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THE END OF AN ERA? FEDERAL CIVIL PROCEDURE AFTER THE 2015 AMENDMENTS

*Adam N. Steinman**

ABSTRACT

The recent amendments to the Federal Rules of Civil Procedure were the most controversial in decades. The biggest criticisms concerned pleading standards and access to discovery. Many feared that the amendments would undermine the simplified, merits-driven approach that the original drafters of the Federal Rules envisioned and would weaken access to justice and the enforcement of substantive rights and obligations.

This Article argues that the amendments that came into effect on December 1, 2015, do not mandate a more restrictive approach to pleading or discovery. Although there was legitimate cause for alarm given the advisory committee's earlier proposals and supporting documents, the final amendments—in light of their text, structure, and accompanying advisory committee notes—should be interpreted to preserve notice pleading and a robust discovery process. The more significant lesson of the 2015 amendments, therefore, may be to confirm the view that the amendment mechanism of the Rules Enabling Act is unlikely to generate consequential changes to the Federal Rules (for better or for worse). The process leading to the 2015 amendments was teed up almost perfectly for opponents of meaningful access and enforcement to make real, detrimental changes to federal pleading and discovery standards. Yet the final amendments ultimately did not do so.

Accordingly, the key battleground following the 2015 amendments will be in the federal courts themselves, as judges are called upon to interpret and apply the rules in particular cases. No doubt aware of this fact, Chief Justice Roberts has taken various steps to spin the recent amendments as making more significant changes than they actually do. These post-amendment moves are not legally authoritative and do not modify the law of civil procedure. But the Chief

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Justice and his allies may win the day if they are able to dominate the gestalt surrounding the 2015 amendments in a way that persuades lower court judges to take a more restrictive approach. Properly interpreted, the 2015 amendments do not support the Chief's narrative. Recognizing this will be crucial for ensuring access and enforcement going forward.

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INTRODUCTION

On December 1, 2015, a set of controversial amendments to the Federal Rules of Civil Procedure took effect.¹ The five-year-long rulemaking process that culminated in these amendments focused most intensely on pleading standards and access to discovery. These two procedural issues are crucial to the judicial enforcement of substantive legal rights and obligations because, in many cases, the evidence and information needed to prove a substantive claim remains in the hands of the defendant.² The pleading standard matters because too strict a standard could create an insurmountable Catch-22: plaintiffs would need court-supervised discovery to obtain the information needed to get past the pleading phase, but they could not invoke the discovery process unless they survived the pleading phase.³ And the scope of discovery matters because—even if a case gets past the pleading phase—too restrictive an approach to discovery can make it impossible to obtain the information needed for judicial enforcement to succeed.⁴

The rulemaking machinery that led to the 2015 amendments, however, was not driven by a desire to facilitate meaningful access to the courts or to promote effective enforcement of substantive rights. Rather, many involved in the process embraced the all-too-common critique that lenient pleading standards and the ability to compel one's adversary to provide discovery invite frivolous lawsuits, unwarranted litigation costs, and lengthy delays in resolving disputes.⁵

¹ See 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, A. BENJAMIN SPENCER & ADAM N. STEINMAN, *FEDERAL PRACTICE & PROCEDURE* § 1007 (4th ed. 2016) (summarizing the amendments); see also Supreme Court of the United States, Order of April 29, 2015, http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf (“[T]he foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2015 . . .”).

² See, e.g., Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 589 (1997); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1583–85 (2014); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824–26 (2010); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1263 (2008); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288–89 (2013); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 355–56 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1311–12 (2010); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1843–51 (2014).

³ See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 42–43 (2010); Steinman, *supra* note 2, at 1352.

⁴ See Miller, *supra* note 2, at 353–56; Subrin & Main, *supra* note 2, at 1849–51.

⁵ See *infra* Section I.C.

Such criticisms have been frequently debunked as empirically unsupported and conceptually incoherent,⁶ but this “cost-and-delay narrative”⁷ featured prominently in the conferences, reports, memoranda, and agenda books that were generated during the rulemaking process.⁸ It seemed to many, then, that the 2015 amendments would undermine the simplified, merits-driven approach put in place by the original drafters of the Federal Rules.

But that is not what happened. Consider, for example, the proportionality considerations that have been codified in the Federal Rules for more than three decades. As the current amendments were making their way through the Rules Enabling Act process, many worried that proportionality would become a more significant obstacle to discovery.⁹ In fact, the text and structure of the amendments that were ultimately adopted—as well as their accompanying advisory committee notes—do not compel or suggest that federal courts should balance these considerations in a more restrictive way.¹⁰ Likewise, the biggest concern regarding pleading standards—the 2015 amendments’ elimination of the pleading forms contained in the rules’ appendix—was mitigated by a clarifying note stating explicitly that deleting the forms “does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”¹¹

⁶ See Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. (forthcoming 2016) (manuscript at 18–19), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520; Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 768 (2010); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1394 (1994); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1090 (2012); Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2074–75 (2002); see also Miller, *supra* note 2, at 361 (“[A]ccording to the practicing bar, . . . litigation abuse is anything the opposing lawyer is doing.”).

⁷ Miller, *supra* note 2, at 365 (identifying the “cost-and-delay narrative” and calling it “an enticing elixir, one that is easily consumed but perhaps one that is lacking in nutritional value”); see also Reda, *supra* note 6, at 1090 (“The longevity of the cost-and-delay narrative should raise alarm bells because it provides support for efforts to foreclose access to civil courts and to shift the focus of procedural lawmaking away from the facilitation of legal claims and the remedying of legal wrongs . . .”).

⁸ See *infra* notes 84–87 and accompanying text.

⁹ See *infra* Section II.A.

¹⁰ Some aspects of the amendments, in fact, place greater emphasis on the need for discovery to avoid information asymmetries that can block effective enforcement of substantive law. See *infra* notes 147–50 and accompanying text. The only aspect of the Rule 26 amendments that forecloses discovery that might otherwise have been available is the elimination of Rule 26(b)(1)’s rarely used “second tier”; as explained *infra* Section III.C, however, this is unlikely to make a significant difference in practice.

¹¹ FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment (discussed *infra* notes 199–203 and accompanying text).

This is not to defend the 2015 amendments. The best that can be said for them is that they left the status quo largely in place, and that is hardly a resounding endorsement. But for those who are justifiably concerned about the potential for more restrictive pleading and discovery standards to obstruct access and to weaken enforcement, this should be welcome news.

In doing so little, however, the 2015 amendments mark another kind of transformation. They seem to confirm the view that the rules amendment process is unlikely to yield significant changes to the Federal Rules of Civil Procedure (for better or for worse). The process leading toward the 2015 amendments was teed up almost perfectly for the cost-and-delay narrative to change the rules of civil procedure in detrimental ways. Yet those efforts failed. That failure, in fact, parallels unsuccessful attempts in Congress to legislate more restrictive approaches to important procedural issues.¹²

The current state of affairs—which stems from a combination of developments in recent years¹³—might be called a post-legislative era in civil procedure. While this situation has the potential upside that neither the rules amendment process nor Congress is likely to make legislative changes that will subvert the original vision of the Federal Rules, other institutions may pose more serious threats. First and foremost, there is the Supreme Court, which institutionally may be better positioned than either Congress or the rule amendment process to take civil procedure down a more restrictive path.¹⁴ This concern may seem self-evident given the controversy surrounding many of the Court's recent decisions on civil procedure.¹⁵

¹² The last piece of congressional legislation to have a significant effect on the procedural rules that mediate access and enforcement was the Class Action Fairness Act of 2005. *See generally* Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1593–94 (2006) (describing the effect of the Class Action Fairness Act). In the decade since, proposed legislation on a range of procedural issues has failed to become law. *See infra* notes 217–19 and accompanying text.

¹³ *Burbank & Farhang, supra* note 2, at 1562–82, discussed *infra* notes 217–20 and accompanying text.

¹⁴ *See id.* at 1580–82.

¹⁵ *See, e.g.,* Daimler AG v. Bauman, 134 S. Ct. 746 (2014). *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See generally* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–72 (2013); Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1514–17, 1525–29 (2016); Miller, *supra* note 2, at 310; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 81–84, 91–104, 161–68 (2011); Subrin & Main, *supra* note 2, at 1869; Noam Scheiber, *As Americans Take Up Populism, the Supreme Court Embraces Business*, N.Y. TIMES (Mar. 11, 2016), <http://www.nytimes.com/2016/03/12/business/as-americans-take-up-populism-the-supreme-court-embraces->

But for the key issues that were the focus of the 2015 amendments, it is less clear than one might suspect that the Supreme Court will impose more restrictive approaches by handing down precedent-setting decisions on discovery and pleading standards. A district court's ruling on whether a particular discovery request comports with proportionality considerations, for example, is an interlocutory ruling that is rarely subject to appellate review (much less Supreme Court review).¹⁶ Pleading standards, of course, were the subject of the Supreme Court's controversial decisions in *Bell Atlantic Corp. v. Twombly*¹⁷ and *Ashcroft v. Iqbal*.¹⁸ But those decisions did not necessarily mandate a stricter approach to pleading—indeed, more recent Supreme Court decisions suggest otherwise.¹⁹ So although empirical studies indicate that federal courts have (at least for some kinds of cases) applied pleading standards more restrictively after *Twombly* and *Iqbal*,²⁰ one explanation may be that lower courts have been misinterpreting those decisions.²¹

There is a crucial lesson in this as courts and scholars try to make sense of the 2015 amendments. The outputs of law-generating decisions—whether binding precedents from the Supreme Court or amendments to positive-law rules and statutes—are not self-defining. Federal judges, particularly lower court

business.html. Because the Supreme Court divided 5–4 in some of these controversial decisions, the passing of Justice Scalia earlier this year may have a major impact on the Supreme Court's approach to these issues going forward. See Adam Liptak & Quoc Trung Bui, *Supreme Court Precedents That May Be at Risk*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/interactive/2016/02/18/us/politics/19-precedents.html>.

¹⁶ See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (“[W]e have generally denied review of pretrial discovery orders.” (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981))).

¹⁷ 550 U.S. 544 (2007).

¹⁸ 556 U.S. 662 (2009).

¹⁹ See Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 336 (2016) (“[I]f one takes the reasoning of *Twombly* and *Iqbal* seriously, there was indeed a path forward that would retain the notice-pleading approach set forth in the text of the Federal Rules and confirmed by pre-*Twombly* case law. That path was always the best way to make sense of *Twombly* and *Iqbal*, and it appears to be the path the Court itself has taken in more recent decisions.” (footnote omitted)).

²⁰ See *infra* notes 70–71 and accompanying text (describing the empirical effects of *Twombly* and *Iqbal*).

²¹ See *supra* note 19. Some federal courts explicitly recognized that *Twombly* and *Iqbal* should not be read to undermine the notice pleading standard that has long been a bedrock of federal civil procedure. See, e.g., *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (noting the pre-*Twombly* understanding that “all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity,” that “a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader’s claim and a general indication of the type of litigation that is involved,” and that *Twombly* and *Iqbal* do not “undermine[] these broad principles”). This is not to excuse the problematic aspects of the *Twombly* and *Iqbal* decisions, but rather to recognize that—as lawmaking events—those decisions should not be interpreted to require a more restrictive approach to pleading. See Steinman, *supra* note 19, at 364–67.

judges, have to interpret and apply those rules and precedents in particular cases. That is where the rubber hits the road, and that is where battles about the 2015 amendments will be fought. Now that the amendments have been finalized, the question is how they should be interpreted going forward.

Chief Justice Roberts's behavior in the wake of the 2015 amendments confirms this point. The Chief has a long history—dating back to his days as a lawyer in the Reagan White House—that puts him squarely in the against-judicial-access camp.²² It is not surprising, then, that he has taken a number of steps to encourage lower courts to apply more restrictive approaches to pleading and discovery following the 2015 amendments. He made the amendments the centerpiece of his *2015 Year-End Report on the Federal Judiciary*.²³ In that report, the Chief Justice portrayed the discovery amendments as a “significant change” that demands “increased reliance” on the proportionality considerations.²⁴ With respect to the abrogation of Rule 84 and the various pleading forms, he flatly contradicted the advisory committee note's instruction that removing the forms “d[id] not alter existing pleading standards”;²⁵ instead, Chief Justice Roberts asserted that the eliminated forms were “obsolete” and did not “reflect current practice and procedure.”²⁶ His Year-End Report then directed readers to what he called “revised” pro se forms that were posted on the U.S. Courts' website—forms that could be read to impose higher burdens on plaintiffs at the pleading stage.²⁷

Neither the Chief Justice's Year-End Report nor the new batch of pro se forms is legally authoritative. They were not approved via the Rules Enabling Act process, nor can they be said to create any sort of binding precedent for lower courts via *stare decisis*. More importantly, they mischaracterize the amendments themselves. Yet Chief Justice Roberts and his allies may ultimately win the day if they are able to control the gestalt surrounding the 2015 amendments in a way that persuades lower court judges to take a more restrictive approach to pleading standards and access to discovery.

The Chief Justice's recent moves deserve criticism from those who are legitimately concerned about weakening meaningful judicial enforcement. But

²² See *infra* notes 124–26 and accompanying text.

²³ See JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015) [hereinafter 2015 YEAR-END REPORT], <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

²⁴ *Id.* at 5–7.

²⁵ FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

²⁶ 2015 YEAR-END REPORT, *supra* note 23, at 8–9.

²⁷ See *infra* notes 239–46 and accompanying text.

such critiques must target more than just the Chief's apparent policy preferences when it comes to civil procedure and access to justice. They should also challenge his assumptions about what the 2015 amendments actually do. Properly interpreted, the 2015 amendments do not mandate more restrictive approaches to pleading standards or access to discovery. Maneuvers like the Year-End Report and the new pro se forms do not change the law of civil procedure. To the contrary, the need to resort to such tactics confirms that the attempt to achieve more ambitious substantive changes to the rules themselves was unsuccessful.

Part I of this Article describes the path that led to the 2015 amendments: the simplified, merits-driven vision of the Federal Rules' initial drafters, the Supreme Court's potentially disruptive decisions in *Twombly* and *Iqbal*, the post-*Iqbal* activity of the relevant rulemaking committees, and the initial proposal that was circulated for notice and comment in the summer of 2013. Part II summarizes the comments that were submitted in response to that initial proposal, and the revisions that the rulemaking committees made following the public comment period. Part III closely examines the key aspects of the 2015 amendments as they pertain to access to discovery and pleading standards and explains how they do not mandate more restrictive approaches for either issue.

Finally, Part IV argues that the real lesson of the 2015 amendments is that they confirm, as a practical matter, that the rules amendment process is unlikely to be an effective mechanism for subverting the original vision of the Federal Rules. The key battleground, therefore, will be in the federal courts, as judges are called upon to interpret and apply the rules in particular cases. This Part then describes Chief Justice Roberts's efforts to spin the 2015 amendments and argues that federal courts should interpret and apply the rules as they are written, not as the Chief Justice wishes they were written.

