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# The Administrative Role of the Chief Justice: Law, Politics, and Procedure in the Roberts Court Era

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**Abstract:** The Chief Justice of the Supreme Court plays a critical role in shaping national politics and public policy. While political scientists tend to focus on the ways in which the chief affects the Court's jurisprudence, relatively little attention has been devoted to the unique administrative aspects of the position that allow for strategic influence over political and legal outcomes. This article examines the role of the chief justice as the head of the Judicial Conference, which is the primary policy making body for federal courts in the United States. Specifically, I examine the degree to which Chief Justice Roberts has appointed members to the Conference's rulemaking committees with a long-standing conservative legal goal in mind: constricting access to courts. By focusing on the 2015 amendments to the Federal Rules of Civil Procedure in particular, I show that Chief Justice Roberts' sole discretion to appoint members to these committees constitutes a "purely procedural" role through which he has exercised extensive political power, blurring the line between "law" and "politics" to great effect.

**Keywords:** Chief Justice of the U.S. Supreme Court; Judicial Conference; discovery rules; civil procedure; federal courts

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## 1. Introduction

The Chief Justice of the Supreme Court plays a critical role in shaping national politics and public policy. Despite this, relatively little attention has been given to the unique administrative dimensions of the position that allow the chief to exercise his power strategically in this way. Traditionally, the primary focus when it comes to the chief justice's role on the Supreme Court is most often his effect on jurisprudence. Related, if the chief also happens to be a newly appointed justice, then the appointment prompts questions as to how the justice will affect the partisan and ideological composition of the court, and subsequently its decision making. In this way, the conversation among law and political science scholars alike is very similar to the academic discussions that arise with any Supreme Court appointment. When it comes to the chief justice, however, his unique role on the Court raises additional questions: how will his leadership affect the Court's decisional process? What will the effects of his opinion assignment be? How will his organizing presence shape the dynamics of oral argument? What will his leadership style look like? And why did the president choose this particular justice for the role?

The first category—the effect of the chief as a justice—receives the lion's share of attention in political science and law. While some political scientists have begun to examine other aspects of the chief's administrative powers—a recent volume focuses on the effect that the chief has when it comes to his powers of opinion assignment and his role in case selection, for example,<sup>1</sup> and work by Ura and Flink hypothesizes the chief's management role when it comes to promoting unanimity

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<sup>1</sup> (Danelski and Ward 2016).

of decisionmaking during his tenure<sup>2</sup>—one of the most important and influential roles remains overlooked: namely, the chief’s position as head of the Judicial Conference, the national policymaking body for the federal courts. This is particularly true among political scientists.<sup>3</sup> An important function of the Conference, among other things, is to “continuously study the operation and effects of general rules of practice and procedure in the federal courts”,<sup>4</sup> which is a task that is carried out by its various subcommittees. While the work of the Conference to this end was long considered “purely procedural”, especially in the eyes of nonjudicial actors in the political system, it became clear by the 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, what groups of litigants may struggle 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.<sup>5</sup>

Notably, the Chief Justice enjoys sole appointment power when it comes to populating the Judicial Conference’s subcommittees, which specialize in rulemaking for either appellate, bankruptcy, civil, criminal, and evidence proceedings. As I will describe, this power is not granted by statute and is not subject to any oversight. Given what we know about the politics of appointments, then, we might expect this to be a “purely procedural” role through which the chief justice could well exercise extensive political power. As such, I argue that it is important to recognize this under-examined corner of our judicial branch as a realm in which the line between “law” and “politics” might be blurred, potentially to great effect. In practice, it is notable that Chief Justice Roberts has appointed rules committees that lean toward ideological conservatism, which in turn have promulgated rule changes with a perennial goal of the conservative legal movement in mind: limiting access to courts, particularly in the realm of civil litigation.<sup>6</sup>

In this article, I argue that Chief Justice Roberts has importantly contributed to these broader goals through his capacity to appoint individuals to these rulemaking committees, and to the Advisory Committee on Civil Rules in particular. During his tenure as chief justice, and most notably in 2015, his Advisory Committee on Civil Rules crafted a number of rule changes with the goal of reducing cost and delay in civil litigation, most notably by placing limits on the scope of discovery.<sup>7</sup> Discovery, which is the phase of civil proceedings in which parties to a lawsuit have the opportunity to obtain relevant information about the opposing party, is often hugely important when there is a significant power differential between the parties, as is often the case in civil rights and consumer claims. As Roberts himself has described, these amendments were intended to “encourage cooperation . . . focus discovery . . . engage judges in early and active case management . . . and address serious new problems associated with vast amounts of electronically stored information”.<sup>8</sup> In effect, however, these changes were the product of intense lobbying by corporate and other large institutional defendants aiming to insulate themselves from litigation by individuals. 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”.<sup>9</sup>

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<sup>2</sup> (Ura and Flink 2016a, 2016b, 2016c).

<sup>3</sup> While some attention has been paid to the Judicial Conference as part of the institutional judiciary—see, for example, Crowe (2012) and Staszak (2015)—political scientists have paid little attention to the chief’s role when it comes to influencing procedure in this way.

