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Who Will Write Your Rules—Your State Court or the Federal Judiciary?

RULEMAKING AND THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION: DISCOVERY

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Executive Summary

In Part I, Professors Burbank and Farhang introduce their topic: the part played by rulemaking in what they term the "counterrevolution" against litigation in the federal courts. Drawing on the original empirical research for their forthcoming book, they argue that this counterrevolution is a continuing response to the "rights revolution" of the 1960s and 1970s. It has resulted in reduced incentives for private enforcement of rights, both Constitutional and statutory. An integral part of the rights revolution, and thus of the counterrevolution, is the discovery mechanism and the capability it provides to parties to obtain, legitimately, information to support their claims. The retrenchment of discovery through the rulemaking process has therefore been integral to the counterrevolution.

In Part II ("A Brief History of Discovery Retrenchment"), Burbank and Farhang first outline the creation of the Federal Rules of Civil Procedure and the evolution of the process of rulemaking. It is now carried out by the federal judiciary through committees of judges and practitioners appointed by the Chief Justice, with assistance from academic specialists and a permanent support staff at the Administrative Office of the U.S. Courts. They then describe the first moves toward retrenchment, with Chief Justice Burger's 1976 Pound Conference serving as an organizing platform for those seeking to use rulemaking to solve purported litigation problems of abuse, delay, and high cost. There followed several rulemaking cycles in which amendments were considered that would modify the original open discovery concept and add limitations and qualifications—including, importantly, a change in the scope of discovery from information relevant to the subject matter of the litigation to information relevant only a stated claim or defense. Cost and delay were cited as justification for change, but little empirical data supported the changes.

In Part III ("The 2015 Amendments"), Professors Burbank and Farhang trace the development of the latest limitations, through the imposition of a "proportionality" qualification on the scope of discovery, which they say are "cause for concern—and should not be emulated" by state courts. They give four reasons: (1) the amendments are premature, coming too soon after the last adjustments in the discovery rules, and are overkill, in that they may prevent parties

from obtaining information that is crucial to their cases; (2) they do not reflect the social benefits of discovery, and of litigation overall, in the enforcement of important rights; (3) because of the trans-substantive application of the federal rules, the amendments will be applied to (and higher costs will be imposed on) cases that are not affected by the problems at which the amendments were said to be directed; and (4) the amendments appear to parallel closely the political ideologies of the rulemakers themselves, who come disproportionately from the business bar and from politically conservative backgrounds.

In their conclusion (Part IV), Burbank and Farhang sum up their concerns about the proportionality requirement: that lack of proportionality may be a problem in some high-stakes cases among business litigants, but there are costs to making proportionality part of the basic scope of discovery. It will, they believe, encourage additional objections to discovery requests made by plaintiffs, and so will inevitably impose higher expenses on individual litigants and their lawyers, who can least afford them. The problem will be especially difficult for the private enforcement of Constitutional and statutory rights, where there often is "asymmetric information," with defendants controlling access to the facts needed to establish a claim. The changed discovery regime thus can readily become an integral part of the "long-running and sustained campaign against litigation."

I. Introduction

In our forthcoming book, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation*,[1] we contribute to an emerging literature that examines responses to the rights revolution of the 1960s and 1970s. We use original archival evidence to identify the origins of the counterrevolution against private enforcement of federal law in the first Reagan Administration. We present original data that permit us systematically to measure the counterrevolution's trajectory over decades in the elected branches, court rulemaking, and the Supreme Court, and to evaluate its success in changing law in those different lawmaking sites. We identify a number of institutional differences that may help to understand why, as our data demonstrate, since the early 1970s the Supreme Court—increasingly conservative and influenced by ideology—has been more effective than either Congress or those responsible for amending the Federal Rules of Civil Procedure in changing legal rules so as to reduce opportunities and incentives for private enforcement of federal statutory and constitutional rights.

Among the institutional differences we identify is the fact that, "[a]lthough significant legislative or rulemaking reform proposals . . . often present stark alternatives that trigger powerful interest group mobilization, the case-by-case, less visible, more evolutionary process of legal change via court decisions on seemingly technical and legalistic issues is far less likely to do so. It is therefore less likely to be obstructed."[2] As a result, "a large transformation in law

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[1] STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (forthcoming 2016-17).

[2] *Id.*, ch. 6 ("Rights, Retrenchment, and Democratic Governance").

governing or influencing private enforcement resulted from a succession of hundreds of decisions, distributed over decades, few of which may have appeared monumental in isolation."[3]

We believe that an institutional perspective is also useful when considering the long path of discovery retrenchment that started in the 1970s and most recently yielded the 2015 amendments to the Federal Rules of Civil Procedure ("Federal Rules"). Moreover, the value of such a perspective extends to those States that follow the federal model by entrusting prospective procedural law to rulemaking under the auspices of the judiciary, in many of which rulemakers tend also to follow particular federal rulemaking initiatives.

Discovery retrenchment under the Federal Rules is a saga long dominated by interest group persistence in the face of frustration, and by unrepresentative surveys masquerading as systematic data. Yet, although only episodically and modestly successful until recently, discovery retrenchment may have overcome the barriers that reforms to the federal rulemaking process in the 1980s erected to consequential changes in the status quo, which still at that time was decidedly favorable to private enforcement. If so, it is difficult not to attribute the result, at least in part, to institutional dynamics that have facilitated the triumph of the ideological preferences of those who favor discovery retrenchment.

Those dynamics include the indirect leadership of a series of chief justices through appointments to the Advisory Committee on Civil Rules, which has primary responsibility for proposing amendments to the Federal Rules. The Chief Justice appoints all members of the committee. Our data demonstrate that, since 1970, a succession of chief justices appointed by Republican presidents have disproportionately favored Article III federal judges (over practitioners and academics) in making appointments, that those judge members were themselves disproportionately appointed by Republican presidents,[4] and that practitioner members have disproportionately represented corporate/business clients.[5]

The relevant institutional dynamics also include the direct leadership of Chief Justice Roberts. The (more than 2,300) comments on the proposed amendments to the discovery rules that became effective in 2015 show that, notwithstanding repeated characterization of the proposals as "modest" or "measured" by some rulemakers and interest groups, they in fact triggered powerful interest group mobilization on both sides. That may be because opponents feared, and proponents expected, a large transformation in discovery resulting from a succession of individual Federal Rules amendments. Alternatively or in addition, it may be because some individuals on both sides regarded the characterizations as naïve or disingenuous: sheep's clothing for a wolf. It is difficult not to entertain the latter possibility knowing that the Advisory Committee's Associate Reporter identified the concept behind some of the proposals to change the scope of discovery—proportionality—as one of two "breakthrough ideas" in rulemaking

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[3] *Id.*

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> Republican-appointed judges have held a majority of Article III judge seats on the committee in every year but two from 1971 to 2014 (they were in parity in 1984, and in the minority in 2004). On average, across the full period, they held 70% of Article III judge seats. Thus . . . controlling for the composition of the federal bench, Republican-appointed judges had more than double the estimated probability of serving on the Committee during the period of interest, and in absolute terms, they were a majority of Article III judges in 41 of 43 years.

