Roberts Rules for Protecting Corporations

The chief justice's changes to the rules for litigation make suing big business a whole lot harder.

BY MOSHE Z. MARVIT

On April 9, 2012, Sandra Robertson was fired from her job at a Fayette County, Pennsylvania, plant run by Hunter Panels, which manufactures insulation materials. Robertson had worked at Hunter Panels for six years, following a much-decorated 20-year career in the Air Force, and was quickly promoted from traffic clerk to become the only female supervisor at the plant. Despite the fact that she did the same work and had more experience than most of her male counterparts, she earned approximately 20 percent less than they did. Furthermore, male supervisors subjected her to all manner of sexual harassment, from making obscene gestures to referring to her as a "bitch" who was "losing her mind" and "throwing fits." When she complained about this treatment, she was told to "work harder" at getting along with her harassers.

Upper management at Hunter Panels treated Robertson differently from male supervisors—not providing her resources she needed and even telling her subordinates that they could ignore her. The human resources manager at the plant made it clear that he disliked her, and when she asked him about his mistreatment of her, he ordered her to undergo anger management therapy.

Robertson took the hint and stopped reporting the harassment. However, a few months later, after she had received highly favorable performance evaluations, a group of male supervisors locked her out of the production office and laughed when they saw her approaching. She complained and was told that she should consider "exiting the organization." She tried again to bring attention to the harassment that she and other female workers were experiencing, which included being given graphic descriptions of their coworkers' penises. As a result of her complaints, Hunter Panels fired her, telling her it was due to her "management style."

Robertson filed a lawsuit in federal court alleging that her employer violated her civil rights by treating her as it did and for firing her when she spoke up. At the trial, Hunter Panels denied many of Robertson's allegations and argued that Robertson was fired for her "unprofessional behavior" and inability to work with her co-workers. As proof, Hunter Panels presented documents that were dated and placed in her file *before* Robertson's complaints to show that she was a problem employee. Unfortunately for the company, Robertson's attorneys had demanded electronic versions of much of that material in its original form. They had computer experts analyze the documents, and found that the metadata proved the documents had been created *after* Robertson's complaints, and then altered to appear as if they were created prior to her complaints.

On April 20, 2015, a federal jury found that Hunter Panels had violated Robertson's civil rights. They awarded her close to $1 million in compensatory damages, and $12.5 million in punitive damages—the largest award of its kind in the history of the Western District of Pennsylvania—to send a message to the company that its conduct would not be tolerated.

Robertson and her attorneys were only able to get those documents, and attendant metadata, because of their right to request broad discovery. Her attorney, John Stember, explained that Sandra Robertson's case "was not a $13 million case when it walked in the door." It was not until they engaged in significant discovery that they realized the magnitude of the case, because in employment discrimination and other civil-rights cases there is almost always an "information asymmetry" between the plaintiff and the defendant. To balance this asymmetry, the federal courts have, for the better part of a century, allowed a party to get any relevant non-privileged legal discovery.

Though it's strange to think in these terms, Sandra Robertson was lucky that her employer discriminated and retaliated against her when it did, and not now.

NINE DAYS AFTER SANDRA Robertson's verdict was handed down, Chief Justice John Roberts sent Congress a package of changes to the Federal Rules of Civil Procedure, the most important of which concerned discovery. Though the Federal Rules of Civil Procedure are boring, technical, and abstract, and a discussion of them can make even lawyers' eyes glaze over, they are perhaps more significant than any other federal law because they are the primary rules that govern how federal courts handle litigation. They control how a

party brings a lawsuit, the types and scope of pretrial discovery the parties can demand from each other, and how a case generally proceeds through the federal courts. As legal scholars Stephen Subrin and Thomas Main have written, "Procedure is power, of course, so the stakes of choosing one over the other produces different winners and losers."

Perhaps unsurprisingly, the Republican-controlled Congress did nothing to alter or reject Roberts's submission. As a result, according to the procedures set forth in a New Deal–era law called the Rules Enabling Act, the most significant changes to the Federal Rules of Civil Procedure in decades went automatically into effect on December 1, 2015. And aside from the attorney insiders who submitted more than 2,300 comments during the public notice and comment period—with almost all plaintiff attorneys decrying the rule changes and almost all corporate and defense attorneys supporting them—no one seems to have noticed that a huge change that strikes at the very core of our democracy has just occurred.

