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Making State Civil Procedure

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MAKING STATE CIVIL PROCEDURE

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State courts matter. Not only do state courts handle more than sixty times the number of civil cases as federal courts, but they also represent an important bulwark against the effects of federal procedural retrenchment. Yet state courts and state procedure are notably absent from the scholarly discourse.

In order to evaluate state procedure—and in order to understand the states' relationship to federal procedural retrenchment—this Article presents the first comprehensive study of who makes state civil procedure. This project begins with a systematic review of the formal processes by which states make their rules of procedure. Many of the relevant sources were not publicly accessible, so this project not only collects important data but in so doing also makes state procedure more accessible.

Formal rulemaking authority is only part of the story. At the federal level, scholars have focused on the Advisory Committee on Civil Rules: an elite committee of mostly judges and practitioners, selected by the Chief Justice, that plays a primary role in proposing amendments to the Federal Rules of Civil Procedure. Critics have argued that the advisory committee favors corporate interests, and they have attributed these effects to committee membership. Since the 1960s, there has been a dramatic decline in the share of practitioners on the committee and, simultaneously, an increased homogeneity among its members—i.e., Republican judges and corporate defense attorneys.

State advisory committees have gone virtually unstudied. Indeed, in many states, advisory committee membership is not readily accessible. I collected membership information for every state advisory committee, and this Article compares these little-studied state committees to the well-known federal committee. In brief, state committees are notably more di-

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verse. They have far greater representation of practitioners than the federal committee, and those practitioners are more evenly divided between plaintiff- and defense-side lawyers and between individual and corporate lawyers. Partisan effects are less severe among state judge members than at the federal level. State committees have much greater female representation than the federal advisory committee, and at least equal representation of racial and ethnic minorities. But at the same time, many state committees are less accessible to the public than the federal committee is.

This Article then makes at least three contributions. First, although these data do not support causal inference, they permit normative engagement with the design of rulemaking institutions. This analysis connects with interdisciplinary research on decision-making that suggests that epistemic diversity can produce better and more durable outputs. Second, I argue that civil rulemaking can unite accessibility and diversity. States can be more accessible, and federal rulemaking can be more diverse. Finally, as state procedure becomes more important, this Article helps ensure that relevant information is not limited to those with privileged access and the resources to use it.

In the 1980s, the Federal Rules of Civil Procedure were in crisis.[1] Critics zeroed in on the Advisory Committee on Rules of

[1] *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 103–12 (2017) (describing this period and collecting sources).

Civil Procedure, an elite group of judges and lawyers appointed by the Chief Justice, that has primary responsibility for drafting amendments to the Federal Rules.[2] Critics charged that this unelected committee pursued narrow corporate interests without meaningful process.[3] In response, Congress debated amendments to the Rules Enabling Act that would increase the transparency of the Advisory Committee and would require that committee membership reflect a balanced cross section of the bench and bar. The final legislation required transparency, but at the last minute, the "balanced cross section" language was dropped with little explanation.[4]

Today, concerns about the Federal Rules and the federal advisory committee are on the rise again. The 2015 discovery amendments,[5] and the famous (or infamous) "Duke Conference" that launched them,[6] have been criticized as too focused on the interests of large corporate defendants.[7] Defenders of the rulemaking process point to its transparency.[8] But what good are open meetings and public comments, the critics say, if the same conservative judges and corporate lawyers make the final decisions?

Unnoticed by virtually all procedure scholars, the states are pursuing a different course. State advisory committees are more diverse, though sometimes less accessible, than the federal advisory committee.

Indeed, the lack of accessibility is part of the reason that state procedure-making has been understudied.[9] But state

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2 I use "federal advisory committee" to refer to this body throughout this Article.

3 BURBANK & FARHANG, *supra* note 1, at 65–67; *see* 28 U.S.C. § 2073 (2018) (authorizing federal advisory committees).

4 *See* 28 U.S.C. § 2073 (2018) (as amended); 134 CONG. REC. 31,067 (daily ed. Oct. 14, 1988) (Senate); 134 CONG. REC. 31,861–74 (daily ed. Oct. 19, 1988) (House); *see also infra* note 254.

5 *See* FED. R. CIV. P. 26, advisory committee's note to 2015 amendment.

6 REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM TO THE 2010 CIVIL LITIGATION CONFERENCE (2010), http://www.uscourts.gov/sites/default/files/actl_task_force_iaals_report_to_the_2010_civil_litigation_conference.pdf [https://perma.cc/FUM4-HRNG].

7 *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1022–23 (2016); *see also infra* notes 89 & 214 (collecting sources).

8 *See infra* notes 246–49 and accompanying text.

9 This is not the only reason, of course. *See*, *e.g.*, Brian J. Ostrom, et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEG. STUD. 755, 756–57 (2004) ("The perennial difficulty in compiling accurate and comparable data at the state level can in large measure be pinned on the fact that there are 50 states with at least 50 different ways of doing business and 50 different levels of commitment to data compilation.").

courts matter. Not only do state courts handle more than sixty times the number of civil cases as federal courts,[10] but they also represent an important bulwark against the effects of federal procedural retrenchment on substantive rights. As decisions such as *Twombly*, *Iqbal*, and *Wal-Mart v. Dukes* make federal courts less amenable to certain claims and claimants,[11] those interested in the vigorous enforcement of important rights can (and should) look to state courts for redress.[12] Regardless of one's views on the merits of these procedural decisions, they may have the effect of pushing more (and more important) cases into state courts.

If state procedure becomes a more significant vehicle for vindicating important rights, it will likely become a more important site for political contestation as well.[13] In fact, state civil procedure is starting to get some attention. In Arkansas, a "tort reform"-inspired constitutional amendment is on the ballot in 2018 that would increase the legislature's role in judicial rulemaking.[14] The Conference of Chief Justices has issued a major "Call to Action" on state procedure.[15] And the American College of Trial Lawyers—a group that played an important role in the aforementioned Duke Conference—has taken up the cause of state civil procedure reform.[16] All sides, it seems, should be paying more attention to the states.

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10 NAT'L CTR. FOR STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 6 n.36 (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashxashx [https://perma.cc/2JRV-C3EM].

11 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011).

12 *See infra* Parts I & III. States also can be breeding grounds for procedural reform. For example, the federal courts are currently engaged in a pilot project on automatic discovery based on an innovation in Arizona state civil procedure. *See* ARIZ. R. CIV. P. 26.1.

13 *See also* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 467–70 (2018) (collecting sources). Another possible effect is that, if interest groups do not get their way in the states, they might push for expanding federal jurisdiction instead.

14 *See* S.J.R. 8, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

15 NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL: RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE (2016), http://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx [https://perma.cc/5CET-U2DG].

16 *See generally Judiciary Committee*, AM. C. TRIAL LAW., https://www.actl.com/home/committees/general-committees/judiciary-committee (noting committee membership and mandate) [https://perma.cc/N9NN-U3HV]. For examples of recent academic interest, see generally Symposium, *The Least Understood Branch: The Demands and Challenges of the State Judiciary*, 70 VAND. L. REV. 1701 (2017); Linda Sandstrom Simard, *Seeking Proportional Discovery:*

In order to evaluate state procedure—and in order to understand the states' relationship to federal procedural retrenchment—this Article presents the first systematic study of who makes state civil procedure. This project first surveys the mechanisms by which every state makes rules of civil procedure. The results are described herein and documented in detail in the comprehensive appendix, including identifying documents not previously accessible to the public.[17] These results, therefore, are not only of scholarly interest but also can help make state procedure more accessible by collecting these details all in one place.

To illustrate the states' varied processes, this project also documents the role of state rulemaking on two issues that have dominated procedural scholarship in recent years: pleading and class actions. This Article includes the first systematic study of the process by which states made their law on these topics (and more).[18] These surveys demonstrate the variation in state procedure-making and the continued importance of court-based rulemaking in particular. They also suggest that state rulemakers do more than simply mirror the federal rules.[19]

Then, inspired by pathbreaking work on federal rulemaking,[20] this project examines the actors involved in state rulemaking. Although proceduralists are well aware of the importance of the federal advisory committee, state advisory committees have gone virtually unstudied.[21] In light of the federal experience, I collected membership information for every state civil advisory committee. I then compared

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The Beginning of the End of Procedural Uniformity in Civil Rules, 71 VAND. L. REV. 1919 (2018); Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501 (2016).

17 *See infra* subpart I.A & Part II and Appendices (collecting information and sources on the formal rulemaking processes and the role of advisory committees (if any)). The appendices are maintained online by the *Cornell Law Review* at http://www.cornelllawreview.org.

18 *See infra* subparts I.B–D and Appendix Tables C–E (discussing pleading, class actions, discovery, forms, offers of judgment, work product, and sanctions).

19 This work connects with prior studies of state procedure, see *infra* note 44, though my focus on procedure-making institutions varies from those earlier treatments.

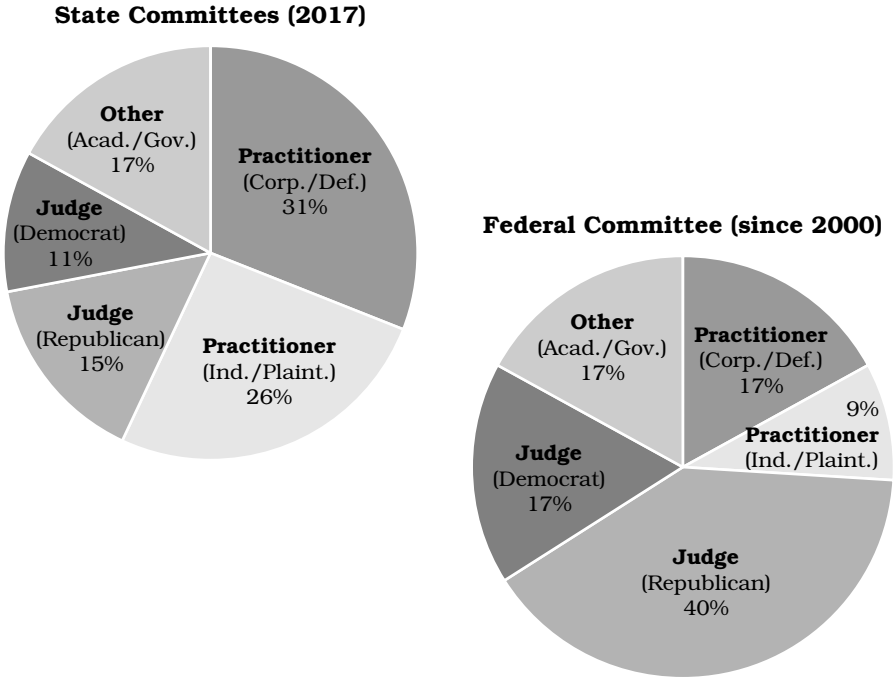
20 This project owes an enormous tangible and conceptual debt to the work of Stephen Burbank, described in detail *infra* notes 108–13 and accompanying text.

21 For a notable exception, studying the advisory-committee process in western states, see Thomas Main, *Civil Rulemaking in Nevada: Contemplating a New Advisory Committee*, 14 NEV. L.J. 852, 853–62 (2014).

empirically these little-studied state committees to the well-studied federal committee.

In short, federal and state advisory committees vary substantially. Critics of the federal advisory committee have noted a dramatic decline in the share of practitioners and, simultaneously, an increased homogeneity in committee membership—*i.e.*, defense-side corporate attorneys and judges appointed by Republican presidents.[22] State committees have far greater representation of practitioners than the federal committee. Those state practitioners are more evenly divided between plaintiff- and defense-side lawyers and between individual and corporate lawyers. Partisan effects exist among state judge members, though they are seemingly less severe than at the federal level. (State committees also have much greater female representation than the federal committee, and at least equal representation of racial and ethnical minorities.) Consider, for example, the composition of today's state committees and the federal committee since 2000.[23]

STATE AND FEDERAL COMMITTEES



22 *See* BURBANK & FARHANG, *supra* note 1, at 19; *see also infra* note 119 and accompanying text.

23 The sources and methods for compiling these tables are provided *infra* Part II.

This Article then makes at least three contributions. First, this Article contextualizes its empirical findings in light of recent research on diversity and group decision making. Epistemic diversity among state rulemakers may have consequences for the content of civil procedure. This is especially important in an era of federal procedural retrenchment: state courts are becoming even more important vehicles for protecting substantive rights, so if we did not care about state procedure-making before, we must now.

Second, as state procedure becomes more important, this Article helps ensure that relevant information is not limited to those with resources and privileged access. Collecting state-level information took a considerable investment in time, and I was substantially aided by a network of contacts to rely upon, the experience to know where to look, and a willingness to be a squeaky wheel. By sharing this information, this Article directly contributes to the state procedure-making accessibility that I find lacking—and hopefully helps to level the playing field among those interested in civil procedure and access to justice.

Third and finally, this Article calls for federal and state rulemakers to learn from one another. Diversity and accessibility are not mutually exclusive. State rulemaking can be more accessible, and federal rulemaking can be more diverse. This Article shows how.[24]

* * *

The balance of this Article proceeds as follows. Part I, in conjunction with the Appendix, describes the rulemaking process in all fifty states. This includes a description of formal rulemaking authorities and a series of studies on rulemaking in action, the latter focusing on the law of pleading and class actions. Having identified judicial rulemaking as a central

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24 This paper does not advocate for court-based rulemaking, but assumes it is here to stay. *Compare* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890 (1999) [hereinafter Bone, *Process of Making Process*] (defending "a view of court rulemaking that sees its central function as developing and maintaining a system of rules that reflects the best principled account of procedural practice"), *and* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–15 (2002) (identifying positive features of judicial procedure-making), *with* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1305–08 (2006) (articulating accountability critique of judicial rulemaking). Note, too, that state rulemaking may not be susceptible to the same constitutional critique as federal rulemaking. Redish & Amuluru, at 1319–27.

form of procedure-making, I then turn to the state advisory committees. Part II documents their creation, selection, and membership. Part III evaluates these results and offers normative conclusions about the making of civil procedure at the state and federal levels. Although there will always be disagreement about the content of procedural rules, perhaps there is some common ground on the way we should go about making those rules in the first place.

I
MAKING STATE PROCEDURE

As most lawyers and law students are aware, the Rules Enabling Act authorizes the Supreme Court of the United States to make the Federal Rules of Civil Procedure.[25] Important changes to federal procedure also may result from legislation[26] or from common-law adjudication in the federal courts.[27]

This Part describes the process of making state rules of civil procedure beginning with a survey of the formal procedure-making authorities in all fifty states.[28] It then describes the ways that states have made procedural law on important issues such as pleading, class actions, and more.[29] While

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25 *See* 28 U.S.C. §§ 2071–2077 (2018) (Rules Enabling Act); *see generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018–27 (1982) [hereinafter Burbank, *Rules Enabling Act*]; Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 49 (1998); Linda S. Mullenix, *Federal Judicial Independence Symposium: Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 735 (1995); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26–27 (2008); A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 U.C.L.A. L. REV. (forthcoming 2019).

26 *See*, *e.g.*, Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.); Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (2018).

27 *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 366–67 (2011); Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); *see also* BURBANK & FARHANG, *supra* note 1, at 21 ("In marked contrast to its substantial failure in Congress and modest success in the domain of rulemaking, the counterrevolution against private enforcement of federal rights achieved growing rates of support, especially over the past several decades, from an increasingly conservative Supreme Court.").

28 *See infra* subpart I.A. This part of my project connects with (and updates) important prior studies on state procedure-making. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1424–26 (1986); Charles Alan Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 85–88 (1959); *see also infra* note 44 (discussing studies of federal and state procedure).

29 *See infra* subparts I.B–D (discussing pleading, class actions, "proportionality," offers of judgment, work-product doctrine, and sanctions). For more examples of state-law procedural variation, see the magisterial appendices to BENJAMIN

much ink has been spilled on the federal versions of these questions, and scholars occasionally dip into the states, there has not been a concerted effort to examine the mechanisms by which states have made procedure in these areas.[30]

A. State Procedure-Making Authority

There are two broad types of state procedure-making arrangements: "rules states" primarily rely on court-made rules and "code states" primarily rely on legislatures.

Forty-one states have followed some version of the federal model of court-based rulemaking.[31] More specifically, of the forty-one rules states, all but three empower the highest court to make the rules of civil procedure,[32] occasionally with legislative involvement.[33] In Delaware and Rhode Island, lower courts take the lead on procedural drafting, subject to the authority of the state high court.[34] In Oregon, a Council on Court Procedures—made up primarily of judges and lawyers—has the power to make rules of civil procedure directly, subject to

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V. MADISON, CIVIL PROCEDURE FOR ALL STATES: A CONTEXT AND PRACTICE CASEBOOK (2010).

30 I cite these scholarly treatments throughout this Part. Note that my study of state procedure-making emphasizes the *process* of making state procedure, not just its content, though I discuss that topic too. *Cf.* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1500–09 (2008) [hereinafter Burbank, *Class Action Fairness Act*] (focusing on content as opposed to process); Clopton, *supra* note 13, at 445–53 (same); Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 711–17 (2016) (same); Subrin & Main, *supra* note 16, at 501–06 (same).

31 *See infra* Appendix Table A.

32 The rules states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Florida; Hawaii; Idaho; Indiana; Iowa; Kentucky; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; North Dakota; Ohio; Oregon; Pennsylvania; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; and Wyoming. *See infra* Appendix Table A.

33 For example, under Tennessee law, the Supreme Court has the power to make rules of civil procedure, but such rules only become effective with approval of the legislature. TENN. CODE ANN. §§ 16-3-401 to -408 (2018). In Montana, the legislature may "disapprove" court-adopted rules. MONT. CONST. art. 7, § 2(3). In Iowa, the Supreme Court must submit proposed rules "to the legislative council and shall at the same time report the rule or form to the chairpersons and ranking members of the senate and house committees on judiciary." IOWA CODE ANN. § 602.4202 (West 2018). The proposed rule or amendment takes effect sixty days after submission to the legislative council, unless the council delays the rule. *Id.* The council may delay the rule to give the General Assembly time to supersede the proposed rule with legislation. *Id.*

34 In Delaware, the Superior Court promulgates its own rules of civil procedure, DEL. CODE ANN. tit. 10, § 561 (2018), subject to the supervisory authority of the Delaware Supreme Court. DEL. CONST. art. 4, § 13. In Rhode Island, the Superior Court makes rules of civil procedure, subject to approval of the Supreme Court. R.I. GEN. LAWS § 8-6-2(a) (2018).

legislative change.[35] Distinct from Oregon's rulemaking council, an additional thirty-five rules states employ a standing "advisory committee" made up of judges, lawyers, academics, and government officials to advise the court rulemakers.[36] These state committees are the subjects of Part II.

Meanwhile, California, Connecticut, Georgia, Illinois, Kansas, Louisiana, New York, North Carolina, and Oklahoma are "code states."[37] In these nine states, the rules of procedure—and any rule amendments—are primarily promulgated through the usual legislative process.[38]

In addition to rulemaking, state legislatures and state courts may affect procedure through other means. In all but a few states,[39] the legislature could address procedural questions through the normal lawmaking process.[40] Procedural change also might result from judicial decisions. These decisions may reflect a court's discretion to manage litigation, or they might be acts of statutory or rule interpretation that are

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35 OR. REV. STAT. § 1.735 (2018). A statute specifies the members of the Council: "(a) One judge of the Supreme Court, chosen by the Supreme Court. (b) One judge of the Court of Appeals, chosen by the Court of Appeals. (c) Eight judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association. (d) Twelve members of the Oregon State Bar, appointed by the Board of Governors of the Oregon State Bar. . . . (e) One public member, chosen by the Supreme Court." OR. REV. STAT. § 1.730 (2018). I classify Oregon as a "rules state" because its process better approximates court-based rulemaking and because its Council includes ten judges and no legislators.

36 *See infra* Part II; *see also infra* Appendix Tables A & B. New Hampshire also formally requires lay participation. *See infra* Appendix Tables A & B.

37 *See, e.g.*, Oakley & Coon, *supra* note 28, at 1383, 1385, 1392, 1394, 1397, 1399, 1411–13 (describing each state's procedure-making). This use of "code states" is distinct from whether the state relies on "code pleading," an unfortunate overlap in terminology. *See id.*

38 Statutory procedure also plays an important role, alongside court-promulgated rules, in at least Nebraska, New Hampshire, and Virginia. *See infra* Appendix Table A. Meanwhile, in some code states, there are court rules that govern some aspects of procedure. *See, e.g.*, ILL. SUP. CT. R. art. II.

39 In Alaska, Florida, South Carolina, and Utah, the legislature can alter procedural rules by legislation, but it must satisfy a higher threshold than normal legislation. ALASKA CONST. art. IV, § 15; FLA. CONST. art. 5, § 2; S.C. Code § 14-3-950; Utah C. Ann. § 78A-3-103. *See also* Ark. Joint Sen. Res. 8 (2017) (proposing constitutional amendment to allow the legislature by three-fifths vote to amend or repeal rules of procedure).

40 Despite this authority, state legislatures (at least outside of code states) do not seem to routinely focus on civil procedure. For example, on May 15, 2018, I queried the LexisAdvance and Westlaw legislation and legislative history databases for state legislative sources referring to *Twombly* or *Iqbal*. I returned zero relevant results. That said, I have noted elsewhere examples of state legislators responding to the Supreme Court's recent personal-jurisdiction jurisprudence. *See* Clopton, *supra* note 13, at 442 (discussing proposals in New York).

functionally equivalent to rulemaking.[41] In the federal system, many of the most well-known procedural changes in recent years have been the result of adjudication, not rulemaking.[42] In the states, too, procedural decisions have been important.[43]

B. Making the Law of Pleading

The previous section demonstrated that states have formal authority to make procedure by legislation, court rule, and judicial decision. The next few sections demonstrate that this division of labor exists in practice too.[44]

I begin with pleading. Although I worry that an overemphasis on pleading has distracted recent procedure scholarship, it is just too perfect a fit for the goals of this Article. I will not, though, wade into overcrowded debates about the effect of different pleading standards or their normative consequences.[45] Instead, I will use the law of pleading to illustrate how procedure is made.[46]

Briefly, during most of the 20th century there were two dominant modes of pleading. Initially, "fact pleading" was par-

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41 For well-known examples of each, see AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 336 (2011) (interpreting the Federal Arbitration Act); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007) (interpreting Rule 8); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (articulating the discretionary doctrine of *forum non conveniens*).

42 *See, e.g.*, *infra* subpart I.B (discussing pleading).

43 *See infra* subpart I.B–D and Appendix Tables C–E; *see also* Clopton, *supra* note 13, at 442–45 (collecting examples of state courts accepting or rejecting federal decisions on pleading, class actions, summary judgment, and others).

44 My analysis connects with a long line of studies focused on the relationship between federal and state procedure. In a series of studies beginning with Professor Charles Alan Wright in 1960, see Wright, *supra* note 28, at 85–88, and building on earlier observations of Judge Charles E. Clark and others, see *id.*, scholars have examined the effect of the Federal Rules on the content of state rules of civil procedure. *E.g.*, Main, *supra* note 21, at 852–54; John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355–59 (2003); Oakley & Coon, *supra* note 28, at 1367–69; Subrin & Main, *supra* note 16, at 501–06; *see also* Clopton, *supra* note 13, at 442–45 (addressing the related question of the influence of federal procedure on state procedural jurisprudence); Dodson, *supra* note 30, at 707 (same).

45 *See, e.g.*, David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1230–34 (2013) (collecting empirical sources); Jonah B. Gelbach, *Material Facts in the Debate over* Twombly *and* Iqbal, 68 STAN. L. REV. 369, 376 (2016) (same); Clopton, *supra* note 13, at 416–17 (collecting sources critical of *Twombly* and *Iqbal*).

