

Online Essay

#SOWHITEMALE: FEDERAL CIVIL RULEMAKING[†]

Brooke D. Coleman

ABSTRACT—116 out of 136. That is the number of white men who have served on the eighty-two-year-old committee responsible for creating and maintaining the Federal Rules of Civil Procedure. The tiny number of non-white, non-male committee members is disproportionate, even in the context of the white-male-dominated legal profession. If the rules were simply a technical set of instructions made by a neutral set of experts, then perhaps these numbers might not be as disturbing. But that is not the case. The Civil Rules embody normative judgments about the values that have primacy in our civil justice system, and the rule-makers—while expert—are not apolitical actors. This Essay argues that the homogeneous composition of the Civil Rules Committee, not only historically, but also today, limits the quality of the rules produced and perpetuates inequality. The remedy to this problem is straightforward: appoint different people to the Committee. To be sure, the federal civil rulemaking process is but one small part of where and how gender and racial identity matter. Even still, this Essay argues that the Civil Rules Committee members, the Judiciary, and the Bar should demand that the civil rulemaking Committee cease being #SoWhiteMale.

AUTHOR—Associate Dean of Research & Faculty Development and Professor of Law, Seattle University School of Law. I am grateful to Zachary Clopton, Andrew Hammond, Elizabeth Porter, and Adam Steinman for their comments. Thank you also to Evanie Parr for her fabulous research assistance. This paper benefitted greatly from comments at the AALS 2018 Annual Meeting.

[†] This Essay was originally published in the *Northwestern University Law Review Online* on October 1, 2018. 113 Nw. U. L. REV. ONLINE 52 (2018), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1265&context=nulr_online [<https://perma.cc/AS8H-7QPD>].

INTRODUCTION408

I. FEDERAL CIVIL RULEMAKING AND ITS COMMITTEE MEMBERS.....411

A. *Brief History of Federal Civil Rulemaking*..... 411

B. *#SoWhiteMale: The Numbers* 413

II. IDENTITY MATTERS423

A. *Identity, Decision-Making, & Federal Civil Rulemaking* 423

B. *Morality of Inclusion Because of a History of Exclusion*..... 429

CONCLUSION430

INTRODUCTION

Of the 136 individuals who have served on the Civil Rules Advisory Committee since its inception, 116 are white men, fifteen are white women, and five are men of color.¹ Of the current fourteen members on the Committee, nine are white men, four are white women, and one is a black man.² In other words, in the roughly eighty years of the Civil Rules Committee’s existence, the gender and racial identity of Committee members has remained static.³ The Committee has been and remains #SoWhiteMale.

One deflection of this critique is that the rules are too technical—too boring, frankly—to be tainted by misogyny or racism. Courts and many commentators, including the rule-makers themselves, argue that the rulemaking process is technocratic; thus, it is ostensibly neutral and

¹ See *infra* Graphs 1–3 and Tables 1–2.

² U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES, 9–12 (2018), <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/47VG-YDCY>]. My research assistant and I created a dataset by compiling a list of Committee members and researching their race and gender. The dataset also includes the Committee members’ years of service, occupations, and geographic locations. On the rare occasion where the race of a Committee member could not be confirmed via research, the assumption was made that the member was white. See Brooke D. Coleman, *Civil Rules Committee Dataset* [hereinafter *Civil Rules Committee Dataset*] (unpublished dataset, on file with *Northwestern University Law Review*).

³ The Civil Rules Committee was disbanded in 1956 and reconstituted in 1958. With those missing two years, the Committee has existed for about eighty-two years in total. See *infra* notes 17–23 and accompanying text.

apolitical.⁴ Indeed, a primary reason the Supreme Court delegated its rulemaking authority to a committee was to ensure that litigation experts, not Congress, would create and monitor the Civil Rules.⁵ Yet, as significant scholarship in administrative law has revealed, when it comes to rulemaking, there is no clean line between expertise and politics.⁶ Putting a group of experts on a committee for a technical task does not mean the process and its participants are immune from bias. To the contrary, ideology, politics, and identity inform how the Civil Rules Committee members approach their work.

Scholars have already considered how the rule-makers might be influenced by their work experience,⁷ political ideology,⁸ and litigation attitudes.⁹ This Essay considers the impact of the rule-makers' gender and racial identities. It is the first to collect and quantify demographic data regarding the gender and racial composition of the Committee members and

⁴ Danya Shocair Reda, *What Does It Mean To Say that Procedure Is Political?*, 85 FORDHAM L. REV. 2203, 2207 (2017) (“The Committee is saddled with the burden of holding itself out as a body whose decisions are apolitical. Indeed, the Committee’s existence relies on the premise that it can engage in a largely expert and technical task best left to the judiciary rather than the political branches. To the extent that its decisions are understood to be political rather than ‘procedural,’ the legitimacy of its actions is called into question.”).

⁵ Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996) (noting that the Rules Enabling Act “envisioned procedural rulemaking as an essentially technical undertaking best left in the expert hands of judges.”).

⁶ See generally Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (arguing in the administrative agency context that a focus on expertise to the exclusion of political influence misjudges the degree to which politics plays a role).

⁷ See, e.g., 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, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017 (2016) (discussing the increase in attorneys on the Committee who specialize in complex litigation).

⁸ See, e.g., BURBANK & FARHANG, *supra* note 7, at 82–90; Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613–17, 636–37 (2001) (noting the conservative and defense orientation of rulemaking and recommending greater “socio-political makeup”); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798–99 (1991) (discussing the “politicization of the civil rulemaking process”).

⁹ See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1086–87 (2015) (discussing the 2013 amendment to Rule 26(b)(1) and its anti-plaintiff effects); 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”—whether plaintiff or defense attorneys).

the first to consider how that demographic data bears on Committee work.¹⁰ This Essay argues that the Committee's homogeneous racial and gender composition is problematic.¹¹

First, the Committee members—while expert—are still human beings; thus, the rule-makers' identities matter.¹² Gender and racial identity do not dictate ideology or normative values, but they certainly have influence. The white male hegemony of civil rulemaking—operating in tandem within a profession that has struggled to welcome women and people of color—has almost certainly affected how the Civil Rules have developed and continue to evolve. Social science regarding group dynamics and decision-making indicates that the Committee's work would benefit from increased identity-diverse Committee membership.¹³ Scholars have already argued that civil rulemaking would improve if fewer judges and more “generalist” lawyers served on the Committee because varied perspectives would improve the quality of the rules produced.¹⁴ Similarly, a Committee with more men of color and women of all colors would change and improve the Committee's output as well.¹⁵

Second, the lack of gender and racial diversity on the Committee is problematic because it is iniquitous. The history of the American legal

¹⁰ In 1996, the Administrative Office of the U.S. Courts conducted a self-study to reflect on the Committee's rulemaking activity. Of the hundreds of comments received, only one from a representative of the American Bar Association noted the lack of women of all colors and men of color on the Committee. See 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, 168 F.R.D. 679, 714–15 (1995) [hereinafter A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING]. Also, while Professors Burbank and Farhang assessed the impact of race and gender on a federal judge's chances for gaining appointment to the Civil Rules Committee, they did not assess the overall demographics of the Committee's membership over time. BURBANK & FARHANG, *supra* note 7, at 82–90. Similarly, Dawn Chutkow's important work reviewing the Chief Justice's appointments to all Judicial Conference committees focused on judicial appointments only. Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J.L. & CTS. 301, 301–25 (2014). For an engaging discussion of race, gender, and other aspects of committee composition at the state rulemaking level, see Zachary D. Clopton, *Making State Civil Procedure*, CORNELL L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3147280 [<https://perma.cc/C47G-N76U>].