<sup>4</sup> The Rules Enabling Act (chp. 651, Pub.L. 73–415, 48 Stat. 1064, enacted June 19, 1934, 28 U.S.C 2072).

<sup>5</sup> For an empirical discussion of the phenomenon of the so-called “vanishing trial”, see (Galanter 2004). Trends in litigation are discussed in the collection of essays in the same volume, pp. 459–84.

<sup>6</sup> See generally (Staszak 2015).

<sup>7</sup> These rules changes, discussed at length below, were approved by the Supreme Court on 29 April 2015 and went into effect on 1 December 2015. See Amendments to the Federal Rules of Civil Procedure, available at <https://www.supremecourt.gov>.

<sup>8</sup> (Roberts 2015).

<sup>9</sup> (Moore 2015).

These changes are unsurprising, however, when one examines 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”.<sup>10</sup> It is also clear that they are ideologically skewed toward political and legal conservatism. By using the Judicial Common Space (JCS) scores,<sup>11</sup> the most common metric in the social sciences for determining judicial ideology, I show that the political orientation of the Chief Justice’s rules committee members that promulgated these controversial rules is in alignment with that of the modern Republican Party. As such, appointments to the rules committees could provide another venue, as Dawn Chuktow argues, “to advance the chief justice’s interests in ways that are not ideologically neutral” beyond his role on the Court itself.<sup>12</sup> As I will describe, just as the politicization of procedural rules and rulemaking processes has mattered greatly over time when it comes to access to courts for less advantaged, individual plaintiffs,<sup>13</sup> so too, then, has the political orientation of the rules committee members themselves.

That the work of these increasingly conservative committees reflects an ideologically conservative legal agenda is made especially clear in light of the committees’ recent activities when it comes to changes to the civil rules in particular. By examining the transcripts and committee reports detailing the nature and substance of the debate over the 2015 changes to the Federal Rules of Civil Procedure, it becomes clear that what at first appears to be a neutral goal—reforming the process of discovery in order to decrease legal costs—is in fact laden with both ideologically partisan motivations and implications. Specifically, I will show that, as lawyers, politicians, legal scholars, professional associations, and interest group leaders weighed in on the proposed changes, the practical effects of discovery reform were quickly laid bare: that limiting the ability of individual plaintiffs to obtain information from powerful institutional defendants would, at its most extreme, effectively shield the latter from legal liability. Given that the very point of discovery is arguably to “level the playing field” where there is a large power differential between plaintiff and defendant, the effects of these reforms on equality under the law was very clear to those who commented. While the effects of these rule changes on the process of civil litigation and its outcomes is hardly lost on law scholars, I seek here to bring their importance into the conversation regarding the politics of litigation reform in political science as well.

Using the 2015 civil rules reforms as a case study, then, I argue that, at this stage in his time as chief, Justice Roberts has a legacy firmly rooted in his administration of these committees as much as in his jurisprudential role on the Court itself. It is undoubtedly true that, in recent decades, the Supreme Court more broadly has increasingly weighed in on cases involving procedural issues, whether by raising the requirements for pleading (in cases like *Bell Atlantic v. Twombly*<sup>14</sup> and *Ashcroft v. Iqbal*<sup>15</sup>); by promoting summary judgment (as in *Scott v. Harris*<sup>16</sup>); 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<sup>17</sup>), to name a few. Notably, many of these changes have taken place specifically under the Roberts Court, as evidenced most recently in *Comcast 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.<sup>18</sup> This has led some scholars to conclude that the real work of procedural rule

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<sup>10</sup> (Moore 2015, p. 1087).

<sup>11</sup> (Boyd 2015; Giles 2001; Epstein et al. 2007).

<sup>12</sup> (Chutkow 2014).

<sup>13</sup> See generally (Staszak 2015).

<sup>14</sup> 550 U.S. 544 (2007).

<sup>15</sup> 556 U.S. 662 (2009).

<sup>16</sup> 550 U.S. 372 (2007).

<sup>17</sup> 564 U.S. 372 (2011).

<sup>18</sup> 569 U.S. 372 (2012).

reform has decidedly shifted away from the rules committees and toward the Supreme Court itself;<sup>19</sup> 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 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 that is not constrained by any constitutional or statutory provision—stands to deeply affect the politics of access to justice and must not be overlooked.

I proceed by detailing the nature of the chief justice’s role when it comes to these committee appointments and discuss the ways in which the work of the rules committees has always had the potential to become political. Because the “politicization” of procedural rules and the multifaceted group of actors involved are relevant to understanding the importance of the 2015 rule reforms that I discuss, I devote significant attention to this process as it unfolded from the Civil Rights era to present. I then turn to the details and politics of the rule changes themselves, with a special focus on the discovery reforms. I follow this by examining the ideological composition of the Roberts’ rules committees and the Advisory Committee on Civil Rules in particular. While there are undoubtedly limitations to this examination (as I discuss in the conclusion), quantitative and qualitative descriptors indicate that the committees relevant to these particular rule changes appear to be conservative overall. Finally, I conclude with a discussion of the implications of both Chief Justice Roberts’ role in particular when it comes to the rules committees, as well as for our understanding of the politics of procedure more broadly.

