</sup> For example, in Indiana, most landlords seeking eviction can file in either small claims court or superior court. Although landlords have historically almost all filed evictions in the lower-cost small claims court, they have increasingly begun filing in the superior court as small claims court judges have begun to implement eviction diversion programs and other tenant-friendly procedures in their jurisdictions. See Cierra Putman, *Landlords Increasingly Turning to Marion Superior Court for Faster, More Expensive Eviction Processes*, WTHR: 13 INVESTIGATES (Feb. 21, 2025, at 11:31 ET), <https://www.wthr.com/article/news/investigations/13-investigates/landlords-superior-court-tenant-eviction-13-investigates-marion-county-renters-apartments/531-64258faf-f02d-47d7-ae11-364738fe79bb> [https://perma.cc/HYN9-YDDB].

to state court, but whether it should get on a commercial docket or proceed as a turnover proceeding.<sup>403</sup>

But, on balance, these administrability costs are likely outweighed by the administrability costs imposed by applying general rules to individual cases.<sup>404</sup> Lawyers, too, are increasingly specializing,<sup>405</sup> which likely lessens the costs they experience from tailored rules at least in some large legal markets. Courts have also developed more robust training programs for judges and staff.<sup>406</sup> As it turns out, court-based rulemaking, bolstered by specialized working groups, has enough local expertise to tailor well and efficiently, and enough nimbleness to test out solutions to make sure they work.<sup>407</sup> The unification of court administrative systems under the leadership of state supreme courts, coupled with the recent expansion of court data analytic capabilities, has potential to be a powerful way to build feedback loops.<sup>408</sup>

In short, the significant procedural variation in state courts today transforms the classic debates over tailoring and requires proceduralists to consider new dimensions as they evaluate both individual instances of tailoring and the trend towards tailored procedures in the aggregate.

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<sup>403</sup> This example reflects the uniqueness of litigating in New York Supreme Court and a case, which the Author helped litigate. See *UBS Sec. LLC v. Dondero*, No. 650744/2023, slip op. at 48 (N.Y. Sup. Ct. Mar. 25, 2025) (denying motion to convert the turnover proceeding into a plenary action but noting that “petitioner has now charted its course and should not complain later should it need more recourse to discovery than this proceeding will permit”). A turnover proceeding is a special mechanism for post-judgment debt relief that operates like summary judgment, thereby providing significant advantages to traditional litigation. N.Y. C.P.L.R. § 5225 (CONSOL. 2025).

<sup>404</sup> For examples of the argument that general rules often create more complexity, see, for example, Subrin, *supra* note 65, at 389 (arguing that transsubstantivity results in “increases in time and monetary expense” and concluding that the “cures,” or the “legitimate desire[s] of judges and rulemakers to constrain that system . . . exacerbate the disease.”); *id.* at 392 (“The drafters would be particularly amazed that their simple procedural system, with its liberal pleading and broad discovery, has led to the opposite: a complex morass of mandatory procedural steps and rigorous pleading requirements, without any discovery.”); Burbank, *The Transformation of American Civil Procedure*, *supra* note 40, at 1941 (describing, through the example of Rule 11, how the Federal Rules have “fail[ed] the historic tests of simplicity and predictability” and arguing that “[a] lawyer charting a procedural course can rely as safely on the Federal Rules of Civil Procedure as a sailor in the Bermuda Triangle can rely on a world atlas”).

<sup>405</sup> Michael Ariens, *Top Ten Changes in the Legal Profession Since 1979, Part II*, MARQ. U. L. SCH. FAC. BLOG (Jan. 3, 2010), <https://law.marquette.edu/facultyblog/2010/01/top-ten-changes-in-the-legal-profession-since-1979-part-ii> [<https://perma.cc/4J5B-NL4T>].

<sup>406</sup> For an overview of judicial training requirements in Arizona, see *Judicial Training*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/education/services/Judicial-Training> [<https://perma.cc/ZGX3-S92K>] (last visited July 31, 2025).

<sup>407</sup> See *infra* notes 452–57 and accompanying text.

<sup>408</sup> See BLUEPRINT, *supra* note 34, at 27.

## IV LESSONS LEARNED & PATHS FORWARD

Some lessons are clear-cut: State courts are shot through with tailoring. Although courts have always adjusted procedure to particular cases, tailoring has transformed from ad hoc rules to systematic differentiation and cuts across many more dimensions than previously understood. Such professionalization was perhaps inevitable. In state courts, with broader subject matter jurisdiction and more severe litigation asymmetries, rulemakers not only have greater incentive to tailor, but also greater authority to do so. In short, scholars should put to rest the myth of “general,” transsubstantive rules and focus instead on the expanding patchwork of tailored procedures that shape most civil disputes in U.S. state courts today.<sup>409</sup>

Some lessons, however, operate at a higher level of abstraction and sophistication and reflect broad currents in civil litigation. I address these below.