46 Professor Wright and later Professors Oakley and Coon were at the forefront of studying the fact-notice distinction in state courts—and I am incredibly indebted to their herculean efforts. *See supra* note 28. Neither study, though, focused on exactly the question asked here: *How* did states switch from fact to notice pleading (and later to plausibility pleading)?

amount.[47] Fact pleading requires pleaders to state the ultimate facts upon which relief can be granted.[48] Fact pleading's chief rival was "notice pleading." In order to survive a motion to dismiss in a notice-pleading jurisdiction, a complaint must provide no more than "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[49]

By the end of the 20th century, notice pleading dominated U.S. civil procedure. In federal court, the Federal Rules of Civil Procedure catalyzed the rise of notice pleading,[50] later exemplified in cases such as *Conley v. Gibson* and *Swierkiewicz v. Sorema*.[51] In the states—perhaps owing a debt to the gravitational pull of the Federal Rules[52]—notice pleading also took hold, though some states stayed loyal to fact pleading.[53]

I reviewed the process by which each state adopted notice pleading.[54] As in the federal system, the most common route was that a state would adopt notice pleading as part of its introduction of court-made rules of procedure. With some variation, this reasonably describes the process in thirty states.[55]

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47 Any subtle distinctions between "fact pleading" and "code pleading" are not relevant to this inquiry.

48 *See, e.g.*, Sierocinski v. E.I. Du Pont De Nemours & Co., 103 F.2d 843, 844 (3d Cir. 1939) (holding that averment of certain claims was sufficient for pleadings); *see also* Kevin M. Clermont, *Three Myths about* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1355–57 (2010) (distinguishing fact pleading from the "plausibility pleading" described below); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 860–63 (2012) (same).

49 Conley v. Gibson, 355 U.S. 41, 47 (1957) (internal footnote omitted) (quoting FED. R. CIV. P. 8(a)(2)).

50 *See* FED. R. CIV. P. 8.

51 *Conley*, 355 U.S. at 47–48; Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002).

52 *See generally* Dodson, *supra* note 30.

53 *See, e.g.*, Oakley & Coon, *supra* note 28, at 1378 (describing states that retained some version of fact pleading); Wright, *supra* note 28, at 85–88 (discussing the effect of the Federal Rules on state procedure). At least eleven states require fact pleading today: Arkansas, California, Connecticut, Florida, Illinois, Louisiana, Maryland, Missouri, Oregon, Pennsylvania, and South Carolina. *See infra* Appendix Table C.

54 Note that this analysis focuses on the courts' formal approach to pleading, not necessarily how every court decides cases in practice.

55 Those states are Alabama, Alaska, Arizona, Delaware, Hawaii, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. I have summarized and cited these changes in Appendix Table C.

Note, however, that the move to a rule-based system did not necessarily involve an immediate switch to notice pleading. In Arkansas, Florida, Iowa, Maryland, Missouri, New Jersey, Oklahoma, and South Carolina, the initial set of court-promulgated rules retained fact pleading from earlier regimes. *See infra*

The remaining notice states followed other paths.[56] In Iowa, it was not the original promulgation of rules, but a rule amendment that led to notice pleading.[57] In four states—Georgia,[58] Kansas,[59] New York,[60] and North Carolina[61]—the legislature accomplished this goal. In New Jersey (and perhaps New York as well), it appears that notice pleading developed as a result of judicial drift.[62] In sum, judicial rulemaking was the primary way that notice pleading arose in the states, but it was not alone.

Notice pleading versus fact pleading was the major split in the 20th century, but the 21st century saw the entry of a new contender: "plausibility pleading."[63] In the famed decisions *Twombly* and *Iqbal*, the Supreme Court held that to survive a motion to dismiss, the well-pleaded allegations in a complaint, taken as true, must *plausibly* show the pleader's entitlement to relief.[64] The Court thus seemed to change the accepted pleading standard not by rule amendment but by judicial decision.[65]

Appendix Table C. I have more to say about Iowa and New Jersey shortly. On the flipside, it appears that Colorado had a version of notice pleading before it adopted its rules-based system. *See infra* Appendix Table C.

56 As noted *supra* note 53, eleven states use fact pleading today.

57 *See* IOWA CT. R. 1.402 Official Comment.

58 *See* Oakley & Coon, *supra* note 28, at 1392 (collecting sources on Georgia).

59 *See* KAN. STAT. ANN. § 60-208 (2018).

60 There is some dispute on this point. Some sources attribute the shift to the legislative adoption of the Civil Practice Law and Rules (CPLR), see DAVID D. SIEGEL, NEW YORK PRACTICE §§ 207-08 (5th ed. 2011), while others suggest judicial decisions are responsible. *See infra* Appendix Table C. Still others dispute whether New York is properly characterized as "notice" or "fact" pleading. *See, e.g.*, Edward D. Cavanagh, *The Impact of* Twombly *on Antitrust Actions Brought in the State Courts*, 12 ANTITRUST SOURCE, Feb. 2013, at 1, 6 ("The New York standard is thus a hybrid of notice pleading and fact pleading that requires a pleader not only to put the defendant on notice of the claim, but also to set forth the elements of its cause of action.").

61 *See* 1967 N.C. Sess. Laws 954; N.C. R. CIV. P. 8 cmts.; Sutton v. Duke, 176 S.E.2d 161, 164 (N.C. 1970); *see also* Oakley & Coon, *supra* note 28, at 1412 ("North Carolina switched from a conventional fact pleading code of procedure when its legislature enacted the North Carolina Rules of Civil Procedure.").

62 The New Jersey rule refers to the pleading of facts, but later decisions applied notice pleading. *See infra* Appendix Table C. For a discussion of New York, see *supra* note 60.

63 *See* Clermont, *supra* note 48, at 1355–59.

64 *See* Bell Atlantic v. Twombly, 550 U.S. 544, 556 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

65 *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 557 (2010); *see generally* BURBANK & FARHANG, *supra* note 1 (arguing that this method of federal procedural change has been the most important in recent decades). Of course, it may have been the federal courts before *Twombly* were misapplying Rule 8, and this decision brought them back in line. *See generally* Redish, *supra* note 48.

Like notice pleading, plausibility pleading has made its way to the states, but the institutional story of plausibility differs profoundly from the notice-pleading precedent.[66] Plausibility entered state pleading law by judicial decision. State courts in at least Colorado, Massachusetts, Nebraska, South Dakota, and Wisconsin adopted plausibility pleading without formal changes to the state rules.[67] Meanwhile, as I have documented elsewhere, courts in at least nineteen states have expressly rejected plausibility pleading.[68] Indeed, some of these states rejected plausibility pleading on institutional grounds, suggesting that such a change should be the product of the state's usual procedure-making process, not a court decision.[69] Although no state rulemaking body has in fact adopted plausibility pleading in this way, it seems plausible—if not likely—that one or more will do so eventually.

C. Making the Law of Class Actions

A second major example of procedure-making relates to class actions. Though the class-action device has deeper roots,[70] the modern damages class action arrived in federal court with the 1966 amendments to Federal Rule of Civil Procedure 23.[71] In other words, in the federal system, rule amend-

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66 Note also that the process by which federal procedure shifted to plausibility complicates how states should "mirror" the Federal Rules—if federal courts reinterpret a rule but do not amend it, what is a state court interpreting identical words in a state rule to do? *See* Dodson, *supra* note 30, at 711–17.

67 *See infra* Appendix Table C.

68 *See* Clopton, *supra* note 13, at 413 (citing cases from state courts in Alabama, Arizona, Delaware, Georgia, Iowa, Kansas, Minnesota, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Vermont, Washington, and West Virginia).

Note also that mere partisan affiliation does not explain these results. To determine partisanship, I used the method identified *infra* section II.B.4 as applied to all of the judges participating in the opinion adopting (or rejecting) plausibility, cited in Appendix Table C. Of the five state courts adopting plausibility, Democrats controlled two, Republicans controlled two, and one was selected through nonpartisan elections. Meanwhile, of the state courts rejecting plausibility pleading, I was able to categorize seven as Democratic-controlled and five as Republican-controlled.

69 *See, e.g.*, Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 537 (Del. 2011) ("[W]e emphasize that, until this Court decides otherwise or *a change is duly effected through the Civil Rules process*, the governing pleading standard in Delaware to survive a motion to dismiss [is unchanged]." (emphasis added)).

70 *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO MODERN CLASS ACTION (1987).

71 *See* FED. R. CIV. P. 23; FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

ment was the mechanism for this important procedural change.[72]

In an early assessment of the Class Action Fairness Act of 2005,[73] Professor Stephen Burbank identified state versions of the 1966 amendments, concluding that all but a few states eventually adopted equivalent rules.[74] There is ample space to debate what would constitute "adopting" those highly significant amendments, but for present purposes, it is sufficient to rely on Burbank's characterization.[75] Instead, the issue for this survey—not reported in these terms by Burbank—is by what mechanism states made this change.

Updating Burbank's study, I determined the mechanism by which each state adopted the 1966-style class action.[76] Tracking the federal approach, the most common way for states to introduce the 1966-style class action was by judicial rule amendment, which occurred in twenty-four states.[77] In ten more states, the 1966-style class action arrived when the state first introduced judicial-rule-based procedure sometime after 1966.[78] Meanwhile, in the code-based states of Kansas, New York, Oklahoma, and Oregon, legislative amendment of the procedure code introduced the modern class action.[79] In at least five states, judicial decisions introduced the 1966-style class action, with later ratification by legislation or rule amendment.[80] Two states have no equivalent class-action rule, and four have class-action approaches that predate, and did not incorporate, the 1966 amendments.[81]

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72 *See* David Marcus, T*he History of the Modern Class Action, Part I:* Sturm und Drang, *1953-1980*, 90 WASH. U. L. REV. 587, 615–19 (2013).

73 *See* Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

74 Stephen B. Burbank, *Class Action Fairness Act*, *supra* note 30, at 1544–51.

75 *See id.*

76 Further documentation is available in Appendix Table D.

77 *See infra* Table A & Appendix Table D.

78 *See id.*

79 *See id.*; *see also supra* subpart I.A (identifying states that rely on legislation versus judicial rulemaking).

80 *See infra* Table A & Appendix Table D.

81 Mississippi and Virginia have no equivalent class action rule, while California, Nebraska, North Carolina, and Wisconsin have class-action rules that predate, and did not incorporate, the 1966 amendments. *See infra* Table A & Appendix Table D. Note though that these states may allow similar types of class actions without having a formal rule. *See, e.g.*, TIMOTHY D. COHELAN, COHELAN ON CALIFORNIA CLASS ACTIONS §§ 1:2–3 (2017–2018 ed.) (describing federal Rule 23 "as guidance on novel class certification issues" under California law).

TABLE A – STATE ADOPTION OF 1966-STYLE CLASS ACTION

Rule Amendment		**New Rules**
Alaska	Nevada	Alabama
Arizona	New Hampshire	Idaho
Colorado	New Jersey	Indiana
Connecticut	New Mexico	Maryland
Delaware	North Dakota	Massachusetts
Florida	Pennsylvania	Michigan
Hawaii	Rhode Island	Ohio
Iowa	South Dakota	South Carolina
Kentucky	Texas	Tennessee
Maine	Utah	Vermont
Minnesota	Washington	
Missouri	Wyoming	
Montana		
Legislative Amendment	**Judicial Decision**	**No Formal 1966-Style Rule**
Kansas	Arkansas	California
New York	Georgia	Mississippi
Oklahoma	Illinois	Nebraska
Oregon	Louisiana	North Carolina
	West Virginia	Virginia
		Wisconsin

In sum, for state versions of the 1966 class action amendments, judicial rulemaking was the most common, but not the only, method of procedural change.

In case one suspects that this is purely a question of timing—that the 1960s were more amenable to rulemaking than recent years—I also checked the 2003 amendments to the federal class action rule, which were among the most important Rule 23 amendments since 1966.[82] Building on an important study by Professors Subrin and Main,[83] I identified seventeen states that updated their rules consistent with the 2003 federal amendments.[84] Thirteen states did so by judicial rule amend-

82 *See* FED. R. CIV. P. 23; FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

83 Subrin & Main, *supra* note 16, at 536.

84 I updated Subrin and Main's findings to reflect my reading of current law. These results, along with the 1966 results, are reported in Appendix Table D.

ment.[85] Five did so by legislative code amendment.[86] Again, rule amendment remains a viable method for significant procedural reform.[87]

D. More Examples

Pleading and class actions, of course, are not the only important procedural issues. In recent years, significant controversy arose regarding amendments to Federal Rule 26 that emphasized that the scope of discovery should be "proportional to the needs of the case."[88] Criticism of "proportionality" has been sharp.[89]

As of April 2018, seven states have adopted the new "proportionality" language.[90] Five of these seven states used judicial rule amendment, while two used statutes.[91] Meanwhile, the Standing Advisory Committee on the Massachusetts Rules of Civil and Appellate Procedure considered but expressly declined to recommend adding this language to the Massachusetts rules.[92] Even before "proportionality," Utah's Advisory Committee announced in 2011 that it no longer found mirroring the Federal Rules to be appropriate for the state.[93]

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85 The states are Arizona, Arkansas, Idaho, Iowa, Kentucky, Minnesota, Montana, New Jersey, North Dakota, Ohio, Texas, and Wyoming. *See infra* Appendix Table D.

86 The states are California, Connecticut, Kansas, Louisiana, and Oklahoma. *See infra* Appendix Table D.

87 Adoption of 2003-style class action amendments, which were understood to be pro-defendant, had a partisan tilt. None of the eleven rules states with high courts controlled by Democrats adopted versions of the 2003 class actions amendments, while six of nineteen Republican-controlled rules states did.

88 *See* FED. R. CIV. P. 26(b)(1); FED. R. CIV. P.26 advisory committee's note to 2015 amendment. Note, though, that the language of proportionality predated the 2015 amendment in another part of Rule 26. FED. R. CIV. P. 23, 26 advisory committee's note to 2015 amendment.

89 *E.g.*, BURBANK & FARHANG, *supra* note 1, at 6; Coleman, *supra* note 7, at 1009–10; Simard, *supra* note 16, at 11; Adam N. Steinman, *The End of an Era? Federal Civil Procedure after the 2015 Amendments*, 66 EMORY L.J. 1, 28 (2016); Subrin & Main, *supra* note 16, at 531; Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1150 (2015); Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 759–60 (2016).

90 Arizona (ARIZ. R. CIV. P. 26(b)(1)(A)); Colorado (COLO. R. CIV. P. 26(b)(1)); Kansas (KAN. STAT. ANN. § 60-226(b)(1) (2018)); Minnesota (MINN. R. CIV. P. 26.02(b)); Oklahoma (OKLA. STAT. tit. 12 § 3226(B)(1)(a) (2018)); Vermont (VT. R. CIV. P. 26(b)(1)); Wyoming (WYO. R. CIV. P. 26(b)(1)).

91 *See* rules and statutes cited *supra* note 90.

92 *See* MASS. R. CIV. P. 26, Reporters Note – 2016.

93 *See* NAT'L CTR. FOR STATE COURTS, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS 1 (2015), https://www.ncsc.org/~/media/Files/PDF/Topics/Civil%20Procedure/Utah%20Rule%2026%20Evaluation%20Final%20Report(2015).ashx [https://perma.cc/HSJ4-ZZE6]

Civil proceduralists also will be familiar with the consternation surrounding proposed amendments to Federal Rule 68 on offers of judgment.[94] In brief, in order to encourage settlement, the federal advisory committee proposed strengthening the penalties associated with rejecting an offer of judgment that ultimately exceeded the final award, including by charging attorney fees to the rejecting side.[95] Significant backlash led this proposal to be dropped.[96]

I reviewed every state's rules on offers of judgment.[97] Eight states include attorney-fee provisions in their offer of judgment rules,[98] with legislatures being responsible for four of the eight provisions.[99] Thirty-six states do not include attorney fees, and six states do not have trans-substantive rules on offers of judgment.[100]

I could go on.[101]

(quoting a memorandum filed by the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure with the Chief Justice); *see also* Simard, *supra* note 16, at 27 (discussing proportionality in state courts and Utah in particular).

94 FED. R. CIV. P. 68.

95 *See, e.g.*, BURBANK & FARHANG, *supra* note 1, at 132–33 (noting that the federal advisory committee "advanced proposals to amend Rule 68 that would have measurably increased the risks of declining offer of judgement"); Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1609 (2008) [hereinafter Bone, *"To Encourage Settlement"*] ("The 1983 proposal . . . included fees in the sanction subject to the court's discretion.").

96 *See, e.g.*, BURBANK & FARHANG, *supra* note 1, at 132–33; Bone, *"To Encourage Settlement," supra* note 95, at 1609.

97 *See infra* Appendix Table E.

98 The states are Alaska, Connecticut, Florida, Georgia, Michigan, Nevada, New Jersey, and Texas. *See* ALASKA R. CIV. P. 68; CONN. GEN STAT. § 52-192a (2018); FLA. STAT. ANN. § 768.79 (West 2018); FLA. R. CIV. P. 1.442; GA. CODE ANN. § 9-11-68 (2018); MICH. CT. R. 2.405; NEV. R. CIV. P. 68; N.J. R. CT. 4:58-1 to -6; TEX. CIV. PRAC. & REM. CODE ANN. § 42.004 (West 2018); TEX. R. CIV. P. 167.4. South Carolina does not include fees but adds an 8% penalty. S.C. R. CIV. P. 68.

99 Connecticut and Georgia are states with legislative procedure codes, and Florida and Texas are states with judge-made procedural rules but with statutes addressing offers of judgment. *See* FLA. STAT. ANN. § 768.79; FLA. R. CIV. P. 1.442; TEX. CIV. PRAC. & REM. CODE ANN. § 42.004.; TEX. R. CIV. P. 167.4.

100 *See infra* Appendix Table E.

101 In 2015, the Supreme Court abrogated Federal Rule 84, which meant that the "Appendix of Forms to the Civil Rules" were no longer authoritative. *See* FED. R. CIV. P. 84 advisory committee's note to 2015 amendment. *See generally* Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093 (2015) (describing and lamenting this development). At least five states have rescinded their "forms" rules this decade. KY. R. CIV. P. 84 (omitted); N.Y. C.P.L.R. § 107 (repealed 2016); Administrative Order of the Chief Administrative Judge of the Courts, AO/119/16 (May 23, 2016); MASS. R. CIV. P. 84 (repealed 2017), Reporter's Notes—2017; UTAH R. CIV. P. 84 (repealed 2017); WYO. R. CIV. P. 84 (forms removed); *see also* DEL. SUP. CT. R. 84 (omitted). Yet during the same period, Illinois added a rule on forms, Arizona reaffirmed its commitment to forms, and Rhode Island amended its rule to direct people to the

II
STATE ADVISORY COMMITTEES

The broad strokes of state procedure-making have much in common with the federal system. In most states, the highest court promulgates rules of civil procedure. Legislatures can exercise lawmaking authority to affect procedure, and judges may make decisions in their judicial capacity that effect procedural changes. These observations are not just theoretical—they describe important procedural decisions about pleading, class actions, discovery, settlement, and more.[102]

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forms website. ARIZ. R. CIV. P. 84 cmt.; ILL. SUP. CT. R. 10-101; R.I. SUP. CT. R. 84. In total, I count at least twenty-four states with general rules providing for the sufficiency of their forms. ALA. R. CIV. P. 84; ARIZ. R. CIV. P. 84; COLO. R. CIV. P. 84; FLA. R. CIV. P. 1.900; GA. CODE ANN. § 9-11-84 (2018); HAW. R. CIV. P. 84; ILL. SUP. CT. R. 10-101; IND. TRIAL P. R. 82; IOWA R. CIV. P. 1.1901; ME. R. CIV. P. 84; MINN. R. CIV. P. 84; MISS. R. CIV. P. 84; MO. SUP. CT. R. 49.01; MONT. R. CIV. P. 84; N.C. R. CIV. P. § 1A-1, Rule 84; N.D. R. CIV. P. 84; N.J. R. 6:1; NEV. R. CIV. P. 84; OHIO R. CIV. P. 84; OKLA. ST. ANN. tit. 12, § 2026 (2018); R.I. SUPER. R. CIV. P. 84; S.D. R. CIV. P. § 15-6-84 (also found at S.D. CODIFIED LAWS § 15-6-84 (2018)); VT. R. CIV. P. 84; W. VA. R. CIV. P. 84.

In *Hickman v. Taylor*, the Supreme Court declared a new work-product doctrine for federal courts, rather than proceeding by rule amendment. 329 U.S. 495, 514 (1947); *see* Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 922–23 (2002) (discussing *Hickman*). Following that decision, a prior edition of Wright & Miller documented about two dozen states dissenting from the *Hickman* approach through procedural rule or statute. 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2022, n.24 (2d ed. 1994). It identified eighteen states that adopted a version of the proposed (but not adopted) Federal Rules amendment from 1946, and five other states that adopted a version of the proposed (but not adopted) Federal Rules amendment from 1955. *Id.* Notably, after Rule 26's work-product provision was amended in 1970, thirty-four states adopted a verbatim copy of the rule and ten more adopted functional equivalents. *Id.* § 2023, nn.27–28.

On sanctions, Professor Madison observed that twenty-five states adopted a version of "good faith" pleading rules that look like the post-1983 Federal Rule 11 ("majority approach"); nineteen adopted versions that look like the post-1993 Federal Rule ("minority approach"); and six states do not have Rule 11 equivalents at all ("nonconforming state"). *See* MADISON, *supra* note 29, at 296–97; *see also* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2037 (1989) (discussing state responses to the Rule 11 amendments). Note that code and rule states behave roughly equally in Madison's count. There are four code states adopting the majority approach, three adopting the minority approach, and two are nonconforming. MADISON, *supra* note 29, at 296–97.

102 One area where states differ markedly from the federal system, and from each other, is in their method of selecting judges. Whether those mechanisms have direct effects on the content of state law is a difficult question beyond the scope of this project, though it sets up nicely for future research on comparative state law. *Cf.* Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1733 (2017) (discussing judicial selection methods and partisanship).

But these descriptions are only part of the story. In the federal system, the Supreme Court's exercise of rulemaking authority depends heavily on a system of "advisory committees" made up primarily of judges and practitioners.[103] The Advisory Committee on Civil Rules considers and proposes amendments to the Federal Rules of Civil Procedure.[104] The advisory committee's proposals are transmitted to the Judicial Conference through its Committee on Rules of Practice and Procedure (known as the "Standing Committee") and if approved, they are ultimately sent to the Supreme Court for consideration and potential adoption.[105]

At the forefront of attention to—and criticism of—the Advisory Committee on Civil Rules has been Professor Stephen Burbank. In the 1980s, Professor Burbank zeroed in on the lack of transparency in the advisory committee process.[106] His criticisms led to the transparency-enhancing reforms described in the Introduction and taken up again below.[107]

In more recent work, Burbank and political scientist Sean Farhang have examined empirically the work and composition of the federal advisory committee.[108] Burbank and Farhang analyzed proposed amendments to the Federal Rules that had consequences for private enforcement. They found a dramatic trend toward pro-defendant proposals from 1960 to 2014: "[T]he predicted probability that [a proposed amendment] would favor plaintiffs went from highly likely at the beginning of

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103 *See also* BURBANK & FARHANG, *supra* note 1, at 77–82 (collecting membership). *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007 (4th ed. 2013) (describing the history of the advisory committees); Burbank, *Rules Enabling Act*, *supra* note 25, 1131–37 (same). The federal advisory committee also includes academics and government officials. BURBANK & FARHANG, *supra* note 1, at 77–82.

104 *See* 28 U.S.C. §§ 2071–2077 (2018) (Rules Enabling Act). *See generally* WRIGHT & MILLER, *supra* note 103 (collecting sources); Struve, *supra* note 24, at 1103–19.

105 *See* sources cited *supra* note 104.

106 As former Rules Committee Reporter Paul Carrington put it, Burbank "had been temperately critical of the 1934 establishment of a rulemaking process that lacked full transparency and sensitivity to potential substantive consequences." Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 615 (2010).

107 *See* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH U. L. REV. 1027, 1032 (2013) ("[T]he committee reluctantly embraced greater transparency and public participation in the rulemaking process, a reform accomplished largely as a consequence of the scholarly critiques of Professor Stephen Burbank."); *see also supra* note 4 and accompanying text; *infra* note 259 and accompanying text.