¹¹ This Essay tackles the Civil Rules Committee because it is the longest-standing rulemaking committee, and it has the most direct influence over the federal civil justice system because it drafts and amends the Federal Rules of Civil Procedure. However, the other committees responsible for federal rules of practice and procedure—the Standing Committee, Appellate Rules Committee, Bankruptcy Rules Committee, Criminal Rules Committee, and Evidence Rules Committee—are critical as well. The gender and racial composition of those committees will be the subject of my future work.

¹² See *infra* Section II.A.

¹³ See *infra* Section II.A.

¹⁴ See Coleman, *supra* note 7, at 1007–08; Thornburg, *supra* note 9, at 792.

¹⁵ The risk inherent in this argument is that it “essentializes” or stereotypes women and people of color. Racial and/or gender identity cannot define individuals.

system is one of exclusion.¹⁶ While many individual lawyers have carried forward an ambitious social justice agenda, the profession itself has excluded men of color and all women for centuries. Because of, and in spite of, that history, legal institutions should endeavor to remedy that exclusion by aggressively pursuing equalizing measures. This effort includes creating a Civil Rules Committee that reflects the greater population.

This Essay proceeds in two parts. Part I presents data regarding Committee membership over time. This Part compares the Committee's gender and racial composition to both the general population and specific segments of the legal profession. Part II then takes up the argument of why identity matters. It argues that the rulemaking process would produce better results if the Committee were more diverse. This Part also argues that putting an end to a #SoWhiteMale rulemaking Committee would help break down the inequalities entrenched in the legal profession and civil justice system.

I. FEDERAL CIVIL RULEMAKING AND ITS COMMITTEE MEMBERS

The federal civil rulemaking process has been in place for roughly eighty-two years. Section A describes how that process has worked and evolved over time. The process is not defined solely by its technical steps and historical evolution, however. The racial and gender identity of the people who make the rules also matters. Section B uses empirical data to show that even though aspects of the rulemaking process have changed over eighty years, the racial and gender composition of the Committee members has remained largely the same.

A. *Brief History of Federal Civil Rulemaking*

The Federal Rules of Civil Procedure were not handed down from a divine being. To the contrary, the Civil Rules have rather humble beginnings. Following a protracted legislative battle,¹⁷ Congress passed the Rules Enabling Act in 1934.¹⁸ Among other things, the Act authorized the Supreme Court to promulgate lower court rules of practice and procedure.¹⁹ The Court subsequently appointed a committee of experts to draft procedures for

¹⁶ See *infra* Section II.B.

¹⁷ See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing the seminal historical account of the Rules Enabling Act of 1934 and its adoption); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261 (2009) (accounting the history of how the Rules Enabling Act was adopted and how access to justice was an abiding concern informing its adoption).

¹⁸ 28 U.S.C. § 2072 (2012); Burbank, *supra* note 17, at 1023.

¹⁹ 28 U.S.C. § 2072.

federal district courts.²⁰ The Committee members were fifteen accomplished academics and litigators.²¹ For four years, the Committee rather quietly drafted a set of rules, and in 1938, the Federal Rules of Civil Procedure became the governing procedures for civil practice in federal district courts.²²

The Committee continues to manage the modern Civil Rules, but the process has evolved over time to become multilayered.²³ The Civil Rules Committee considers and studies proposals.²⁴ If adopted, a proposal is forwarded to the Standing Committee on the Federal Rules of Practice and Procedure for approval.²⁵ Once approved, the rule amendment is published for public comment. After the public process, the Civil Rules Committee reconsiders the proposal in light of that feedback.²⁶ If it moves forward with the proposal, the Standing Committee approves the rule once again and forwards it on to the Judicial Conference of the United States.²⁷ Once the Judicial Conference approves the rule amendment, it is sent to the United States Supreme Court, which—if it approves the rule—sends it on to Congress.²⁸ Congress then has seven months to alter or disapprove the rule. If Congress fails to act by December 1, the rule becomes law.²⁹

While still composed of federal litigation experts, the Committee's composition has changed over time, much like the rulemaking process. First, there are more judges and fewer academics on the Committee, flipping the original composition of solely practitioners and professors.³⁰ Second, the

²⁰ The Supreme Court appointed an Advisory Committee in 1935, naming former Attorney General William D. Mitchell as the chair and then-Yale Law School Dean Charles E. Clark as the reporter. Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1934); Paul V. Niemeyer, *Revisiting the 1938 Rules Experiment*, 71 WASH. & LEE L. REV. 2157, 2161 (2014).

²¹ Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 710 (1998) (Committee composed of nine lawyers and five law professors).

²² *Id.* at 729. The Advisory Committee sent its final draft to the Supreme Court in November 1937. *Id.* From there, the Court made a few insignificant changes and “promulgated the Federal Rules on December 20, 1937.” *Id.* Congress took no action on the rules, and they went into effect on September 16, 1938. *Id.*

²³ For a detailed history of the rulemaking process, see Burbank, *supra* note 17.

²⁴ *Overview for the Bench, Bar, and Public*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/GEX4-XLGF>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1565 (2015); Coleman, *supra* note 7, at 1017 (“The [C]ommittee has profoundly changed between 1971 and the present day, with judges taking up more seats than practitioners and academics combined.”).

modern Committee’s practitioners are steeped in high-stakes, complex litigation, while the original Committee’s lawyers were what we might call generalists.³¹ And finally, the Committee members are perceived to be—or, according to some, are in fact—more ideologically motivated and ideologically homogeneous than the original Committee members.³²

B. #SoWhiteMale: The Numbers

The Civil Rulemaking Committee consists of fifteen people, including a chairperson, a reporter, and a member of the Department of Justice, most often an Assistant Attorney General, who sits *ex officio*.³³ The Committee members—including the chairperson—are appointed for three-year terms and generally do not serve more than two terms on the Committee.³⁴ The reporter’s term on the Committee is unlimited. For this dataset, I counted only the voting Committee members, Committee chairs, and Committee reporters, because those Committee members are appointed by the Chief

³¹ Coleman, *supra* note 7, at 1018 (“[T]he practitioner profile has shifted from lawyers with a mix of clients to lawyers that specialize in representing businesses or individuals, but rarely both. Plaintiffs’ lawyers on the early [C]ommittee represented both individual and business interests, but the plaintiffs’ lawyers on the modern [C]ommittee represent individuals or classes almost exclusively. On the other side, the defense lawyers on the [C]ommittee represent solely business interests.”); Thornburg, *supra* note 9.