### *A. All Tailoring Is Not Equal*

A first major lesson is that the fairness, accuracy, and process gains and losses of tailoring vary by design choice. Tailoring is much more nuanced than the transsubstantivity/substance-specificity dichotomy that has dominated past debates about procedural design. The design options available to courts—from furthering different goals, to bending diverse norms, to layering on implementation flexibility—have consequences. Although a full normative accounting exceeds this Article’s scope, my typology and analysis can preview some of the tradeoffs.

Consider first what the various motivations of tailoring are likely to accomplish at their best and risk at their worst. “Access” tailoring is well suited to remove procedural barriers for litigants but can introduce the appearance of bias and threaten norms of court neutrality. “Speedy resolution” and “information exchange” tailoring can be an effective way to ensure that legal process costs do not exceed expected litigation value—thereby keeping courts accessible—but can risk creating second-class justice. “Substantive alignment” and “harm reduction” tailoring can optimize error risk by accounting for the significance, frequency, and distribution of harm, but they are also more likely to trespass into

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<sup>409</sup> For other scholars who have come to similar conclusions, see *supra* note 14. Cf. Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 261–62 (2021) (arguing that “the procedural law we write about and teach is nothing like what most ordinary Americans experience when they step into court” and advocating for the “actual” to be incorporated into debates about procedural reform).

substance because of the closeness of fit with substantive values and social harms.

The norms a court bends when tailoring can mitigate or exacerbate these risks. Consider, for example, the risks to court neutrality posed by representation-status and party-type tailoring. Representation-status tailoring—e.g., requiring judicial review of a stipulated judgment involving an unrepresented party<sup>410</sup>—at least formally applies to both sides of the “v” and recognizes that error risk is likely to be skewed against self-represented litigants for reasons unrelated to party identity or substantive claims. In contrast, tailoring by party characteristics—e.g., raising pleading requirements for some parties but not others<sup>411</sup>—is *designed* to have clear and disproportionate distributional effects on certain litigants. The latter form of tailoring will be more salient to subgroups and therefore presents a greater risk to judicial neutrality.

Flexibility also significantly impacts the calculation. Court flexibility can better match procedures to a local justice ecosystem, and judicial flexibility can avoid entrenching second-class justice tiers, but both carry a slightly greater risk of capture or bias. Litigant choice can be a useful way for courts to achieve a procedural goal when they lack the institutional authority to mandate tailoring.<sup>412</sup> Unilateral party choice can force plaintiffs to internalize costs and therefore keep them reasonable for defendants and courts. Still, choice is no panacea. There is a yawning flexibility gulf between plaintiffs and defendants in state courts—often with represented, repeat-player plaintiffs having the greatest amount of choice. Opt-out provisions may not be sufficient to constitute a knowing and voluntary waiver of more robust procedural entitlements.

Other factors matter and my typology does not purport to be comprehensive. For example, whether tailoring is to be implemented by a generalist or a specialist court will affect the risks and benefits.<sup>413</sup> It would be much easier to capture a specialist, who presides over one type of case and is likely to repeatedly interact with the same key litigants. But if a tailored procedure is imposed from state-court

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<sup>410</sup> See, e.g., MICH. CT. R. 4.201(K)(2)(e)(iii)–(iv).

<sup>411</sup> For example, consider the different pleading requirements for debt-buyer and seller plaintiffs in certain jurisdictions. See *supra* note 253.

<sup>412</sup> Pre-dispute and post-dispute agreements and opt-in and opt-out regimes layer on additional complexities. See *supra* notes 265–69 and accompanying text.

<sup>413</sup> As another example, we might care about the unique mix of litigants in a court—for example, if there are lots of repeat player plaintiffs or unrepresented plaintiffs.

rulemakers to be implemented in *all* cases in a specialist court—say, a judge presiding over an eviction docket—then we need only worry about the risk of bias at the initial rulemaking, not procedural bias brought in by the specialist judge, who now only has one procedure available. In contrast, there is a risk of bias at the implementation stage for a generalist judge who gets to choose which procedure to apply or whether eligibility criteria are met, even though the risk of capture is lower.

As another example, state courts often use pricing or fees to require litigants to internalize the cost of procedure.<sup>414</sup> For example, Ohio bifurcates eviction proceedings based on remedy, allowing plaintiffs to file a first-cause hearing with streamlined procedures on the issue of possession and a second-cause hearing with more rigorous procedural protections on damages.<sup>415</sup> Although most jurisdictions allow plaintiffs to allege both first- and second-cause claims for the same price, Franklin County charges thirty-seven dollars more to file both claims.<sup>416</sup> Fees and pricing variation, therefore, are yet another design tool that may alter the risks and benefits of tailoring.

### *B. Tailored Rules Narrow Individual Judicial Discretion*

A second lesson is that there has been a seismic shift in who makes procedure in state courts. As state courts have centralized authority and expanded their use of tailored procedures, they have sidelined legislative rulemaking, displaced local rulemaking, and narrowed judicial discretion. The evolution of tailoring in Arizona evidences this trend at a high level.