108 BURBANK & FARHANG, *supra* note 1, at 77–82; *see also* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1587–88 (2014).

the series to highly unlikely at the end."[109] Burbank and Farhang also studied committee membership.[110] The share of judges on the committee relative to practitioners has increased substantially over time.[111] Among committee members, the vast majority of judges had been appointed to the bench by Republican presidents.[112] Practitioners on the committee skewed heavily toward corporate, defense-side lawyers, especially in recent years.[113]

This Part describes the states' use of civil rules advisory committees and presents the results of a large empirical study of state advisory committee membership.[114] In brief, state advisory committees are quite common. Their selection processes often mirror the federal advisory committee, but the membership of state committees differs on various dimensions from federal membership today: there are substantially more practitioners, and there is more balance among members of each professional group. On the other hand, I find that states are not always publicly accessible in their procedure-making processes.

A. State Advisory Committee Procedures

Researching state courts is decidedly more challenging than researching the federal courts, but I have endeavored to determine the process by which every state court system adopts rule changes. Of the forty-one rule-based states, it appears that at least thirty-five states have advisory committee-like structures.[115] This total does not include Oregon, which as noted above, authorizes a committee to adopt rule changes

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109 BURBANK & FARHANG, *supra* note 1, at 95.

110 *Id* at 77–82. I discuss their results in more detail below as I survey the state results.

111 *Id.* at 79.

112 *Id.* at 84–85.

113 *Id.* at 81.

114 This inquiry was entirely absent from the otherwise highly detailed studies of state procedure mentioned *supra* note 44.

115 Alabama; Alaska; Arizona; Arkansas; Colorado; Delaware; Florida; Hawaii; Idaho; Indiana; Iowa; Kentucky; Maine; Maryland; Massachusetts; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; North Dakota; Ohio; Pennsylvania; South Carolina; Tennessee; Texas; Utah; Vermont; Virginia; Wisconsin; and Wyoming. For citations to relevant authorities, see Appendix Table A.

Note that, in South Carolina, a state court rule calls for the creation of a Rules Advisory Committee and specifies a selection mechanism. *See* S.C. APP. CT. R. 609. I have collected the most recent membership, but there is some evidence that the committee is no longer active. *See infra* Appendix Table A.

directly.[116] Michigan, Rhode Island, South Dakota, Washington, and West Virginia seemingly do not employ standing rules committees.[117]

The next question is who appoints committee members. In the federal system, the Chief Justice has the authority to appoint members of the advisory committee.[118] It has not escaped notice that since 1953, every Chief Justice has been appointed by a Republican president, and the Republican chiefs have exercised their appointment authority in ways that have drawn criticism regarding balance.[119]

Turning to the states, committee members are selected by the state high court in at least twenty-three of the thirty-five states with committees: Alabama, Arkansas, Colorado, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, and Wyoming.[120] Four states expressly authorize selection by the Chief Justice: Alaska, Hawaii, North Dakota, and Virginia.[121] Among the states in these two groups, I cannot establish the *de facto* division of authority, meaning that it is possible that some of these states in practice rely on the entire court while others effectively delegate authority to the Chief Justice.

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116 *See supra* note 35 and accompanying text.

117 For citations to relevant authorities, see Appendix Table A.

118 *See supra* notes 103–104 (collecting sources).

119 *See, e.g.*, BURBANK & FARHANG, *supra* note 1, at 83–91 (studying judge members since 1970). The Chief's potential partisan inclinations have been relevant to other administrative functions too, though not all of them. *See, e.g.*, Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 925–26 (2018) (noting that recent Chief Justices have selected Republican-appointed judges for the advisory committees and the Foreign Intelligence Surveillance Court, but not for the Judicial Panel on Multidistrict Litigation); James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1135 (2013) (noting some scholars belief that Chief Justice Rehnquist took a partisan approach to judicial appointments); 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, 1604 (2006) (same); Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 390–95 (2004) (examining empirical evidence regarding the appointments of Chief Justices Burger and Rehnquist).

120 For citations to relevant authorities, see Appendix Table A. I do not include Kentucky here because, despite numerous requests, the Clerk of the Supreme Court of Kentucky declined to provide the relevant information.

121 For citations to relevant authorities, see Appendix Table A.

The remaining states have varied approaches. In Arizona[122] and Florida,[123] a standing committee is appointed by the State Bar Association.[124] Delaware courts rely on two bodies: one appointed by the trial court and one appointed by the high court.[125] Four states have mixed-appointment systems specified by rule or statute, such that appointment authority is shared among some combination of the high court, the lower courts, bar associations or other professional groups, the state public defender, the governor, the attorney general, the legislature (or some subset of legislators), and law school deans.[126]

Among the states with "standard" advisory committees, at least three formally constrain membership otherwise selected by the state high court:

- Minnesota: The Supreme Court must appoint an advisory committee comprised of "eight members of the bar of the state, one judge of the Court of Appeals, and two judges of the district court . . . ."[127]
- South Carolina: The members shall be "(1) a circuit court judge who shall serve as the chair of the Committee; (2) a circuit court judge or a master-in-equity; (3) a family court judge; (4) a probate judge; (5) a magistrate or municipal court judge; (6) four regular members of the South Carolina Bar; and, (7) a non-voting reporter."[128]
- Vermont: The members shall be "two Superior and/or District Court Judges, one superior court clerk, the chair of the Vermont Bar Association corresponding standing

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122 *See* ARIZ. REV. STAT. § 12-110; *see also* Main, *supra* note 21, at 860 (citing STATE BAR OF ARIZ., STANDING COMMITTEE GUIDELINES 1 (2013)).

123 FL. R. JUD. ADMIN. 2.140.

124 Arizona also has a Task Force appointed by its Chief Justice. *See* SUPREME COURT OF THE STATE OF ARIZ., Order No. 2014-116, IN THE MATTER OF: ESTABLISHMENT OF THE TASK FORCE ON THE ARIZONA RULES OF CIVIL PROCEDURE, ADMIN. ORDER (2014).

125 The Delaware Superior Courts established a Civil Rules Advisory Committee appointed by the president judge of the Superior Court. *See* SUPERIOR COURT OF THE STATE OF DEL., IN RE: POLICY, TIME STANDARDS, AND PROCEDURES RELATING TO CIVIL CASE DISPOSITION, CIVIL ADMINISTRATIVE ORDER (2000), http://courts.delaware.gov/superior/pdf/civiladmord.pdf [https://perma.cc/BZU7-B2FN]. At the same time, under the Delaware Constitution, the Supreme Court has constitutional supervisory authority over the superior court rules. DEL. CONST. art. 4, § 13. Pursuant to that authority, the Supreme Court Rules call for the creation of a permanent Advisory Committee on Supreme Court Rules, Rules of Civil Procedure, and Rules of Evidence, with members appointed by the Supreme Court. DEL. SUP. CT. R. 93.

126 These states are Mississippi, New Hampshire, Ohio, and Wisconsin. *See* MISS. CODE ANN. § 9-3-65; N.H. SUP. CT. R. 51; OHIO R. PRAC. & P. COMMISSION § 3; WIS. STAT. ANN. § 758.13; *see also infra* Appendix Table A (quoting these provisions in full).

127 MINN. STAT. ANN. § 480.052 (West 2018).

128 S.C. APP. CT. R. 609.

> committee (to the extent that one exists), and seven other members to be appointed by the Supreme Court."[129]

Finally, Iowa has a court rule announcing a policy of gender balance that seems to apply here: "It is a policy of the judicial branch that all boards, commissions, and committees to which appointments are made or confirmed by any part of the judicial branch shall reflect, as much as possible, a gender balance."[130] Iowa's committee today is comprised of more women than men.[131]

B. State Advisory Committee Membership

Advisory committee membership may have meaningful consequences for civil procedure. Therefore, in addition to understanding the mechanisms for state committee appointment, I also have endeavored to determine the composition of state committees.

I have been able to determine the members of thirty-four of the thirty-five state advisory committees, comprising 682 total observations.[132] Although the most thorough study would collect data over time, this task is both significantly more difficult for state courts than their federal equivalent, and it would involve substantially more observations. For comparison, taking yearly measurements of the federal advisory committee, one would need about fifty years of federal data to equal the number of state observations in this paper.

Having collected the identities of the current members of state advisory committees, I coded each observation across a range of dimensions including profession, race, sex, and partisan affiliation.[133] This research relied first on Westlaw's "profiler" tools (including its "reports" feature), followed by various publicly available sources. I also contacted by email various practitioner and academic members of state committees. These data are not spotless—some characteristics for some individuals were not available or were ambiguous—but the

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129 VT. SUPREME COURT, ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE, Admin. Order 17 (1979) (on file with author).

130 IOWA CT. R. 22.34.

131 *See infra* Appendix Table A.

132 I use membership as of July 1, 2017. As noted above, I lack membership data for Kentucky. *See supra* note 120.

133 I will say more about these coding decisions as they come up.

gaps are not systematic and thus general descriptive observations are still possible.[134]

I should note that this study cannot account for the relative weight of each member's contribution. It may be that on some committees the chair controls the agenda, while on others the law professor serving as "reporter" plays a major role. But this first-cut analysis can help shed light on comparative procedure-making in the federal and state systems.[135]

1. *Profession*

Tracking Burbank and Farhang, the first level of analysis is the professional category. In particular, committee members are typically judges, practitioners, academics, or government officials.[136]

In the federal system, Burbank and Farhang observed a dramatic increase over time in the proportion of judges relative to the other categories. In particular, prior to Chief Justice Burger's reconstitution of the federal advisory committee in 1971, judges represented about 18% of the committee.[137] This describes, for example, the committee that took the lead on the important 1966 amendments to Rule 23.[138] The proportion of judges jumped to almost 70% under Burger and has remained at about this level.[139] Practitioners, who had been the majority before Burger, have since hovered around 25%.[140] Burbank and Farhang explained that the increase in judicial membership was linked with a desire to protect the institutional interests of the judiciary and, perhaps, to the Chief Justice's perception that he would have more influence over judicial members.[141]

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134 The one exception is race, for which I suspect the gaps are systematic. Below, I explain further how I interpret these results. *See infra* note 155 and accompanying text.

135 *See, e.g.*, Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658–64 (1995); Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 195 F.R.D. 386, 386–87 (2000).

136 For Burbank and Farhang, "government official" meant the ex officio federal government representative on the committee. *See* BURBANK & FARHANG, *supra* note 1, at 77. For states, I include any government employee, which could include court employees other than judges (such as the clerk of court), high officials (such as the state attorney general or a state legislator), or other government employees (such as lower-level attorneys in the state AG's office).

137 *See id.* at 78–79.

138 *See id.* at 72–77; *see also supra* subpart I.C (discussing class actions).

139 *See* BURBANK & FARHANG, *supra* note 1, at 78–79.

140 *See id.*

141 *See id.* at 98; *see also infra* Part III.

In the states, practitioners vastly outnumber judges. My data reveal that state advisory committees are on average 56% practitioners, 27% judges, 13% government, and 4% academics.[142] (New Hampshire also requires lay membership.[143]) Comparing these results to the federal system, the state ratios are closer to Chief Justice Warren's 1960 appointments than anything we have seen since that time.[144]

I also find that state partisanship does not seem to affect the relative proportions of committee-member professions. The data do not vary meaningfully with either the partisan results in the 2016 presidential election[145] or the partisan control of the state high court.[146]

2. *Gender and Race*

Gender and race are the next relevant categories. Though Burbank and Farhang's book analyzed gender and race for judges only,[147] they kindly shared their collection of data on the full membership of the federal advisory committee.[148] Because diversity norms have changed over time, I used Burbank and Farhang's results only since 2000 (rather than from the entire existence of the federal committee). From these data I determined that women represented only 13% of committee years since 2000 and nonwhite members represented less than 7% of committee years since 2000.[149]

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142 Of the government officials, about 50% are state executive branch officials or attorneys, 40% are court or other administrative staff, and 10% are legislators or legislative staff.

143 *See infra* Appendix Table A. Wisconsin requires the governor to appoint members of the public to the Judicial Council, though they do not necessarily serve on the civil rules committee. *See* WIS. STAT. ANN. § 758.13; *see also Wisconsin Judicial Council*, https://www.wicourts.gov/courts/committees/judicialcouncil/index.htm [https://perma.cc/2BDD-JVYM]. Oregon requires lay membership on its rulemaking council as well. *See supra* note 35 (discussing Oregon).

144 *See* BURBANK & FARHANG, *supra* note 1, at 71, 77–79.

145 States voting for Hillary Clinton were 52% practitioners, 28% judges, 15% government, and 4% academics. States voting for Donald Trump were 58% practitioners, 26% judges, 12% government, and 5% academics.

146 Among states for which I could identify partisan control of the high court, Democratic states were 62% practitioners, 24% judges, 11% government, and 2% academics. Republican states were 54% practitioners, 27% judges, 14% government, and 5% academics.

147 *See* BURBANK & FARHANG, *supra* note 1, at 86.

148 Their data-collection method is described in *id.* at 84–85. To determine race and gender, I used my methods described above.

149 Looking at the entire history of the federal committee, Brooke Coleman finds that more than 85% of members have been white men. Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 52, 62 (2018).

Turning to the states, although I was unable to identify the sex and race of every committee member, I can report on those members for which information was available. On gender, I was able to identify 205 female members,[150] meaning that state committees are at least 30% female.[151] This is consistent with the proportion of female state judges overall,[152] and it is substantially more representative than the federal advisory committee (only 13% since 2000).[153] The professional categories of the female committee members were at parity with state committees overall.[154]

For race and ethnicity, white committee members were not routinely identified as "white." However, based on publicly available information, I was able to identify fifty-four nonwhite members,[155] meaning that state advisory committees are no less than 8% nonwhite.[156] These results are roughly in line with the federal advisory committee.[157] State committees are less representative than state judiciaries overall, though I would note that my race data are particularly imprecise.[158] Finally, like women, nonwhite members of state committees

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150 For example, many media sources identify female lawyers and many employer biographies use gendered pronouns. I treat these as accurate for purposes of this study. Though there may be errors, I do not see any reason that they would be systematic.

151 I say at least 30% because I am dividing the 205 women by the total number of members (including some for whom I have not been able to identify gender).

152 *See* Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1908 (2017) (finding that women hold about 30% of state judgeships).

153 According to data provided by the Federal Judicial Center, women occupied approximately 26% of federal judgeships in 2017. *See* Federal Judicial Center, *Gender*, https://www.fjc.gov/history/exhibits/graphs-and-maps/gender [https://perma.cc/8ETW-8B7K].

154 Female committee members were 51% practitioners (versus 56% overall), 30% judges (versus 26% overall), 17% government (versus 13% overall), and 3% academics (versus 4% overall).

Women were slightly more likely to be selected in states that voted for the Republican presidential candidate in 2016 (32% female) than the Democratic candidate (30% female).

155 For example, members occasionally self-identify race in publicly available documents, or they are characterized as belonging to a certain racial or ethnic group in public reports.

156 As above, I say at least 8% because I am dividing by the total number of committee members even though I have not identified every member's race.

157 Again, using Burbank and Farhang's data I find that the federal committee included 7% nonwhite members since 2000. *See supra* note 148 and accompanying text.

158 *See* George & Yoon, *supra* note 152, at 1908 (finding about 20% of state judgeships are held by nonwhites). According to data provided by the Federal Judicial Center, nonwhites occupied approximately 20% of federal judgeships in 2017. *See* Federal Judicial Center, *Race and Ethnicity*, https://www.fjc.gov/his

are distributed proportionately among professional categories.[159]

3. *Practitioners*

Further analysis requires subdividing the members by professional category. For various reasons, not least of which are their small numbers, government officials and academics are the least interesting categories, so I will not analyze them further.[160] Instead, this subsection discusses practitioners and the next subsection discusses judges.

To better understand practitioners, Burbank and Farhang classify practitioner members along two dimensions: plaintiff-side versus defense-side, and individual clients versus corporate clients.[161] In their federal data, Burbank and Farhang find rough parity on both measures in 1960, trending dramatically toward defense-side and corporate since that time.[162] This decade, the ratios are around two-to-one on both measures, favoring defense-side and corporate lawyers.[163] Though they are careful about making causal claims, these trends coincide with their observation that the federal advisory committee's work product has trended toward anti-plaintiff proposals during this period.[164]

Turning to the states, I identified 381 practitioner members in the sample. Using Westlaw's litigation history reports, and occasionally other sources, I coded practitioners (when possible[165]) along Burbank and Farhang's two dimensions.[166] For practitioners who could be coded as primarily plaintiff-side or defense-side, I find 43% plaintiff-side and 57% defense-

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tory/exhibits/graphs-and-maps/race-and-ethnicity [https://perma.cc/B9HH-YAAN].

159 The nonwhite state members represent about 8% of all judge members and 10% of practitioner members. Among nonwhite members, 29% are judges and 69% are practitioners.

160 For limited analysis on state government members, see *supra* note 136.

161 *See* BURBANK & FARHANG, *supra* note 1, at 79–82. Note that individual clients include attorneys representing classes of individuals. In addition to these two categories, I also coded for sex and race. State practitioner members are at least 27% female and at least 10% nonwhite.

162 *See id.*

163 *See id.*

164 *See id.* at 91–103.

165 If practitioner data were unavailable, or if practitioners represented roughly equal numbers of the two categories, I did not code them.

166 Of course, there are shortcomings in these reports, but again, the goal here is not causal inference, so these imperfections are not problematic.

side.[167] Using the same sources, I identified 42% of practitioners as having client bases that were primarily individual, and 58% that were primarily corporate. Standardizing for committee membership, these latter results are even closer: 47% individual and 53% corporate.[168] Note also that every state committee had a mix of practitioners representing corporate and individual clients.[169] Anecdotally, a substantial number of practitioner members themselves represented a mix of corporate and individual clients, and a mix of plaintiffs and defendants.[170]

Though these data do not account for the pool of potential practitioners—and, of course, this is just a snapshot of state committees—these percentages give us a rough picture of the practitioners who help make state rules of civil procedure. In short, corporate and defense-side lawyers outnumber individual and plaintiff-side lawyers in state committees, but their numbers are close to even—and they are much closer to even than we have observed in the federal advisory committee in recent years.[171]

In addition, recall that practitioners are a significant majority on state advisory committees.[172] So not only is there closer parity between individual and corporate lawyers and between plaintiff and defense lawyers on state committees, but individual and plaintiff lawyers make up an even larger proportion of total committee membership in the states as compared with the federal system.[173]

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167 Standardizing for committee size, I also find that state committees are, on average, 57% defense-side and 43% plaintiff-side. To standardize for committee size, I determined the proportion of plaintiff-side and defense-side attorneys within each committee and then averaged across them.

168 To standardize for committee size, I determined the proportion of attorneys with primarily corporate and individual clients within each committee, and then averaged across them.

169 All but three had a mix of practitioners with primarily defense-side and plaintiff-side clients. Committees in the three outlier states included multiple attorneys with mixed client bases of their own.

170 For example, state-court family-law practitioners (rare in federal court) routinely represent plaintiffs and defendants; small-scale commercial litigators also may represent plaintiffs or defendants and corporate or individual clients. *See, e.g.*, Simard, *supra* note 16, at 8 (contrasting federal- and state-court litigation). Burbank and Farhang also observed that committee members with mixed client bases were much more common in the early years of the federal advisory committee than today. *See* BURBANK & FARHANG, *supra* note 1, at 82.

171 *See supra* note 158 and accompanying text.

172 *See supra* section II.B.1.

173 If my practitioner data were representative of state committees, then we would expect roughly one-quarter of all state committee members to be plaintiff-side and individual-client lawyers.

4. *Judges*

The other significant category of committee members is judges. Burbank and Farhang report on the appointing president, race, and gender of Article III judges serving on the federal advisory committee.[174] Burbank and Farhang report that Republican-appointed judges held 70% of the judge seats from 1970-2014, and were a majority on the committee in forty-one of forty-three years.[175] To put it another way, Republican-appointed judges are 150% more likely to be appointed to the federal advisory committee than Democratic appointed judges.[176] Burbank and Farhang also find that nonwhite judges are significantly less likely to be appointed—they comprise only 2% of committee years.[177] Looking only since 2000, nonwhite judges comprise about 7% of the judge years.[178] Burbank and Farhang's data also reveal that women judges made up about 12% of the all committee years, and 18% since 2000.[179]

Turning to the state data, I first report information on the sex and race of judge members. Using the same methods as above, I find that about one-third of judges on state committees are female.[180] I was able to identify 9% of state judges as nonwhite, though again, the data on race are far from complete. These data compare favorably to the federal results.[181] Indeed, female judges are much more likely to serve on state committees than the federal equivalent.[182]

Ideology is somewhat more complicated to report, given the manifold mechanisms by which state judges are appointed. In

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174 *See* BURBANK & FARHANG, *supra* note 1, at 83–91. Their work was aided by the fact that every Article III judge has been appointed in the same manner (and necessarily by a single president of one of two political parties), *see* U.S. CONST. art. II, § 2, and that the Federal Judicial Center produces a publicly available biography for each judge. Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-present*, https://www.fjc.gov/history/judges [https://perma.cc/CJ6H-RXYA].

175 *See* BURBANK & FARHANG, *supra* note 1, at 84–91.

176 *See id.*

177 *See id.* During the same period, nonwhite judges comprised 11% of overall judge years. *Id.*

178 These race data were not published in the text but provided to the author by Burbank and Farhang. *See supra* note 144.

179 These gender data were not published in the text but provided to the author by Burbank and Farhang. *See supra* note 144.

180 My finding of 34% is slightly higher than the 30% overall share of state judgeships occupied by women. *See* George & Yoon, *supra* note 152, at 1907.

181 *See supra* notes 177-178 and accompanying text.

182 Recall that women represented 12% of federal committee years and 18% since 2000. Women represent 22% of judges on the current federal committee. *See supra* note 179 and accompanying text.

the sample, I coded judges for political party based on a combination of two factors. First, I identified the political party of the governor (or legislative majority) that initially appointed the judge to her current seat. Second, I identified the political party associated with any partisan candidacy of the judge herself—often a partisan judicial election to the judge's current appointment, but not limited to those elections.[183] Of the 181 judges, 52% were coded as Republican, 32% as Democratic, 2% as Independent, and 14% as nonpartisan. Excluding the nonpartisan judges, state committee judges are 61% Republican, 37% Democratic, and 2% Independent. Finally, standardizing by committee membership, Republicans are 57% of partisan judges, Democrats are 40%, and Independents are 3%.[184]

Again, the state data seem to be skewed in the same direction as the federal data—here, toward Republican judges as committee members—but the magnitude of the effect is weaker. Recall that Republican judges make up 70% of the federal committee[185] but only about 60% of state committees. Or, while Republican judges were a majority in 95% of federal committee years,[186] Republican judges are a majority on 63% of state committees, tied on 7%, and a minority on 30%.

Moreover, while Democratic and Republican appointees represent roughly equal shares of the federal judiciary,[187] the Republican skew of elected state officials suggests that the pool of state judges may skew Republican as well.[188] As a result,

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183 So, for example, if a judge previously ran for state senate as a Democrat and later won a nonpartisan election as a judge, she would be coded as a Democrat. Similarly, if a judge is appointed by a partisan governor, but then wins reelection as a nonpartisan candidate, I code the judge to match the appointing governor's party.

184 To standardize for committee size, I determined the proportion of judges from each party within each committee, and then averaged across them. So, for example, the fact that Texas has a large committee (including eleven of twelve judges with Republican affiliations) would not skew these data.

185 *See supra* notes 175–176 and accompanying text.

186 *See supra* notes 175–176 and accompanying text.

187 *See* Federal Judicial Center, *supra* note 174.

188 *See, e.g.*, National Conference of State Legislatures, *State Vote 2016*, http://www.ncsl.org/research/elections-and-campaigns/statevote-2016.aspx [https://perma.cc/GDC9-YCDA] (noting that after the 2016 election, "Republicans will control 66 of the 98 partisan state legislative chambers"); Reid Wilson, *Republicans Will Completely Control 26 States*, THE HILL (Aug. 3, 2017), http://thehill.com/homenews/state-watch/345232-republicans-will-completely-control-a-quarter-of-the-states [https://perma.cc/9JNT-YJUB] ("[T]he GOP now controls all levers of government in 26 states across the country . . . ."). Brian Fitzpatrick took up a different task, studying the ideology of state appellate judges relative to their electorates. *See* Fitzpatrick, *supra* note 102, at 1732. Fitzpatrick finds that, in

state advisory committees are likely more representative of the population of available judges than the federal committee is.

