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The Making of the Supreme Court Rules

*Scott Dodson**

Abstract

The reality that rules define institutions is no less applicable to the Supreme Court. Yet the literature on the Supreme Court Rules, and the rulemaking process behind them, is practically nonexistent. Part of the reason is that the rulemaking process for the Supreme Court Rules is a black box—the Court promulgates its rules with neither oversight nor transparency. This Article, relying on interviews with current and former government officials, opens that black box to reveal the history of the rulemaking process for the Supreme Court Rules from the 1980s to the present. That process, as contrasted with the open and participatory rulemaking process for the lower-court rules, is highly secretive and insular. The Article analyzes the justifications of such an approach and finds that none are persuasive. The Article then turns to modest proposals for reform that will benefit the rulemaking process at marginal cost.

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Introduction

The federal courts are creatures of rules. Statutory rules authorize their jurisdiction and other powers. Court-created rules govern the nuts and bolts of specific proceedings. Common-law rules fill the gaps. Variations and crossovers permeate these rough allocations, but the point is that rules define the institution.

Congress has long authorized the federal courts to make and adopt rules of practice and procedure for themselves. In 1937, the Supreme Court adopted the revolutionary Federal Rules of Civil Procedure, which established a uniform set of procedural rules for civil cases in the nation's federal district courts. Additional sets of federal rules for criminal cases, appeals, and other areas followed, as well as local rules for each court. Much has been written about these rules and the process for making them. Entire law school courses are devoted to them. These rules are the lifeblood of practice in the lower federal courts for both lawyers and judges alike.

The Supreme Court has its own rules, too, and those rules—no less than the rules that govern the lower federal courts—are essential to defining the Supreme Court as an institution. The Supreme Court Rules calculate deadlines for the filing of documents, establish stan-

dards for the Court's exercise of its certiorari discretion, prescribe the mechanism for seeking stays and other relief requested in applications to individual justices, establish procedures for original actions before the Court, and more. As Felix Frankfurter and James Landis once wrote, "the history of the Supreme Court . . . derives meaning to no small degree from the cumulative details which define the scope of its business, and the forms and methods of performing it—the Court's procedure, in the comprehensive meaning of the term."[1]

An accounting of the Supreme Court Rules is thus crucial to understanding the institution itself. Yet very little commentary on the Supreme Court Rules exists. Since the 1950s, the commentary on the Supreme Court Rules has been descriptive and oriented toward contemporary practitioners.[2] In contrast with the voluminous academic interrogation of the lower-court rules and their history, the Supreme Court Rules have been neglected and overlooked.

This disparity is especially glaring with respect to the rulemaking process itself. If rules define an institution, then the process for making those rules—who makes them, how they are made, what policies are infused in them, and why—is the key to controlling the institution.[3] The rulemaking process for the lower courts is statutorily prescribed and exhibits a highly formal process marked by numerous layers of review, transparency, and broad participation. Anyone can propose a rule amendment and comment on proposals. The identities of all persons involved in the rulemaking process, along with their roles, are publicly disclosed. Rulemakers' meetings are open, and

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1 Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System xxxvi (1928). Frankfurter and Landis had a broad conception of procedure in mind, but they surely were including the Supreme Court Rules.

2 The Supreme Court practitioner's bible, *Supreme Court Practice*, now in its eleventh edition, states as its "specific purpose" to give a present-day accounting of the rules "that a Supreme Court practitioner needs to know." Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice vii (11th ed. 2019). Bob Stern and Gene Gressman helpfully published an article after each major revision of the Supreme Court Rules from 1960 to 2005, but those pieces were primarily explanatory rather than analytic. Volume 23 of *Moore's Federal Practice* contains a description of and commentary on the Supreme Court Rules, with some historical analysis. 23 James Wm. Moore & Marsha E. Kalman, Moore's Federal Practice § 500 (3d ed. 2021). None of these sources focuses on the rulemaking process.

3 *See* Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 991 (1996) ("The power over the procedural environment in which cases are heard and decisions are rendered is probably the power that is nearest the core of institutional judicial independence."); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 Mercer L. Rev. 733, 734 (1995) ("A judiciary that cannot create its own procedural rules is not an independent judiciary.").

their deliberations are recorded. If one is worried that the Chamber of Commerce or the Association of Trial Lawyers of America is having too much influence in the making of lower-court rules, one need only look to the comments submitted by those groups (which are public), track the changes in the drafts and their explanatory notes (which are also public), and review the detailed minutes of the advisory committee that works on the drafts (which are also public) to determine whether that interest group's suggestions have influenced the end product. The lower-court rulemaking process is open for inspection.

By contrast, the Supreme Court Rules are made in a black box. For more than 150 years, the Supreme Court would simply issue an order, out of the blue, with a new rule or rule amendment. The Court sometimes does that even today. The Court has never publicly disclosed its rulemaking process. The Court does not reveal who provides input on rule proposals, what that input is, or why the input does or does not influence the rule changes the Court ultimately makes. The Court promulgates its rules without detailed explanation of the changes or the Court's rationale for making them. The lack of broad participation means that the Supreme Court could be unaware of—or purposefully ignoring—valid practitioner or public interests. At the same time, if groups or individuals with particular agendas are influencing the Supreme Court Rules behind the scenes, it is very likely that no one would know.

In this Article, I open the Court's black box of rulemaking and, in the process, offer three contributions. First, relying on contemporary interviews of current and former Court personnel, I make a descriptive contribution by documenting the Court's rulemaking process over the last three decades, especially in contrast with the process for making the lower-court rules. Second, I make an analytical contribution by mining and assessing the potential justifications for why the Court has chosen a more insular and secretive process for its own rulemaking. Third, I make a normative contribution by urging modest reforms to the rulemaking process for the Supreme Court Rules.

Part I begins by setting out the open and participatory process for making the lower-court rules. Statutory prescriptions since 1988 mandate a multilayered process that delegates specific rulemaking roles to diverse rulemaking actors. The rules are continuously and openly studied. Rulemaking stages are transparent with opportunities for public participation. Two congressionally created entities—the Administrative Office and the Federal Judicial Center—assist the rulemakers with information and data. These rulemaking features

have both positive and negative effects, but most agree that the openness and broad participation generally produce better rulemaking, legitimate the process, and enhance accountability to Congress.

Part II contrasts the lower-court rulemaking process with the secretive and insular process for making the Supreme Court Rules. Unlike lower-court rulemaking, Congress has set no rulemaking parameters, structures, or oversight requirements for the making of the Supreme Court Rules; nor has Congress required continuous study of the Supreme Court Rules. The Supreme Court may, if it wishes, consult no one in promulgating its rules; nor need it give any reasons for rule amendments. The Court has never disclosed publicly its rulemaking process, the role of the rulemaking actors inside the Court, or how any Court outsiders have formally or informally participated in rulemaking.

Part II relies on numerous interviews with current and former government officials to reveal that, under this hands-off approach, the rulemaking process for the Supreme Court Rules remains semiformal, cloistered, and secretive. The Clerk's Office plays a centralizing role in the rulemaking process by taking the lead on drafting rule amendments and soliciting input from certain Court personnel and perhaps specific outsiders. That work is overseen by a Rules Committee of justices. In 1995, the Court, for the first time, began a sporadic practice of publicly posting rule proposals and providing a short period of time for public comment. It appears that some comments have influenced the final rule as adopted. But the Court refuses to reveal any comments it received, the identity of those who submitted comments, or how the comments affected, if at all, the final version of the rule.

Part III analyzes potential explanations and justifications for the Court's choice to follow a more insular and secretive process for making its own rules, including that the Supreme Court Rules are the Court's business alone, that traditions of secrecy and insularity in other aspects of the Court's business justify similar protections for the Supreme Court Rules, that the Court's rulemaking process produces the advantages of flexibility and efficiency, and that the Court's close-to-the-vest approach helps reinforce its special status as the only constitutional court and as the apex of the federal judiciary. This Part concludes that although each explanation has some purchase, they cannot, even in the aggregate, justify the extreme levels of secrecy and isolation that permeate the rulemaking process for the Supreme Court Rules.

Part IV advances four modest reforms. Because the virtues of public participation through notice and comment are strong, while the burdens are light, the Court should follow a default practice of notice and comment, with specified conditions for particular deviations from that practice. To enhance the legitimacy of the Court's rulemaking, the Court should publish any public comments received, following the example of the lower-court rulemaking process. For the same reason, the Court should also publish its rulemaking process, identifying the stages and the rulemaking roles in each stage. Finally, the Court should voluntarily commit to periodic self-study of its rules and rulemaking process, just as Congress has required for the lower courts. These reforms should reap many of the benefits of the open and participatory design of the lower-court rules without overburdening the Court or subjecting it to the tribulations of full-blown bureaucracy. The Article concludes with some additional thoughts for the future.

I. Rulemaking for the Lower Courts

Historians and legal academics have well documented the revolutionary nature and subsequent evolution of the Rules Enabling Act,[4] which today delegates to the Supreme Court the supervisory power to promulgate "rules of practice and procedure" for the federal courts.[5]

4 *E.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 944–70 (1987). I use the common epigraph "Rules Enabling Act" throughout to refer generally to the rulemaking authorizations contained in Title 28 of the U.S. Code. I refer to the Enabling Act of 1934 specifically as the "Enabling Act."

5 28 U.S.C. §§ 2071–72. Congress has long delegated to the Supreme Court some supervisory rulemaking authority over lower-court rules. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (Process Act) (obliging federal courts to conform to state law in common-law actions and to apply "principles, rules and usages" of equity in equity actions, "subject . . . to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same"); *See also* Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 ("[T]he Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."). The Supreme Court, under its delegated authority, promul-

The congressional delegation "imposes significant procedural requirements,"[6] and the rulemaking procedures overall feature informed study, transparency, levels of review, and broad participation.[7] This Part details the rulemaking process as it has existed since 1988.

A. *Rulemaking Committee Makeup and Structure*

Congress has created the Judicial Conference,[8] a council of judges who make policy for the federal courts.[9] The Judicial Conference operates through committees, including the statutorily required Committee on Rules of Practice and Procedure, colloquially called the Standing Committee.[10] Congress authorized the Judicial Conference to create rulemaking advisory committees, and the Judicial Conference has long done so.[11] The Chief Justice appoints committee members,[12] but Congress directed that such committees "consist of members of the bench and the professional bar, and trial and appellate judges."[13] The memberships of the Judicial Conference, Standing Committee, and all advisory committees are publicly available.[14]

B. *Continuous Study*

Rulemaking is best waged when armed with information. Congress has charged the Judicial Conference with the responsibility to

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gated the Equity Rules by court order in 1822, 1842, and 1912. *See* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) v (1822); Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xli (1842); Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912). Additionally, the Supreme Court promulgated the Admiralty Rules in 1845 and 1921. *See* Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction, 44 U.S. (3 How.) iii (1845); Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction, 254 U.S. 671 (1921). In 1872, however, Congress passed the Conformity Act, which obligated lower federal courts to apply state procedure in actions at law, "any rule of court to the contrary notwithstanding." Act of June 1, 1872, ch. 255, 17 Stat. 196–97. This proscription prevented the Supreme Court from promulgating lower-court rules for common-law actions until passage of the Enabling Act in 1934.

6 Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002).

7 For some depictions, see Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103 (2007).

8 Pub. L. No. 85-513, 72 Stat. 356 (July 11, 1958) (codified at 28 U.S.C. § 331).

9 *About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/R7L2-PATZ].

10 28 U.S.C. §§ 331, 2073(b).

11 *About the Judicial Conference*, *supra* note 9.

12 *Id.*

13 28 U.S.C. § 2073(a)(2).

14 *About the Judicial Conference*, *supra* note 9.

study the operation and effect of the federal rules of practice and procedure,[15] a responsibility that the Judicial Conference largely fulfills through its committees[16] along with two congressionally established entities: the Administrative Office of the U.S. Courts ("AO")[17] and the Federal Judicial Center ("FJC").[18]

The AO, an agency within the judicial branch, produces an annual report on the state of the lower federal courts, which is publicly available, and which contains detailed data on operations, case management, and recent and proposed amendments to federal rules, among many other things.[19] As required by Congress, the AO tracks and makes publicly available a trove of information on the workings and business of the federal courts, including docket loads, makeups, and statistics.[20]

The FJC, the primary research arm of the judicial branch,[21] "studies judiciary operations and recommends to the Judicial Conference how to improve the management and administration of the federal courts."[22] The FJC often undertakes empirical studies of specific elements of litigation or judicial management in the lower federal courts. Rulemakers regularly request, and occasionally rely upon, FJC studies

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15 28 U.S.C. § 331.

16 *See, e.g.*, A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1996), *reprinted in* 168 F.R.D. 679, 683 (1996) [hereinafter SELF-STUDY].

17 28 U.S.C. §§ 601–13.

18 28 U.S.C. §§ 620–29.

19 *See Annual Report 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/annual-report-2019 [https://perma.cc/XX6H-KZ9K].

20 *Federal Court Management Statistics*, U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics [https://perma.cc/CK22-ATRM]; *Federal Judicial Caseload Statistics*, U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics [https://perma.cc/76JU-NVFW]; 28 U.S.C. § 604(a).

21 28 U.S.C. § 620(a) ("There is established within the judicial branch of the Government a Federal Judicial Center, whose purpose it shall be to further the development and adoption of improved judicial administration in the courts of the United States."); *see also id.* § 620(b) (specifying the FJC's functions as "to conduct research and study of the operation of the courts of the United States" and "to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States," among others).

22 *Judicial Administration*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/judicial-administration [https://perma.cc/8AVZ-X69R]. Congress established the FJC by statute in 1967. *See* 28 U.S.C. §§ 620–29.

when considering amendments to federal rules.[23] All FJC reports are publicly available on the FJC website.[24]

C. Rulemaking Process

Congress has set some rulemaking procedures by statute and has charged the Judicial Conference to fill in details by "prescrib[ing] and publish[ing] the procedures for the consideration of proposed rules."[25] Fulfilling that directive, the Judicial Conference has adopted and published the procedures for lower-court rulemaking in the *Guide to Judiciary Policy*.[26]

Anyone can submit proposed rule changes or recommendations to the Standing Committee Secretary.[27] Every submission is publicly available on the U.S. Courts website and includes the name, address, and e-mail address of the submitter.[28] The website offers guidelines for submitting proposals and examples of draft proposals.[29] The Secretary acknowledges receipt of proposals, logs them in a consolidated, sortable, and searchable repository on the U.S. Courts website, and refers them to the appropriate advisory committee.[30]

All committee discussions of a proposal are recorded in detailed meeting minutes and agenda books, which are then posted on the U.S.

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23 *See, e.g.*, Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon Motions to Dismiss for Failure to State a Claim After *Iqbal* 1 (Fed. Jud. Ctr. 2011) (producing a report, requested by the Judicial Conference, on the effect of two Supreme Court cases interpreting Rule 8).

24 *Reports & Studies*, Fed. Jud. Ctr., https://www.fjc.gov/research/reports-and-studies [https://perma.cc/G56U-WQY5].

25 28 U.S.C. § 2073.

26 *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*, *in* 1 Guide to Judiciary Policy § 440 (2011) [hereinafter Judicial Conference Procedures]. Early publications of the Judicial Conference procedures were included in the notices of proposed rules. *See, e.g.*, Proposed Amendments to Federal Rules, 195 F.R.D. 95, 598–601 (2000). The Judicial Conference first adopted rulemaking procedures in 1983 and anticipated many of the statutory directives in the 1988 Act. *See* Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347–52 (1983).

27 Judicial Conference Procedures, *supra* note 26, at § 440.20.20.

28 *How to Suggest a Change to Federal Court Rules and Forms*, U.S. Cts., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-federal-court-rules-and-forms [https://perma.cc/2DKU-NCWZ].

29 *Id.*

30 Judicial Conference Procedures, *supra* note 26, at § 440.20.20. The repository includes the full text of each proposal submitted, the identity of the person or entity who submitted it, the date of submission, the rules targeted for amendment, and a regularly updated status of the rulemaking bodies' consideration of the proposal. *Rules Suggestions*, U.S. Cts., https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-suggestions [https://perma.cc/YX5H-5TS8].