Id., ch. 3 ("The Rulemaking Counterrevolution: Birth, Reaction, and Struggle").
This imbalance is particularly striking in appointments to the important position of chair. Eleven of twelve chairs of the Advisory Committee since 1970 have been appointed by Republican presidents.

[5] *See id*., ch. 3.

concerning discovery over the last four decades.[6] Moreover, as we note in *Rights and Retrenchment*:

> [W]hatever doubt there may be about the significance of the 2015 discovery amendments, the Chief Justice has made his hopes clear. Having prodded the Advisory Committee to [move forward with discovery retrenchment], after the amendments went into effect Chief Justice Roberts added his voice to the effort to ensure that they would not be ignored, and to influence their interpretation. Devoting his entire year-end report for 2015 to the amendments, Roberts emphasized their potential importance. Thus, he observed, although "[m]any rules amendments are modest and technical, even persnickety . . . the 2015 amendments to the Federal Rules of Civil Procedure are different." That is because "[t]hey mark significant change, for both lawyers and judges, in the future conduct of civil trials," with the result that, although they "may not look like a big deal at first glance . . . they are."[7]

In this paper, adopting an institutional perspective, we first survey the history of discovery retrenchment. We then turn to four related reasons why the 2015 amendments to Rule 26 were improvident and should not be used as a model in the States.

II. A Brief History of Discovery Retrenchment

A. Origins through 1970

The original Federal Rules of Civil Procedure became effective in 1938, four years after the successful conclusion of a decades-long campaign that culminated in the Rules Enabling Act of 1934.[8] The system that the Supreme Court devised to exercise the power that Congress delegated in the Enabling Act remained essentially the same until 1956. An Advisory Committee appointed by the Court prepared draft Federal Rules and amendments, with some (albeit, by modern standards, limited) input from the bench and bar, for consideration by the Court and, if acceptable, reporting to Congress. Once so reported proposed rules went into effect if not vetoed by Congress in legislation signed by the president within a specified period.[9]

Following the discharge of the Advisory Committee in 1956, the judiciary sought, and in 1958 Congress enacted, legislation revamping the rulemaking process. The 1958 legislation directed the Judicial Conference of the United States, through which the federal judiciary formulates and supervises the implementation of institutional policy, to "carry on a continuous study of the operation and effect of" the various rules of practice and procedure promulgated under the Enabling Act. It further directed the Conference to recommend to the Court "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote

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[6] Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691, 1709 (2014).

[7] BURBANK & FARHANG, *supra* note 1, ch. 3, (quoting 2015 Year-End Report on the Federal Judiciary, at 4, 5, *available at* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[8] This 1934 statute, now codified at 28 U.S.C. § 2072 et seq. (2012), delegated legislative power to the Supreme Court to promulgate "general rules" of procedure to govern civil actions in the federal trial courts.

[9] For the order appointing the original Advisory Committee, see 295 U.S. 774 (1935). Note that the statutory arrangements governing the Enabling Act's "report and wait" system changed in 1950. *See* Act of May 10, 1950, ch.174, § 2, 64 Stat. 158; Burbank 1982: 1077 n.268. They changed again in 1988.

simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[10] The Judicial Conference promptly decided to exercise its statutory duties through a system of advisory committees reporting to a single Standing Committee, which in turn reported to the Conference.[11]

The 1938 Federal Rules were litigation-friendly. In this they reflected the jurisprudential and social commitments of the individuals who were responsible for drafting them. The way that those individuals approached pleading and discovery in the 1938 Federal Rules made these procedural features critical pillars of the regime they created, and it is thus not surprising that they have been important sites of contestation.

The architects of the 1938 Federal Rules constructed a broad highway for litigation that was free of some of the imposing roadblocks found in prior systems. The work of a very active committee in the 1960s, which included the 1970 discovery amendments, added lanes and cleared other roadblocks. The "highway effect" was not, however, evident for many years. A small federal judiciary managed to dispose of its caseload without evident strain for more than twenty years after the Federal Rules went into effect. By the mid to late 1960s, however, leaders of the federal judiciary were voicing serious concern about increasing caseloads.

B. The Retrenchment Effort in the 1970s: A Decade of Frustration

In *Rights and Retrenchment*, we show that, although Chief Justice Burger had the goal of major litigation retrenchment when he reconstituted the Advisory Committee in 1971, the committee frustrated that goal by spending most of its time over six years studying class action reform, a project they abandoned once the Justice Department caused legislation to be introduced that would have repealed and replaced Rule 23(b)(3), the provision that governs most damages class actions.

Not easily thwarted, however, in 1976 Burger stimulated and presided at the Pound Conference, which was a showcase for those seeking retrenchment through rulemaking. Billed as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice—after Pound's famous 1906 address to the ABA—the Pound Conference sought to address the problem of growing caseloads through procedural reform. In his keynote address, Burger noted "widespread complaints that [pretrial procedures] are being abused and overused," and that "the cure is in our hands,"[12] making clear that he meant a cure by rulemaking under the Rules Enabling Act. Prominent critics took aim at notice pleading and discovery—the cornerstones of modern, litigation-friendly federal procedure—as well as at the recently amended class action rule.[13] Some scholars have "characterized the Burger-organized Pound Conference in 1976 as the most important event in the counteroffensive against notice pleading and broad discovery." [14]

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[10] Act of July 11, 1958, Pub. L. No. 85-313, 72 Stat. 356.

[11] Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, Sept. 1958, at 6-7, available at http://www.uscourts.gov/about-federal-courts/reports-proceedings-1950s.

[12] Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23, 35 (A. Leo Levin & Russell R. Wheeler eds., 1979).

[13] *See* Stephen N. Subrin & Thomas Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1864-65 (2014).

[14] Mike Tonsing, *An Introduction to Symposium on Proposed Changes to Federal Rules of Civil Procedure*, 51 FED. LAW. 22, 25 (2004).