³² Moore, *supra* note 9, at 1087 (“Given the makeup of the Advisory Committee and the Standing Committee, none of this is surprising. The members of both committees were all appointed by Chief Justice John Roberts, and except for a few tokens, they are ideologically predisposed to think like Federalist Society members, demographically predisposed to think like elite white males, or experientially predisposed to think like corporate defense lawyers.”); Stempel, *supra* note 8, at 637 (“On a longer term, but perhaps more elusive level, policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup.”). This has led many scholars to allege that rulemaking is in a state of “crisis.” Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 448 (2013) (“In 2013, the Federal Rules of Civil Procedure (Rules) turn seventy-five years old. Though the Rules themselves have earned their encomia, the process by which they are promulgated under the Rules Enabling Act (REA) has been a source of gloom for more than a generation.”).

³³ See U.S. COURTS, *supra* note 2.

³⁴ Committee Membership Selection, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [<https://perma.cc/Z4M4-9PNH>]. Committee chairs are generally only appointed for one three-year term, but exceptions can (and have been) made. Thus, a member may serve on a committee for a maximum of six years. Chairs of the committees are normally appointed for just one three-year term. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1666 (1995).

Justice of the United States Supreme Court.³⁵ The Committee has been in place for eighty-two years from 1934–2018, taking a two-year hiatus from 1956–58. During that period and according to my dataset, 136 individuals served on the Committee. The Committee’s composition by race and gender is set forth in the graphs below.³⁶

There are several caveats to this Essay’s breakdown of the racial and gender composition of the Committee. With respect to racial identity, I used the United States Census Bureau racial designations. Yet, these designations have shortcomings. “Race” as a formal category is complicated: by distilling one’s identity down to a single categorical description, the Census Bureau oversimplifies personal identity and perpetuates categories that have their origins in oppression and racism.³⁷ While a full discussion of racial identity is beyond the scope of this Essay, I would be remiss in failing to point out this flaw in the dominant ways we think about and identify race. At the same time, categorical labels are required to describe and define the lack of diversity on the Committee (and beyond). To that end, I use the Census Bureau’s racial descriptors, but not without trepidation.³⁸

With respect to gender, the terminology refers to men and women. Like racial identity, these terms are also problematic. First, they presume that gender is binary, a social construct that has been roundly discounted.³⁹

³⁵ While the reporter does not vote, he is appointed by the Chief Justice to the Committee. Moreover, his role is central to the process. The reporter is responsible for researching and presenting information to the Committee, drafting proposed rule changes, reviewing and summarizing the public comments regarding rule changes, and recording the Committee’s work in minutes and reports. Committee Membership Selection, *supra* note 34. The DOJ representative votes, but he or she sits by designation on the Committee and is appointed by the President, not the Chief Justice. See *Lori Atherton, Chad Readler, ’97, Appointed Acting Assistant Attorney General of the Department of Justice Civil Division*, M^LA^W NEWSROOM, https://www.law.umich.edu/newsandinfo/features/Pages/ChadReadler_050917.aspx [<https://perma.cc/B35N-6NA8>] (“Readler was appointed January 30 by President Donald Trump.”); COMMITTEES ON RULES OF PRACTICE AND PROCEDURE MEMBERSHIP 2 (2017), http://www.uscourts.gov/sites/default/files/2017_committee_roster.pdf [<https://perma.cc/YYX4-LWYC>].

³⁶ Civil Rules Committee Dataset, *supra* note 2.

³⁷ Janet E. Helms, *Introduction: Review of Racial Identity Theory*, in *BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE* 3 (Janet E. Helms ed., 1990) (stating that “the term ‘racial identity’ actually refers to a sense of group or collective identity based on one’s *perception* that he or she shares a common racial heritage with a particular racial group”).

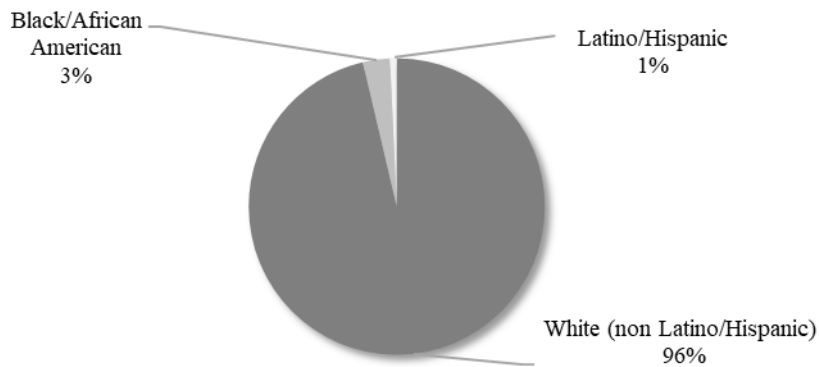
³⁸ See Kenneth Prewitt, *Fix the Census’ Archaic Racial Categories*, N.Y. TIMES (Aug. 21, 2013), <http://www.nytimes.com/2013/08/22/opinion/fix-the-census-archaic-racial-categories.html> [<https://perma.cc/E96L-863E>] (critiquing the current designations and calling for a new approach to collecting census data).

³⁹ Doug Werth, *Because of Sex: Gender Identity and Transgender Rights Under Titles VII and IX*, *ADVOCATE*, May 2017, at 32, 32 (“[A] binary approach [to gender] fails to account for other factors that may contribute to define a person’s sex, such as chromosomal mutations, hormonal differences and gender identity. In some instances, the assignment of sex at birth based upon visual examination of external genitalia may not reflect a person’s gender.”).

Second, the term woman/women does not properly account for the intersectionality that differently impacts women of different races, sexual orientation, class, or other factors. When women are presented as a monolithic group, the experience of women with intersectional identities becomes invisible.⁴⁰ Where possible—and where the statistics are available—this Essay will present information about women divided, at the very least, along racial lines. As with the racial identity caveat above, however, in presenting the stark contrast of the number of men who have served on the Committee versus women, this Essay uses the term woman/women as a default descriptor.⁴¹

Of the 136 individuals who have served on the Committee, 116 are white men, fifteen are white women, four are black men, and one is a Latino/Hispanic man. Graphic illustrations of this composition are available below.

