PROCEDURAL CHANGE IN THE FIRST TEN YEARS OF THE ROBERTS COURT

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INTRODUCTION

In addition to his role on the Supreme Court, the Chief Justice occupies a variety of administrative posts. One key administrative capacity in which the Chief Justice serves is as the head of the Judicial Conference, the national policymaking body for the federal courts. An important function of the Conference, among other things, is "to carry on a continuous study of the operation and effect of the general rules of practice and procedure" in the federal courts, a task that is carried out by its various subcommittees. While the work of the Conference to that end was long considered "purely procedural," especially in the eyes of non-judicial actors in the political system—members of Congress, interest groups, and presidents, for example—it became clear by the

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Civil Rights era that procedural rule changes were often used to shape substantive political and legal outcomes. Whether by affecting what types of cases are most likely to be decided by a trial, implementing rule changes that affect how well particular groups of litigants are able to navigate the process of civil litigation, and even by enabling courts and judges to make substantive policy determinations as part of what looks to be simple procedural change, this trend continues today.[1]

In recent years, procedural rule changes have often been used to limit access to courts, particularly in the realm of civil litigation.[2] In this Article, I argue that Chief Justice Roberts has most influenced this trend in his capacity to appoint individuals to the Judicial Conference and its subcommittees. During his tenure as Chief Justice, and most notably in 2015, his Advisory Committee on Civil Rules has crafted a number of rule changes with the perennial goal of reducing cost and delay in civil litigation, largely by placing limits on the scope of discovery.[3] As Roberts himself has described, these amendments were intended to "(1) encourage . . . cooperation . . . (2) focus discovery . . . (3) engage judges

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1 For an empirical discussion of the phenomenon of the so-called "vanishing trial," see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–76 (2004). Trends in litigation are discussed in the collection of essays in the same volume. *See generally* Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571 (2004); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627 (2004); Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637 (2004); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659 (2004); Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004); Galanter, *supra*; Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735 (2004); Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973 (2004); Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004); Judith Resnik, *Migrating, Morphing,* and *Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843 (2004); Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. EMPIRICAL LEGAL STUD. 913 (2004); Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943 (2004).

2 *See generally* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015).

3 These rules changes, discussed at length below, were approved by the Supreme Court on April 29, 2015 and went into effect on December 1, 2015. *See* Order of the Supreme Court, Apr. 29, 2015, https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf.

in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information."[4] In effect, however, these changes primarily influence lawsuits brought by individuals against institutional defendants and are the product of intense lobbying by corporate defendants aiming to insulate themselves from litigation. As one commentator has put it, the substantive anti-plaintiff effect of these changes is clear, "evidenced by a stark split in the public reaction, with plaintiff's lawyers almost unanimously against most of the amendments and defendant's lawyers almost unanimously in favor."[5]

These changes are unsurprising, however, given the composition of the current Standing and Advisory Committees on Civil Rules: as Patricia Hatamyar Moore has summarized, except for a few, the members are "ideologically predisposed to think like Federalist Society members, demographically predisposed to think like elite white males, or experientially predisposed to think like corporate defense lawyers."[6] It is also clear that they are ideologically oriented toward political conservatism. By using the Judicial Common Space (JCS) scores, the most common metric in the social sciences for determining judicial ideology, I will show that the political orientation of the Chief Justice's rules committee members is decidedly in alignment with that of the modern Republican Party. Therefore, as Dawn Chutkow argues, appointments to the rules committees provide another venue "to advance the chief justice's interests in ways that are not ideologically neutral" beyond his role on the Court itself.[7] As I will describe, just as the politicization of procedural rules and the rulemaking process has mattered greatly over time with respect to access to courts for less advantaged, individual plaintiffs,[8] so too, then, has the political orientation of the rules committees members themselves.

In terms of access to courts, therefore, I argue that Chief Justice Roberts's legacy is more firmly rooted in his administration of these committees than in his jurisprudential role on the Court itself. It is undoubtedly true that the Supreme Court has increasingly weighed in on cases involving procedural issues, whether by raising the

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4 U.S. SUPREME COURT, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2015), http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

5 Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1086–87 (2015).

6 *Id.* at 1087.

7 Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J. L. & CTS. 301, 302 (2014).

8 *See generally* STASZAK, *supra* note 2.

requirements for pleading (in cases like *Bell Atlantic Corp. v. Twombly*[9] and *Ashcroft v. Iqbal*[10]); by promoting summary judgment (as in *Scott v. Harris*[11]); or by making it more difficult for litigants to certify as a class in order to pursue a class action lawsuit (as in the 2011 *Wal–Mart* case[12]), to name a few. And notably, many of these changes have taken place at the hands of John Roberts's Court, as evidenced most recently in *Comcast Corp. v. Behrend*, in which cable subscribers bringing a class action against Comcast were found to be improperly certified as a class under a narrow reading of Rule 23(b)(3) of the Federal Rules of Civil Procedure.[13] This has led some scholars to conclude that the real work of procedural rule reform has decidedly shifted away from the rules committees and toward the Supreme Court itself;[14] but I argue that these recent rule changes in particular make clear that the committees themselves remain a strong locus of control when it comes to constricting access to courts for certain groups of plaintiffs while simultaneously advantaging corporate defendants under the guise of "purely procedural" change. In this way, the Chief Justice's sole authority to appoint members to these committees—a power not constrained by any constitutional or statutory provision—stands to affect the politics of access to justice substantially and must not be overlooked.[15]

I proceed by describing briefly the ways in which the process of civil rulemaking was politicized from the mid-1970s onward, with the effect of exposing the degree to which procedural changes could be used to forward political agendas and thereby opening up the rulemaking process to involvement from a variety of political actors and groups. I also detail the major rules changes that have, at different times, alternatively opened up or constricted access to courts for political reasons. I then address the highly anti-plaintiff rule changes that have come from Roberts's rules committees—most recently in 2015—and

9 *See* 550 U.S. 544 (2007).

10 *See* 556 U.S. 662 (2009).

11 *See* 550 U.S. 372 (2007).

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

13 *See* 133 S. Ct. 1426 (2013).

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

15 This power was given to the chief justice as part of a compromise reached by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit while on the *Queen Mary* on their way to the American Bar Association Convention in 1957. *See* SUBCOMM. ON LONG RANGE PLANNING, A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 686 (1995); Moore, *supra* note 5, at 1144–45; *see also infra* note 20 and accompanying text.

situate these changes in terms of the political orientation of the members themselves. In light of the data on the current composition of the rules committees (as far as their backgrounds and political ideologies are concerned), I conclude by reflecting on how this administrative role contributes to and shapes Roberts's legacy as Chief Justice.