Elements of the organized bar, supported by the business community, have sought to restrict the scope of discovery for decades. Following the 1976 Pound Conference, the ABA, working through a Special Committee for the Study of Discovery Abuse of its Section of Litigation, succeeded in setting the agenda for discovery reform. The Preliminary Draft of Proposed Amendments that the Advisory Committee circulated for comment in March 1978 "was in major part the response of the Advisory Committee to a study of the discovery rules that had been undertaken by the [ABA Special Committee]."[15] After two rounds of notice and comment and two days of public hearings, the Advisory Committee decided not to propose changing the scope of discovery, rejecting the ABA Special Committee's recommendation. Its Chair observed that "we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit."[16]

In addition to rejecting the ABA Special Committee's proposed scope change, the Advisory Committee also rejected its proposal "to amend Rule 33(a) by limiting the number of questions that could be asked by written interrogatories to a party to thirty (30) unless the court permitted a larger number."[17] Explaining the reasons for that decision, the Advisory Committee Chair observed:

> The constantly-echoed criticism was that a limitation on the number of questions was arbitrary, unreasonable and unnecessary. Many commentators stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor. It was frequently stated that limitation of the number of questions would lead to routine requests for court orders enlarging the number.[18]

In 1980 Justice Powell, joined by two colleagues, dissented from the promulgation of the proposed discovery amendments that emerged from this process, deriding them as "tinkering changes" that would "delay for years the adoption of genuinely effective reforms."[19] In this, Justice Powell, who had been President of the ABA, was echoing the reasoning of the ABA Special Committee, which had urged the Advisory Committee not to transmit its proposals, "[m]indful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade."[20] Even though Chief Justice Burger's role in the Rules Enabling Act process probably prevented him from joining Justice Powell's dissenting statement, he cannot have been pleased. Moreover, his disposition cannot have been improved by Powell's use of the term of disparagement — "tinkering" — that Burger himself, channeling Roscoe Pound, had used in his call to action at the 1976 Pound Conference.

C. Proportionality is Born

Whether or not the 1983 amendments to the Federal Rules were "genuinely effective reforms," they certainly were not long delayed. Moreover, primarily because of their emphasis

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[15] Memorandum from Judge Walter R. Mansfield, Chair of the Advisory Committee on Civil Rules, to Judge Roszel C. Thomsen, Chair of the Stranding Committee 2 (June 14, 1979) (available from authors).
[16] *Id.* at 8.
[17] *Id.* at 9-10.
[18] *Id.* at 10.
[19] 446 U.S. 997, 1000 (1980) (dissenting statement of Powell, J., joined by Stewart and Rehnquist, J.J.).
[20] Mansfield memorandum, *supra* note 15, at 8 (quoting ABA Special Committee's Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure).

on sanctions, particularly in the amendments to Rule 11, they were intensely controversial and only barely escaped legislative override. Again rejecting the ABA's recommendation to eliminate discovery relevant to the subject matter of the action (as opposed to the claims or defenses asserted),[21] the Advisory Committee proposed replacing language in Rule 26(a) that seemed to invite unlimited discovery (in the absence of a protective order) with (1) language in Rule 26(b) imposing a duty on the court to limit discovery if it determined that any of three conditions was satisfied, including if the discovery sought was "unduly burdensome or expensive," and (2) a new provision, Rule 26(g), imposing a duty on attorneys and unrepresented parties to certify that, among other things, requests for and responses to discovery were not "unreasonable or unduly burdensome or expensive," backed up by sanctions. Thus was the concept of proportionality in discovery born.

Following an interval during years when the Advisory Committee was preoccupied by controversies arising from proposals to amend Rule 68 [22] and the 1983 amendments to Rule 11, which fueled 1988 legislation amending the Rules Enabling Act,[23] discovery reform returned to center stage in the 1993 amendments. Again, however, the Advisory Committee eschewed change to the scope of discovery in favor of other measures, chiefly required disclosures and presumptive limits on depositions and interrogatories. Unfortunately, having confirmed the value of systematic empirical data in crafting proposed amendments designed to get Rule 11 right,[24] the Advisory Committee reverted to bad habits in its proposed amendments to Rule 26 on required disclosures.

> Again, there was little relevant empirical evidence and, indeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules. Having once abandoned ship, the Committee was apparently persuaded to reboard by the view that it "had a duty to provide leadership in light of its study and hearings," by expressed doubt that ongoing experimentation would yield any useful empirical data and by the argument that a national rule would be necessary to effect "the cultural change the Committee sought."[25]

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[21] *See* Advisory Committee on Civil Rules, Analysis of Comments to Rules 26(a) and (b) 1 (Dec. 21, 1981) ("The ABA believes the proposal does not go far enough in restricting discovery and urges that we submit our 1979 version, which would eliminate the 'subject matter' relevancy standard of 26(b) in favor of 'claims or defenses.'") (available from authors). This memorandum carries the initials of the Chair and Reporter of the Advisory Committee.

[22] *See* Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship?*, 19 U. MICH. J.L. REFORM 425 (1986).

[23] *See* BURBANK & FARHANG, *supra* note 1, ch. 3 (discussing 1980s rulemaking process reforms and noting how they had the effect, and for some proponents the purpose, of making change to the status quo more difficult).

[24] Before the Advisory Committee had access to reliable empirical data on the operation of the 1983 amendments to Rule 11, it had regarded "the criticism [a]s impressionistic." Advisory Committee on Civil Rules, Committee Minutes 53-54 (April 27-29, 1989) (available from author). Even so, it recognized that "the anger level in the bar is high." Moreover, a member "urged that the Committee should strive to be sufficiently receptive to the concerns of others that people will not generally think it necessary or desirable to go to Congress for help." *Id.*

[25] Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOKLYN L. REV. 841, 845 (1993). Some may view the 2015 amendments favorably because the rulemakers have resumed reform leadership following implicit rebukes in the Supreme Court's pleading decisions. *See infra* text accompanying note 42. If so, they should consider what a perceived "duty to provide leadership" wrought in (and after) 1993.

The Advisory Committee linked presumptive limits on interrogatories (but not those on depositions) to the disclosures required by proposed Rule 26(a)(1)-(3): "Because Rule 26(a)(1)-(3) requires disclosures of much of the information previously obtained by this form of discovery, there should be less occasion to use it."[26] The Committee did not revisit the subject when it reduced the scope of required disclosures in 2000.[27]

The discovery/disclosure proposals (and the Rule 11 proposals) encountered resistance at the Supreme Court, with Chief Justice Rehnquist indicating that Court promulgation did not mean that "the Court itself would have proposed these amendments,"[28] and with "four other Justices indicat[ing] their agnosticism about, lack of competence to evaluate or disagreement with, one or more of the amendments."[29] As in 1983, the proposed amendments barely escaped legislative override.