5. *Modeling Practitioners and Judges*

The foregoing analysis compared the state committees to their federal counterpart, but we also might wonder whether there are interstate effects that predict the identities of practitioners and judges.

I do not find a partisan effect in the selection of practitioners. The results on plaintiff versus defense and individual versus corporate are about the same if we separate states based on the 2016 presidential election,[189] the partisan affiliation of the Chief Justice,[190] or the partisan affiliation of the high court.[191] Using various statistical techniques, none of the differences is statistically significant.[192]

There is, however, a partisan effect for judge selection. Looking first at the 2016 presidential results, judge members in red states are 67% Republican while judge members in blue states are only 54% Republican. Looking at control of the state high court, the results are even starker.[193] In states where I

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virtually every state, judges are to the political left of the general public when measured by the judges' campaign contributions. *Id.* at 1745. He also finds that this effect is weakest in states that use partisan elections. *Id.* at 1748; *see also* Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Introduce Ideology into Judicial Selection*, 60 J.L. & ECON. 559, 560 (2017) (comparing judges to lawyers).

I attempted to use Bonica and Sen's "campaign finance score" ("cf scores") data to assess the partisan affiliation of state judge members, *see id.* at 561, but cf scores were available for only about 30% of judge members in this study. Therefore, I do not find those results trustworthy. For reader interest, the average cf score of judges for whom scores were available was about -.20, with negative referring to liberal. This result is to the left of state judges overall. *See id.*

189 In Democratic states, practitioners are 57% corporate and 57% defense-side; in Republican states, practitioners are 58% corporate and 57% defense-side.

190 In states with Democratic Chief Justices, practitioners are 57% corporate and 56% defense-side; in states with Republican Chief Justices, practitioners are 55% corporate and 58% defense-side.

191 In Democratic-controlled states, practitioners are 55% corporate and 62% defense-side; in Republican-controlled states, practitioners are 61% corporate and 57% defense-side.

192 Using a chi-squared test, the p values are as follows: corporate by president (p = .8473); defense by president (p = .8936); corporate by chief justice (p = .5335); defense by chief justice (p = .7913); corporate by high court (p = .2512); defense by high court (p = .4271). Similarly, using a two-sample t test, there is not a significant difference in the share of defense-side or corporate attorneys based on any of the measures of state partisanship. There, the p values are as follows: corporate by president (p = .5128); defense by president (p = .5685); corporate by chief justice (p = .7102); defense by chief justice (p = .7035); corporate by high court (p = .8776); defense by high court (p = .6608).

193 *See supra* note 183 (describing the method).

can identify partisan control of the high court, Democratic committee judges outnumber Republicans about 60–40 in Democratic-controlled states, while Republicans outnumber Democrats 70–30 in Republican-controlled states.[194]

More formally, I ran a regression with the outcome variable being the share of Republican judges on the committee, and predictor variables for the partisan outcome of the 2016 presidential election and partisanship of the high court and chief justice. There was a significant relationship ($p = .033$) only between partisan high court and Republican share.[195]

These results track the federal data. Republican judges dominate the federal committee, and it has been Republican Chief Justices who have selected federal committee members.[196] In the states, Republican high courts (and Republican chiefs) are more inclined to pick Republican judges, and the same is true for Democrats. Though, again, the magnitudes of the effects—and their comparison to the overall populations—are less substantial for state committees.[197]

In short, therefore, state committees exhibit some partisan tilt in the selection of judges but no partisan effects in the selection of practitioner members.[198] And, again, practitioners comprise a more substantial share of state committee membership overall.[199]

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194 Similarly, states with Democratic chiefs are 53% Republican while states with Republican chiefs are 64% Republican. *See supra* note 183 (describing method).

195 A comparison of means (two-sample t test) also reveals a statistically significant difference between states with high courts controlled by Democrats and Republicans ($p = .0136$).

196 *See supra* notes 118–19 and accompanying text.

197 *See supra* note 188 and accompanying text.

198 It is more challenging to evaluate the consequences of these results, both due to the complexity of the legal system and the infrequency of outputs. I ran logistic regressions where the outcomes were the state rules on pleading, the 2003 class-action amendments, the fee-shifting provisions in offer of judgment rules, and the "proportionality" standard for discovery. *See supra* subparts I.B–D. Explanatory variables were the proportion of Republican versus Democratic judges, proportion of corporate versus individual attorneys, proportion of defense-side versus plaintiff-side attorneys, the current partisan orientation of the high court and chief justice, and the partisan results of the 2016 election. The only statistically significant association I identified was between the 2003 class-action amendments and state partisanship (*i.e.*, the 2016 presidential results). None of the measures of committee composition was significantly associated with any of the outputs.

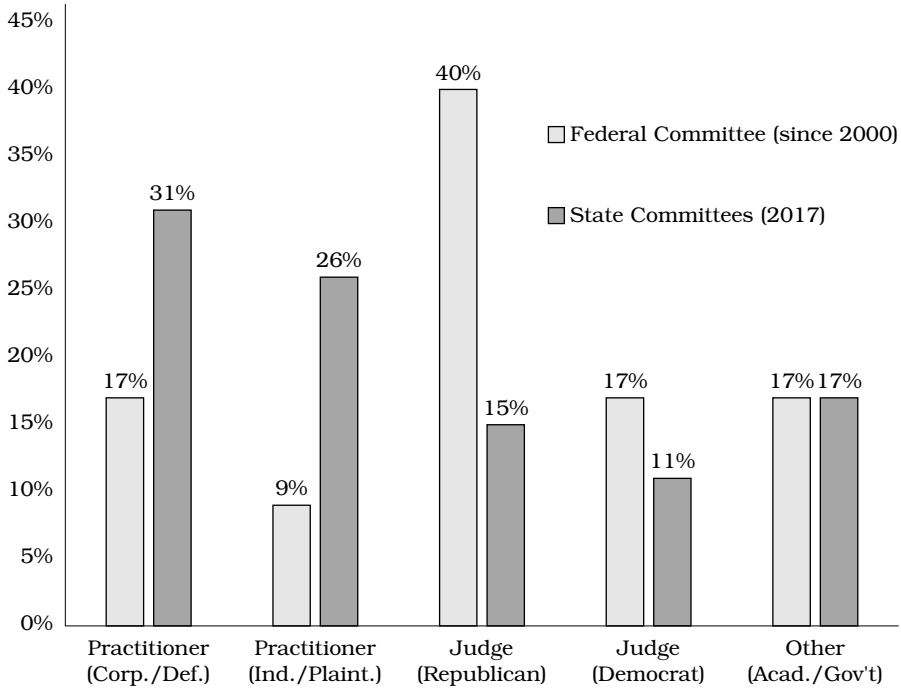
199 *See supra* section II.B.1.

6. *Data Summary*

Like the federal system, most states use advisory committees, and most advisory committees are appointed by state high courts or chief justices. But when it comes to advisory committee membership, state committee members today differ substantially from their federal counterparts.

Consider a comparison between the state committees in 2017 and the federal committee since 2000:

FEDERAL VERSUS STATE COMMITTEES



Or, we could consider just 2017. The 2017 federal committee was comprised of eight judges, four practitioners, an academic, and a government official.[200] Were we to create a composite 2017 state committee, the most striking difference is that we would need to *double* the number of practitioners and *halve* the number of judges. More granularly, on the federal committee, 25% of practitioners represent primarily individual clients; on our state committee, that share should be approaching 50% of practitioners. Around 70% of the federal judge members are Republican; the state committee would have only two Republicans among four judges.

200 *See* United States Courts, *Committee Membership Selection*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection [https://perma.cc/W4VB-ZX6P].

C. State Rulemaking Accessibility

Before leaving the study of state advisory committees, I should also address the issue of accessibility. As mentioned above, criticism of the federal advisory committee reached a boiling point in the 1980s.[201] Congress responded by amending the Rules Enabling Act to require more process, including requiring that the federal advisory committees hold open meetings after sufficient notice and requiring that all proposed rules are subject to notice and comment,[202] though not "Notice and Comment."[203]

My review of state rulemaking reveals that there is substantial variation among the states. For every state with an advisory committee, I inquired whether committee meetings were open to the public. For all 41 rules states, I inquired whether proposed rule changes were published before they were adopted. (Whether code states should be considered accessible is a question for another time.)

Among the thirty-five states with advisory committees, fourteen states have public meetings with centralized notice procedures.[204] At least twenty-one states either do not typically open their meetings to the public or do not routinely give notice to the public of upcoming meetings.[205] On proposed rules, most rules states publish their proposed rules before adoption, but at least four states do not.[206] I describe these results in detail in Appendix B. For interested parties, Appendix B also includes information on where to find proposed rules and committee meetings.[207]

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201 *See, e.g.*, BURBANK & FARHANG, *supra* note 1, at 103–12.

202 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 §§ 401 & 403 (1988) (codified as amended at 28 U.S.C. §§ 2071(b), 2073(c)(2), (d) (2018)); *see also* BURBANK & FARHANG, *supra* note 1, at 103–12.

203 *Cf.* 5 U.S.C. § 553 (2018) (requirements for notice-and-comment rulemaking under the Administrative Procedures Act). The APA does not apply to the Federal Rules, though some think it should. *See* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1188 (2012).

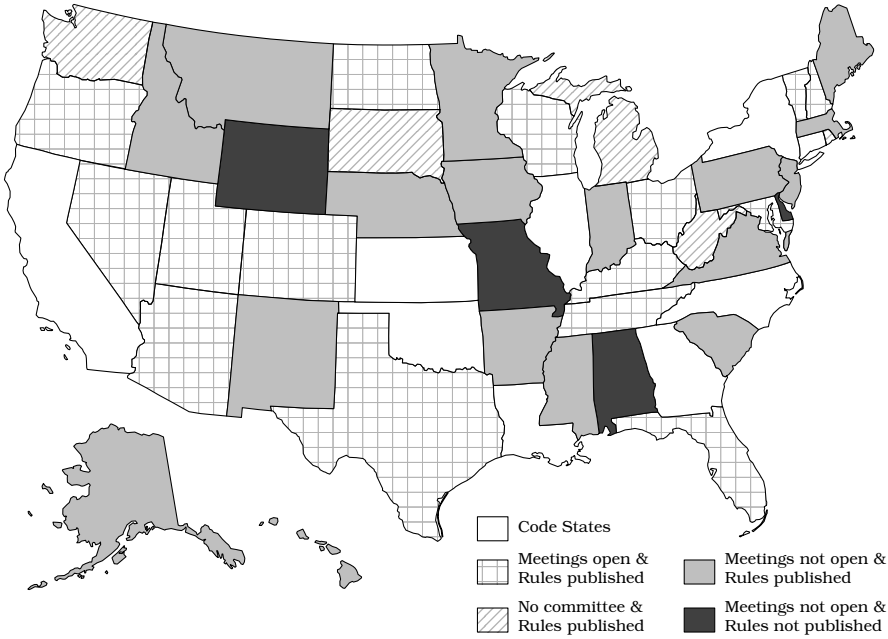
204 *See infra* Appendix Table B. Oregon also has public meetings for its rulemaking Council. *See supra* note 35 and accompany text (discussing Oregon). For the reader's benefit, I have included information on Oregon's meetings in Appendix Table B.

205 *See infra* Appendix Table B. Twelve states do not have open meetings; seven states have open meetings but no centralized location for notices; and one state does not advertise meetings and does not have a policy on whether a member of the public would be permitted to attend. Additional variation is documented in Appendix Table B.

206 *See infra* Appendix Table B.

207 *See infra* Appendix Table B.

STATE RULEMAKING ACCESSIBILITY



Finally, my anecdotal experiences with this project revealed additional hurdles to accessibility. Accessing the relevant information was a substantial challenge. To the best of my knowledge, the membership of the advisory committees in eleven states was not available online, and multiple online lists were out of date until I alerted relevant record keepers.[208] Even the court orders and other formal legal documents authorizing various stages of rulemaking were not easily accessible in many states (at least for an out-of-town researcher).[209] I was able to collect these documents only through substantial effort, leveraging existing contacts and my willingness to be a pest.

III
DISCUSSION

The foregoing analysis reveals important differences between federal and state procedure, and between federal and state procedure-making. These differences are meaningful in their own right, and they point to potential reforms for procedure-making at all levels.

208 *See infra* Appendix Table A.
209 *See infra* Appendix Table A.

First, as demonstrated in Part I, state procedure differs in content from federal procedure.[210] For those critics of federal procedural retrenchment, the states represent a meaningful alternative.[211] A litigant filing a federal civil-rights claim, for example, might prefer a state with notice pleading to a federal court applying *Twombly* and *Iqbal*.[212] The content of civil procedure also differs *among* the states.[213] Whatever forces explain these interstate differences, it appears that state procedure-making has tapped into the experimentalist virtue of federalism[214]—a virtue that, in practice, is often unfulfilled.[215]

Turning to procedure-making, the most striking difference is the substantially greater role for practitioners on state advisory committees.[216] Critics of the federal process have worried that a committee stacked with judges will over-privilege judicial interests and will be too easily controlled by the Chief Justice, who might manipulate that control for ideological ends.[217]

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210 *See supra* sections I.B–D; *see also* Clopton, *supra* note 13, at 424–42 (collecting examples).

211 Clopton, *supra* note 13, at 424–45. Of course, reasonable people can disagree about the propriety of various packages of procedural rules. That is why I address this claim to audiences critical of federal procedure.

212 *See id.* at 426 (collecting sources on state courts applying state notice pleading to Section 1983 claims after *Twombly*).

213 *See id.* at 424–42.

214 *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 74 (2010) (virtues of federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1492–93 (1994) (same); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491 (1987) (same). I do not mean to suggest that states are consciously experimenting in a scientific way, only that they are producing diverse policy mixes that may permit learning. For a similar inquiry into state administrative independence, see generally Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. (forthcoming 2019).

215 *See, e.g.*, Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1338 (2009) (discussing political-science literature on policy diffusion and noting that states experiment less than is optimal); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (discussing theoretical problems with relying on federalism for experimentation).

216 *See supra* Part II.

217 *See* BURBANK & FARHANG, *supra* note 1, at 78–79; Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on* Macey, 23 J. LEGAL STUD. 647, 648–49 (1994); Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in Our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L.J. 1293, 1312–13 (2015); Coleman, *supra* note 7, at 1017–19; Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 290 (2009); 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, 1140–44 (2015); Struve, *supra* note 24, at 1109–10; Thomas & Price, *supra* note 89, at 1157 (2015); Thornburg, *supra* note 89, at 755;

Both of these concerns may be allayed by the presence of practitioners on committees.

First, practitioners are a natural check on judicial rulemakers' institutional interest in aggrandizing judge authority to the detriment of parties' interests or other values.[218] Famously articulated by Professor Judith Resnik,[219] a major concern with "managerial judges" is that their case-management authority will erode due-process protections built into ordinary adjudication.[220] Although lawyers in theory can protect their clients' interests, lawyers in active litigation are hampered in their ability to resist judicial overreach because the same judge they would challenge also would decide their case.[221] But attorney rulemakers should be less constrained—and, indeed, rulemaking has been identified as an important way to regulate managerial judging.[222] The simple claim here is that rule-based responses to judicial overreach may be more vigorous when there are more attorneys participating in rulemaking.

Second, critics of federal rulemaking have worried about excessive control by the Chief Justice. Burbank and Farhang, for example, explained that Chief Justice Burger might have been inclined to appoint judges to the federal advisory committee as a "control strategy" with ideological goals.[223] Practitioner members may be better insulated from the sway of their state's high court.[224] There are also reasons to suspect that practitioners will be more ideologically independent than judge

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Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998).

218 *See* BURBANK & FARHANG, *supra* note 1, at 79.

219 Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

220 *See id.* at 424–30.

221 Resnik refers to this as a problem with "repeat adjudicators." *Id.* at 429.

222 *See id.* at 432–33. Similarly, Professor Nora Freeman Engstrom calls for rulemaking responses to the trend of "judges . . . increasingly, and, to my mind, inexplicably, using strict time limits to shorten the trial time of the small smattering of litigants who defy all odds to get their day in court." *See generally* Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L. J. 933, 936 (2018).

223 *See* BURBANK & FARHANG, *supra* note 1, at 104 ("The 1980s Advisory Committee was a group chiefly distinguishable from their predecessors in the 1970s by reason of the greater representation of judges appointed by Republican presidents, whose presumed ideological preferences made them more likely to favor retrenchment and thus to take their lead from a Chief Justice who was not shy about telling them what he wanted.").

224 This is Burbank and Farhang's claim at the federal level, for example. *See id.* at 243.

members.[225] It must be true, for example, that practitioners weigh client interest (and their own pecuniary interests) against ideology more heavily than judges do.[226] And because state committee members have diverse client bases, these client interests will not be monolithic either.[227] State practitioners are also more independent of the Chief Justice of the United States, meaning that states should be willing to reject Federal Rule amendments such as "proportionality"[228] and federal procedural decisions such as *Twombly* and *Iqbal*.[229] And they have been.[230]

A final issue relates to competence. This Article's comparison of federal and state rulemakers recalls Professor Burt Neuborne's 1977 article *The Myth of Parity*.[231] Neuborne's most famous claim was that federal courts were superior to state courts in technical competence: "Stated bluntly, in my experience, federal trial courts tend to be better equipped to

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225 *See supra* note 217 and accompanying text; *see also* Fitzpatrick, *supra* note 102, at 1731 (discussing the ideologies of lawyers and judges). As noted above, I find partisan effects among *judicial* committee members in the states. *See supra* section II.B.5.

226 Indeed, the notion that attorney rulemakers have some pecuniary motive is the premise of the critique about practitioner homogeneity on the federal advisory committee. *See supra* notes 89 & 217 (collecting sources).

227 *See supra* subpart II.B. I expand on the theme of diversity below.

228 Professors Subrin and Main advocate for exactly this position. *See* Subrin & Main, *supra* note 16, at 503.

229 *See* Clopton, *supra* note 13, at 425–27. Again, it is a normative question whether these differences are for better or for worse, but this paper suggests reasons that the differences might be meaningful.

230 *See supra* subparts I.B–D.

231 90 HARV. L. REV. 1105 (1977). For more on the "parity debate," see generally, for example, Erwin Chemerinsky, *Parity Reconsidered: Defining A Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 233 (1988); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 U.C.L.A. L. REV. 329, 329 (1988). *See also* Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 88 (2000); Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 651–53 (1989); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599–600 (1999); Michael Wells, *Beyond the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 609–12 (1991). Though Neuborne focused on constitutional adjudication, many have applied his indictments of state courts more broadly. *See, e.g.*, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 299–303 (7th ed. 2015); RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 216 (2d ed. 1996); Brian Bix, *Considering the State Law Consequences of an Allegedly Improper Bankruptcy Filing*, 67 AM. BANKR. L.J. 325, 336 (1993); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1251–52 (2007); Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1774–76 (2008); Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 670–71 (1995). At a minimum, scholars routinely apply the "parity" lens to federal rights generally.

analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts."[232]

As applied to procedure-making, the question is not a general federal–state comparison, but instead whether the handful of judges and practitioners selected to serve on state advisory committees are more or less competent than their federal counterparts. I have not seen any evidence casting doubt on the individual competence of federal or state committee members.

However, the composition of state procedure-making institutions may have consequences for *group* competence. The federal advisory committee has been criticized as insufficiently diverse.[233] Some have gone as far as to suggest that this lack of diversity has consequences for its output.[234]

This Article demonstrates that state rulemakers are more diverse on a range of dimensions, and it is possible that this diversity can contribute to decision-making competence. In addition to the well-known benefits of group decision-making generally,[235] there are reasons to value *diverse* group decision-making in particular. For one thing, the fact that state committee members come from different professional groups (and sometimes from different demographic groups) might improve their ability to resolve complicated questions of procedural policy.[236] Unlike homogenous groups, diverse groups can aggregate different perspectives and skill sets to solve complex problems.[237] Indeed, some research suggests that adding a diverse decision-maker to a group will improve the overall qual-

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232 Neuborne, *supra* note 231, at 1120. Neuborne attributes these effects not only to judge competence but also to clerk competence and caseload burdens. *Id.* at 1121–24. Caseloads and clerks are seemingly less important for rulemaking. For example, even if judge rulemakers have "rules clerks" or involve them in their rulemaking activities, this involvement seems less significant than the overall role of clerks in typical adjudication.

233 *See supra* note 217 (collecting sources).

234 *Id.*

235 For example, there is the "wisdom of crowds" claim that additional decision-makers improve the overall efficacy of statistical estimates by flattening out random errors. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS 3–22 (2004).

236 One could think about this in the negative (avoiding systematic bias by adding participants with different biases) or in the affirmative (improving outcomes by aggregating perspectives).

237 *See* SCOTT E. PAGE, DIVERSITY AND COMPLEXITY 9 (2010) [hereinafter PAGE, DIVERSITY AND COMPLEXITY]; SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 9 (2007) [hereinafter PAGE, THE DIFFERENCE]; Lu Hong & Scott E. Page, *Problem Solving by Heterogeneous Agents*, 97 J. ECON. THEORY 123, 143, 146 (2001); *see also* Elizabeth

ity of decision-making even when that new decision-maker is of lower individual competence.[238] So even if Neuborne were correct that federal courts are more "competent" than state courts,[239] the result still might be that state rulemakers are more competent as a group.

State committee diversity also might improve information. A major challenge for rulemaking is the acquisition of accurate information. Indeed, the federal advisory committee has been criticized for its lack of reliable, empirical support for some of its decisions.[240] I have no evidence that state rulemakers are more likely to acquire the "big data" that some critics are seeking. But at a minimum, the anecdotal experiences of diverse practitioners should be more representative than the anecdotal experiences of a few elite corporate defense attorneys.[241] And these diverse practitioners likely have access to more diverse professional networks from which they can gather information. Moreover, because states often consider previous federal amendments,[242] they have the benefit of all of the information

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Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 71 (2015) (applying similar logic to multidistrict litigation).

Page has taxonomized cognitive diversity along four dimensions: (i) "Diverse Perspectives: ways of representing situations and problems"; (ii) "Diverse Interpretation: ways of categorizing or partitioning perspective"; (iii) Diverse Heuristics: ways of generating solutions to problems"; (iv) "Diverse Predictive Models: ways of inferring cause and effect." PAGE, THE DIFFERENCE at 7. Although most federal and state committee members are lawyers and judges—and thus may be less "diverse" on these dimensions than equally sized pools of citizens at large—state committees evince more cognitive diversity by including attorneys that work in different settings (*e.g.*, solo practitioners versus big firms) and judges that work at different levels of adjudication (*e.g.*, state high court versus small claims court).

238 *See, e.g.*, Ilan Yaniv, *The Benefit of Additional Opinions*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 75, 75 (2004) (collecting sources).

239 *See* Neuborne, *supra* note 231, at 1120–24.

240 *See, e.g.*, Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 845–46 (1993) ("What the Committee's 'study' involved, other than thought experiments by judges and law professors and consideration of some anecdotal experiences . . . are not clear." (footnotes omitted)); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 816–21 (1991) (raising process-related concerns about the level of empirical study the federal advisory committee should conduct before it promulgates a new rule).

241 *See, e.g.*, JON ELSTER, SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS 279 (2013) (noting that diverse agents may contribute specialized knowledge); PAGE, DIVERSITY AND COMPLEXITY, *supra* note 237, at 3 (discussing the value of "collective knowledge" in diverse groups). Professor Struve has specifically highlighted the value of practitioner members (versus judges) for information acquisition. *See* Struve, *supra* note 24, at 1137–38. And, again, state committees have a dramatically larger share of practitioners. *See supra* subpart II.B.