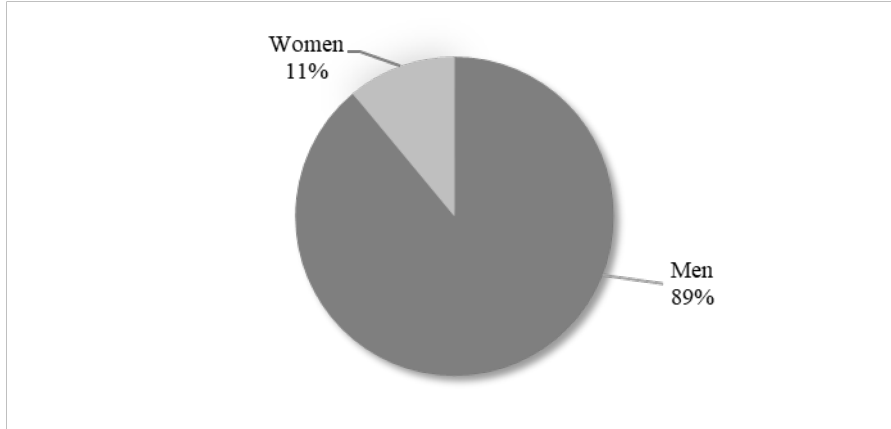
GRAPH 1: COMMITTEE COMPOSITION BY RACE 1934–2018



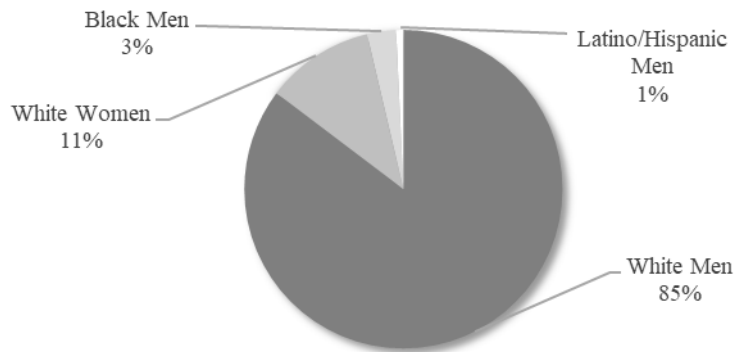
⁴⁰ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (describing the intersectional location of women of color and their marginalization within feminist discourse); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (discussing the need for the feminist movement to engage and embrace intersectional identities).

⁴¹ In addition, while beyond the scope of this Essay, there are other meaningful inquiries that could be made into the Committee’s composition, such as sexual orientation and disability status. *See, e.g.*, Kathleen Dillon Narko, “Inclusion Means Including Us, Too”: *Disability and Diversity in Law Schools*, FED. LAW., January/February 2017, at 22, 23 (“This article will explore why disability should be included in ideas of diversity and inclusion as well as the barriers people with disabilities face. I focus on those preparing to enter the legal profession—law students.”); Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias*, 79 MO. L. REV. 119, 121–22 (2014) (examining geographic identity and its impact on judging with experiential bias).

GRAPH 2: COMMITTEE COMPOSITION BY GENDER 1934–2018



GRAPH 3: COMMITTEE COMPOSITION BY RACE & GENDER 1934–2018



As the graphs show, the Committee’s gender composition is 89% men and 11% women. In terms of race and gender, the historical composition of the Committee is 85% white men, 3% black men, 0.7% Latino/Hispanic men, and 11% white women. No women of color have ever served on the Committee, and only five men of color have served—four black men and one Latino/Hispanic man.

William Thaddeus Coleman, Jr. was the first person of color appointed to the Committee in 1965.⁴² The next person of color was not appointed until over thirty years later in 1998, when Professor Myles Lynk (Arizona State University) joined the Committee.⁴³ Since then, Judge Jose Cabranes (U.S. Court of Appeals for the Second Circuit) was appointed in 2004, Judge Solomon Oliver, Jr. (U.S. District Court for the Northern District of Ohio) was appointed in 2011, and Professor Benjamin Spencer (University of Virginia) was appointed in 2017.⁴⁴ To put it differently, in the past thirty years, only one man of color has been appointed to the Committee per decade.

The first woman appointed to the Committee was Judge Shirley M. Hufstедler (U.S. Court of Appeals for the Ninth Circuit) in 1971.⁴⁵ The next women were appointed in 1985: attorney Larrine Holbrooke and Judge Mariana R. Pfaelzer (U.S. District Court for the Central District of California).⁴⁶ Attorney Carol Fines⁴⁷ was appointed in 1991 after Holbrooke and Judge Pfaelzer cycled off the Committee.⁴⁸ Judge Christine Durham (Supreme Court of Utah) was appointed in 1995 to serve during Fines's final two years on the Committee.⁴⁹ In 1997, Judge Lee Rosenthal (U.S. District Court for the Southern District of Texas) was appointed to the Committee, followed by Sheila Birnbaum (partner, Quinn Emanuel Urquhart & Sullivan, LLP) and Judge Shira Scheindlin (U.S. District Court for the Southern District of New York) in 1998.⁵⁰ This was the first time in the Committee's history that more than two women served on the Committee at one time.

In 2004, Chilton Varner (partner, King & Spalding LLP) was added to the Committee, overlapping with Judge Scheindlin for one year and with Judge Rosenthal for three, maintaining the female membership of the Committee at three until Judge Scheindlin cycled off the Committee in 2006.⁵¹ From 2011–14, female membership remained at two with Judge Gene Pratter (U.S. District Court for the Eastern District of Pennsylvania)

⁴² Civil Rules Committee Dataset, *supra* note 2.

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ Carol Fines was also listed as Carol Posegate in rulemaking records. *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ Judge Rosenthal was elevated to Chair of the Civil Rules Committee from 2003–07 and then to Chair of the Standing Committee on Practice and Procedure from 2007–14. Richard Ellison, *Judicial Profile: Hon. Lee H. Rosenthal, U.S. District Judge, Southern District of Texas*, FED. LAW., July 2008, at 22, 22–23.

and Elizabeth Cabraser (partner, Lief Cabraser Heimann & Bernstein, LLP) serving during that time.⁵² Virginia Seitz (partner, Sidley Austin LLP) joined the Committee in 2014, raising the number of women back up to three.⁵³ Since 2015, the female membership of the Committee has increased to four with Seitz, Cabraser, Judge Sara Lioi (U.S. District Court for the Northern District of Ohio), and Judge Joan Ericksen (U.S. District Court for the District of Minnesota) serving from 2015–16 and Seitz, Judge Ericksen, Judge Lioi, and Ariana Tadler (partner, Milberg Tadler Phillips Grossman LLP) serving from 2017 to present.⁵⁴

Not one woman of color has ever been appointed to the Committee. Every single one of the fifteen women who has served on the Committee is white.