I. THE PATH TOWARD PROCEDURAL RECALIBRATION?

To set the stage for the 2015 amendments, this Part begins by laying out the Federal Rules' initial vision on pleading standards and access to discovery. It then explains how the Supreme Court's controversial decisions in *Twombly* and *Iqbal* raised questions about both the proper approach to pleading and the desirability of court-supervised discovery, prompting renewed activity by the various rulemaking committees on those topics. Finally, it describes the initial template for the 2015 amendments—the batch of proposals that was circulated for public comment in August 2013.

A. A Brief History of the Federal Rules

Two crucial features of the initial Federal Rules of Civil Procedure (which took effect in 1938) were the new rules' approaches to pleading and discovery. With respect to both issues, the goal was to enable the judicial enforcement of substantive law by removing unnecessary obstacles to adjudicating cases on their merits.²⁸ The general pleading standard in the Federal Rules was—and remains—Rule 8's instruction that a complaint need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁹ This pleading standard was meant to provide a simpler approach than had traditionally been required under either common-law pleading or code pleading, to facilitate determinations of cases on their merits.³⁰

The Federal Rules illustrated this simpler approach with several hypothetical complaints that were included in the rules' appendix. One of them provided that a negligence complaint would satisfy Rule 8 by alleging: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff.”³¹ A hypothetical patent infringement complaint, using the example of electric motors, provided that it would be sufficient to allege: “The defendant has infringed and is still infringing the Letters Patent by making, selling, and using

²⁸ See WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at § 1008; Miller, *supra* note 2, at 288 (“[T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.”); Subrin & Main, *supra* note 2, at 1843 (“The drafters of the Federal Rules wanted cases to be resolved on the merits.”)

²⁹ FED. R. CIV. P. 8(a)(2) (2015). As described below, this language has remained unchanged since its initial adoption in 1938. See *infra* note 46.

³⁰ See Burbank & Farhang, *supra* note 2, at 1584 (“In rejecting common law pleading, . . . the drafters of the 1938 Federal Rules embraced the insights of legal realism. Pleadings are an inferior method to find out what actually happened . . .” (footnote omitted)); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 319 (1938) (“[I]n the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such substitute is in very truth to make technical forms the mistress and not the handmaid of justice.”); Miller, *supra* note 2, at 288–89 (“Because the rulemakers were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior English and American procedural systems—that is, the common law forms of action and then the codes—the Rules established an easily satisfied pleading regime for stating a grievance that abjured factual triviality, verbosity, and technicality.” (footnote omitted)).

³¹ FED. R. CIV. P. Form 11, ¶ 2 (2014) (abrogated 2015), *reprinted in* Steinman, *supra* note 19, at 395. Until 2007, this form appeared as Form 9 and was drafted slightly differently. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting) (quoting former Form 9: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway”); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002). The 2007 change occurred as part of a general restyling of the Federal Rules, which was intended “to be stylistic only” and “to make no changes in substantive meaning.” FED. R. CIV. P. 1 advisory committee’s notes to 2007 amendment.

electric motors that embody the patented invention. . . .”³² Judge Charles Clark, the chief drafter of the original Federal Rules, believed that these sample complaints were “the most important part of the rules” as far as illustrating Rule 8’s pleading standard.³³

For the Federal Rules’ first seven decades, Supreme Court case law expounded the simplified approach to pleading commanded by the text of Rule 8 and these illustrative forms. In 1957, *Conley v. Gibson* made clear that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”³⁴ Rather, a complaint is sufficient as long as it “give[s] the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”³⁵ During the half-century that followed *Conley*, the Court repeatedly quoted and applied the “fair notice” standard.³⁶ As the Court explained as recently as 2002, “[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”³⁷

Indeed, the discovery process set forth in the initial rules was also integral to the drafters’ procedural vision.³⁸ It permitted depositions and other forms of discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”³⁹ In *Hickman v. Taylor*,⁴⁰ nine years after the rules came into effect, the Court wrote that discovery under the Federal Rules plays “a vital role in the preparation for trial” by “narrow[ing] and

³² See FED. R. CIV. P. Form 18, ¶ 3 (2014) (abrogated 2015), *reprinted in* Steinman, *supra* note 19, at 397. This language derived from Form 16 of the original rules, but became Form 18 in 2007.

³³ Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) (“What we require [in Rule 8] is a general statement of the case We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms.”).

³⁴ 355 U.S. 41, 47 (1957).

³⁵ *Id.*

³⁶ See, e.g., *Swierkiewicz*, 534 U.S. at 512 (quoting *Conley*, 355 U.S. at 47); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

³⁷ *Swierkiewicz*, 534 U.S. at 512.

³⁸ See *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (“The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure.”).

³⁹ FED. R. CIV. P. 26(b) (1938), *reprinted in* 308 U.S. 663, 694 (1939); see also FED. R. CIV. P. 33 (1938), *reprinted in* 308 U.S. at 707 (authorizing interrogatories); FED. R. CIV. P. 34 (1938), *reprinted in* 308 U.S. at 707–08 (permitting upon motion and showing of good cause an order that a party produce documents and things); FED. R. CIV. P. 36(a) (1938), *reprinted in* 308 U.S. at 709 (authorizing requests for admission); *Burbank & Farhang*, *supra* note 2, at 1584 (“[T]he architects of the 1938 Federal Rules wrote rules that afforded much broader discovery than had been available in equity or in any of the merged systems in the states.”).

⁴⁰ 329 U.S. 495 (1947).

clarify[ing] the basic issues between the parties” and “ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.”⁴¹ As one leading treatise puts it: “The basic philosophy underlying this procedure was that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged.”⁴²

As with the rules’ simplified pleading standard, the discovery process was designed to allow disputes to be resolved on their merits by providing a mechanism for the parties to uncover the relevant facts and evidence.⁴³ There is, of course, a crucial connection between pleading and discovery. The simplified pleading standard was what enabled a case to proceed to the discovery process.⁴⁴ Unless the myriad of obstacles that characterized code pleading and common-law pleading were eliminated, robust discovery would often be useless; the information needed to satisfy the pleading standard could not be obtained unless the plaintiff was able to get *past* the pleading phase so he or she could make use of the discovery process.⁴⁵

While the text of the federal pleading standard has remained the same since 1938,⁴⁶ the discovery rules have undergone a number of changes.⁴⁷ The original language in Rule 26(b) allowed discovery:

regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other

⁴¹ *Id.* at 501.

⁴² WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at § 2001; *see also Hickman*, 329 U.S. at 501 (“The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.”).

⁴³ *See* Miller, *supra* note 2, at 289 (noting that the rules “made available a wide-angle discovery into the facts underlying the dispute’s merits, enabling the parties to secure any information relevant to the subject matter of the action”); *id.* at 333 (“Philosophically, at least, the Federal Rules say: ‘Feel injured? Well, come on in, this is a friendly, justice seeking litigation system, and we will sort the merits out after everyone has access to the facts through discovery.’”).

⁴⁴ *See, e.g.,* Steinman, *supra* note 19, at 389 (“The initial pleading is the key to the courthouse door. A claim that cannot survive the pleading phase is effectively no claim at all.”).

⁴⁵ *See, e.g.,* Steinman, *supra* note 2, at 1352 (noting that pleading standards can place plaintiffs “in the Catch-22 of needing court-supervised discovery to uncover the factual and evidentiary details that would be required to get past the pleadings phase to discovery”).

⁴⁶ Then and now, Rule 8(a) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Compare* FED. R. CIV. P. 8(a)(2) (1938), *reprinted in* 308 U.S. 663, 672 (1939), *with* FED. R. CIV. P. 8(a)(2) (2015).

⁴⁷ *See generally* WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at §§ 2002–2003.1 (discussing amendments to the federal discovery rules).

party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.⁴⁸

In 1946, Rule 26(b) was revised to clarify that a responding party could not object to discovery on the ground that the information sought “will be inadmissible at the trial” as long as the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.”⁴⁹

In 1983, Rule 26(b)(1) was amended to add the following provision:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.⁵⁰

According to the advisory committee note accompanying the amendment, this change was designed “to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry” and “to encourage judges to be more aggressive in identifying and discouraging

⁴⁸ FED. R. CIV. P. 26(b) (1938). This original language “spoke only to the scope of examination on a deposition,” but “[m]ost courts [had] held that the broad scope defined in Rule 26(b) was controlling in measuring the scope of discovery by devices other than depositions.” WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at § 2003. With the 1970 amendments, Rule 26(b) was “recast to cover the scope of discovery generally,” and to “regulate[]the discovery obtainable through any of the discovery devices” FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment (Subdivision (b)—Scope of Discovery).

⁴⁹ FED. R. CIV. P. 26(b) (1946), *reprinted in* 329 U.S. 847, 854 (1946). As discussed *supra* note 48, the text of the original discovery rules focused on obtaining testimony through depositions. Accordingly, the new 1946 sentence stated: “It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* In 1970—when Rule 26(b) was revised to encompass the full range of discovery devices—this sentence was amended to read: “It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1) (1970).

⁵⁰ FED. R. CIV. P. 26(b)(1) (1983).

discovery overuse.”⁵¹ In 1993, Rule 26(b)(1) was “subdivided into two paragraphs for ease of reference,” and these proportionality considerations were placed in Rule 26(b)(2).⁵²

The 1993 amendments also imposed presumptive numerical limits for certain discovery devices: ten depositions per side,⁵³ and twenty-five interrogatories per party.⁵⁴ In 2000, amendments took effect that created a presumptive durational limit for each deposition: one day of seven hours.⁵⁵ These limits were not inflexible, however; courts retained the authority to allow discovery beyond the presumptive limits (as well as to restrict parties to less discovery than allowed by the presumptive limits).⁵⁶

The 2000 amendments made other changes as well. The language regarding the relationship between discoverability and admissibility was clarified to emphasize that the information must still be “relevant” in order to fall within the scope of discovery.⁵⁷ The 2000 amendment also modified the scope of discovery

⁵¹ FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment. *See generally* Miller, *supra* note 2, at 353–54 (describing the 1983 amendments). The 1983 amendment added similar language to Rule 26(g), providing that the attorney’s signature on a discovery request:

constitutes a certification that [the signer] has read the request . . . and that to the best of [the signer’s] knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) *not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.*

Fed. R. Civ. P. 26(g) (1983) (emphasis added).

⁵² FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment (subdivision (b)).

⁵³ *See* FED. R. CIV. P. 30 advisory committee’s note to 1993 amendment (subdivision (a)).

⁵⁴ *See* FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment (subdivision (a)).

⁵⁵ *See* FED. R. CIV. P. 30 advisory committee’s note to 2000 amendment (subdivision (d)).

⁵⁶ *See* FED. R. CIV. P. 30 advisory committee’s note to 1993 amendment (subdivision (a)) (“Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles.”); FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment (subdivision (a)) (“As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.”); FED. R. CIV. P. 30 advisory committee’s note to 2000 amendment (subdivision (d)) (“The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.”).

⁵⁷ *See* FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment (subdivision (b)(1)). The 2000 language stated: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1) (2000).

by creating a two-tiered structure. The first tier—which required no prior authorization by the court—covered “any nonprivileged matter that is relevant to any party’s *claim or defense*.”⁵⁸ The second tier—which required a finding of “good cause” by the court—permitted discovery of “any matter relevant to the *subject matter involved in the action*.”⁵⁹ Thus, if good cause was shown, a court had discretion to permit discovery into matters *beyond* what was relevant to the claims or defenses but *within* what was relevant to the “subject matter involved.”⁶⁰

B. *The Shot(s) Heard Round the World: Twombly, Iqbal, and Why They Matter*

There is nothing fundamentally new about arguments that procedural rules should be recalibrated to make it harder for parties to access the federal courts. After all, a procedural system that enables enforcement of substantive rights and obligations means that those who violate the substantive law can be held accountable in ways that might otherwise have been impossible.⁶¹ Not

⁵⁸ FED. R. CIV. P. 26(b)(1) (2014) (emphasis added).

⁵⁹ *Id.* (emphasis added). See generally *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 (10th Cir. 2009) (noting that the 2000 amendment “implemented a two-tiered discovery process; the first tier being attorney-managed discovery of information relevant to any claim or defense of a party, and the second being court-managed discovery that can include information relevant to the subject matter of the action”); Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 18 (2001) (“To put it in the terms colloquially used by litigators who seek more court management of contentious discovery, the amended rule’s second tier aims to provide ‘adult supervision’ to contain possible squabbles when any party seeks and may engage in broader subject-matter discovery.”).

⁶⁰ See FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment (subdivision (b)(1)) (“The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.”).

⁶¹ See Miller, *supra* note 2, at 353 (noting defense interests’ objections to the federal discovery process and observing that “unconstrained discovery allows plaintiffs to look behind their clients’ curtains—thereby providing access to otherwise unobtainable information that possibly cuts too close to the substantive bone and endangers the defense’s position on a dispute’s merits”). Of course, enforcement of substantive law through private litigation is not the only available method. Public enforcement by government officers or agencies is an option too. See Burbank & Farhang, *supra* note 2, at 1549 (“The primary alternative is to empower and fund administrative authorities to perform that enforcement function.”). In many areas of substantive law, however, lawmaking bodies have opted for private rather than public enforcement. See *id.* at 1547 (“It is a legislative choice to rely on private litigation in statutory implementation.”); *id.* at 1549 (“This reason to choose private enforcement has become much more significant to American public policy since the late 1960s, when divided party control of the legislative and executive branches became the norm and relations between Congress and the President became more antagonistic.”); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 648 (2013) (“A society’s general legal landscape is relevant to

surprisingly, business groups and other powerful interests who tend to be defendants in litigation have frequently pushed for procedural changes such as heightened pleading standards and reduced access to discovery—both of which create practical obstacles for parties seeking judicial remedies for violations of substantive law.⁶²

While these arguments have a long tradition, they were significantly reinvigorated by the Supreme Court's decisions in *Twombly*⁶³ and *Iqbal*.⁶⁴ *Twombly* was an antitrust class action alleging that America's largest telecommunications firms had engaged in an anti-competitive "contract, combination . . . , or conspiracy" in violation of § 1 of the Sherman Antitrust Act.⁶⁵ *Iqbal* involved constitutional claims against Attorney General John Ashcroft and FBI Director Robert Mueller, brought by a Pakistani man who had been detained by federal officials following the September 11th attacks.⁶⁶ In both cases the issue before the Court was whether the plaintiffs' allegations satisfied the federal pleading standard, and in both cases a divided Court found that the complaints were insufficient and should be dismissed under Rule 12(b)(6) for failing to satisfy the general pleading standard set forth in Rule 8(a)(2).⁶⁷

It remains unclear whether *Twombly* and *Iqbal* mandate a more restrictive approach to pleading.⁶⁸ There are certainly parts of those opinions that—when read in isolation—indicate a new rigorous standard by which a plaintiff must identify the evidence she will use to support her claims or include extensive

the choice of an enforcement strategy and may be critical to the efficacy of a private enforcement regime."); Freer, *supra* note 15, at 1522 ("There was a conscious political decision in the 1960s to expand rights and provide for enforcement through litigation, rather than enforcement through the administrative state."); *id.* at 1497 n.24 ("This was a recognition that the administrative state was not able to enforce the laws fully, and therefore it enlisted private enforcement.").