D. Retrenchment and Advisory Committee Leadership

Much of the Advisory Committee's work during the 1990s was devoted to class action reform and to attempts to reach out to and reflect the concerns of the practicing bar. The former bore fruit in a 1998 amendment adding Rule 23(f), which has proved more consequential than many imagined at the time by facilitating the development of appellate class action jurisprudence.[30] The latter were largely unsuccessful, as proposed amendments on jury size were squelched by the Judicial Conference, and the Chief Justice did not extend the term of or reappoint the Chair. It is interesting that in the last year of his three-year term, Judge Higginbotham observed:

> Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.[31]

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[26] FED. R. CIV. P. 33 advisory committee note (1993).

[27] *See* Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 239 (1999).

[28] H.R. DOC. NO. 74, 103d Cong., 1st Sess. 1 (1993), *reprinted in* 113 S. Ct. (Preface) 477 (1993).

[29] Burbank, *supra* note 25, at 842.

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> Ironically, however, Rule 23 amendments that seemed modest at the time have facilitated major change in class action jurisprudence through court decisions. The most obvious and important example is the 1998 amendment adding Rule 23(f). Facially neutral as between plaintiffs and defendants, this amendment permits courts of appeals in their discretion to entertain immediate appeals from class certification decisions. It has enabled and highlighted another path to retrenchment of private enforcement by substantially expanding the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class action jurisprudence. This suggests that, even in the domain of rulemaking, some consequential reforms can fly under the radar screen. In Chapters 4 and 5 we argue that this phenomenon has been an important reason for the Supreme Court's success in furthering the goals of the counterrevolution through decisions on issues salient to private enforcement.

BURBANK & FARHANG, *supra* note 1, ch. 3.

[31] Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997). *See also* Patrick E. Higginbotham, *Iron Man of the Rules*, 46 U. MICH. J.L. REFORM 627, 627-30 (2013).

Nonetheless, under the leadership of a new Chair, who had different preferences, the Committee decided to return to discovery. Having resisted calls to reduce the scope of discovery for more than twenty years, in the late 1990s it proposed amendments to Rule 26 that would shrink the scope of discovery from material relevant to the subject matter of the action, to material relevant to a claim or defense. As we have noted, the Advisory Committee had rejected this change to the scope of discovery when fashioning the proposals that became the 1980 discovery amendments, on the ground that there was insufficient empirical evidence to support it. The 1990s proposed amendments also included a cost-shifting provision that in some circumstances would have required the information-requesting party to bear some or all of the costs of the responding party. Such a rule could have been particularly disadvantageous to parties of modest means, including in particular plaintiffs seeking information in the voluminous records of corporate and government defendants.

In a remarkable display of candor, Judge Niemeyer, the new Advisory Committee Chair, acknowledged both the lack of empirical evidence for the position being urged on the Advisory Committee and the influence of repeated calls for limitations on discovery. He explained:

> Indeed, in August 1991, the President's Council on Competitiveness issued a report claiming that "over 80 percent of the time and cost of a typical lawsuit involves pre-trial examination of facts through discovery." While I am not aware of any empirical data to support this claim, the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation.[32]

Anticipating the change in the Advisory Committee's position, Judge Niemeyer here invoked persistent pressure for litigation retrenchment from elite elements of the bar and a report from President Bush's Council on Competitiveness that had been issued in 1991. The Council, chaired by Vice President Quayle, advocated a variety of anti-litigation proposals, including damages caps, a loser pays rule, and a moratorium on federal statutory one-way fee shifting provisions. The Vice President explained that the Council's proposals were "geared toward reducing excessive and unnecessary litigation and decreasing the costs and time associated with resolving disputes."[33] More candidly, the Council's charge concerned reducing costs imposed on business by government regulation. Some of the Council's litigation reform proposals were subsequently incorporated into the Republicans' 1994 Contract with America, with Newt Gingrich as their public champion.

The Advisory Committee's note explaining its action, which made subject matter discovery available only on a showing of good cause, sounded similar themes:

> Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this

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[32] Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998). *See id.* at 520 (observing that "it is the persistence of complaints and questions about the merit of broad discovery and its expense that, at bottom, has caused the Committee to take another look").

[33] Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 561 (1992).

> subdivision to delete the "subject matter" language. Nearly one third [*sic*] of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions . . . The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.[34]

For those favoring retrenchment, the timing was right. The political climate favored the counterrevolution, and, given the post-1994 locus of partisan control of Congress, there was no risk of congressional override.[35] In a memorandum to his colleagues on the American College of Trial Lawyers' Federal Civil Procedure Committee describing a conversation with Judge Niemeyer, Robert Campbell reported that Niemeyer had delivered the "extremely good news" that the Judicial Conference had approved the proposed discovery scope amendment. The College is an organization of primarily defense lawyers, and it is a long-time advocate of litigation retrenchment. Observing that members of the College had spent "thousands of hours" working for the amendment, Campbell also noted that credit was due to a member of the College, Francis Fox, who "played a major role" on the Advisory Committee when it was considering the proposal.[36]

Even so, the Judicial Conference rejected one of the Committee's proposed discovery amendments (on cost-shifting), and the scope amendment passed that body by a vote of thirteen to twelve.[37] This was an important reminder that the multi-tiered process that was first put in place to exercise the Judicial Conference's responsibilities under the 1958 legislation, and that was subsequently solidified by the 1988 legislation, contributes to the stickiness of the court rulemaking status quo.[38]

Methodologically sound empirical data concerning discovery have been remarkably consistent in debunking claims of ubiquitous abuse or excess made by bar organizations and the business community over the last forty years.[39] From the perspective of putative abuse, in other

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[34] FED. R. CIV. P. 26 (b)(1) advisory committee note (2000).

[35] For a detailed account of the 2000 amendments, many aspects of which are confirmed by our systematic longitudinal data, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001). As we suggest more generally concerning the 1990s, Professor Stempel observes that the "Committee seems to have been operating under both a preference for scientific inquiry and the gravitational pull of the venerable myth of discovery abuse" *Id.* at 555; *see also id.* at 613-14 ("What has changed, of course, are the pressure points of political power, particularly the Advisory Committee's receptiveness to certain arguments preferred by certain groups. Although the Committee and the other Rulemakers continue to strive for nonpartisan fairness, the composition of the Rulemakers has become distinctly more conservative in both ideology and social background.").

[36] Memorandum from Robert S. Campbell, Jr., Comm. Chair, to Members, Fed. Civil Procedure Comm., American College of Trial Lawyers (Sept. 16, 1999) (available from authors).

[37] *See* Stempel, *supra* note 35, at 619, 621.