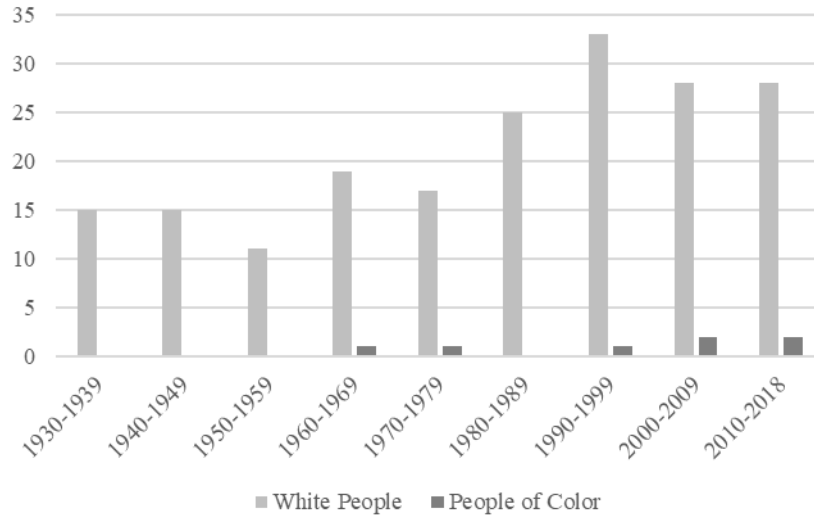
Graphs 4 and 5 below show the composition of the Committee broken down first by race and then by gender from decade to decade. As these graphs show, no people of color have served on the Committee during the first four decades of the Committee's existence. In the remaining five decades, people of color have served in severely disproportionate numbers compared to white individuals. Similarly, women did not serve on the Committee for the first four decades of its existence. For the remaining five decades, women have had greater representation than men and women of color (especially the latter, given that no women of color have been appointed to the Committee), but their representation still falls far short of equipoise.

⁵² See Civil Rules Committee Dataset, *supra* note 2.

⁵³ See *id.*

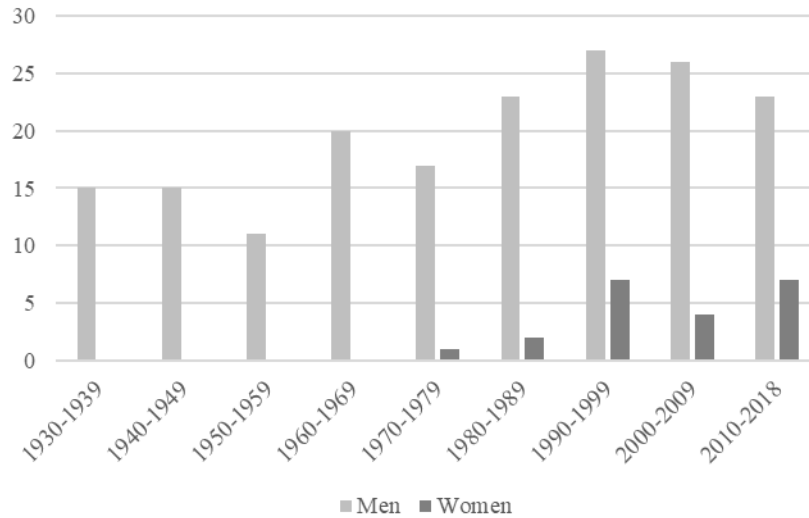
⁵⁴ See *id.*

GRAPH 4: COMMITTEE RACIAL COMPOSITION BY DECADE



NORTHWESTERN UNIVERSITY LAW REVIEW

GRAPH 5: COMMITTEE GENDER COMPOSITION BY DECADE



To further put these stark numbers into context, Table 1 compares the racial composition of the Committee to the racial composition of the United States as reported by the Census Bureau (as of July 2017),⁵⁵ followed by the racial composition of lawyers and federal district court judges in the United States. The pool of candidates for Committee positions largely consists of federal district court judges and practicing lawyers; thus, the Table below focuses further on those two categories.⁵⁶

⁵⁵ *Quick Facts: United States*, THE UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217#qf-headnote-b> [<https://perma.cc/C3EJ-GQMK>].

⁵⁶ Federal district court judges make up most of the Committee—currently holding six of the Committee positions. *See* U.S. COURTS, *supra* note 2. While one state court judge and one federal appellate judge serve on the Committee as well, most of the judges are from the federal district court. Following judges, the next largest category of Committee members are lawyers—currently four serve on the Committee. *See id.* While academics serve on the Committee, they hold only two positions—one as reporter and one as a Committee member. *See id.*

TABLE 1: COMMITTEE MEMBERSHIP: RACIAL IDENTITY COMPARED TO GENERAL POPULATION, LAW PRACTICE POPULATION, & JUDICIARY

Race	Committee Membership (1934–2018)	Current Committee Membership	U.S. Population (Census)	Legal Practice ⁵⁷	Federal District Court Judges ⁵⁸
White (non-Latino/Hispanic)	96%	93%	60.7%	85.5%	71%
Latino/Hispanic	0.7%	0%	18.1%	5.1%	10%
Black/African American	2.9%	7%	13.4%	4.6%	14%
American Indian or Alaska Native	0.0%	0%	1.3%	**	**
Asian	0.0%	0%	5.8%	4.8%	3%
Native Hawaiian or Other Pacific Islander	0.0%	0%	0.2%	**	**

Table 1 shows that white men are overrepresented on the Committee both over time and currently. This is true with respect to every metric—general population, legal practice, and federal district court judges. Conversely, every racial designation is underrepresented on the Committee on every count. For example, while Latino/Hispanic individuals hold 10% of federal district court judgeships and make up about 5% of the Bar, they have made up less than 1% of the Committee over time and hold zero seats on the Committee currently. The story is roughly the same for other people of color. For instance, while black individuals hold 14% of federal district court judgeships, there is not one black federal judge serving on the Committee. The only person of color serving on the Committee currently is

⁵⁷ INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 18 (2017), http://www.theiilp.com/resources/Pictures/IILP_2016_Final_LowRes.pdf [<https://perma.cc/9LMQ-GCQ4>] [hereinafter IILP REVIEW 2017]. These numbers reflect data for 2015.

⁵⁸ *Percentage of Active U.S. District Court Judges as of August 2017, by Race and Hispanic Origin*, STATISTICA, <https://www.statista.com/statistics/408483/percentage-of-us-district-court-judges-by-race> [<https://perma.cc/N6NJ-MPPS>]. The categories are slightly different than what is presented in this Table because the statistics account for “multi-racial” judges, with 8% of federal district court judges falling into that category. The data provided in the IILP Review 2017 did not break down percentages in these two categories.

a law professor who was recently appointed in 2017. Indeed, white men—both historically and currently—dominate the Committee’s composition.

Gender composition of the Committee is no different. Like the previous Table, Table 2 compares the gender composition of the Committee to the gender composition of the general population, legal practice, and federal district courts.