## 2. The Politics of Institutional Procedure

Prior to the 1920s, the judicial branch consisted of courts and judges, but few other institutions or components. As Justin Crowe describes, “the pre-1920s judiciary was neither capable of planning and administering its own programs nor responsible for the regulation of its internal affairs”.<sup>20</sup> Alongside efforts to increase the number of district court judges, however, Congress (at Chief Justice Taft’s urging) created the “Conference of Senior Circuit Judges” in 1922: an annual meeting of the chief justice and the senior judges from each judicial circuit at which they would review the state of the judicial branch and make policy recommendations with regards to the administration of U.S. courts.<sup>21</sup> As the primary policy making body for the courts, Congress changed its name to the Judicial Conference of the United States in 1948 and added district judges to the Conference in 1957.<sup>22</sup>

As codified today, the Judicial Conference is charged not only with providing a comprehensive survey of the operations of the courts on an annual basis and submitting suggestions in the interest of promoting uniformity in management procedures and expediting court business, but it also provides a “continuous study” of the rules of practice and procedure for all federal courts. As the nature of litigation grew more complex over time, this task necessitated the further expansion of the judicial branch’s administrative apparatus. Shortly after the Rules Enabling Act of 1934 gave the Supreme Court power “to prescribe general rules of practice and procedure” for the federal courts,<sup>23</sup> the Supreme Court empowered the Judicial Conference to oversee rulemaking. To assist in this task, the Supreme Court first established a rules advisory committee in June of 1935 in order to help draft the Federal Rules of Civil Procedure, which went into effect in 1938. Today, the Judicial Conference has expanded its committee infrastructure further to create a two-tiered system wherein Advisory Committees on Rules of Appellate, Bankruptcy, Civil, Criminal Procedure, and the Rules of Evidence carry out the work of this “continuous study” before recommending changes to the Judicial Conference

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<sup>19</sup> See (Burbank and Farhang 2014).

<sup>20</sup> See (Crowe 2007).

<sup>21</sup> Act of Congress of September 14, 1922 (24 Stat. 837, 838; sec. 218, Title 28, U.S.C.).

<sup>22</sup> Section 331 (“The Judicial Conference of the United States”, Title 28, U.S.C.).

<sup>23</sup> Rules Enabling Act, 28 U.S.C. Section 2072(a).

through a Standing Committee on Rules of Practice and Procedure. Recommended rule changes must then be approved by the Judicial Conference and Supreme Court before transmission to Congress.

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. The relevant portions of the United States Code simply grant that the chief “shall preside at such conference which shall be known as the Judicial Conference of the United States”. While the membership of the Conference itself must include the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional circuit court (as chosen by a majority vote of all the circuit and district judges of a given circuit), there are no such stipulations when it comes to the membership of its subcommittees. Additionally, these subcommittee members are selected separately; that is, they are not drawn from the membership of the Judicial Conference. Instead, the chief justice’s sole appointment power was granted as the product of what has been described as a “long-forgotten unofficial ‘compromise’”, which was 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 of that year.<sup>24</sup> Today, the rules committee members serve for no more than six years and include not only federal judges, but also practicing lawyers, law professors, state chief justices, and high-level officials from the Department of Justice and federal public defender organizations. This unconstrained discretion, however, means that the chief justice might choose 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 provides a vehicle for it. While one might note that the chief’s power is structurally “checked” by the power of the Supreme Court and Congress to veto rule changes, these institutions’ use of such power has been limited (as in the case of the Court) or complicated in nature (as with Congress), as described below.<sup>25</sup>

Second, as noted, Congress has always had the formal authority to play a meaningful role in the rulemaking process. In fact, the Rules Enabling Act provided that proposed rules would become law unless Congress acted to veto them within sixty days.<sup>26</sup> 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 as well. But, until 1973, Congress never did veto 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 litigation and to a wider range of cases during the Civil Rights era in particular.

For the first 35 years of their existence, rules committee members benefitted from the widely held belief that the rules subject to their review were “purely procedural” in nature, therefore not requiring input from elected officials or the public, and were best left to the expertise of judges, lawyers, and academics. It is notable that the development of these committees overlapped temporally with the growth and development of the administrative state in the 1930s and no doubt benefitted similarly from increased deference to bureaucratic “expertise”.<sup>27</sup> As such, judicial rulemakers initially had

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<sup>24</sup> See *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 discusses this at pp. 1144–45; see also *infra* note 20 and accompanying text.

<sup>25</sup> The Supreme Court’s use of such veto power appears to have been extremely limited. Existing research seems to identify one example where a single justice dissented to a rule change and describes this as notable; but even in that instance, the rule changes moved forward. See (Staszak 2015, p. 94).

<sup>26</sup> Rules Enabling Act, 28 U.S.C. section 2074 was amended in 1950 to extend the time frame from sixty 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”, as well as states that changes would go into effect “no earlier than December 1”.