Rulemaking petitions add texture. Petitions often justify tailoring as a way to reduce ad hoc decisionmaking and improve consistency. The Rules of Protective Order Procedure were promulgated to “resolve the pervasive confusion and conflict over the applicability of other procedural rules.”<sup>417</sup> The Petition to Adopt Justice Court Rules of Civil Procedure cited how “[p]rocedures in the superior court rules . . . are

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<sup>414</sup> For a theorization of the role of pricing and fees in procedure, see Avraham & Hubbard, *supra* note 57, at 916–22.

<sup>415</sup> OHIO REV. CODE ANN. §§ 1923.05, 1932.081 (West 2025). Other states also bifurcate possession and damages. *See, e.g., Start an Eviction Case*, ALASKA CT. SYS.: SELF-HELP, <https://courts.alaska.gov/shc/housing/startevictioncase.htm> [<https://perma.cc/4UW5-QJHZ>] (last visited Nov. 1, 2025) (describing the two parts of an eviction hearing in Alaska).

<sup>416</sup> *See Evictions Questions*, FRANKLIN CNTY. MUN. CT. CLERK, <https://www.fcmclerk.com/faq/civil/evictions#how-much-does-it-cost-to-file-an-eviction-case> [<https://perma.cc/9SM4-8KZ6>] (last visited July 31, 2025) (providing that eviction-only claims cost \$128 and eviction claims with damages costs \$165).

<sup>417</sup> Protective Order Petition, *supra* note 289, at 18.

applied inconsistently in justice courts.”<sup>418</sup> The Rules of Procedure for Eviction Actions were issued to promote uniformity upon a finding that the ill-fitting general rules “resulted in great diversity of practice from courtroom to courtroom.”<sup>419</sup> Indeed, several of the eviction rule changes target “discrepancies in the practice between judicial officers” such as the filing of motions and the determination of rental concessions.<sup>420</sup> Even the IFLT Rules responded to the reality “that many judicial officers already conduct family law trials [informally].”<sup>421</sup>

Stated differently, the explosion of tailoring by state rulemakers reins in ad hoc procedures by judges and the managerial turn of local courts.<sup>422</sup> Judges and local courts were already developing strategies to conduct informal family law trials or navigate disclosures in eviction.<sup>423</sup> Although each of these forms of state-level tailoring might create greater variance on paper by breaking with transsubstantive norms, in practice they reduce it by preempting this variation among local courts and judges—and seeking to ensure that like cases are treated similarly. Moreover, they often legitimize such practices through the expertise and public ventilation of formal court rulemaking.

Recent procedural innovations that give back a measure of agency to courts or discretion to judges do not reverse this trend. The choice between pre-vetted, publicly ventilated procedural tracks is not a return to ad hoc decisionmaking. In fact, introducing a measure of discretion can provide important local expertise to understand how mandatory mediation or FASTAR, or opt-in or opt-out IFLT might work in a local civil justice ecosystem. Another key difference is that this new discretion is limited to *some* judges (in my review, often the more qualified superior court judges), with protections against implementation bias (acting by majority vote and choosing between pre-vetted procedures).<sup>424</sup>

This shift in power over procedure raises important normative considerations, including who should make procedure, the relationship

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<sup>418</sup> See Paul Julien, Petition to Adopt Justice Court Rules of Civil Procedure, No. R-12-0006, at 8 (Ariz. Jan. 6, 2012), <https://rulesforum.azcourts.gov/Rules-Forum/aft/342> (click on attachment “116292361478.pdf”) [<https://perma.cc/S56H-F5Y8>].

<sup>419</sup> See Eviction Rules Petition, *supra* note 206, at 3.

<sup>420</sup> *Id.* at 5–8.

<sup>421</sup> Original IFTL Rules Petition, *supra* note 145, at 4; see also *Riojas v. Mejia*, No. 1CA-CV21-0156FC, 2022 WL 324203, at \*3 (Ariz. Ct. App. Feb. 3, 2022) (finding such an informal trial to not be an abuse of discretion).

<sup>422</sup> See Engstrom, Marcus & Setzer, *supra* note 19, at 1311–29 (outlining the historical expansion of managerialism in the courts).

<sup>423</sup> See *supra* notes 144–45, 209.

<sup>424</sup> See *supra* note 192 and accompanying text (providing that local superior court judges can vote to adopt FASTAR Rules in their jurisdiction); *supra* note 180 and accompanying text (rule proposal providing that local superior court judges can vote to adopt the IFTL rules as either an opt-in or opt-out regime).

between procedure and substance, and the role of courts in society. Eviction diversion programs, which straddle the line between substance and procedure, and have been implemented by legislatures, state-court rulemakers, and local courts, surface each of these issues.<sup>425</sup> Impacted parties have felt this shift and pushed back.<sup>426</sup> Rulemakers have made different determinations about the scope of their authority. Time will tell how these determinations shape the civil litigation landscape and perceptions of court neutrality and legitimacy.