I. THE POLITICS OF PROCEDURAL CHANGE

The Federal Rules of Civil Procedure govern the process of courtroom litigation. When an individual has suffered an injury as defined by substantive law, these rules then determine, procedurally, whether or not one has a valid legal claim. The rules also dictate the form that adjudication must take, who the relevant parties are to the claim, what information and evidence are applicable and available to the parties, as well as what opportunities exist for appeals, delays, and motions to end or move the claim from its initial courtroom. These rules, now codified under Title II of the U. S. Code, were first authorized by the Rules Enabling Act of 1934, which empowered the Supreme Court to promulgate rules of procedure for the federal courts that have the force and effect of law.[16] The first set of rules was approved by Congress in 1938 and is largely controlled by the Judicial Conference of the United States, a body of experts appointed by the Chief Justice of the Supreme Court. The impetus for the initial rules was largely to make pleading—and therefore getting one's day in court—easier.[17]

For the first thirty-five years of their existence, rules committee members benefitted from the widely held belief that the rules were "purely procedural," therefore not requiring input from elected officials or the public, and best left to the expertise of judges, lawyers, and academics. As such, rule-makers had great success in exercising a vast amount of discretion in their work, even as they *did* often promulgate

16 Rules Enabling Act, Pub. L. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1988)).

17 The Supreme Court addressed the "notice pleading" system in *Conley v. Gibson* in 1957, determining that under Rule 8 of the federal civil rules, a complaint cannot be dismissed by a judge unless there are no set of facts upon which relief could potentially be granted. 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). This was widely viewed as in concordance with the impetus for adopting a code of uniform civil rules early in the 20th century. *See, e.g.*, *Judicial Procedure: Hearing Before the Subcomm. of the Comm. on the Judiciary*, 61st Cong. 17, 26 (Jan. 12, 1910); *Procedure in the Federal Courts: Hearing before the Comm. on the Judiciary,* 67th Congress, 2 (Feb. 14 and Mar. 7, 1922) (Woodrow Wilson's statement); William D. Mitchell, Edgar B. Tolman & Charles E. Clark, *"Open Forum" Discussion of Proposed Rules of Civil Procedure*, 23 A.B.A. J. 965, 972 (1937).

rule changes that had substantive political and legal effects. During the 1950s and '60s in particular, rule-makers used procedural change to facilitate the ideological, political, and policy goals of the Civil Rights era, crafting rules that were geared toward opening up the courtroom to a broader swath of litigants and cases, thereby helping to forward the political and legal goals of the time. But once the members of the rules committees seemed to overreach in the early 1970s, exposing the degree to which the rules could change the substance of policy and rights protections and therefore be considered "political" in nature, a variety of actors—well beyond the Judicial Conference and its subsidiary committees—became interested in how exactly they too could be involved in the business of rulemaking. Whether interest groups, members of Congress, or members of the executive branch, a broadening array of groups overtly recognized that their interests were directly affected by rule changes. Some prioritized appropriating influence in the rulemaking process as a means by which to pursue an agenda of political backlash to the rights revolution; others looked to rule changes in an attempt to restrict the role that courts play in American politics; and still others saw procedural reform as an ideal mechanism for lessening the ever-increasing burden on an overworked judicial system fraught with problems of expense and delay.[18]

Specifically, by the mid-1970s legislators and interest groups aligned with the Democratic Party began to strive for greater influence over the rulemaking process. In the 1980s, these actors continued to push for reforms that would enhance their authority, and they were also joined by rule-makers internal to the rulemaking process who wanted—for largely nonpartisan reasons—to find ways to address what they deemed a litigation crisis that was overwhelming court capacity. However, opening up the rulemaking process to greater political contestation altered the landscape of rulemaking by involving many others beyond judges and courts, thereby politicizing the process. Crucially, this politicization of the rulemaking process subsequently allowed actors with more overtly ideological goals to use procedural change in order to facilitate partisan political agendas. Starting in 1994, the politics of rule reform has since really been dominated by Republican legislators and business lobbyists interested in reducing tort and public interest litigation, through class action reform in particular.[19] And now, a decade into the Roberts Court era, the decidedly conservative composition of the rules committees has enabled members to use rule reform similarly, largely by constricting the process of

18 *See* STASZAK, *supra* note 2, at 79–117.

19 *See id.*

discovery to the clear disadvantage of individual plaintiffs and to the clear advantage of corporate defendants and other powerful "repeat players" in the legal system.[20] As such, the unique historical, institutional, and political underpinnings of this politicization add another key dimension to the institutional legacy of both the Roberts Court and Judicial Conference.

A. *The Origins of the Federal Rules of Civil Procedure*

While the modern version of the federal civil rules was initially created during the New Deal era, the impetus for rule reform emerged much earlier. Although Congress granted rulemaking authority to the courts "to make and establish all necessary rules for the orderly conducting business [sic]" in the Judiciary Act of 1789,[21] the Court never adopted general rules for cases at common law. This led to a pervasive problem in that it meant federal courts followed *not* their own set of procedural rules, but rather the rules of the states in which they were located. This created significant confusion and inconvenience for lawyers who found themselves with entirely different rules to follow, even if they primarily argued cases in federal court.[22]

In response, a reform movement, involving at times both Congress and the American Bar Association (ABA), emerged by the mid-1800s, advocating the adoption of simple and uniform rules for civil proceedings in federal court. But these efforts were constantly thwarted by disagreement over the question of *who* exactly should have authority to make and amend such rules: the Supreme Court? Judges more broadly? A sampling of lawyers? Legal academics? Would there be official involvement from Congress? As this debate extended into the early 20th century, Democrats feared that judicial control of the rules might enable courts and judges to make substantive policy determinations under the guise of procedural change. And in fact, these

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20 *See supra* note 3. The idea of "repeat players" is detailed by Marc Galanter in *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

21 The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 83 (1789), *quoted in* Wayman v. Southard, 23 U.S. 1, 42 (1825).