Courts website.[31] All advisory committee meetings are, in the ordinary course, open to the public, and each is preceded by notice to the public of the date, time, and location of the meeting.[32] Interest groups routinely send representatives to committee meetings.[33]

If the committee decides to move forward with a proposal, the committee reporter will draft amendments, explanatory committee notes, and copies or summaries of the recommendations or suggestions received by the committee.[34] When the advisory committee recommends an amendment proposal for publication, it must submit that amendment proposal, explanatory note, and basis for recommendation to the Standing Committee for preapproval.[35] The recommendation must include the advisory committee's "evaluation of competing considerations."[36] The recommendation and report are made public and posted on the U.S. Courts website.[37]

The Standing Committee will consider recommendations for publication of proposed rule amendments at its next meeting, which is public. Meeting deliberations are recorded in detailed minutes and an agenda book, both of which are posted on the U.S. Courts website.[38] If the Standing Committee approves a proposal for publication, the Secretary will circulate the proposed change to the bench, bar, and public via the *Federal Register*, the U.S. Courts website, and legal publica-

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31 *Records of the Rules Committees*, U.S. CTS., https://www.uscourts.gov/rules-policies/records-rules-committees [https://perma.cc/667L-QUPV].

32 28 U.S.C. § 2073(c). To be fair, advisory committees sometimes allocate work to subcommittees, and any subcommittee conference calls are not subject to the same transparency requirements as full-committee meetings. *See* Richard Marcus, *Rulemaking's Second Founding*, 169 U. PA. L. REV. 2519, 2544 (2021) ("Despite the extensive disclosure via agenda books of what the subcommittees have been doing and regular review during full Advisory Committee meetings of these subcommittee efforts, the Subcommittee conference calls are not open to all, or regarded as subject to the openness mandate of the 1988 Act.").

33 *See* Marcus, *supra* note 32, at 2535 ("The Advisory Committee also hears regularly from a number of organizations, which ordinarily send representatives to attend its meetings as well as make proposals for rule changes and comment on pending topics of Committee consideration and on published amendment drafts. Examples include the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association.").

34 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.30(b).

35 28 U.S.C. § 2073(d) (requiring that any committee recommendation "shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views").

36 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.30(c).

37 *Records of the Rules Committees*, U.S. CTS., https://www.uscourts.gov/rules-policies/records-rules-committees [https://perma.cc/B9VQ-7ME6].

38 28 U.S.C. § 2073(c); *Records of the Rules Committees*, *supra* note 37.

tions.[39] Judicial Conference rules admonish that publication "should be as wide as possible."[40] The Secretary must separately notify members of Congress, federal judges, and the chief justice of each state's highest court, with a link to the proposal materials.[41]

The public comment period must, by default,[42] extend for at least six months after publication,[43] during which the advisory committee must, by default, conduct public hearings on the proposed change, with advance notice of the times and places of hearings published in the *Federal Register* and on the U.S. Courts website.[44] The hearings must be recorded, and, by default, a transcript must be produced.[45] Hearing recordings and transcripts are posted on the U.S. Courts website.[46]

During the public comment period, a multitude of interested parties and diverse members of the public submit comments.[47] All public comments are posted on a U.S. Courts webpage that organizes the comments by submitter, date, and rule proposal.[48] When the public-comment period ends, the advisory committee prepares a summary of the written comments and of the hearing testimony.[49]

At its next meeting, which, as usual, is open to the public and recorded, the advisory committee then considers revisions in light of the information received during the public-comment period and documents its reasons for making any revisions. If the advisory committee makes substantial revisions, the proposed amendment should, pre-

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39 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at §§ 440.20.40(a), 440.20.40(a)(2).

40 *Id.* § 440.20.40(a).

41 *Id.* § 440.20.40(a)(1).

42 The Standing Committee can shorten the public-comment period or eliminate public hearings if deemed unnecessary or if expedited procedures are needed "and that appropriate notice to the public can still be provided and public comment obtained," but any such deviation from the default must be communicated, with explanation, to the Judicial Conference. *Id.* § 440.20.40(d). Such deviations are rare.

43 *Id.* § 440.20.40(b).

44 *Id.* § 440.20.30(a); *Rules & Policies: About the Rulemaking Process*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process [https://perma.cc/V7JJ-2TWA].

45 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.40(c).

46 *Rules & Policies: Transcripts and Testimony*, U.S. CTS., https://www.uscourts.gov/rules-policies/records-rules-committees/transcripts-and-testimony [https://perma.cc/T9FT-XH8L].

47 The 2017 proposal to amend Rule 30(b)(6) to require the parties to confer in good faith about the matters for examination of organizational depositions generated more than 1,700 submitted comments. *See* Marcus, *supra* note 32, at 2538.

48 *Rules & Policies: Rules Comments*, U.S. CTS., https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-comments [https://perma.cc/N2ZU-US3L].

49 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.50(a).

sumptively, be republished for an additional period of public comment.[50]

The advisory committee then submits a report and recommendation to the Standing Committee with each proposed rule change, a separate report of the comments received, explanation of any revisions made after the notice-and-comment period, and an explanation of competing considerations examined by the advisory committee.[51] The advisory committee typically will include extensive "Advisory Committee Notes," which also go through the same approval process, and which often offer detailed explanations and guidance from the advisory committee on the amendment's rationale and its application to particular situations.[52] All of these materials are published and maintained on the U.S. Courts website.[53]

At a public meeting, the Standing Committee will consider recommended rule amendments and may accept, reject, modify, or return to the advisory committee any amendment.[54] The Standing Committee's actions, reasons, and deliberations are recorded in the meeting minutes and agenda book, which are posted and maintained as publicly available on the U.S. Courts website.[55] If the Standing Committee approves a rule amendment, the Standing Committee transmits the approved changes, together with the advisory committee's report, to the Judicial Conference.[56] The Judicial Conference will consider the proposal, at one of its biennial meetings, which, although not public, is documented in a Report of the Proceedings and posted on the U.S. Courts website.[57] If the Judicial Conference approves, it will transmit the rule amendment to the Supreme Court.

The Supreme Court will then consider the proposal. Although the Supreme Court has, on occasion, rejected an amendment proposal,[58] it usually approves proposals by order and transmits them to Congress by May 1. Congress then has until December 1 to act to delay the

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50 *Id.* § 440.20.50(b).

51 *Id.* § 440.20.50(c).

52 Struve, *supra* note 6, at 1158.

53 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.60(b)-(c); *Records of the Rules Committees*, *supra* note 37.

54 *Id.* § 440.30.20(c).

55 *Id.*; *Records of the Rules Committees*, *supra* note 37.

56 JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.30.20(d).

57 *Reports of the Proceedings—Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us [https://perma.cc/P4JR-ZC38].

58 For an example of the Court refusing to transmit to Congress an amendment proposal, in 1991, see Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 843 (1993).

effective date, reject the proposal, or modify it.[59] Absent congressional action, the proposal becomes law on December 1.

D. *Effects of the Lower-Court Rulemaking Process*

As the existing literature on lower-court rulemaking has documented, this layered, formalized, open, and informed process has both upsides and downsides. One upside is the benefit of having the input of a wide range of experts and interest groups—including the judges, practitioners, and academics on the advisory committees; the gamut of other stakeholders who submit comments in the notice-and-comment period; and the data and studies of the AO and the FJC. Such input is seen as generally leading to better rulemaking.[60] One "striking" example, as recounted by one of the reporters to the Civil Rules Advisory Committee, was the January 1997 mini-conference on discovery amendments, which, as proposed by the committee, were "plain va-

[59] Congress intervenes sporadically. The most notable example was Congress's effective rejection (though with subsequent partial codification) of the proposed Federal Rules of Evidence, in 1973. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. For a more minor example, in 1983, Congress passed a law stating that the proposed amendments to Rule 4 of the Federal Rules of Civil Procedure, which had been approved on August 2, 1982, "shall not take effect." Act of Jan. 12, 1983, Pub. L. No. 97-462, § 5, 96 Stat. 2530.

[60] *See* Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 223 (1997) (insisting that the rulemaking process "include the practicing bar"); Marcus, *supra* note 32, at 2538 ("[T]he public comment requirement has served the Committee well"); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 459–60 (1993) (praising the involvement of judges for the expertise they bring). Admittedly, the rulemakers have not always heeded that input, or the need for it, in the past. A notable post-1988 example is the 1993 amendment adding mandatory disclosures to the discovery rules. As Professor Linda Mullenix noted, the rulemakers proposed the amendment without sufficient study or knowledge. *See* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991) ("[T]here is virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the result of informal discovery. There also is no literature describing the types of cases in which lawyers elect to use informal discovery, whether the attorney discusses this choice with the client, or the extent to which opposing counsel cooperates. There are no analyses of the use of these methods and the relative ease in obtaining information needed for adequate trial preparation. There has been neither empirical research assessing the efficiency and cost savings achieved through informal discovery methods, nor any assessment of attorney and client satisfaction with informal discovery."). Further, the rulemakers pressed forward with the proposal even after receiving more than 200 comments on it, most of them negative. *Mandatory Pretrial Disclosure Idea, Under Fire, Likely to Be Dropped by Panel*, DAILY REP. FOR EXECS. (D.C.), Apr. 1, 1992, at C-1; Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J. (D.C.), May 4, 1992, at 1 (describing how the Advisory Committee was "bombarded with negative comments" on its proposed 1993 amendment to Rule 26). More recently, rulemakers seem to have consciously attended to the interests of stakeholders marginalized in the past. *See* Burbank, *supra*, at 243 (noting "rulemakers' recent attitudes towards cooperation with the practicing bar").

nilla," but the mini-conference participants redirected the committee to a more pressing problem—e-mail discovery and Rule 34 document production.[61] The reporter concluded: "But for the outreach efforts, the Committee might not have gotten wind of these problems until much later."[62]

To be sure, the membership of the rulemaking committees features some homogeneity of interests, characteristics, and viewpoints[63] that can lead rulemakers to overvalue certain stakeholder interests.[64] But that fact stems largely from the particular appointments made rather than the design of the committee framework itself. Further, it is a failure only in relativistic terms. After all, no one contends that the process would be better if it reverted to when the Supreme Court promulgated lower-court rules all by itself, and even critics applaud the evolution of rulemaking toward openness and participation.[65]

Another benefit is the legitimacy that broad participation and transparency bring to the process. Whether legitimacy is in the nature of the democratic participation or in the principled and informed deliberation that it fosters,[66] all agree that the participation and trans-

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61 Marcus, *supra* note 32, at 2536.

62 *Id.*

63 *See* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institution Approach*, 15 NEV. L.J. 1559, 1565 (2015) (documenting the trend of increasing judicial membership); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & CONTEMP. PROBS. 229, 232 (1998) (arguing that "increased judicial participation in the drafting process" has progressed "to the point of domination"); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 77–82 (2017) (documenting the shift from generalist practitioners to plaintiff or defense attorneys on the Committee); Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407, 408 (2018) (reporting that of the 136 members who served on the Civil Rules Advisory Committee from 1934–2018, 116 were white men); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017 (2016) (discussing the increase in attorneys on the Civil Rules Advisory Committee who specialize in complex litigation); Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 767 (2016) (describing the Committee members as "operat[ing] in the rarified world of complex litigation").

64 *See* Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) (arguing that the rulemakers have been too aligned with judicial interests); Yeazell, *supra* note 63, at 231 ("[A] judicially dominated rulemaking process is more likely to produce faulty rules and, just as important, rules perceived to be faulty.").

65 *See, e.g.*, Yeazell, *supra* note 63, at 235 n.28 ("[T]he process used to produce rules should be visible, open, and transparent.") (alteration in original).

66 *Compare* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890 (1999) ("[T]he legitimacy of the court rulemaking process does not derive from public participation or political accountability, but instead from a model of principled deliberation akin to common law reasoning."), *with* Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 WM. & MARY L. REV. 2239, 2297–98

parency enhance the legitimacy of the process. Because court rules are neither neutral nor nonsubstantive,[67] norms of government accountability—even for those who will not stand for reelection—demand that rulemaking be open and transparent.[68]

The lower-court rulemaking process has its downsides. The many layers, broad participation, and deliberate pace cause heavier workloads, a protracted process, an increasingly politicized process, and the propensity for small-ball changes.[69] A recent discovery proposal, for instance, generated more than 2,300 comments.[70] Successful rulemaking usually takes at least three years.[71] The notice-and-comment period provides a forum for interest-group lobbying by those who support or oppose proposals,[72] and the unseemliness of partisan lobbying of rulemakers, especially of judges who may see themselves as bringing an air of neutrality to the process, may lead rulemakers to avoid controversial areas for reform.[73] The process tends to weed out

(2019) ("The opening of court-centered rulemaking to public involvement in the 1970s and 1980s was necessary to maintain the federal court system's legitimacy in the rulemaking arena.").

67 Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472-73 (1987).

68 *See* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1348–49 (2011) (tying transparent rulemaking to governmental legitimacy). *Cf.* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (detailing the history and effects of public participation in agency rulemaking).

69 *See* Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1, 8–9 (2018) (stating that the participatory process leads to "caution, accommodation, compromise, and, at times, capitulation").

70 Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 19, 23 (2016).

71 *Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/5N4Q-X9ZW].

72 *See* 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, 1612 (2008) ("Since the 1980s, the court rulemaking process has become increasingly politicized."); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 460–61 (2013) (noting the same trend); Mullenix, *supra* note 60, at 843–55 (describing lobbying efforts targeting Advisory Committee members). *Cf.* Richard Marcus, *Procedural Polarization in America?* (U.C. Hastings. Coll. of L., Research Paper No. 183, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841422 [https://perma.cc/99WB-PGEP] (detailing the polarization of procedural rulemaking). *But see* Marcus, *supra* note 32, at 2535 (conceding that "[o]ne could perhaps regard some of these [participants] as lobbyists of a sort" but concluding that "the participation of such people has been a boon, not a burden").

73 BURBANK & FARHANG, *supra* note 63, at 120 ("When rulemakers are judges, and when justification for rule changes must be publicly articulated in light of a public evidentiary record, in addition to (and potentially contradicting) judicial experience and common sense, those judges may be reluctant to become involved in controversies in which their decisions can be tarred with a political label."). *See also* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1171 (1996) (ar-

aggressive proposals, such that amendments today skew toward modest adjustments over grand reforms.[74] These downsides, and others, are balanced against the upsides of transparency, openness, and structured bureaucracy.

II. Rulemaking for the Supreme Court

In contrast to the formal, bureaucratic, public, informed, and participatory process set up by the Rules Enabling Act for the lower-court rules, the Supreme Court has charted a far more insular, private, go-it-alone approach to its own rules, as the following sections detail.

A. *Statutory Authorization*

In contrast to the lower-court rules, Congress has taken a hands-off approach to the Supreme Court Rules, both in studying the rules and in the rulemaking process. As for study, although Congress charged the AO with studying the "dockets of the courts" and compiling "statistical data and reports as to the business of the courts,"[75] Congress defined "courts" to exclude the Supreme Court.[76] Similarly, Congress uniquely excluded the Supreme Court Rules from its charge to the Judicial Conference of a "continuous study of the operation and effect of the federal rules of practice and procedure."[77] Finally, although Congress has, without exclusion, charged the Judicial Conference with studying the business of "the courts of the United States"[78] and the FJC with researching the "operation of the courts of the United States,"[79] neither the Judicial Conference nor the FJC has seemingly made any attempt to study the Supreme Court Rules.[80] The

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guing that the current process forces the judiciary into the political fray without a good way to stay above it).

74 *See* Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. Rev. 917, 922–24, 933 (2017) (reviewing failed proposals to Rule 23 and documenting the Advisory Committee's preference for "amendment minimalism"); Steinman, *supra* note 70, at 5 (concluding that the 2015 discovery amendments "seem to confirm the view that the rules amendment process is unlikely to yield significant changes to the Federal Rules of Civil Procedure"); Yeazell, *supra* note 63, at 231 (worrying that the process "is likely to produce paralysis rather than reform").

75 28 U.S.C. § 604(a).

76 *Id.* § 610.

77 *Id.* § 331.

78 *Id.*

79 *Id.* § 620(b).

80 Based on a survey of the available research, there is only one FJC study of the Supreme Court, but it did not mention the Supreme Court Rules. *See* Fed. Jud. Ctr., Report of the Study Group on the Caseload of the Supreme Court (1972) [hereinafter Freund Commission Report]. For more discussion of that study, see *infra* text accompanying notes 333–40.

upshot is that studies of, and data on, the Supreme Court Rules are practically nonexistent.[81]

As for rulemaking, the Rules Enabling Act authorizes all federal courts to prescribe local rules,[82] but Congress uniquely exempted the rulemaking process for the Supreme Court Rules from the four requirements imposed on other local rules: (1) that courts appoint an advisory committee to handle most of the drafting work, (2) that local-rule proposals go through a public notice-and-comment period, (3) that local rules be reviewed and subject to modification by the Judicial Conference, and (4) that adopted local rules be furnished to the AO and made publicly available.[83] In fact, aside from the requirement that the Court's rules be "for the conduct of [its] business" and "consistent with" congressional acts, Congress has put no constraints on the rulemaking process for the Supreme Court Rules.[84] Thus, Congress has enabled the Supreme Court to promulgate and amend its own rules without oversight or outside participation even while establishing agencies and councils for the study of lower-court rules, and while imposing multilayered review, transparency requirements, and broad democratic participation for the lower-court rules. With few exceptions, the Court has done just that, as the following Sections detail.