TABLE 2: COMMITTEE MEMBERSHIP: GENDER IDENTITY COMPARED TO GENERAL POPULATION, LAW PRACTICE POPULATION, & JUDICIARY

Gender	Committee Membership (1943–2018)	Current Committee Membership	U.S. Population (Census) ⁵⁹	Legal Practice ⁶⁰	Federal District Court Judges ⁶¹
Male	89%	72%	49.2%	64%	66%
Female	11%	28%	50.8%	36%	34%

Table 2 demonstrates similar trends based on gender. Women hold 34% of federal district court judgeships and make up 36% of practicing lawyers, yet they have held only 11% of the Committee seats over time and hold only 28% currently. The latter number is more promising. In the past few years, four women have served on the Committee, making up 28% of its composition. This is certainly progress, but again, these women are all white. No woman of color has ever been appointed to the Committee, even though women of color hold 11.9% of federal judgeships⁶² and make up 14.5% of practicing lawyers.⁶³

The homogeneity of the Committee membership is notable, but it is even more prominent when looking at Committee leadership. The two key roles on the Committee are the chair and the reporter. The chair is the leader of the Committee and in recent history is the person who serves as Standing Committee Chair once his or her service as the civil rules chair has ended. The reporter is the academic Committee member who is paid a small sum to be the scribe and researcher for the Committee. The reporter often provides the first draft of the proposed amendments, summarizes public comments, and provides and organizes additional research that the Committee might request.

⁵⁹ *Quick Facts: United States*, *supra* note 55.

⁶⁰ IILP REVIEW 2017, *supra* note 57, at 18.

⁶¹ BARRY J. McMILLION, CONG. RES. SERV., U.S. CIRCUIT & DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 15 (2017), <https://fas.org/sgp/crs/misc/R43426.pdf> [<https://perma.cc/GHM3-D3SH>].

⁶² *Id.* at 20 fig.12.

⁶³ IILP REVIEW 2017, *supra* note 57, at 18. This percentage is for the year 2015.

The identity make-up of these two important positions—like the Committee membership itself—has remained static. All but one of the fifteen Committee chairs—Judge Lee Rosenthal, a white woman—have been white men. And, every single one of the nine reporters has been a white man.⁶⁴ In other words, like the Committee’s membership, the Committee’s leadership is #SoWhiteMale.

II. IDENTITY MATTERS

The identity of the Rulemaking Committee is homogeneous—that much is clear. The question is whether that homogeneity should matter. After all, some would argue the rules are technical and the process neutral, so why does it matter whether the Committee membership is diverse or not? In this Part, this Essay argues that even in the context of an expert-driven technical process, identity matters. The Committee members are susceptible to bias, and one way to mitigate that inevitable bias is to diversify the Committee membership, resulting in a rulemaking process that can help identify and overcome biases that may limit decision-making as well as create rules that incorporate diverse perspectives.

In addition to making the pragmatic case for why identity matters, this Part also argues that stakeholders are duty-bound to ensure the Committee is more representative. The historical and current exclusion and underrepresentation of men of color and women of all colors in the legal profession can only be remedied through thoughtful leadership and action.

A. *Identity, Decision-Making, & Federal Civil Rulemaking*

Identity matters in the context of federal civil rulemaking. First, some Committee members assert that the Committee is an apolitical body

⁶⁴ There have been eight Committee reporters, but Richard Marcus has recently served as an associate reporter to Ed Cooper on the Committee. Thus, he is included in the total number of reporters as he likely stands to become the official reporter when Cooper retires. See COMMITTEES ON RULES OF PRACTICE AND PROCEDURE MEMBERSHIP, *supra* note 35, at 1 (listing Richard Marcus as associate reporter).

engaging in neutral, expert-driven work.⁶⁵ That is simply not the case. The Committee is not political in the traditional sense because the members are not elected, but instead appointed by the Chief Justice of the Supreme Court. Yet, the members are subject to the same biases and preferences to which we all succumb. Second, those biases cannot be eliminated, but they can be mollified by a more diverse Committee membership. Finally, the Committee's product—the Federal Rules of Civil Procedure—would benefit from a heterogeneous rulemaking body that can better identify implicit biases and incorporate diverse members' unique insights and perspectives into the rules.

Professor Kathryn Watts has effectively argued that in an expert-driven context like administrative regulatory rulemaking, ideological politics inevitably play a role and thus should be explicitly considered.⁶⁶ In that context, the President is an elected official with a clear political agenda he or she hopes to implement. In civil rulemaking, pure politics are not nearly as front and center. The Chief Justice, an unelected member of the Judicial Branch, appoints the Committee members, many of whom are judges themselves whose day jobs are based on their ability to be neutral and objective.

An important distinction between Professor Watts's thesis and the federal rulemaking process is that the unelected head of the judiciary appoints the rulemaking Committee members; yet, there are still important connections to be made with her scholarship. First, while experts may try to approach rulemaking with a neutral perspective, they are still human beings

⁶⁵ See, e.g., Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 301–02 (as a former committee reporter, Carrington lauded the Committee's work because it allowed for an "apolitical approach to matters of procedure," as it did not allow "groups . . . such as 'repeat players' and the organized bar [to] exercise disproportionate influence on the process" and protects the interests of the "disorganized (and hence powerless)"); Freer, *supra* note 32, at 467 ("And despite the politicization, one insider reports that the Committee hearings and conferences are 'relatively apolitical' and 'probably come a good deal closer to a seminar than many hearings in Congress.'"); Mullenix, *supra* note 8, at 842 ("On the contrary, traditionalists hold paramount the principles of trans-substantive rules, a belief that compels an apolitical process conducted by expert elites operating with relative immunity from partisan pressures."); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 L. & CONTEMP. PROBS. 197, 198 (2001) ("Rulemaking is viewed on the one hand as an apolitical procedure and on the other hand as a 'disguised outcry for tort reform.'").

⁶⁶ Watts, *supra* note 6, at 8–9.

and are subject to the same cognitive biases as anyone else.⁶⁷ Second, while not elected, the Committee members come to the table with experiences that inform how they view the world, and more narrowly, civil litigation.⁶⁸ Finally, the rulemaking process cannot be neutral because the rules are not neutral. While cast as a technical set of prescriptions for how to litigate a case in federal court, they are a set of normative judgments about how to balance competing values in our civil justice system. Rule-makers, like judges, believe in their objectivity, but as Professor Danya Reda has argued, when it comes to the Civil Rules, much like judging, “[w]e are not dealing with ‘fact’ but with policy or normative judgment.”⁶⁹ Because of the inherently subjective salience of the work the Committee is doing, stakeholders rightfully care about the identities of the individuals who make the rules.

Almost every rule amendment reflects the Committee members’ normative judgment about what litigation values should be elevated. For example, the 1983 amendment to Rule 11 provided for mandatory sanctions.⁷⁰ That choice—to harden the sanction rule—was not simply a technical tweak. It was a choice reflecting the Committee members’ normative judgment that the civil justice system would be better served if more frivolous claims were filtered out earlier.⁷¹ That judgment did not stand alone, however. It necessarily subordinated other value judgments, such as the loss of more meritorious claims (that might be filtered out wrongly under such a high standard) and the potential chilling effect (that some meritorious claims might not be brought because of the fear of the high standard and its consequences).⁷²

⁶⁷ Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 2013 (2013) (“The impact of these cognitive biases reaches beyond the general public, affecting the conduct of agencies as well.”); Stephen Gilles, *What’s So Great About Lay Judgments? What’s So Bad About Expertise?*, 14 PACE ENVTL. L. REV. 499, 500 (1997) (“Cognitive psychologists have reported that both laypeople and experts often suffer from cognitive biases of various kinds.”); Watts, *supra* note 6, at 33 (“[A]llowing agencies to unapologetically disclose political influences and enabling courts to credit openly political judgments would help to bring hard look review, which currently hinges on an outmoded model of ‘expert’ decisionmaking, into harmony with other major administrative law doctrines that embrace the more current ‘political control’ model.”).