<sup>27</sup> That the autonomy of the conference was protected by the idea its work was “purely procedural” resonates deeply with Dan Carpenter’s argument regarding bureaucracy. See (Carpenter 2001).

great success in exercising a vast amount of discretion in their work, even as they did promulgate rule changes that had substantive political and legal effects. During the 1950s and 60s in particular, the rulemakers used procedural change to facilitate the ideological, political, and policy goals of the rights revolution, 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 1970s (when proposing a variety of particularly controversial evidence rules),<sup>28</sup> they exposed the degree to which the rules could change the substance of policy and rights protections—as well as exactly how “political” they could be in practice. As such, a variety of actors—well beyond those on the Judicial Conference and its subsidiary committees—became interested in exactly how they too could become 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 that was fraught with problems of expense and delay.<sup>29</sup>

Specifically, by the mid-1970s, legislators and interest groups that were 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 rulemakers that were internal to the rulemaking process who wanted—for largely nonpartisan reasons—to find ways to address what they deemed to be 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 the 1990s, the politics of rule reform came to be dominated by Republican legislators and business lobbyists interested in reducing tort and public interest litigation, through class action reform in particular.<sup>30</sup> Now, more than 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 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.<sup>31</sup>

In many ways, it seems striking that anyone would have argued that the civil rules in particular were at any time truly “apolitical”; but, that characterization is precisely what made them such powerful turns for social reform, and what kept rulemaking authority insulated for so long. Importantly, the historical, institutional, and political underpinnings of this process of politicization add another key dimension to the institutional legacy of both the Roberts Court and Judicial Conference. Especially when viewed in combination with the chief’s sole power to appoint these rulemakers, it is

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<sup>28</sup> For example, one rule would have forced a spouse to reveal the other’s confidential admissions in a courtroom; another similarly threatened patient/doctor confidentiality; and another would have protected government officials from having to divulge information related to their job in court. This prompted backlash from groups like the American Bar Association and the American Medical Association who expressed concern to Congress that their input wasn’t solicited regarding such important rules. Further, in light of the concurrent Watergate scandal, this “unveiling” of the discretion granted to the rules committees via the rulemaking process prompted a similar concern that judicial power was dangerously encroaching upon the powers of the legislative branch. See *Rules of Evidence: Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93rd Congress 155 (1973).

<sup>29</sup> (Staszak 2015, pp. 79–117).

<sup>30</sup> (Staszak 2015, pp. 79–117).

<sup>31</sup> See note 5 above. The idea of “repeat players” is detailed by Marc Galanter in “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change”, (Galanter 1974).

arguably unsurprising that we have recently seen the rules committees take overt steps to further the conservative legal agenda.

### 3. 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. As described, in cases like *Bell Atlantic v. Twombly*, *Ashcroft v. Iqbal*, *Scott v. Harris*, *Wal-Mart v. Dukes*, and *Comcast v. Behrend*, the Court 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; by (2) further promoting summary judgment, or a judgment that was entered in favor of one party without a trial; and, (3) by making it more difficult for litigants to certify as a class for purposes of pursuing a class action lawsuit.<sup>32</sup> 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”.<sup>33</sup> The 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.<sup>34</sup>

While the authors also suggest that the partisan divide on the rules committees has developed similarly, they nonetheless conclude “the stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically predisposed to it”.<sup>35</sup> But, now more than a decade into the Roberts Court era, this has not proven to be the case. Instead, the manifestation of the first 10 years of appointments to the rules committees, with all of their unifying characteristics—whether demographic, experiential, ideological, or political—produced a set of conservative committees that 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 that are 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 recent changes to the civil rules under Roberts—the most effectual of which went into effect in 2015, and which I will primarily focus on here—was to reduce the cost of litigation.<sup>36</sup> As the American Bar Association Section on Litigation has described, the Federal Rules of Civil Procedure are intended to achieve “a singular, overarching objective—a just, speedy, and inexpensive resolution to every civil action in federal courts”.<sup>37</sup> Despite this, however, there have been complaints about costs, delays, and burdens of civil litigation for decades, which have at times prompted a variety of amendments to the rules. But notably, the practical effect of these changes—whether changes to Rule 11 sanctions in the 1980s, class action reform in the 1990s, or these recent changes to discovery—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.<sup>38</sup> This has been accomplished through a variety of rule changes throughout Roberts’ tenure. It is again notable

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<sup>32</sup> See notes 10–14 above.

<sup>33</sup> (Burbank and Farhang 2015). The authors 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.

<sup>34</sup> (Burbank and Farhang 2015, p. 1562).

<sup>35</sup> (Burbank and Farhang 2015, p. 1562).

<sup>36</sup> (Roberts 2015).

<sup>37</sup> (Henry and Palacios 2016).