These changes may effectively close the courthouse doors to many of the hundreds of thousands of Americans who seek relief in federal court each year. Though federal laws provide Americans a broad range of rights, these rights are purely symbolic if the rules prevent litigants from getting their day in court.

The changes to the rules have been part of a decades-long conservative project to limit access to the courts, and thereby limit corporate and government defendants' exposure to liability. Unable to achieve many of these changes through the usual legislative process, conservatives have turned to the courts. And the courts, acting in an adjudicative capacity, have for the last several decades, largely been compliant in making it tougher to bring lawsuits to vindicate one's federal rights.

Now, conservatives have found a way to use the Federal Rules of Civil Procedure, precisely because they're obscure and technical, as a backdoor means to limit Americans' ability to win legal relief. Elon University School of Law professor Eric Fink said, "I'm not saying there was a conspiracy, but if one wanted to upend the whole system, it would be foolish to do a full-frontal attack. Instead, go after a technical rule that's so boring I don't even teach it to my civil procedure class, but which affects everything."

Unlike the depictions of litigation in television and movies, trials are only a small part of lawsuits, of establishing facts on the record. Discovery is the real lifeblood of a case. Pretrial discovery is the means by which parties gather information so they can fully prepare and understand the case, assess its value, and often settle it—as 90 percent of cases are—before a long and costly trial. Discovery evens the playing field by trying to give each side equal access to relevant information.

Traditionally, the rules of discovery have been broad, allowing each side to demand any relevant non-privileged information, either in the form of documents or depositions, which are testimonies taken before trial under oath. Someone who alleges employment discrimination, for instance, can depose under oath high-level individuals at the company and gain access to relevant emails, conversations, employment policies, financial documents, treatment of other employees, and any other relevant information that she would need to get to the truth and make her case. This process can be disruptive to a company's business, it can be invasive, and for a large multinational company, it can prove to be expensive, but it is absolutely necessary to be able to prove wrongdoing.

In most lawsuits, one side is in control of the vast majority of the information—indeed, plaintiffs' attorneys often describe the process of bringing a lawsuit as "flying blind"—and the only way to make the system work is to allow broad discovery. In opposing the rules changes, the NAACP Legal Defense and Education Fund's Jonathan Smith said that the NAACP was "deeply concerned" about the changes to discovery, explaining that "as discrimination has become more subtle and sophisticated, civil rights plaintiffs face an even higher burden as they are often required to establish discrimination through circumstantial evidence. Thus, civil rights plaintiffs use the discovery process to ferret out and expose discriminatory policies, practices, and actions."

The new rules enacted on December 1 do exactly the opposite by changing the standard from one where a party can get anything that is "relevant" and not privileged to a "proportionality" test. This new test shifts the focus from getting at the truth of the matter to whether the costs and burdens on the defense are too great to get at the truth. Gone is the presumption that a plaintiff is entitled to the information that affects her case. Now she must also prove that it is not too much of a burden on the other side to provide this information.

The new rules list six factors for proportionality, of which the first two (importance of the issues at stake and amount in controversy) are perhaps the most important and problematic. The problem is that judges are now being directed to decide early on in a case, when they know virtually nothing about it or how it will develop, whether to limit access to information based on the importance and amount at stake, when it is the very information at issue that often reveals the importance of the case and the dollar amount at stake. One cannot separate the procedure from the substance, and limiting the procedure will have a naturally limiting effect on the substance. In the case of Sandra Robertson, if her discovery requests had been denied or limited, she likely would not have prevailed in court as she did.

Wealthy parties have always had superior access to justice, but the courts have now formalized and codified the class disparities that exist in so many areas of American life. As of December 1, 2015, if two employees—one a minimum-wage worker and the other a salaried white-collar worker—both bring the same suit against the same employer, the white-collar worker will be entitled to more discovery and therefore has a far better chance to win her suit and get relief—because the lower-paid worker's suit will be worth less than a higher-paid worker's. This factor is now central to the initial inquiry.

TO UNDERSTAND WHAT happened last December, it is important to understand the process by which the rules are changed, and how conservative judges have tried to use this obscure process to limit access to courts, in contrast to clear legislative intent. The December 1 changes mark one of the most significant sets of changes to the rules in decades—"the brass ring for those seeking litigation retrenchment," as one legal scholar put it. Compounding the problem has been a parallel private process that is corporate-sponsored, which

some are claiming extends the rules beyond even what the conservative judges could get through the public process.