⁶² See, e.g., Burbank & Farhang, *supra* note 2, at 1588–89 (describing activities of the Chamber of Commerce in the early 1970s and the Pound Conference organized by Chief Justice Burger in 1976, which "[s]cholars have characterized . . . as the most important event in the counteroffensive against notice pleading and broad discovery"); Miller, *supra* note 2, at 353 ("Vulnerability to discovery, after all, always has been a bête noire of both business and government defendants.").

⁶³ 550 U.S. 544, 556 (2007).

⁶⁴ 556 U.S. 662, 687 (2009).

⁶⁵ *Twombly*, 550 U.S. at 548.

⁶⁶ *Iqbal*, 556 U.S. at 667–69.

⁶⁷ See *Twombly*, 550 U.S. at 554–56; *Iqbal*, 556 U.S. at 678–80, 683–84.

⁶⁸ Compare, e.g., Subrin & Main, *supra* note 2, at 1848 ("Plausibility pleading . . . is nothing less than a 'revolutionary' departure from notice pleading and from the original vision of the Federal Rules."), with Steinman, *supra* note 19, at 351 ("Although the decisions are problematic in many respects, their approach to pleading can and should be reconciled with the notice-pleading approach that characterized federal practice for nearly seven decades.").

factual details, neither of which might be available to a plaintiff without access to court-supervised discovery. The Court left considerable uncertainty regarding the “plausibility” inquiry employed in those cases,⁶⁹ and empirical studies have found that *Twombly* and *Iqbal* have increased the likelihood that motions to dismiss would be granted (at least for particular kinds of cases).⁷⁰ Studies also indicate that the decisions had significant selection effects—that is, parties were opting not to pursue certain claims out of concern that they would founder on the rocks of *Twombly* and *Iqbal*.⁷¹

There are other aspects of the *Twombly* and *Iqbal* opinions, however, suggesting that the more lenient pleading approach envisioned by the original rules’ drafters remains in place.⁷² This view finds further support in post-*Iqbal* Supreme Court decisions on pleading standards.⁷³ In other words, while *Twombly* and *Iqbal* have had important empirical effects, the real cause may be that lower courts and litigants are misinterpreting those cases. Read properly, *Twombly* and *Iqbal* do not impose a stricter pleading standard.⁷⁴

⁶⁹ See Steinman, *supra* note 19, at 363 (noting that the Court “gave little meaningful guidance as to crucial aspects of pleading doctrine and how that doctrine commanded the results in *Twombly* and *Iqbal*” and that its creation of a “newly-constituted ‘plausibility’ inquiry . . . from thin air . . . [generated] confusion and consternation”); see also Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1760–66 (2013) [hereinafter Steinman, *To Say What the Law Is*] (noting the uncertainty surrounding what *Iqbal* means as a matter of stare decisis).

⁷⁰ See, e.g., Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 12 (2012); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 603 (2012); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2143–44 (2015).

⁷¹ See Christina L. Boyd et al., *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253, 254 (2013); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2306–07 (2012).

⁷² See Steinman, *supra* note 19, at 366 (arguing that to read *Twombly* and *Iqbal* as imposing a more restrictive pleading standard would ignore aspects of those decisions that explicitly embrace notice pleading and pre-*Twombly* Supreme Court precedent); see also Hamilton v. Palm, 621 F.3d 816, 817 (8th Cir. 2010) (“*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2).”); Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (noting “[t]he Supreme Court’s explicit decision to reaffirm the validity of *Swierkiewicz*, which was cited with approval in *Twombly*” (citations omitted)); Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009) (noting that *Twombly* had not “repudiated the general notice-pleading regime of Rule 8” and that “[t]his continues to be the case after *Iqbal*.”).

⁷³ See, e.g., Johnson v. City of Shelby, 135 S. Ct. 346, 347 (2014) (stating that a complaint passed muster under *Twombly* and *Iqbal* as long as it “stated simply, concisely, and directly events that, they alleged, entitled them to damages”); see also Steinman, *supra* note 19, at 367–80 (discussing the Supreme Court’s post-*Iqbal* decisions in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), *Johnson, supra*, *Wood v. Moss*, 134 S. Ct. 2056 (2014), *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011), and *Skinner v. Switzer*, 562 U.S. 521 (2011)).

⁷⁴ See Steinman, *supra* note 19, at 364–65 (recognizing the empirical consequences of *Twombly* and *Iqbal* but arguing that “lower federal courts are wrong to take a more restrictive approach to pleading” (emphasis omitted)).

Whatever the correct reading of *Twombly* and *Iqbal*, those decisions gave pleading standards a prominent place on the advisory committee's agenda.⁷⁵ They also prompted interest in the discovery process itself. In both *Twombly* and *Iqbal*, the majority expressed concern about the burdens of discovery on defendants in civil cases as well as skepticism about whether judicial management of the discovery process after the pleading phase could adequately alleviate those burdens.⁷⁶

Twombly, for example, worried that "a plaintiff with a largely groundless claim" might "be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."⁷⁷ It also noted "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."⁷⁸ *Iqbal* invoked *Twombly*'s "rejection of the careful-case-management approach."⁷⁹ In particular, it stated that, for governmental defendants like Ashcroft and Mueller, the discovery process can "exact[] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."⁸⁰ There are serious questions about the empirical validity of these assertions,⁸¹ but they certainly provided added ammunition for those who favored more restrictive standards for pleading and discovery.

C. Initial Steps in the Rulemaking Process

This section summarizes two crucial early steps in the process that culminated in the 2015 amendments. The first was the 2010 "Duke Conference," which laid much of the groundwork for the current amendments. The second

⁷⁵ See *infra* Section I.C.

⁷⁶ See *infra* notes 77–80 and accompanying text.

⁷⁷ *Twombly*, 550 U.S. at 558 (citation omitted).

⁷⁸ *Id.* at 559 (citation omitted).

⁷⁹ *Iqbal*, 556 U.S. at 685; see also *id.* at 686 ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.").

⁸⁰ *Id.* at 685 (citation omitted).

⁸¹ See, e.g., Miller, *supra* note 3, at 58–59 & nn.226–30 (challenging *Twombly*'s reliance on "a somewhat dated and highly theoretical 1989 journal article by Judge (then Professor) Frank H. Easterbrook" and data cited in a 1999 memorandum by Judge Paul Niemeyer that was "questionable as to its coverage" and "not borne out by more contemporary surveys"); see also *id.* at 79–82 ("Although some contemporary critics of case management continue to cite Judge Easterbrook's theoretical assumptions, there has been little research conducted that confirms his conclusions, let alone research that systematically measures the amount or consequences of any management shortfall." (footnote omitted)).

was the preliminary draft of the amendments that was circulated for public comment in August 2013.

1. *The 2010 Duke Conference*

In the wake of *Twombly* and *Iqbal*, the Civil Rules Advisory Committee organized the 2010 Conference on Civil Litigation, which was held at Duke University in May 2010. The conference was “designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation,”⁸² spurred on by “complaints about the costs, delays, and burdens” of civil litigation in the federal courts.⁸³

The Duke Conference would prove quite influential in the rulemaking process that followed. The advisory committee created a Duke Conference Subcommittee to evaluate and propose potential amendments, and the batch of amendments that ultimately went into effect in December 2015 became known as the “Duke Rules Package.”⁸⁴ As justifications for its proposals, the various committees and subcommittees emphasized several studies presented at the Duke Conference.⁸⁵ Many of these empirical studies have been challenged, with critics questioning both their methodological validity and whether they supported the particular rule changes that were ultimately proposed.⁸⁶ These critiques will be discussed in more detail below. But the important point here is that such studies were tailor-made to bolster the sort of anti-access amendments that those who oppose private enforcement through litigation have long desired.

⁸² JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1 (2010) [hereinafter 2010 DUKE CONFERENCE REPORT TO THE CHIEF JUSTICE].

⁸³ *Id.*; see also Memorandum from Honorable David G. Campbell to Honorable Jeffrey S. Sutton 260 (May 8, 2013, as supplemented June 2013) [hereinafter Civil Rules Advisory Committee Spring 2013 Report] (“The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation.”); Memorandum from Honorable Mark R. Kravitz to Honorable Lee H. Rosenthal 7 (May 17, 2010) [hereinafter May 2010 Report of the Civil Rules Advisory Committee] (“Had there been any doubt about perceptions of cost and delay, the 2010 Conference participants and papers dispelled it.”).

⁸⁴ Civil Rules Advisory Committee Spring 2013 Report, *supra* note 83, at 260 (referring to the “‘Duke Rules’ Package”); WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at § 1007.

⁸⁵ See 2010 DUKE CONFERENCE REPORT TO THE CHIEF JUSTICE, *supra* note 82, at 2–4; see also Civil Rules Advisory Committee Spring 2013 Report, *supra* note 83, at 265. (“Surveys produced in connection with the Duke Conference by various groups . . . indicate that excessive discovery occurs in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate contentious adversary behavior.”).

⁸⁶ See *infra* notes 115–17 and accompanying text.

Indeed, the Conference put pleading standards and access to discovery squarely in the cross-hairs of the rulemaking activity that would follow.⁸⁷

2. *The 2013 Proposal*

The process that began with the Duke Conference took a major step forward in 2013, when the advisory committee completed a preliminary draft of proposed amendments.⁸⁸ The most controversial aspects of the proposal concerned discovery and pleading standards, both of which—as discussed above—can be crucial to whether meaningful judicial enforcement of substantive law is available.⁸⁹

With respect to discovery, the advisory committee first proposed reducing the presumptive numerical limits for certain discovery devices. For depositions, the presumptive number would be reduced from ten per side to five per side.⁹⁰ In addition, the presumptive time limit for depositions would be reduced from one day of seven hours to one day of six hours.⁹¹ The presumptive number of interrogatories would be reduced from twenty-five per party to fifteen per

⁸⁷ See 2010 DUKE CONFERENCE REPORT TO THE CHIEF JUSTICE, *supra* note 82, at 5; May 2010 Report of the Civil Rules Advisory Committee, *supra* note 83, at 4 (noting that “[p]leading was addressed by many of the participants at the 2010 Conference” and that “[t]he conference discussion of pleading inevitably tied to discussion of discovery”).

⁸⁸ PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE (August 2013) [hereinafter 2013 PRELIMINARY DRAFT], <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0001>.

⁸⁹ The August 2013 proposal contained amendments on a number of other issues as well: Rule 4(m)’s time period for serving process after filing the complaint, the timing and contents of scheduling orders under Rule 16(b), early requests for production of documents under Rule 34, objections and responses to Rule 34 requests, and sanctions for failing to take reasonable steps to preserve electronically stored information. *See id.* at 282, 284–86, 294, 306–08, 314–17. These proposals remained in the final version and also became effective on December 1, 2015. *See* FED. R. CIV. P. 4(m), 16(b), 26(d)(2), 34(b)(2), 37(e) (2015) (adopting the proposed amendments). While these changes will merit attention going forward, they are beyond the scope of this Article.

⁹⁰ 2013 PRELIMINARY DRAFT, *supra* note 88, at 300 (proposed Rule 30(a)(2)(A)(i)) (requiring leave of court “if the parties have not stipulated to the deposition and . . . the deposition would result in more than 5 depositions”); *id.* at 267 (“The proposals would reduce the presumptive limit on the number of depositions from 10 to 5.”).

⁹¹ *Id.* at 301 (proposed Rule 30(d)(1)) (“Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 6 hours.”); *id.* at 267 (“The proposals . . . would reduce the presumptive duration to 1 day of 6 hours.”).

party.⁹² Requests for admission—which had not been subject to any presumptive numerical limits—would be limited to twenty-five per party.⁹³

More generally, the advisory committee proposed revising Rule 26(b) in several ways. First, it proposed slightly revising the proportionality factors that already existed as mandatory “limitations” on discovery in Rule 26(b)(2),⁹⁴ and transplanting them to Rule 26(b)(1), which defines the “scope of discovery.”⁹⁵ As described above, those factors had initially been added into Rule 26 in 1983.⁹⁶ Since 2000, the relevant language appeared in Rule 26(b)(2)(C), which stated:

[T]he court must limit the frequency and extent of discovery otherwise allowed . . . if it determines that: . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.⁹⁷

Rule 26(b)(1) also made clear that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”⁹⁸

The 2013 proposal deleted the reference to these factors in Rule 26(b)(2)(C) and added instead a requirement in Rule 26(b)(1) that discovery must be “proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the

⁹² *Id.* at 305 (proposed Rule 33(a)(1)) (“Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than 15 interrogatories, including all discrete subparts.”).

⁹³ *Id.* at 310 (proposed Rule 36(a)(2)) (“Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts.”); *see also id.* at 268–69 (describing this proposal).

⁹⁴ FED. R. CIV. P. 26(b)(2)(C)(iii) (2014). The Rule states that:

[T]he court *must* limit the frequency and extent of discovery otherwise allowed . . . if it determines that: . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Id. (emphasis added).

⁹⁵ *See* 2013 PRELIMINARY DRAFT, *supra* note 88, at 289–92 (proposed Rule 26(b)). Even under the rules as they then existed, Rule 26(b)(1) made an explicit reference to the proportionality factors articulated in Rule 26(b)(2)(C); Rule 26(b)(1) stated: “All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).” FED. R. CIV. P. 26(b)(1) (2014).

⁹⁶ *See supra* notes 50–51 and accompanying text.

⁹⁷ FED. R. CIV. P. 26(b)(2)(C)(iii) (2014).

⁹⁸ FED. R. CIV. P. 26(b)(1) (2014).

importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”⁹⁹

Second, the advisory committee proposed revising the sentence in Rule 26(b)(1) on the relationship between discoverability and admissibility.¹⁰⁰ It replaced the sentence, “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,”¹⁰¹ with the sentence, “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”¹⁰²

Third, the advisory committee proposed eliminating what had come to be known as the “second tier” of discovery in Rule 26(b)(1). Since 2000, Rule 26(b)(1) permitted discovery without prior court authorization into matters relevant to any party’s *claim or defense* (the so-called “first tier”).¹⁰³ Parties could also obtain discovery into matters relevant to the *subject matter involved in the action* (the so-called “second tier”), but this required the court to find “good cause” for such discovery.¹⁰⁴ The 2013 proposal eliminated this second-tier authority to permit, upon a showing of good cause, discovery beyond what was relevant to the parties’ claims or defenses.¹⁰⁵

The advisory committee’s final proposal regarding Rule 26(b)(1) was to remove a list of examples of matter that qualify as “relevant to any party’s claim or defense.” The 2013 proposal deleted language stating that such “relevant” matter “includ[es] the existence, description, nature, custody, condition, and

⁹⁹ 2013 PRELIMINARY DRAFT, *supra* note 88, at 289–92 (proposed Rule 26(b)). The advisory committee also proposed a minor amendment to Rule 1. Rule 1 had provided that the Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1 (2014). Under the advisory committee’s proposal, Rule 1 would also instruct that the rules “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.” 2013 PRELIMINARY DRAFT, *supra* note 88, at 281 (proposed Rule 1) (emphasis added). Although the potential trade-offs between “just, speedy, and inexpensive” determinations may in some sense parallel the proportionality considerations in Rule 26(b), Rule 1 does not impose any independent restriction on access to discovery beyond what is already provided in Rule 26. *See infra* note 151.