<sup>38</sup> (Moore 2015, p. 1086).

that, despite the substantive import of these changes (described below) their effects have largely flown under the radar, at least among political scientists. This is striking in light of the fact that, as Jeb Barnes has argued, we tend to be acutely aware of the political nature of change that stems from the political process, especially through congressional action. Yet despite that the stages of civil litigation map onto the stages of policymaking (as Barnes shows) we tend to ignore these parallel processes when it comes to the work of courts.<sup>39</sup> The 2015 changes are described in Table 1 below.<sup>40</sup>

**Table 1.** 2015 Civil Rule Reforms.

Rule 1 (Scope & Purpose)	2015	<ul style="list-style-type: none"> <li>• 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 an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes”.<sup>41</sup>).</li> </ul>
Rule 4 (Summons)	2015	<ul style="list-style-type: none"> <li>• Reduces plaintiff’s presumptive time to serve defendant from 120 to 90 days (in order to reduce delay in litigation). Time of notice required by Rule 15(c)(1)(C) for relation back is also shortened.</li> <li>• Plaintiff must show good cause to avoid dismissal upon failure to serve within 90 days.<sup>42</sup></li> </ul>
Rule 16 (Pretrial Conferences; Scheduling; Management)	2015	<ul style="list-style-type: none"> <li>• “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”.<sup>43</sup></li> <li>• “The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared”.<sup>44</sup></li> <li>• 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).</li> </ul>
Rule 26 (Duty to Disclose; General Provisions Governing Discovery)	2015	<ul style="list-style-type: none"> <li>• 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”.<sup>45</sup> [Post-amendment cases applying proportionality include <i>Henry v. Morgan’s Hotel Group</i>, 15-CV-1789 (ER) (JLC), 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016) and <i>Gilead Sciences, Inc. v. Merck &amp; Co.</i>, No. 5:13-cv-04057-BLF, 2016 WL 146574, at *1 (N.D. Cal. Jan. 13, 2016)].</li> <li>• “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”.<sup>46</sup></li> <li>• Deletes phrase “reasonably calculated to lead to the discovery of admissible evidence”.<sup>47</sup></li> </ul>
Rule 31 (Depositions by Written Questions)	2015	<ul style="list-style-type: none"> <li>• “Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1)”.<sup>48</sup></li> <li>• Original amendment reduced number of depositions from ten to five and duration of deposition from seven to six.</li> </ul>
Rule 34 (Producing Documents . . . and Other Purposes)	2015	<ul style="list-style-type: none"> <li>• Objection must state whether “responsive materials are being withheld”.<sup>49</sup></li> <li>• Boilerplate objections no longer allowed; must state specificity.</li> </ul>
Rule 37 (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions)	2015	<ul style="list-style-type: none"> <li>• “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]”.<sup>50</sup></li> <li>• Requires showing of prejudice in order to impose sanctions [court must find that “additional discovery” could restore or replaced missing information].<sup>51</sup></li> <li>• Adverse-inference instructions require intent to lose/destroy information.</li> <li>• 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).</li> </ul>

<sup>39</sup> (Barnes 2008).

<sup>40</sup> The text of Table 1 is drawn from the Federal Rules of Civil Procedure (FRCP) and Notes of the Advisory Committee on Civil Rules.

<sup>50</sup> FRCP Rule 37(e); Advisory Committee notes, 2015 amendment.

<sup>51</sup> FRCP Rule 37; Advisory Committee notes, 2015 amendment.

Table 1. Cont.

Rule 84 (Forms)	2015	• Abrogated by amendment. Forms provided examples of pleading requirements and other stages of litigation. <sup>52</sup>
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The Supreme Court adopted the package of proposed amendments on 29 April 2015, which went into effect on 1 December 2015 without any congressional interference. As the ABA summarized, this group of reforms “represents the most significant overhaul of the rules governing civil litigation in federal court that we have seen in decades, including dramatic changes to the timing and procedures surrounding case management and a veritable sea change in the scope of discovery”.<sup>53</sup> But, many of these changes are subtle. For example, 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”.<sup>54</sup> The burden of resolving disputes on 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 also amended to reduce the plaintiff’s amount of time to serve a defendant, from 120 to 90 days after a complaint is filed. 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 that are available to guide parties during the course of litigation. 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*.”<sup>55</sup>

Most far reaching are the 2015 limits on the scope of discovery. The discovery rules have been long identified as a potential locus for significant reform to civil litigation, particularly with an eye toward reducing the costs and duration of a lawsuit. As early as the Pound Conference of 1976, for example, discovery procedures were characterized as overused,<sup>56</sup> and the business and legal communities have similarly long sought reforms that would authorize judges to restrict the process in order to move cases along more quickly. These efforts met some success in 1980, when Rule 26 was amended to promote case management by judges by requiring an early discovery conference of counsel in most cases, and with amendments to Rule 26(b), which authorized district judges to restrict discovery for several reasons, including on a cost-benefit basis.<sup>57</sup> While further amendments to Rule 26 were rejected in the 1990s (including a cost-shifting provision wherein the requesting party would have to bear some of the costs for producing said information), by the time that discovery reform

<sup>52</sup> FRCP Rule 84; Advisory Committee notes, 2015 amendment.

<sup>51</sup> FRCP Rule 37; Advisory Committee notes, 2015 amendment.

<sup>50</sup> FRCP Rule 37(e); Advisory Committee notes, 2015 amendment.

<sup>49</sup> FRCP Rule 34(b)(2)(B); Advisory Committee notes, 2015 amendment.

<sup>48</sup> FRCP Rule 31; Advisory Committee notes, 2015 amendment.

<sup>47</sup> FRCP Rule 26; Advisory Committee notes, 2015 amendment.

<sup>46</sup> FRCP Rule 26; Advisory Committee notes, 2015 amendment.