81 By contrast, academic studies of various uncodified aspects of the Supreme Court's business, such as docket size, voting trends, and internal procedures, are in wide supply. *E.g.*, Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401 (2016); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

82 28 U.S.C. § 2071(a).

83 *Id.* § 2071(b) ("Any rule prescribed by a court, *other than the Supreme Court*, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment.") (emphasis added); *id.* § 2071(c)(2) ("Any other rule prescribed by a court *other than the Supreme Court* under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.") (emphasis added); *id.* § 2071(d) ("[C]opies of all rules prescribed by a court *other than the Supreme Court* under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.") (emphasis added); *id.* § 2077(b) ("Each court, *except the Supreme Court*, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court . . . . The advisory committee shall make recommendations to the court concerning such rules and procedures.") (emphasis added).

84 *Id.* § 2071(a). Technically, the Supreme Court Rules, like all local rules, must also be consistent with the lower-court rules prescribed by the Supreme Court under the Rules Enabling Act. *See id.* But although that requirement is a considerable constraint on lower-court local rulemaking, *see, e.g.*, Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 436 (2010) (describing rampant conflicts between local rules and the Federal Rules of Civil Procedure), it is hardly any constraint on the Supreme Court Rules because the lower-court rules rarely have occasion to affect them.

B. A Brief History of the Supreme Court Rules, 1789–1986

The story of the Supreme Court Rules really goes back to 1789. Two days after passage of the Judiciary Act of 1789,[85] the Court issued what might be considered its first rule: an order regarding the seals of the federal courts.[86] However, the Court did not issue any rules regarding its practice or procedure until August 1792, when Attorney General Edmund Randolph asked "to be informed of the system of practice by which the attornies and counsellors of this Court shall regulate themselves and of the place in which rules in causes here depending shall be obtained."[87] The Court responded that if the Attorney General and other practitioners "have any remarks to offer on the subject of the mode of practice to be adopted here this Court are willing to hear them."[88] It is doubtful that the Court received any remarks from outsiders. The very next day, Chief Justice Jay indicated that the justices would "consider the practice of the Courts of Kings Bench and of Chancery in England as affording outlines for the practice of this Court and that they will from time to time make such alterations therein as circumstances may render necessary."[89]

For the next 150 years or so, the Court followed the general practice of issuing an order, usually without warning or outside input, when it wished to amend its rules. This informal, ad hoc, private, and insular process remained true through the late 1900s, even as the rulemaking process for the lower courts was evolving toward transparency and layered participation under the Rules Enabling Act.[90]

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85 Act of Sept. 24, 1789, ch. 20, 1 Stat. 83. Among many other things, the Judiciary Act granted each federal court, including the Supreme Court, the power to promulgate local rules not inconsistent with law. *Id.* § 17.

86 Order of Sept. 26, 1789, *reprinted in* 210 U.S. 471, 472 n.2 (1907). Interestingly, it was not until three days later that Congress passed a bill specifically empowering the Supreme Court to provide seals for itself and the circuit courts. Act of Sept. 29, 1789, ch. 21, § 1, 1 Stat. 93.

87 *The Minutes of the Supreme Court of the United States 1789–1806 – August Term 1792 to February Term 1794*, 5 AM. J. LEGAL HIST. 166, 168 (1961).

88 *Id.*

89 *Id.* at 169. This rule continued in force, at least for original actions before the Supreme Court, until 1939. *Compare* Rule 5, 286 U.S. 596 (1932) (maintaining the semblance of the 1792 language), *with* Rule 5, Order of Feb. 13, 1939, 306 U.S. 671 (1939) (directing that original cases will follow the same procedure, by default, as appellate cases). This early event shows that the history of the Supreme Court Rules is long, and that the Court wrestled with formulating a rulemaking process even in its nascent years. The Court's invitation to the Attorney General and bar is illuminating, and no doubt there is much to be gleaned from a detailed and comprehensive assessment of the whole history of the Supreme Court Rules. I hope to document that full history in later projects.

90 The one major exception was the process leading to the 1954 Revision of the Supreme Court Rules, in which the Court appointed an advisory committee to shoulder most of the wor-

In 1969, Warren Burger replaced Earl Warren as Chief Justice. Burger, who "was very much into the administrative side of things,"[91] convinced Congress to create, in 1972, the position of Administrative Assistant to the Chief Justice, akin to a chief of staff, who helped funnel information and communication to the Chief Justice.[92] In 1975, Burger also hired a young Jim Duff as Aide to the Chief Justice, a position Duff held until 1979. (Duff later became Administrative Assistant to Chief Justice William Rehnquist from 1996-2000, and a long-time Director of the AO in 2006).[93] In 1977, Burger hired Jeffrey Morris, who had been a Judicial Fellow in 1976-77, as Research Assistant to the Administrative Assistant to the Chief Justice. Morris held that position until 1981 and, during that time, often worked with Burger directly on administrative matters.[94]

Given Burger's interest in judicial administration and rules of court, one might have thought that the rulemaking process of the Supreme Court Rules would change to a more formalized or bureaucratic process, perhaps even be centralized through the Administrative Assistant or other chambers staff. But that did not occur. Instead, the Court continued its insular and private process for rulemaking, with periodic revisions punctuated by one-off amendments. And it appears that Burger's chambers staff neither worked on any Supreme Court Rule amendments nor had any particular role in the rulemaking process.[95] Similarly, neither the AO nor the Judicial

kload of the revision. *See* Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 38 (1954). The 1954 Revision is discussed more fully *infra* text accompanying notes 259–64. In a minor exception leading up to the 1967 Revision, the Court requested and received input from the Advisory Committee on Appellate Rules regarding a proposed amendment to Supreme Court Rule 49, which set procedures for using habeas corpus to obtain the appearance of prisoners appearing before the lower courts. *See* Bennett Boskey & Eugene Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139, 159 (1967).

91 Telephone Interview with Douglas McFarland, Professor Emeritus, Hamline Univ. Sch. of L. (Sept. 3, 2020). *See also* E-mail from Jeffrey Morris, Professor of L., Touro L. Ctr., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Feb. 5, 2021, 5:25 PM) (on file with author) ("Burger . . . took seriously his role as head of the federal court system (and as titular head of America's state courts) and was heavily involved in matters affecting them.").

92 Pub. L. No. 92-238, § 1, 86 Stat. 46 (1972) (codified as amended at 28 U.S.C. § 677).

93 Telephone Interview with James C. Duff, Former Dir. of the Admin. Off. of the U.S. Cts. (Sept. 1, 2020).

94 E-mail from Jeffrey Morris to Scott Dodson, *supra* note 91.

95 E-mail from Douglas McFarland, Professor Emeritus of Hamline Univ. Sch. of L., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 3, 2020, 9:09 AM) (on file with author); Telephone Interview with Jeffrey Morris, Professor of L., Touro L. Ctr. (Oct. 1, 2020). The Administrative Assistant was usually aware of any rulemaking that was taking place because the Court was, and remains, a relatively small operation, but the Clerk of the Court was the hub for rulemaking. *See* Telephone Interview with James C. Duff, *supra* note 93.

Conference played any role in the rulemaking process for the Supreme Court Rules.[96] The rulemaking process for the Supreme Court Rules continued to be ad hoc, informal, and cloistered—a product primarily of the justices and the Clerk of the Court.[97]

C. The 1990 Revision

In 1985, the Court appointed Joseph F. Spaniol, Jr., a longtime AO deputy, to the position of Clerk of the Court.[98] Shortly thereafter, in 1986, Burger retired, and William Rehnquist was confirmed as Chief Justice to succeed him.

When Spaniol arrived in the Clerk's Office, he inherited a file kept by the previous Clerk that contained accumulated suggestions for rule changes made by attorneys, staff, judges, and justices.[99] With anticipated congressional changes to the Court's mandatory appellate jurisdiction in the works, those suggestions languished in the Clerk's Office for a few years.[100] Nevertheless, Spaniol took the initiative, early in his tenure, to draft some rule amendments based on the accumulated suggestions, the impending statutory change, and some of his own ideas.[101] One idea he had was to remove the gendered pronoun "he" to make the rules genderless; this change was less an affirmative recognition of the changes in practitioner and justice demographics and more because the lower-court rules, in which Spaniol had been heavily involved prior to becoming Clerk, were undergoing a similar change.[102]

By the time the Judicial Improvements and Access to Justice Act passed in November 1988, which eliminated most of the Court's mandatory appellate jurisdiction,[103] Spaniol was ready with draft

96 Telephone Interview with Joseph Frederick Spaniol, Jr., Eighteenth Clerk, Sup. Ct. (Sept. 2, 2020) (Spaniol was a longtime employee at the AO starting in the 1950s and through into the 1980s; he held a variety of positions there, including Division Chief, General Counsel, Assistant Director, and Deputy Director); Telephone Interview with James C. Duff, *supra* note 93 (Duff indicated that the AO Director might be consulted if a Supreme Court Rule amendment affected or was affected by the rules or operations of the lower courts).

97 Telephone Interview with James C. Duff, *supra* note 93.

98 Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* Two prominent commentators surmised that Justice O'Connor might have influenced this change, either affirmatively or just by her presence on the Court. *See* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Rules for the Nineties*, 128 F.R.D. 295, 307–08 (1990). I found no evidence to support that suspicion.

103 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648–49 (1988).

amendments.[104] At that time, the Court had no set rulemaking procedure.[105] Chief Justice Rehnquist had appointed a Rules Committee of justices, made up of Justice John Paul Stevens (chair) and Justice Antonin Scalia.[106] Spaniol took his draft amendments to Stevens on a Friday in the spring of 1989. Stevens called him with some questions on Monday, which Spaniol then answered.[107] Later, Scalia spoke with Spaniol and suggested reordering some of the rules. Spaniol reordered the rules as he suggested and resubmitted the revisions.[108]

In the fall of the 1989 Term, the Court approved the rules in conference and issued an order, on December 5, adopting the revision, effective January 1, 1990, largely as drafted by Spaniol.[109] It does not appear that anyone other than Spaniol and the justices played any role in the rulemaking process.[110] Nor were any of the discussions, documents, or processes made public despite the 1988 Act's dramatic opening of the rulemaking process for the lower-court rules.[111]

Some rule amendments truly were housekeeping rules, such as the announcement that the Clerk's Office would close on Saturdays, and Rule 30.1, which extended deadlines to the next day the Clerk's

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104 Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96.

105 *Id.*

106 *Id.* It is not clear how long the Rules Committee had been in service. A Rules Committee was appointed as early as the 1952 Term, when Chief Justice Fred Vinson appointed a Committee of the Supreme Court of the United States on the Revision of the Rules made up of Justices Stanley Reed, Felix Frankfurter, William O. Douglas, and Robert Jackson. *See* Wiener, *supra* note 90, at 33. But it is not clear whether the committee persisted into the 1980s.

107 Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96.

108 *Id.*

109 *Id.*; Sup. Ct. R. 18.1 (1990).

110 *See* Telephone Interview with Joseph Frederick Spaniol, Jr., *supra* note 96; E-mail from Joseph Frederick Spaniol, Jr., Eighteenth Clerk, Sup. Ct., to Scott Dodson, Professor of L. at U.C. Hastings Coll. of L. (Sept. 2, 2020, 2:20 PM) (on file with author). Chris Wright, who served as Assistant Solicitor General from 1986 to 1994, did not review or comment on any of the 1990 Supreme Court Rules amendments (or any other rule amendment). *See* E-mail from Christopher J. Wright, Assistant Solic. Gen., Off. of Solic. Gen., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Oct. 5, 2020, 5:29 PM) (on file with author).

111 The 1988 Act also created a Federal Courts Study Committee to "examine problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the Federal judiciary," including assessments of "the structure and administration of the Federal court system," and to report and make recommendations to the Judicial Conference, the President, the Congress, and others. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 102(b), 102 Stat. 4642, 4644 (1988). The Committee was charged with "a complete study of the courts of the United States." *Id.* § 105. Although the Act's language appeared to charge the Federal Courts Study Committee with studying all federal courts, including the Supreme Court, there is no indication that the Committee considered the Supreme Court Rules or their rulemaking process, and its report does not mention those items.

Office was open when a deadline fell on a Saturday.[112] Yet other amendments altered the procedures applicable to practitioners. As contemporary commentators noted: "In many areas the 1990 Rules confront the practicing bar with a need to modify old habits and old procedures."[113] Rule 13, for example, was amended to increase the certiorari deadline in Rule 13.1 from sixty to ninety days for criminal cases and to increase the maximum extension period for the criminal deadline from an extra thirty days to an extra sixty days.[114] New Rule 29.2 provided that filing by courier was timely only when received rather than when mailed (as provided for first-class, postage-prepaid mail through the United States Postal Service).[115] The Court raised filing fees significantly. And the Court added a new admonition to amici in Rule 37.1: "An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored."[116]

The 1990 Rules exhibited two features that may have been oversights and surely would have incited comments had they been proposed to the public in draft form. The first, Rule 18.1, provided that a notice of appeal must be filed with the clerk of the district court within thirty days after entry of judgment, but that deadline conflicted with the Balanced Budget and Emergency Deficit Control Act of 1985, which imposed a statutory deadline for certain appeals of just ten days.[117] The second, Rule 11, eliminated without explanation the rule that a timely petition for rehearing in a criminal case tolls the certiorari deadline until the denial of rehearing or entry of a new judgment.[118] Rule 13.4 retained that tolling provision for civil petitions.[119]

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112 SUP. CT. R. 30.1.

113 Boskey & Gressman, *supra* note 102, at 297.

114 SUP. CT. R. 13 (1989) (repealed 1995).

115 SUP. CT. R. 29.2.

116 SUP. CT. R. 37.1 (1989) (repealed 1995). The Court also added a new condition to Rule 5.1 that an applicant for admission must "have been free from any adverse disciplinary action whatsoever" three years preceding. SUP. CT. R. 5.1 (1989) (repealed 1995). A new provision in Rule 8.2 provided that the Court may sanction a member of its bar "for conduct unbecoming . . . or for failure to comply with these Rules or any Rule of the Court." SUP. CT. R. 8.2 (1989) (repealed 1995). The Court added a provision that incorporates the prisoner mailbox rule of *Houston v. Lack*, 487 U.S. 266, 276 (1988). Boskey & Gressman, *supra* note 102, at 302–03, n.12.

117 *Compare* 2 U.S.C. § 922(b), *with* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 § 274 (1985).

118 *Compare* SUP. CT. R. 11.3 (1980) (containing Rule 11.3), *with* SUP. CT. R. 11 (1990) (eliminating Rule 11.3).

It is not clear why the Court eliminated this tolling rule; perhaps the Court thought that, because the criminal deadline is nonjurisdictional, equitable-tolling principles established in the case law were more appropriate.[120] Yet if that was the Court's rationale, it is in tension with the Court's simultaneous decision to affirmatively codify in Rule 29 the prisoner mailbox rule established in *Houston v. Lack*.[121]

D. The 1995 Revision

The 1990s brought a number of personnel changes to the Court. Most importantly for the Supreme Court Rules, Spaniol retired as Clerk in 1991, and William Suter was appointed to replace him.[122]

Suter played basketball in college before attending law school and then entering the Army, where he served in the JAG Corps, eventually achieving the rank of major general and the position of Acting Judge Advocate General. After thirty years of Army service, he announced plans to retire. He heard from friends that the position of Clerk of the Court was opening and, knowing that he liked administration, applied. Justice Sandra Day O'Connor, who was on the Court's Personnel Committee, called Suter to interview with her and the other Personnel Committee members—Justice Antonin Scalia and Justice Anthony Kennedy. Suter spoke with them for about an hour, and the next day, O'Connor called him to come meet the Chief Justice.[123]

Suter did so the following day. Rehnquist's fireplace was crackling in his chambers, and O'Connor started by announcing that the Committee had recommended hiring Suter—"so that [he] could keep playing basketball," she joked—and Rehnquist finished by confirming that the whole Court had voted 9-0 to extend him an offer.[124] "So," the Chief continued, "when can you start?" Suter responded that his retirement was effective January 31, 1991.[125] "Then we'll see you February 1," responded Rehnquist dryly.[126]

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119 SUP. CT. R. 13.4 (1990).