22 While the Permanent Process Acts of 1789 and 1792 sought to promote conformity in the rules, in effect they only confused matters further, in that they required federal courts to apply the common law rules of pleading and procedure that were in effect in their state not at present, but at the time that it joined the union—even if the state had since modified its rules. *See* STASZAK, *supra* note 2, at 83–84.

concerns foreshadowed exactly the crisis that would emerge decades later.[23]

By the 1930s, however, increased input from legal academics, coupled with a growing concern for the efficiency of the judiciary, made some kind of reform a necessity. As such, Congress passed the Rules Enabling Act in 1934, giving the Supreme Court power "to prescribe general rules of practice and procedure" for the federal courts.[24] The resulting rules, first adopted in 1938, gave the federal judiciary centralized control over a process that formerly had been diverse and decentralized. However, the Supreme Court actually only plays a very minimal role in the process of rulemaking; what the Rules Enabling Act put into place was a multi-step system of committee development, Supreme Court approval, and transmission to Congress. Specifically, the Supreme Court empowered the Judicial Conference of the United States—the primary policy-setting body for the courts—to oversee rulemaking. The Judicial Conference, composed of federal judges, in turn created a two-tiered committee structure, including a Standing Committee on the Rules of Practice and Procedure and an Advisory Committee on Civil Rules. The latter, now largely responsible for regular review of the rules, is composed mostly of judges, as well as some practicing lawyers, law professors, and a representative from the Department of Justice. Proposed rule changes are subject to review and revision by the Standing Committee, Judicial Conference, and Supreme Court before being sent to Congress for approval.[25]

The process of writing and amending the rules has always had the potential to become political, in at least two ways. First, the Chief Justice has the sole authority to appoint members to these committees, and this power is not constrained by any constitutional or statutory provision. Instead, this power was granted as the product of what has been described as a "long-forgotten unofficial 'compromise,'" made informally in 1957 by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge of the Fourth Circuit John J. Parker while en route to the American Bar Association Convention.[26] This allows the Chief Justice to single handedly empower individuals who share his and/or a particular vision of the legal system and processes of litigation. While the politicization of procedure was in no way inevitable, this power clearly provided a foundation for it. Second, Congress has always had the formal authority to play a meaningful role in the rulemaking

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23 *See Simplification of Judicial Procedure: Hearings Before the Subcomm. of the S. Comm. on the Judiciary*, S. Res. 552, 64th Cong. (1915).

24 Rules Enabling Act, 28 U.S.C. § 2072(a) (2012).

25 *See id.* § 2073.

26 *See supra* note 15 and accompanying text.

process. In fact, the Rules Enabling Act provided that proposed rules would become law *unless* Congress acted to veto them within sixty days.[27] And as a political body by nature, it is perhaps unsurprising that Congress's power to weigh in on procedural change would enable it to use the rules in the service of political goals down the line.

But until 1973, Congress never vetoed any rule changes—much less even discussed them—despite the fact that procedures inherently carry with them decisions about the distribution of power and authority, often interact with social and political currents, and were increasingly used as tools for opening the courthouse door to more litigants and to a wider range of cases. For example, as John Frank—who was a member of the Advisory Committee on Civil Rules in the 1960s when Rule 23 was written, enabling the class action lawsuit as we know it today—said later of his experience regarding class action reform in the 1960s:

> Rule 23 was in work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation.[28]

In many ways, it seems striking that anyone would have argued that the civil rules were at any time "apolitical"; but that characterization is precisely what made them such powerful tools for social reform, and what kept rulemaking authority insulated for so long.

B. *Congress Intervenes*

Congress did intervene in 1973, however, when it voted to postpone indefinitely the effective date for its new Federal Rules of Evidence. The proposed evidence rules were contentious in terms of their content, and their contentious nature subsequently drew the attention of groups like the ABA and the American Medical Association (AMA), who expressed concern that they were not consulted regarding new rules that they felt would deeply affect them. Specifically, one rule would have forced a spouse to reveal the other's confidential admissions

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[27] Rules Enabling Act, 28 U.S.C. § 2074 was amended in 1950 to extend the time frame from sixty days to ninety days, and it was further amended in 1988 to require that proposals be transmitted to Congress "not later than May 1 of the year in which [it] . . . is to become effective," and state that changes would go into effect "no earlier than December 1 . . . ."

[28] *Mass Torts and Class Action Lawsuits: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 23–24 (1998) (statement of John P. Frank).

in a courtroom; another similarly threatened patient/doctor confidentiality; and yet another would have protected government officials at almost any level from having to divulge information related to their job in court. As former Supreme Court Justice Arthur Goldberg said in his testimony before the House of Representatives subcommittee charged with discussing whether or not to approve the new evidence rules, "some of the proposed Rules extend beyond mere matters of procedure and represent real changes in the substantive rights and duties of persons throughout the country."[29]

But if procedural rules had been used as vehicles for substantial political change at least since the Civil Rights era, what explains Congress's sudden interest in the rulemaking process? First, in response to the proposed evidence rules, Congress was barraged by interest groups that either felt they would be hurt by the content of the evidence rules or felt that they were not adequately involved in the process. For example, the ABA expressed frustration that the rules committees did not formally include their input, and groups like the AMA and the Association of Trial Lawyers of American (ATLA, and now the American Association for Justice) made clear that these proposed changes would deeply impact their professions.[30] Second, given the concurrent Watergate scandal, members of Congress were particularly sensitive at that moment to perceived encroachments on their power. The *New York Times* picked up on this immediately, presenting the rule changes as a move by Congress to "curb justices."[31] As one member of Congress put it: "[W]e constantly hear that our prerogatives are being threatened by the expansion of Executive power. The encroachment of the judiciary upon the Congress is equally dangerous."[32] And while ironically there had been no recent "encroachment" per se, this marked the moment when legislators seemed to realize for the first time that they had a role to play in the rulemaking process if they wanted it.

While this episode ended with no formal change to the rulemaking process, it is important to note that the backlash to judicial control of rulemaking did *not* stem from dissatisfaction with the broader project of the rights revolution or social reform; rather, what prompted both interest groups and Congress to get involved is that they wanted to play a larger role in the *process* of rulemaking. But by breaking down the insularity of the rulemaking committees, exposing the rules to political

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29 *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 155 (1973) [hereinafter *Rules of Evidence Hearings*] (statement of Arthur J. Goldberg, former Justice of the U.S. Supreme Court).

30 *See id.* at 189; *see also* 93D CONG. REC. 8345 (1973).

31 *See* Warren Weaver, Jr., *Congress Moves to Curb Justices*, N.Y. TIMES, Feb. 1, 1973, at 9.

32 *Rules of Evidence Hearings*, *supra* note 29, at 3739 (statement of Bertram Podell).

actors and forces, and inserting themselves in these conversations, the politics and processes of rulemaking changed completely. And by calling into question judicial control of the process, what this unwittingly set in motion was decades of constrictions on judicial power and access to courts.