<sup>45</sup> FRCP Rule 26(b)(1).

<sup>44</sup> FRCP Rule 16; Advisory Committee notes, 2015 amendment.

<sup>43</sup> FRCP Rule 16; Advisory Committee notes, 2015 amendment.

<sup>42</sup> FRCP Rule 4(m); Advisory Committee notes, 2015 amendment.

<sup>41</sup> U.S. Supreme Court, 2015 Year-End Report on the Federal Judiciary 5 (2015), available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

<sup>53</sup> (Henry and Palacios 2016).

<sup>54</sup> (Roberts 2015).

<sup>55</sup> (Moore 2015, p. 1086).

<sup>56</sup> For a further discussion of the 1976 Pound Conference, see (Levin and Wheeler 1979).

<sup>57</sup> For further discussion of these changes, see (Subrin and Main 2014).

was revisited in 2000 the politically partisan dimensions of the debate were clear.<sup>58</sup> Specifically, the 2000 reforms—which narrowed the obligation of initial disclosure as well as narrowing the scope of discovery and making it binding—fit seamlessly with Congress’s proposed “common sense legal reforms” of the time. As such, the reforms went into effect without congressional intervention, as consistent with the House and Senate’s propensity to go along with anything that even remotely promised less civil litigation. As Jeffrey Stempel describes, even at this juncture, the composition of the rulemaking committees had “become distinctly more conservative in both ideology and social background”. He also notes that, even as of the early 2000s “defense-oriented law and business groups have become considerably more aggressive and sophisticated in pushing their agenda for reducing claimant access to the courts”<sup>59</sup>—precisely the concern that would later pervade the 2015 rules committee notice and comment period.

The 2015 reforms amended Rule 26(b)(1) to recognize 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”. These changes make “proportionality” a 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”. In practice, these changes may drastically limit e-discovery in particular, arguably caving to large organizations that do not want to have to open their electronically stored information to plaintiffs. Further, changes to Rule 37 permits 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. Finally, the rules were also amended to explicitly recognize a court’s authority to enter orders that allocate expenses for disclosure or discovery, though also noting that parties should not assume that cost-shifting will become a common practice.<sup>60</sup>

While the Advisory Committee also explains that these changes are not meant to place the burden of addressing all the proportionality considerations on the party seeking discovery (nor are they intended to permit the opposing party to make simple “boilerplate” objections based on proportionality to any discovery request), concerns quickly arose that the proposed amendments would in fact do just that, pervading the notice and comment period over the proposed changes. Many parties noted that “the proposed changes will negatively impact almost all plaintiffs”,<sup>61</sup> in particular serving to protect “those who have more information—commonly defendants—and harm those who have less—commonly plaintiffs”,<sup>62</sup> and specifically favoring “parties with more financial resources”.<sup>63</sup> The potential for disadvantaging individuals and groups that are pursuing legal action against corporations drew particular attention: as a representative for the American Association for Justice put it, the impact of these changes “will occur only in cases that are involving smaller plaintiffs against large defendants. They will create an incentive to maintain information in forms that are costly to access, in order to claim the cost of production outweighs possible benefits”.<sup>64</sup> In this way, another commentator noted that the set of proposals “looks like corporate America’s wish list to never again be

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<sup>58</sup> (Stempel 2001).

<sup>59</sup> (Stempel 2001, pp. 613–14.)

<sup>60</sup> Federal Rules of Civil Procedure Advisory Committee notes to 2015 amendment.

<sup>61</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014. This report presents recommendations to approve several proposals that were published for comment in August of 2013 (and would later become the amendments adopted by the Supreme Court on 29 April 2015). It also includes a summary of testimony and comments, in which these quotations are located. See statement of Hillary G. Rinehardt, p. 301.

<sup>62</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of Jonathan J. Margolis, p. 324.

<sup>63</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of David McKelvey, p. 261.

<sup>64</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of J. Burton LeBlanc, p. 372.

held responsible for anything they do”,<sup>65</sup> with yet another pointing out, “you’re hearing the defense side and the corporations that they represent say, we love it, and the plaintiff side and the folks that we represent saying, you’re changing the way the game is played and it’s unfair. I think that’s a very telling point that we ought to be reminding ourselves of”.<sup>66</sup> On the basis of what seemed to be a widely-apparent power differential—in terms of information and resources—between individuals and corporate defendants, some even went as far to describe the proposals as “one-sided”, “transparently corrupt”, “wholly unwarranted”, and serving only to “further tilt the balance against those of limited means and limited power”.<sup>67</sup>

These concerns are most acute when it comes to civil rights and consumer plaintiffs in particular. Senators Christopher Coons, Richard Durbin, Al Franken, Patrick Leahy, and Sheldon Whitehouse stressed that the proposals would have significant “collateral effects” in civil rights litigation, “where social disapproval of discrimination means there often is no ‘smoking gun’, forcing plaintiffs to rely on circumstantial evidence that is within the power of the defendant”.<sup>68</sup> These concerns gain even more traction in light of other changes—both rule-based and jurisprudential—wherein the ability of disadvantaged individuals to have their day in court has been constricted in recent years. As Jonathan A. Smith, speaking on behalf of the NAACP Legal Defense Fund, noted, especially when viewed alongside other developments that make it more difficult to pursue civil rights claims (including heightened pleading standards, obstacles to class certification, and the enforcement of arbitration contracts), the impacts of further limiting discovery on right-based litigation would be profound, exacerbating the existing imbalance between plaintiffs and defendants even more.<sup>69</sup> We might expect this to be true for consumer plaintiffs as well; in medical malpractice cases, for example, defendants often have “vastly superior knowledge and much more documentation”, and restricting the ability of injured patients to access that information “is going to lead to unfair results”.<sup>70</sup>