120 *See, e.g.*, Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 446 n.4 (1974) (tolling the time to docket an appeal).

121 487 U.S. 266 (1988); *see* SUP. CT. R. 29.2 (1990).

122 Telephone Interview with William K. Suter, Former Clerk of the U.S. Sup. Ct. (Sept. 8, 2020).

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

When Suter arrived at the Court on February 1, he met Justice Byron White, who noted Suter's long military career and asked: "What am I supposed to call you?" Suter responded: "Bill." White replied: "I like General better. We're all gonna call you General."[127] And so they did.

Suter saw a large part of his role as Clerk as making sure the Court functioned smoothly behind the scenes and to fix things that were broken. For example, he always helped prepare advocates who were arguing cases before the Court, and he would greet them in the Lawyers Lounge with tissues and cough drops. Once, a rookie advocate's suit lining started falling out the inside of his jacket. Suter was ready with needle and thread (and a little duct tape) to patch him up.[128] In the early 1990s, a female lawyer in the prep room asked him: "Where's our restroom?"[129] There was a public women's restroom at the end of the hall, but only a men's restroom in the prep area. Suter made a point to install a women's restroom in the prep area.[130]

Early in his tenure, O'Connor pressed Suter on his role with the Supreme Court Rules. "Now, here's what my colleagues and I want you to do," she told him. "We want you to militarize this place. Get this place cleaned up. Get some rules. Just like you do in the Army."[131] According to Suter, although the justices knew the importance of rules and process, most of them did not like the business of court administration as much as they liked the substantive law and doctrine. For the most part, the justices, including the Chief Justice, trusted him to oversee the rulemaking process and deferred to him.[132]

Still, the hope that Suter would bring formality and process to rulemaking got off to a rocky start. In April 1991, just a few months after Suter began, the Court issued a per curiam order adding Rule 39.8, which imposed new restrictions on frivolous in forma pauperis filings.[133] The new rule was so controversial among the justices that three justices (Thurgood Marshall, John Paul Stevens, and Harry Blackmun) dissented, in two separate opinions.[134] Perhaps for that reason, the Court's order came with an explanation for the rule change, an unusual departure from past amendment practice. Yet de-

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *In re* Amendment to Rule 39, 500 U.S. 13 (1991).

134 *Id.* at 14–15.

spite the controversy surrounding the new rule, Suter had no idea the rule was being adopted until the order was issued.[135]

Suter found that "there was no process for the rules" except to leave them be "while no one was squawking."[136] He began building a file on possible rule amendments. Some inconsistencies, gaps, or problems he found himself, but Suter also relied on outside suggestions. Of note, Suter recognized that the main printers of Supreme Court briefs dealt with many of the formatting rules on a routine basis, so he periodically sought their input on potential rule amendments.[137]

Suter also established a semiformal standard operating procedure for rulemaking, centralized in the Clerk's Office. When ideas for rule amendments would come up—initiated by him, Court insiders, or outsiders such as regular Court practitioners or the Solicitor General's office—Suter would keep a record of them in a file.[138] Suggestions could come formally in writing or informally in telephone conversations or in casual conversation.[139] As credible rule suggestions amassed, Suter would coordinate with the Rules Committee and the Chief Justice to determine when to amend the rules.[140]

By 1994, Suter was ready to propose a revision. In the intervening years, Marshall, White, and Blackmun retired and were replaced by Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer, respectively. Ginsburg, in particular, had an interest in court procedure. She had been on the D.C. Circuit's rules committee, and she had both taught and written about court procedure as a

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135 Telephone Interview with William K. Suter, *supra* note 122.

136 *Id.*

137 *Id.*

138 *Id.*

139 Professor Alan Morrison, who was Director of the Public Citizen Litigation Group for many years and who has argued twenty cases before the Court, once approached Suter about why the Court required a public notary to witness a signature in the application for admission to the Supreme Court bar. Suter responded that he did not know but would investigate. Upon investigation inside the Court, Suter received the answer: because that's the way it's always been done. Suter decided that it was time to reconsider the practice, so he told Morrison that he would work on eliminating the notary requirement. Telephone Interview with Alan B. Morrison, Lerner Fam. Assoc. Dean for Pub. Int. & Pub. Serv., Geo. Wash. Univ. L. Sch. (Sept. 25, 2020); Telephone Interview with William K. Suter, *supra* note 122. Another time, Morrison wrote a letter to the Clerk suggesting a rule change that might allow more leniency for recent Supreme Court judicial clerks to assist attorneys with cases before the Court. The Clerk wrote Morrison back to inform him that the Court had considered his request and had declined to make such a change. Telephone Interview with Alan B. Morrison, *supra*.

140 Telephone Interview with William K. Suter, *supra* note 122.

law professor at Rutgers.[141] So, after she had served on the Café Committee for a year, Rehnquist added her to the Rules Committee along with Stevens and Scalia.[142]

When Suter approached the Rules Committee about possible amendments, Ginsburg pressed for a new procedure akin to the procedure developed for the lower-court rules, namely, assembling an advisory group of outside lawyers to take the lead on the drafting work and then publishing amendment proposals for notice and comment. Suter was uncomfortable with assembling a group because he thought it unseemly for the Court to pick and choose among outsiders. According to Suter, they compromised: the rule revisions would be drafted internally but would, at least for major proposed revisions, go through a notice-and-comment period.[143]

Under this new procedure, then, Suter would draft a set of rules revisions and add a clerk's comment purporting to explain the rule change briefly so that the public might better understand the change. He would then circulate the proposed revision to the Reporter of Decisions, the Marshal, the Librarian, the Public Information Office, and other internal Court personnel implicated by the rule changes. Almost invariably, these recipients had no comment.[144]

Suter would keep the Administrative Assistant to the Chief Justice—later renamed Counselor—apprised of the process. The position under Rehnquist held a large portfolio. Harvey Rishikof, Administrative Assistant from 1994–1996, was aware of the rulemaking process but was not directly involved,[145] and it appears that subsequent office-

141 Scott Dodson, *A Revolution in Jurisdiction*, *in* THE LEGACY OF RUTH BADER GINSBURG, 137 (2005).

142 Telephone Interview with William K. Suter, *supra* note 122. It is traditional for the most junior justice to serve on the Café Committee. Stephen Breyer became the most junior justice a year after Ginsburg was appointed, and he remained the junior justice—and on the Café Committee—for more than a decade. *Id.*

143 *Id.*

144 *Id.* It is unclear how involved the Counsel's Office has been in rulemaking. Suter did not mention involving that office, and one Administrative Assistant said she would be "surprised" if the Counsel's Office was involved under Rehnquist because Rehnquist viewed that office's mandate narrowly. Telephone Interview with Sally Rider, Professor, Univ. of Ariz. James E. Rogers Coll. of L. (Sept. 14, 2020). However, other Administrative Assistants recalled the Counsel's Office being at least kept aware of proposed amendments. Telephone Interview with James C. Duff, *supra* note 93; Telephone Interview with Harvey Rishikof, Former Admin. Assistant to the Chief Justice of the U.S. Sup. Ct. (Aug. 23, 2020); *see also* E-mail from Jeffrey Morris, *supra* note 91 (recalling that, under Burger, the Court's two "law officers" were involved in the Court's rulemaking process).

145 Telephone Interview with Harvey Rishikof, *supra* note 144.

holders likewise did not actively participate in the rulemaking.[146] Suter did not usually seek input from anyone in the lower-court rulemaking apparatus, such as the Director of the AO or the Secretary of the Judicial Conference or any members of the Standing Committee or advisory committees.[147]

Formally, no outside input was sought or received, but it is unclear how much was sought or received informally. Contemporaneous commentators reported "some informal consultation between lawyers and the Clerk's Office" and that, in at least one instance, "the Clerk, after obtaining authorization from the Committee of the Justices, made available a draft of a proposed revision to a very few lawyers for their comments and suggestions."[148] Once, Alan Morrison wrote a letter, joined by a dozen or so other Supreme Court practitioners, proposing a restructuring of the Court's argument sessions to alleviate end-of-term pressures. According to Morrison, the Court asked for the Solicitor General's views on the proposal, and, when the Solicitor General responded without a recommendation, the Court declined to adopt the proposal.[149] In light of the close relationship between the Court and the Solicitor General's office, it would not be surprising if the Clerk regularly requested the Solicitor General to review rule proposals, even proposals not in the public notice-and-comment period.[150] There is some anecdotal evidence that certain former Solicitors General were consulted, but I have not been able to confirm that.[151]

After proposal review, Suter would then send the proposed revision to the Rules Committee. Although the justices' clerks were not a formal part of the rulemaking process, and although most justices tried to shield them from such work, a few—mostly from Ginsburg's chambers—did participate from time to time, mostly by contributing

146 Telephone Interview with William K. Suter, *supra* note 122.

147 *Id.*

148 Bennett Boskey & Eugene Gressman, *The Supreme Court's New Rules – Model 1995*, 164 F.R.D. 80, 84 (1995).

149 Telephone Interview with Alan Morrison, *supra* note 139.

150 Telephone Interview with Sally Rider, *supra* note 144.

151 Seth Waxman, who was Solicitor General from 1997–2001, stated that the Solicitor General's Office always submitted comments during a notice-and-comment period, but that he personally was never consulted informally on drafts after leaving the Solicitor General's Office. E-mail from Seth Waxman, Former Solic. Gen. of the U.S., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 15, 2020, 2:59 PM) (on file with author). Ted Olson, who was Solicitor General from 2001–2004, also stated that as he recalled, he was never consulted informally on rule amendments after leaving the office. E-mail from Theodore B. Olson, Former Solic. Gen. of the U.S., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 9, 2020, 12:18 PM) (on file with author).

wordsmithing editing.[152] After committee review and approval, the Rules Committee would send the revision to the Chief Justice, who circulated the proposal to each justice for conference.[153] At a designated conference, the justices would vote to approve the proposal for public notice and comment.[154]

At times, before the vote, a justice might discuss the proposed revision with Suter. For example, one proposal changed the date of filing from the date of Clerk receipt to the date of mailing as postmarked so that the date could be readily ascertained by both the Clerk and the parties. One justice worried that such a shift might degrade the importance of the Court, but Suter pushed back until the justice relented, telling him, "Okay, have it your way, General."[155] Under Suter's tenure, proposed revisions "sailed through conference without a hitch."[156]

Upon approval by the Court, Suter would, in the normal course, post the proposed revision for notice and comment.[157] Suter usually received a number of comments, many of which helpfully pointed out problems or subtle improvements in the language.[158] Suter and his staff would revise the proposed amendments in light of comments before sending the final draft amendments, along with select comments received, to the Rules Committee.[159] Upon committee approval, the Chief Justice would circulate the amendments to the other justices for a final vote at conference.[160] Upon final vote, the new rules would be published, along with an effective date.[161]Meanwhile, Suter kept meticulous records on all rulemaking activities for each rule change, including internal and external correspondence and memos from the justices.[162] He kept all rule drafts and comments submitted from within and from outside the Court. Those rulemaking documents and details have never been made public.[163]

That was how the 1995 Rules revision was processed. The Court released proposed rules on March 13, 1995, with comments due by

152 Telephone Interview with William K. Suter, *supra* note 122.
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*

April 28.[164] About two dozen sets of comments were submitted, some of which "appear to have had a significant influence on the final version of the Rules."[165] The final revision was adopted by the Court on July 26, effective October 2.[166]

The 1995 revision included a number of important rule changes, including rules pertaining to the timeliness of corrections to defective certiorari petitions, changes to the start of the thirty-day certiorari-petition deadline, and others.[167] Of note, Rule 30 prescribed additional procedures when an application for an extension of time was acted on in the first instance by the Clerk, a gap left open by the 1990 Rules.[168]

The final rules also contained two important changes that were not in the proposed rules published for notice and comment. In the first change, Rule 10 gave additional guidance about the standards for granting a certiorari petition by changing the 1990 formulation of "only when there are special and important reasons" to "only for compelling reasons," and by inserting the word "important" into three of the four criteria that previously lacked the word.[169] The amendments also added the following warning that a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[170] It is not clear whether submitted comments or some other impetus caused the Court to adopt these changes.

In the second change, Rule 15 was amended to direct the Clerk, "no less than 10 days after the brief in opposition is filed" to distribute cert petitions to the Court, to give time for a reply brief.[171] Previously,

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164 Boskey & Gressman, *supra* note 148, at 84.

165 *Id.* at 85.

166 *Id.* at 80.

167 Rule 14 was amended to provide that timely but defective petitions will be returned by the Clerk with an indication of the deficiency, and that a corrected petition received "no more than 60 days after the date of the Clerk's letter" will be deemed timely. Amended Rule 15 provided for the thirty-day deadline for a respondent's opposition to cert brief to start when the case is "put on the docket" rather than when respondent receives the petition (to avoid confusion about when the deadline began or if there are multiple respondents). Amended Rule 35 provided that successor public officers, though automatically substituted, shall be identified by the parties. The amendments added new Rule 44.5 to provide that the Clerk will not file any amicus brief in support or, or in opposition to, a petition for rehearing. Rule 33 was amended to update the printing rules with computerization in mind. A number of minor or stylistic amendments were also adopted. *See id.* at 81–82.

168 *Id.* at 92.

169 *Id.* at 89.

170 SUP. CT. R. 10 (1995).

171 SUP. CT. R. 15 (1995).

a petitioner did not know when the papers would be distributed for conference; often the Clerk would do so immediately upon receiving the opposition brief.[172] The new rule gave the petitioner ten days to file a reply brief to be assured it would be included in the distribution to the justices.[173] This rule change likely stemmed from comments submitted by practitioners.[174]

E. 1997 to 2013

The late 1990s and 2000s brought many changes to the Court, including an electronic revolution, the impeachment of President Bill Clinton, 9/11, anthrax scares at the Court, and major changes in Court personnel. Throughout these changes, the rulemaking procedures implemented by Suter largely stayed consistent, with sporadic deviation from the notice-and-comment procedure.

In 1996, just a few months after the effective date of the 1995 Rules, Suter proposed another rule amendment. It had become common practice for parties to fund and even draft amicus briefs submitted nominally by outside amici,[175] and Suter was concerned that parties were using amicus briefs to circumvent the page limits imposed on party briefs.[176] The practice was sufficiently alarming to the Chief Justice that Jim Duff, then Rehnquist's Administrative Assistant, followed the Court's rulemaking response fairly closely.[177] On March 18, Suter published the following proposed amendment to the amicus rule: "Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall identify, in the bottom margin of the first page of text, every person or entity, other than the *amicus curiae* or its counsel, who made any contribution, in money or services, to the cost of preparing and submitting the brief."[178]

The proposal brought more public attention than expected,[179] and, reportedly, a number of adverse comments were submitted in response.[180] Perhaps in response to the comments received, the Court dispensed with the proposed language "any contribution, in money or

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172 Boskey & Gressman, *supra* note 148, at 86.

173 *See id.* at 85.

174 *Id.*

175 Bennett Boskey & Eugene Gressman, *The 1997 Restatement and Revisions of the Supreme Court's 1995 Rules*, 170 F.R.D. 30, 32 (1997).

176 Telephone Interview with William K. Suter, *supra* note 122.

177 Telephone Interview with James C. Duff, *supra* note 93.

178 *Proposed Rules*, 164 F.R.D. 581, 583 (1996).

179 Telephone Interview with James C. Duff, *supra* note 93.

180 Boskey & Gressman, *supra* note 175, at 31.

services" in favor of "author[ship]" and "monetary contribution." The Court adopted the final rule in January 1997 along with minor changes to other rules[181]:

> Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.[182]

In 1998, the Court approved revisions to the Federal Rules of Appellate Procedure for the Courts of Appeals, which were to take effect on December 1, 1998. And so, on October 6, 1998, Suter published for comment proposed rule amendments to the Supreme Court Rules conforming to those changes. For example, the amendments proposed to change the required corporate disclosures of "nonwholly owned subsidiaries" to disclosure of "any publicly held company that owns 10% or more of the corporation's stock," a change tracking the Appellate Rules amendments.[183]

In addition, the amendments proposed to delete, in Rule 13.3's definition of when the ninety-day period for filing a cert petition begins, the provision that a suggestion for a rehearing en banc in the Court of Appeals is not a petition for rehearing that would toll the deadline to file a cert petition "unless so treated by the United States court of appeals."[184] New Rule 41(b) of the Federal Rules of Appellate Procedure codified the equivalent treatment of panel-rehearing petitions and en banc rehearing petitions, so the Supreme Court Rule provision in 13.3 was superfluous. Only a few comments were reportedly received,[185] and the Court adopted the rule amendments in January 1999, effective May 3, 1999.[186]

On November 18, 2002, Suter published new proposed rules, with an end date for comments of December 2, an extraordinarily short

181 *Id.* at 33–36.