C. *Politicization in the 1980s*

The process of politicizing the civil rules really escalated in the 1980s, fueled in many ways by a rift that developed between judges on the one hand and plaintiff lawyers and Democrats in Congress on the other. By the 1980s there were persistent calls for greater case management by judges in order to ease the burden that a dramatic increase in litigation rates was causing the legal system.[33] In other words, in order to overcome problems of expense, delay, and overload, judges increasingly felt that they needed to be able to take more control of judicial proceedings in hopes of resolving disputes more efficiently. But taking control in this way—which included things like imposing firm dates and deadlines for discovery and creating sanctions for abusive lawyer tactics—conflicts in practice with the concentrated interests of lawyers, for whom doing exactly those things can be a way to win cases.[34] This subsequently led to a split between lawyers and judges, leading major legal organizations like the ABA and ATLA to join with Democrats in Congress in their pursuit of rulemaking reform, instead of with judges and rule-makers. And so under the intense lobby of these and other public interest groups, Democratic legislators sought rule reform that would: 1) continue to open up access to litigation; and 2) open up the process of rulemaking to easier intervention from both Congress and the greater public.

To that end, the civil rules were amended to provide the threat of sanction for lawyers engaging in abusive tactics, to empower active trial management by judges and encourage settlement, and to authorize judges to restrict the process of discovery in order to move cases along more quickly. Specifically, amendments to Rule 26 in 1980 promoted case management by judges by requiring an early discovery conference of counsel in most cases (aimed at disposing of the case without a trial); changes to Rule 11 in 1983 imposed disciplinary sanctions for attorneys in order to curb abusive tactics; changes to Rule 16, also in 1983,

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33 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

34 *See* Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513 (1996); *see also* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931 (1993).

strongly empowered active trial management and authorized judicial involvement with settlement promotion for the first time; and changes to Rule 26(b) authorized district judges to restrict discovery for several reasons, including on a cost-benefit basis. In addition, Rule 11-type sanctions were written into the other rule amendments as an additional measure for constraining lawyer abuses.[35] Notably, these changes are said to have constituted a "new era in the history of American civil procedure,"[36] comprised of rule reforms that are "correlated and enduring because, since the 1970s, they have pointed largely in one direction: constricting access to courts, limiting discovery, and denying trials."[37]

The rules committees certainly did not accomplish all of what they sought in the 1980s. For example, they proposed changes to Rules 4 and 68 that would have provided incentives to settle by expanding the provision requiring that a prevailing claimant who declined a more favorable offer of judgment pay post-offer "costs" by allowing both plaintiffs *and* defendants to make offers and counter offers. However, these proposals were quashed by Congress, likely as a result of intense lobbying on the part of groups like the ACLU and NAACP Legal Defense Fund, as well as other critics who argued that these changes would have the effect of keeping civil rights plaintiffs out of court.[38] But at the same time, while the Judicial Conference and its committees were beginning to implement rule changes that had the effect of constricting litigation: 1) the Supreme Court began to weigh in similarly on rules-related matters (by making summary judgment easier to obtain, for example);[39] and 2) Congress successfully began to pursue its own rule-related legislation aimed toward reforming the rulemaking process. For

35 *See* STASZAK, *supra* note 2, at 98–99.

36 *See id.* at 99.

37 Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1856 (2014).

38 Opponents feared that civil rights plaintiffs would be deterred from filing cases because, if they were to lose, they would have to be able to pay the defendant's attorney's fees as well as their own—a financial burden often too great to bear. Also, because judges would have the discretion to coerce settlements by threatening sanctions, these groups worried that civil rights plaintiffs would be forced to accept plainly inadequate settlement offers out of fear that if they went to trial and lost, they would not be able to pay. *See* H.R. REP. NO. 99-422, at 4 (1985); *see also* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985).

39 In the so-called "Steel Trilogy" cases of 1986—*Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court set a new standard for summary judgment whereby if the party moving for it does not have the underlying burden of proof at trial, it need not provide evidence negating the other party's claim; instead, it may simply show that the opposing party has failed to provide evidence behind a critical part of his or her claim. It has been argued that this disproportionately affects plaintiffs by forcing them to "show their hand" before a trial commences.

example, the Judicial Improvements and Access to Justice Act (1988) codified long sought efforts to open up the rulemaking process to public participation by requiring public hearings, open meetings, publicly available minutes, and longer periods for public commentary. This formally obligated the committees to hear input from interest groups and has effectively led to political lobbying of the judiciary.[40] Further—and as evidenced by the Civil Justice Reform Act (1990)—the continued politicization of the rules made Congress even more willing to initiate its own rule changes, albeit outside of the formal process for writing and amending rules.[41] At times, Congress even debated overhauling the rulemaking process in its entirety.[42] In total, these changes poked a hole into the insularity that the rules committees once enjoyed by thoroughly opening up the rulemaking process to political actors.

D. *The 1990s and Partisan Rule Reform*

In the early 1990s, the same rules prompted more controversy. For example, the compulsory nature of Rule 11, coupled with defense attorneys' rampant use of it, led to thousands of additional sanctions and opinions—precisely the opposite effect of what was intended by the 1983 reforms. Additionally, significant concern developed that these sanctions were being used to the disproportionate disadvantage of civil rights plaintiffs in order to impede public interest litigation. Given that the sanctions embedded in Rule 26 were being used similarly, rule-makers proposed amendments to both rules in hopes of softening their impact by making sanctions discretionary.[43]

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40 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 28 U.S.C.). Both comments and testimony were "by invitation only" prior to the passage of this law, and in practice those regularly contacted included only a handful of major legal organizations, such as the ABA. *See, e.g.*, *Court Reform and Access to Justice Act of 1987: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. (1987, 1988); *The Rules Enabling Act: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. (1988).

41 Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 5, 17, 28, 47 U.S.C.). In an attempt to cut costs and delays in civil litigation, the Act directed the district courts to convene committees in order to design district-level procedures toward these ends; it also further increased judicial management of litigation and required districts to develop expense and delay reduction plans.

42 *Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 1, 19–21, 23, 33, 48–63, 104 (1983, 1984); H.R. REP. NO. 99-422, at 5.