242 *See supra* Part I; *see also, e.g.*, Dodson, *supra* note 30, at 723 (describing states consciously adopting or rejecting federal rule amendments); Subrin & Main, *supra* note 16, at 506 (same).

available to federal rulemakers plus any new federal experience since the rule changes.[243] When Massachusetts rejected "proportionality" in 2016, its advisory committee suggested that the state "wait and see."[244]

Including potentially conflicting interests on state committees also could positively contribute to their outputs. State committees are less monolithic than the federal advisory committee with respect to plaintiff- and defense-side lawyers, individual and corporate lawyers, and Republican and Democratic judges.[245] The products of their deliberations should be those ideas that can achieve cross-cutting support[246]—and it would not take a major leap to suggest that such ideas might be more durable and perhaps better in some qualitative sense.[247] Even if these groups do not agree on first principles, like Sunstein's "incompletely theorized agreements," their compromises can promote stability while demonstrating mutual respect.[248] And even if they do not agree on final outcomes, the presence of

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243 State rulemakers thus are often offering a "second opinion." *See* Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1436–42 (2011).

244 MASS. R. CIV. P. 26, Reporter's Notes—2016.

245 See *supra* Part II.

246 The claim here is based on the unexceptional notion that parties make agreements consistent with their interests. It is possible that diverse preferences could produce irrationality, such as vote cycling. But I have not seen evidence that state rules are constantly in flux. On the other hand, it is possible that diverse preferences lead to inaction. Professor Bone, for example, is not optimistic about "logrolling" in procedure-making because he believes it will lead to paralysis. *See* Bone, *Process of Making Process*, *supra* note 24, at 922. This is an empirical claim that is difficult to test, but I would note that this Article demonstrated that diverse state committees—by logrolling or otherwise—have continued to make important procedural decisions despite seemingly conflicting interests. *See supra* Part I; *see also infra* note 248 (discussing incompletely theorized agreements). And even if these observations obtained, it is possible that the benefits of diversity outweigh its costs. *See, e.g.*, PAGE, DIVERSITY AND COMPLEXITY, *supra* note 237, at 255 (making this point about diversity generally).

247 *See, e.g.*, PAGE, DIVERSITY AND COMPLEXITY, *supra* note 237, at 196–248 (listing ten mechanisms by which diversity contributes to robustness of complex systems).

248 Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) ("Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle. They do not offer larger or more abstract explanations than are necessary to decide the case. When they disagree on an abstraction, they move to a level of greater particularity. The distinctive feature of this account is that it emphasizes agreement on (relative) particulars rather than on (relative) abstractions. This is an important source of social stability and an important way for diverse people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole." (emphasis and footnotes omitted)).

dissenters can improve decision-making by resisting "groupthink."[249]

Of course, committee membership is but one way to access diverse viewpoints.[250] Formally, the amendments to the federal Rules Enabling Act and other changes by the judiciary itself resulted in federal rulemaking becoming more accessible.[251] As documented above, many states fall short on this measure.[252] The public would have difficulty accessing the meetings of more than half of state advisory committees, and in some states proposed rules are never published for public consideration.[253]

The federal committee also is likely more accessible in practice. In response to the proposed 2015 amendments, for example, the federal advisory committee received more than 2,300 comments and heard from more than 120 testifying witnesses.[254] Even in states with formal accessibility, I doubt that state committees receive anything close to this breadth of public participation.[255] Anecdotally, when I queried state rulemakers about public access, committee members from multiple states remarked that their meetings were open but that no member of the public had ever attended.

It is not obvious to me whether procedure-making is better served by public access or by committee-member diversity. But, importantly, public access and diversity should not be seen as mutually exclusive. One could easily imagine an accessible and diverse procedure-making process.[256] And the foregoing discussion suggests that such a process would have a lot going for it.

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249 *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 1–13 (2003).

250 I am using "accessibility" rather than "transparency" in order to emphasize the public's ability to contribute to the rulemaking process, rather than whether committee members have opportunities for private deliberations or decisions.

251 *See supra* note 4 and accompanying text.

252 *See supra* subpart II.C; Appendix Table B.

253 *See supra* subpart II.C; Appendix Table B.

254 *See Proposed Amendments to the Federal Rules of Civil Procedure, Docket ID: USC-RULES-CV-2013-0002*, https://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002 [https://perma.cc/Q8M2-JJHR] (last visited Sept. 11, 2018); *Transcripts and Testimony, United States Courts*, http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/transcripts-and-testimony [https://perma.cc/SD8Q-WK55]. This was an unusually high level of public attention, but in general the federal process seems to receive more public attention than the states, and the 2015 experience may be a sign of things to come in federal rulemaking.

255 *See supra* subpart II.C; Appendix Table B (documenting accessibility).

256 Some states are both diverse and accessible, though I cannot speak systematically to whether the public takes advantage of its access in these states. Such questions are left for further study.

With that in mind, I end this Article with a call for *accessible diversity* in federal and state rulemaking. For federal rulemaking, this Article demonstrated that more diversity among rulemakers is not only possible but in fact exists right now in the states.[257] This Article highlighted some formal mechanisms to increase diversity,[258] such as divided appointment authority, specifically allocated seats, and requirements on gender balance.[259] It also suggested that informal norms matter too.[260] More directly, this Article has identified a pool of hundreds of potential rulemakers whose expertise could be of value to the federal process.[261]

For state rulemaking, one major barrier is the lack of publicly available information about state rulemaking. I have endeavored personally to make much of that information more accessible. For example, simply documenting the formal state rulemaking process in each state required me to access numerous legal documents that were not heretofore accessible re-

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257 *See supra* subpart II.B.

258 Burbank and Farhang offer their own prescriptions for federal rulemaking as well. *See* BURBANK & FARHANG, *supra* note 1, at 242–47.

259 *See supra* subpart II.A. As suggested above, Congress considered an amendment to the Rules Enabling Act requiring that the federal committees include "a balanced cross section of bench and bar." *See, e.g.*, H.R. 3550, 99th Cong. (1st Sess. 1985) (proposing this language); H.R. 4807, 100th Cong. (2d Sess. 1988) (continuing to include this language through House adoption and calendaring in Senate). On October 14, 1988, by unanimous consent, Senator Byrd amended H.R. 4807 by substituting the full text of S. 1482, which among other things dropped the "balanced cross section" language. 134 CONG. REC. 31,067 (daily ed. Oct. 14, 1988). The amended bill was adopted by the House. 134 CONG. REC. 31,861–74 (daily ed. Oct. 19, 1988). Today the relevant section says only that the "committee shall consist of members of the bench and the professional bar, and trial and appellate judges." *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702 § 403 (1988) (codified as amended at 28 U.S.C. § 2073(a)(2) (2018)); *see also* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2076–77 n.50 (1989) ("The Committee is now more diverse than it was, but representativeness in this context may be illusory."); Mullenix, *supra* note 240, at 832 ("Thus, what openness advocates lost in committee representativeness, they gained in participatory process."). Note, though, that Representative Kastenmeier, the primary reformer in Congress, described this change as a "technical amendment," 134 CONG. REC. 31,873 (daily ed. Oct. 19, 1988), but at a minimum there is symbolic value in this statutory change.

260 Most states do not have formal requirements, yet still have more balanced committees. *See supra* Part II.

261 *See supra* subpart II.B. This would be a cousin of Professor Nash's "judicial laterals." Jonathan Remy Nash, *Judicial Laterals*, 70 VAND. L. REV. 1911, 1911–14 (2017). Though in recent years state high-court judges have served on the federal advisory committee, that says nothing about state-court practitioners (or state lower-court judges).

motely. I have cataloged those documents in this Article's Appendix.[262]

In addition, by drawing attention to the importance of state rulemaking, I hope that this work will increase public interest in state procedure. Indeed, it was public interest that led to increased accessibility in the federal process in the 1980s.[263] Perhaps this project also can inspire the state rulemakers themselves to take further steps toward accessibility. Anecdotally, since beginning this project, dozens of practitioners have reached out to me to express their interest in knowing more about state rulemaking. I am happy to oblige.

IV
APPENDICES

As described in the text, this Article includes extensive appendices, available online, related to the making of state rules of civil procedure and related to the content on state rules on particular topics. To view the appendices online, please visit the *Cornell Law Review* online. Online appendices are as follows:

262 *See infra* Appendix Tables A & B. These include, for example, some of the orders establishing and governing advisory committees. *Id.*

263 *See supra* notes 4 & 259 and accompanying text.

APPENDIX TABLE A: STATE RULEMAKING PROCEDURES[264]

State	Mechanism description	Citations	Committee appointments
Alabama	Under the Alabama Constitution and statutes, the Supreme Court has the power to promulgate rules of civil procedure. *See* ALA. CONST. art. VI, § 150; *see also* ALA. CODE § 12-2-7(4) (1975). The Alabama Supreme Court appoints the Alabama Supreme Court Standing Committee on the Alabama Rules of Civil Procedure. Order Adopting the Alabama Rules of Civil Procedure, para. 4-5 (Ala. Jan. 3, 1973) (on file with author); *see also, e.g.*, Order, March 26, 2012 (Ala.), http://judicial.alabama.gov/docs/rules/rcvp_5_1.pdf [https://perma.cc/XVM4-R6QS]; Howell Heflin, *The New Alabama Rules of Civil Procedure*, 4 CUMB.-SAMFORD L. REV. 207 (1973) (explaining Alabama procedural rulemaking).	ALA. CONST. art. VI, § 150; ALA. CODE § 12-2-7(4) (1975); Order Adopting the Alabama Rules of Civil Procedure (Ala. Jan. 3, 1973)	Supreme Court

264 As described in the main text, this table attempts to catalog the states' procedures for making rules of civil procedure. This table describes the mechanism in the forty-one states with rules-based modes of procedure. The nine code states—California, Connecticut, Georgia, Illinois, Kansas, Louisiana, New York, North Carolina, and Oklahoma—are excluded from this table.

State	Mechanism description	Citations	Committee appointments
Alaska	Under the Alaska Constitution, the Supreme Court has the power to make rules of civil procedure. ALASKA CONST. art. IV, § 15. The legislature can "change" these rules, but only by two-thirds vote of each house. *Id.* *See* Leege v. Martin, 379 P.2d 447 (Ala. 1963). Alaska court rules require the chief justice to establish rules committees and authorize the chief justice to make appointments to committees, drawn from "members of the judiciary, Alaska Bar Association, and other qualified persons." ALASKA R. CT., ADMIN. R. 44, https://public.courts.alaska.gov/web/rules/docs/adm.pdf [https://perma.cc/VGH9-53B7]. Alaska currently has a Civil Rules Committee to advise on the rules of civil procedure. *See* Members of Committee (on file with author).	ALASKA CONST. art. IV, § 15; Alaska R. Ct., Admin. R. 44	Chief Justice
Arizona	Under the Arizona Constitution and statutes, the Supreme Court has the power to promulgate rules of civil procedure. ARIZ. CONST. art. 6, § 5; ARIZ. REV. STAT. § 12-109 (2018). Arizona law requires that the Arizona bar, or a bar committee, advise the court on rules. ARIZ. REV. STAT. § 12-110 (2018). *See also* Thomas Main, *Civil Rulemaking in Nevada: Contemplating a New Advisory Committee*, 14 NEV. L.J. 852 (2014). Members are appointed by the President of the State Bar, with approval of the Board of Governors. *See id.* (citing State Bar of Ariz., Standing Committee Guidelines 1 (2013)). In 2014, the Arizona Supreme Court issued an order creating a Task Force on the Arizona Rules of Civil Procedure to review the existing rules of civil procedure. In the Matter of: Establishment of the Task Force on the Arizona Rules of Civil Procedure, Admin. Order No. 2014-116 (Ariz. 2014). Members of the Task Force are appointed by the Chief Justice.	ARIZ. CONST. art. 6, § 5; ARIZ REV. STAT. § 12-109 et seq.	Committee: President of the State Bar, with approval of the Board of Governors Task Force: Chief Justice

State	Mechanism description	Citations	Committee appointments
Arkansas	Under the Arkansas Constitution, the Supreme Court has the power to promulgate rules of civil procedure. ARK. CONST. amend. 80, § 3. Prior statutory authorization has been repealed. *See* ARK CODE ANN. § 16-11-302, *repealed by* Acts of 2003, Act 1185, § 69 (2003). There is a current proposal for a constitutional amendment to allow the legislature, by three-fifths vote, to amend or repeal rules of procedure. *See* Ark. Joint Sen. Res. 8 (2017). *See* In the Matter of Appointments to the Committee on Rules of Pleading, Practice, and Procedure in Civil Cases (Ark. July 5, 1988) (per curiam) (on file with author); Press Release, Supreme Court of Arkansas, Supreme Court Appoints Attorneys to Committee on Civil Practice (July 15, 2014), https://courts.arkansas.gov/sites/default/files/6-26-14%20appointments.pdf [https://perma.cc/A3ZL-3G39].	ARK. CONST. amend. 80, § 3	Supreme Court
Colorado	Under the Colorado Constitution and statutes, the Supreme Court has the power to promulgate rules of civil procedure. COLO. CONST. art. 6, § 21; COLO. REV. STAT. § 13-2-108 (2018). The Colorado Supreme Court appoints a standing Civil Rules Committee with jurisdiction over the rules of civil procedure. *See* COLORADO JUDICIAL BRANCH, CIVIL RULES COMMITTEE, https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=5 [https://perma.cc/ZEM6-XALR].	COLO. CONST. art. 6, § 21; COLO. REV. STAT. § 13-2-108 (2018)	Supreme Court

State	Mechanism description	Citations	Committee appointments
Delaware	Under Delaware statute, pursuant to the Delaware Constitution, the judges of the Superior Court have the power to make rules of civil procedure. DEL. CODE ANN. tit. 10, § 561 (2018); DEL. CONST. art. 4, § 13. These rules supersede conflicting statutes. DEL. CODE ANN. tit. 10, § 561. The Supreme Court has constitutional supervisory authority over the superior court rules. DEL. CONST. art. 4, § 13. Pursuant to that authority, the Supreme Court Rules call for the creation of a permanent Advisory Committee on Supreme Court Rules, Rules of Civil Procedure, and Rules of Evidence, with members appointed by the Supreme Court. DEL. S. CT. R. 93. Meanwhile, the Superior Courts have established a Civil Rules Advisory Committee appointed by the president judge of the Superior Court. *See* DELAWARE SUPERIOR COURT, IN RE: POLICY, TIME STANDARDS, AND PROCEDURES RELATING TO CIVIL CASE DISPOSITION, CIVIL ADMINISTRATIVE ORDER (Mar. 28, 2000), http://courts.delaware.gov/superior/pdf/civiladmord.pdf [https://perma.cc/DBD4-KR5M].	DEL. CODE ANN. tit 10, § 561 (2018); DEL. CONST. art. 4, § 13; DEL. S. CT. R. 93	Superior Court Civil Rules Advisory Committee: Presiding Judge of the Superior Court Supreme Court Advisory Committee: Supreme Court
Florida	Under the Florida Constitution, the Supreme Court has the power to make rules of civil procedure. FLA. CONST. art. 5, § 2. The legislature can "repeal" these rules, but only by two-thirds vote of each house. *Id.* Per court rule, the Florida Bar Association appoints a Civil Procedure Rules Committee comprised on attorneys and judges. FLA. R. JUD. ADMIN. 2.140.	FLA. CONST. art. 5, § 2; FLA. R. JUD. ADMIN. 2.140	Bar
Hawaii	Under the Hawaii Constitution, the Supreme Court has the power to make rules of civil procedure. HAW. CONST. art. VI, § 7. The Chief Justice appoints the Permanent Committee on Rules of Civil Procedure and Circuit Court Civil Rules. *See* In the Matter of the Appointment of the Members of the Permanent Committee on Rules of Civil Procedure and Circuit Court Civil Rules (Haw. Apr. 23, 1986) (on file with author).	HAW. CONST. art. VI, § 7; HAW. REV. STAT. § 601-4 (2018); HAW. SUP. CT. R. 4.	Chief Justice

State	Mechanism description	Citations	Committee appointments
Idaho	Under Idaho statute, the Supreme Court has the power to make rules of civil procedure. IDAHO CODE (2018) § 1-212. The Idaho Supreme Court appoints a Civil Rules Advisory Committee. *See* IDAHO SUPREME COURT, JUDICIAL COMMITTEES, https://isc.idaho.gov/main/judicial-committees [https://perma.cc/8YMW-3VL8]. *See also, e.g.*, *In re* Members of the Civil Rules Advisory Committee, Order (Idaho Mar. 17, 2009) (on file with author).	IDAHO CODE § 1-212 (2018)	Supreme Court
Indiana	Under Indiana statute, the Supreme Court has the power to make rules of civil procedure. IND. CODE § 34-8-1-3 (2018). Under an Indiana Rule, the Supreme Court appoints the Supreme Court Committee on Rules of Practice and Procedure. IND. TR. P. R. 80.	IND. CODE § 34-8-1-3 (2018); IND. TR. P. R. 80	Supreme Court
Iowa	Under Iowa statute, the Supreme Court has the power to make rules of civil procedure. IOWA CODE §§ 602.4201–02 (2018). The court must submit proposed rules "to the legislative council and shall at the same time report the rule or form to the chairpersons and ranking members of the senate and house committees on judiciary." IOWA CODE § 602.4202 (2018). The proposed rule or amendment takes effect 60 days after submission to the legislative council, unless the council delays the rule. *Id.* The council can delay the rule by a majority vote, and thus give the General Assembly time to supersede the proposed rule with legislation. *Id.* The Supreme Court appoints an advisory committee on the rules of civil procedure. *See* IOWA COURTS IOWA JUDICIAL BRANCH ADVISORY COMMITTEES, http://www.iowacourts.gov/About_the_Courts/Advisory_Committees [https://perma.cc/8PFR-7R5M]. Iowa has a court rule providing: "It is a policy of the judicial branch that all boards, commissions, and committees to which appointments are made or confirmed by any part of the judicial branch shall reflect, as much as possible, a gender balance." IOWA CT. R. 22.34.	IOWA CODE §§ 602.4201 et seq.	Supreme Court

State	Mechanism description	Citations	Committee appointments
Kentucky	Under the Kentucky Constitution, the Supreme Court has the power to make rules of civil procedure. KY. CONST. § 116. Kentucky has a Civil Rules Committee. The Clerk of the Supreme Court declined to provide the names of committee members. *See* Email from Susan Clary to author (April 9, 2018) (on file with author).	KY. CONST. § 116	n/a
Maine	Under Maine statute, the Supreme Court has the power to make rules of civil procedure. ME. STAT. tit. 4, § 8 (2018). The procedures for the Advisory Committee on Civil Rules are provided by court rule. Me. R. Rulemaking P. Op. 1 et seq. The Supreme Court appoints members of the Advisory Committee. *See* 2 ME. PRAC., ME. C. PRAC. § 1:1 (3d ed.) (citing Orders of February 8, 1967, Me. Reptr., 225–237 A.2d XXIV, XXV); *see also* Appointments to the Advisory Committee on Rules of Civil Procedure, No. SJC-12 (Me. Nov. 14, 2016) (on file with author).	ME. STAT. tit. 4, § 8 (2018); Me. R. Rulemaking P. Op. 1 et seq.	Supreme Court
Maryland	Under the Maryland Constitution, the Court of Appeals has the power to make rules of civil procedure. MD. CONST. art. 4, § 18. *See also* MD. CODE ANN., CTS. & JUD. PROC. § 1-201 (2018). Maryland has a Standing Committee on Rules of Practice and Procedure, authorized by statute. MD. CODE ANN., CTS. & JUD. PROC. § 13-301 (2018). Members are appointed by the Court of Appeals. *Id.*	MD. CONST. art. 4, § 18; MD. CODE ANN., CTS. & JUD PROC. §§ 1-201 & 13-301 (2018).	Court of Appeals
Mass.	Under Massachusetts statute, the courts have the power to make rules of civil procedure under the authority of the Supreme Court. MASS. GEN. LAWS ch. 213, § 3 (2018). The Supreme Judicial Court appoints the Standing Advisory Committee on the Rules of Civil and Appellate Procedure.	MASS. GEN. LAWS ch. 213, § 3 (2018)	Supreme Judicial Court

State	Mechanism description	Citations	Committee appointments
Michigan	Under the Michigan Constitution, the Court of Appeals has the power to make rules of civil procedure. MICH. CONST. art 6, § 5. The Supreme Court's process is defined by rule. MICH. CT. R. 1.201. Though the Chief Judge has the power to appoint committees, MICH. CT. R. 8.110, there is no permanent committee addressing rules of civil procedure. *See* E-mail from Anne Boomer, Administrative Counsel, Michigan Supreme Court (July 18, 2017) (on file with author).	MICH. CONST. art 6, § 5; MICH. CT. R. 1.201.	No committee
Minnesota	Under Minnesota statute, the Supreme Court has the power to make rules of civil procedure. MINN. STAT. § 480.051 (2018). By statute, before adopting any rule changes, the Supreme Court must appoint an advisory committee comprised of "eight members of the bar of the state, one judge of the Court of Appeals, and two judges of the district court." MINN. STAT. § 480.052 (2018).	MINN. STAT. § 480.051 et seq. (2018)	Supreme Court
Mississippi	Under Mississippi statute, the Supreme Court has the power to make rules of civil procedure. MISS. CODE ANN. § 9-3-61 (2018). Mississippi statute requires an advisory committee and defines its membership as follows: "(a) two (2) members selected by the judges of the Court of Appeals; (b) two (2) members selected by the Conference of Circuit Court Judges; (c) two (2) members selected by the Conference of Chancery Court Judges; (d) two (2) members selected by the Conference of County Court Judges; (e) two (2) members selected by the Mississippi Bar; (f) two (2) members selected by the Magnolia Bar Association; (g) two (2) members selected by the Mississippi Trial Lawyers Association; (h) two (2) members selected by the Mississippi Defense Lawyers Association; (i) two (2) members selected by the Mississippi Prosecutors Association; (j) two (2) members selected by the Mississippi Public Defenders Association; (k) the Dean of the University of Mississippi School of Law, or his designee; and (l) the Dean of the Mississippi College School of Law, or his designee." MISS. CODE ANN. § 9-3-65 (2018).	MISS. CODE ANN. § 9-3-61 et seq. (2018)	Mix

State	Mechanism description	Citations	Committee appointments
Missouri	Under the Missouri Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* MO. CONST. art. 5, § 5; *See also* MO. REV. STAT. § 477.011 (2016). The legislature is authorized by the Constitution to amend or annul such rules. MO. CONST. art. 5, § 5. The Supreme Court appoints members of the Civil Rules Committee. *In re* Supreme Court Civil Rules Committee (Oct. 4, 1994) (en banc) (on file with author).	MO. CONST. art. 5, § 5; MO. REV. STAT. § 477.011 (2016)	Supreme Court
Montana	Under the Montana Constitution and statute, the Supreme Court has the power to make rules of civil procedure. MONT. CONST. art. 7, § 2(3); MONT. CODE ANN. § 3-2-701 (2017). The Constitution provides that rules are subject to "disapproval" by the legislature within two legislative sessions. MONT. CONST. art. 7, § 2(3). The process of rulemaking is further elaborated by court rule. MONT. S. CT. INTERNAL OPERATING R. § 6. The Montana Supreme Court has established the Advisory Commission on Rules of Civil and Appellate Procedure. *See* MONTANA JUDICIAL BRANCH, ADVISORY COMMISSION ON RULES OF CIVIL AND APPELLATE PROCEDURE, http://courts.mt.gov/courts/supreme/boards/Advisory [https://perma.cc/EG3Q-42M6].	MONT. CONST. art. 7, § 2(3); MONT. CODE ANN. § 3-2-701 (2017)	Supreme Court
Nebraska	Under the Nebraska Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* NEB. CONST. art. V, § 25; *see also* NEB. REV. STAT. § 25-801.01 (2018); *see also* NEB. CT. R. §§ 1-101 et seq. Pursuant to its constitutional authorization, the Supreme Court appointed the Committee on Practice & Procedure. *See* STATE OF NEBRASKA JUDICIAL BRANCH, COMMITTEE ON PRACTICE & PROCEDURE, https://supremecourt.nebraska.gov/committee-practice-procedure [https://perma.cc/J853-WDH9].	NEB. CONST. art. V, § 25; NEB. REV. STAT. § 25-801.01 (2018); NEB. CT. R. §§ 1-101 et seq.	Supreme Court