### C. State Courts Need Different Safeguards

The third major lesson is that tailoring has thrown off the usual braking applied to court procedure making. Fifteen years ago, in reviewing the decline of transsubstantivity in the federal courts, David Marcus argued that “[i]f trans-substantivity has a future, it is as this: a principle of institutional allocation of rulemaking power.”<sup>427</sup> Marcus found in transsubstantivity “a legal process value that is worth defending,” that might still “operat[e] as an institutional restraint on court-supervised rulemakers” and “strengthen their legitimacy to craft procedural rules.”<sup>428</sup> Although this recommendation might still have purchase for the federal Advisory Committee, it is of limited use for state rulemakers, who have already moved largely in the other direction.

If the transsubstantive center cannot hold,<sup>429</sup> what principles can guide procedural design in the state courts? There are at least two ways forward. A first option involves ditching the illusion of procedural uniformity and building procedure in specialized batches. A working group considering new eviction procedures need not consider any uniform norms, only to get the right mix of rules to optimize procedural values for the cases at hand. A second approach involves retaining

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<sup>425</sup> Compare Residential Eviction and Consumer Debt Early Resolution Program, Admin. Ord. No. 2020-09 (Cook Cnty., Ill., Cir. Ct. Dec. 14, 2020), <https://www.cookcountycourt.il.gov/order/general-administrative-order-no-2020-09-residential-eviction-and-consumer-debt-early> [<https://perma.cc/B9V5-MTH5>] (local court order requiring judges to continue eviction cases for a minimum of fourteen days to allow either or both parties to work with diversion program), with Order Amending Pre-Eviction Diversion Program, No. 22S-MS-308 (Ind. Sep. 2, 2022), <https://www.in.gov/courts/files/order-other-2022-22S-MS-308.pdf> [<https://perma.cc/WR4P-MR6G>] (supreme court order requiring judges to notify eviction litigants about the availability of eviction diversion resources and continue the case if both parties opt-in), and REV. CODE WASH. § 59.18.660 (2022) (expired July 1, 2023) (state statute creating a mandatory eviction resolution pilot program).

<sup>426</sup> See, e.g., *supra* notes 4–5 and accompanying text (describing response to new eviction rules).

<sup>427</sup> Marcus, *supra* note 21, at 375.

<sup>428</sup> *Id.*

<sup>429</sup> I’m echoing Carl Tobias. Tobias, *supra* note 14, at 1508 (“[T]he trans-substantive center will not hold . . .”).

transsubstantivity and other norms of procedural uniformity as a useful fiction—benchmarks by which to measure deviation from standard procedural entitlements.<sup>430</sup> The working group considering eviction procedures would seek to optimize procedural values while ensuring that the degree of deviation is proportional. In short, transsubstantive and uniform rules are presumptively within the zone of a court's authority; the greater the deviation from a norm, the more pressing the need to identify the procedural value that justifies the departure.

I favor the second approach. Our procedural norms loom large in the imagination of judges and litigants and exist to mitigate real world harms that can undermine perceptions of sociological legitimacy—for example, the favoring of one litigant or case over another without justification.<sup>431</sup> Benchmarking is important to ensure consistency across complex court systems. It can also serve as an additional layer of protection against some of the risks of tailoring, like bias, by requiring specialized working groups to anchor to the same core norms and values. Finally, by retaining a common language of procedural design, successes in one area can spur innovation in another.

Below, I propose three new safeguards to induce reflection about whether tailoring is likely to strike the right balance among values: (1) proportional design; (2) reason-giving; and (3) iterative review. As a comprehensive discussion exceeds the scope of this Article, these sketches are primarily intended to spark discussion as to how state-court rulemaking procedures, developed for a previous (largely uniform) era of procedure-making, may no longer be sufficient.

### 1. *Proportional Design*

Before tailoring, courts should determine why a procedural variation is necessary.<sup>432</sup> This would require considering (1) the procedural value(s) at risk by the procedural default; (2) the likely effect of tailoring on the identified procedural value and civil litigation broadly; and (3) whether other design options can similarly advance

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<sup>430</sup> David Marcus conceptualized a similar process. See Marcus, *supra* note 225, at 1222 (arguing that deviation from transsubstantivity should require “a contextualized assessment of the principle’s costs and benefits”).

<sup>431</sup> See *supra* notes 357–67 and accompanying text.

<sup>432</sup> Step zero in any analysis would be for a proceduralist to locate the zone of authority to craft a procedural solution. As discussed earlier, state-court rulemaking authority varies significantly among the states. See *supra* notes 341–48 and accompanying text. Rulemakers might also have context-specific limitation on their authority to tailor in a particular case type—for example, in eviction where the legislature has acted. The analysis will be very different for a court that seeks to tailor through its inherent authority, without the safeguards of a rulemaking process.

the targeted value(s) with fewer collateral effects or less erosion of procedural norms.<sup>433</sup>

*Step 1. Identify a Reason for Norm Deviation.* The first step of tailoring should be to identify the problem to be solved. Rulemakers often do this by convening working groups to draft diagnostic reports. If proceduralists do not define the problem concretely, detractors can argue that the tailoring “is a solution in search of a problem,”<sup>434</sup> especially when they are likely to bear the costs of tailoring.<sup>435</sup> Problem identification will also expose the range of values that state courts seek to advance through rulemaking, including policy problems, which straddle the line between substance and procedure.