[38] Under the 1988 legislation, the Conference is permitted but not required to authorize the appointment of advisory committees, but without them the statutorily required Standing Committee would have primary responsibility for all rulemaking (i.e., civil, criminal, appellate, evidence and bankruptcy) under the Rules Enabling Act, which would be untenable. See 28 U.S.C. § 2073 (2012).

[39] *See, e.g.*, EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf; Danya Shocair Reda, *The Cost and Delay*

words, the discovery landscape did not appear meaningfully different in the run-up to the 2000 amendments than it had in 1980. Nor, alas, did the claims of those seeking to curtail discovery. An abiding lack of reliable empirical evidence to support their position did not cause them to change their tune, a strategy of blinkered persistence (or, in social science parlance, "availability cascades") that finally paid off with a different group of rulemakers.

Although the 2000 discovery scope amendment was a retrenchment victory, its significance was questioned at the time, with many deeming the change unlikely to have much practical, as opposed to symbolic, effect. On that view, the episode illustrates that retrenchment of even modest ambition by rulemaking under the 1980s process reforms will elicit controversy and may have difficulty successfully navigating that process.

With the advent and rapid spread of e-discovery, however, even a hard-hearted empiricist aware of the studies in question had reason to wonder whether the landscape had changed or would soon change. The Advisory Committee's work in this area, culminating in the 2006 amendments, is a model of careful and inclusive rulemaking designed to identify incipient problems and nip them in the bud. The FJC's 2009 study, which was stimulated in large part because of concerns that e-discovery was a game-changer, does not give reason for serious general concern.[40]

III. The 2015 Amendments

In *Rights and Retrenchment*, we suggest that one reason for the Advisory Committee's mixed record in the 1990s — why it did not attempt more and bolder retrenchment — had to do with the very different qualities and priorities of its leadership over the decade, contrasting the process by which the Advisory Committee considered class action reform with its consideration of discovery reform. The qualities and priorities of the Committee's leadership also help to understand why rulemaking in the first decade of the new millennium was restrained. On a number of occasions, the Advisory Committee prevented anti-private enforcement proposals from going forward. Moreover, prominent rulemakers celebrated these examples of restraint as evidence that the Rules Enabling Act process works.[41] From this perspective, restraint reflected the benefits of an open process and greater commitment to empirical study, as well as of taking seriously the Enabling Act's prohibition against abridging, enlarging or modifying substantive rights. We also note that some proponents of the Enabling Act process reforms of the 1980s sought to increase the stickiness of the rulemaking status quo, in part by increasing the burdens of evidence needed to justify changes, in precisely this way.

An important question as federal court rulemaking entered the current decade was whether the relative restraint evident in the immediately preceding period would continue. Our interpretation of rulemaking's vacillation between restraint and episodic retrenchment efforts is that there are contending perspectives among rulemakers, even those who support retrenchment.

Narrative in Civil Justice Reform: Its Fallacies and Functions, 90 OR. L. REV. 1085, 1103-11 (2012) (discussing 2009 FJC study); *id.* at. 1111 ("Nearly every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study.").

[40] *See id.* at 1103-11. Professor Reda here discusses both the FJC 2009 study and a 2010 FJC study reporting the results of multivariate analysis of the factors associated with litigation costs. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (2010).

[41] *See* Mark R. Kravitz, David F. Levi, Lee H. Rosenthal, and Anthony J. Scirica, *They Were Meant for Each Other: Professor Edward Cooper and The Rules Enabling Act*, 46.U. MICH. J.L. REFORM 495 (2013):

For some influential rulemakers, the important lessons of the 1980s concerned the threat that empirical deficits of proposed reforms, or overreaching the Rules Enabling Act's charter by abridging substantive rights, pose to the perceived legitimacy of the process. Rulemaking's perceived legitimacy serves the judiciary's institutional interest in control of procedure; it helps the judiciary resist legislatively imposed procedure. For others, the key lessons focused attention on what retrenchment could actually be accomplished given the preferences of bodies with veto power, in particular Congress. They recognized that if power is to be exercised effectively, it must be exercised strategically, with attention to potential responses of other institutional actors.

Against this historical and institutional background, we believe that the 2015 discovery amendments, in particular the amendment adding proportionality to the basic scope of discovery, are cause for concern—and should not be emulated—for four reasons.

A. Prematurity or Overkill

First, these amendments represent the seventh set of (non-stylistic) discovery reforms since 1980. The major change in the landscape during that period—electronic discovery—had been the focus of relatively recent reforms, the effects of which had yet to be thoroughly evaluated, while a 2009 study of e-discovery did not support the retrenchment narrative. For those reasons, and because the amendments came on the heels of Supreme Court decisions that sought to address the same putative discovery problems through judicial amendment of the pleading rules,[42] they were at best premature and at worst overkill.

Consideration of discovery reform in historical perspective reveals repeated amendments to the discovery rules starting in 1980, with the brass ring—scope reduction—repeatedly sought by influential members of the organized bar and the business community, which tended to dismiss other reforms as, in the words of Justice Powell, "tinkering changes." Having for twenty years resisted scope reduction on the ground that there was insufficient evidence to warrant it, but with no qualitatively different evidence before it, in 2000 the Advisory Committee essentially acknowledged that it was yielding to the insistent claims of elite elements of the organized bar—as if long-term repetition could fill the empirical vacuum—while also admitting that less than one third of lawyers surveyed by the FJC supported the change.

Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that those amendments have been ineffective,[43] further discovery amendments (other than those that address special problems, as in 2006 and 2010) were at best premature.

At worst they were (and are) overkill. In presenting a preliminary draft of proposed amendments to Rule 56 for public comment in 2008, the Advisory Committee referred to summary judgment as "the third leg of the notice-pleading, discovery, summary-judgment stool." Both the Supreme Court's 2007 *Twombly* decision and its 2009 *Iqbal* decision, which judicially amended the pleading rules, were predicated on supposed (albeit quite different) costs of discovery and on the inability of federal district court judges to manage discovery in such a way as to keep those costs under control. After what has happened to summary judgment and notice-

[42] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[43] *See* Frank H. Easterbrook & Thomas E. Baker, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 699 (1995) ("[T]he Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.").

pleading, one can only wonder whether, following the 2015 amendments, the stool is still serviceable for the purposes for which it was intended.

The elimination of subject matter discovery (on a demonstration of good cause) can only seem "modest" or "moderate" if one neglects the history recounted above and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination will have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so. In that regard, to eliminate other language in Rule 26, which had previously survived in the face of *Twombly*-like claims of managerial deficits, could only further encourage courts to see in these amendments a major change of course. More important, that view now has the blessing of the Chief Justice.