43 *Amendments to the Federal Rules of Civil Procedure: Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. of the Judiciary*, 103d Cong. 6 (1993) (statement of Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice and Proc.,

These rule changes, however, were met with unprecedented resistance. Importantly, by this time—and particularly once the Republican, Newt Gingrich-led Congress was in full operation—the civil rules were thoroughly politicized, meaning that members of Congress were now regularly lobbied regarding rule-related matters. This in turn meant that Congress pushed the envelope even further in terms of proposing its own procedural reforms as well—but through legislation, thereby skirting the formal rulemaking process. The rules committees continued to operate as they always had, and the increasingly anti-litigation work of the Rehnquist Court continued fairly seamlessly. However, many of the high profile efforts in the realm of procedure in the 1990s and 2000s ultimately came from Congress, evidencing a real shift in rulemaking authority from the judicial model stressing the importance of "experts" to legislative dominance over the process.

For example, "tort reform" became a prominent piece of the Republican agenda, and Congress passed laws like the Private Securities Litigation Reform Act, which had the effect of heightening pleading standards for investors alleging fraud and making lawyer sanctions more imposing in these types of cases.[44] Notably, by heightening pleading standards by statute, Congress in effect superseded Rule 9 of the civil rules, which deals with the amount of particularity and specificity an investor needs to provide in order to bring litigation on the grounds of alleged security fraud.[45] Congress acted similarly when it came to passing the Prison Litigation Reform Act, which also effectively increased pleading standards, this time for prisoners seeking to file condition of confinement suits.[46] And perhaps Congress' most prominent political victory was the Class Action Fairness Act of 2005 (CAFA), which amended Rule 23 on class actions in various ways, with the goal of eliminating forum shopping for state jurisdictions notoriously receptive to class actions.[47]

U.S. Judicial Conference); *see also* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191–94 (1988).

44 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77–78 (2012)). President Clinton vetoed the law but was overridden by Congress. *See* David R. Sands, *Senate Vote Completes Override of Clinton Veto White House Lobbying Effort Fails; Lawsuit Reform Billpasses [sic], 68-30*, WASH. TIMES, Dec. 23, 1995, at A2.

45 *See* FED. R. CIV. P. 9.

46 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 18, 28 U.S.C.).

47 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1453, 1711–15).

While the question remains as to how much of an effect CAFA has had in practice,[48] it was nonetheless touted as a major political victory for Republicans in terms of "cracking down" on the courts and litigation.[49] It is also in many ways emblematic of what rule retrenchment has come to look like as of late: a state of affairs wherein the politicization of the process means that interest groups seek to pressure their legislators to pass laws that affect the rules in some way, often serving their political and policy preferences in a roundabout fashion. Importantly, this has created another prominent venue for changing civil rules alongside both the Judicial Conference and the Supreme Court.

II. RULE CHANGE IN THE ROBERTS COURT ERA

As a continuation of the anti-litigation-oriented Rehnquist Court before it, the Roberts Court itself has played a major role in constricting substantive rights through procedural changes. Specifically, in cases like *Bell Atlantic Corp. v. Twombly*, *Ashcroft v. Iqbal*, *Scott v. Harris*, *Wal-Mart Stores, Inc. v. Dukes*, and *Comcast v. Behrend*, the Court has maneuvered to keep would-be litigants out of court in three important ways: 1) by further raising the requirements for pleading by increasing the amount of facts that must be stated in a complaint for a lawsuit to move forward; 2) by further promoting summary judgment; and 3) by making it more difficult for litigants to certify as a class for purposes of pursuing a class action lawsuit.[50] In fact, as recent work by Stephen Burbank and Sean Farhang on litigation reform in the realm of private enforcement has shown, in the period from 1970–2013, the Supreme Court rendered a variety of decisions in which it used its powers of statutory interpretation to "dull" private enforcement legislation, particularly when the issues at hand "turned on interpretation of a Federal Rule of Civil Procedure, where the result would either widen or narrow opportunities or incentives for private enforcement."[51] The

48 The Federal Judicial Center is tracking the effect of CAFA on class action litigation and has issued several reports; for a discussion of the results thus far, see EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS (2008).

49 *See* John F. Harris, *Victory for Bush on Suits; New Law to Limit Class-Action Cases*, WASH. POST, Feb. 18, 2005, at A1; John F. Harris & Jim VandeHei, *Senate Nears Revision of Class Actions; Passage of Legislation Backed by Bush and Business Appears Certain*, WASH. POST, Feb. 10, 2005, at A4.

50 *See* sources cited *supra* notes 9–13 and accompanying text.

51 Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1560–61 (2015) (footnote omitted). The authors

authors conclude that these changes were facilitated by the gap between conservatives and liberals on the Court, and by the Court holding the institutional "upper hand" when it comes to statutory interpretation and procedural change.[52]

While the authors also suggest that the partisan divide on the rules committees has developed similarly, they nonetheless conclude that "the stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically disposed to it."[53] But now a full decade into the Roberts Court era, this has not proven to be the case. Instead, the manifestation of ten years of appointments to the rules committees, with all of their unifying characteristics—whether demographic, experiential, ideological, or political—has produced a set of conservative rules committees that, over time, have had great success in pursuing an anti-plaintiff, pro-defendant, and broadly anti-litigation agenda. The political orientation of committee members, then, is reflected in the recent rule changes detailed below—particularly those limiting the scope of discovery. As such, the ability of these committees to affect access to courts has hardly been lost.

The stated motivation for the changes to the civil rules under Roberts—the most effectual of which went into effect in 2015—was to reduce the cost of litigation.[54] As discussed, the practical effect of these changes has been to disadvantage individual plaintiffs and to acquiesce to the corporate defense community's "thirty year war" to adjust the civil rules to their advantage.[55] This has been accomplished through a variety of rule changes, as detailed in Table 1:

Table 1.[56]

Rule 1 (Scope & Purpose)	2015	• They should be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding. (J. Roberts: "The new passage highlights the point that lawyers . . . have

examine and draw these conclusions only with regards to the procedural dimensions of private enforcement statutes, which include efforts by Congress to deputize private individuals and their lawyers to implement and enforce policy through litigation. *Id.* at 1562.

52 *See id.*

53 *Id.* at 1562.