*Step 2. Estimate the Likely Effect of Tailoring.* The next step is to forecast a tailored future: Is tailoring apt to solve the problem(s) and what impact might it have on civil litigation broadly? States like Arizona that pilot major rule changes might already have a robust hypothesis. This step requires proceduralists to think through likely impacts and provides accountability by tethering tailoring to measurable outcomes.<sup>436</sup>

*Step 3. Consider Other Options.* The final step requires the designer to step back and consider the full range of design options to determine whether the targeted value(s) can be achieved at lower costs to litigants, courts, and procedural norms. Rulemakers should be attentive to the risks that come from bending procedural norms and exercise appropriate restraint. Rulemakers might also consider the effects of layering a degree of choice—whether by court, judge, or one or both parties. Public ventilation through committee participation and reports, notice and comment, and hearings may provide opportunities for affected parties to flag costs and propose alternatives. In the states where proposed rule changes are not available for public comment or advisory committee meetings are not publicly accessible,<sup>437</sup> courts will need different mechanisms to surface other options.

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<sup>433</sup> For other examples of rulemaking criteria, see Bone, *supra* note 361, at 951–52 (setting out a three-part test); see also Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 464 (1993) (setting out a five-part test); Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 19, 1981), *reprinted in* 5 U.S.C. § 601 note (1988) (setting out criteria for agency rulemaking).

<sup>434</sup> Mich. Eviction Ord., *supra* note 2, at 24 (Zahra, J., dissenting).

<sup>435</sup> See, e.g., Parham, *supra* note 207, at 3 (arguing that the eviction rules “will add greatly to the time and expense of evictions without serving any worthwhile purpose justifying their cost”).

<sup>436</sup> The failure to set measurable goals was a significant criticism of the FASTAR Rules. See, e.g., Sakall & Pack, *supra* note 356, at 502.

<sup>437</sup> See Clopton, *supra* note 64, at 35–36 (describing the accessibility of state rulemaking procedures to the public in the several states).

## 2. Reason-Giving

When tailoring presents a significant risk of bias or threatens court neutrality or substantive rights, courts will benefit from sharing these considerations publicly. Some state-court rulemakers, like those in Arizona, already create transparency through robust analyses in working group reports and rulemaking petitions,<sup>438</sup> or occasional committee rule comments.<sup>439</sup> But, in most cases, the Arizona Supreme Court issues even those rule changes that involve rigorous public debate, like the FASTAR Rules, with no explanation.<sup>440</sup> When issuing the mandatory stay for eviction nonpayment cases, the Michigan Supreme Court also did not issue any clear statement justifying the rule,<sup>441</sup> despite the ferocity of the public debate and vigorous dissents arguing that the rule violated separation of powers.<sup>442</sup>

Scholars have long extolled the virtues of reason-giving for courts. It can reinforce legitimacy,<sup>443</sup> promote trust and compliance,<sup>444</sup> and operate as a constraint on decisionmakers.<sup>445</sup> Perhaps most importantly,

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<sup>438</sup> For good examples of this transparency during the process, see *infra* notes 454–62 and accompanying text (describing the various reports and debates during the FASTAR Rules pilot).

<sup>439</sup> See, e.g., ARIZ. R. CIV. P. 26.2 cmt. (describing the intent behind tiered discovery).

<sup>440</sup> See FASTAR Rules Order, *supra* note 192, at 1–2 (noting that the court considered this matter at its August 2024 Rules Agenda, deemed it necessary to entertain another period of comment, then adopted the below amendments without explanation).

<sup>441</sup> See Mich. Eviction Ord., *supra* note 2, at 1.

<sup>442</sup> See Mich. Mar. 2021 Ord., *supra* note 1, at 3 (Zahra, J., dissenting) (arguing that this change “violates a fundamental tenet of our democracy: the separation of powers”); see also *id.* at 4 (Viviano, J., dissenting) (“The changes . . . upend the statutory scheme . . .”). Justice Welch offered a cursory defense of this issue—that the court has authority to grant stays. Mich. Eviction Ord., *supra* note 2, at 19 n.8 (Welch, J., concurring). But the judicial discretion to grant stays does not explain what procedural values justify the appropriateness of systemic stays, which will routinely advantage one party and harm the other.

<sup>443</sup> See, e.g., Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1001–05 (2008) (arguing that providing justifications enhances judicial legitimacy); Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1448 (1995) (arguing that judging requires a reasoned explanation, not just “blind announcements” of the results); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 116 (2007) (“[R]eason giving is fundamental to the moral and political legitimacy of the American and European legal orders.”).

<sup>444</sup> See Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 362–63 (2001) (finding that legal authorities are only effective when they can “gain acceptance for their decisions among the members of the public with whom they personally deal”).