In 1934, Congress delegated to the federal courts the authority to set the rules of procedure in a piece of New Deal legislation known as the Rules Enabling Act. In the first sentences of the act, Congress gave the Supreme Court the power to make the rules, but also said that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants." The Court thus has a duty to at least try to keep the rules neutral and in line with the intent of the laws.

The Rules Enabling Act created a procedure wherein an Advisory Committee, composed primarily of practitioners and academics chosen by the chief justice of the Supreme Court, would make suggestions to a Standing Committee. If the Standing Committee felt that the suggested changes were appropriate, it would issue a proposed rule, which the general public could comment on. After some period of comment and revision based on the comments received, the Standing Committee would send a final rule to the Supreme Court for approval. The Supreme Court would then send the rule to Congress, and if Congress did nothing, then the rule automatically became law.

By 1938, the Federal Rules of Civil Procedure had been drafted and passed. After a great deal of debate, policy-makers, judges, and scholars wrote into these rules a system of simple pleading and broad discovery so that the courts would be open to all. They recognized the inequalities that exist in society, and that if the courts were to provide any remedy to violations of rights, people had to have easy access to courts and information. In describing the rules of discovery, a unanimous Supreme Court wrote, in what has become one of the seminal cases of the New Deal era, that under these rules "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."

The original Advisory Committee had no judges and was composed only of practitioners and academics who gave real-world input on problems of practice and suggested solutions. This trend changed under Richard Nixon's appointee for chief justice, Warren Burger, to the point where now judges dominate the committee. The chief justice is charged with choosing and renewing appointments to both committees—and can exercise more control over judges than he can over outsiders. Since Burger's appointment in 1969, chief justices have been conservatives who have utilized their control of this process to advance limiting rules.

Starting with the rise of the new conservatism of the 1970s, the right has consistently attempted to curb private enforcement of rights by limiting access to justice, as a database created by professors Stephen Burbank and Sean Farhang clearly documents. They identified all congressional bills from 1973 (the first year of the Library of Congress Database) through 2010 that sought to limit the abilities of people to get their rights heard in court by reducing or eliminating attorneys' fees, reducing plaintiffs' damage awards, shifting fees, reducing the availability of class actions, increasing sanctions against attorneys, or other methods. These bills did not attack civil and other rights head on, but instead tried to convert them into mere symbolic laws that protect rights, but provide no clear remedy.

What Burbank and Farhang found was that the number of provisions that tried to suppress litigation spiked from an average of 70 per congressional session during Jimmy Carter's presidency to 257 per session in Ronald Reagan's first term as president, to 463 in Reagan's second term, to 1,038 in 1995 and 1996, when the Newt Gingrich–led Republicans took control of the House and Senate.

Few of these attempts were successful, however. In the almost 40 years that the database covers, only 11 of these bills passed. People don't like having their rights taken away, and democratic politics made it difficult for such bills to pass in the open—a reality recognized by policy-makers in the Reagan administration, which was at the forefront of such retrenchment. A young John Roberts, then working in Reagan's Justice Department, promoted the idea of limiting attorneys' fees in order to minimize litigation against the government, but warned against the political results of trying to pass it. Similarly, Reagan's counsel, Fred Fielding, understood that a fee cap bill would have its greatest impact on "civil rights litigation, welfare entitlement suits, environmental litigation, and the like." Fielding was "deeply concerned that it will be viewed and portrayed as yet another Administration effort to limit the delivery of legal services to minorities, the poor, and the aged."

The political failures did not dissuade conservatives from their goals of limiting rights; instead, they just chose to do it through the non-democratic arena of the courts. In a pair of decisions from 2007 and 2009—one against a corporation (*Bell Atlantic Corp. v. Twombly*) and one against the government (*Ashcroft v. Iqbal*)—the Supreme Court heightened the pleading standards that plaintiffs have to meet. Similarly, in a pair of decisions from 2011 (*Wal-Mart Stores, Inc. v. Dukes* and *AT&T Mobility LLC v. Concepcion*), the Supreme Court severely restricted people's access to class-action lawsuits, often the only vehicle for many to go up against large corporations, especially when the issue is complex or the amount at stake is relatively small. Supreme Court scholar Erwin Chemerinsky has written, "One crucial aspect of the Roberts Court's decision-making has been its systematically closing the doors to those suing corporations, to those suing the government, to criminal defendants, and to plaintiffs in general."