¹⁰⁰ As described *supra* notes 47–49 and accompanying text, such language was initially added to Rule 26 in 1946 and was then revised in 2000.

¹⁰¹ FED. R. CIV. P. 26(b)(1) (2014).

¹⁰² 2013 PRELIMINARY DRAFT, *supra* note 88, at 289–90 (proposed Rule 26(b)(1)).

¹⁰³ *See supra* note 58 and accompanying text.

¹⁰⁴ *See supra* note 59 and accompanying text.

¹⁰⁵ *See* 2013 PRELIMINARY DRAFT, *supra* note 88, at 289–90 (proposed Rule 26(b)(1)).

location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”¹⁰⁶

The advisory committee also proposed revising the protective order provision in Rule 26(c). Rule 26(c)(1) stated that courts—upon a showing of “good cause”—may issue orders to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” by “issu[ing] an order . . . specifying terms, including time and place, for the disclosure or discovery.”¹⁰⁷ The committee proposed adding “the allocation of expenses” as another example of protective “terms” that a court might “specify[.]”¹⁰⁸

With respect to pleading standards, the 2013 proposal did not include any change to the rules governing pleading standards, such as Rule 8 or Rule 12(b)(6). The advisory committee did, however, recommend deleting all of the pleading forms that appeared in the rules’ appendix; it would also delete Rule 84, which instructed that those forms “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”¹⁰⁹ This raised concern about pleading standards because, as discussed above, the exemplar complaints in the appendix illustrated the sort of lenient approach to pleading contemplated by the original rules’ drafters.¹¹⁰

II. REACTION TO THE PROPOSED AMENDMENTS

This Part recounts the aftermath of the advisory committee’s initial proposal. First, it summarizes the comments and critiques that came in response to the proposal after the Judicial Conference Committee on Rules of Practice and Procedure (often referred to as the Standing Committee) approved it for publication in August 2013, which began a six-month notice-and-comment period. Second, this Part describes the changes that were made to the proposed amendments following the official public comment period.

¹⁰⁶ *Id.*

¹⁰⁷ FED. R. CIV. P. 26(c)(1) (2014).

¹⁰⁸ See 2013 PRELIMINARY DRAFT, *supra* note 88, at 292–93 (proposed Rule 26(c)(1)) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.”).

¹⁰⁹ See *id.* at 329–30 (proposing striking all of Rule 84 and all of the Appendix of Forms). The only two forms the advisory committee proposed preserving had nothing to do with pleading standards. These forms related to requesting a waiver of service of process under Rule 4(d), and the committee proposed placing them following the text of Rule 4. See *id.* at 331–36 (proposed amendments to Rule 4).

¹¹⁰ See *supra* notes 29–30 and accompanying text.

A. Responses from Attorneys, Judges, and Academics

During the six months following the release of its initial proposal, the advisory committee held three public hearings and invited public comments.¹¹¹ More than 2300 comments were submitted from attorneys, judges, and law professors.¹¹²

Many of the comments criticized the amendments' proposals on discovery as well as the potential effect of the elimination of the forms on pleading standards.¹¹³ Commenters repeatedly emphasized that more restrictive

¹¹¹ See Adam Steinman, *Proposed Amendments to the FRCPs: Now Published and Available for Comment*, CIVIL PROCEDURE & FEDERAL COURTS BLOG (Aug. 16, 2013), <http://lawprofessors.typepad.com/civpro/2013/08/proposed-amendments-to-the-frcps-now-published-and-available-for-comment.html>.

¹¹² See Adam Steinman, *Next Steps in the FRCP Amendment Process*, CIVIL PROCEDURE & FEDERAL COURTS BLOG (Apr. 3, 2014), <http://lawprofessors.typepad.com/civpro/2014/04/next-steps-in-the-frcp-amendment-process.html>.

¹¹³ See, e.g., Lois Bloom, U.S. Magistrate Judge, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 6, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0632>; Stephen B. Burbank, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 10, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0729>; Brooke D. Coleman, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 7, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0654>; Ingrid Evans, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 13, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0930>; William Royal Ferguson, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 14, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1199>; Elaine Gray, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 18, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1797>; Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro & Adam N. Steinman, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 5, 2014) [hereinafter Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment], <https://www.regulations.gov/#documentDetail;D=USC-RULES-CV-2013-0002-0622>; Suzette M. Malveaux, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 14, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1650>; Arthur R. Miller, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 9, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0386>; Patricia W. Moore, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 31, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0491>; Alan B. Morrison, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Dec. 31, 2013), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0383>; Judith Resnik et al., Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 18, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-2078> ("We support the 'Joint Comments by Professors Helen Hershkoff, Lonny Hoffman, Alexander A. Reinert, Elizabeth M. Schneider, David L. Shapiro, and Adam N. Steinman on Proposed Amendments to Federal Rules of Civil Procedure.'"); Shira A. Scheindlin, U.S. District Judge, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 13, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0398>; Joseph M. Sellers, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil

approaches to pleading and discovery would undermine access to the federal courts and the judicial enforcement of substantive law.¹¹⁴ In addition, many questioned the empirical basis for the proposed amendments, particularly the studies on which the advisory committee relied to support its concerns about “cost and delay.”¹¹⁵ Critics marshaled evidence undermining the view that discovery or other aspects of federal pretrial procedure imposed unjustifiable costs¹¹⁶ and detailed how existing provisions in the Federal Rules were more than adequate to handle concerns that might arise in particular cases.¹¹⁷ They also observed that the proposed amendments could encourage more discovery disputes, which would itself increase cost and delay.¹¹⁸ With respect to the elimination of Rule 84 and the pleading forms, commenters expressed concern

Procedure (Nov. 6, 2013), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0325>; Jonathan R. Siegel et al., Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 31, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0493>; Beth Thornburg, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 31, 2014), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0499>; Stephen C. Yeazell, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Nov. 26, 2013), <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0342>; Jay Zainey, U.S. District Judge, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 7, 2014), <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0657>.

¹¹⁴ See, e.g., Burbank, *supra* note 113, at 12–13 (“[T]he proposed 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.”); *id.* at 18 (arguing that the proposed amendments would be “another means of pricing the poor and middle class out of court”); Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 1–2 (“[T]hey will create unnecessary barriers to relief in meritorious cases, waste judicial resources, and drive up the cost of civil justice.”); Miller, *supra* note 113, at 4 (“Several of the current proposals to amend the discovery rules . . . reflect the significant turning away from the vision of the original Federal Rules of a relatively unfettered and self-executing discovery regime—a true commitment to ‘equal access to all relevant data’ so critical to the effective resolution of disputes.”).

¹¹⁵ See, e.g., Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 1–4; Moore, *supra* note 113, at 2; see also Burbank, *supra* note 113, at 9 (“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.”).

¹¹⁶ See, e.g., Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 2–3; Moore, *supra* note 113, at 2–6; Thornburg, *supra* note 113, at 1–2.

¹¹⁷ See, e.g., Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 17 (noting that the “best current empirical evidence suggest[s] that trial judges are managing the vast majority of their dockets well”).

¹¹⁸ See, e.g., *id.* at 11 (arguing that the proposal to lower presumptive limits for certain discovery devices “will likely spawn more discovery disputes”); Miller, *supra* note 113, at 9 (“[T]he proposed amendment is fertile ground for increased costs and delays.”); *id.* at 11 (“I fear that the proposed amendments could produce increased motion practice costs, delays, consumption of judicial time better spent in other ways, [and] fact-dependent hearings . . .”).

that it would effectively—and unjustifiably—resolve debates over post-*Iqbal* pleading standards in favor of a more restrictive approach.¹¹⁹

The proposed amendments also reinvigorated critiques of the composition of the rulemaking committees themselves. With respect to both the Standing Committee and the Civil Rules Advisory Committee, both chairpersons were federal judges who had been appointed to the federal bench by a Republican President—George W. Bush.¹²⁰ Membership on the two committees was also tilted in favor of judges appointed by Republican Presidents and practitioners whose practice emphasized civil defense and business interests.¹²¹

The makeup of these committees is not surprising given that the chairs and members of each rulemaking committee are determined entirely by the Chief Justice.¹²² Chief Justice Roberts, like the committee chairs and most of the judges he placed on the standing and civil rules committees, was also appointed by a Republican President.¹²³ Moreover, empirical studies of the Chief’s votes

¹¹⁹ See, e.g., Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 16 (“The Committee’s second explanation, that the Forms cannot be squared with the Supreme Court’s decisions in *Twombly* and *Iqbal*, prematurely resolves a question that the Committee has yet to fully consider. . . . It is premature to call an end to the debate. . . .”); Miller, *supra* note 113, at 12 (“[E]liminating the forms, including those showing the intended simplicity of pleading under the Federal Rules, will be construed as the rulemakers’ acceptance—or implicit codification—of plausibility pleading under *Twombly* and *Iqbal* when in reality there has not been any fundamental re-examination of the possible deleterious effects of those cases’ return to fact pleading, or any comprehensive or penetrating empiric research on the subject. . . .”); see also Siegel et al., *supra* note 113, at 2–3 (arguing against abrogating the forms because the forms, not *Twombly* and *Iqbal*, reflect the correct interpretation of Rule 8’s pleading standard). One scholar argued that eliminating the Forms without addressing the text of Rule 8 would violate the Rules Enabling Act process. See Coleman, *supra* note 113, at 2; see also Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1106 (2015).

¹²⁰ See Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1145–46 (2015).

¹²¹ See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1567–76 (2015); Moore, *supra* note 120, at 1146–52; see also Miller, *supra* note 113, at 5 (“[The proposed amendments] appear to have been motivated, at least in part, by the ongoing concern of defense interests that broad discovery allows plaintiffs to look behind their clients’ curtains, thereby providing access to otherwise unobtainable oral and documentary information that may well cut too close to the substantive bone and endanger the defense because it may well reveal a claim’s merits, thereby increasing the risk of liability and enhancing the case’s settlement value.”).

¹²² Burbank & Farhang, *supra* note 2, at 1605 (“The Chief Justice not only appoints all members of the rulemaking committees; he meets regularly with the chairs of the key rulemaking committees.”).

¹²³ See *supra* note 120. This was also the case under Chief Justice Rehnquist. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform”*, 64 L. & CONTEMP. PROBS. 197, 250–51 (2001). Indeed, critiques of the committee’s composition and the role of the Chief Justice in the rulemaking process have a long history. See, e.g., Howard Lesnik, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 581 (1975) (“The composition of the advisory committees should

on the Supreme Court place him as one of the two most pro-business Justices in the Court's history (second only to his current colleague Justice Alito),¹²⁴ and one of "the most anti-private enforcement Justices on the modern Supreme Court."¹²⁵ Indeed, as a young lawyer in the Justice Department, Roberts was ensconced in one of the Reagan Administration's early legislative battles to reduce judicial access and enforcement by capping fee awards in cases where private litigants sue to enforce federal law.¹²⁶

B. Post-Comment Revisions to the Proposed Amendments

Despite the strong criticism the 2013 proposal received during the comment period, most of the proposed amendments remained in the set that was ultimately adopted by the Supreme Court.¹²⁷ One important change, however, was to withdraw the proposals that would have (1) lowered the presumptive numbers of depositions and interrogatories, (2) imposed a presumptive limit on the number of requests to admit, and (3) reduced the presumptive length of depositions.¹²⁸

be more representative, and the appropriateness of the extreme centralization of authority in the Chief Justice should be examined.”)

¹²⁴ See Epstein, Landes & Posner, *supra* note 15, at 1449–50 (2013) (ranking Justice Alito and Chief Justice Roberts first and second based on Supreme Court decisions since 1946).

¹²⁵ Burbank & Farhang, *supra* note 2, at 1554; *see also id.* at 1572–73 (finding that during the period from 1970 until 2013, “[t]he four most anti-private enforcement scores are those of Thomas, Alito, Roberts, and Scalia”).

¹²⁶ *See id.* at 1553–54:

Advocates of retrenching private enforcement recognized that the proliferation of fee-shifting provisions in the 1970s had produced a private enforcement infrastructure not just among liberal public interest groups, but also, more significantly, among the for-profit American bar.

....

John Roberts, then working for the Reagan Justice Department, was another active participant in deliberations over the fee-cap bill.

¹²⁷ See ADVISORY COMM. ON CIVIL RULES, APRIL 2014 CIVIL RULES ADVISORY COMMITTEE AGENDA BOOK 5 (2014), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2014>.

¹²⁸ The Duke Conference Subcommittee recommended withdrawal of these proposals following the comment period. *See id.* at 79. The Civil Rules Advisory Committee agreed and modified the amendments accordingly. See ADVISORY COMM. ON CIVIL RULES, OCTOBER 2014 CIVIL RULES ADVISORY COMMITTEE AGENDA BOOK 20 (2014), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-october-2014>.

In addition, several revisions were made to the proposed committee notes that had accompanied the advisory committee's 2013 proposals.¹²⁹ An especially significant change occurred in the spring of 2015, shortly before the Supreme Court adopted the amendments. In response to a request from the Supreme Court itself, the advisory committee note that would accompany the abrogation of Rule 84 was revised to state: "The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8."¹³⁰

On April 29, 2015, the Supreme Court adopted the final version of the amendments, ordering that the rules be amended and providing that those amendments would take effect on December 1, 2015.¹³¹ These dates conformed to the window set forth in the Rules Enabling Act during which Congress may reject or modify any amendments to the Federal Rules via legislation.¹³² The Act provides that any amendments adopted by the Court prior to May 1 of a given year will become effective on December 1 of that year absent congressional action.¹³³

Given contemporary gridlock in Congress,¹³⁴ no one expected a legislative response to the 2015 amendments. Indeed, Congress remained on the sidelines and the rules officially went into effect on December 1, 2015.

¹²⁹ The committee note for the Rule 26 amendment, for example, was almost completely overhauled. Compare 2013 PRELIMINARY DRAFT, *supra* note 88, at 296–99 (proposed advisory committee note to Rule 26), with FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

¹³⁰ FED. R. CIV. P. 84 advisory committee's note to 2015 amendment; JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (Mar. 2015), <http://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us> ("[I]n response to a request from the Supreme Court, the [Standing Committee] recommended modest modifications to the committee notes accompanying the proposed amendments to Rules 4(m) and 84, noting that such modifications reflected the Committee's intent.").

¹³¹ See Supreme Court Order Adopting the Amendments to the Federal Rules of Civil Procedure (Apr. 29, 2015).