<sup>445</sup> See Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 888–90 (1987) (reason-giving as a political constraint on decisionmakers’ career prospects); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (“A decisionmaker

reason-giving promotes accountability<sup>446</sup> by requiring decisionmakers to commit themselves in ways that provide uniformity for subsequent decisions and allow for revision if the identified procedural values are not realized.<sup>447</sup>

Of course, reason-giving comes at a price: It takes time, may constrain future rulemaking, and may reveal the kind of compromises and sausage-making that might breed cynicism if there are too many reversals or inconsistencies.<sup>448</sup> After all, if procedure is supposed to be “neutral,” do courts really want to make tradeoffs salient? Moreover, when a state’s highest court issues a rule, it may be hesitant to formally defend it *ex ante*, preferring to wait instead until a challenge is brought and the record is complete.<sup>449</sup>

On balance, I recommend reason-giving in instances where tailoring is particularly risky or likely to result in significant real-world effects. The best test is probably the court’s assessment of likely impact. But there also might be a benefit to defaulting to reason-giving whenever public debate over a proposed rule reaches a certain decibel.<sup>450</sup> The

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required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat.”); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 *GEO. L.J.* 1283, 1318–20 (2008) (arguing that reason-giving improves decisionmaking).

<sup>446</sup> Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. REV.* 461, 528–29 (2003) (explaining reason-giving requirement can promote accountability and prevent arbitrariness); *see also* Schwartzman, *supra* note 443, at 1012 (arguing that judges must justify their decisions publicly to advance judicial legitimacy because “legal authority is properly exercised only if those who wield it give justifications for their decisions”).

<sup>447</sup> *See* Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 657 (1995) (describing reason-giving as forcing rulemakers to commit to their decisions); Jeffrey A. Parness & Christopher C. Manthey, *Public Process and State Judicial Rulemaking*, 1 *PACE L. REV.* 121, 139–41 (1980); Deborah S. Gordon, *Trusting Trust*, 63 *KAN. L. REV.* 497, 536–37 (2015) (explaining the importance of decisionmakers’ process to public accountability); *cf.* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 *ALA. L. REV.* 683, 713 (2014) (borrowing concepts from administrative law to argue that rulemakers should require judges using select discretionary procedural devices to justify those choices with reason-giving).

<sup>448</sup> Schauer, *supra* note 447, at 658.

<sup>449</sup> For a parallel debate currently playing out, consider reason-giving in the Supreme Court’s emergency docket. *See* Adam Liptak, *Kavanaugh Defends Supreme Court’s Terse Emergency Orders*, *N.Y. TIMES* (July 31, 2025), <https://www.nytimes.com/2025/07/31/us/politics/kavanaugh-supreme-court-emergency.html> [<https://perma.cc/7NM5-54EC>] (contrasting Justice Kavanaugh’s argument that a premature opinion might create a “lock-in effect” with Justice Kagan’s argument that the Court should provide some reasons to build transparency and trust).

<sup>450</sup> I adopt this test from a proposal from a reporter to the federal Civil Rules committee in 1988 that a “decibel” test might serve as a manner of institutional allocation: If public debate over a rule received a certain decibel, then it was a political issue and should be left to Congress. Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. REV.* 795, 836 (1991). To be sure, relying exclusively on a decibel test would raise collective action problems (for example, landlords are organized

burden would be minimal—nothing more than a short, clear statement about the procedural value that the rule is designed to advance. Such a statement would communicate intent without preempting future challenge. In Arizona, this might be accomplished through a simple amendment to the Rules of the Supreme Court:

**Rule 28. Procedure for Adoption, Amendment, and Abrogation of Court Rules**

**Court Consideration of Rule Petitions; Effective Date of Rules; Explanation; Notice.**

...

(4). *Explanation.* If the Court determines that the rule change is likely to significantly impact litigants, the Court shall further determine whether it would be appropriate and beneficial to provide the public, in its implementing order, a short explanation of the reasons for the rule change, either by adopting the reasons contained in the rulemaking petition or associated committee reports, or by substituting the Court's own reasoning.

### 3. *Iterative Review*

Finally, because tailored procedures inherently involve prejudice that may dictate results in ways that are self-fulfilling, proceduralists should build in feedback loops to avoid entrenchment. A case that is prejudged to be “simple” and only need ten hours of total depositions will be more likely to remain simple because facts that would add texture are never uncovered. Trends can be sticky—even if underlying social values have changed. This is apparent in eviction. A summary process designed to meet a historical need led to an entrenched system where a tenant's side of the dispute is rarely heard, even after the law has significantly changed.<sup>451</sup>

Court rulemakers can take practical steps to ensure continuous improvement. They should develop robust data collection and analysis capabilities to better assess the impacts of tailoring.<sup>452</sup> They should

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and have concentrated interests; tenants are rarely organized and have diffuse interests). See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971) (explaining that collective action works much better in furthering common goals than individual ones). Public reaction, however, remains a significant indicator that explanation might be advantageous. This would have the additional advantage of showing respect for public participation. See, e.g., Schauer, *supra* note 447, at 658 (“[G]iving reasons is a way of opening a conversation” which ultimately can make “the subject of the decision feel[] more a part of the decision, producing the possibility of compromise and the respect for a final decision that comes from inclusion.”).