54 U.S. SUPREME COURT, *supra* note 4.

55 Moore, *supra* note 5, at 1086.

56 The text of Table 1 is drawn from the Federal Rules of Civil Procedure and Notes of the Advisory Committee on Rules.

		an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes."[57]).
Rule 4 (Summons)	2007	• "Rule 4(i)(4) corrects a misleading reference to 'the plaintiff' in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party."[58]
	2015	• Reduces plaintiff's presumptive time to serve defendant from 120 to ninety days (in order to reduce delay in litigation). Time of notice required by Rule 15(c)(1)(C) for relation back is also shortened.[59] • Plaintiff must show good cause to avoid dismissal upon failure to serve within ninety days.[60]
Rule 6 (Computing and Extending Time; Time for Motion Papers)	2009	• Time calculations now include weekends and holidays.[61]
Rule 13 (Counterclaim and Crossclaim)	2009	• Part (f) abrogated to alter defendant's right to amend counterclaims in Rule 15.[62]
Rule 14 (Third-Party Practice)	2007	• "Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the

57 U.S. SUPREME COURT, *supra* note 4, at 6.
58 FED. R. CIV. P. 4(i)(4) advisory committee's note to 2007 amendment.
59 FED. R. CIV. P. 4(m) advisory committee's note to 2015 amendment.
60 FED. R. CIV. P. 4(m).
61 FED. R. CIV. P. 6(a)(1) advisory committee's note to 2009 amendment.
62 FED. R. CIV. P. 13(f) advisory committee's note to 2009 amendment.

		distinction between compulsory and permissive counterclaims. A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to 'counterclaim' is deleted."[63]
	2009	• "The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6."[64]
Rule 16 (Pretrial Conferences; Scheduling; Management)	2006	• Adds to list of "topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement."[65] • Reduces time to issue scheduling order from 120 to ninety days by tying deadline to service of process.
	2015	• "The provision for consulting at a scheduling conference by 'telephone, mail, or other means' is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means."[66] • "The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served,

63 FED. R. CIV. P. 14 advisory committee's note to 2007 amendment.
64 *Id.*
65 FED. R. CIV. P. 16(b) advisory committee's note to 2006 amendment.
66 FED. R. CIV. P. 16 advisory committee's note to 2015 amendment.

		or 60 days (not 90 days) after any defendant has appeared."[67] • Adds to list of topics court may consider at pretrial conference (e.g., the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court).
Rule 26 (Duty to Disclose; General Provisions Governing Discovery)	2006	• Requesting party must show "good cause" to obtain electronically stored information that responding party has demonstrated to be not "reasonably accessible" given "burdens and costs" of retrieval.[68] • "Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution."[69]
	2007	• Attorney signature is effective certification of discovery request, response, or objection even if certifying "nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law."[70]
	2010	• "The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and

67 *Id.*
68 FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment.
69 FED. R. CIV. P. 26(b)(5) advisory committee's note to 2006 amendment.
70 FED. R. CIV. P. 26(g).

		limit the expert report to facts or data (rather than 'data or other information,' as in the [previous] rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel."[71] • "Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all 'facts or data considered by the witness in forming' the opinions to be offered, rather than the 'data or other information' disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications. The refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel."[72]
	2015	• Amendment to Rule 26(b)(1) codifies the concept of "proportionality"—courts determine whether discovery is "proportional to the needs of the case, considering the importance of the issues at stake."[73] [Post-amendment cases applying proportionality include *Henry v. Morgan's Hotel Group*, 15-CV-1789 (ER)(JLC), 2016 WL 303114 (S.D.N.Y.

71 FED. R. CIV. P. 26 advisory committee's note to 2010 amendment.
72 FED. R. CIV. P. 26(a)(2)(B) advisory committee's note to 2010 amendment.
73 FED. R. CIV. P. 26(b).

		Jan. 25, 2016) and *Gilead Sciences, Inc. v. Merck & Co.*, No. 5:13-cv-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016)]. • "Deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action."[74] • Deletes phrase "reasonably calculated to lead to the discovery of admissible evidence."[75]
Rule 31 (Depositions by Written Questions)	2015	• "Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1)."[76]
Rule 33 (Interrogatories to Parties)	2006	• Parties may respond by allowing access to documents/electronically stored information (ESI) instead of answering, if the "burden of deriving the answer will be substantially the same for either party."[77]
Rule 34 (Producing Documents . . . and Other Purposes)	2006	• Incorporates electronically stored information in discoverable materials.[78]
	2015	• Objection must state whether "responsive materials are being withheld."[79] • Boilerplate objections no longer allowed; must state specificity.
Rule 37 (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions)	2006	• "Absent exceptional circumstances, sanctions cannot be imposed" under Rule 37 "for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system."[80] • Authorizes certain measure for court to take when responsive information is lost.

74 FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.
75 *Id.*
76 FED. R. CIV. P. 31 advisory committee's note to 2015 amendment.
77 FED. R. CIV. P. 33 advisory committee's note to 2006 amendment.
78 FED. R. CIV. P. 34(a) advisory committee's note to 2006 amendment.
79 FED. R. CIV. P. 34(b)(2)(B) advisory committee's note to 2015 amendment.
80 FED. R. CIV. P. 37 advisory committee's note to 2006 amendment.

	2015	• "Authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim [mitigates threat of common law preservation requirements imposed by state rules]."[81] • Requires showing of prejudice in order to impose sanctions [court must find that "additional discovery" could restore or replaced missing information].[82] • Adverse-inference instructions require intent to lose/destroy information. • Courts may direct adverse-inference in response to bad-faith non-preservation only if non-preservation of evidence was intentional (some courts formerly said negligence was enough).
Rule 45 (Subpoena)	2006	• "Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause."[83] • "As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a

81 FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.
82 FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.
83 FED. R. CIV. P. 45 advisory committee's note to 2006 amendment.

		party serving a subpoena 'shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,' and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance 'shall protect a person who is neither a party nor a party's officer from significant expense resulting from' compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2)."[84] • "[A] subpoena is available to permit testing and sampling as well as inspection and copying."[85] • Creates procedure for asserting privilege during discovery.
	2013	• Adds notice requirement for subpoenaed witnesses; generally makes it more difficult to subpoena nonparty witnesses. • Trial subpoena cannot command party/officer to travel more than 100 miles from home or place of work, when in different state.[86] • Rule 45(b)(2) is amended to provide that a subpoena may be served anywhere in U.S.[87]

84 *Id.*
85 *Id.*
86 FED. R. CIV. P. 45 advisory committee's note to 2013 amendment.
87 FED. R. CIV. P. 45(b) advisory committee's note to 2013 amendment.