Conservatives have found a way to use the rules, precisely because they're obscure and technical, as a backdoor means to limit Americans' ability to win legal relief.

What occurred in the December 1, 2015, rules changes was the culmination of decades of a conservative agenda being pushed through the bizarre rules process, where judges are actually making new law, and then interpret-

ing that selfsame law when it comes before them in cases.

THE ORIGINS OF THE RULES changes go back to a May 2010 invitation-only meeting at the Duke University Law School to examine what some said were problems with the rules and to consider possible amendments. One would expect any conference that addresses the cost and delays of the judicial system to consider empirical studies that show that such costs and delays exist. At the Duke 2010 conference, dozens of papers were indeed presented, but almost all of them were based on surveys about perceptions of the system as problematic, rather than revealing real data on the problems. Most traded in the anecdotes, rumors, and horror stories that are common in discussions about litigation, rather than taking a broad look at the system and its effectiveness.

However, one study stood out. In preparation for the Duke 2010 conference, the Advisory Committee solicited a massive study from the Federal Judicial Center (FJC), which is the federal courts' research agency. The FJC conducted a survey of both plaintiffs and defense attorneys who had closed cases in the last quarter of 2008 in order to get a sense for how much of a burden discovery was on litigants. If the system had indeed been broken for decades and needed radical reform, then a strong neutral empirical study detailing the scope of the problem was necessary. And the FJC was supposed to provide such a study.

For a conference organized around the principle that discovery was out of control, the FJC's findings had to come as a disappointment. It reported that the median entire costs for litigation, including attorney fees and discovery, were $15,000 for plaintiffs and $20,000 for defendants. Of this amount, discovery represented 20 percent of the costs for plaintiffs and 27 percent for defendants. Therefore, the median costs for discovery were $3,000 and $5,400 for each side, respectively, which includes not only production of materials, but also the costs of an attorney reviewing them. Furthermore, discovery accounted for only 1.6 percent of the reported total monetary amount sought by plaintiffs and 3.3 percent of the costs for defendants. This was hardly evidence of a system out of control.

However, recognizing that there is no "right" amount to spend on discovery—if someone feels a case is baseless or frivolous, then even one dollar is too much—the study asked lawyers the normative question of what the proper ratio of the costs of discovery to the total litigation costs would be. Plaintiff attorneys said that in an ideal world, discovery should constitute approximately 33 percent of the total litigation costs, and defendant attorneys said 40 percent. Since the actual amounts the FJC found were 20 percent and 27 percent, respectively, what parties actually spend on discovery is significantly less than what they think should be spent. There could have been no clearer indication than this that peoples' perception on the matter was false and that the practice of discovery worked well. Furthermore, the study showed that the time it took to litigate most cases had remained surprisingly stable over the decades.

Under the new rules, if a minimum-wage worker and a salaried worker bring the same suit against the same employer, the salaried worker has a better chance to win.

These median statistics do not tell the whole story, of course. The study found that in the top 5 percent of cases—those that involved at least $5 million—the median total cost of litigation was $300,000. It's this small percentage of cases, where both the stakes and litigation costs were extremely high, that seems to be behind the case for changing the rules. Indeed, a survey conducted of Fortune 200 companies by the corporate- and defense-side group Lawyers for Civil Justice found that average discovery costs for their cases ran between $600,000 and $3 million.

The Fortune 200 companies have trillions of dollars in market value, so although these figures are substantial, it is difficult to know if they really represent a problem for these companies or whether they are large in relation to the cases at issue. But it was the Fortune 200 crowd and others at the top who were driving the rules change. Seattle University School of Law professor Brooke Coleman, in a new paper, terms the new rules the "one percent procedure."

Despite decades of empirical studies by the FJC and others that have found that the system of discovery serves its intended purpose without high costs or delays, the Advisory Committees since Burger's time have taken their cues from anecdotes and horror stories rather than the facts. In 1998, the chair of the Advisory Committee, Judge Paul Niemeyer, repeated a statistic that seemed to originate with Vice President Dan Quayle's Council on Competitiveness: "Over 80 percent of the time and cost of a typical lawsuit involves pre-trial examination of facts through discovery."

The problem with this zombie statistic was that it was completely baseless. Indeed, Niemeyer followed up the 80 percent statistic with an acknowledgment that it was baseless. "While I am not aware of any empirical data to support this claim, the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation."