<sup>451</sup> Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137–38 (2000).

<sup>452</sup> See BLUEPRINT, *supra* note 34, at 9, 27 (suggesting the same).

commit to pilot testing and partner with national organizations or universities to get independent and rigorous assessments of impact.<sup>453</sup> Most importantly, they should routinely reexamine tailoring as it works in the real world to determine if it has achieved design goals. The more robust a court's design, testing, and review, the more freedom it should have to engage in procedural innovation.

Arizona's rulemaking process is quite good at this. The FASTAR pilot program, for example, was issued after a three-year-long study by a working group.<sup>454</sup> The committee raised several concerns, including an uneven error-risk for personal injury plaintiffs. For example, the committee found that mandatory arbitration puts plaintiffs at a disadvantage because defendants retain expensive experts for the first time on appeal, and then serve offers of judgment to force plaintiffs to settle for a lower amount rather than risk sanctions for doing worse at trial when facing new evidence.<sup>455</sup> As a result, the proposed pilot attempted to incentivize fast trial by eliminating proposed offers for judgment and providing for no appeals by plaintiffs after arbitration.<sup>456</sup>

The initial pilot appears to have missed the mark. A series of three status reports<sup>457</sup> and two rounds of notice and comment<sup>458</sup> revealed

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<sup>453</sup> For a model, see generally *id.* (describing partnership between the Superior Court of Los Angeles and Stanford Law School).

<sup>454</sup> CALL TO REFORM, *supra* note 353, at 2, 19.

<sup>455</sup> *Id.* at 18–19. Arizona law and court rules impose a penalty if a party either does worse after appealing an arbitration award or refusing an offer of judgment. ARIZ. REV. STAT. ANN. § 12-133 (2012) (setting 23% improvement requirement to avoid penalty for appealing the arbitration award); ARIZ. R. CIV. P. 68(g) (penalty for refusing offer of judgment).

<sup>456</sup> CALL TO REFORM, *supra* note 353, at 123, 134.

<sup>457</sup> See, e.g., Kyle Bryson, Petition to Permanently Adopt Rules for the Fast Trial and Alternative Resolution Program (“FASTAR”), No. R-20-0012 (Ariz. Jan. 9, 2020) [hereinafter Permanent FASTAR Petition], <https://rulesforum.azcourts.gov/Rules-Forum/aft/1083> (click on attachment “FASTAR.petition.final.pdf”) [<https://perma.cc/T75K-MEMU>] (describing split comments by lawyers, but noting the common complaint about the plaintiff's inability to appeal an arbitrator's decision); Lisa M. Panahi, Comment of the State Bar of Arizona, *In re* Petition to Permanently Adopt Rules for the Fast Trial and Alternative Resolution Program (“FASTAR”), Ariz. Sup. Ct. No. R-20-0012, Exhibit A (May 1, 2020), <https://rulesforum.azcourts.gov/Rules-Forum/aft/1083> (click on attachment “R-20-0012 State Bar Comment Final with Exhibits.pdf”) [<https://perma.cc/DK6A-8RPG>]; Letter from Kellie L. Johnson, Civ. Presiding J., Superior Ct. of Ariz., Pima Cnty. & Mark Meltzer, Ct. Servs. Div., Admin. Off. of the Cts., to Robert Brutinel, C.J., Ariz. Sup. Ct. 7 (Dec. 14, 2023), <https://rulesforum.azcourts.gov/Rules-Forum/aft/1544> (click on attachment “FASTAR Report (without cover sheet or appendices) (003)\_1”) [<https://perma.cc/7M9Q-Q3YY>] (noting complaints about rigid timelines, including limited time to complete service).

<sup>458</sup> See Order Requesting Comment on Proposed Statewide Rules for the Fast Trial and Alternative Resolution Program, No. R-24-0004, at 2–3 (Ariz. Aug. 22, 2024), <https://rulesforum.azcourts.gov/Rules-Forum/aft/1544> (click on attachment “R-24-0004 Order Circulating Amendments For Comment.PDF”) [<https://perma.cc/VWP5-9NLZ>] (describing initial comment period starting in January 2024 and finding it “necessary to entertain [another] abbreviated period of public comment”).

that many plaintiffs felt that the new procedural design put them at a disadvantage: Trial costs were still out of reach for most plaintiffs and they faced asymmetrical appeal rights post-arbitration.<sup>459</sup> The Court amended the pilot rules in 2021 to lower costs in the fast trial track by eliminating the requirement that a plaintiff lay foundation for medical bills.<sup>460</sup> In 2025, it again considered feedback and amended the rules to relieve plaintiffs of the burden of having to call an expert to prove the reasonableness of medical bills<sup>461</sup> and allow both parties to appeal an arbitration decision, albeit using the fast trial rules (which prohibit the offer-of-judgment penalty).<sup>462</sup> Arizona's commitment to building feedback loops into the rulemaking process helps ensure that its tailored procedures create better courts—and might serve as a useful model for other courts around the country.