State	Mechanism description	Citations	Committee appointments
Nevada	Under Nevada statute, the Supreme Court has the power to make rules of civil procedure. NEV. REV. STAT. § 2.120 (2017). By order, the Supreme Court appointed a committee to advise on the Nevada Rules of Civil Procedure. *In re* Creating a Committee to Udpate (sic.) and Revise the Nevada Rules of Civil Procedure, ADKT0522 (Nev. Feb. 10, 2017), https://www.nvbar.org/wp-content/uploads/CommitteeEstablishment.pdf [https://perma.cc/8YYT-R33N].	NEV. REV. STAT. 2.120 (2017); *In re* Creating a Committee to Udpate (sic.) and Revise the Nevada Rules of Civil Procedure, ADKT0522 (Nev. Feb. 10, 2017)	Supreme Court
New Hampshire	Under the New Hampshire Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* N.H. CONST. pt. 2, art. 73-a; *see also* N.H. REV. STAT. ANN. § 490:4 (2018). Supreme Court rule calls for the creation of an advisory committee, and defines its appointments as follows: "(i) One active or retired judge of the Supreme Court shall be appointed by the Supreme Court and shall serve as the Chair of the Committee; (ii) One active or retired judge of the Superior Court shall be appointed by the Supreme Court; (iii) Two active or retired judges from the Circuit Court shall be appointed by the Supreme Court; (iv) Two attorneys shall be appointed by the Supreme Court. (v) Three laypersons shall be appointed by the Supreme Court. (vi) One member shall be appointed by the Governor. (vii) The president of the senate, or the president's designee. (viii) The speaker of the house, or the speaker's designee. (ix) One clerk or court administrator from the Superior Court shall be appointed by the Supreme Court. (x) One clerk or court administrator from the Circuit Court shall be appointed by the Supreme Court. (xi) One member of the New Hampshire Bar Association Board of Governors and one member of the Committee on Cooperation with the Courts shall be designated by the president of the New Hampshire Bar Association." N.H. S. CT. R. 51(d)(1)(A).	N.H. CONST. pt. 2, art. 73-a; N.H. REV. STAT. ANN. § 490:4 (2018); N.H. S. CT. R. 51(d)(1)(A)	Mix

State	Mechanism description	Citations	Committee appointments
New Jersey	Under the New Jersey Constitution, the Supreme Court has the power to make rules of civil procedure. N.J. CONST. art. 6, § 2, para. 3. The New Jersey Supreme Court appoints the Civil Practice Committee.	N.J. CONST. art. 6, § 2, para. 3	Supreme Court
New Mexico	Under New Mexico statute, the Supreme Court has the power to make rules of civil procedure. N.M. STAT. ANN. § 38-1-1 (2018). By court rule, the Supreme Court appoints members of the Rules of Civil Procedure for State Courts Committee (or, prior to December 31, 2017, the Rules of Civil Procedure for the District Courts Committee). N.M. S. CT. GEN. R. 23-106. The rulemaking process is further outlined in N.M. S. CT. GEN. R. 23-106.1.	N.M. STAT. ANN. § 38-1-1 (2018); N.M. S. CT. GEN. R. 23-106 et seq.	Supreme Court
North Dakota	Under the North Dakota Constitution, the Supreme Court has the power to make rules of civil procedure. *See* N.D. CONST. art. VI, § 3*; see also* N.D. R. P. R. § 1. By court rule, the Supreme Court created the standing Joint Procedure Committee with responsibility over rules of civil procedure. N.D. R. P. R. § 8. According to the rule, the members are appointed by the Chief Justice, with the exception of one liaison member appointed by the state bar association. *Id.*	N.D. CONST. art. VI, § 3; N.D. R. P. R. §§ 1, 8	Chief Justice + bar liaison

State	Mechanism description	Citations	Committee appointments
Ohio	Under the Ohio Constitution, the Supreme Court has the power to make rules of civil procedure. OHIO CONST. art. IV, § 5(B). The Ohio Supreme Court established the Commission on the Rules of Practice and Procedure. Ohio R. Prac. & P. Commission § 1 et seq. The Supreme Court appoints the members. *Id.* § 3. However, the rule also provides: "(A) Ten members shall be members of the following organizations or committees and shall be nominated for appointment by: (1) the Chair of the Civil Law and Procedure Committee of the Ohio Judicial Conference; (2) the Chair of the Criminal Law and Procedure Committee of the Ohio Judicial Conference; (3) the President of the Ohio Courts of Appeals Judges Association; (4) the President of the Ohio Common Pleas Judges Association; (5) the President of the Ohio Association of Probate Judges; (6) the President of the Ohio Association of Domestic Relations Judges; (7) the President of the Ohio Association of Juvenile Court Judges; (8) the President of the Association of Municipal/County Court Judges of Ohio; (9) the President of the Ohio Association of Magistrates; (10) the Chair of the Judicial Administration and Legal Reform Committee of the Ohio State Bar Association. (B) Nine members shall be appointed by the Supreme Court as follows: (1) Five attorneys admitted to and engaged in the practice of law in Ohio; (2) Two attorneys who are members of law faculty and are engaged in full-time legal education in Ohio law schools; (3) One attorney admitted to the practice of law in Ohio who is employed full-time as a prosecuting attorney, city prosecutor, or city law director; (4) One attorney admitted to the practice of law in Ohio whose practice includes the representation of persons charged with criminal offenses." *Id.*	OHIO CONST. art. IV, § 5(B); Ohio R. Prac. & P. Commission § 1 et seq.	Supreme Court

State	Mechanism description	Citations	Committee appointments
Oregon	Under Oregon statute, the Council on Court Procedures has the power to make rules of civil procedure. OR. REV. STAT. § 1.735 (2018). The legislature may amend, repeal, or supplement rules by statute. *Id.* According to the statute, the Council shall be comprised of "(a) One judge of the Supreme Court, chosen by the Supreme Court. (b) One judge of the Court of Appeals, chosen by the Court of Appeals. (c) Eight judges of the circuit court, chosen by the Executive Committee of the Circuit Judges Association. (d) Twelve members of the Oregon State Bar, appointed by the Board of Governors of the Oregon State Bar . . . . (e) One public member, chosen by the Supreme Court." OR. REV. STAT. § 1.730 (2018).	OR. REV. STAT. § 1.725 et seq. (2018)	Mix. Note: This committee has power to make rules.
Pennsylvania	Under the Pennsylvania Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* PA. CONST. art. 5, § 10; *see also* 42 PA. CONS. STAT. § 1722 (2018). The Supreme Court appoints the Civil Procedural Rules Committee. PA. R. CIV. P. pmbl.	PA. CONST. art. 5, § 10; 42 PA. CONS. STAT. § 1722 (2018); PA. R. CIV. P. pmbl.	Supreme Court
Rhode Island	Under Rhode Island statute, the Superior Court, by a majority of its members, may make rules of civil procedure, subject to approval of the Supreme Court. R.I. GEN. LAWS § 8-6-2(a) (2018).	R.I. GEN. LAWS § 8-6-2(a) (2018)	No committee

State	Mechanism description	Citations	Committee appointments
South Carolina	Under the South Carolina Constitution, the Supreme Court has the power to make rules of civil procedure. S.C. CONST. art. V, § 4. The constitutional authority is "subject to the statutory law." *Id.* By statute, rules or amendments "become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting." S.C. CODE ANN. § 14-3-950 (1976). A court rule provides that the Supreme Court appoints the Rule Advisory Committee consisting of "(1) a circuit court judge who shall serve as the chair of the Committee; (2) a circuit court judge or a master-in-equity; (3) a family court judge; (4) a probate judge; (5) a magistrate or municipal court judge; (6) four regular members of the South Carolina Bar; and, (7) a non-voting reporter." S.C. APP. CT. R. 609.	S.C. CONST. art. V, § 4; S.C. CODE ANN. § 14-3-950 (1976); S.C. APP. CT. R. 609	Supreme Court
South Dakota	Under the South Dakota Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* S.D. CONST. art. V, § 12; *see also* S.D. CODIFIED LAWS § 16-3-2 (2018).	S.D. CONST. art. V, § 12; S.D. CODIFIED LAWS § 16-3-2 (2018)	No committee
Tennessee	Under Tennessee statute, the Supreme Court has the power to make rules of civil procedure, but such rules only become effective with approval of the legislature. TENN. CODE ANN. § 16-3-401 et seq. (2018). By statute, the Supreme Court appoints the Advisory Commission on the Rules of Practice and Procedure. TENN. CODE ANN. § 16-3-601 (2018).	TENN. CODE ANN. § 16-3-401 et seq. (2018) & § 16-3-601 (2018)	Supreme Court

State	Mechanism description	Citations	Committee appointments
Texas	Under the Texas Constitution and statute, the Supreme Court has the power to make rules of civil procedure. TEX. CONST. art. V, § 31; TEX. GOV'T CODE ANN. § 22.004 (West 2018). According to the statute, "rules and amendments to rules remain in effect unless and until disapproved by the legislature." TEX. GOV'T CODE ANN. § 22.004(b) (West 2018). The Supreme Court appoints the Supreme Court Advisory Committee. *See* Supreme Court Advisory Committee, Order, Misc. Docket No. 15-9119 (Tex. July 6, 2015) (on file with author); *see also* TEXAS JUDICIAL BRANCH, SUPREME COURT ADVISORY COMMITTEE, http://www.txcourts.gov/scac [https://perma.cc/Y4T4-Y79D].	TEX. CONST. art. V, § 31; TEX GOV'T CODE ANN. § 22.004 (West 2018)	Supreme Court
Utah	Under the Utah Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* UTAH CONST. art. VIII, § 4; *see also* UTAH CODE ANN. § 78A-3-103 (West 2018). According to the statute, the legislature may amend rules by two-thirds vote. UTAH CODE ANN. § 78A-3-103 (West 2018). The Supreme Court established the Advisory Committee on the Rules of Civil Procedure. *See* Utah S. Ct. R. Prof. Prac. R. 11-101 et seq; *see also* UTAH COURTS, GOVERNING BOARDS AND COMMITTEES, https://www.utcourts.gov/committees/index.asp?comm=14 [https://perma.cc/428B-QGNM].	UTAH CONST. art. VIII, § 4; UTAH CODE ANN. § 78A-3-103 (West 2018); Utah S. Ct. R. Prof. Prac. R. 11-101 et seq.	Supreme Court

State	Mechanism description	Citations	Committee appointments
Vermont	Under the Vermont Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* VT. CONST. ch. II, § 37; *see also* VT. STAT. ANN. tit. 12, § 1 (2018). The Constitution reserves the power of the legislature to revise the rules. VT. CONST. ch. II, § 37. The statute explains the process by which the legislature can delay, repeal, revise, or modify any rule. VT. STAT. ANN., tit. 12, § 1 (2018). The Supreme Court appoints members of the Advisory Committee on the Rules of Civil Procedure, consisting of "two Superior and/or District Court Judges, one superior court clerk, the chair of the Vermont Bar Association corresponding standing committee (to the extent that one exists), and seven other members to be appointed by the Supreme Court." Advisory Committee on the Rules of Civil Procedure, Admin. Order 17 (Vt. June 5, 1979) (on file with author).	VT. CONST. ch. II, § 37; VT. STAT. ANN., tit. 12, § 1; Advisory Committee on the Rules of Civil Procedure, Admin. Order 17 (Vt. June 5, 1979)	Supreme Court

State	Mechanism description	Citations	Committee appointments
Virginia	Under the Virginia Constitution and statute, the Supreme Court has the power to make rules of civil procedure. *See* VA. CONST. art. VI, § 5; *see also* VA. CODE ANN. § 8.01-3 (2018). By statute, Virginia has a Judicial Council with responsibility, among others, to review the Rules of Civil Procedure. VA. CODE ANN. § 17.1-700 et seq. (2018). The Judicial Council is composed of "the Chief Justice of the Supreme Court, one judge of the Court of Appeals, six circuit court judges, one general district court judge, one juvenile and domestic relations district court judge, two attorneys qualified to practice in the Supreme Court, and the Chairmen of the Committees for Courts of Justice of the Senate and the House of Delegates or their designees who shall be members of the Courts of Justice committees." VA. CODE. ANN. § 17.1-700 (2018). The Chief Justice is responsible for appointing members of the Judicial Council other than the members of the legislature. *Id.* In 1974, the Judicial Council established an Advisory Committee on the Rules of Court. The Chief Justice selects members of the Advisory Committee. Email from Kristi S. Wright, Office of the Executive Secretary, Supreme Court of Virginia (July 20, 2017) (on file with author).	VA. CONST. art. VI, § 5; VA. CODE ANN. § 8.01-3 (2018); VA. CODE ANN. § 17.1-700 et seq. (2018)	Chief Justice
Washington	Under Washington statute, the Supreme Court has the power to make rules of civil procedure. WASH. REV. CODE § 2.04.190 (2018). The rulemaking process is further detailed by court rule. *See* WASH. GEN. R. 9*; see also* Thomas Main, *Civil Rulemaking in Nevada: Contemplating a New Advisory Committee*, 14 NEV. L.J. 852 (2014).	WASH. REV. CODE § 2.04.190 (2018); WASH. GEN. R. 9	No committee
West Virginia	Under the West Virginia Constitution, the Supreme Court of Appeals has the power to make rules of civil procedure. W. VA. CONST. art. VIII, § 3.	W. VA. CONST. art. VIII, § 3	No committee

State	Mechanism description	Citations	Committee appointments
Wisconsin	Under Wisconsin statute, the Supreme Court has the power to make rules of civil procedure. WIS. STAT. § 751.12 (2018). The statute expressly provides that this power does not abridge the right of the legislature to enact, modify or repeal rules. *Id.* The statute also establishes a judicial council. *Id.* A separate statute defines council membership as: "1. One supreme court justice designated by the supreme court. 2. One court of appeals judge designated by the court of appeals. 3. The director of state courts or his or her designee. 4. Four circuit judges designated by the judicial conference. 5. The chairpersons of the senate and the assembly committees dealing with judicial affairs or a member of each such committee designated by the respective chairperson. 6. The attorney general or his or her designee. 7. The chief of the legislative reference bureau or his or her designee. 8. The deans of the law schools of the University of Wisconsin and Marquette University or a member of the respective law school faculties designated by the deans. 9. The state public defender or his or her designee. 10. The president-elect of the State Bar of Wisconsin or a member of the board of governors of the state bar designated by the president-elect. 11. Three additional members of the state bar selected by the state bar to serve 3-year terms. 12. One district attorney appointed by the governor. 13. Two citizens at large appointed by the governor to serve 3-year terms." WIS. STAT. § 758.13 (2018). Under the statute, the council may create committees. *Id.* The council has appointed the Evidence and Civil Procedure Committee. *See* WISCONSIN JUDICIAL COUNCIL, JUDICIAL COUNCIL COMMITTEES, https://www.wicourts.gov/courts/committees/judicialcouncil/committees.htm [https://perma.cc/JZN4-PUEZ].	WIS. STAT. §§ 751.12, 758.13 (2018)	Mix

State	Mechanism description	Citations	Committee appointments
Wyoming	Under Wyoming statute, the Supreme Court has the power to make rules of civil procedure. WYO. STAT. ANN. § 5-2-114 (2018). The Supreme Court appoints the Permanent Rules Advisory Committee. *See, e.g.*, Order Appointing Member to the Permanent Rules Advisory Committee (Wyo. Mar. 14, 2017) (on file with author); *see also, e.g.*, WYOMING STATE BAR, PERMANENT RULES ADVISORY - CIVIL, http://www.wyomingbar.org/about-us/boards-committees/?show=26 [https://perma.cc/6WL5-ZGHN].	WYO. STAT. ANN. § 5-2-114 (2018)	Supreme Court

APPENDIX TABLE B: STATE RULEMAKING ACCESS[265]

State	Advisory committee meetings	Proposed rule changes
Alabama	Meetings are not open to the public. Email from Doy Leale McCall, III, Office of the Clerk, Alabama Supreme Court, to author (Dec. 13, 2017) (on file with author).	No public comment. Email from Doy Leale McCall, III Office of the Clerk, Alabama Supreme Court, to author (Dec. 13, 2017) (on file with author).
Alaska	Meetings are not open to the public. Email from Laura C. Bottger, Court Rules Attorney, to author (Dec. 13, 2017) (on file with author).	*See* Alaska Court System, Court Rules, http://www.courts.alaska.gov/rules/index.htm#comments [https://perma.cc/7EWW-79FE]. Additional committee materials available upon request. *See* ALASKA R. CT., ADMIN. R. 44(f), available at http://www.courtrecords.alaska.gov/webdocs/rules/docs/adm.pdf [https://perma.cc/A5AK-VR27].
Arizona	*See* STATE OF ARIZONA BAR, CIVIL PRACTICE AND PROCEDURE NOTICES, http://www.azbar.org/sections-committees-panels-workinggroups/committees-panels-andworkinggroups/civilpracticeandprocedure/civilpracticeandprocedurenotices [https://perma.cc/96GE-FS7L].	*See* STATE OF ARIZONA BAR, CIVIL PRACTICE AND PROCEDURE NOTICES, http://www.azbar.org/sections-committees-panels-workinggroups/committees-panels-andworkinggroups/civilpracticeandprocedure/civilpracticeandprocedurenotices [https://perma.cc/96GE-FS7L].
Arkansas	Meetings are open to the public but there is no centralized location for meeting notices. Email from Larry Brady, Arkansas Administrative Office of the Courts, to author (Dec. 14, 2017) (on file with author). Interested parties can contact the Chair of the Committee. *Id.*	*See* ARKANSAS JUDICIARY, PROPOSED RULE CHANGES, https://courts.arkansas.gov/proposed-rule-changes [https://perma.cc/6TSJ-M5ZA].

265 As described in the main text, this table catalogs the states' approaches to two issues of transparency: whether the advisory committee meetings are open to the public and whether proposed rules or rule amendments are posted for public scrutiny.

State	Advisory committee meetings	Proposed rule changes
Colorado	*See* COLORADO JUDICIAL BRANCH, CIVIL RULES COMMITTEE, https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=5 [https://perma.cc/5EYG-XG5C].	*See* COLORADO JUDICIAL BRANCH, CIVIL RULES COMMITTEE, https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=5 [https://perma.cc/5EYG-XG5C]
Delaware	Meetings of the Delaware Superior Court's Civil Rules Advisory Committee are not open to the public. Email from I. Barry Guerke, Esquire, Parkowski, Guerke & Swayze, P.A., to author (Dec. 21, 2017) (on file with author). Meetings of the Delaware Supreme Court Rules Committee are not open to the public. Email from David J. Margules to author (Dec. 27, 2017) (on file with author).	No public comment for rules proposed by the Delaware Superior Courts Civil Rules Advisory Committee. Email from I. Barry Guerke, Esquire, Parkowski, Guerke & Swayze, P.A., to author (Dec. 21, 2017) (on file with author). Rules proposed by the Delaware Supreme Court Rules Committee are not generally published for public comment. Email from David J. Margules to author (Dec. 27, 2017) (on file with author).
Florida	*See* THE FLORIDA BAR, COMMITTEE DOCUMENTS, CIVIL PROCEDURE RULES, https://www.floridabar.org/about/cmtes/docs/?durl=/cmdocs/cm210.nsf/wdocs [https://perma.cc/FHX6-SJ4U].	*See* THE FLORIDA BAR, FLORIDA RULES OF CIVIL PROCEDURE, https://www.floridabar.org/rules/ctproc [https://perma.cc/573T-R7R8]; *see also* FL. R. JUD. ADMIN. 2.140(b).
Hawaii	Meetings are not open to the public. Email from Jaye Atiburcio, Judicial Assistant to Chief Justice Mark E. Recktenwald, to author (Dec. 18, 2017) (on file with author).	*See* HAWAI'I STATE JUDICIARY, PROPOSED RULE CHANGES, http://www.courts.state.hi.us/legal_references/rules/proposed_rule_changes/proposedRuleChanges [https://perma.cc/M27T-E3VD]; *see also* HAWAI'I STATE JUDICIARY, HAWAI'I RULES OF COURT, http://www.courts.state.hi.us/legal_references/rules/rulesOfCourt [https://perma.cc/GLK8-E5X8].
Idaho	Meetings are not typically open to the public, but the chair has discretion to allow non-members to attend. Email from Cathy Derden, Staff Attorney, to author (Dec. 14, 2017) (on file with author).	*See* STATE OF IDAHO JUDICIAL BRANCH, SUPREME COURT, IDAHO COURT RULES & AMENDMENTS AVAILABLE FOR PUBLIC COMMENT, https://isc.idaho.gov/main/rules-for-public-comment [https://perma.cc/RT82-ZB3T].
Indiana	Not open to the public. Email from Thomas M. Carusillo, Senior Counsel, Indiana Supreme Court, Office of Judicial Administration, to author (Dec. 13, 2017) (on file with author).	*See* INDIANA JUDICIAL BRANCH, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, http://www.in.gov/judiciary/iocs/3140.htm [https://perma.cc/6YU6-SXB2].

State	Advisory committee meetings	Proposed rule changes
Iowa	Not routinely open to the public. Email from Patrick B. Bauer, to author (Dec. 13, 2017) (on file with author).	*See* IOWA JUDICIAL BRANCH, ORDERS, https://www.iowacourts.gov/iowa-courts/supreme-court/orders [https://perma.cc/S6QG-KMW8].
Kentucky	Meetings are open to the public. *See* Email from Susan Clary to author (Mar. 26, 2018) (on file with author). The Clerk of the Supreme Court declined to provide the names of committee members. *See* Email from Susan Clary to author (April 9, 2018) (on file with author).	The public is permitted to comment at an open session of the Annual Convention of the Kentucky Bar Association. *See* Email from Susan Clary to author (Mar. 26, 2018) (on file with author).
Maine	Meetings are open to the public but there is no centralized location for meeting notices. Email from David L. Herzer to author (Dec. 20, 2017) (on file with author).	*See* STATE OF MAINE JUDICIAL BRANCH, COURT RULES, http://www.courts.maine.gov/rules_adminorders/rules/index.shtml [https://perma.cc/DBM8-J2BH]; *see also* Me. R. Rulemaking P. Op. 4.
Maryland	*See* MARYLAND COURTS, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, SCHEDULE OF MEETINGS, https://mdcourts.gov/rules/meetings [https://perma.cc/X9VN-ZMQ6]	*See* MARYLAND COURTS, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PROPOSED RULE CHANGES AND RECENT RULES ORDERS, http://mdcourts.gov/rules/ruleschanges.html [https://perma.cc/VHH7-FRB4].
Mass.	Not open to the public. Email from Christine Burak, Legal Counsel to the Chief Justice, to author (Dec. 13, 2017) (on file with author).	*See* MASSACHUSETTS COURT SYSTEM, RULE CHANGES AND INVITATIONS TO COMMENT ON PROPOSED RULES AND AMENDMENTS, http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment [https://perma.cc/Z96R-CAZB].
Michigan	No advisory committee. *See* Appendix Table A, *supra*.	*See* MICHIGAN COURTS, PROPOSED RULES, RULE AMENDMENTS, ADMINISTRATIVE ORDERS, AND APPOINTMENTS, http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx [https://perma.cc/EV4F-22DQ]; *see also* MICH. CT. R. 1.201.
Minnesota	Meetings are open to the public but there is no centralized location for meeting notices. Interested parties may request to be placed on the "notice list" for future meeting. Email from David Herr, Reporter, to author (Dec. 13, 2017) (on file with author).	MINNESOTA JUDICIAL BRANCH, PUBLIC NOTICES, http://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements.aspx?t=notice [https://perma.cc/UF2B-URQB]; *see also* MINN. STAT. § 480.054 (2018).