⁶⁸ Coleman, *supra* note 7, 1016–19.

⁶⁹ Reda, *supra* note 4, at 2223.

⁷⁰ See Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court’s 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 100–01 (1993) (discussing the evolution of Rule 11).

⁷¹ *Id.*

⁷² Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1817 (2015) (noting that Rule 11 reflected the Committee’s shift in values from “one of receptivity to the potential for a meritorious claim to suspicion that more claims are now frivolous”).

The recent proportionality amendments are similarly value-laden. Rule 26(b)(1) was amended in 2015 to further restrict the scope of discovery to require that it be “proportional to the needs of the case.”⁷³ This rule amendment reflects a normative judgment that discovery must be highly monitored and restricted in order to avoid unnecessary “costs and delay.”⁷⁴ Again, the amendment was not the mere fine-tuning of a rule. In contrast to previous Committee members’ value judgments that discovery should be expansive (even at the expense of some delay), the current Committee members decided to give primacy to their judgment that restrictive discovery is better for the civil justice system—even if that means that some plaintiffs with valid claims will be unable to get the information they need to win their cases.⁷⁵

In addition, the Committee is a deliberative body that depends on thoughtful consideration by its members. Social science studies repeatedly demonstrate that diverse perspectives in decision-making bodies improve the product. With respect to racial and gender diversity, studies demonstrate that decisions are more accurate when made by a heterogeneous group versus a homogeneous one. For example, a recent study of jury deliberations determined that the ethnically diverse group of jurors was significantly more likely than the all-white group of jurors to notice missing evidence, ask better questions, and make accurate decisions.⁷⁶ While some studies have shown that heterogeneous group composition in decision-making is not always a net

⁷³ FED. R. CIV. P. 26(b)(1). The rule now includes the following six factors: (1) “whether the burden or expense of the proposed discovery outweighs its likely benefit”; (2) “the amount in controversy”; (3) “the parties’ resources”; (4) “the importance of the issues at stake”; (5) “the importance of the discovery in resolving the issues”; and (6) “the parties’ relative access to relevant information.” *Id.* The first five factors were previously located in Rule 26(b)(2)(C), and the sixth was added through the amendment process. U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES, 80–81, (Apr. 2014), http://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf [<https://perma.cc/GXS9-RQ4K>].

⁷⁴ Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1089 (2012) (arguing that the cost-and-delay narrative persists even when argued that “[d]ecades of empirical work . . . support[] the view that the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost is proportional to the amount at stake”).

⁷⁵ Coleman, *supra* note 72, at 1811–15.

⁷⁶ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY SOC. PSYCHOL. 597, 605–06 (2006).

benefit because of inter-group conflict,⁷⁷ that problem does not apply to all groups and all forms of decision-making. The context of the decision-making is what matters, because where decision-making requires a rigorous consideration of facts with a goal of accuracy, diversity is a benefit. That is because it creates what researchers call “friction.”⁷⁸ Friction “can increase conflict in some group settings,” but it can also inspire group members to ask better questions, think more deeply about problems, and actively participate in the proceedings.⁷⁹ According to researchers, for this kind of decision-making, “vigilant skepticism is beneficial; overreliance on others’ decisions is risky.”⁸⁰

In other words, in a context like federal civil rulemaking, diverse decision-making bodies are “smarter.”⁸¹ When people work with individuals who are different from them, they tend to ask better questions and think harder about issues.⁸² Heterogeneity in group decision-making may not lead to a smooth, conflict-free decision-making process, but it will lead group members to “sharpen” their thinking and make better decisions.⁸³

Finally, there are instances where one can imagine that a more representative rulemaking body might have produced a different, and perhaps better, rule. For example, when the modern class action rule (Rule 23) was adopted in 1966, the Committee was an all-white-male body.⁸⁴ Rule

⁷⁷ See, e.g., Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741, 741–42 (1999); Eden B. King et al., *Conflict and Cooperation in Diverse Workgroups*, 65 J. SOC. ISSUES 261, 267–68 (2009); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 41–42 (2005). This has led some scholars to argue in favor of cognitive diversity. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 120 (2015) (arguing for the elevation of “cognitive diversity”). As I have argued previously, cognitive diversity is valuable, but it should not supplant identity diversity. Brooke D. Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 IND. L.J. 1, 23 (“While cognitive diversity might have a place in this important discussion, it should not obscure and cannot solve the problem that power in the legal profession—and society more generally—is distributed in a way that aligns closely with gender and racial inequality that were the deliberate products of the American legal system. Identity politics are currently out of favor, but discrimination based on identity persists.”).

⁷⁸ Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 PROC. NAT’L ACAD. SCI. 18524, 18525 (2014).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter> [<https://perma.cc/59GZ-N6P9>].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 709 (2011) (“The men who revised Rule 23 were well-meaning white elites who may have underappreciated some of the complexities of desegregation in their zeal for the cause.”); see also Civil Rules Committee Dataset, *supra* note 2.

23(b)(2), the class action injunction rule, was adopted in response to the school desegregation cases of the 1950s and 1960s. As Professor David Marcus has shown in his seminal historical work on the adoption of the modern class action rule, the Committee was obsessed with providing courts with a tool to desegregate schools through injunctive structural reform.⁸⁵ Professors Benjamin Kaplan and Albert Sacks, the committee members who spearheaded the adoption of Rule 23(b)(2), were both active in the civil rights movements, and the remaining Committee members, while white, male, and elite, were exceedingly progressive.⁸⁶ As Professor Marcus notes, Rule 23(b)(2) was a “noble” effort; the Committee designed a procedural tool to eradicate a systemic wrong.⁸⁷

Imagine if a historically marginalized person like a woman or a man of color served on the Committee—one perhaps steeped in the challenges for women in the workplace who considered the possibility for future structural reform via Title VII. Would the rule have developed differently if the Committee members had considered other types of institutional reform litigation, like gender discrimination or sexual harassment? For example, might Rule 23(b)(2) have expressly allowed for the recovery of certain kinds of monetary relief, like backpay, along with the injunctive relief? The Supreme Court had the opportunity to resolve this issue left open by the rule’s plain language in *Wal-Mart Stores, Inc. v. Dukes*.⁸⁸ The Court held that the individualized backpay sought in *Dukes* was not permitted in a Rule 23(b)(2) class action.⁸⁹ It left the door open, however, to other monetary damages that might be construed as incidental and thus potentially available in gender discrimination and other Rule 23(b)(2) class actions.⁹⁰ A rule that specifically allowed for this relief and anticipated future structural reform would have put this question to bed entirely. In other words, were the all-white-male Committee members blind to the other goals that Rule 23(b)(2)

⁸⁵ Marcus, *supra* note 84, at 697 (“The ‘classic example’ of a class action generating a broadly preclusive judgment regardless of category of right, Kaplan continued, is ‘of course the desegregation cases.’”).