182 SUP. CT. R. 37.6 (1997).

183 Bennett Boskey & Eugene Gressman, *The Supreme Court's 1999 Revisions of its Rules*, 183 F.R.D. 603, 609 (1999).

184 SUP. CT. R. 13.3.

185 Boskey & Gressman, *supra* note 183, at 603.

186 The 1999 Amendments also changed the format for the printing of briefs. *See id.* at 604–08.

time period over the Thanksgiving holiday week.[187] The Court reportedly received four sets of comments.[188] The final rules were adopted January 27, 2003, effective May 1,[189] and made minor changes to filing procedures, including changing the start date of a number of deadlines from the date the clerk receives the triggering filing to the date of filing. The rules also authorized commercial carriers for filing papers and made other minor amendments.[190]

On March 14, 2005, the Court issued two rule amendments without notice or comment for the first time since 1995.[191] Although the Court did not explain why it did not give advance notice and an opportunity for public comment, the most likely explanation was based on the unique circumstances precipitating the two amendments, which ended up being minor, conforming, and somewhat time sensitive. One amendment closed a gap in the certiorari timing of Rule 13.3, which had not previously indicated the effect on certiorari timing of an untimely petition for rehearing or sua sponte rehearing in the Court of Appeals. The prior year, in *Hibbs v. Winn*,[192] the Court considered the timing effect when a Court of Appeals recalled its own mandate and ordered briefing on whether it should rehear the case en banc. Justice Ginsburg, writing for a unanimous Court, noted that the procedure was not addressed by Rule 13.3 but nevertheless held that the lower court's actions made the judgment nonfinal and thus the petition timely.[193] The 2005 rule amendment conformed Rule 13.3 to *Hibbs*, as the Clerk's comment to the new rule confirmed.[194] The second change amended Rule 47 to specify that the term "state court" includes the Guam and Northern Mariana courts, over which the Supreme Court obtained certiorari jurisdiction by statutes that became effective in 2004.[195] The need for a rule amendment came to be realized when

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187 Press Release, Sup. Ct. of the U.S. (Nov. 18, 2002).

188 Bennett Boskey & Eugene Gressman, *Supreme Court Rules: The 2003 Revisions*, 213 F.R.D. 505, 506 (2003).

189 Press Release, Sup. Ct. of the U.S. (Jan. 27, 2003), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-27-03 [https://perma.cc/TA5Z-MLFB].

190 Boskey & Gressman, *supra* note 188, at 508–15.

191 Press Release, Sup. Ct. of the U.S. (Mar. 14, 2005), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-14-05 [https://perma.cc/2ED4-U9LG]. For commentary on the 2005 amendments, see Bennett Boskey & Eugene Gressman, *Supreme Court Rules: Minor 2005 Changes*, *in* 1 AAA West's Fed. Forms, Sup. Ct. App'x N (5th ed. 2019).

192 542 U.S. 88 (2004).

193 *Id.* at 96–99, 114.

194 *See* Sup. Ct. R. 13.3 (2005), Clerk's Comment.

195 Pub. L. No. 108-378, § 2, 118 Stat. 2206 (Oct. 30, 2004) (giving the Supreme Court certiorari appellate jurisdiction over Guam courts); 48 U.S.C. § 1824 (giving the Ninth Circuit appel-

Suter fielded an anxious phone call in 2004 inquiring about the procedures for certiorari review from Northern Mariana courts.[196]

O'Connor retired from the Court on January 31, 2006, and Rehnquist died on September 3, 2005. They were replaced by Chief Justice John Roberts and Justice Samuel Alito. Roberts and Alito brought new interest and approaches to the Supreme Court Rules. They were more attuned to the need for the rules to be modernized and able to withstand the challenges of evolving technology.[197] Alito, in particular, was interested in rules, having chaired the Appellate Rules Advisory Committee. So, Roberts appointed Alito to the Rules Committee to replace longtime committee member Stevens. Despite his own interest in court procedure, Roberts tended to leave the rulemaking process that Suter had implemented largely intact and entrusted to the Clerk.[198] According to Sally Rider, the Counselor to the Chief Justice from 2000 to 2006, the Counselor's rulemaking role under Roberts remained largely unchanged from that under Rehnquist, with the Counselor being aware of rulemaking but not particularly involved because the process continued to be centralized by the Clerk's Office.[199]

The Court returned to the notice-and-comment process in 2007, when it posted proposed rules on May 14, 2007, adopting them shortly after on July 17, effective October 1.[200] The amendments were minor and mostly conforming to changes in the Appellate Rules, and there are no reports of comments being filed.[201]

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late jurisdiction over the Northern Mariana courts until May 1, 2004, with reversion then to the Supreme Court's certiorari jurisdiction).

196 Telephone Interview with William K. Suter, *supra* note 122.

197 Telephone Interview with Sally Rider, *supra* note 144.

198 Telephone Interview with William K. Suter, *supra* note 122.

199 Telephone Interview with Sally Rider, *supra* note 144.

200 Press Release, Sup. Ct. of the U.S. (May 14, 2007), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-14-07 [https://perma.cc/2LL5-L5S8]; Press Release, Sup. Ct. of the U.S. (July 17, 2007), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_07-17-07 [https://perma.cc/996B-BSZB].

201 The amendments changed page-count limits in Rule 33 to word-count limits, consistent with similar changes in new amendments to the Federal Rules of Appellate Procedure; revised the briefing schedule under Rule 25; and revised some procedures pertaining to the filing of amicus briefs under Rule 37. The amendments also altered Rule 37 to require amicus briefs at the merit stage to be due seven days after the brief for the party supported is filed, a requirement that was not published for notice and comment but that followed parallel changes in the Federal Rules of Appellate Procedure. *See* Press Release, Sup. Ct. of the U.S. (July 17, 2007), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_07-17-07 [https://perma.cc/6RVE-844V].

In 2010, with Alito now on the Rules Committee, the Court adopted a set of rule amendments without notice and comment for the second time since 1995.[202] Unlike in 2005, the 2010 amendments were neither conforming nor time-sensitive. Further, these amendments addressed matters of substantial interest to advocates appearing before the Court. The amendments, among other things, reduced the word-count limit for merits-stage reply briefs, clarified that only an attorney admitted to the Supreme Court Bar may file an *amicus* brief, and prohibited extensions of time for merits-stage *amicus* briefs.[203]

In 2013, the Court again adopted a set of rule amendments without notice and comment.[204] These amendments included, by the Clerk's own assessment, "several significant changes."[205] The amendments expanded the number of days the Clerk would wait to distribute a case for conference from 10 to 14, giving petitioners more time to file a reply brief; clarified that parties may file a blanket consent to amicus briefs under Rule 37; relieved state-court-appointed attorneys from the obligation to file an affidavit of indigency; required electronic service of documents at the time of filing under Rule 29.3; and added a requirement to merits-stage motions under Rule 21.[206] It does not appear that the Court received input even from the Solicitor General on these rule changes.[207]

F. 2013 to Present

Bill Suter retired in the summer of 2013 and was succeeded by the Court's longtime Legal Counsel Scott Harris. Before departing, Suter compiled a large Clerk's Office Operations Manual, modeled after the Army's Continuity of Operations Planning manuals, containing all of the detailed procedures he had developed and maintained during his twenty-two years as Clerk of the Court, including those pertaining to the rulemaking process for the Supreme Court Rules.[208] Harris appears largely to have continued Suter's rulemaking process for the Supreme Court Rules.

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202 Press Release Sup. Ct. of the U.S. (Jan. 12, 2010), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-12-10new [https://perma.cc/3R96-M5RJ].

203 *Id.*

204 Press Release, Sup. Ct. of the U.S. (Apr. 29, 2013), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-29-13 [https://perma.cc/J86J-WSCV].

205 *Id.*

206 *Id.*

207 E-mail from Donald Verrilli, Former Solic. Gen. of the U.S., to Scott Dodson, Professor of L., Univ. Cal. Hastings L. (Sept. 21, 2020, 2:09 PM) (on file with author).

208 Telephone Interview with William K. Suter, *supra* note 122.

Under Harris's tenure, the Supreme Court Rules have been amended twice. In 2017, the Court adopted, without notice or comment, rule amendments "necessary to implement the Court's electronic filing system,"[209] which went live on November 13, 2017. These amendments were not controversial.

On November 1, 2018, the Court announced proposed rule changes and invited public comment for the first time since 2007.[210] The proposed amendments were picked up by media outlets and widely publicized.[211] Three proposed amendments were adopted as proposed. The first required the parties to provide a list of all related cases so that justices who participated in those related cases could recuse themselves early.[212] The rationale was to avoid belated recusals, as in *Washington v. United States*, when Kennedy realized he had participated in a related case more than thirty years earlier; without Kennedy, the Court split 4-4 and affirmed without opinion.[213] A second proposal required that a reply brief in a case scheduled for argument be received by the Clerk not later than ten days before the date of argument.[214] The third made explicit that paper remains the official form of filing even though electronic filing is also required.[215]

A fourth proposal, to reduce the word limit in merits briefs, generated negative comments. A group of eighteen law firms with prominent Supreme Court practices submitted a letter opposing the word-limit reductions as "harmful" to advocacy in high-profile cases.[216] The Court threw the commentators a bone but not much else. On April 18, 2019, the Court adopted the rule amendments largely as proposed,

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209 Press Release, Sup. Ct. of the U.S. (Sept. 27, 2017), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-27-17 [https://perma.cc/ZNN3-8SL4].

210 Press Release, Sup. Ct. of the U.S. (Nov. 1, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-01-18 [https://perma.cc/AM44-RFGA].

211 *See, e.g.*, Amy Howe, *Court announces proposed rule changes*, SCOTUSBLOG (Nov. 1, 2018), https://www.scotusblog.com/2018/11/court-announces-proposed-rule-changes/ [https://perma.cc/5H9S-MP7J].

212 Press Release, Sup. Ct. of the U.S. (Nov. 1, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-01-18 [https://perma.cc/6JGA-3G2Q].

213 Tony Mauro, *Two Surprise Supreme Court Orders Show Why Recusals Matter*, NAT'L L.J. (June 11, 2018), https://www.law.com/nationallawjournal/2018/06/11/two-surprise-supreme-court-orders-show-why-recusals-matter/ [https://perma.cc/Q64E-DBUW].

214 Press Release, Sup. Ct. of the U.S. (Nov. 1, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-01-18 [https://perma.cc/N8BB-MA95].

215 *Id.*

216 *See* Tony Mauro, *Supreme Court Advocates Push Back on 'Harmful' Proposed Word Limits*, NAT'L L.J. (Nov. 30, 2018), https://www.law.com/nationallawjournal/2018/11/30/supreme-court-advocates-push-back-on-harmful-proposed-rules-changes/ [https://perma.cc/GS8C-QDHX].

with one exception: the adoptions left intact the previous word limit for reply briefs.[217] The Court did not explain its change of heart on reply briefs, nor did it explain why it found the practitioners' letter otherwise unpersuasive.[218]

G. Summary

The present state of the rulemaking process for the Supreme Court Rules appears to be semiformal, with little transparency and only sporadic outside input. The Clerk's Office centralizes the process, with suggestions coming there first. When the Clerk deems the time ripe for a rule amendment, perhaps with the approval of the Rules Committee of justices, the Clerk will draft proposed amendments and circulate them to internal Court personnel and, possibly, specific outsiders, finally proposing them to the justices on the Rules Committee. None of the drafts, discussions about the drafts, or comments about the drafts are made public.

It is not clear who decides whether to put an amendment proposal through a notice-and-comment period, what the standards for that decision are, or how long that period should be. If the proposal does get posted for notice and public comment, the Clerk posts the proposal on the Supreme Court's website as a press release, often with a sentence or two summarizing the changes. The Court does not reveal any of the comments it receives or even whether it received comments. After reconsideration of the proposal by the Clerk in light of any comments, the Clerk sends a final draft proposal to the Rules Committee. The final draft is not made public.

Upon final approval by the Rules Committee, perhaps with modifications by the justices, the Chief Justice circulates the proposal to all the justices for consideration at conference, whereupon the justices vote to approve the rule amendments, perhaps, again, with modifications. Neither the justices' deliberations nor any changes made are disclosed to the public.[219] The Clerk then publishes the revised rules, along with a spare Clerk's Comment explaining the rule, on the Court's webpage. The final, approved rule amendment, plus any approved proposal posted for notice and comment, are the only parts of rulemaking process visible to the public.

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217 Press Release, Sup. Ct. of the U.S. (Apr. 18, 2019), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-18-19 [https://perma.cc/VBE7-4JC6].

218 *Id.*

219 A comparison between a proposal published for comment and the final rule can reveal changes but not who made them or why.

This closed and cloistered process is in contrast to the open and participatory process for lower-court rulemaking. It is even in some tension with the process the Court uses when it issues opinions on substantive law. In litigated cases, the Court allows amici—often hordes of amici—to participate and even publicly invites specific amici to participate.[220] All briefs of parties and amici are public, the record is public, and a transcript of oral argument is made and posted publicly. Although the justices' internal deliberations are not public, the justices make public their opinions, which are supported by careful and detailed reasoning. In many ways, the process for issuing an amendment to the Supreme Court Rules is more insular and secretive than the Court's adjudicative process for deciding a case.

III. Justifying the Differences in Rulemaking

What justifies the Court's choice of such a process for the making of its own rules? I discuss and evaluate possible justifications below.

A. *The Court's Business Alone*

The Court's cloistered and secretive attitude to the making of the Supreme Court Rules might stem from the perception that the rules are nobody's business but the Court's: as one former staffer put it (without necessarily endorsing it), "How we run our shop is up to us."[221] A weaker form of the "nobody's business" attitude is the view that no one else really cares.

But these attitudes and views do not reflect reality—legally or practically. Legally, Congress has at least some say over the rules of practice and procedure for the Supreme Court.[222] Putting aside the difficult question of whether—and to what extent—the Court can fashion its own rules in the absence or in contravention of congressional authorization,[223] scholars and the Court generally agree that

220 *See* Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from Chaff*, 106 Geo. L.J. Online 135, 135 (2017) (reporting that amicus briefs in argued cases number nearly 1,000 each term); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901, 1902 (2016) (reporting that "the marquee cases attract[] briefs in the triple digits"). The Court regularly invites the Solicitor General to file an amicus brief in cases pertaining to the interests of the United States, and often appoints an amicus to argue a legal position at issue in the case that neither party contests.

221 Telephone Interview with Douglas McFarland, *supra* note 91.

222 *See* U.S. Const. art. III, § 2, cl. 2.

223 *Compare, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 428–29 (1793) ("The mode [of service of process], if it be not otherwise prescribed by law, or long usage, is in the discretion of the Court"), *with id.* at 432–33 (Iredell, J., dissenting) ("I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which

Congress has some authority, even primary authority, over the Supreme Court's practice and procedures.[224] Congress has long assumed its primacy, for even when delegating local rulemaking power to the Court in the Judiciary Act of 1789, Congress qualified that delegation as allowing only rules "not repugnant to the laws of the United States."[225]

It is true that Congress has given the Court the widest authorization to make its own rules.[226] But that does not mean that Congress does not care about the rules or the rulemaking process the Court has instituted. Congress has, at times, cared a great deal about the lower-court rules and its rulemaking process.[227] Congress has also, at times, cared a great deal about the Court's jurisdiction—both the scope of its jurisdiction and the way the Court exercises its discretionary certiorari jurisdiction.[228] If, for example, Congress believed that the Court's guidance for exercising its discretion to grant certiorari review, presently in Supreme Court Rule 10, was excluding important cases, Congress might assert corrective measures, theoretically by prescribing certio-

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they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only."). *Cf.* United States v. Hill, 26 F. Cas. 315, 317 (C.C.D. Va. 1809) (Marshall, Cir. J.) (holding that federal circuit courts had power to summon grand jury even though no statute explicitly gave them this power, because circuit courts could not give effect to statutes granting them criminal jurisdiction in absence of such power).

224 The source and scope of Congress's authority are subject to vigorous debate. *Compare, e.g.*, John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997) (sourcing Congress's power over the Court's appellate jurisdiction in the Exceptions Clause), *and* William Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 225, 270 (1973) (same), *with* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 79-80 (sourcing Congress's authority in the Necessary and Proper Clause). *Compare also* Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 61 (1825) ("Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do."), *with* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (asserting that the federal courts have inherent powers that "cannot be dispensed with . . . because they are necessary to the exercise of all others"). For other important commentary on the division of authority over court rulemaking, *see, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Daniel J. Meador, *Inherent Judicial Authority in the Context of Civil Litigation*, 73 TEX. L. REV. 1805 (1995); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001). I need not wade into those troubled waters, for my argument depends not on the source or scope but only on the existence of some congressional authority to regulate the Supreme Court's procedures.