¹³² See 28 U.S.C. §§ 2072–74 (2012) (describing the process and timing for prescribing rules of procedure under the Rules Enabling Act).

¹³³ 28 U.S.C. § 2074(a) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.").

¹³⁴ See generally Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013) (symposium issue containing twelve articles on congressional gridlock).

III. THE 2015 AMENDMENTS: A CLOSE READING

Now that the ink has dried on the 2015 amendments, the question shifts to how they have changed the pleading and discovery standards that are so crucial to meaningful access and enforcement. This Part closely analyzes the final version of the 2015 amendments, and explains why they do not compel more restrictive approaches to pleading or discovery.¹³⁵ Part IV will address some of the larger lessons that can be learned from the fact that the process that culminated in these amendments failed to impose a more restrictive approach, even though many involved in the process seemed to favor heightened pleading standards and reduced access to discovery.

A. *Scope and Proportionality*

One of the most controversial aspects of the recent amendments was that they moved what had come to be known as the “proportionality” factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1). Prior to the 2015 amendments, Rule 26(b)(1) defined the “scope of discovery” as “any nonprivileged matter that is relevant to any party’s claim or defense” and commanded that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”¹³⁶ Rule 26(b)(2)(C), in turn, mandated that:

[T]he court must limit the frequency or extent of discovery otherwise allowed . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”¹³⁷

These so-called “proportionality factors” had been part of the discovery rules since 1983, when they also appeared in Rule 26(b)(1).¹³⁸ In 1993, those factors

¹³⁵ As described *supra* note 89, the final version also included amendments affecting several other issues, including Rule 4(m)’s time period for serving process after filing the complaint, the timing and contents of scheduling orders under Rule 16(b), early requests for production of documents under Rule 34, objections and responses to Rule 34 requests, and sanctions for failing to take reasonable steps to preserve electronically stored information.

¹³⁶ FED. R. CIV. P. 26(b)(1) (2014).

¹³⁷ FED. R. CIV. P. 26(b)(2)(C)(iii) (2014).

¹³⁸ See *supra* notes 50–51 and accompanying text. Indeed, the advisory committee note explicitly referred to proportionality in explaining the objective of the 1983 amendment. See FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment (“The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”). Courts often did so as well. See, e.g., *Sacramona v.*

were moved to Rule 26(b)(2)(C), simply “for ease of reference.”¹³⁹ The 2000 amendments added a sentence to Rule 26(b)(1) instructing that “[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2),”¹⁴⁰ but the advisory committee note recognized that this was a “redundant cross-reference.”¹⁴¹

For more than thirty years, therefore, it was clear that parties could invoke these proportionality considerations when opposing discovery requests, and that courts were required to enforce these considerations when managing the discovery process. Former Rule 26(b)(1) stated that “[a]ll discovery” was subject to Rule 26(b)(2)(C)’s limitations,¹⁴² and Rule 26(b)(2)(C) stated that “the court *must* limit the frequency or extent of discovery” according to the proportionality factors.¹⁴³

The 2015 amendments moved these proportionality factors from Rule 26(b)(2)(C) to Rule 26(b)(1). Thus, the scope of discovery is now defined as:

any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.¹⁴⁴

Given the decades-long presence of these proportionality considerations in Rule 26(b), it is hard to understand why there was any need to move them from

Bridgestone/Firestone, Inc., 152 F.R.D. 428, 431 (D. Mass. 1993); Rhone-Poulenc Rorer Inc. v. Home Indem. Co., Civ. A. No. 88-9752, 1991 WL 183842, at *4 (E.D. Pa. Sept. 16, 1991); Leksi, Inc. v. Fed. Ins. Co., 129 F.R.D. 99, 105 (D.N.J. 1989); Advanced Semiconductor Prods., Inc. v. Tau Labs., Inc., No. 83-20412 RPA, 1986 WL 215149, at *2 (N.D. Cal. Jan. 23, 1986); In re Convergent Techs. Sec. Litig., 108 F.R.D. 328, 330–31 (N.D. Cal. 1985); Wigler v. Elec. Data Sys. Corp., 108 F.R.D. 204, 205–06 (D. Md. 1985).

¹³⁹ FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.

¹⁴⁰ FED. R. CIV. P. 26(b)(1) (2000).

¹⁴¹ FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment.

[A] sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2)

Id. (citations omitted).

¹⁴² FED. R. CIV. P. 26(b)(1) (2014) (emphasis added).

¹⁴³ FED. R. CIV. P. 26(b)(2)(C) (2014) (emphasis added).

¹⁴⁴ FED. R. CIV. P. 26(b)(1) (2015).

26(b)(2) to 26(b)(1). Indeed, the initial report to the Chief Justice about the 2010 Duke Conference recounted that there was “no demand . . . for a change” to Rule 26(b)(1).¹⁴⁵ It would be a mistake, however, to read the mere transplantation of the proportionality factors from one subsection of Rule 26(b) to another subsection of Rule 26(b) as compelling—or even suggesting—a more restrictive approach. Having these factors appear in a different subsection of the rule does not mean that courts and parties must prioritize the potential costs of responding to discovery requests over meaningful access to the facts and evidence necessary to assess substantive claims and defenses on their merits. Significantly, the final committee note for the 2015 amendments omitted the empirically unsupported suggestion in earlier committee reports that the long-standing proportionality factors were “not invoked often enough to dampen excessive discovery demands.”¹⁴⁶

The 2015 amendments do make some changes to the way the proportionality factors are articulated. These changes, however, arguably encourage courts to apply the discovery rules in ways that will facilitate, rather than undermine, access and enforcement. For example, the text of Rule 26 now explicitly recognizes “the parties’ relative access to information” as a factor relevant to proportionality.¹⁴⁷ This factor can strengthen arguments in support of discovery in precisely those cases where discovery is most crucial—where a party needs certain information to prove its claim or defense but that information is only in the hands of its opponent.

Indeed, the 2015 committee note explicitly acknowledges the common problem of “information asymmetry.”¹⁴⁸ That is, “[o]ne party—often an individual plaintiff—may have very little discoverable information,” while “[t]he other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve.”¹⁴⁹ As the committee note explains, “these circumstances often mean that the burden

¹⁴⁵ 2010 DUKE CONFERENCE REPORT TO THE CHIEF JUSTICE, *supra* note 82, at 8.

¹⁴⁶ 2013 PRELIMINARY DRAFT, *supra* note 88, at 265. Indeed, the view expressed in earlier reports defies common sense. If the lawyers who complained about “excessive discovery” in response to the Duke Conference survey questions, *see id.*, were the same ones who were “not invoc[ing] Rule 26(b)(2)(C) often enough,” then it is their advocacy on behalf of their clients—not Rule 26—that requires improvement. More likely, lawyers complaining about excessive discovery were fully aware of Rule 26’s long-standing proportionality considerations, but they were not uniformly successful in limiting discovery requests that *they* viewed as excessive. *Cf.* Miller, *supra* note 2, at 361 (“[A]ccording to the practicing bar, . . . litigation abuse is anything the opposing lawyer is doing.”).

¹⁴⁷ FED. R. CIV. P. 26(b)(1) (2015).

¹⁴⁸ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁴⁹ *Id.*

of responding to discovery lies heavier on the party who has more information, *and properly so.*"¹⁵⁰

Likewise, the advisory committee note squarely refutes the notion that the 2015 amendment was meant to make discovery more restrictive by changing the way courts should apply the proportionality factors. The advisory committee note states explicitly that transplanting the proportionality factors to Rule 26(b)(1) "*does not change* the existing responsibilities of the court and the parties to consider proportionality."¹⁵¹ It describes the "considerations that bear on proportionality" as simply being "moved," "slightly rearranged," and simply "restor[ed]" to Rule 26(b)(1)—where those factors had initially resided in 1983.¹⁵² It acknowledges "one addition"¹⁵³ to the proportionality factors—namely the "direction to consider the parties' relative access to relevant information"¹⁵⁴—but, as discussed above, that factor strengthens the argument that the proportionality factors should not be employed to create the sort of "Catch-22" that effectively blocks the enforcement of substantive rights and obligations.¹⁵⁵

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.* (emphasis added). The 2015 amendment to Rule 1 also does not modify access to discovery. As discussed *supra* note 99, Rule 1 provided that the Federal Rules "should be construed and administered" to "secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1 (2014). The 2015 amendment added that the rules should also be "*employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1 (2015) (emphasis added). It might be argued that this change restricts access to discovery insofar as the court and parties must emphasize "inexpensive[ness]" during the discovery process. But that is not what the revision actually does, and it would be misguided for courts to impose a more restrictive approach going forward. First of all, the committee note makes clear that the 2015 amendment to Rule 1 "does not create a new or independent source of sanctions" and does not "abridge the scope of any other of these rules." FED. R. CIV. P. 1 advisory committee's note to 2015 amendment. Rather, the note explains that the amendment is meant "to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way." *Id.* See generally WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at § 1011 (describing the history and purpose of Rule 1).

¹⁵² FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; see also *supra* notes 50–51 and accompanying text (discussing the 1983 addition of the proportionality factors to Rule 26(b)(1)).

¹⁵³ *Id.* ("The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and *with one addition.*" (emphasis added)).

¹⁵⁴ *Id.*

¹⁵⁵ The committee note also states that moving the proportionality factors to Rule 26(b)(1) "reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections." *Id.*; see also FED. R. CIV. P. 26(g)(1)(B)(iii) ("By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry . . . with respect to a discovery request, response, or objection, it is . . . neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."). The 2015 committee note does not explain *how* relocating the proportionality

One concern that had been expressed during the comment period was that moving the proportionality factors to Rule 26(b)(1) would change the burdens placed on each party when a discovery dispute arises, increasing the obligations on the party requesting discovery to justify that request in light of the proportionality considerations.¹⁵⁶ But there is absolutely nothing in the text or the notes to suggest that. To the contrary, the advisory committee note recognizes that the amended rule does *not* “permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”¹⁵⁷ If the 2015 amendment had shifted the burden, then such a boilerplate objection would be sufficient, unless the requesting party was able to prove that its request was proportional.

In fact, the committee note to Rule 26 anticipates a suitably pragmatic approach to resolving discovery disputes. It explains: “The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”¹⁵⁸ With respect to such disputes, “the parties’ responsibilities would remain as they have been since 1983.”¹⁵⁹ As a structural matter, the process for invoking and litigating objections based on proportionality remains identical before and after the 2015 amendments. Regardless of where the proportionality factors are located within Rule 26(b), the responding party must make an objection, the parties must confer,¹⁶⁰ and then the responding party will decide whether to provide the requested discovery. If it does not, the requesting party may file a motion to compel and,

considerations from Rule 26(b)(2) to Rule 26(b)(1) “reinforces” that obligation, but it certainly does not suggest that the obligation is stricter or more onerous than it had been prior to 2015.

¹⁵⁶ See, e.g., Burbank, *supra* note 113, at 11–12, 16; Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 9–11 (noting the “danger that the rewritten rule would be misinterpreted to place the burden on the discovering party, in every instance, to satisfy each item on the (b)(2)(C)(iii) laundry list in order to demonstrate discoverability”).

¹⁵⁷ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁵⁸ *Id.* Further illustrating this pragmatic approach, the 2015 advisory committee note states:

A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

Id.

¹⁵⁹ *Id.*

¹⁶⁰ See FED. R. CIV. P. 37(a)(1) (2015).

ultimately, the court will decide how to apply the proportionality factors to that particular request.¹⁶¹

B. Admissibility and Discovery

A second change to Rule 26(b) was to eliminate the sentence, “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”¹⁶² In its place, the amended version states: “Information within this scope of discovery need not be admissible in evidence to be discoverable.”¹⁶³

Echoing a concern expressed in connection with the 2000 amendments to Rule 26, the 2015 committee note states that “use of the ‘reasonably calculated’ phrase to define the scope of discovery ‘might swallow any other limitation on the scope of discovery.’”¹⁶⁴ The 2000 amendment had sought to clarify this point by stressing that “[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence,”¹⁶⁵ but the 2015 committee asserted that “the ‘reasonably calculated’ phrase has continued to create problems.”¹⁶⁶

It is hard to tell, however, what sort of “problems” this phrase had created. Minutes of a 2013 advisory committee meeting referred to “[p]reliminary research” that had identified “hundreds if not thousands of cases that explore this phrase” and expressed concern that “many” of these cases “seem to show that courts also think it defines the scope of discovery.”¹⁶⁷ But there was no indication that any such cases had permitted discovery into matters that were not “relevant.”¹⁶⁸

¹⁶¹ See *id.*

¹⁶² FED. R. CIV. P. 26(b)(1) (2014).

¹⁶³ FED. R. CIV. P. 26(b)(1) (2015).

¹⁶⁴ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁶⁵ FED. R. CIV. P. 26(b)(1) (2014) (emphasis added); see also FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment (“[T]his sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence.”).

¹⁶⁶ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁶⁷ See Advisory Comm. on Civil Rules, Civil Rules Advisory Committee Minutes 9 (April 11–12, 2013), <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2013>.

¹⁶⁸ See Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 8 n.22. Indeed, information that is “reasonably calculated to lead to admissible evidence” would seem quite naturally to be “relevant to the claims and defenses” and hence a proper subject of pretrial discovery. Under the Federal Rules of Evidence, evidence is only admissible if it is relevant. See FED. R. EVID. 402 (“Relevant evidence is

While the lack of a convincing justification for this change is frustrating, the new language does not imply a more restrictive approach to the scope of discovery. Both before and after the 2015 amendments, nonprivileged material that is relevant to the claims or defenses is discoverable, subject to the proportionality factors that have been part of the rules since 1983, regardless of whether the material itself would be admissible at trial. Eliminating the phrase “reasonably calculated to lead to admissible evidence” does not restrict what is already a broad “relevance” standard. It has long been recognized that matters “relevant to the claims or defenses” include “[a] variety of types of information not directly pertinent to the incident in suit”—such as “other incidents of the same type,” “organizational arrangements or filing systems,” and “information that could be used to impeach a likely witness.”¹⁶⁹ And as to the relationship between the scope of discovery and admissibility, the new language states that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”¹⁷⁰

Accordingly, there is no reason to read the 2015 amendment’s elimination of the “reasonably calculated to lead to admissible evidence” language as constricting the scope of discovery. In many respects, this aspect of the 2015 amendment parallels the revisions regarding the proportionality factors discussed above. As to both issues, there was an empirically unsupported perception that parts of Rule 26 were not being followed. As to both issues, a similarly unsupported perception had prompted an earlier amendment in 2000. As to both issues, the 2015 amendment sought to clarify yet again an aspect of Rule 26 that did not actually need further clarification. And as to both issues, the

admissible . . . Irrelevant evidence is not admissible.”). Information that is “reasonably calculated to lead to the discovery of admissible evidence” is, by necessity, reasonably calculated to lead to relevant evidence. *See* Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 8. Given that any such discovery would be subject to proportionality limitations (both before and after the 2015 amendments), it is unclear why the prospect of discovery into information that is “reasonably calculated to lead to the discovery of admissible evidence” would be viewed as problematic. *See id.*

¹⁶⁹ FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment. The advisory committee explained:

[O]ther incidents of the same type, or involving the same product, could be properly discoverable under the [relevant to the claims or defenses] standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

Id.