⁸⁶ *Id.* at 702–05.

⁸⁷ *Id.* at 660–61.

⁸⁸ 564 U.S. 338, 360 (2016) (“Our opinion in *Ticor Title Ins. Co. v. Brown* . . . expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.”).

⁸⁹ *Id.*

⁹⁰ Megan E. Barriger, Comment, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in Wal-Mart Stores, Inc. v. Dukes*, 15 U. PA. J. CONST. L. 619, 620 (2012) (noting that the elimination of the recovery of backpay in a Rule 23(b)(2) class action “would create an enormous roadblock to Title VII employment discrimination claims, which have historically been brought under Rule 23(b)(2) and have also included awards for backpay”).

may have achieved, and if so, could members with more diverse identities have developed a rule that accommodated these other remedies to more effectively promote institutional reform? It is at least possible that a Committee with different membership would have produced an even “nobler” rule.

In sum, the federal civil rulemaking process relies on expertise, and rightfully so. Yet, that expertise does not eliminate the potential for bias in decision-making. A Committee that is more representative of men of color and women of all colors would not only mitigate these biases, but would also likely produce rules that reflect a variety of diverse perspectives and consider issues that other members may have overlooked.

B. *Morality of Inclusion Because of a History of Exclusion*

Justice John Marshall Harlan’s concurrence in *Hanna v. Plumer*—the seminal 1965 *Erie* doctrine case substantiating the validity of the Federal Rules of Civil Procedure—found the integrity of the Rules to be “absolute” because they were created by “the members of the Advisory Committee, the Judicial Conference, and this Court,” who Justice Harlan noted were “presumably reasonable men.”⁹¹ Justice Harlan was not being politically insensitive; he was stating pure fact. Each institutional body Justice Harlan referenced was comprised mostly of white men. Stated differently, for much of our nation’s history and for much of the history of the legal profession, men of color and women of all colors have been regularly and systematically excluded.⁹²

This history of exclusion in the legal profession is an important reason to pursue greater diversity on the Civil Rules Committee. As a body that represents the most elite members of the legal community, the Committee

⁹¹ *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

⁹² Troy J.H. Andrade, *Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession*, 33 U. HAW. L. REV. 249, 257 (2010) (“The legal profession’s history can be characterized as one of discrete and sometimes outright exclusion.”); Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 2–3 (2013) (“Despite being the architects of significant, positive societal advancement over the last half of the twentieth century, members of the legal community continue to struggle with the inequality that exists within their own ranks.”); Kevin R. Johnson, *Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law*, 46 U.C. DAVIS L. REV. 1655, 1658–62 (2013) (summarizing the history of exclusion of immigrants and “others” from the practice of law); Mary Vasaly, *Men in Black: Gender Diversity and the Eighth Circuit Bench*, 36 WM. MITCHELL L. REV. 1703, 1703 (2010) (“For most of the history of the legal profession in the United States, courts were the exclusive domain of ‘men in black.’”); David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1560–70 (2004) (summarizing how the legal profession historically excluded non-white men and women).

should endeavor to actively right the wrongs of this past and take action.⁹³ The Chief Justice must prioritize appointing more men of color and women of all colors to the Committee; however, this will not happen without the insistence of the greater judiciary, lawyers, and members of the academy.⁹⁴

The Committee cannot remediate the inevitable results of the exclusion of whole categories of individuals overnight, but diversifying membership is a step in the right direction. White men have had a consistent advantage over women of all colors and men of color that can only be remedied through action.⁹⁵ A more diverse Committee will have concrete benefits for the rulemaking process and the rules themselves, and it will contribute to what should be a professional commitment to correcting the legal profession's history of excluding so many qualified individuals based on identity alone.

CONCLUSION

#SoWhiteMale should not describe the federal civil rulemaking process or the Federal Rules of Civil Procedure. In the first survey of its kind, this Essay evaluates the gender and racial compositions of the Rulemaking Committee over its eighty-year tenure and finds that historically white men have disproportionately served on the Committee to the exclusion of men of color and women of all colors. There are also clear disadvantages to excluding diverse individuals from the Rulemaking Committee. Social science studies show diverse perspectives can help mollify members' potential biases, identify details other members may miss, and encourage deeper thinking about complex problems. While the Committee has made progress in including white women and men of color in the last few decades, no women of color have ever been appointed to the Committee, and white men continue to be appointed in overwhelming numbers.

Moreover, the underrepresentation of men of color and women of all colors on the Committee reflects the dearth of diverse voices and

⁹³ In response to past critiques, the Chief Justice's appointments to the Committee have become more geographically varied and have included some variety of practice types (smaller firms, for example). McCabe, *supra* note 34, at 1666. Yet, gender and race have not been prioritized.

⁹⁴ While an early House version of the 1988 amendments to the Rules Enabling Act included language requiring that the rules committees have a "balanced cross section of bench and bar, and trial and appellate judges," that language did not make it into the final version of the bill. Coleman, *supra* note 7, at 1064. While Congress could similarly amend the Act today, it is not very likely that such an amendment will take effect. Change is more likely to emerge from less formal action by the judiciary, the bar, and the academy.

⁹⁵ David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1922 (2005) (arguing that "[l]aw schools and legal employers were justified in taking affirmative steps to assist black students and lawyers in order to counteract the systematic and pervasive preferences that had been accorded to white, Anglo-Saxon, Protestant men of means for more than one hundred years.").

perspectives within the legal profession itself. Prioritizing the diversification of the Rulemaking Committee is a small step in correcting the systematic exclusion of diverse individuals in the legal profession.

The time has come for the Chief Justice to commit to ensuring that the Rulemaking Committee's racial and gender composition is more representative. The evidence of imbalance is clear and the action to be taken is quite simple.⁹⁶ Judges, attorneys, and academics must now demand change.

⁹⁶ There are ample resources for determining how best to reduce bias in hiring decisions. *See, e.g.*, Rebecca Knight, *7 Practical Ways to Reduce Bias in Your Hiring Process*, HARV. BUS. REV. (June 12, 2017), <https://hbr.org/2017/06/7-practical-ways-to-reduce-bias-in-your-hiring-process> [<https://perma.cc/8TTW-GALH>]; Adam Stites, *NFL's Rooney Rule: What Is It and How Does It Work*, SB NATION (Jan. 6, 2018), <https://www.sbnation.com/2018/1/6/16856550/rooney-rule-nfl-explained-how-it-works-coaches> [<https://perma.cc/TH88-5JUL>] (discussing the so-called Rooney Rule, which requires all NFL teams to interview minority candidates when hiring general managers and head coaches). The Chief Justice and the Administrative Office of the U.S. Courts could implement these types of practices when making appointments. All that it takes is the will to do so.