State	Advisory committee meetings	Proposed rule changes
Mississippi	Meetings are not open to the public. Email from Hubbard T. Saunders, IV, Court Administrator and Counsel, Supreme Court of Mississippi, to author (Dec. 14, 2017) (on file with author).	*See* STATE OF MISSISSIPPI JUDICIARY, RULES FOR COMMENT, https://courts.ms.gov/research/rules/rulesforcomment/rulesforcomment.php [https://perma.cc/7MLK-Z9M3].
Missouri	Meetings are open to the public but there is no centralized location for meeting notices. Email from Jeremiah J. Morgan, General Counsel, Supreme Court of Missouri, to author (Dec. 13, 2017) (on file with author).	No public comment. Adopted rules do not go into effect for six months and adopted-but-not-effective rules are posted on the court's website. *See* Email from Jeremiah J. Morgan, General Counsel, Supreme Court of Missouri, to author (Dec. 18, 2017) (on file with author).
Montana	Meetings are open to the public but there is no centralized location for meeting notices. Email from Jim Goetz to author (Dec. 20, 2017) (on file with author).	*See* MONTANA JUDICIAL BRANCH, MONTANA SUPREME COURT RULES, http://courts.mt.gov/courts/rules/supreme [https://perma.cc/W6PY-NNUB].
Nebraska	The committee does not advertise its meetings. The committee has not considered whether to allow the public to attend; it would consider this issue on a case-by-case basis. *See* Email from John Lenich to author (Dec. 15, 2017) (on file with author).	*See* STATE OF NEBRASKA JUDICIAL BRANCH, RULE AMENDMENTS, https://supremecourt.nebraska.gov/supreme-court-rules/rule-amendments [https://perma.cc/XZP3-7EZU].
Nevada	*See* NEVADA RULES OF CIVIL PROCEDURE COMMITTEE OVERVIEW, https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Overview [https://perma.cc/P59R-QV8N].	*See* SUPREME COURT OF NEVADA, PROPOSED RULE AMENDMENTS FOR ALL NEVADA COURTS, https://nvcourts.gov/Supreme/Rules/Proposed_Rule_Amendments_for_all_Nevada_Courts [https://perma.cc/3KLQ-4P3U].
New Hampshire	*See* NEW HAMPSHIRE JUDICIAL BRANCH, COMMITTEES - ADVISORY COMMITTEE ON RULES, https://www.courts.state.nh.us/committees/adviscommrules [https://perma.cc/8NQX-PCJV].	*See* NEW HAMPSHIRE JUDICIAL BRANCH, SUPREME COURT - ORDERS, https://www.courts.state.nh.us/supreme/orders/index.htm [https://perma.cc/F47E-YHLH].
New Jersey	Meetings are not open to the public. Email from Taironda E. Phoenix, Chief, Civil Court Programs, to author (Dec. 14, 2017) (on file with author).	*See* NEW JERSEY COURTS, SUPREME COURT COMMITTEE REPORTS, https://www.judiciary.state.nj.us/courts/supreme/reports.html [https://perma.cc/6U2Q-Q7KQ].

State	Advisory committee meetings	Proposed rule changes
New Mexico	Meetings are open to the public but there is no centralized location for meeting notices. Telephone Interview with Terri Saxon, New Mexico Supreme Court (Jan. 3, 2018).	*See* NEW MEXICO COURTS, SUPREME COURT, OPEN FOR COMMENTS, https://supremecourt.nmcourts.gov/open-for-comment.aspx [https://perma.cc/MQ6K-4DQA].
North Dakota	*See* NORTH DAKOTA SUPREME COURT COMMITTEES, SCHEDULE OF MEETINGS & EVENTS, http://www.ndcourts.gov/court/committees/schedule.htm [https://perma.cc/272W-K32F].	*See* NORTH DAKOTA SUPREME COURT COMMITTEES, JOINT PROCEDURE COMMITTEE, https://www.ndcourts.gov/court/JP/committee.asp [https://perma.cc/3D9C-QMJF].
Ohio	*See* THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, COMMISSION ON THE RULES OF PRACTICE AND PROCEDURE, https://www.supremecourt.ohio.gov/Boards/practiceprocedure/default.asp [https://perma.cc/3SR3-7HG7].	*See* THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, PROPOSED RULE AMENDMENTS, http://www.supremecourt.ohio.gov/RuleAmendments/ [https://perma.cc/TMV8-B9Q3].
Oregon	*See* OREGON COUNCIL ON COURT PROCEDURES, http://www.counciloncourtprocedures.org [https://perma.cc/R3NU-5G5Y].	*See* OREGON COUNCIL ON COURT PROCEDURES, http://www.counciloncourtprocedures.org [https://perma.cc/R3NU-5G5Y].
Pennsylvania	Meetings are not open to the public. *See* Email from Daniel A. Durst, Chief Counsel, Rules Committees, to author (Dec. 14, 2017) (on file with author).	*See* THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, CIVIL PROCEDURAL RULES COMMITTEE, http://www.pacourts.us/courts/supreme-court/committees/rules-committees/civil-procedural-rules-committee [https://perma.cc/D3QD-Q52L].
Rhode Island	No advisory committee. *See* Appendix Table A, *supra*.	*See* RHODE ISLAND JUDICIARY, SUPREME COURT, MISCELLANEOUS ORDERS, https://www.courts.ri.gov/Courts/SupremeCourt/Pages/Miscellaneous%20Orders%20Main.aspx [https://perma.cc/HT63-ZUBZ].
South Carolina	Meetings are not open to the public. *See* Email from H. Mills Gallivan, Senior Shareholder, to author (Dec. 19, 2017) (on file with author).	*See* SOUTH CAROLINA JUDICIAL DEPARTMENT, COURT NEWS, http://www.sccourts.org/whatsnew [https://perma.cc/BF3Q-LVAH].
South Dakota	No advisory committee. *See* Appendix Table A, *supra*.	*See* SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM, RULES HEARINGS, http://ujs.sd.gov/Supreme_Court/ruleshearing.aspx [https://perma.cc/AX58-ZSRG].

State	Advisory committee meetings	Proposed rule changes
Tennessee	*See* TENNESSEE STATE COURTS, CALENDAR, https://www.tncourts.gov/calendar [https://perma.cc/AC9S-JM48].	*See* TENNESSEE STATE COURTS, PROPOSED RULES AND AMENDMENTS, https://www.tncourts.gov/rules/proposed [https://perma.cc/EG7M-6BBB].
Texas	*See* TEXAS JUDICIAL BRANCH, SUPREME COURT ADVISORY COMMITTEE, MEETINGS, http://www.txcourts.gov/scac/meetings [https://perma.cc/F8JP-L7Z3]. For additional documents, see SCAC WEBSITE, http://jwclientservices.jw.com/sites/scac/default.aspx [https://perma.cc/B646-6JXP].	*See* SCAC WEBSITE, http://jwclientservices.jw.com/sites/scac/default.aspx [https://perma.cc/B646-6JXP]; *see also* TEXAS JUDICIAL BRANCH, SUPREME COURT ADVISORY COMMITTEE, http://www.txcourts.gov/scac [https://perma.cc/F8JP-L7Z3].
Utah	*See* UTAH COURTS, CIVIL PROCEDURES COMMITTEE, https://www.utcourts.gov/utc/civproc/committee-meeting-schedule [https://perma.cc/6S65-RQAM].	*See* UTAH COURT RULES - PUBLISHED FOR COMMENT, https://www.utcourts.gov/utc/rules-comment [https://perma.cc/C9M6-ZFAQ].
Vermont	*See* VERMONT JUDICIARY, NEWS ROOM, https://www.vermontjudiciary.org/news [https://perma.cc/GE5Z-BQG8]. Meetings are open to the public though public participation is not permitted. Email from Allan R. Keyes, Chair, Advisory Committee on Rules of Civil Procedure, to author (Dec. 14, 2017) (on file with author).	*See* VERMONT JUDICIARY, PROPOSED AND PROMULGATED RULES, https://www.vermontjudiciary.org/attorneys/rules [https://perma.cc/T3KJ-FCGR].
Virginia	Meetings are not open to the public. *See* Email from Kristi S. Wright, Director of Legislative and Public Relations, Office of the Executive Secretary, Supreme Court of Virginia, to author (Dec. 18, 2017) (on file with author).	*See* VIRGINIA'S JUDICIAL SYSTEM, RULES OF THE SUPREME COURT OF VIRGINIA, http://www.courts.state.va.us/courts/scv/rules.html [https://perma.cc/38EA-PB8N].
Washington	No advisory committee. *See* Appendix Table A, *supra*.	*See* WASHINGTON COURTS, PROPOSED RULES OF COURT - PUBLISHED FOR COMMENT ONLY, https://www.courts.wa.gov/court_rules/?fa=court_rules.proposed [https://perma.cc/L868-63EW].
West Virginia	No advisory committee. *See* Appendix Table A, *supra*.	*See* WEST VIRGINIA JUDICIARY, REQUESTS FOR PUBLIC COMMENT, http://www.courtswv.gov/legal-community/requests-for-comment.html [https://perma.cc/X9BR-VCRM].

State	Advisory committee meetings	Proposed rule changes
Wisconsin	*See* WISCONSIN JUDICIAL COUNCIL, SCHEDULED MEETING DATES, https://www.wicourts.gov/courts/committees/judicialcouncil/meetingdates.htm [https://perma.cc/2D2E-EC73].	*See* WISCONSIN COURT SYSTEM, SUPREME COURT RULES, https://wicourts.gov/scrules/notices.htm [https://perma.cc/FYW4-54J4].
Wyoming	Meetings are open to the public but there is no centralized location for meeting notices. Interested parties may ask to attend. Email from Justice Kate M. Fox, Wyoming Supreme Court, to author (Dec. 14, 2017) (on file with author).	Rules are not typically posted for comment. Email from Justice Kate M. Fox, Wyoming Supreme Court, to author (Dec. 14, 2017) (on file with author).

APPENDIX TABLE C: STATE PLEADING[266]

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Alabama	ALA. R. CIV. P. 8(a), (e), (f)	Notice	Gilley v. S. Research Inst., 176 So.3d 1214, 1220 (Ala. 2015)	The adoption of a rules-based system introduced notice pleading to Alabama. *See* ALA. R. CIV. P. 8 cmt.	Change to notice	Rules	Rejected	Thomas v. Williams, 21 So.3d 1234, 1236 n.1 (Ala. Civ. App. 2008)
Alaska	ALASKA R. CIV. P. 8(a), (e), (f)	Notice	Foondle v. O'Brien, 346 P.3d 970, 973 (Alaska 2015)	Alaska adopted a rule-based system including notice pleading shortly after becoming a state. *See* Oakley & Coon; Wright.	Change to notice	Rules	n/a	n/a
Arizona	ARIZ. R. CIV. P. 8(a), (d), (e)	Notice	Coleman v. City of Mesa, 284 P.3d 863, 867 (Ariz. 2012) (en banc)	The adoption of a rules-based system introduced notice pleading to Arizona. *See* Oakley & Coon; Wright.	Change to notice	Rules	Rejected	Cullen v. Auto-Owners Ins. Co., 189 P.3d 344 (Ariz. 2008) (en banc)

266 As described in the main text, this table attempts to catalog the states' approaches to pleading. This table reflects original research and frequent citations to John B. Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) and Charles Alan Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959). The left-hand columns describe current law. The "Effect of Rules" column explains what consequence, if any, resulted from the state's original adoption of a rule-based procedural system. The "Mechanism for notice" column explains the mechanism by which the state adopted notice pleading at any time. The final two columns address the states' reactions to plausibility, if any. For further discussion of plausibility in the states, see Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411 (2018).

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Arkansas	ARK. CIV. P. 8(a)(2)	Fact	Duit Constr. Co. v. Ark. State Claims Comm'n, 476 S.W.3d 791, 794–95 (Ark. 2015)	The Arkansas Supreme Court adopted rules that consciously kept the fact-pleading regime from the prior code system.	Kept fact	n/a	n/a	n/a
California	CAL. CIV. P. CODE § 425.10(a)	Fact	Lee v. Hanley, 354 P.3d 334, 337 (Cal. 2015)	California has been a fact pleading state by statute since at least 1851. *See* Wright.	n/a	n/a	n/a	n/a
Colorado	COLO. R. CIV. P. 8(a), (e), (f)	Plausibility	Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016) (en banc)	Colorado seemed to allow notice pleading under its code-based procedure system and adoption of rules reaffirmed notice pleading.	Kept notice	Old code	Adopted	Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016) (en banc)
Conn.	CONN GEN. STAT. § 52-91 (2018)	Fact	White v. Mazda Motor of America, Inc., 99 A.3d 1079, 1091 (Conn. 2014)	Connecticut has been a fact pleading state by statute since at least 1879. *See* Wright.	n/a	n/a	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Delaware	DEL. SUPER. CT. R. CIV. P. 8(a), (e), (f)	Unclear	n/a	The Delaware pleading regime is not exactly fact or notice. The major change toward notice was effected by the adoption of rules-based procedure. *See* Daniel L. Herrmann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327 (1956); Wright.	Change toward notice	Rules (law today is unclear)	Rejected	Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 537 (Del. 2011)
Florida	FLA. R. CIV. P. 1.110(b)	Fact	Berrios v. Deuk Spine, 76 So.3d 967, 970 n.1 (Fla. Dist. Ct. App. 2011)	The fact pleading standard is derived from the Florida rules. *See* Wright.	Kept fact	n/a	n/a	n/a
Georgia	GA. CODE ANN. § 9-11-8(a), (e), (f) (2018)	Notice	Austin v. Clark, 755 S.E.2d 796, 800 (Ga. 2014) (Nahmias, J., concurring)	Adoption of Civil Procedure Act moved Georgia to notice pleading. *See* Oakley & Coon (collecting sources).	n/a	Legislative change	Rejected	Bush v. Bank of N.Y. Mellon, 720 S.E.2d 370, 375 n.13 (Ga. 2011)
Hawaii	HAW. SUPER. CT. CIV. R. 8(a), (e), (f)	Notice	Kealoha v. Machado, 315 P.3d 213, 216 (Haw. 2013)	Since statehood, Hawaii's rules have adopted notice pleading. *See* Oakley & Coon.	Notice	Rules	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Idaho	IDAHO R. CIV. P. 8(a), (d), (e)	Notice	Colafranceschi v. Briley, 355 P.3d 1261, 1264 (Idaho 2015)	Although somewhat complicated, it appears that Idaho's adoption of rules combined with legislative repeal of code provisions introduced notice pleading into Idaho. *See* Oakley & Coon (collecting rules and statutes).	Change to notice	Rules (plus legislative repeal)	n/a	n/a
Illinois	735 ILCS 5/2-601 et seq.	Fact	Hadley v. Doe, 34 N.E.3d 549, 556 (Ill. 2015)	Illinois courts have consistently interpreted its statute to require fact pleading.	n/a	n/a	n/a	n/a
Indiana	IND. TRIAL P. R. 8(A), (E), (F)	Notice	Schmidt v. Indiana Ins. Co., 45 N.E.3d 781, 786 (Ind. 2015)	The adoption of a rules-based system introduced notice pleading to Indiana. *See* Oakley & Coon (collecting sources).	Change to notice	Rules	n/a	n/a
Iowa	IOWA CT. R. 1.402	Notice	Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 609 (Iowa 2012)	Iowa's original rules kept fact pleading, but rule amendment introduced notice pleading. *See* IOWA CT. R. 1.402 cmt. *See also* Oakley & Coon.	Kept fact	Rule amendment	Rejected	Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Kansas	KAN. STAT. ANN. 60-208(a), (d), (e) (2018)	Notice	Berry v. Nat'l Med. Servs., Inc., 257 P.3d 287, 288 (Kan. 2011)	Legislative action updating code introduced notice pleading. *See* KAN. STAT. ANN. 60-208 (2018).	n/a	Legislative change	Rejected	Smith v. State, 272 P.3d 1287 (Table), 2012 WL 1072756 at *6 (Kan. Ct. App. 2012)
Kentucky	KY. R. CIV. P. 8.01(1)	Notice	Pete v. Anderson, 413 S.W.3d 291, 301 (Ky. 2013)	The adoption of a rules-based system introduced notice pleading to Kentucky. *See* Shreve v. Taylor Cty. Pub. Library Bd., 419 S.W.2d 779, 782 (Ky. 1967).	Change to notice	Rules	n/a	n/a
Louisiana	LA. CODE CIV. PROC. ANN. art. 854	Fact	McCarthy v. Evolution Petroleum Corp., 180 So.3d 252, 257 (La. 2015)	Louisiana is a fact pleading jurisdiction by statute. *See* LA. CODE CIV. PROC. ANN. art. 854, cmt.	n/a	n/a	n/a	n/a
Maine	ME. R. CIV. P. 8(a), (e), (f)	Notice	Marshall v. Town of Dexter, 125 A.3d 1141, 1143 n.1 (Me. 2015)	The adoption of a rules-based system introduced notice pleading to Maine. *See* Wright (cited in Oakley & Coon).	Change to notice	Rules	n/a	n/a
Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 2-303(b) (2018)	Fact	Khalifa v. Shannon, 945 A.2d 1244, 1256–57 (Md. 2008)	The adoption of a rules-based system retained fact pleading. *See* Oakley & Coon (collecting sources).	Kept fact	n/a	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Mass.	MASS. R. CIV. P. 8(a), (e), (f)	Plausibility	Edwards v. Commonwealth, 76 N.E.3d 248, 254 (Mass. 2017)	The adoption of a rules-based system introduced notice pleading to Massachusetts. *See* MASS R. CIV. P. 8 Reporter's Notes.	Change to notice	Rules	Adopted	Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008)
Michigan	MICH. CT. RULE 2.111(A)	Notice	Yono v. Dept. of Transp., 858 N.W.2d 128, 135 (Mich. Ct. App. 2014)	Although there is some complexity in the history of Michigan procedure, it appears that the introduction of a rules-based system of procedure was an important step in the change to notice pleading, and subsequent rules continued this evolution. *See* MICH. GEN. CT. R. 111 (1963); Durant v. Stahlin, 130 N.W.2d 910, 911–13 (Mich. 1964) (discussing 1945 Court Rules); Oakley & Coon; Wright. Note that while the rules imply "fact pleading," they have been interpreted in line with notice-pleading concepts.	Change to notice	Rules	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Minnesota	MINN. R. CIV. P. 8.01	Notice	Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603–05 (Minn. 2014)	The adoption of a rules-based system introduced notice pleading to Minnesota. First Nat'l Bank of Henning v. Olson, 74 N.W.2d 123, 129 (Minn. 1955).	Change to notice	Rules	Rejected	Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014)
Miss.	MISS. R. CIV. P. 8(a), (e), (f)	Notice	Scafidi v. Hille, 180 So.3d 634, 650 (Miss. 2015)	The adoption of a rules-based system introduced notice pleading to Mississippi. *See* Oakley & Coon (collecting sources).	Change to notice	Rules	n/a	n/a
Missouri	MO. R. CIV. P. 55.05	Fact	Sides v. St. Anthony's Med. Ctr., 258 S.W.3d 811, 823 (Mo. 2009) (en banc)	The adoption of a rules-based system retained fact pleading. *See* Oakley & Coon (collecting sources).	Kept fact	n/a	n/a	n/a
Montana	MONT. R. CIV. P. 8(a), (d), (e)	Notice	Griffin v. Moseley, 234 P.3d 869, 877 (Mont. 2010)	The adoption of a rules-based system introduced notice pleading to Montana. *See* Oakley & Coon (collecting sources).	Change to notice	Rules	Rejected	Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 500 (Mont. 2012)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Nebraska	NEB. CT. R. PLDG. § 6-1108(a), (e)	Plausibility	Funk v. Lincoln-Lancaster Cty. Crime Stoppers, Inc., 885 N.W.2d 1, 13–14 (Neb. 2016)	The adoption of rules-based pleading introduced notice pleading to Nebraska. *See* NEB. REV. STAT. § 25-801.01; Legis. B. 876, 97th Leg., 2d Sess. (Neb. 2002). *See also* John P. Lenich, *Notice Pleading Comes to Nebraska: Part I – Pleading Claims for Relief*, NEB. LAW, Sept. 2002. A later judicial decision introduced plausibility.	Change to notice	Rules	Adopted	Doe v. Bd. of Regents of the Univ. of Neb., 788 N.W.2d 264, 278 (Neb. 2010)
Nevada	NEV. R. CIV. P. 8(a), (e), (f)	Notice	Nutton v. Sunset Station, Inc., 357 P.3d 966, 974 (Nev. 2015)	It appears that adoption of a rules-based system was important in moving to notice pleading. *See* Oakley & Coon; *see also* Schmidt v. Sadri, 601 P.2d 713 (Nev. 1979).	Change to notice	Rules	Rejected	Garcia v. Prudential Ins. Co. of America, 293 P.3d 869, 871 n.2 (Nev. 2013)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
New Hampshire	N.H. REV. STAT. ANN. § 515:3 (2018); N.H. SUPER. CT. CIV. R. 8(a).	Notice	City of Keene v. Cleaveland, 118 A.3d 253, 263 (N.H. 2015)	New Hampshire has a mix of code and rules-based procedure, and it appears that notice pleading predated the Federal Rules of Civil Procedure. *See* Oakley & Coon.	n/a	n/a	n/a	n/a
New Jersey	N.J. CIV. PRAC. R. 4:5-2	Notice	Major v. Maguire, 128 A.3d 675, 689–90 (N.J. 2016)	The New Jersey rule refers to the pleading of facts, and early cases characterized New Jersey as something other than notice pleading. *See, e.g.*, Grobart v. Society for Establishing Useful Mf'rs, 65 A.2d 833 (N.J. 1949); Kotok Bldg. v. Charvine Co., 443 A.2d 260 (N.J. Super. Ct. 1981). More recent decisions apply notice pleading, suggesting that judicial decisions are responsible for notice pleading--though there is no single decision announcing a change. *See, e.g.*, Mancini v. Teaneck, 846 A.2d 596 (N.J. 2004).	Kept fact	Seems like judicial decision (drift)	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
New Mexico	N.M. R. DIST. CT. 1-008(A), (E), (F)	Notice	Deutsche Bank Nat'l Trust Co. v. Johnston, 369 P.3d 1046, 1055 (N.M. 2016)	The adoption of a rules-based system introduced notice pleading to New Mexico. Zamora v. St. Vincent Hosp., 335 P.3d 1243, 1246 (N.M. 2014). *See also* Jerrold L. Walden, *The "New Rules" in New Mexico: Some Disenchantment in the Land of Enchantment*, 25 F.R.D. 107 (1960).	Change to notice	Rules	Rejected	Madrid v. Vill. of Chama, 283 P.3d 871, 876 (N.M. Ct. App. 2012)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
New York	N.Y. CIV. PRAC. L. & R. §§ 3013, -14, -26	Notice	Davis v. S. Nassau Cmties. Hosp., 46 N.E.3d 563, 572 (N.Y. 2015)	Although today New York courts characterize the state's pleading regime as "notice pleading," previous commentators suggested that the state was a fact pleading jurisdiction. *Compare* Davis v. S. Nassau Cmties. Hosp., 46 N.E.3d 563, 572 (N.Y. 2015) *with* Oakley & Coon. *See also* N.Y. CIV. PRAC. L. & R. § 3013 notes. This suggests that judicial decisions have moved New York to notice pleading—though there is no single decision announcing a change. Other sources, though, attribute the shift to the legislative adoption of the CPLR. *See* SIEGAL, N.Y. PRAC. §§ 207-08. *See also* Foley v. D'Agostino, 21 A.D.2d 60, 63 (N.Y. App. Div. 1964).	n/a	Legislative change	Rejected	Krause v. Lancer & Loader Gp., LLC, 965 N.Y.S.2d 312, 320 n.3 (N.Y. Sup. Ct. 2013)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
North Carolina	N.C. R. CIV. P. 8(a), (e), (f)	Notice	Fussell v. N.C. Farm Bureau Mut. Ins. Co., Inc., 695 S.E.2d 437, 441–42 (N.C. 2010)	The legislature introduced notice pleading when it adopted North Carolina's modern rules of civil procedure. *See* 1967 N.C. Sess. Laws 954; *see also* N.C. R. CIV. P. 8 comments; *see also* Sutton v. Duke, 176 S.E.2d 161, 164 (N.C. 1970); Oakley & Coon.	n/a	Legislative change	Rejected	Holleman v. Aiken, 668 S.E.2d 579, 584–85 (N.C. Ct. App. 2008)
North Dakota	N.D. R. CIV. P. 8(a), (d), (e)	Notice	McColl Farms, LLC v. Pflaum, 837 N.W.2d 359, 367 (N.D. 2013)	The adoption of a rules-based system introduced notice pleading to North Dakota. *See* Wright; *see also* Prod. Credit Ass'n v. Olson, 280 N.W.2d 920, 924 (N.D. 1979).	Change to notice	Rules	n/a	n/a
Ohio	OHIO CIV.. R. 8(A), (E), (F)	Notice	State v. State, 56 N.E.3d 913, 918 (Ohio 2016)	The adoption of a rules-based system introduced notice pleading to Ohio. *See* Willoughby Hills v. Cincinnati Ins. Co., 459 N.E.2d 555, 558 (Ohio 1984); *see also* Oakley & Coon.	Change to notice	Rules	Split	Split