Judges are supposed to be uniquely skilled at distinguishing fact from hearsay.

THE 2010 DUKE CONFERENCE ended with a call for more cooperation and education among lawyers. The 28-page report submitted to Chief Justice John Roberts did not portend that the rules were about to go through a major change.

Individuals who attended the conference were therefore surprised when, in August 2013, the Advisory Committee revealed a set of proposed rules that went far beyond what most had imagined. The proposed rules cut the number of interrogatories (written questions) parties could pose; they cut the time limits for depositions; they got rid of the forms that were included since the 1930s and embodied the accessibility of the courts; and they imposed

the proportionality standard. The proposed rules proceeded as if the conference and FJC study never occurred and simply assumed there was a system badly in need of repair.

Comments, many in the form of multi-page responses that described personal experiences and adduced statistics, flooded in, with the vast majority of attorneys on civil-rights and consumer-rights cases, and those representing prisoners and other plaintiffs, arrayed against the new rules, while the vast majority of defense attorneys favored them. At hearings in Washington, D.C., Dallas, and Phoenix, more than 120 speakers testified, largely breaking along the same lines. The judges coordinating the rules changes, along with defense and corporate attorneys, tried to argue that the new rules represented nothing new: They merely had taken an implied proportionality standard from a different spot in the rules, moved it up, and fleshed it out. Plaintiff attorneys countered that attempts to cast the rules changes as anything but a huge giveaway to corporate and government defendants were belied by the obvious camps that had formed.

At the same time that this was playing out in the public, Duke Law School was organizing a private invitation-only conference to draft "guidelines" on the new rules, at its newly formed Center for Judicial Studies. The center has the laudable goals of training judges and organizing conferences where academics, judges, and practitioners can exchange ideas about the judicial system. Though the Duke guidelines purport to represent simple guidance put out by a private third party on how to understand and interpret a major change in the rules of the court, several prominent scholars have cried foul. Chief among these critics is Suja Thomas, a law professor at the University of Illinois Law School.

In late summer of 2015, while the Duke guidelines drafting process was already well under way, Thomas sent a letter to federal judges David Campbell, Jeffrey Sutton, and a handful of others. In addition to their roles as federal judges, Campbell was the chair of the Advisory Committee on the Federal Rules of Civil Procedure and Judge Sutton was chair of the Standing Committee of Rules and Practice on Procedure. Therefore, these two judges, along with Chief Justice John Roberts, represented the highest levels of rule-making within the judiciary.

In the polite tones that are necessary in addressing federal judges, Thomas sought to bring to their attention the Duke guidelines process, and that current and former members of the federal Advisory Committee were taking part in it. Justice Charles Evans Hughes, who served as chief justice of the Supreme Court in the 1930s when the Rules Enabling Act was passed and helped guide the drafting of the initial rules, had made clear that the Supreme Court found it "objectionable" to have members of the Advisory Committee take part in a private effort to interpret the rules. The chief justice had explained that such efforts "would have the appearance of an official explanation and interpretation of the rules." Thomas was informing these judges in charge of the rules process that such "objectionable" behavior was taking place on their watch.

Thomas didn't know it at the time, but she didn't need to make Sutton and Campbell aware of her concerns—because they were a part of the very process she was questioning. Sutton was serving on the Advisory Council for Duke's judicial center, and Campbell was serving on the center's board. (Neither are currently in those positions with the Duke center.)

At the time of the drafting of the guidelines, the Duke center Advisory Council was composed chiefly of the general counsels and heads of litigation from corporations such as Merck, Pfizer, Bank of America, ExxonMobil, Home Depot, GE, State Farm, and Altria (the world's largest tobacco company and parent company of Philip Morris). The corporations occupy all the "Gold" and "Silver" sponsor spots the center reserved for its largest financial contributors.

Less than two months after her first letter, Thomas extended her critique in a follow-up letter to Sutton, Campbell, 13 chief federal judges across the country, as well as Chief Justice Roberts, and the chairs and ranking members of the Senate and House Judiciary Committees. She pointed out that the Duke center, which had significant corporate sponsorship and was chaired by the general counsel of Bayer, had drafted an 11-page set of private guidelines to interpret one sentence in the new rules, and was using federal judges to teach these guidelines to other judges in federal courthouses across the country, in a process they were calling the "Roadshow."