A more likely cause of such a change of course, however, is the amendment that transforms proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself— its status since 1983— into an integral part of the scope definition.

We do not infer from Professor Arthur Miller's testimony on the proposed proportionality amendments[44] that the Advisory Committee he served as Reporter in 1983 intended to bury a bomb—sold as a firecracker—that could be detonated decades later after having been unearthed. But the fact that the limitation has existed since 1983 and has been given greater prominence because of concern that judges were not properly managing discovery[45] again lends surface plausibility to the "modest" or "measured" label. Apparently, that was also the intent of those who argued that the change would not, as claimed by critics, shift the burden in discovery disputes, pointing to Rule 26(g). The specific argument is fallacious. More important, the Chief Justice's 2015 Year-End Report again suggests that the label was a smokescreen.

It is true that those seeking discovery under prior law were required to make the certification prescribed by Rule 26(g). It is not true, however, that they had the burden of persuasion when another party made a motion for sanctions:

> To guard against misuse of the rule, including the use of hindsight, the courts presume the validity under Rule 26(g) of discovery requests, responses and objections and of Rule 26(a)(1) and (3) disclosures. As under Rule 11 . . . this is not a formal evidentiary presumption. Rather, it is a reflection of the fact that *the burden is on the opposing party to demonstrate the inadequacy of any challenged paper*. It represents an approach under which all doubts are resolved in favor of the signer, and sanctions are imposed only if it is patently clear that they are appropriate.[46]

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[44] *See* Advisory Committee on Civil Rules, Transcript of Proceedings 36-45 (Jan. 9, 2014) (testimony of Arthur R. Miller), available at www.uscourts.gov/file/9446/download.

[45] The kinship of this reasoning with the Court's reasoning in *Twombly* and *Iqbal* suggests that it is a common trope of litigation retrenchment. Whatever the institutional mode of retrenchment, one should not accept the concerns at face value. Thus, the Advisory Committee's Associate Reporter chronicled increasing attention to proportionality under the pre-existing rule. *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2008.1, at 159 (2010) ("Judges relatively frequently limit or forbid discovery when the cost and burden seem to outweigh the likely benefit in producing evidence.").

[46] GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 642 (5th ed. 2013) (emphasis added).

Having denied a shift of burden during the comment process, the Advisory Committee ultimately acknowledged that in some cases the burden would indeed be on the party seeking discovery.[47]

The most worrisome potential effect of the scope change is not the prospect of substantially increased transaction costs if proportionality replaces burdensomeness as the preferred objection of those who have something to hide or for whom discovery is an opportunity to inflict financial pain on opponents (which, as discussed below, is worrisome enough). It is rather that, either in prospect or in fact, such transaction costs will prevent a party from securing discovery that is central to its claims or defenses, imposing costs of a very different order.

B. The Neglected Social Benefits of Discovery

Second, the 2015 discovery amendments in question proceed from an impoverished view of litigation and discovery that minimizes or ignores the social benefits of both.[48] Put otherwise, the amendments do not reflect serious or sustained consideration of the fact that limiting discovery may entail substantial costs for the enforcement of the substantive law, including law that Congress, legislating against the background of the Federal Rules, intended to be enforced through private litigation.

The primary architect of the Federal Rules on discovery, Edson Sunderland, was both a Legal Realist and, more important for these purposes, a Progressive.[49] The Progressives gained prominence in the early 20th Century, reacting to the excesses of the Industrial Revolution through a campaign for what they called "legibility"—we would now say transparency. They contended that effective regulation was impossible without access to the facts concerning the regulated enterprise.[50] Sunderland wrote in 1925:

> The spirit of the times calls for disclosure, not concealment, in every field— in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush.[51]

Shortly following the 1980 discovery amendments, in an article that was sharply critical of the retrenchment effort (particularly as evidenced by Justice Powell's dissent), Jack Friedenthal pointed out that discovery enables parties in civil litigation to secure not only evidence that is necessary to establish their claims and defenses, but also, on occasion, evidence that reveals the

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[47] "The change does not place on the party seeking discovery the burden of addressing *all* proportionality considerations." FED. R. CIV. P. 26(b)(1) advisory committee note (2014) (emphasis added), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014.

[48] *See* Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647 (2015). *See also* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 Ga. L. Rev. ___ (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520 JR]

[49] *See* BURBANK & FARHANG, *supra* note 1, ch. 3.

[50] *See* Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEVELOP. 61 (2002).

[51] Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 116 (1925). *See id.* at 129 ("The legal profession alone halts and hesitates. If it is to retain the esteem and confidence of a progressive age, it must itself become progressive.").

inadequacy of existing substantive law.[52] Moreover, the 1996 reminder by the then Chair of the Advisory Committee that "[c]alibration of discovery is calibration of the level of enforcement of the social policy set by Congress," was echoed at the same symposium by a recent Reporter:

> We should keep clearly in mind that discovery is the American alternative to the administrative state . . . every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accomplished by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish disincentives for lawless behavior across a wide spectrum of forbidden conduct.[53]

More recently, research by political scientists has demonstrated that the substantial increase in federal litigation in the late 1960s and 1970s is closely correlated with purposeful decisions by Congress to provide incentives for private enforcement of federal statutes, and that in doing so instead of relying exclusively on administrative (or other public) enforcement, Congress was often seeking to insulate the majority's preferences from subversion by agencies under the control of an ideologically distant executive.[54] This and other work makes clear that Americans rely on decentralized litigation—for a variety of cultural, institutional, financial, and political reasons—to do what in many other advanced democracies is done by social insurance or a central bureaucracy.[55] It also makes clear that private enforcement regimes are complex, polycentric designs and that they rely on—may stand or fall because of—the procedural infrastructure.[56]

Knowing these things, it is disconcerting to see how little attention the Advisory Committee gave to the social benefits of litigation and discovery. Access to court, which receives an occasional passing nod in the materials from this process that we have read, is important in its own right.[57] But we live in a society where the same influences that prompt reliance on private enforcement of public law render it difficult to make up for capacity that is lost in that realm, an insight that may have contributed to the Reagan Administration's decision to pursue deregulation

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[52] *See* Jack Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806 (1981).

[53] Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

[54] *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE (2010).

[55] See *id.*; ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001). Thus, if "it behooves us to look to places like the U.K. and Germany to see how you can have an effective court system which does not function the way ours does," Advisory Committee on Civil Rules, Transcript of Proceedings 125 (Nov, 7, 2013) (testimony of Dan Troy), it also behooves us to consider the broader regulatory environment—which might dampen the zeal of those who make such partial comparisons.