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Oklahoma	OKLA. STAT. tit. 12, § 2008(A), (E), (F) (2018)	Notice	State v. McPherson, 232 P.3d 458, 464 (Okla. 2010)	The legislature introduced notice pleading when it adopted Oklahoma's modern rules of civil procedure. 1984 Okla. Sess. Laws 164, § 8; *see* Oakley & Coon.	n/a	Legislative change	Rejected	Edelen v. Bd. of Comm'rs of Bryan Cty., 266 P.3d 660, 663 (Okla. Ct. App. 2011)
Oregon	OR. R. CIV. P. 18	Fact	McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co., 193 P.3d 9, 17 (Or. 2008)	Oregon Supreme Court adopted rules that kept fact-pleading regime from prior code system. *See* Oakley & Coon.	Kept fact	n/a	n/a	n/a
Penn.	PA.. R. CIV. P. 1019	Fact	Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co., 625 Pa. 26, 46 (Pa. 2014)	Pennsylvania provides for fact pleading by rule. PA. R. CIV. P. 1019.	Kept fact	n/a	n/a	n/a
Rhode Island	R.I. SUPER. CT. R. CIV. P. 8(a), (e), (f)	Notice	Chhun v. Mortg. Elec. Registration Sys. Inc., 84 A.3d 419, 421–22 (R.I. 2014)	The adoption of a rules-based system introduced notice pleading to Rhode Island. *See* Oakley & Coon.	Change to notice	Rules	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
South Carolina	S.C. R. CIV. P. 8(a), (e), (f)	Fact	Charleston Cty. Sch. Dist. v. Harrell, 713 S.E.2d 604, 607 (S.C. 2011)	The South Carolina Supreme Court adopted rules that kept fact-pleading regime from prior code system. *See* S.C. R. CIV. P. 8 Reporter's Note; *see also* Oakley & Coon.	Kept fact	n/a	n/a	n/a
South Dakota	S.D. R. CIV. P. § 15-6-8 (also found at S.D. CODIFIED LAWS § 15-6-8 (2018))	Plausibility	Hernandez v. Avera Queen of Peace Hosp., 886 N.W.2d 338, 344–45 (S.D. 2016)	The adoption of a rules-based system introduced notice pleading to South Dakota. Sazama v. State, 729 N.W.2d 335, 340–41 (S.D. 2007).	Change to notice	Rules	Adopted	Sisney v. Best Inc., 754 N.W.2d 804, 809 (S.D. 2008)
Tennessee	TENN. R. CIV. P. 8.01	Notice	Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 427 (Tenn. 2011)	The adoption of a rules-based system introduced notice pleading to Tennessee. *See* Oakley & Coon.	Change to notice	Rules	Rejected	Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 425 (Tenn. 2011)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Texas	TEX. R. CIV. P. 47	Notice	Weizhong Zheng v. Vacation Network, Inc., 468 S.W.3d 180, 186 (Tex. Ct. App. 2015)	The Supreme Court introduced notice pleading when it adopted Texas's modern rules of civil procedure. *See* Reaves v. Corpus Christi, 518 S.W.3d 594 n.10 (Tex. Ct. App. 2017). *Cf.* Cochran v. Carruth, 12 S.W.2d 1078, 1082 (Tex. Ct. Civ. App. 1929) (characterizing Texas as fact pleading jurisdiction, prior to adoption of rules); *see also* Oakley & Coon.	Change to notice	Rules	Split	Split
Utah	UTAH R. CIV. P. 8(a), (f)	Notice	Am. W. Bank Members, L.C. v. State, 342 P.3d 224, 230 (Utah 2014)	The adoption of a rules-based system introduced notice pleading to Utah. *See* Williams v. State Farm Ins. Co., 656 P.2d 966, 970–72 (Utah 1982); *see also* Oakley & Coon.	Change to notice	Rules	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Vermont	VT. R. CIV. P. 8(a), (e), (f)	Notice	Mahoney v. Tara, LLC, 107 A.3d 887, 892 (Vt. 2014)	The adoption of a rules-based system introduced notice pleading to Vermont. *See* VT. R. CIV. P. 8 Reporter's Note. *Compare* Prive v. Vt. Asbestos Grp., 992 A.2d 1035, 1040 (Vt. 2010) *with* Wright v. Nasal, 271 A.2d 833, 834 (Vt. 1970)	Change to notice	Rules	Rejected	Colby v. Umbrella, 955 A.2d 1082, 1086 n.1 (Vt. 2008)
Virginia	VA. SUP. CT. R. 1:4(d)	Notice	Preferred Sys. Solutions, Inc. v. GP Consulting, LLC, 732 S.E.2d 676, 689 (Va. 2012)	Rule has aspects of both fact and notice pleading, though Virginia courts insist they apply notice pleading principles. Aspects of notice pleading predate the rules-based system. *See* Chisholm v. Gilmer, 299 U.S. 99, 103 (1936); *see also* Harrell v. Woodson, 353 S.E.2d 770, 772 (Va. 1987); Ian James Wilson & William Louis Payne, *The Specificity of Pleading in Modern Civil Practice: Addressing Common Misconceptions*, 25 U. RICH. L. REV. 135 (1990).	Not clear	n/a	n/a	n/a

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Wash.	WASH. SUPER. CT. CIV. R. 8(a), (e), (f)	Notice	McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 862–63 (Wash. 2010) (en banc)	The adoption of a rules-based system introduced notice pleading to Washington. *See* Robert Meisenholder, *Piecemeal Adoption of the Federal Rules of Civil Procedure in Washington*, 26 F.R.D. 123 (1960).	Change to notice	Rules	Rejected	McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 862–63 (Wash. 2010) (en banc)
West Virginia	W. VA. R. CIV. P. 8(a), (e), (f)	Notice	Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 188 (W. Va. 2010)	The adoption of a rules-based system introduced notice pleading to West Virginia. *See* Oakley & Coon; *see also* Wright.	Change to notice	Rules	Rejected	Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189 n.4 (W. Va. 2010)

State	Rule	Current standard	Current citation	Source of current standard	Effect of Rules	Mechanism for notice	Decision on plausibility	Plausibility citation
Wisconsin	WIS. STAT. § 802.02(1), (5), (6) (2018)	Plausibility	Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 699 (Wis. 2014)	The Wisconsin Supreme Court introduced notice pleading on top of existing mix of rules and statutes as part of an extensive revision of procedure (functionally the introduction of a new rules-based system). *See* Oakley & Coon; *see also* Wright; *see also* WIS. STAT. § 801.01 Judicial Council Committee's Note; WIS. STAT. § 802.02 Judicial Council Committee's Note. Note also that prior pleading standard appears to derive from legislative enactment of Field Code-like regime. *See* Gould v. Jackson, 42 N.W.2d 489, 490 (Wis. 1950).	Not clear	Rules* (functionally)	Adopted	Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 699–701 (Wis. 2014)
Wyoming	WYO. R. CIV. P. 8(a), (d), (e)	Notice	Ridgerunner, LLC v. Meisinger, 297 P.3d 110, 114 (Wyo. 2013)	The adoption of a rules-based system introduced notice pleading to Wyoming. *See* Oakley & Coon; *see also* Wright.	Change to notice	Rules	n/a	n/a

APPENDIX TABLE D: STATE ADOPTION OF FEDERAL CLASS ACTION RULES[267]

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Alabama	ALA. R. CIV. P. 23	Rules	1973	*See* Burbank; *see also* Oakley & Coon.	n/a	n/a
Alaska	ALASKA R. CIV. P. 23	Rule amendment	1976	Burbank.	n/a	n/a
Arizona	ARIZ. R. CIV. P. 23	Rule amendment	1966	Burbank.	Rule Amendment	*See* ARIZ. R. CIV. P. 23
Arkansas	ARK. R. CIV. P. 23	Judicial decisions interpreting rules (and later judicial rules amendment)	1988	Burbank explains that the Arkansas Supreme Court interpreted a prior rule as consistent with the 1966 amendments (as of 1988), and later a rule amendment codified this change (1990).	Rule Amendment	*See* ARK. R. CIV. P. 23 & Addition to Reporter's Note, 2006 Amendment

267 As described in the main text, this table attempts to catalog the states' adoption of versions of the major federal amendments to the class action rule. Some interpretative issues are discussed therein. For the 1966 amendments, I began with Stephen Burbank's research published in Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008). Citations to Burbank are to this article. I supplemented those citations with original research and citations to John B. Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) and Charles Alan Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959). For the 2003 amendments, I began with, but substantially supplemented, the work of Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501 (2016).

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
California	CAL. CIV. R. 3.760 et seq.	n/a	n/a	Retaining a rule not derived from the Federal Rule.	Code Amendment	Although California did not adopt 1966-type amendments, it seemed to incorporate the 2003 changes. *See* CAL. CIV. R. 3.760 et seq.
Colorado	COLO. R. CIV. P. 23	Rule amendment	1970	Burbank identifies the change between 1966 and 1971. It appears that the 1970 revision to Colorado Rules of Civil Procedure updated Rule 23 to match 1966 Federal Rule.	n/a	n/a

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Indiana	IND. TR. R. 23	Rules	1970	Burbank identifies the change between 1966 and 1971. It appears that Indiana's adoption of a rules-based system in 1970 introduced the 1966-type class action. *See* Boehne v. Camelot Vill. Apartments, 288 N.E.2d 771, 776–77 (Ind. Ct. App. 1972). *See also* Oakley & Coon.	n/a	n/a
Iowa	IOWA R. CIV. P. 1.261 et seq.	Rule amendment	1980	Burbank.	Rule Amendment	*See* IOWA R. CIV. P. 1.261 et seq.
Kansas	KAN. STAT. ANN. 60-223 (2018)	Legislative amendment	1970	Burbank lists the date as 1969 and cites a court order. Though there is some ambiguity, it may be more proper to cite statutory amendments effective 1970. *See* KAN. STAT. ANN. 60-223 (2018).	Code Amendment	*See* KAN. STAT. ANN. 60-223 (2018); *see also* Subrin & Main
Kentucky	KY. R. CIV. P. 23.01 et seq.	Rule amendment	1969	Burbank lists the date as 1969 by implication. *See also* Watson Clay, *Significant 1969 Amendments to the Kentucky Rules of Civil Procedure*, 58 KY. L.J. 7 (1969).	Rule Amendment	*See* KY. R. CIV. P. 23.01 et seq.; *see also* Subrin & Main
Louisiana	LA. CODE CIV. PROC. ANN. art. 591 et seq. (2018)	Judicial decisions interpreting code (and later legislative code amendment)	1975	Burbank identified the change as dating to 1975, based on judicial decisions interpreting the code. The legislature later updated the code to match the Federal Rule. *See* LA. CODE CIV. PROC. ANN. art. 591 (2018).	Code Amendment	*See* LA. CODE CIV. PROC. ANN. art. 591 et seq. (2018)

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Indiana	IND. TR. R. 23	Rules	1970	Burbank identifies the change between 1966 and 1971. It appears that Indiana's adoption of a rules-based system in 1970 introduced the 1966-type class action. *See* Boehne v. Camelot Vill. Apartments, 288 N.E.2d 771, 776–77 (Ind. Ct. App. 1972). *See also* Oakley & Coon.	n/a	n/a
Iowa	IOWA R. CIV. P. 1.261 et seq.	Rule amendment	1980	Burbank.	Rule Amendment	*See* IOWA R. CIV. P. 1.261 et seq.
Kansas	KAN. STAT. ANN. 60-223 (2018)	Legislative amendment	1970	Burbank lists the date as 1969 and cites a court order. Though there is some ambiguity, it may be more proper to cite statutory amendments effective 1970. *See* KAN. STAT. ANN. 60-223 (2018).	Code Amendment	*See* KAN. STAT. ANN. 60-223 (2018); *see also* Subrin & Main
Kentucky	KY. R. CIV. P. 23.01 et seq.	Rule amendment	1969	Burbank lists the date as 1969 by implication. *See also* Watson Clay, *Significant 1969 Amendments to the Kentucky Rules of Civil Procedure*, 58 KY. L.J. 7 (1969).	Rule Amendment	*See* KY. R. CIV. P. 23.01 et seq.; *see also* Subrin & Main
Louisiana	LA. CODE CIV. PROC. ANN. art. 591 et seq. (2018)	Judicial decisions interpreting code (and later legislative code amendment)	1975	Burbank identified the change as dating to 1975, based on judicial decisions interpreting the code. The legislature later updated the code to match the Federal Rule. *See* LA. CODE CIV. PROC. ANN. art. 591 (2018).	Code Amendment	*See* LA. CODE CIV. PROC. ANN. art. 591 et seq. (2018)

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Indiana	IND. TR. R. 23	Rules	1970	Burbank identifies the change between 1966 and 1971. It appears that Indiana's adoption of a rules-based system in 1970 introduced the 1966-type class action. *See* Boehne v. Camelot Vill. Apartments, 288 N.E.2d 771, 776–77 (Ind. Ct. App. 1972). *See also* Oakley & Coon.	n/a	n/a
Iowa	IOWA R. CIV. P. 1.261 et seq.	Rule amendment	1980	Burbank.	Rule Amendment	*See* IOWA R. CIV. P. 1.261 et seq.
Kansas	KAN. STAT. ANN. 60-223 (2018)	Legislative amendment	1970	Burbank lists the date as 1969 and cites a court order. Though there is some ambiguity, it may be more proper to cite statutory amendments effective 1970. *See* KAN. STAT. ANN. 60-223 (2018).	Code Amendment	*See* KAN. STAT. ANN. 60-223 (2018); *see also* Subrin & Main
Kentucky	KY. R. CIV. P. 23.01 et seq.	Rule amendment	1969	Burbank lists the date as 1969 by implication. *See also* Watson Clay, *Significant 1969 Amendments to the Kentucky Rules of Civil Procedure*, 58 KY. L.J. 7 (1969).	Rule Amendment	*See* KY. R. CIV. P. 23.01 et seq.; *see also* Subrin & Main
Louisiana	LA. CODE CIV. PROC. ANN. art. 591 et seq. (2018)	Judicial decisions interpreting code (and later legislative code amendment)	1975	Burbank identified the change as dating to 1975, based on judicial decisions interpreting the code. The legislature later updated the code to match the Federal Rule. *See* LA. CODE CIV. PROC. ANN. art. 591 (2018).	Code Amendment	*See* LA. CODE CIV. PROC. ANN. art. 591 et seq. (2018)

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Maine	ME. R. CIV. P. 23	Rule amendment	1981	Burbank was unable to identify the year that Maine introduced the 1966-type class action. My research suggests that Maine adopted post-1966 version of Rule 23 by rule amendment in 1981. *See* ME. R. CIV. P. 23, Advisory Committee Notes--1981.	n/a	n/a
Maryland	MD. R. CIV. P. 2-231	Rules	1984	*See* Burbank; *see also* Oakley & Coon.	n/a	n/a
Massachusetts	MASS. R. CIV. P. 23	Rules	1973	*See* Burbank; *see also* Oakley & Coon.	n/a	n/a
Michigan	MICH. CT. R. 3.501	Rules	1985	Although there is some complexity in the history of Michigan procedure, it appears that the introduction of a rules-based system of procedure in 1985 introduced the 1966-type class action. *See* Oakley & Coon.	n/a	n/a
Minnesota	MINN. R. CIV. P. 23.01 et seq.	Rule amendment	1967	Burbank.	Rule Amendment	*See* MINN. R. CIV. P. 23.01 et seq.; *see also* Subrin & Main.
Mississippi	n/a	n/a	n/a	No class action. Burbank.	n/a	n/a
Missouri	MO. R. CIV. P. 52.08	Rule amendment	1972	Burbank.	n/a	n/a
Montana	MONT. R. CIV. P. 23	Rule amendment	1967	Burbank.	Rule Amendment	*See* MONT. R. CIV. P. 23; *see also* Subrin & Main.

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Nebraska	NEB. CT. R. PLDG. § 6-1108	n/a	n/a	Retaining a rule not derived from the Federal Rule. Burbank.	n/a	n/a
Nevada	NEV. R. CIV. P. 23	Rule amendment	1971	Burbank.	n/a	n/a
New Hampshire	N.H. SUPER. CT. CIV. R. 16	Rule amendment	1983	Burbank.	n/a	n/a
New Jersey	N.H. R. CT. 4:32-2	Rule amendment	1969	Burbank.	Rule Amendment	*See* N.J. R. CT. 4:32-2
New Mexico	N.M. R. CIV. P. DIST. CT. 1-023	Rule amendment	1978	Burbank.	n/a	n/a
New York	N.Y. C.P.L.R. § 901 et seq.	Legislative amendment	1975	Burbank.	n/a	n/a
North Carolina	N.C. G.S. § 1A-1, Rule 23	n/a	n/a	Retaining equivalent to older version of Federal Rule. Burbank.	n/a	n/a
North Dakota	N.D. R. Civ. P. 23	Rule amendment	1971	Burbank identifies the change between 1971 and 1973. Burbank.	Rule Amendment	*See* N.D. R. Civ. P. 23
Ohio	OHIO CIV. R. 23	Rules	1970	Burbank; *see also* OHIO CIV. R. 23, Staff Notes; Oakley & Coon.	Rule Amendment	*See* OHIO CIV. R. 23; *see also* Subrin & Main
Oklahoma	OKLA. STAT. tit. 12, § 2023 (2018)	Legislative amendment	1978	Burbank.	Code Amendment	*See* OKLA. STAT. tit. 12, § 2023 (2018); *see also* Subrin & Main

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Oregon	OR. R. CIV. P. 32	Legislative amendment	1973	Burbank. *See also* OR. REV. STAT. § 13.220 (repealed 1979) (amending prior code system to allow for 1966-type class actions).	n/a	n/a
Pennsylvania	PA. R. CIV. P. 1702	Rule amendment	1977	Burbank.	n/a	n/a
Rhode Island	R.I. SUPR. R. CIV. P. 23	Rule amendment	1991	Burbank.	n/a	n/a
South Carolina	S.C. R. CIV. P. 23	Rules	1985	Burbank. *See also* Oakley & Coon.	n/a	n/a
South Dakota	S.D. R. CIV. P. § 15-6-23 (also found at S.D. CODIFIED LAWS § 15-6-23 (2018))	Rule amendment	1969	Burbank.	n/a	n/a
Tennessee	TENN. R. CIV. P. 23.01 et seq.	Rules	1971	Burbank. *See also* Oakley & Coon; Wright.	n/a	n/a
Texas	TEX. R. CIV. P. 42	Rule amendment	1977	Burbank.	Rule Amendment	*See* TEX. R. CIV. P. 42.
Utah	UTAH. R. CIV. P. 23	Rule amendment	1971	Burbank.	n/a	n/a
Vermont	VT. R. CIV. P. 23	Rules	1971	Burbank.	n/a	n/a

State	Current rule	Method of adoption of 1966-style class action	Date of adoption	Sources and explanation	Method of adoption of 2003 amendments	Citation and explanation
Virginia	n/a	n/a	n/a	No class action. Burbank.	n/a	n/a
Washington	WASH. SUPER. CT. CIV. R. 23	Rule amendment	1967	Burbank.	n/a	n/a
West Virginia	W. VA. R. CIV. P. 23	Judicial decisions interpreting rules (and later judicial rules amendment)	1983	Although Burbank dates the adoption of 1966-style class actions to 1998, he also acknowledges earlier judicial decisions adopting 1966-type requirements. *See, e.g.*, State v. Starcher, 474 S.E.2d 186, 187 (W. Va 1996); Burks v. Wymer, 307 S.E.2d 647, 647 (W. Va. 1983). Having reviewed these cases, it appears that judicial interpretation first introduced the 1966-type class action to West Virginia, followed by rules amendment.	n/a	n/a
Wisconsin	WIS. STAT. 803.08 (2018)	n/a	n/a	Retaining a rule not derived from the Federal Rule. Burbank.	n/a	n/a
Wyoming	WYO. R. CIV. P. 23	Rule amendment	1971	Burbank.	Rule Amendment	*See* WYO. R. CIV. P. 23.

APPENDIX TABLE E: STATE OFFERS OF JUDGMENT RULES[268]

State	Current rule	Fee Shifting
Alabama	ALA. R. CIV. P. 68	No
Alaska	ALASKA R. CIV. P. P. 68	Yes
Arizona	ARIZ. R. CIV. P. 68	No
Arkansas	ARK. R. CIV. P. 68	No
California	CAL. C. CIV. P. § 998	No
Colorado	COLO. REV. STAT. § 13-17-202	No
Connecticut	CONN. GEN. STAT. § 52-192a	Yes
Delaware	DEL. SUPER. CT. CIV. R. 68	No
Florida	FLA. STAT. § 768.79; FLA. R. CIV. P. 1.442	Yes
Georgia	GA. CODE ANN. § 9-11-68	Yes
Hawaii	HAW. R. CIV. P. 68	No
Idaho	IDAHO R. CIV. P. 68	No
Illinois	n/a	n/a
Indiana	IND. TR. P. R. 68	No
Iowa	IOWA CODE § 677.1 et seq.	No
Kansas	KAN. STAT. ANN. § 60-2002	No
Kentucky	KY. R. CIV. P. 68	No
Louisiana	LA. CODE CIV. PROC. ANN. art. 790	No
Maine	ME. R. CIV. P. 68	No
Maryland	n/a	n/a
Massachusetts	MASS. R. CIV. P. 68	No
Michigan	MICH. CT. R. 2.405	Yes
Minnesota	MINN. R. CIV. P. 68.01 et seq.	No
Mississippi	MISS. R. CIV. P. P. 68	No
Missouri	MO. REV. STAT. § 77.04	No
Montana	MONT. R. CIV. P. 68	No
Nebraska	NEB. REV. STAT. § 25-901	No
Nevada	NEV. R. CIV. P. 68	Yes

268 As described in the main text, this table attempts to catalog the states' approaches to attorney fees in offer-of-judgment rules pleading. This table reflects original research. The "Fee Shifting" column captures whether the state provides for attorney fee shifting when an offer of judgment is rejected and then the final award is lower.

State	Current rule	Fee Shifting
New Hampshire	n/a	n/a
New Jersey	N.J. R. CT. 4:58-1 et seq.	Yes
New Mexico	N.M. R. CIV. P. DIST. CT. 1-068	No
New York	N.Y. C.P.L.R. § 3220 et seq.	No
North Carolina	N.C. G.S. § 1A-1, Rule 68	No
North Dakota	N.D. R. CIV. P. 68	No
Ohio	n/a	n/a
Oklahoma	OKLA. STAT. tit. 12, § 1101	No
Oregon	OR. R. CIV. P. 54	No
Pennsylvania	n/a	n/a
Rhode Island	R.I. SUPER. R. CIV. P. 68	No
South Carolina	S.C.R. CIV. P. 68	No
South Dakota	S.D. R. CIV. P. § 15-6-68 (also found at S.D. CODIFIED LAWS § 15-6-68)	No
Tennessee	TENN. R. CIV. P. 68	No
Texas	TEX. R. CIV. P. 167.4; TEX. CIV. PRAC. & REM. CODE ANN. § 42.004	Yes
Utah	UTAH. R. CIV. P. 68	No
Vermont	VT. R. CIV. P. 68	No
Virginia	n/a	n/a
Washington	WASH. SUPER. CT. CIV. R. 68	No
West Virginia	W. VA. R. CIV. P. 68	No
Wisconsin	WIS. STAT. § 807.01	No
Wyoming	WYO. R. CIV. P. 68	No