The potential that the changes could serve as a constraint on all civil litigation was clearly recognized as well; as one commentator put it, the proposals appear “overwhelmingly and undeniably aimed at chilling the number of lawsuits filed in the federal courts”,<sup>71</sup> contributing to a growing number of “procedural stop signs” that narrow access to courts.<sup>72</sup> Further, prominent judges and attorneys argued that the proposals may even “become a background on which competing philosophical perspectives wage war over the role of civil litigation in today’s society”.<sup>73</sup> At its extreme, then, the reforms might be said to compromise the vital public role that courts serve “in bridging the gap between first awareness of a harm and the tipping point of knowledge leading to needed regulation or legislation to correct the status quo”.<sup>74</sup> Coupled with the fact that empirical evidence largely demonstrates a system of discovery that is functioning effectively, the degree to which increasingly

<sup>65</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of Alex B. Scheingross, p. 2281.

<sup>66</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of William B. Curtis (February Hearing), p. 77.

<sup>67</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statements of William York, David Angle, and Patrick Barry, pp. 336, 707, 397 (respectively).

<sup>68</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, p. 392.

<sup>69</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, p. 310.

<sup>70</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of Sarah Tankersley, p. 364.

<sup>71</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of Caryn Groedel, p. 361.

<sup>72</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, statement of Arthur R. Miller, p. 386.

<sup>73</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, Statement of Craig B. Shaffer and Ryan T. Shaffer, p. 289.

<sup>74</sup> Report of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure, 2 May 2014, Statement of Lisa P[sic], p. 387.

conservative rules committees are devoted to an ideological narrative about the litigation crisis is apparent. This is true even in the face of evidence to the contrary; the Federal Judicial Center, for example, continues to study whether and how much the process of discovery contributes to expense and delay, regularly finding little effect—and this study was repeatedly referenced with regards to the 2015 rule changes.<sup>75</sup>

In this way, the nature of these changes is not surprising in the context of who exactly populates the rules committees today. Qualitative and quantitative studies that have tracked the changing composition of the committees over time has 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.<sup>76</sup> Notably, they are also conservative—particularly the committees that are relevant to the civil rulemaking process. I use the Judicial Common Space (JCS) scores in order to determine the judicial ideology of the 2015 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 (as illustrated in Table 2 below).<sup>77</sup> JCS scores are assigned to federal judges and are calculated using information about the president who appointed the judge and/or the judge’s home state senator.<sup>78</sup> Because the committee sizes are small—the appellate committee has 10 members, civil 18, criminal 15, evidence 12, and the Standing Committee on Practice and Procedure 18—to allow for the analysis of as many non-judge committee members as possible, I assigned non-federal judge members the JCS scores of judges for whom they clerked. This is generally consistent in the literature with the use of clerks to gauge judicial ideology, which has found that “the ideology of judges is strongly predictive of their clerks”.<sup>79</sup> This approach, however, does come with potential limitations; for example, as Bonica et al. also note, “many conservative judges tend to hire clerks who are relatively liberal”.<sup>80</sup> In fact, when the law clerk-related scores are removed from the committee calculations below, the average and median memberships do become more conservative;<sup>81</sup> but because the numbers of members represented becomes small, I include them in the calculations below. If a committee member is neither a judge nor clerked for one, they are omitted from the analysis.

**Table 2.** 2015 Rules Committees, Judicial Common Space (JCS) Scores.

Rules Committees (2015)	Average JCS Score	Median JCS Score	Min/Max
Appellate Procedure	0.271	0.381	−0.267/0.559
Civil Procedure	0.131	0.174	−0.532/0.570
Criminal Procedure	−0.067	−0.166	−0.352/0.559
Rules of Evidence	−0.176	−0.356	−0.502/0.531
Standing Committee on Practice and Procedure	0.187	0.176	−0.292/0.531

A negative JCS corresponds with a liberal orientation and a positive JCS corresponds with conservative, ranging from −0.532 (most liberal) to 0.570 (most conservative). In Table 2 below, I show the average and median JCS scores for the membership of each 2015 rules committee, as well as the

<sup>75</sup> (Lee and Willging 2009).

<sup>76</sup> See, for example, Dawn M. Chutkan, “The Chief Justice as Executive” (Chutkan 2014) and Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees* (Moore 2015) at pp. 1149 (discussed further *supra* notes 9 and 12).

<sup>77</sup> See (Boyd 2015; Giles 2001; Epstein et al. 2007), *supra* note 11.

<sup>78</sup> See (Bonica et al. 2016, p. 33).