225 Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 23, 83.

226 *See supra* Section II.A.

227 *See* Burbank, *supra* note 224.

228 *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (detailing the history of the Court's certiorari jurisdiction).

rari standards itself or by expanding the Court's mandatory appellate jurisdiction. At the very least, Congress might want to know the basis for any changes the Court makes to Rule 10.

Practically, the rules are much more than just the Court's business. The Supreme Court Rules affect practitioners and parties, too. As Bill Suter acknowledged, "It's the lawyers who practice at the Court who live, and die, by the Rules."[229] From the earliest days of the Court, its bar has needed to know and understand its rules of practice and procedure.[230] Thus, the rules directly affect practitioners.[231] Further, the Supreme Court Rules have affected practitioners and their clients in egregiously unfair ways. In 1952, an attorney filed a petition for certiorari in the Supreme Court on the ninety-first day after the lower court entered judgment.[232] When the clerk deemed the filing as untimely, the attorney objected and pointed to Rule 38(2), which specified the time for filing as the time prescribed by Section 8 of the 1925 Act, which itself specified as "three months."[233] The clerk explained, however, that Congress replaced the 1925 Act's deadline with ninety days in 1948.[234] The Supreme Court Rule, however, had not been updated. Thus, the attorney's filing was timely under the Court's own rules but untimely under the prevailing statute, and so the clerk rejected the filing.[235] More generally, in 1991, Suter "became aware that the Rules needed an overhaul" because "[t]hey were loaded with trip wires and land mines that caused hardships to the [Supreme Court] Bar."[236] The history of the Supreme Court Rules is replete with opacity, errors, omissions, and misleading provisions.[237]

Even less egregious examples abound. The letter sent by a group of eighteen law firms protesting the 2018 proposed word-count reductions shows practitioner interest even in some of the more mundane aspects of the rules.[238] Many Supreme Court Rules specifically address procedures pertaining to litigation involving the United States, repre-

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229 E-mail from William K. Suter, Former Clerk of the U.S. Sup. Ct., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Sept. 4, 2020, 2:18 P.M) (on file with author).

230 *See supra* text accompanying notes 87–89.

231 *See, e.g.*, Boskey & Gressman, *supra* note 102, at 297 ("In many areas the 1990 Rules confront the practicing bar with a need to modify old habits and old procedures.").

232 This story is recounted in Wiener, *supra* note 90, at 32–33.

233 *Id.*

234 *Id.*

235 *Id.*

236 E-mail from William K. Suter, *supra* note 229.

237 The sorry state of the Supreme Court Rules prior to the 1954 revision, for example, is documented in Wiener, *supra* note 90, at 21–32.

238 *See supra* text accompanying notes 216–18.

sented by the Solicitor General's Office, which presumably would be very interested in any rulemaking that might affect those procedures.[239] The Court's own practice of publishing some proposals for public comment, coupled with the fact that comments are in fact submitted by both the Solicitor General and by members of the Court's private bar, shows that practitioners care both about the rules and about the rulemaking process. The state of the rules—and how they are made—is very much the business of, and of interest to, legislators and practitioners before the Court.

B. Traditions of Secrecy and Insularity

The Supreme Court has always been a tradition-steeped, insular, and notoriously secretive institution.[240] Internal correspondence, opinion drafts, and the justices' deliberations are all kept confidential. In 1987, the Court adopted a written code of conduct for Supreme Court law clerks,[241] which dictates that law clerks owe the Court and their individual justices "complete confidentiality, accuracy, and loyalty" and admonishes law clerks "never disclose to any person any confidential information received in the course of the law clerk's duties."[242] In addition, Chief Justice Roberts warns each incoming class of law clerks against leaking information, and most justices reiterate their intense dislike of breaches of confidence.[243] The same general norms of

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239 The Department of Justice is well represented on the advisory committees in the rulemaking process for the lower-court rules, including having the Solicitor General be an ex officio member of the Appellate Rules Advisory Committee. *See Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees*, *Advisory Committee on Appellate Rules*, U.S. CTS. (Jan. 4, 2022), https://www.uscourts.gov/sites/default/files/committee_roster_for_web_current.pdf [https://perma.cc/A8TG-7Q57].

240 *See* Peter G. Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225, 225 (1967) ("Of America's political institutions, the United States Supreme Court is the most remote and insulated."); Rory K. Little, *Clerking for a Retired Supreme Court Justice—My Experience of Being "Shared" Among Five Justices in One Term*, 88 GEO. WASH. L. REV. ARGUENDO 83, 105–06 (2020) ("The U.S. Supreme Court has always been, for many reasons, shrouded in secrecy.").

241 DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 127 (Aaron Javsicas ed., 9th ed. 2011).

242 *See* Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 104–05 (2012). Consistent with its jealously guarded confidentiality, the Court has consistently refused to make copies of the Code of Conduct available to the public. *Id.*

243 *See* Jack Goldsmith, *Temple of Silence: Why SCOTUS Leaks Less than the CIA*, NEW REPUBLIC (June 23, 2012), http://www.tnr.com/article/politics/magazine/104219/jack-goldsmith-SCOTUS-Leaks-CIA [https://perma.cc/G7AQ-LNCA].

secrecy are impressed upon staff.[244] As Justice Ginsburg was once quoted about the fate of cases prior to the release of the Court's opinions, "Those who know don't talk . . . . And those who talk don't know."[245]

She was mostly right.[246] Leaks happen on rare occasion,[247] and when they do, the Court can act aggressively to protect its secrets.[248] In the early 1900s, a law clerk conspired with outsiders to use nonpublic information about pending cases to profit in the stock market. The Chief Justice referred the matter to the Department of Justice, suggesting that it warranted criminal investigation.[249] After Professor Ed-

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244 *See* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT vi–vii (1998).

245 *See* Goldsmith, *supra* note 243.

246 Ryan C. Black & Timothy R. Johnson, *Behind the Velvet Curtain: Understanding Supreme Court Conference Discussions Through Justices' Personal Conference Notes*, 19 J. APP. PRAC. & PROCESS 223, 224 (2018) ("The system [of confidentiality and security at the Court's conference] works so well that the Court has seldom experienced information leaks about how it will decide or about what transpires at conference.").

247 Several law clerks leaked information about the Court's deliberations in *Bush v. Gore*. *See* David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 319–20. It is fair to say that the Roberts Court has been plagued by several leaks in high-profile cases. *See, e.g.*, Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/DQW4-WSYX]; Joan Biskupic, *Anger, Leaks and Tensions at the Supreme Court During the LGBTQ Rights Case*, CNN (July 28, 2020), https://www.cnn.com/2020/07/28/politics/neil-gorsuch-supreme-court-lgbtq-civil-rights-act-alito/index.html [https://perma.cc/7E2N-XMPC]; Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012), http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/ [https://perma.cc/3T7A-VVLJ].

248 *See, e.g.*, Tierney Sneed, *Escalation of Supreme Court's Leak Probe Puts Clerks in a 'No-Win' Situation*, CNN (June 1, 2022), https://edition.cnn.com/2022/06/01/politics/supreme-court-clerks-leak-investigation-phones-affidavit-abortion/index.html [https://perma.cc/QFM4-274Z] (reporting that "court officials tasked with leading the investigation" into the leak of a draft opinion on abortion rights asked clerks to "turn over private phone data and sign affidavits"). Ironically, the leaks sometimes come from the justices themselves. In 1979, Bob Woodward and Scott Armstrong published a bombshell book on the inner workings of the Court. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979). "The Book," as the justices called it, "generated intense controversy both inside and outside the Court." David J. Garrow, *The Supreme Court and* The Brethren, 18 CONST. COMMENT. 303, 303, 305 (2001). One columnist wrote that "[t]he Justices are brothers in the style of Cain and Abel. This book will destroy the Court's collegiality, if there is any to destroy." George F. Will, *The Injudicial Justices*, NEWSWEEK, Dec. 10, 1979, at 140. As it turned out, though, a number of the justices themselves were primary sources for the book. *See* Garrow, *supra*, at 304–05 (calling Stewart the "secret instigator and primary early source" for the book and concluding that the evidence strongly suggests that Rehnquist was also a source).

249 *See* John B. Owens, *The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 NW. U. L. REV. 271, 277–78 (2000).

ward Lazarus published a book detailing internal happenings at the Court during his time as a law clerk to Justice Harry Blackmun, Court personnel, including justices, insisted on calling him "The Rat."[250] The Court threatened legal action against Professor Peter Irons after he unexpectedly released transcripts and audiotapes of several oral arguments that previously had not been publicly disseminated.[251] In addition, the public release of Justice Thurgood Marshall's papers a few months after his death caused "an uproar at the [C]ourt"[252] and was condemned by Chief Justice Rehnquist.[253]

These institutional pressures and norms may explain why several current or recent court staff personnel, in responding to my requests for interviews, declined to offer nonpublic information on the record. Longtime Deputy Public Information Officer Ed Turner, for example, must have been channeling Justice Ginsburg when he wrote: "What I will tell you isn't very interesting, and what is interesting I won't tell you."[254]

Deliberative secrecy when deciding cases is one thing. Confidentiality in conference, deliberations, and opinion-drafting allows for candid exploration of difficult and sometimes uncertain legal arguments, the opportunity to explore wrong or wrongheaded positions without premature backlash, and the incentive to arrive at reasoned, defensible results.[255] As Scott Idelman has written, "Only if judges are truly free to deliberate over and experiment with the development of the law, relatively immune from the extrinsic pressures potentially triggered by compulsory candor, will that development transpire in a coherent and intelligent manner."[256] Felix Frankfurter once wrote that

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250 *See* LAZARUS, *supra* note 244.

251 *See* Jeffery L. Sheler, *No, It Doesn't Please the Court*, U.S. NEWS & WORLD REP., Sept. 13, 1993, at 14. Eventually, the Court changed its tune and adopted a new policy of allowing unrestricted public access to audiotapes of oral argument. *See* Linda Greenhouse, Supreme Court Eases Restrictions on Use of Tapes of Its Arguments, N.Y. TIMES, Nov. 3, 1993, at A22.

252 Tony Mauro, Tales of the Court, USA TODAY, May 27, 1993, at 1A.

253 *See* Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES (May 26, 1993), https://www.nytimes.com/1993/05/26/us/chief-justice-assails-library-on-release-of-marshall-papers.html [https://perma.cc/3FDM-F7Q2].

254 E-mail from Edward L. Turner, Former Deputy Pub. Info. Officer, Sup. Ct. of the U.S., to Scott Dodson, Professor of L., U.C. Hastings Coll. of L. (Oct. 13, 2020, 5:59 PM) (on file with author).

255 *See* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1024, 1028 (1996). The Court has accepted this premise as a basis for certain claims of executive privilege. *See* U.S. v. Nixon, 418 U.S. 683, 708 (1974) ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.").

256 Scott C. Idelman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1373

deliberative secrecy "is essential to the effective functioning of the Court."[257]

Perhaps so.[258] But the secrecy that surrounds the Supreme Court's rulemaking is another thing entirely. Extending the deliberative secrecy of the adjudicative process to the rulemaking process demands some justification. I can think of three possible justifications: (1) that secrecy and insularity is a tradition that should be continued for tradition's sake, (2) that the rulemaking process needs secrecy and insularity for the same reasons as the adjudicatory process, and (3) that secrecy and insularity in the rulemaking process protects against a slippery slope that jeopardizes the secrecy of adjudication decisionmaking. None holds much water.

1. Tradition

The first potential justification is tradition. Whenever one asks why the Court persists in a particular course of conduct, a likely answer will be "because it's always been done this way."

With respect to the Supreme Court Rules, though, it *hasn't* always been done this way. The Court experimented, starting in 1995, with publishing rule proposals for public notice and comment, something it had never done for its own rules before. More drastically, in 1952, the Court, recognizing that the Supreme Court Rules were then woefully outdated and disorganized, determined that a complete revision of the Rules was needed.[259] To take the lead on the revision (which ultimately became the 1954 Revision) and to accommodate the "needs and desires of the Bar for changes," the Court appointed a formal consulting group—an advisory committee of sorts—composed

(1995). *See also* Tony Mauro, *Tales of the Court*, USA TODAY, May 27, 1993, at A1 (quoting Professor Stephen Carter as arguing that the justices "can't have a free and open exchange of views if it's all going to be public knowledge").

257 Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955).

258 Or perhaps not. *See* Fish, *supra* note 240, at 240 (concluding that a serious leak in the Taney Court about a pending high-profile case "neither altered the political situation in Missouri nor materially changed the institutional status of the Court"). In any event, many deliberations and other insider information are eventually revealed through the publication of justices' papers and through other historical research. *See* Black & Johnson, *supra* note 246, at 224. It does not appear that any such revelations—even the immediate release of Justice Thurgood Marshall's papers—have ever really damaged the Court's reputation or ability to function.

259 As Chief Justice Earl Warren later remarked, "Clarity, simplicity, and a logical arrangement of the rules were among the objectives. . . . Another objective was completeness . . . . Our aim in this regard has been achieved. Counsel need not resort to textbooks, nor be reliant on the Clerk's Office for guidance . . . ." Earl Warren, Chief Justice, U.S. Sup. Ct., Address Before the American Law Institute Annual Meeting (May 19, 1954), *in* 31 A.L.I. 1, 4 (1954).

of attorneys with "firsthand knowledge of [Court] practice" and academics who "had made a special study of procedural questions."[260]

The consulting group included Clerk of the Court Harold B. Willey and seven outsiders: Acting Solicitor General Robert L. Stern, Warner W. Gardner (private practice), Professor Henry M. Hart, Charles A. Horsky (private practice), Professor James William Moore (also a member of the Civil Rules Advisory Committee), Professor Herbert Wechsler, and Frederick Bernays Wiener (private practice).[261] Wiener was designated the group's reporter to the Rules Committee of justices,[262] and he subsequently published a detailed history of the group's process, thinking, and proposals,[263] although he wrote that "the communications between the committee and its reporter must be regarded as privileged in the highest degree."[264] No one has contended that the opening of the normal rulemaking process to include the consulting group and the publishing of Wiener's article describing the rulemaking process, the rules changes, and their rationales had any negative effect on the Court, the Supreme Court Rules, or their rulemaking process.

On rare occasions, the Court itself reveals more detail about particular rule amendments or rule revisions when justices dissent.[265] In April 1991, for example, the Court promulgated new Rule 39.8, which imposed new restrictions on frivolous filings by in forma pauperis applicants.[266] Three justices—Marshall, Stevens, and Blackmun—dissented in two separate published opinions, prompting the Court to publish a per curiam opinion explaining in some detail the rationale behind the rule amendment.[267] In this instance, the Court itself disclosed some of the decisionmaking and internal disagreements involved in the rulemaking process.

The history of the Court's own rulemaking suggests that tradition for tradition's sake is no answer to why the Court follows its current process.

260 *Id.*

261 Revised Rules of the Sup. Ct. of the U.S., 346 U.S. 943, 945–46 (1953); Wiener, *supra* note 90, at 39 n.86.

262 Wiener, *supra* note 90, at 39. The Rules Committee was chaired by Reed; other members included Frankfurter, Douglas, and Jackson. *Id.* at 38 n.82.

263 *Id.* at 39.

264 *Id.* at 40.

265 *See, e.g.*, Rule, No. 37, 30 U.S. (5 Pet.) 724 (1831) (Baldwin, J., dissenting); 48 U.S. (7 How.) v (1849) (Woodbury, J., declining to join); Revised Rules of the Sup. Ct. of the U.S., 346 U.S. 943, 946 (1953) (Black, J., dissenting).

266 *In re* Amendment to Rule 39, 500 U.S. 13 (1991).

267 *Id.*

2. *Necessity*

The second potential justification is the necessity of secrecy and insularity for effective rulemaking. The history of rulemaking belies, even inverts, that necessity. By most accounts, the 1954 Revision of the Supreme Court Rules, which involved a consulting group of outsiders, was highly successful.[268] For at least some of the 1954 amendments, it could be argued that *the consulting group* was necessary for effective rulemaking. The consulting group's reporter wrote that the old rules exhibited the "indefensible feature" of perfecting appeals from state courts and from federal courts in civil cases, which was "burdensome to litigants, to judges, and to court officials, and it was distinctly unhelpful to the Court itself."[269] Yet although the pathway for reform of this rule was laid at least as of 1948, the Court did not act until prodded by the consulting group.[270] The reporter explained: "In this instance, the failure to act reflects the condition that, broadly speaking, most of the inconveniences of the old system had very little if any direct impact on the members of the Supreme Court itself."[271] In other words, the expertise, insights, and perspectives of outside practitioners and academics were necessary for effective reform.