### CONCLUSION

We live in a new procedural era. From a transsubstantive trunk, tailored procedures branch again and again—all the time becoming more and more specialized. Such branching can bring civil justice closer to those who need it most. But not all branches will be healthy or grow as intended. There is good, necessary work for procedural scholars here—to study, shape, graft, and prune.

A goal of this Article has been to trace the complexities of this new growth. Arizona, which once adopted the transsubstantive Federal

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<sup>459</sup> For comments expressing these concerns, see, for example, R-24-0004 Petition to Permanently Adopt the FASTAR Rules in Pima County ,[sic] and Modify FASTAR Rules101[sic] and 126, ARIZ. CT. RULES F., <https://rulesforum.azcourts.gov/Rules-Forum/aft/1544> (see comments of David Buchel, William Bacon, Michael Bell, and Richard Biggs) [<https://perma.cc/4FDT-Y7ZN>] (last visited Jan. 5, 2026).

<sup>460</sup> Permanent FASTAR Petition, *supra* note 457. Compare Original FASTAR Order, *supra* note 355, at Rule 117(d) (2017) (requiring that absent a “specific legal objection” in the pretrial statement, “the party requesting admission of a [medical] bill establish[] a foundation that the amount of the bill is reasonable and the treatment or service described in the bill was medically necessary”), with ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 117(d) (amended Dec. 3, 2021, eff. Dec. 31, 2021) (requiring that “*unless a document is not what it appears to be and there is a specific legal objection on that ground,*” medical bills are generally admissible into evidence, but “*the admission of any specific medical bill does not relieve the admitting party of its burden of proving that the amount of the bill is reasonable, and the treatment or service described in the bill was medically necessary . . . [including hospital and other medical bills]*” (emphasized language reflects the 2021 amendments)).

<sup>461</sup> FASTAR Rules Order, *supra* note 192, at 6 (showing that the rules were amended to make medical bills alone proof of reasonableness); ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 117(d)(1) (amended Dec. 3, 2024, eff. July 1, 2025) (editing the 2021 version of the bill cited *infra* note 462 to provide simply that providing that “the following documents are admissible in evidence: (1) *The following medical bills, without further proof . . .*” (emphasized language reflects the 2025 amendments)).

<sup>462</sup> See ARIZ. FAST TRIAL & ALT. RESOL. PROGRAM R. 126 (appeal rule).

Rules because it felt that it “was unlikely to improve upon them,”<sup>463</sup> has since grown in confidence and ambition, and has become a model of innovation for state and federal courts alike. A higher ambition of this work, however, has been to show how tailoring relates to broader currents and questions in civil litigation. Tailoring reveals a profound shift in who makes procedure in state courts and the goals that procedure might achieve. It displaces local rulemaking and narrows judicial discretion. It stretches the values that procedure has traditionally advanced. These changes raise important questions about civil procedure and the role of courts in society.

State court tailoring also has implications for the future of federal civil procedure. With vastly different dockets and rulemaking constrained by levels of bureaucracy, congressional oversight, and constitutional limits,<sup>464</sup> federal courts remain frozen in a past rulemaking era. Local rules and standing orders fill in the gaps, impacting case assignment, disclosure requirements, class actions, summary judgment, discovery timelines, and more.<sup>465</sup> This variance among judges and courts drives forum and judge shopping and can create inconsistent results.<sup>466</sup> The states show another way.<sup>467</sup> In state court tailoring, federal rulemakers might find not only an evidence base to overcome ossification, but a roadmap for how such tailoring might shift the balance of procedural power and experience of litigants.

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<sup>463</sup> Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2027 (1989).

<sup>464</sup> For an overview of federal rulemaking, see *Overview for the Bench, Bar, and Public*, U.S. CTS., <https://www.uscourts.gov/forms-rules/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/8DAA-FDHE>] (last visited Aug. 1, 2025). For constitutional and statutory limitations, see *supra* notes 332–35 and accompanying text.

<sup>465</sup> See Zachary D. Clopton & Marin K. Levy, *Local Rules*, 111 VA. L. REV. 1187, 1217–23 (2025) (creating a typology of local rules and standing orders).

<sup>466</sup> See Zachary D. Clopton & Marin K. Levy, *Local Rulemaking*, 75 DUKE L.J. 815, 817 (2026) (describing rise of judge and forum shopping due to local rules).

<sup>467</sup> When in 2010 the Advisory Committee sponsored a conference on the state of civil procedure, it concluded that “[c]ontinued study of state practice will be important” because “[t]he state courts are an important source of information about experience with different rules and approaches.” JUD. CONF. ADVISORY COMM. ON CIV. RULES AND COMM. ON RULES OF PRAC. & PROC., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE OF CIVIL LITIGATION 11–12 (2010), <https://www.uscourts.gov/file/reporttothechiefjusticepdf> [<https://perma.cc/6MHE-YT22>].