¹⁷⁰ FED. R. CIV. P. 26(b)(1) (2015).

2015 amendments did not ultimately change the standards by which courts should assess whether any given discovery request is proper under the rules.

C. *Eliminating Discovery's "Second Tier"*

As explained above, the 2015 amendments eliminated what had come to be known as the “second tier” of discovery, which had previously allowed courts—if good cause was shown—to allow discovery into a matter relevant to the *subject matter involved in the action*, even if it was not relevant to any party’s claim or defense. Discovery remains available—without any prior court authorization—into all matters relevant to any party’s claim or defense.

So what exactly is the impact of removing a court’s discretionary authority to permit discovery into matters *beyond* what was relevant to the claims or defenses but *within* what is relevant to the “subject matter involved”?¹⁷¹ This change is admittedly a puzzling one: a classic example of a solution in search of a problem. Indeed, the advisory committee note explaining this change did not even suggest that court-ordered, good-cause, second-tier discovery was being misused; in fact it stated that “[t]he Committee has been informed that this language is rarely invoked.”¹⁷² Neither the committee note itself nor any of the materials and reports leading up to the 2015 amendment cites a single example where courts or parties invoked this provision in a problematic way. Combined with the Duke Conference report that showed there was “no demand . . . for a change” to Rule 26(b)(1),¹⁷³ it is hard to fathom why eliminating this provision was justified.

As with other changes to Rule 26(b)(1), however, it would be a mistake to view this change as limiting access to discovery in a significant way. Most importantly, the first tier of discovery (now the only tier) regarding matters that are “relevant to any party’s claim or defense” is still quite expansive. Again, this was explicitly recognized in the advisory committee note to the 2000 amendments, which explained that a variety of information could be “relevant” to the claims or defenses even if not directly related to the incident in question.¹⁷⁴ The 2015 advisory committee note confirmed this, citing the 2000 note and observing that discovery would remain available—without prior court order—

¹⁷¹ See FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁷² *Id.*

¹⁷³ 2010 DUKE CONFERENCE REPORT TO THE CHIEF JUSTICE, *supra* note 82, at 8.

¹⁷⁴ FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment; *see supra* note 169 and accompanying text.

into “other incidents of the same type, or involving the same product; information about organizational arrangements or filing systems; and information that could be used to impeach a likely witness.”¹⁷⁵

Given the breadth of discovery available under the “first tier,” there are few—if any—cases where a lack of “second tier” discovery is likely to be harmful. Indeed, courts finding “good cause” for discovery into matters relevant to “the subject matter involved in the action” had often concluded that the same discovery requests were relevant to the party’s claims or defenses; that is, the court invoked the second tier solely as an alternative justification.¹⁷⁶

If there is a genuine concern regarding the loss of the second tier it is this: It could be harder for parties to use the discovery process to find information to support claims or defenses that are related to the general “subject matter” of the action but that they have not *yet* asserted. The drafters of the 2000 amendments recognized this explicitly. By requiring a finding of good cause in order to engage in “subject matter” discovery, the 2000 amendments “signal[ed] to the parties that they have no *entitlement* to discovery to develop new claims or defenses that are not already identified in the pleadings.”¹⁷⁷

In many cases, of course, information supporting new claims or defenses will also be relevant to the already-asserted claims or defenses and therefore could have been—and will continue to be—discoverable without a specific finding of good cause.¹⁷⁸ But even when there *is* some matter that would be relevant to the “subject matter involved in the action” but *not* to “any party’s claim or defense,”

¹⁷⁵ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (internal quotations omitted); *see also id.* (“Such discovery is not foreclosed by the amendments.”).

¹⁷⁶ *See, e.g.,* Janis v. Nelson, No. CR. 09-5019-KES, 2009 WL 5216898, at *4–5 (D.S.D. Dec. 30, 2009) (“This information is relevant to plaintiffs’ claim that defendants’ practice or procedure with regard to the voter registration lists and provisional ballots must be precleared pursuant to Section 5 of the Voting Rights Act. . . . Even if these discovery requests seek information beyond plaintiffs’ claims, such information is relevant to the subject matter of this case and good cause exists for allowing the discovery.”).

¹⁷⁷ FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment (emphasis added); *see also* Hill v. Motel 6, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (noting that under the 2000 amendment’s two-tier approach, “Plaintiff has no entitlement to discover all Area Managers’ personnel files in the hope of developing a new age-discrimination claim based on a theory of discriminatory impact” because “[t]his case has been from the outset a discriminatory-treatment case—a discrete dispute over Defendants’ motives for the single decision to terminate Plaintiff’s employment, rather than a more expansive challenge to Defendants’ company-wide policies or practices”); WRIGHT, MILLER, KANE, MARCUS, SPENCER & STEINMAN, *supra* note 1, at § 2008 (“It is at this point where a new claim or defense is the focus of discovery not relevant to the current ones that calls for a determination whether to allow discovery that goes to the subject matter limit.”).

¹⁷⁸ *See, e.g.,* Mylan Pharm., Inc. v. Kremers Urban Dev., No. Civ. A. 02-1628 GMS, 2003 WL 22711586, at *2, *5 (D. Del. Nov. 14, 2003) (allowing the amendment of complaint to add new claims based on information obtained during discovery).

a party could seek to add the new claims about which he or she hopes to obtain discovery.¹⁷⁹ A party might need permission from the court to amend its pleading to add such claims.¹⁸⁰ But the party would have needed permission anyway to obtain “subject matter” discovery prior to the 2015 amendments.

This does not excuse the frustrating lack of any persuasive justification for eliminating the second tier. The documentation supporting the amendments provided no support whatsoever for the notion that good cause discovery into matters relevant to the “subject matter involved in the action”—but not to “any party’s claim or defense”—had been used improperly. But getting rid of that second tier is not likely to constrain access to discovery in a significant way.

D. Deleting Examples of Relevant Matter

Prior to the 2015 amendments, Rule 26(b)(1) provided that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”¹⁸¹ The new amendments delete the italicized language, which means that the text of Rule 26(b)(1) no longer clarifies explicitly that matter “relevant to any party’s claim or defense” includes “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”¹⁸²

Like the other amendments to Rule 26(b)(1) described earlier, this change cannot sensibly be understood to restrict the availability of discovery. The advisory committee note to the 2015 amendments says this with unmistakable clarity, explaining that “[d]iscovery of such matters is *so deeply entrenched* in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples,”¹⁸³ and that “[t]he discovery identified in these examples *should still be permitted* under the revised rule when relevant and proportional to the

¹⁷⁹ See, e.g., *McGrath v. Everest Nat. Ins. Co.*, No. 2:07 cv 34, 2009 WL 1325405, at *1–2 (N.D. Ind. May 13, 2009), *amended on other grounds*, 2009 WL 2508216 (N.D. Ind. May 13, 2009) (recognizing that discovery was relevant to the parties’ claims or defenses in light of new claims added in an amended complaint); see also *Hill*, 205 F.R.D. at 493 (recognizing that if the plaintiff had asserted a discriminatory impact claim from the beginning, there would have been no need to obtain good cause to allow second-tier discovery).

¹⁸⁰ See FED. R. CIV. P. 15(a)(1)–(2) (2015) (describing when the court’s leave is required to amend a pleading).

¹⁸¹ FED. R. CIV. P. 26(b)(1) (2014) (emphasis added).

¹⁸² See *supra* note 106 and accompanying text.

¹⁸³ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (emphasis added).

needs of the case.”¹⁸⁴ This is consistent with earlier committee notes, which likewise instruct that “[i]nformation about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information.”¹⁸⁵

Moreover, it is clear from the text of the pre-2015 rule that “the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter” were “*includ[ed]*” in what constitutes “matter that is relevant to any party’s claims or defense.”¹⁸⁶ Thus, the elimination of that list does not reduce the scope of discoverable matter. It simply removed from the text some illustrative examples of discoverable matter—the discoverability of which “is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26.”¹⁸⁷ Thus, as a matter of textual logic—bolstered by the clarification provided in the 2015 committee note—it would be irresponsible for judges to interpret this change as mandating a more restrictive approach.

E. Protective Orders and Cost-Shifting

The 2015 amendments also revised Rule 26(c), which governs protective orders. Even before the 2015 amendments, Rule 26(c) provided that upon a showing of “good cause,” the court may “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” by “issu[ing] an order . . . specifying terms for . . . the disclosure or discovery.”¹⁸⁸ The 2015 amendments clarified that the “terms” a court might “specify[]” in order to “protect a party or person from . . . undue burden or expense” include the “allocation of expenses.”¹⁸⁹

Who bears the cost of discovery is very important when it comes to meaningful access to justice. In most cases, as described above, discovery plays its most significant role when the defendant possesses the information relevant to its liability, and the plaintiff cannot obtain that information without recourse to court-supervised discovery.¹⁹⁰ Shifting the cost of producing that information

¹⁸⁴ *Id.* (emphasis added).

¹⁸⁵ FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment.

¹⁸⁶ FED. R. CIV. P. 26(b)(1) (2014) (emphasis added).

¹⁸⁷ FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

¹⁸⁸ FED. R. CIV. P. 26(c)(1)(B) (2014).

¹⁸⁹ FED. R. CIV. P. 26(c)(1)(B) (2015).

¹⁹⁰ *See supra* note 147–50 and accompanying text.

to the requesting plaintiff can, in some circumstances, make it economically impossible to pursue meritorious claims.¹⁹¹

The question going forward is this: Do the 2015 amendments actually expand a court's ability to shift the costs of discovery pursuant to Rule 26(c)? It does not. As a textual matter, it would be hard to contend that the pre-2015 authority to "specify [the] terms . . . for . . . discovery" could not include the authority to allocate expenses.¹⁹² In cases where discovery truly would create "undue burden or expense," an order "specifying" that costs be shared would seem to be an especially well-tailored device for mitigating that burden or expense.

Accordingly, the real issue is—and always has been—*when* would the burden or expense of discovery be so "undue" that cost-shifting or some other protective order is justified. The 2015 amendments to Rule 26(c) do not purport to address that question, and the committee note confirms that the change does not overhaul the general rule that each party bears its own expenses during the discovery process. The note states explicitly that the 2015 amendment "does not imply that cost-shifting should become a common practice" and that "[c]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding."¹⁹³

The structure of Rule 26 indicates that a discovery request should not be deemed to create "undue burden or expense" for purposes of Rule 26(c) if it satisfies the "proportionality" inquiry for purposes of Rule 26(b) (whether under the pre-2015 Rule 26(b)(2) or the post-2015 Rule 26(b)(1)). If the court finds that a discovery request is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or

¹⁹¹ See, e.g., *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (noting that cost-shifting "places a price on justice that will not always be acceptable: it would result in the abandonment of meritorious claims by litigants too poor to pay for necessary discovery"); see also *Sellers*, *supra* note 113, at 10 ("While cost-shifting may be appropriate in limited circumstances, it is unwarranted and inefficient in most, and could have the effect of denying discovery altogether in civil rights and employment cases where plaintiffs have limited resources to bear such costs." (footnote omitted)); *Thornburg*, *supra* note 113, at 7 (arguing that "the explicit approval of cost shifting" in Rule 26(c) "threatens the ability of under-resourced litigants to discover important information").

¹⁹² FED. R. CIV. P. 26 advisory committee's note to 2015 amendment ("Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.").

¹⁹³ *Id.*

expense of the proposed discovery outweighs its likely benefit,”¹⁹⁴ then the court has necessarily found that the “burden or expense” of that request is not “undue.”¹⁹⁵

It follows that a court’s ability to issue an “order to protect a party” from such “undue burden or expense” by “specifying . . . the allocation of expenses” comes into play *only* when the court would otherwise refuse discovery entirely because of the proportionality factors. Understood correctly, then, these protective orders can only *expand* the ability of requesting parties to uncover relevant information. If the burden of producing relevant information is not undue, then there is no justification for issuing a cost-shifting protective order under Rule 26(c)—and no justification for refusing discovery on proportionality grounds (either before or after the 2015 amendments). But if the burden of producing relevant information *is* undue, then there would be grounds for refusing discovery entirely (because of the proportionality factors), and Rule 26(c) would give a court the ability to order discovery on the condition that the requesting party bear some portion of the production expenses.

Accordingly, this change to the protective-order provision of Rule 26 does not expand the power of courts to shift costs. To the contrary, it simply confirms a court’s ability to *allow* discovery that it would otherwise deem to create impermissible burden or expense, on the condition that the requesting party bears some or all of the costs of production.

F. Elimination of the Pleading Forms

While most of the 2015 amendments focus on the discovery process, one aspect of the recent amendments elicited strong criticism because of its potential impact on pleading standards. As discussed above, the 2015 amendments eliminated all but two of the forms that had previously appeared in the appendix to the Federal Rules of Civil Procedure.¹⁹⁶ Among the forms that were eliminated were iconic pleading forms, which had long stood as exemplars of the lenient approach to pleading that the drafters of the original rules envisioned.¹⁹⁷

¹⁹⁴ FED. R. CIV. P. 26(b)(1) (2015).

¹⁹⁵ FED. R. CIV. P. 26(c)(1) (2015).

¹⁹⁶ See *supra* notes 109–10 and accompanying text.

¹⁹⁷ See *supra* notes 31–33 and accompanying text.

Many surmised that the real motivation behind abrogating the forms was to implement a more restrictive approach to pleading standards.¹⁹⁸ As long as those pleading forms remained in the rules' appendix—accompanied by Rule 84's instruction that those forms “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate”¹⁹⁹—it would be difficult for federal courts to insist that a plaintiff's complaint contain the sort of factual detail and evidentiary support that proponents of heightened pleading standards would prefer. At the very least, eliminating the forms created a risk that lower courts would impose an undesirably strict approach.²⁰⁰

Whatever the initial motivations may have been behind the proposal to abrogate the forms, the 2015 amendments cannot fairly be read as an invitation to make pleading standards more restrictive. Most significantly, the advisory committee note states explicitly that the elimination of the forms “does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”²⁰¹ Rather, the forms that were eliminated “are no longer necessary” because “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.”²⁰²

These premises directly and forcefully refute the notion that federal courts should view the elimination of the forms as enshrining a heightened pleading standard along the lines of some interpretations of *Twombly* and *Iqbal*.²⁰³ As an interpretive matter, it would be nonsensical to use the fact that the forms' “purpose” has been “fulfilled” as justification for an approach to pleading that flies in the face of those same forms. It follows that the pleading forms that had long occupied the appendix to the Federal Rules—and that the original rules' drafters believed were crucial illustrations of the way the rules were meant to operate²⁰⁴—should remain relevant. Given the explicit instruction in the committee note and the fact that no amendments were made to the rules that govern pleading and pleading motions (such as Rule 8 and Rule 12), pleading

¹⁹⁸ See, e.g., Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 16–17; Siegel et al., *supra* note 113, at 1–2.