[56] *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

[57] Proponents of these amendments sometimes sought to sell them in terms of access, leading the Chair of the Advisory Committee to suggest at the first public hearing that "concern about access to justice is pushing on both sides of this." Transcript, *supra* note 55, at 62 (Nov. 7, 2013). Those who are concerned about access to justice for the parties in high-stakes, complex cases should find a solution to discovery problems in such cases that does not come at the price of access for the poor and the middle class.

through litigation retrenchment.[58] In the case of the long campaign for discovery retrenchment, success may lead to *no enforcement*, an insight that suggests why some in the business community and those who do their bidding are willing to invest in what we describe above as "a strategy of blinkered persistence."

Inattention to the social benefits of litigation and discovery (or the costs of discovery retrenchment) is especially disconcerting when one recalls that any power the rules committees exercise (as agents of the Supreme Court) under the Rules Enabling Act is delegated legislative power. It is not an accident that, through institutional dialogue in the shadow of proposed legislation and ultimately the 1988 amendments to the Enabling Act, the rulemaking process has come to look very much like the administrative process.[59] One need not believe that formal cost-benefit analysis is appropriate for federal court rulemaking[60] to conclude that the rulemakers should openly acknowledge and reckon with what is at stake. Instead of ignoring such soft variables, the Advisory Committee should take them into account. In connection with the 2015 amendments, it could have done so by self-consciously determining the strength of the evidence that is needed to justify discovery retrenchment, recognizing the risk it poses of destabilizing the infrastructure on which Congress can be assumed to have relied in the 1960s and (particularly) 1970s, when it passed scores of statutes with private enforcement regimes.

Doing so would have rendered it more difficult to ignore or dismiss the fragility of the empirical basis underlying the amendments in question. It would also have made clear that, if the Advisory Committee proceeded for what some interest groups, lacking sound empirical support, began calling "normative reasons," it would signal intent, in Judge Higginbotham's words, to "calibrat[e] . . . the level of enforcement of the social policy set by Congress."

C. The Transaction Costs of Trans-Substantive Procedure

Third, even if the 2015 amendments are responsive to discovery problems that occur in a relatively small slice of federal litigation, they will predictably generate additional transaction costs in the great majority of cases that lack such problems, disadvantaging litigants with fewer resources, including plaintiffs seeking remedies under federal statutes that include private enforcement regimes.

Jack Friedenthal's objections to the 1980 discovery amendments included the criticism that they responded to problems arising chiefly or exclusively in complex cases.[61] As the senior author of this paper pointed out a few years later:

> But if there has been distortion, complex litigation may not be the culprit. Rather, the problem may be that today's reformers remain transfixed by the vision of uniform, trans-substantive procedure that animated the [1938] Federal Rules of Civil Procedure. Whatever the cause, *the fact that complex litigation has brought*

[58] *See* BURBANK & FARHANG, *supra* note 1, ch. 2 ("The Legislative Counterrevolution: Emergence, Growth, and Disappointment").
[59] *See id.*, ch. 3.
[60] *Cf.* Administrative Conference of the United States, Benefit-Cost Analysis at Independent Regulatory Agencies (Recommendation 2013-2) (June 13, 2013), *available at* http://www.acus.gov/sites/default/files/documents/Recommendation%202013-2%20%28Benefit-Cost%20Analysis%29_0.pdf.
[61] *See* Friedenthal, *supra* note 50, at 813.

> *to light serious problems may make us less critical than we ought to be about the effects of proposed reforms in other types of cases*.[62]

In the intervening decades, we have witnessed dramatic evidence of the dilemma that this vision can pose for procedural reform, with the Court's pleading decisions a recent but particularly vivid example.[63] Of course, it is a welcome dilemma for those who seek to leverage isolated problems into wholesale retrenchment.

We have also witnessed less obvious effects of turning the Federal Rules of Civil Procedure into the Federal Rules of Complex Litigation. Since the senior author of this paper started teaching Civil Procedure around the time of the 1980 amendments, it appears that all federal civil litigation has become more complex and expensive. Part of the responsibility must lie with the rulemakers and with federal judges who faithfully seek to implement their reforms. The sheer number of discovery changes since 1980—prominently including a new layer of disclosures, expert reports and multiple requirements to confer—gives pause in that regard, as does the creeping substitution of motion practice for trial practice. Also consequential, we suspect, has been the relentless push toward judicial management, which is a necessity in some types of cases under a system of "general rules" that must go easy on determinative content and provide substantial room for judicial discretion. That which is a necessity in high-stakes, complex cases, however, can be a curse in simpler cases of modest stakes.[64]

In 1993 the Advisory Committee suggested that, as a result of the required expert reports it introduced, "the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition."[65] Such a suggestion reflects inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs. Some of the 2015 amendments appear to reflect similar inattention.

Thus, for instance, once one recognizes that making proportionality part of the scope definition rather than a defense to a request for relevant evidence in fact shifts the burden to the party seeking discovery on some issues, one cannot avoid the possibility— some would say the likelihood—that, as we observed above, "proportionality [will replace] burdensomeness as the preferred objection of those who have something to hide or for whom discovery is regarded as an opportunity to inflict financial pain on opponents."

Nor would these costs—expense and delay—be confined to the parties. Others have commented about the difficulty of assessing proportionality under the 2015 amendments and the risk that the multi-factor analysis they prescribe will lead to subjective and inconsistent judgments that are effectively unreviewable. [66] As Judge Easterbrook observed in a 1989 article on what he called "impositional discovery," "[m]ulti-factor standards cut down on loopholes—the bane of rules—but at great cost."[67] Whatever one thinks of the Supreme Court's reliance on

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[62] Stephen B. Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1465 (1987) (emphasis added).

[63] *See* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009).

[64] *See* Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 JUDICATURE 163 (2008).

[65] FED. R. CIV. P. 26(a)(2)(B) advisory committee note (1993).

[66] *See* Gelbach & Kobayashi, *supra* note 48.

[67] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989). The quest for proportionality is not the problem. The means chosen are. For a different vision of proportionality, one that relies on relatively hard-and-fast limits on discovery, but only in a separate track for simple cases (defined to exclude cases brought under

Judge Easterbrook's 1989 article, *Discovery as Abuse*, in its *Twombly* decision—the Court did not so much as mention the numerous post-1989 discovery amendments[68]—his description of the dilemma that a judge faces when seeking to identify abuse in a regime of proportionality still seems apt in the altered landscape of plausibility pleading:

> Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. The timing is all wrong. . . . The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find . . . Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests . . . The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label a request as abusive . . . [Judicial officers] have no way to evaluate the costs and benefits of discovery ex ante. . . .[69]

At that, Judge Easterbrook's concept of impositional discovery does not attend to social benefits.