Subsequent revisions support the idea that secrecy and insularity are detrimental to, rather than supportive of, rulemaking efficacy. At times, submitted public comments seem to have influenced the final version of a rule amendment in ways that improved the language or accommodated interests of the Supreme Court Bar.[272] By contrast, some rule amendments that did not go through public notice and comment have been promulgated with omissions or errors that may have been discovered through a more collaborative rulemaking process.[273]

The benefits of transparency and broad participation to Supreme Court rulemaking are also supported, by analogy, to rulemaking in other contexts, including agency rulemaking and lower-court rulemak-

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268 *See, e.g.*, Wiener, *supra* note 90, at 94.

269 *Id.* at 40.

270 *Id.* at 47.

271 *Id.* at 47–48.

272 *See, e.g.*, Boskey & Gressman, *supra* note 148, at 85 (opining that comments "appear to have had a significant influence on the final version" of the 1995 Revision). The Court's nondisclosure of submitted comments stymies a full accounting of the role that comments have played in influencing the Court's rule proposals over the years.

273 For example, the 1990 Revision amended Rule 18.1 to set a thirty-day deadline for filing a mandatory appeal, which conflicted with the ten-day deadline for mandatory appeals under the Balanced Budget and Emergency Deficit Control Act of 1985. *Compare* Sup. Ct. R. 18.1 (1990), *with* 2 U.S.C. § 922(b) (1985).

ing. It is true that transparency and participation in these rulemaking areas further values—like enhanced accountability to the electorate or to Congress—that are not as applicable to the Supreme Court Rules.[274] But even independent of accountability, transparency and participation make agency rulemaking and lower-court rulemaking generally more effective too.[275] The idea that different people with different interests and different knowledge bases can identify suboptimal aspects of rule proposals that may go unnoticed by a smaller, homogenous set of rulemakers ought to be applicable to Supreme Court rulemaking too.

Openness, transparency, and participation do lead to one valid concern: the risk of becoming a forum for lobbying or intense partisanship. Some commentators have worried about such concerns in the lower-court rulemaking process.[276] Maintaining insularity and secrecy for the Supreme Court Rules does allow the Court to stay above any partisan or political fray that might otherwise be encouraged by openness and engagement. Yet any concerns seem modest at best, at least in comparison to the lobbying and partisanship that comes with the Court's core function of case adjudication. There, the party briefs and amicus briefs, which are publicly available, stake out positions and arguments that can be intensely partisan and polarizing and that the Court necessarily must engage in its role as adjudicator.[277] To avoid that milieu, the Court does not resort to secrecy or closed doors but, rather, to openness and disclosure by way of reasoned decisionmaking.

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274 *See* Burbank, *supra* note 224, at 1696 (identifying an accountability rationale in the 1988 amendments to the lower-court rulemaking process); Caroline Cecot & Robert W. Hahn, *Transparency in Agency Cost-Benefit Analysis*, 72 ADMIN. L. REV. 157, 161 (2020) ("Transparency in government decisionmaking—defined as information about decisions and the decisionmaking process that is provided to the public—lies at the core of a well-functioning democracy because it allows interested parties to hold decisionmakers accountable for their decisions.").

275 Cecot & Hahn, *supra* note 274, at 161 ("Transparency is also important in improving government decisionmaking over time, steering an agency toward decisions that have the sturdiest basis in available science and allowing interested parties to replicate results, catch errors, and promote relevant research."); Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking*, 65 ADMIN. L. REV. 77, 79 (2013) ("[B]roader and more informed public participation should produce 'better' rules in that the rules are more rational and defensible because the agencies receive data and identify issues that they might not otherwise have considered adequately."). *See generally* CASS R. SUNSTEIN, HOW CHANGE HAPPENS (2019); TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? (Christopher Hood & David Heald eds. 2006).

276 *See supra* text accompanying notes 72–73.

277 For commentary on the role of amicus briefs, see Larsen & Devins, *supra* note 220.

The rub is that the Court's current levels of secrecy and insularity do not appear necessary—or even particularly beneficial—to the rulemaking process for the Supreme Court Rules. To the contrary, engaging broader participation and providing more fulsome explanations could very well improve the rulemaking process and offer better rules and guidance to practitioners, resulting in more efficiency and efficacy for the Court's business.

3. Prophylaxis

The third potential justification is to guard against the slippery slope of undermining any beneficial secrecy and insularity in the adjudicative decisionmaking process. But opening the rulemaking process is unlikely to lead down such a slippery slope. For one, the rulemaking process and the adjudicatory process are on entirely different slopes. Rulemaking presents no cases to prejudge, no parties to upset with unsettled expectations, no precedent to be made, and far less political heat to endure. Unlike the core judicial power of adjudication, rulemaking is operational and procedural. Rulemaking is important, to be sure, but it involves a process that is, in character and expectations, quite different from adjudication.

For another, the Court has navigated that slippery slope well even on the adjudicatory side. The Court nearly prosecuted Peter Irons for releasing audiotapes of oral arguments in the 1980s, but, today, the Court releases oral-argument recordings promptly on its own and, at times, offers real-time broadcasting of oral arguments.[278] The Supreme Court website and electronic filing system disclose "a wealth of information about the Court" and "the Court's opinions, orders, rules, and argument transcripts."[279] None of these moves toward openness and transparency have presented any real threat to the core confidences of adjudicatory decisionmaking.

C. Efficiency and Flexibility

The Court's current approach to rulemaking offers the logistical virtues of being relatively efficient and flexible. If the Court wishes, it can change a rule immediately and unilaterally, without submitting to layers of review and without sifting through comments and input. One

278 *See* Press Release, Sup. Ct. of the U.S., Media Advisory Regarding October Teleconference Argument Audio (Oct. 1, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/ma_10-01-20 [https://perma.cc/2K79-2EMV] (announcing live audio broadcasts of telephonic Supreme Court arguments).

279 *See* SHAPIRO ET AL., *supra* note 2, at x.

former clerk expressed a concern that opening the rulemaking process up might generate a lot of "makework."[280] There is something to that concern. The Court has a relatively small staff and limited resources,[281] and the lower-court rulemaking process has shown that even minor rulemaking can generate significant numbers of comments and often years of shuttling among the layers of review.[282]

Still, it seems doubtful that the workload generated by a more open and participatory process for amending the Supreme Court Rules would be even close to commensurate with that generated by the lower-court rulemaking process, which affects a broader swath of participants and is the front line of court justice. And the Court does have resources. The Clerk's Office alone has a clerk, four deputies, and twenty-seven other assistants.[283] The FJC and AO could offer additional support for Supreme Court rulemaking, though Congress might need to specifically empower AO assistance.[284] If needed or appropriate, the Court could appoint an advisory committee of outside experts to assist in studying or drafting rule proposals, as it successfully did for the 1954 Revision. Together, these resources seem plausibly sufficient for the kind of workload likely to be generated by a more involved rulemaking process. If more help is needed, Chief Justice Burger's successful request to Congress in the 1970s to create an Administrative Assistant position shows that Congress can be amenable to creating and funding administrative support for the Court.[285]

Aside from managing workload, flexibility can be important when a need for immediate amendment arises. Such circumstances have occurred periodically throughout the history of the Supreme Court Rules. For example, when Congress passed the Military Justice Act, effective August 1, 1983, which for the first time granted the Supreme Court authorization to review certain military decisions,[286] the Court quickly promulgated rule amendments to conform to the statutory changes, with the new rule provisions made effective on the same

280 Telephone Interview with William K. Suter, *supra* note 122.

281 E-mail from Jeffrey Morris, *supra* note 91.

282 *See supra* text accompanying notes 69–74.

283 SHAPIRO ET AL., *supra* note 2, at 1–28.

284 *See supra* Parts I.B, II.A.

285 *See supra* text accompanying notes 91–94.

286 Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1405 (1983) (codified at 28 U.S.C. § 1259).

day as the statute.[287] A number of similar circumstances have arisen in more recent years.[288]

Though important, flexibility need not control the process. A more open and participatory process can accommodate unusual needs for speed through default rules and exceptions. The lower-court rulemaking process, for example, allows the Judicial Conference to make exceptions when more expeditious rulemaking is warranted.[289] Congress, too, has recognized that the need for speed can justify exceptions to the usual rulemaking process. In its delegation of local rulemaking authority, Congress instructed that, although lower-court local rulemaking must, by default, proceed through "appropriate public notice and an opportunity for comment,"[290] the court "may proceed under this section without public notice and opportunity for comment" if it "determines that there is an immediate need for a rule."[291] As these default-and-exception regimes suggest, transparent and participatory processes can adequately accommodate flexibility when the need arises.

D. Maintaining the Court's Status

As Jim Duff put it:

> The Supreme Court is just different. Different from its inception. It is the only court specifically created under the Constitution, for example. . . . And it is the only court with a set Term every year. And it is the court that has the last word on the Constitution. . . . As a result, distinctions permeate many aspects of the administration of the Supreme Court. The Court views itself as different from the lower courts. And the lower courts view the Supreme Court as different from their operations as well. And to a great degree, this is necessary both to reinforce the authority of the Supreme Court and to reflect the practical, everyday differences between the courts.[292]

Duff's observation has a ring of truth, but it is worth asking whether certain adjustments to the Court's local rulemaking process

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287 *See* Bennett Boskey & Eugene Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329, 329–30 (1984).

288 *E.g.*, *supra* text accompanying notes 191–96 (discussing the 2005 amendments).

289 *See* Judicial Conference Procedures, *supra* note 26, at § 440.20.40(d).

290 28 U.S.C. § 2071(b).

291 *Id.* § 2071(e).

292 Telephone Interview with James C. Duff, *supra* note 93.

would really erode the Court's special status as the head of the judicial branch and as the only constitutional court.

Under the current circumstances, any erosion seems very unlikely. In the local rulemaking context, Congress already has accentuated the Court's special status by explicitly and specifically exempting the Supreme Court from most statutory requirements on local rulemaking applicable to all other federal courts.[293] It is hard to see how the Court's special status would be diminished if the Court itself, on its own terms, were to open its rulemaking process up and invite more participation from interested stakeholders.

As documented above, the Court has already done so in a number of ways, including by instituting, in 1995, its own notice-and-comment practice for the Supreme Court Rules, and, for the 1954 Revision, by appointing a formal consulting group to draft the revision.[294] Even though these procedures mirror aspects of the lower-court rulemaking process, no one has suggested that they diminished the Court's status.

Further, the Court itself seems fainthearted about protecting its special status when it comes to court rulemaking. Congress has long given the Supreme Court the primary role in promulgating rules for the lower courts, an assignment that can be seen as a tip of the hat to the Court's position at the apex of the judicial hierarchy. Yet the Court has often treated that rulemaking assignment as misplaced, with the Court and individual justices occasionally disclaiming substantive approval of rules.[295] In the early 1980s, Congress even considered removing the Court from the lower-court rulemaking process entirely, and Chief Justice Warren Burger wrote in response: "The Members of

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293 *See, e.g.*, 28 U.S.C. § 2071(b) ("Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment."); § 2071(c)(2) ("Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference."); § 2071(d) ("Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public."); § 2077(b) ("Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business . . . shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court.").

294 *See supra* text accompanying notes 259–64.

295 *See* Order, 146 F.R.D. 403 (1993) (approving the 1993 amendments under a process-based rationale and disclaiming any implication "that the Court itself would have proposed these amendments in the form submitted"); Struve, *supra* note 6, at 1127–29, 1154 (documenting instances in which justices disclaimed independent judgment on the merits of amendment proposals).

the Court see no reason to oppose legislation to eliminate this Court from the rule making process."[296] These sentiments undermine the idea that the Court fears that changes in court rulemaking might erode its special status.

Congress could, however, backtrack from its hands-off approach to the Supreme Court Rules and attempt to prescribe significantly more oversight or bureaucracy to the Court's local rulemaking. Such an effort might do more than threaten the Court's special status; the effort might threaten its very independence, depending upon how intrusive Congress purports to be. This effort might also put the Court in a position of having to decide whether such oversight is constitutional.[297] Congress has asserted its control over court rulemaking in the past, most notably in 1988, when, concerned about rulemaker overreaching and wanting to send a wake-up call to the rulemaking bodies, Congress revamped the lower-court rulemaking process, imposed significantly more process and oversight, and dramatically reduced the Supreme Court's supervisory role.[298] And in other areas, such as judicial ethics and access to courts, Congress has suggested an interest in imposing new regulations on the Supreme Court.[299]

The question, though, is whether reasoned, voluntary changes to the Court's current local rulemaking process is likely to incite Congress to assert control over or otherwise intrude in the rulemaking process for the Supreme Court Rules in a way that would pose a real threat to the Court's status and independence. The answer would seem to be no. Congress passed the 1988 Act in response to a lower-court rulemaking process that had become *too* insular and unaccountable; the Act moved lower-court rulemaking in the direction of trans-

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296 Letter from Hon. Warren E. Burger, to Rep. Robert W. Kastenmeier (May 12, 1983), *reprinted in* Hearings on Oversight and H.R. 4144 Before the Subcomm. on Cts., Civ. Liberties, and the Admin. of Just. of the House Comm. on the Judiciary, 98th Cong. at 195 (1983–84). About a year later, Burger reversed course, but that reversal was likely because of pressure from *state* rulemakers who worried about their status. *See* Burbank, *supra* note 224, at 1721–22.

297 For literature on the differing views of the scope of Congress's authority over the Supreme Court's procedure, see Burbank, *supra* note 224.

298 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 401–03, 102 Stat. 4648–52 (1988). For extended discussion, see Burbank, *supra* note 224, at 1693–98.

299 *See* Twenty-First Century Courts Act, H.R. 6017, 116th Cong., 2d Sess. (Feb. 28, 2020) (proposing to require the Supreme Court to promulgate a code of conduct for the justices, to prescribe recusal rules for the justices, and to require livestreamed oral argument). Currently, the judicial ethics rules do not apply to justices of the Supreme Court. *See* Code of Conduct for United States Judges, 2A GUIDE TO JUDICIARY POLICY 2 (Mar. 12, 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/U5WG-4YZ7].

parency and participation. If anything, it is the Court's choice to proceed with a secretive, go-it-alone attitude that is likely to spark congressional concern, not any changes toward transparency and participation.[300]

IV. Reforming the Supreme Court Rulemaking Process

The previous Part suggested that there is room for beneficial changes to the rulemaking process for the Supreme Court Rules that will neither overwhelm the Court with work nor subject the Court to unwarranted scrutiny. This Part offers some modest proposals.

A. *Default Notice and Comment*

Starting in 1995, the Court began publishing draft amendment proposals for notice and public comment. This practice was a welcome development. Because the advocates (and printers) have to live with rule changes, they can provide input that can be important to them yet underappreciated, or even overlooked, by the Court. Comments submitted in response to published proposals seem to have influenced the final versions in a number of instances.[301] By contrast, the 1990 Revision, promulgated without a notice-and-comment period, likely contained two oversights that would have been discovered and corrected in a notice-and-comment period.[302] Notice and comment ensure that the Rules adequately reflect both the needs of the Court and the needs and interests of practitioners and the public.[303] Further, provid-

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300 As Professor Steve Burbank has eloquently written with respect to the court rulemaking's shared enterprise between Congress and the courts: "Rather than waging a losing battle about power, far better to seek to forestall irrationality and irresponsibility through genuine dialogue, informed and nourished by the respect that is due to all branches of government and that is required if we are to honor the genius of those who fought and died for our liberty." Burbank, *supra* note 224, at 1735–36; *see also* Burbank, *supra* note 60, at 246 (calling for "a cooperative study of existing arrangements for implementing procedural change by representatives of the three branches of government and representatives of the practicing bar"); *cf.* Geyh, *supra* note 73, at 1234 (proposing a "permanent, independent, fifteen-member Interbranch Commission on Law Reform and the Judiciary" to facilitate dialogue between Congress and the courts).

301 *See supra* text accompanying notes 164–218.

302 *See supra* text accompanying notes 117–21.