¹⁹⁹ FED. R. CIV. P. 84 (2014) (abrogated 2015).

²⁰⁰ Hershkoff, Hoffman, Reinert, Schneider, Shapiro & Steinman Comment, *supra* note 113, at 15 (“*Twombly* and *Iqbal* create tension with the Forms—but that tension is not insurmountable and, even if it were, one still needs a rationale for choosing one over the other. The Committee has provided no explanation for opting to abandon the Forms rather than to reexamine plausibility pleading.”).

²⁰¹ FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

²⁰² *Id.*

²⁰³ See Steinman, *supra* note 19, at 361–62 & n.163.

²⁰⁴ See *supra* notes 31–33 and accompanying text.

forms that occupied the Federal Rules for its first eight decades are still the best indicators of the federal pleading standard.

This is not to defend the decision to eliminate the forms. But it would be a mistake to read this aspect of the 2015 amendments as tacitly approving a restrictive approach to pleading. Those concerned about meaningful judicial access and enforcement should resist that view, lest proponents of a more restrictive pleading standard be granted a victory that they did not actually obtain through the amendment process.

G. A Few Words on Interpretive Methodology

The general topic of how to interpret the Federal Rules of Civil Procedure has garnered some scholarly attention,²⁰⁵ although not nearly the amount of scrutiny directed at statutory or constitutional interpretation.²⁰⁶ Scholars have examined—among other things—the force of the advisory committee notes in interpreting the rules,²⁰⁷ the contrast between interpreting the rules formalistically as opposed to pragmatically or with reference to policy considerations,²⁰⁸ and the unusual dual role the Supreme Court plays as both adopter and interpreter of the rules and their amendments.²⁰⁹

It is beyond the scope of this Article to propose a comprehensive interpretive theory for the Federal Rules. Insofar as many of the arguments set out above rely on the advisory committee notes that accompany the 2015 amendments, such

²⁰⁵ See generally, e.g., Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role As Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927; Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (1993); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123 (2015); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

²⁰⁶ See, e.g., Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539, 541 (2011) (noting "the forests that have been laid waste in service of three decades' worth of academic and judicial discourse about federal statutory interpretation").

²⁰⁷ See, e.g., Marcus, *supra* note 205, at 965–67; Struve, *supra* note 205, at 1152–69.

²⁰⁸ See, e.g., Moore, *supra* note 205, at 1040 (contrasting a literalist or plain meaning approach with a more activist one); Porter, *supra* note 205, at 131–42 (contrasting a statutory mode of interpretation with a managerial mode).

²⁰⁹ See, e.g., Marcus, *supra* note 205, at 942–50; Moore, *supra* note 205, at 1061–72; Mulligan & Staszewski, *supra* note 205, at 1194–1202; Porter, *supra* note 205, at 144–48; Struve, *supra* note 205, at 1119–41.

reliance has been common practice in the Supreme Court²¹⁰ and throughout the federal judiciary²¹¹ when it comes to interpreting the rules. Justice Scalia was known for objecting to the use of the advisory committee notes,²¹² but he was a lone exception in this regard.²¹³ In any event, the arguments above are also supported by the text and structure of the 2015 Federal Rules independent of the accompanying advisory committee notes.

Admittedly, there are examples of courts using a policy-driven methodology when interpreting the Federal Rules of Civil Procedure.²¹⁴ And one can certainly imagine some judges interpreting the 2015 amendments to impose more restrictive approaches to pleading and discovery by embracing the sort of policy arguments (notwithstanding their lack of empirical foundation) that are often advanced by those who support limiting private enforcement and access to courts. It is hotly contested, however, whether a court's policy preferences—even the Supreme Court's policy preferences—justify disregarding an interpretation that is supported by the text and advisory committee notes.²¹⁵ Indeed, if one was truly to embrace the view that policy concerns trump the rules' text, structure, and supporting advisory committee notes, then the 2015

²¹⁰ See, e.g., *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015); *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 134 S. Ct. 773, 781 (2014); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013); *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550 (2010); *Becker v. Montgomery*, 532 U.S. 757, 764–65 (2001); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 356 (1981).

²¹¹ See, e.g., *In re Nat. Football League Players Concussion Injury Litig.*, 775 F.3d 570, 578–79, 581, 587 (3d Cir. 2014); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 866–70 (9th Cir. 2014); *Peer v. Lewis*, 606 F.3d 1306, 1311–15 (11th Cir. 2010).

²¹² See, e.g., *Krupski*, 560 U.S. at 557 (Scalia, J., concurring).

²¹³ See *supra* note 210.

²¹⁴ See, e.g., Porter, *supra* note 205, at 136–42 (describing a “managerial mode” of interpretation where the Court “strategiz[es] and innovat[es] to achieve normative goals”); see also Marcus, *supra* note 205, at 973 (describing the *Twombly* decision as “based . . . on policy concerns” rather than any “attempt to unpack rule text or unearth rule maker intent or purpose”); Mulligan & Staszewski, *supra* note 205, at 1196 (“[C]ommentators almost universally recognized *Twombly* and *Iqbal* as statements regarding the policy underlying pleading requirements . . . not the legalistic interpretation of Rule 8.”).

²¹⁵ See, e.g., Mulligan & Staszewski, *supra* note 205, at 1223–24 (arguing that when an interpretation of the Federal Rules of Civil Procedure involves policy choices, “the Court should refer the issue for resolution pursuant to the court rulemaking process, rather than resolving the issue pursuant to adjudication”); Struve, *supra* note 205, at 1119–20 (noting that both the Supreme Court and lower federal courts have “felt free to strain the Rules’ text, and ignore relevant Notes, in order to implement their own views of desirable policy” and arguing “that such an approach enlarges the powers of the courts beyond their proper boundaries”). *But see* Moore, *supra* note 205, at 1085 (“[T]he Court has a clear duty to determine, within the framework of the particular Rule and the Federal Rules as a whole, how best to effectuate the various and sometimes competing policy interests involved.”); *id.* at 1093 (“[A] more activist role in the interpretative stage, one that considers purpose and policy, is appropriate.”).

amendments themselves are completely irrelevant; a court could impose more restrictive standards even if the rules had not been amended at all.

In any event, there are strong disagreements over whether restrictive approaches to pleading or discovery are, in fact, desirable from a policy standpoint. So it certainly cannot be said that a pragmatic or policy-driven interpretive methodology would require courts to read the 2015 amendments as imposing more restrictive standards. Of course it is always possible that individual judges will privilege their own policy preferences over other considerations when applying the Federal Rules of Civil Procedure. But the key point here is that no interpretive methodology would compel courts to heighten pleading standards or to limit access to discovery in the wake of the 2015 amendments. And for all the reasons described above, there are strong arguments against such an interpretation.

IV. BEYOND THE 2015 AMENDMENTS: LESSONS AND CHALLENGES

Part III shows that the 2015 amendments, properly understood, did not make meaningful changes to either the pleading standard or the basic framework and principles governing access to discovery. This is encouraging news for those who were concerned that the amendments would disrupt the simplified, merits-driven approach to these issues that the drafters of the original Federal Rules put into place nearly eight decades ago. But it also highlights a number of important lessons and challenges.

The 2015 amendments confirm the view that the rules amendment process is unlikely to make significant changes regarding the procedural issues that are so crucial for access to justice and the judicial enforcement of substantive law. This means that the key battleground will be the federal courts themselves, as individual judges in individual cases are called upon to interpret and apply the federal rules. Therefore, special attention must be paid to post-adoption developments that are likely to influence those judges. This Part concludes by addressing recent moves by Chief Justice Roberts that seek to spin the 2015 amendments as changing more than they actually do.

A. *Civil Procedure's Post-Legislative Era*

At first glance, it may seem quite surprising that the 2015 amendments did not lead to more sweeping changes. As described above, many who were involved in the rulemaking process appeared to embrace the empirically unsupported premise that federal litigation was plagued by unjustifiably high

discovery costs, and the chairs and members of the key rulemaking committees came disproportionately from one side of the ideological spectrum.²¹⁶ Everything seemed to be teed up perfectly for those wishing to restrict access and enforcement to make major legislative changes to the Federal Rules of Civil Procedure. Yet the fruits of those efforts—the amendments themselves—failed to do so.

There are a number of institutional explanations for this result. As Steve Burbank and Sean Farhang have explained, a variety of factors have conspired to make it very difficult to bring about significant positive-law changes to the Federal Rules of Civil Procedure—whether through congressional legislation or through the rules amendment process.²¹⁷ With respect to Congress, divided government has made major procedural legislation virtually impossible.²¹⁸ While restrictive reforms have been a high priority for Republican lawmakers for decades, their legislative efforts have done little more than “nibble[] around the edges of the litigation state.”²¹⁹ And with respect to amending the Federal Rules via the Rules Enabling Act, changes to the amendment process enacted in 1988 “made it more difficult to use the rulemaking process for major civil litigation reform.”²²⁰ The 2015 amendments’ most significant lesson, therefore, may be to mark even more clearly the end of the period when positive,

²¹⁶ See *supra* notes 120–23 and accompanying text.

²¹⁷ See Burbank & Farhang, *supra* note 2, at 1562–68, 1580–82.

²¹⁸ See *id.* at 1567; see also *id.* at 1545 (“So long as Democrats controlled at least one chamber of Congress, Republicans’ litigation reform proposals had little chance of success. Even when Republicans secured control of both chambers (and for a time concurrently held the presidency), their litigation reform successes were modest and clustered in a few discrete policy areas.”).

²¹⁹ *Id.* at 1564. The most recent piece of successful legislation was the Class Action Fairness Act of 2005, the most significant consequence of which was to expand federal subject-matter jurisdiction over high-stakes class actions that otherwise might have proceeded only in state court. See generally Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1856–61 (2008) (discussing the expansion of diversity jurisdiction by the Class Action Fairness Act of 2005); Sherman, *supra* note 12, at 1596–1605 (discussing the various exceptions to the expansion of diversity jurisdiction under the Class Action Fairness Act). During the past decade, ambitious attempts at restrictive legislation have failed. See, e.g., Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. (Apr. 22, 2015); Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. (Mar. 9, 2011); Small Business Growth Act of 2007, H.R. 1012, 110th Cong. (Feb. 13, 2007).

²²⁰ Burbank & Farhang, *supra* note 2, at 1546; see also *id.* at 1601 (“[T]he 1988 reforms assimilated the formal characteristics of the rulemaking process to those of the administrative process, and brought the landscape of rulemaking closer to that of the legislative process more generally. In combination with other influences promoting institutional self-restraint, their effect was to entrench the status quo and to render consequential reform by Federal Rule more difficult . . .”).

prospective lawmaking was a driving force in the content of federal civil procedure.²²¹

The key question going forward is who, if anyone, will fill the lawmaking void. One possibility is the Supreme Court itself—not by adopting positive-law amendments to the Federal Rules of Civil Procedure through the Rules Enabling Act process, but rather by issuing precedential decisions in individual cases.²²² And indeed, recent years have witnessed several controversial Supreme Court decisions—on a variety of important issues—that appear to push federal civil procedure in a more restrictive direction.²²³

With respect to pleading standards and discovery, however, it is not clear that the Supreme Court is likely to drive procedural reform through the stare decisis effect of its decisions in individual cases. When a district court decides a discovery motion—which would be the vehicle for applying Rule 26(b)'s proportionality considerations, for example—principles of appellate jurisdiction usually insulate that ruling from immediate appellate review.²²⁴ This makes Supreme Court review of discovery issues quite rare. Pleading standards (which are more easily reviewed on appeal) might seem more susceptible to Supreme Court meddling. That was precisely why the Court's decisions in *Twombly* and *Iqbal* elicited such strong criticism. In terms of stare decisis, however, it is far

²²¹ Ongoing rulemaking activity regarding class actions provides further support for this point. Although the Civil Rules Advisory Committee created a "Rule 23 Subcommittee" to explore possible amendments to Rule 23, it placed more controversial amendments on hold, declining to include them in proposed amendments that were circulated for public comment in August 2016. See ADVISORY COMM. ON CIVIL RULES, APRIL 2016 CIVIL RULES ADVISORY COMMITTEE AGENDA BOOK 107–12 (2016), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2016> (indicating that possible amendments regarding "pick-off issues" and "ascertainability" had been put "on hold"). There remains, of course, considerable debate over whether the Rules Enabling Act process—as presently constituted—is a desirable method of generating and amending procedural rules. See, e.g., Lesnik, *supra* note 123, at 582 ("The assignment of a rule-promulgating role to the Supreme Court is unwise and inappropriate and should be re-examined."); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, L. & CONTEMP. PROBS., Summer 1998, at 229, 231, 237 (critiquing the fact that the current rulemaking process is "dominated by judges," as well as the "diffusion of responsibility" that stems from the fact that "so many people and so many layers are involved in [the] rulemaking [process]"). For a general discussion of debates surrounding the Rules Enabling Act process, see OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 1162–94 (2003).

²²² See Burbank & Farhang, *supra* note 2, at 1580–82 (arguing that the conservative Supreme Court was in a better position than the Republicans in the political branches to restrict private access to judicial remedies).

²²³ See *supra* note 15.

²²⁴ See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("[W]e have generally denied review of pretrial discovery orders." (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981))).

from clear that those decisions mandate a stricter approach to pleading.²²⁵ Indeed, more recent Supreme Court decisions on pleading standards confirm that *Twombly* and *Iqbal*, properly understood, reaffirm basic aspects of notice pleading.²²⁶

While there may be disagreement about the correct interpretation of *Twombly* and *Iqbal* in terms of their prospective lawmaking content,²²⁷ the aftermath of *Twombly* and *Iqbal* is worth keeping in mind as courts and commentators consider and respond to the 2015 amendments. *Twombly* and *Iqbal* were problematic decisions to be sure,²²⁸ and critics raised legitimate questions about where the Court's reasoning might lead. Many who favored the simplified, merits-driven approach contemplated by the initial drafters of the Federal Rules condemned *Twombly* and *Iqbal* on the grounds that those decisions imposed a more restrictive pleading standard. And many who favored a more restrictive standard were perfectly happy to use *Twombly* and *Iqbal* to accomplish that result. Because of this dynamic, the focus of the debate was not on whether those decisions *should* be read to disrupt a half-century's worth of notice pleading, but rather on whether that change was normatively desirable.²²⁹

Like *Twombly* and *Iqbal*, the 2015 amendments and the process that led to them are troubling in many respects. But it does not follow that the best interpretation of those amendments is one that would require judges to reduce access to discovery and to heighten pleading standards. Judges should be encouraged to interpret the 2015 amendments in a way that allows meaningful access to judicial remedies and enforcement of substantive rights and

²²⁵ See Steinman, *supra* note 2, at 1320 (“The conventional reading of *Twombly* and *Iqbal* assumes that they have essentially overruled pre-*Twombly* authorities on federal pleading standards. This view cannot withstand close scrutiny, however.” (footnote omitted)); see also *supra* note 72 and accompanying text (arguing that important parts of the *Twombly* and *Iqbal* opinions support the more lenient pleading approach envisioned by the original rules’ drafters).