D. Discovery Retrenchment as Politics and the Legitimacy of Court Rulemaking

Fourth, in light of the long history of discovery retrenchment sought by powerful and persistent interest groups and the abiding paucity of sound empirical data supporting their claims, the 2015 amendments suggest that rulemaking is destined for controversies, professional and political, akin to those that led to the 1988 amendments to the Rules Enabling Act and attended the 1993 amendments— controversies that the Advisory Committee worked hard to put behind them in the first decade of the new millennium.

In *Rights and Retrenchment*, we provide an institutional account of federal court rulemaking that traces its travails in the 1980s, in large part, to the perceived insularity and lack of openness of the rulemakers and the rulemaking process, and inattention to both empirical data and the limits on rulemaking imposed by the Rules Enabling Act. We attribute the relative lack of controversy in the 2000s to "the deeper epistemic foundation that results from an open process and from greater commitment to empirical study" and to "the rulemakers' commitment to take the Rules Enabling Act's limitations seriously."[70] We also suggest that changing institutional dynamics may have played a part:

> [W]hen rulemakers are judges, and when justification for rule changes must be publicly articulated in light of a public evidentiary record, in addition to (and

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statutes containing private enforcement regimes), see Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 409-12 (2011).

[68] *See Twombly*, 550 U.S. at 560.

[69] Easterbrook, *supra* note 67, at 638-39. "The portions of the Rules of Civil Procedure" cited by Judge Easterbrook were Rules 26(g) and 26(c). *See id.* at 638 n. 14. Note that the informational problems he describes are less serious if questions of proportionality are raised late in the discovery process, which seems more likely under the former regime.

[70] BURBANK& FARHANG, *supra* note 1, ch. 3.

> potentially contradicting) judicial experience and common sense, they may be reluctant to become involved in controversies in which their decisions can be tarred with a political label. This is especially true when the decision-makers' monopoly of expertise is in question, in part because the effect of potential procedural choices on substantive rights is plain for all to see. The possibility that the ostensibly procedural will be revealed as manifestly substantive is made more likely by public hearings, a public record, and the virtual certainty that advocates for those opposing a rulemaking proposal will articulate an impending injury to substantive rights.[71]

The 2015 amendments suggest that it may be time to reconsider that process. The reduced threat of statutory override since 1995 appears to have influenced some leaders who favored the goals of the counterrevolution (including Chief Justice Roberts). Even if sharing the concern about the legitimacy and effectiveness of the Rules Enabling Act process that contributed to rulemaking's restraint throughout much of the period since the 1980s process reforms, these leaders evidently believed that it was a concern that could safely be subordinated to the desire to exercise power. Nor is this surprising since threats to a proposed amendment that the Court promulgates and to the Rules Enabling Act itself have a common source: Congress.

Particularly if this is true, but in any event, the serious imbalances that we find in the composition of the Advisory Committee suggest that a change in the locus of power to make appointments should be considered as one option.[72] To be sure, we do not believe that such imbalances make a difference in the great majority of the committee's work. As we discuss in *Rights and Retrenchment*, however, we expect ideological differences about the content of Federal Rules to surface precisely in that part of the landscape of litigation procedure where ideological and political influence has been inescapable since the birth of the counterrevolution in the first Reagan administration — private enforcement of federal law — and in the terrain with which it merged not long thereafter, the project of tort reform.[73]

In addition, it is difficult to escape the possible influence on the current Chief Justice's appointments to the Advisory Committee (as well as the Standing Committee) of the personal ideological preferences that animated his role in the birth of the counterrevolution. As we show, that role included advocating for an attorney's fee bill that others in the administration regarded as politically dangerous, and initiating legislative proposals to dilute enforcement of Section 1983, one of the most important civil rights statutes, and one that can only be enforced by private plaintiffs.[74] Our data revealing Chief Justice Roberts as the most anti-private enforcement justice in over fifty years in cases with at least one dissent,[75] do not suggest that his preferences have changed. Nor, of course, do his encouragement to move ahead with rulemaking in an area of intense controversy or, once amendments in that area became effective, his decision to use the Chief Justice's entire 2015 Year-End Report on the Federal Judiciary to emphasize his view of their importance and to support training of judges designed to make sure they are effective.

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[71] *Id.*

[72] In *Rights and Retrenchment*, we also discuss the option of prescribing membership criteria by statute. *See id*., ch. 6.

[73] *See id.*, ch. 3.

[74] *See id.*, ch. 2.

[75] *See id.*, ch. 4 ("The Counterrevolution on the Supreme Court: Succeeding Through Interpretation"), Figure 4.4 (showing that Chief Justice Roberts voted against plaintiffs on private enforcement issues at a 91% rate).

IV. Conclusion

It is ironic, but in context entirely appropriate, that the Chief Justice begins and ends his 2015 Year-End Report with stories about dueling, which was, of course, an activity (usually) confined to adversaries of a certain, and the same, socio-economic class. Continuing a trend that goes back decades, the 2015 amendments take a problem that arises chiefly in complex, high-stakes litigation between corporations and devise solutions that necessarily apply to all federal litigation. As a result, the layers of additional expense that active judicial management can impose make litigation costlier for litigants less able to afford it, including most importantly individuals.

Making proportionality part of the basic scope of discovery will encourage more objections by litigants who understand the strategic value of increasing the expense of their adversaries, particularly when opposing counsel is serving on a contingency-fee basis. In many such cases, there will be a problem of asymmetric information, as when a Title VII plaintiff seeks the evidence necessary to establish her claim and that evidence is buried in the files of her employer. When there is disagreement, the amendments to Rule 26 require decisions about a matter critical to effective access to court and to private enforcement of public law. Those decisions will be made according to a multi-factored analysis that is necessarily subjective and likely to cause judges to privilege the private costs over the public benefits of discovery. It does so at a time when there has been a long-running and sustained campaign against litigation in all federal lawmaking sites—a campaign that *Rights and Retrenchment* shows has been most successful in the federal courts.

While celebrating and seeking to ensure the effectiveness of the discovery amendments, the Chief Justice observes that the "success of the 2015 civil rules amendments will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share."[76] As we observe in *Rights and Retrenchment*, however, "[i]f the data on decisions interpreting Federal Rules that we present in Chapter 4 tell us anything, it is that, when those rules have obvious implications for private enforcement, shared values have become increasingly hard to find."[77]

[76] 2015 Year-End Report, *supra* note 7, at 10.
[77] BURBANK & FARHANG, *supra* note 1, ch. 3.