		• All subpoenas now issued from court where action is pending, instead of where witnessed is located. • Court may transfer subpoena motions from court where compliance is required to issuing court. • Court may issue contempt sanctions for failure to comply with subpoena order.
Rule 55 (Default; Default Judgment)	2009	• Prior notice to defaulting party changed from three to seven days.[88]
Rule 56 (Summary Judgment)	2007	• Gives courts discretion to deny summary judgment when no genuine issue of fact exists[89] (abrogated by 2010 amendment).
	2009	• Broadens time frame for summary judgment motions from as early as commencement of action to the presumptive deadline of thirty days after close of discovery.[90]
	2010	• Changes no material "issue" to no material "dispute."[91] • Clarifies that "summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense."[92] • Summary judgment must be supported by particular parts of record (depositions, documents, admissions, interrogatory answers, etc.). • Summary judgment may be supported by unsworn declarations instead of sworn affidavits.[93] • Clarifies that parties may object that evidence cited in summary judgment motion would not be admissible at trial. • Court may decide summary judgment

88 FED. R. CIV. P. 55 advisory committee's note to 2009 amendment.
89 FED. R. CIV. P. 56 advisory committee's note to 2007 amendment.
90 FED. R. CIV. P. 56 advisory committee's note to 2009 amendment.
91 FED. R. CIV. P. 56 advisory committee's note to 2010 amendment.
92 *Id.*
93 *Id.*

		without independent review of record. • Authorizes courts to treat undisputed facts as admitted. • Courts can only grant summary judgment if a party is entitled; not by default if party fails to respond or dispute. • Sanctions for bad faith affidavit/declaration under (h) are now discretionary, not mandatory.[94] • Removes discretion to deny summary judgment when no genuine issue of fact exists.
Rule 84 (Forms)	2015	• Abrogated by amendment. Forms provided examples of pleading requirements and other stages of litigation.[95]

Some of these changes are subtle. The amendment to Rule 1 added only a few words; but, as Roberts says, it creates "an affirmative duty [for parties] to work together, and with the court, to achieve prompt and efficient resolutions of disputes."[96] The burden of resolving disputes in a "prompt" and "efficient" way, however, falls largely on plaintiffs, often by shortening the time they are given to make their best case. For example, Rule 4 was amended to reduce the plaintiff's amount of time to serve a defendant from 120 to ninety days after a complaint is filed.[97] Further, changes that appear at first glance to be geared toward streamlining the process by eliminating many of the official forms that were promulgated by the rules committees in 1938 may in effect serve to heighten pleading requirements, albeit indirectly. Amendments to Rule 84, for example, eliminate a variety of sample forms available to guide parties during the course of litigation. It has been argued that these forms, however, were especially useful for pro se cases and small-firm litigants, who may otherwise lack the access to alternate resources. It has even been suggested that the elimination of this kind of guidance represents a silent "ratification of the heightened pleading standard imposed on plaintiffs by the Supreme Court in *Twombly* and *Iqbal*."[98]

94 FED. R. CIV. P. 56(h) advisory committee's note to 2010 amendment.
95 FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.
96 *See* U.S. SUPREME COURT, *supra* note 4, at 6.
97 FED. R. CIV. P. 4.
98 Moore, *supra* note 5, at 1086 (footnote omitted).

Most far reaching are the 2015 limits on the scope of discovery. Rule 26(b)(1) now recognizes a general rule of "proportionality" in discovery: parties may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[99] These changes make "proportionality" part of the definition of discovery rather than a limit upon it, eliminating a judge's ability to broaden discovery to include "any matter relevant to the subject matter involved in the action."[100] In practice, these changes drastically limit e-discovery, arguably caving to large organizations that do not want to have to make their electronically stored information available to plaintiffs. Further, changes to Rule 37 permit an adverse inference to be drawn—and therefore a sanction imposed—from loss or destruction of evidence *only* if it can be found that the loss or destruction of materials was intentional.

The nature of these changes is not surprising in the context of who populates the rules committees today. Qualitative and quantitative studies that have tracked the changing composition of the committees over time have unearthed a number of clear trends among committee members: clerkship for a Republican-appointed Supreme Court justice; employment with a large, corporate defense firm; and affiliation with the Federalist Society or Lawyers for Civil Justice are key among them. The majority of rules committee members are also white and male.[101] Notably, they are also overwhelmingly conservative. I use the Judicial Common Space (JCS) scores[102]—a metric in the social sciences commonly used to determine judicial ideology—in order to determine the judicial ideology of the current Roberts rules committees, including the Advisory Committee on the Rules of Appellate Procedure, the Committee on the Rules of Civil Procedure, the Committee on the Rules of Criminal Procedure, and the Committee on the Rules of Evidence. JCS scores are assigned to federal judges and calculated using information about the president who appointed the judge and/or the judge's home state senator. To allow for analysis of as many non-judge committee members as possible, I assigned non-judge members the JCS scores of judges for whom they clerked, as is generally consistent in the literature with the use of clerks to gauge judicial ideology.[103] A negative

99 FED. R. CIV. P. 26(b).

100 FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

101 *See* Moore, *supra* note 5, at 1147–50; *cf.* Galanter, *supra* note 1, at 461.

102 *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007); Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001); *Federal District Court Judge Ideology Data*, CHRISTINA L. BOYD, http://cLboyd.net/ideology.html (last visited Oct. 5, 2016).

103 *See* Adam Bonica et al., *The Political Ideologies of Law Clerks and their Judges*, *in* COASE-SANDOR WORKING PAPER SERIES IN LAW & ECON. NO. 754, at 33 (2016).

JCS corresponds with a liberal orientation and a positive JCS corresponds with conservative, ranging from -.532 (most liberal) to .570 (most conservative). By this measure, the average JCS score for all members was .116. In Table 2 below, I show the average JCS score for the members of each rules committee. Three of the committees are significantly "conservative" based on this measure, one is arguably "neutral," and just one significantly leans toward judicial liberalism. At each end of the spectrum, the current membership of the Committee on the Rules of Appellate Procedure is most conservative, with a score of .271, and the Committee on the Rules of Evidence is most liberal, with a score of -.176.

Table 2.

Rules Committees (2015)	*Average JCS Score*
Rules of Appellate Procedure	.271
Rules of Civil Procedure	.131
Rules of Criminal Procedure	-.032
Rules of Evidence	-.176
Standing Committee on Practice and Procedure	.187

In order to supplement the quantitative measure of ideology, I also assembled information from a variety of sources regarding each member's profession, previous employer (or District/Circuit for judges), nominating or appointing president, further past employment history, and practice specialty. Of the members for whom JCS scores cannot be assigned, it is worth noting that the group includes several state judges who were nominated by Republicans; former clerks for conservative judges; individuals who list themselves as members on the Federalist Society and Heritage Foundation websites; and a former deputy attorney general under President George W. Bush. In total, these descriptive measures complement the quantitative data.