²²⁶ See *supra* note 73 and accompanying text. See generally Steinman, *supra* note 19, at 367–80 (discussing the Supreme Court’s decisions since *Iqbal*).

²²⁷ See, e.g., Steinman, *supra* note 19, at 364–65 (contrasting “the standard critique of *Twombly* and *Iqbal*” with a reading of those cases that would require federal courts to continue to follow pre-*Twombly* pleading precedents).

²²⁸ See, e.g., Steinman, *supra* note 2, at 1299 (“*Twombly* and *Iqbal* appear to be result-oriented decisions designed to terminate at the earliest possible stage lawsuits that struck the majorities as undesirable. And it was irresponsible for the Court to invite the controversial ‘plausibility’ concept into pleading doctrine in a way that has led to such widespread confusion.” (footnote omitted)).

²²⁹ While some federal courts understood *Twombly* and *Iqbal* to preserve the Federal Rules’ long-standing notice-pleading approach, see *supra* note 21, empirical studies revealed that—at least for certain kinds of cases—federal courts applied pleading standards more restrictively in the wake of those decisions. See *supra* notes 70–71 and accompanying text.

obligations. As explained in Part III, the text and structure of the 2015 amendments, confirmed by the advisory committee notes, should be read to maintain rather than to restrict the rules' long-standing approach to pleading and discovery.

B. *Post-Adoption Developments*

The insights of the previous section indicate that the effect of the 2015 amendments on crucial procedural issues like pleading standards and access to discovery will not be compelled by top-down, binding edicts (whether from Congress, the rules amendment process, or precedential Supreme Court decisions). Rather, a battle of persuasion in the lower courts will determine their ultimate impact. The opening salvos in this battle have already come from Chief Justice Roberts himself. Not even a full month after the 2015 amendments became effective, he devoted considerable attention to them in his *2015 Year-End Report on the Federal Judiciary*.²³⁰

The Chief's report began with a two-page introduction about a dueling pamphlet authored in 1838 by former South Carolina governor John Lyde Wilson.²³¹ While the Chief called the pamphlet "a largely forgotten relic of a happily bygone past," he wrote that it was also "a stark reminder of government's responsibility to provide tribunals for the peaceful resolution of all manner of disputes," and opined that "civil tribunals, far more than the inherently uncivilized dueling fields they supplanted, must be governed by sound rules of practice and procedure."²³²

Chief Justice Roberts then proceeded to heap praise on the 2015 amendments. They are a "big deal,"²³³ a "significant change,"²³⁴ and a "major stride toward a better federal court system,"²³⁵ arising from "five years of intense study, debate, and drafting to address the most serious impediments to just,

²³⁰ 2015 YEAR-END REPORT, *supra* note 23; *see also* Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES (Dec. 31, 2015), <http://www.nytimes.com/2016/01/01/us/politics/chief-justices-report-praises-limits-on-claimants-access-to-information.html> (describing the report and the responses of several scholars).

²³¹ 2015 YEAR-END REPORT, *supra* note 23, at 1–3. For additional insights on dueling practices in the early decades of our republic, *see generally* Anthony Ramos, Lin-Manuel Miranda, Jon Rua & Leslie Odom, Jr., *Original Broadway Cast of Hamilton, Ten Duel Commandments*, YOUTUBE (Sept. 26, 2015), <https://www.youtube.com/watch?v=dS79uxNFoHw>.

²³² 2015 YEAR-END REPORT, *supra* note 23, at 2–3.

²³³ *Id.* at 5 ("The amendments may not look like a big deal at first glance, but they are.").

²³⁴ *Id.* ("They mark significant change, for both lawyers and judges, in the future conduct of civil trials.").

²³⁵ *Id.* at 9 ("The 2015 civil rules amendments are a major stride toward a better federal court system.").

speedy, and efficient resolution of civil disputes.”²³⁶ He declared that the 2010 Duke Conference’s “40 papers and 25 data compilations[] confirmed that . . . in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts” and showed the need to (among other things) “focus discovery . . . on what is truly necessary to resolve the case.”²³⁷ The revised Rule 26(b)(1), he wrote, “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality”; “[s]pecifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery.”²³⁸

With respect to the elimination of Rule 84 and the forms, Chief Justice Roberts wrote that “many of those forms have become antiquated and obsolete.”²³⁹ He explained that, following the abrogation of the forms, the Administrative Office of the U.S. Courts had “assembled a group of experienced judges to replace those outdated forms with modern versions that reflect current practice and procedure.”²⁴⁰ The Chief Justice then directed readers to what he called twelve “revised” pro se forms that were posted on the U.S. Courts website.²⁴¹

These new pro se forms stand in stark contrast to the forms that occupied the rules’ appendix for decades and were deemed to “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”²⁴² Form 11, for example, had instructed that a negligence complaint would pass muster merely by alleging: “On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.”²⁴³ By contrast, the new Pro Se Form 5—entitled *Complaint for a Civil Case Alleging Negligence*²⁴⁴—insists that the plaintiff describe not only “the acts or failures to act” but also “why they were negligent.”²⁴⁵ It is a laudable goal to provide resources for pro se litigants who

²³⁶ *Id.* at 4.

²³⁷ *Id.* at 4–5.

²³⁸ *Id.* at 6–7.

²³⁹ *Id.* at 8–9.

²⁴⁰ *Id.* at 9.

²⁴¹ *Id.* (citing *Pro Se Forms*, USCOURTS.GOV, <http://www.uscourts.gov/forms/pro-se-forms> (last visited May 12, 2016)).

²⁴² FED. R. CIV. P. 84 (2014) (abrogated 2015).

²⁴³ FED. R. CIV. P. Form 11, ¶ 2 (2014) (abrogated 2015).

²⁴⁴ See *Complaint for a Civil Case Alleging Negligence*, USCOURTS.GOV, <http://www.uscourts.gov/forms/pro-se-forms/complaint-civil-case-alleging-negligence> (last visited May 12, 2016).

²⁴⁵ *Id.* To their credit, the “experienced judges” who prepared these forms for the Administrative Office of the U.S. Courts, 2015 YEAR-END REPORT, *supra* note 23, at 9, warn that the new pro se forms do not “provide[]

must navigate an increasingly complex federal judiciary, especially after the elimination of the forms. But it is both troubling and inaccurate for the Chief Justice to declare unilaterally in his Year-End Report that these new pro se forms—which insist on more detail than the recently abrogated forms—“reflect current practice and procedure.”²⁴⁶

Chief Justice Roberts’s recent activity is precisely what we would expect to see in this post-legislative era. His Year-End Report and the new batch of pro se forms are not binding law. They have not been enacted by majorities of both houses of Congress and signed into law by the President.²⁴⁷ They have not been approved by the Supreme Court pursuant to the process set forth in the Rules Enabling Act.²⁴⁸ And they are not Supreme Court decisions that bind lower courts via *stare decisis*.²⁴⁹ These maneuvers by Chief Justice Roberts are advocacy, not law. Given current institutional realities, however, they are what remain in the arsenal of those who seek to make judicial enforcement less available and less effective.²⁵⁰

legal advice” and that “[v]ariations” are “[p]ossible.” *See, e.g., Complaint for a Civil Case Alleging Negligence, About These Forms*, USCOURTS.GOV, <http://www.uscourts.gov/forms/pro-se-forms/complaint-civil-case-alleging-negligence> (last visited May 12, 2016). The website states:

A form may call for more or less information than a particular court requires. The fact that a form asks for certain information does not mean that every court or a particular court requires it. And if the form does not ask for certain information, a particular court might still require it. Consult the rules and caselaw that govern in the court where you are filing the pleading.

Id. Descriptively, it is certainly true that “a particular court” might—correctly or not—“require[]” “more or less information” than the pro se form indicates. As described in greater detail below, what is troubling is Chief Justice Roberts’s suggestion in his Year-End Report that these pro se forms “reflect current practice and procedure”—at least if one assumes that he means legally correct “practice and procedure.” *See infra* notes 254–57 and accompanying text.

²⁴⁶ 2015 YEAR-END REPORT, *supra* note 23, at 9.

²⁴⁷ *See* U.S. CONST. art. I, § 7 (“Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States . . .”).

²⁴⁸ *See* 28 U.S.C. §§ 2072–2074 (2012).

²⁴⁹ *See, e.g.,* Steinman, *To Say What the Law Is*, *supra* note 69, at 1738 (“Because of *stare decisis*, a judicial opinion creates law that can bind subsequent decision-makers just as much as a statute or constitutional provision.”).

²⁵⁰ Scholars have recognized how conduct that does not directly generate binding law can nonetheless influence judicial access and enforcement. The Chief Justice in particular has a number of such tools at his disposal, not only his power to appoint members to the relevant rulemaking committees, *see supra* note 120–23 and accompanying text, but also through his authority over administrative and budgetary issues for the federal judiciary and through his advocacy in that capacity vis-à-vis Congress, important organizations like the American Bar Association, and even the nation as a whole. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1598 (2006) (“[W]hat the infrastructure of ‘administrative’ functions permits is a profoundly new set of opportunities for the Chief Justice to shape American law through methods less visible and accessible to law professors and the public than that of opinion writing.”); *see also* Judith Resnik, *The Programmatic*

It is no surprise that the Chief Justice would prefer that the rules be applied more restrictively.²⁵¹ But neither he nor likeminded players in the rules amendment process were able to make meaningful changes to the rules themselves. Chief Justice Roberts can declare that the 2015 amendments are “a big deal” and a “significant change” insofar as they “crystalize[] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”²⁵² As described in Section III, however, the changes to Rule 26 suggest no such “change” or “increase[.]” Considering proportionality when evaluating discovery requests is nothing new, and the 2015 amendments do not indicate that proportionality considerations need to be balanced in a more restrictive manner.²⁵³

Similarly misguided is the Chief Justice’s view regarding the elimination of the pleading forms. The pro se forms that now appear on the U.S. Courts website do not “replace” the eliminated forms. There are fundamental differences in both their authoritativeness and their content. The rules themselves had provided that the pleading forms in the appendix “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”²⁵⁴ And the advisory committee note to the 2015 amendment confirmed that the elimination of those forms “does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.”²⁵⁵ It follows that a complaint containing the same

Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act, 74 S. CAL. L. REV. 269, 285 (2000) (“[T]he Chief Justice has, through institutional design, enormous influence.”). Judicial training is another non-legislative mechanism that can impact the practical application of the rules of civil procedure. See Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 426–28 (2016) (describing some of the themes conveyed during judicial training sessions). Regarding the 2015 amendments specifically, some commentators have voiced concern about training programs held by the Duke Law Center for Judicial Studies, as well as the Duke Center’s published guidelines for implementing the amendments to Rule 26. See Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. (forthcoming 2016); Suja A. Thomas, Opinion, *Via Duke, Companies Are Shaping Discovery*, LAW360 (Nov. 4, 2015, 2:41 PM), <https://www.law360.com/articles/723092>. Although an analysis of the Duke Center’s activities is beyond the scope of this Article, such activities provide another example of how non-lawmaking actors and institutions may play a role in influencing how judges interpret the 2015 amendments.

²⁵¹ See *supra* notes 124–26 and accompanying text.

²⁵² See *supra* notes 233–38 and accompanying text.

²⁵³ See *supra* Section III.A.

²⁵⁴ FED. R. CIV. P. 84 (2014) (abrogated 2015).

²⁵⁵ FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment; see *supra* notes 201–02 and accompanying text.

levels of “simplicity and brevity” reflected in the now-eliminated forms must continue to suffice following the 2015 amendments.²⁵⁶

Therefore, it is wrong to view the 2015 amendments as a declaration that the pleading forms in the rules’ appendix were “antiquated and obsolete” and did not “reflect current practice and procedure.”²⁵⁷ Moreover, unlike the form complaints that long appeared in the appendix, the new pro se forms do not have any special claim to “illustrate” what the federal pleading standard requires. And indeed, there are clear differences between the now-eliminated form complaints and the new pro se sample complaints that Chief Justice Roberts highlighted in his 2015 Year-End Report.²⁵⁸ Again, the relevant advisory committee note states unambiguously that deleting the forms “does not alter existing pleading standards.”²⁵⁹

Our system does not give the Chief Justice unilateral lawmaking authority over pleading standards, access to discovery, or any other aspect of civil procedure. For anyone concerned that restrictive approaches to pleading and discovery will undermine meaningful judicial access and enforcement, the strongest response to Chief Justice Roberts is to stress the disconnect between the position articulated in the Year-End Report and the text, structure, and declared purpose of the 2015 amendments themselves. The Chief Justice’s attempt to spin the amendments as more than they actually are is a glaring admission that the rulemaking enterprise itself failed to accomplish his hoped-for results. It is the rules themselves that bind federal courts, not the Chief Justice’s Year-End Report.

CONCLUSION

The process that culminated in the 2015 amendments to the Federal Rules of Civil Procedure was driven by a “cost-and-delay narrative”²⁶⁰ that put pleading standards and access to discovery in the cross-hairs. Given the crucial role these issues play in access to justice and the judicial enforcement of substantive rights, the amendments merited—and received—close attention. The amendments that were ultimately adopted, however, do not mandate a more restrictive approach

²⁵⁶ See *supra* notes 203–04 and accompanying text; see also Steinman, *supra* note 19, at 361 n.163 (arguing that long-standing pleading forms should continue to inform the federal pleading standard even though the appendix of forms has been deleted).

²⁵⁷ See *supra* notes 239–40 and accompanying text.

²⁵⁸ See *supra* notes 241–45 and accompanying text.

²⁵⁹ FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment.

²⁶⁰ Miller, *supra* note 2, at 365.

to pleading or discovery. Although there was legitimate cause for alarm given the advisory committee's early proposals and supporting documents, the text and structure of the final amendments are entirely consistent with notice pleading and a robust discovery process.

The more significant lesson of the 2015 amendments, therefore, may be that they confirm the view that the amendment mechanism of the Rules Enabling Act is unlikely to generate significant changes to the Federal Rules of Civil Procedure. The process that led to the 2015 amendments was set up almost perfectly for those who favor a more restrictive approach to make real, detrimental changes to federal pleading and discovery standards. Yet those efforts failed. Now, the key battleground will be the federal courts themselves, as judges are called upon to interpret and apply the rules in particular cases.

Chief Justice Roberts has already taken various steps to spin the 2015 amendments as changing far more than they actually do. These post-amendment moves do not change the law of civil procedure, but the Chief Justice may ultimately win the day if he persuades lower court judges to take a more restrictive approach. Properly interpreted, the 2015 amendments do not impose new pleading and discovery standards. To preserve access and enforcement going forward, it will be crucial to recognize the limited nature of the changes made by the 2015 amendments.