The public and private processes had

Chief Justice John Roberts: *The new rules, he wrote, "engineer a change in our legal culture."*

TOM WILLIAMS / CQ ROLL CALL VIA AP IMAGES

become entangled in such a way that corporations and others on the defense side were getting to write the rules of the game. Not surprisingly, the guidelines reflect their authors' viewpoints. They further limit plaintiffs' rights by encouraging judges to limit discovery early in the process. Attendees of the "Roadshow" have explained that the presentation of the guidelines further encourages "cost sharing," wherein plaintiffs would have to pay for the defendants' efforts to produce discovery.

Thomas's concerns were that the Duke process and resulting guidelines have taken on the imprimatur of official interpretations to the rules. They were drafted in part by judges who are current and former members of the official Advisory Committee; they have been used to train a high percentage of federal magistrates and judges prior to the enactment of the actual rules; and they are currently being used in the "Roadshow" by current and former members of the federal Advisory Committee that drafted the official rules to train judges and attorneys in federal courthouses.

Confused by the difference between the Advisory Council, which is run by Duke and sponsored by corporations and has federal judges serving as its mouthpiece, and the Advisory Committee that speaks for the federal judiciary, which has some of those same federal judges as members? Confused where the official rules that stem from the Duke 2010 conference end and the unofficial guidelines that stem from the Duke 2013 conference begin? This is exactly Thomas's point. She argued that the trainings were improper and that if they continued, a "congressional hearing on this matter is warranted."

John Rabiej, the director of the Duke Center for Judicial Studies, insists that there was nothing untoward about this arrangement. In an interview and subsequent communications, he said he has worked with federal judges for decades and cannot imagine one of them not understanding the difference between the official rules and the Duke guidelines. However, when I've requested information about what individuals who drafted these private guidelines said, or the transcripts of the Roadshow, Rabiej has denied the requests by pointing out that these are federal judges—an objection that seems germane only if they're on official business.

The current fear by some civil procedure experts is not only that the guidelines go further than the official rules have gone in limiting discovery, but that there is now what appears to be an officially sanctioned private corporate-dominated process for shifting the rules to the right. Many are concerned that this process has only just begun.

THE NEW FEDERAL RULES HAVE been in effect for less than a year, but already one can see they were not the minor adjustment that so many judges and defense-side attorneys claimed during the process. Chief Justice John Roberts devoted almost the entirety of his annual year-end report on the federal judiciary to the rules changes, noting that "[m]any rules amendments are modest and technical, even persnickety, but the 2015 amendments to the Federal Rules of Civil Procedure are different." These changes were major, and were aimed, in Roberts's words, at "engineer[ing] a change in our legal culture."

The right-wing agenda has prevailed through a bizarre rules process, where judges actually make new law and then interpret that law when it comes before them in cases.

There is no comprehensive way to determine the effect the new rules have had in the months since their passage because each judge handles challenges to discovery differently. Most handle such matters informally, preferring not to spend time writing carefully crafted opinions for any but the few unique or major cases before them. Several practitioners estimated that at most 10 percent of such decisions are published, and the number is likely even less. These decisions are virtually unappealable, so whatever the judge decides usually stands unchallenged.

An analysis of such published decisions, however, does reveal that the rules changes have already had a major effect. Between December 1, 2015, when the new rules went into effect, and March 1, 2016, there were 182 published decisions concerning discovery disputes that applied the new proportionality rules. The majority of these decisions did not allow much of the materials sought. Thirty-eight of these decisions analyzed discovery with an eye toward the burdens that one side would face in providing the information sought. During the same time period in 2012 through 2013, by contrast, there were almost no decisions that discussed discovery and proportionality. These numbers clearly show that parties are challenging the right to information, and many judges, following the new rules, are limiting information.

The effects of limiting discovery do not end with the litigants themselves. Many cases lead to changes in corporate and government behavior, and these cases are now much harder to bring. Legal discovery is one of the few means of gaining important information about the inner workings of corporations and government entities. Not only do our laws rely on a private enforcement model, but much of our journalism relies on the same model. The discovery that makes up the backbone of lawsuits also makes up the backbone of many of the nation's most important exposés.

Justice Roberts has described the new rules as "a good start." Some suspect that the next step will be an attempt to either change the rules, or interpret them, to require the party asking for discovery to pay for it. If history is any indication, subsequent changes will have enormous impact on people's access to justice, but will be effected in a process that ensures they receive almost no public attention. ◘

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