In Table 3 below, I have extracted the JCS scores and qualitative data on the members of the Advisory Committee on Civil Rules specifically. The descriptive data includes information regarding each member's previous employer(s) and notes about the nature of their employment history. Here, I also include a column marked "Conservative," "Liberal," and "Neutral," which represents the probable political preference of each individual based on the political party of the appointing president and/or party of the judge for whom a member clerked. By this measure, descriptively, of the nineteen members of the Civil Rules committee, ten are clearly conservative, six are liberal, and two are neutral. Overall, the JCS score for members of this committee is .131.

Table 3.

Name	*Profession & Employer*	*Notes*	*JCS*	*Ideology*
Barkett, John M.	Private Practice– Defense, Shook, Hardy & Bacon	Clerked for David W. Dyer (5th Cir.)	-0.015	Neutral
Bates, John D.	Judge, D. D.C.		0.486	Conservative
Cabraser, Elizabeth	Private Practice, Lief Cabraser		N/A	Neutral
Cooper, Edward H.	Professor, U. Mich.	Clerked for Clifford O'Sullivan (6th Cir.) (Eisenhower)	0.174	Conservative
Dow, Jr., Robert Michael	Judge, N.D. Ill.		0.486	Conservative
Ericksen, Joan N.	Judge, D. Minn.		0.486	Conservative
Folse, Parker C.	Private Practice, Susman Godfrey L.L.P.	Clerked for Rehnquist & Sneed (9th Cir.) (Nixon)	0.415	Conservative
Gorsuch, Neil M.	Judge, 10th Cir.		0.531	Conservative

Klonoff, Robert	Professor, Lewis & Clark	Clerked for John R. Brown (Eisenhower) Ass't United States Attorney, Ass't to Solicitor General, Private Practice, Jones Day	0.570	Conservative
Marcus, Richard L.	Professor, U.C. Hastings	Partner at Dinkelspiel, Pelavin, Steefel & Levitt; Clerk for Alfonso Zirpoli (JFK)	-0.182	Liberal
Matheson, Jr., Scott M.	Judge, 10th Cir.	U.S. Att'y for Utah '93–'97	-0.440	Liberal
Mizer, Benjamin C.	Government, DOJ	Currently Principal Deputy Ass't Att'y General for Civil Division of DOJ; clerked for John Paul Stevens & Judith Rogers (D.C. Cir.) (Clinton)	-0.422	Liberal
Morris, Brian	Judge, D. Mont.		-0.211	Liberal

Nahmias, David	Judge (state), Ga.	Former Ass't U.S. Att'y for N.D. Ga.; Ass't Att'y General in D.C.; clerked for Scalia & Laurence H. Silberman (D.C. Cir.) (G.W. Bush)	0.559	Conservative
Oliver, Jr., Solomon	Judge, N.D. Ohio		-0.357	Liberal
Pratter, Gene E. K.	Judge, E.D. Pa.	Former partner at Duane Morris	0.141	Conservative
Seitz, Virginia A.	Private Practice, Sidley Austin L.L.P.	Ass't Att'y General (Legal Counsel) under Obama; clerked for Brennan & Harry T. Edwards (D.C. Cir.)(Carter)	-0.532	Liberal
Shaffer, Craig B.	Judge (mag.), D. Colo.	DOJ under Reagan & Bush1; partner at Moye Giles	0.545	Conservative

These measures are largely consistent with other qualitative and quantitative studies that assess the degree to which we might expect the political ideologies of committee members to align with that of the Chief Justice. For example, as Chutkow has shown, under a conservative Chief Justice, "Republican judges have a distinct appointment advantage over their Democratic counterparts,"[104] and anecdotal evidence from scholars of the committee appointments process suggests the same.[105] Further, the JCS scores of the members of the Advisory Committee on Civil Rules seem compatible with other descriptive measures of these committee members. As Moore summarizes,

> [T]hirteen of the fifteen members of the Advisory Committee had at least one of the following characteristics: they were appointed by a Republican president, clerked for a Republican-appointed Supreme Court justice, work or worked for a defense-oriented, large corporate law firm, and/or are affiliated with the Federalist Society or Lawyers for Civil Justice.[106]

CONCLUSION

A decade into the Roberts Court era, it is clear that: 1) the membership of the Chief Justice's rules committees sits to the right on the ideological spectrum; and 2) his committees (particularly the Advisory Committee on Civil Rules) have made changes to the rules that reflect an agenda long-associated with the ideological right: the now decades-long goal of constricting access to courts. It is important to stress that this agenda has not always been partisan in nature; as described above, an historical assessment illuminates that, at times, both liberals and conservatives have supported this goal, albeit for different reasons. Their interests have coalesced at different junctures around the goal of reducing expense and delay when it comes to civil litigation, and in pursuing rule changes that would lessen the growing burden on the federal courts in order to keep the legal system as efficient as possible. However, given that the rules committees *do* have a history of using their power in order to make changes that protect or disadvantage certain groups of litigants—often in the service of (or in order to stifle)

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104 Chutkow, *supra* note 7, at 321.

105 *See generally* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589 (1998).

106 *See* Moore, *supra* note 5, at 1149 (footnote omitted).

specific political or policy agendas—we would be remiss to ignore the practical implications of just who sits on these committees.

In addition to his role on the Court itself, then, in terms of John Roberts' legacy as Chief Justice, his administration of the rules committees under the Judicial Conference has had important substantive outcomes for access to courts. The rules committees now operate in a universe where politicians and interest groups have become much more aware of the ways in which changes to procedure can affect their interests, and this has had two important effects in practice. First, what was once the province of judges and other members of the rules committees is often perceived as overtly political in nature by others in government, which means that Roberts has inherited an institutional dynamic wherein a variety of groups battle for control over the rules. Second, this dynamic has no doubt given both conservatives more broadly and certain groups specifically—namely corporations and other large institutional defendants—another tool by which to pursue their own agendas and protect their own interests. Clearly, business interests have done well in the Roberts Court era, well beyond what I am focused on here; but the fact that businesses can pursue their substantive interests by lobbying on behalf of procedural change is illustrative of just how political procedure has become. In this context, Roberts's administrative role provides him a clear venue for pursuing an ideological agenda, and one that he appears willing to use.