303 *Cf.* Burbank, *supra* note 60, at 236 (urging, in the context of lower-court rulemaking, an open conversation among the judiciary, bar, and Congress for "a shared vision of the need for change"); Struve, *supra* note 6, at 1136 (observing, in the context of lower-court rulemaking, that "the Court appears less representative, less knowledgeable, and perhaps more liable to engraft erroneous policy choices on the Rules" and that "members of the Court may be more sensitive to the interests of the judiciary than to those of litigators"); Edson R. Sunderland, *Rules of Court Governing Practice and Procedure*, 9 Mo. B.J. 198, 200, 202 (1938) (stating that "[l]awyers . . . are

ing transparency and inviting comment from those interested stakeholders is a courtesy that enhances the reputation of the Court.[304]

Yet the Court has never committed itself to the notice-and-comment practice, and, in recent years, the Court has followed the practice only sporadically. In the last four revisions of the Supreme Court Rules, the Court has published advance notice of proposals and invited comment only once, and one of those three revisions promulgated without input, the 2010 Revision, made important changes that directly affected the practicing bar.[305] Nor has the Court ever publicly explained the conditions under which it opts for notice and comment.

The Court should publicly commit to a default notice-and-comment practice, with expressed reasons for departure from that default practice. Such formalization and standardization will alert the public to the nature of particular rule amendment and ensure that the Court is developing rules and rulemaking norms in a principled way and with appropriate input. The default of notice and comment should apply even for technical or conforming amendments; only alacrity, an obvious need for conformance to a statutory change, or other unusual needs, publicly stated, should justify dispensing with notice and comment. The default-and-exception standards for the notice-and-comment requirement in the lower-court rulemaking process provide appropriate models for similar standards for the Supreme Court Rules.[306]

The two main downsides to more standardized adherence to notice and comment—makework and tensions—present only minor risks, if any at all. The relatively small cohort of high-minded and reputation-cultivating Supreme Court practitioners is unlikely to create makework or antagonism with the Court. In 2007, for example, the Court published minor proposed changes to its rules and received no

in a better position than judges to understand the public attitude toward the administration of justice").

304 *Cf.* DANIEL PATRICK MOYNIHAN, COUNTING OUR BLESSINGS: REFLECTIONS ON THE FUTURE OF AMERICA 121 (1980) ("Emulation by one branch of another [can] eliminate any appearance of disparate levels of legitimacy.").

305 *See supra* text accompanying notes 202–18.

306 *See* JUDICIAL CONFERENCE PROCEDURES, *supra* note 26, at § 440.20.40 ("The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.").

comments.[307] In 2002, the Court received only four comments.[308] Likewise, in 1998, the Court received only a handful of comments.[309] It is true that other amendments, namely, the 2017 proposed amendment reducing word-court limits, the 1996 amendment requirement disclosures in the preparation and financing of amicus briefs, and the 1995 Revision, generated greater numbers of comments, some of which were negative.[310] But the number of comments never appeared to exceed about thirty in any comment period, and, in each case, the comments appear to have been helpful to the Court's rulemaking. Further, there is no indication that any set of comments was inappropriately caustic or created any friction between the Court and its practicing bar. Compared to the comment practice in the lower-court rulemaking process, the comment process for the Supreme Court Rules amounts to a positive, productive conversation with only the lightest of burdens. A default notice-and-comment process should be continued, standardized, and formalized.

B. Publication of Comments Received

Although the Court has published rule proposals for notice and public comment, the Court has never published the comments submitted. Because the Supreme Court is not subject to the Freedom of Information Act,[311] it appears the public has no way to obtain them, short of obtaining them directly from the submitters themselves.[312] The Court also refuses to disclose the identities of the submitters. The result is that the public generally is unaware of both the identities of those who submitted comments and the substance of the comments submitted. This practice of nondisclosure is in contrast with the lower-court rulemaking process: the U.S. Courts website publishes all comments submitted in the lower-court rulemaking process in a chart that is searchable and sortable.[313]

The Supreme Court should publish the comments submitted. On the upside, disclosing comments is likely to enhance the legitimacy of the Court's rulemaking process. Publication enables members of the public and interested stakeholders to know what information the

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307 *See supra* text accompanying notes 200–01.

308 *See supra* text accompanying notes 187–90.

309 *See supra* text accompanying notes 183–86.

310 *See supra* text accompanying notes 164, 210–18.

311 *See* 5 U.S.C. § 552(f).

312 A reporter obtained a copy of one submitted comment in 2017. *See supra* text accompanying note 216.

313 *See supra* text accompanying notes 27–30.

Court is considering when discussing proposed amendments. Publication exposes the sources of any influences—and the influences themselves—pressed during the process. Publication thus will reveal whether particular commentators exercise outsized influence in the making of the Supreme Court Rules and whether the Supreme Court is responsive to legitimate public and practitioner interests expressed in submitted comments. As for downsides, the costs to make comments public—uploading the materials received to the Court's website—are miniscule. Any submitter privacy interests are marginal at best. Nor has publication of comments chilled the submission of comments in the lower-court rulemaking process. The benefits of posting comments vastly outweigh the costs.

C. Publication of the Rulemaking Process

The Court does not disclose its rulemaking process.[314] It should. Transparency about the rulemaking process advances both legitimacy and efficacy.

Transparency advances legitimacy because those who watch the Court do not have to wonder whether the Court is seeking or relying on inappropriate or insufficient input and information, or whether the Court is using different rulemaking procedures for different rule amendments. Transparency also advances efficacy. Publicizing the process allows interested parties to know how the rulemaking process works so that they can participate most effectively, thereby supplying information most relevant and useful for the Court's consideration, leading to better, more informed rulemaking. Transparency will also allow academic scholars, and perhaps Congress, to suggest appropriate rulemaking reforms.

The Court's website already is a repository of information about case opinions, about oral arguments, and on informal internal processes for deciding cases, among many other Court matters. The website includes a link to the minutes of all official Court meetings. The website also maintains a webpage on "Rules and Guidance," which includes links to the current set of Supreme Court Rules and to all historical versions of the Supreme Court Rules. This webpage contains links to a number of helpful "guides" and "guidelines" for various aspects of practice, such as use of the electronic filing system, how to file certain cases and briefs, and information on scheduling and de-

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314 Most of the law clerks I interviewed, including those who clerked for the Chief Justice or justices on the Rules Committee, had no knowledge of the rulemaking process for the Supreme Court Rules.

livery of documents to the Clerk's Office.[315] A black-and-white screenshot of the webpage as of July 1, 2021, follows:

Electronic Filing
Rules and Guidance
Supreme Court Bar

Rules and Guidance

Court Rules
- Rules of the Supreme Court (Effective July 1, 2019) (PDF)
- Summary of 2019 Rules Changes (PDF)
- Historical Rules of the Supreme Court

Guides for Counsel
- Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System (Updated Nov. 20, 2017) (PDF)
- Guide to Filing Paid Cases (Effective July 1, 2019) (PDF)
- Guide to Filing *In Forma Pauperis* Cases (Effective July 1, 2019) (PDF)
- Guide to Filing *Amicus Curiae* Briefs (October 2019) (PDF)
- Guidance on Scheduling (February 2020) (PDF)
- Guide for Counsel in Cases to be Argued (October Term 2019) (updated October 3, 2019) (PDF)
- Booklet-Format Specification Chart (Effective July 1, 2019) (PDF)
- Delivery of Documents to the Clerk's Office

Forms
- Waiver Form (PDF)
- Oral Argument Form (PDF)

Circuit Assignment of Justices
- Assignment Order (PDF)
- Circuit Map (PDF)

Case Distribution Schedule
- Case Distribution Schedule -- October Term 2020 (PDF)

COVID-19 Announcements

Adding a new link, bulleted under the "Court Rules" header, to information about the rulemaking process for the Supreme Court Rules would fit seamlessly into the topics and guidance already publicly browsable on the webpage. Rulemaking information disclosed should include the steps in the process, the general sense of the timing of each step, the role of each rulemaking actor, the kinds of comments desired by the Court and in what form they should be submitted, and whose opinions—both inside and outside the Court—the Court solicits as a matter of course. The Judicial Conference's publicly available *Guide to Judiciary Policy*, which prescribes and publishes the rulemaking process for the lower-court rules,[316] provides a useful template, though a sufficient description of the rulemaking process for the Supreme Court Rules likely could be detailed with far more brevity—

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315 *Rules and Guidance*, Sup. Ct. of the U.S. https://www.supremecourt.gov/filingandrules/rules_guidance.aspx [https://perma.cc/Z6Z6-BMYF].

316 *See supra* Section I.C.

in a paragraph or two—because the Supreme Court Rules undergo a far simpler process than the lower-court rules.

Along with the rulemaking process itself, the Court could include on the same webpage links to all historical rule *proposals*, which currently are buried in a chronological list of all press releases issued by the Court,[317] and links to comments received during any notice-and-comment period, as recommended in the preceding section. The lower-court rulemaking webpages and comment repository on the U.S. Courts website offer usable templates.[318]

Publishing the rulemaking process would not mean hamstringing the Court to rigidity. Like the default nature of many of the lower-court rules, the rulemaking process for the Supreme Court Rules, even if formalized in a published disclosure, can still be subject to change at the discretion of the Court, upon specified circumstances. The more important goal is to disclose the existing rulemaking process to provide transparency into the rulemaking process behind the Supreme Court Rules.

D. Commitment to Periodic Self-Study

Congress has charged the Judicial Conference with a continual study of the lower-court rules, supported by its committees, the AO, and the FJC.[319] Ongoing inspection can produce advantages, both in the making of effective rules and in promoting humility in rulemaking itself. Humility and self-restraint can, in turn, help keep rulemaker ambition in check and ameliorate friction between the judicial branch and Congress.[320]

For example, in June 1993, the Judicial Conference's Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.[321] The Subcommittee did so and submitted a detailed report on all four directives, including recommendations to increase the

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317 *Press Releases*, Sup. Ct. of the U.S. https://www.supremecourt.gov/publicinfo/press/pressreleases.aspx [https://perma.cc/A8B3-9FCB].

318 *See About the Rulemaking Process*, *supra* note 44.

319 28 U.S.C. § 331.

320 *See* Burbank, *supra* note 224, at 1737 ("The result of the judiciary's self-restraint is likely to be few occasions of friction when the Court promulgates, and few overrides of, proposed Federal Rules of Civil Procedure.").

321 SELF-STUDY, *supra* note 16, at 683.

diversity (both professionally and personally) of the composition of the Standing Committee and advisory committees,[322] increase advisory committee knowledge by distributing to their members relevant publications,[323] increase reliance on empirical research as opposed to anecdotal experiences,[324] keep the goal of national uniformity,[325] keep the primary drafting responsibility with advisory committees,[326] and continue attentiveness to rule style and language,[327] among other recommendations.

To be sure, correlation between self-study and self-restraint is not always apparent. The immediate effects of the 1995 self-study on rulemaker ambition were ambivalent, perhaps because they were outweighed by prevailing personal and political agendas.[328] But the longer view suggests that the rulemakers have attended to some of the self-study's recommendations more closely, and the 2000s were marked by significantly more rulemaker restraint and commitment to informed rulemaking.[329] Honest introspection may not be a panacea, especially in the face of strong countervailing pressures, but it can also produce beneficial changes.

Congress has not mandated any study of the Supreme Court's rules, and, as explained in Part II.A, most of the congressional charges of judicial study of rules of court exempt the Supreme Court.[330] However, Congress's charges to the Judicial Conference to study the business of "the courts of the United States"[331] and to the FJC to research the "operation of the courts of the United States"[332] are broad enough to encompass the Supreme Court.

The judiciary's historical instances of Supreme Court study are few and, to date, have either avoided recommendations entirely or have had no relevance to the Supreme Court Rules. As for avoidance, the 1995 self-study, for example, considered "whether the High Court

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322 *Id.* at 696, 701.

323 *Id.* at 697.

324 *Id.* at 699.

325 *Id.* at 702.

326 *Id.* at 702–03.

327 *Id.* at 703–04.

328 *See* Burbank & Farhang, *supra* note 63, at 1588–89 (characterizing rulemaker activity in the late 1990s as "Janus-like" and documenting the personnel and political influences of the era).

329 *See id.* at 1592–93 (detailing rulemaking in the 2000s); Burbank, *supra* note 224, at 1736–37 (arguing that rulemakers have heeded some of the recommendations of the 1995 self-study).

330 *See supra* text accompanying notes 75–79.

331 28 U.S.C. § 331 (2018).

332 *Id.* § 620(b).

should continue its role in the statutory scheme" of lower-court rulemaking[333] but ultimately decided "to leave to the Justices themselves the question whether there should be any change in their role."[334] As for relevance, in 1971, Chief Justice Warren Burger, concerned with the dramatic rise in the Court's docket, used his power as chairperson of the FJC Board to appoint a "Study Group" of professors and practitioners to analyze the caseload of the Supreme Court and to make recommendations.[335] The Study Group received helpful data from the Clerk of the Court and the FJC staff, and it considered a variety of jurisdictional and procedural changes.[336] The resulting Freund Commission Report ultimately recommended the establishment of a National Court of Appeals,[337] the elimination of mandatory appeals to the Court,[338] and, although conceding the "difficult[y] for outsiders to assess the internal practices of the Court,"[339] some modest changes to the Court's internal practices,[340] but it did not mention the Supreme Court Rules.

Nevertheless, there is one instance in which the Supreme Court voluntarily commissioned a study of the Supreme Court Rules: the 1952 appointment of a consulting group that spearheaded the work on the 1954 Revision.[341] The Court appointed that group of outsiders to help the Rules Committee of justices "ascertain the defects and difficulties" of the existing rules and to "propose[] [a] thorough revision."[342] The consulting group did so, reporting that many of the rules were opaque, ambiguous, misleading, confusing, or obsolete, and that they had achieved this state because of the Court's practice to amend rules episodically, as an individual need arose, rather than engage in more systematic and comprehensive study and revision, which the consulting group provided for the 1954 Revision.[343] The consulting

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333 SELF-STUDY, *supra* note 16, at 705.

334 *Id.* at 706.

335 The Study Group included Paul A. Freund, chair (Harvard), Alexander M. Bickel (Yale), Peter Ehrenhaft (D.C. Bar), Russel D. Niles (Institute of Judicial Administration), Bernard Segal (former ABA president), Robert L. Stern (former Acting SG), and Charles Wright (Texas). *See* FREUND COMMISSION REPORT, *supra* note 80, at ix.

336 *Id.* at ix–x.

337 *Id.* at 18.

338 *Id.* at 25.

339 *Id.* at 39.

340 *Id.* at 39–46.

341 *See supra* text accompanying notes 259–64.

342 Wiener, *supra* note 90, at 38.

343 *Id.* at 21–38.

group appears to have been highly successful in performing its duties for the Court.[344]

Informally, the Clerk's Office continually studies the Supreme Court Rules by noting any problems that it finds, by collecting suggestions for changes, and by communicating with the justices about proposals. As the hub for the Court's rulemaking, the Clerk's Office would seem, in the ordinary course, well-positioned for coordinating piecemeal amendments. But more comprehensive study, especially with regard to accommodating interests outside of the Court, would seem to require outside assistance. In one instance, in 1859, the Court ordered the Clerk to "collect all the rules adopted by this Court," "designate those which are obsolete or have been repealed," "arrange and classify all those now in force under their appropriate heads," and "report the same to this Court."[345] The Clerk dutifully fulfilled the Court's directive, but not very effectively.[346]

To avoid overburdening the Clerk's Office, the Court should, from time to time, engage the FJC in a more comprehensive study, perhaps supplemented by the appointment of a small consulting group of outsiders and the Clerk of the Court, to ensure that its rules as a whole are adequately meeting the Court's needs, are accommodating the interests of the bar and the public at large, and are consistent with practice. Such periodic study may very well find that the Supreme Court Rules are working optimally and need no immediate action. That would be valuable enough. Or the study may reveal, as the 1954 Revision's consulting group found, that the Supreme Court Rules need pressing attention. Either outcome would be worthwhile. And even apart from the outcome, the deep engagement with the Supreme Court Rules and the interests of the stakeholders would be educational for many of those involved in the process.

Conclusion

This Article has shined some light on the rulemaking process for the Supreme Court Rules, revealing the stark differences between that process and the process for making the lower-court rules. Those differences suggest that the making of the Supreme Court Rules could move toward the lower-court process's norms of openness, transparency, and participation. Those moves need not be dramatic leaps;

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344 *See supra* text accompanying note 268.

345 Wiener, *supra* note 90, at 34.

346 Wiener, *supra* note 90, at 35 (asserting that the Clerk's draft in response to the Court's 1859 directive "was not an arrangement that was either helpful or notably logical").

the reforms I propose are incremental steps that follow apace the 1995 institution of the practice of providing public notice and comment. Yet these reforms should also improve both the process of making the Supreme Court Rules and the rules themselves.