<sup>79</sup> See (Bonica et al. 2016, p. 45).

<sup>80</sup> (Bonica et al. 2016, p. 45) See also (Bonica et al. 2017; Samuel 2016).

<sup>81</sup> For the Committee on Civil Rules, for example, when law clerk scores are omitted, the average JCS score becomes 0.185 and the median 0.486 (as juxtaposed with 0.131 and 0.174 when clerk scores are included).

minimum and maximum scores for each. Three of the committees are characterized as “conservative” based on this measure; one is arguably “neutral/liberal”; and, one 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 0.271 and a median of 0.381, while the Committee on the Rules of Evidence is most liberal, with a score of  $-0.176$  and a median of  $-0.356$ .

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; several former clerks for conservative judges and justices (prominently including clerkships for Justices Thomas and Burger); individuals who list themselves as members on the Federalist Society and Heritage Foundation websites (including the latter’s advisory board); and, a former deputy attorney general under President George W. Bush. In total, these descriptive measures complement the quantitative data.

In order to provide further context for these scores—particularly to serve as a frame of reference for the civil rules committee scores—I calculated the average and median scores for the Judicial Conference as well. The average JCS score for the Conference of that year is  $-0.021$ , and the median is  $-0.148$ . Notably, the Conference’s membership is appointed through a different, arguably more “neutral” procedure (as described above) and, descriptively, might serve as a benchmark from which to view the committee scores. However, even this is complicated; given that approximately half of the Conference members are effectively voted in by other judges in a judicial district, we might also expect that, as the ideological spread of judges changes over time (as a reflection of the appointing president and his party), it may not in fact provide such a “neutral” benchmark overall. But, it nonetheless provides another perspective from which to consider the committees that are appointed by the chief justice.

In Table 3 below I have extracted the JCS scores and qualitative data on the members of the 2015 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 19 members of the Civil Rules committee, 10 are clearly conservative, six liberal, and two are neutral. Overall, the average JCS score for members of this committee is 0.131 and the median is 0.174.<sup>82</sup>

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”,<sup>83</sup> and anecdotal evidence from scholars of the committee appointments process suggest the same.<sup>84</sup> Further, the JCS scores of the members of the Advisory Committee on Civil Rules seem to be 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”.<sup>85</sup>

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<sup>82</sup> It is worth noting that the jump from the median score to the next most conservative score is large (from 1.74 to 0.415). In this way, the conservative wing of the civil rules committee might be considered to be especially conservative.

<sup>83</sup> (Chutkow 2014, p. 321).

<sup>84</sup> See, for example, (Fish 1973; Resnik 1998).

<sup>85</sup> (Moore 2015, FN 2, p. 1149).

**Table 3.** 2015 Members of the Advisory Committee on Civil Rules.

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	−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 DC; 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

#### 4. Conclusions

More than 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 a goal that is associated with the ideological right: the now decades-long process of constricting access to courts. It is important to stress that this agenda has not always been partisan in nature; at times, both liberals and conservatives have supported this goal, albeit for different reasons. Their interests have coalesced at times 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 have often used their power in order to make changes that protect or disadvantage certain groups of litigants—often in the service of/ in order to stifle specific political or policy goals—we would be remiss to ignore the practical implications of just who sits on these committees.

In many ways, this is a preliminary analysis that raises a variety of questions for future work. Here, I have examined a snapshot of the rulemaking process and committees at work—focusing on one set of reforms—and have illustrated the appointment efforts of just one chief justice. In so doing, my aim has been to illustrate the degree to which (1) the procedural rules committees engage in work that may substantively affect access to courts for individuals; (2) that this reflects a reform agenda

that is consistent with the broader anti-litigation-oriented, conservative legal movement; and (3) that should suggest that political scientists might pay greater attention to the role of the chief justice in this domain, particularly as there is increasing attention to the managerial and administrative duties that he performs. On this last point in particular, there are limitations here that could be addressed in future work.

As noted, this analysis captures what is ultimately a static moment and raises questions, therefore, as to whether or not there has been change over time in the willingness of chief justices to use their committee appointment power politically. The method that is employed here for assigning JCS scores to committee members is unfortunately limited by the data, therefore constraining my ability to speak to the appointment activities of more than one justice; looking back into even the last few years of Rehnquist's tenure, for example, the number of committee members whose ideology is captured by the data drops dramatically. This could potentially be rectified by examining the use of Bonica et al.'s DIME scores—which scale both judges and lay people based on campaign contributions—in order to enhance the number of committee members that might be included in these calculations.<sup>86</sup> Expanding the data in this way would also allow for comparisons between conservative and liberal chief justices, as well as for an examination as to whether or not the ideological composition of the rules committees tracks with the politicization of the rules generally since the Civil Rights era.

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. This is important not just for potential individual plaintiffs in any given case, but also in terms of the degree to which decreased access can detract from the role of courts in a system of government that regularly employs private enforcement regimes. Further, 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—act another tool by which to pursue their own agendas and protect their own interests. Clearly, the interests of business have done well in the Roberts Court era, well beyond what I am focused on here; but the fact that they 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' administrative role provides him a clear venue for pursuing an ideological agenda, and one that he appears willing to use.

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