Roberts's Illegal Policy and Policy Making at the Conference

"[T]he notion that by confining the Rules to matters of 'procedure,' as the Rules Enabling Act of 1934 directed, one could somehow prevent them from having important and controversial socio-economic and political consequences outside the courtroom is **absurd** . . . it is perhaps unreasonable anachronistically to superimpose on the Congressional drafters a sophisticated understanding of how procedural choices may impact substantive policies." [Emphasis added by author.] See 356 U.S. 525, 549 (1958) (Whittaker, J., concurring in part and dissenting in part.) ("The words 'substantive' and 'procedural' are mere conceptual labels and in no sense talismanic.") and 304 U.S. 64, 91–92 (1938) (Reed, J., concurring) ("The line between procedural and substantive law is hazy …").

The Rules Enabling Act is intended to preserve Congress' legislative power. In *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1307–08, 1326 (2006), author Martin H. Redish wrote: "The reasoning appears to have been that where the Court merely promulgates rules of 'procedure,' it is not overstepping its constitutionally limited bounds because procedure is, by definition, internal to the operation of the judiciary; it has no impact outside the four walls of the courthouse. We now know—and probably should have known at the time of the Act's passage—that this is **political nonsense**. In numerous instances, procedural choices inevitably—and often **intentionally—impact the scope of substantive political choices**. This recognition should logically raise a concern that the Act unconstitutionally vests in the Supreme Court power that is reserved, in a constitutional democracy, for those who are representative of and accountable to the electorate."

Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1043 (1993) ("[C]ommentators have placed recent emphasis on the relationship between Congress and the Court in the rulemaking process as the source of the restriction against affecting substantive rights."); Martin H. Redish, *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1307–08, 1326 (2006) **("arguing that current rulemaking oversteps constitutional bounds because the committee produces substantive rules and proposing that rules falling into a 'non-housekeeping' category of procedural rules or that 'are found to implicate significant economic, social, or political dispute(s)' should require Congressional and presidential approval")**; Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841–42 (1993) ("arguing that the rulemaking process should rely more heavily on empiricism and called for a moratorium on rulemaking pending further study"); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) ("arguing that the discovery proposals lacked empirical foundation and calling for reform of the rulemaking process"); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 481 (1993) ("arguing for a limit on the Committee's discretion to be accomplished through a set of administrative agency-like guidelines"); Marc S. Galanter, *The*

Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459, 491 (2004); Professor Richard L. Marcus has noted, we have a "litigation machine that often seems indifferent to the merits." Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 BROOK. L. REV. 761, 766 (1993).

Sarah Staszak, "The Administrative Role of the Chief Justice: Law, Politics, and Procedure in the Roberts Court Era." *Laws* (ISSN 2075-471X), a peer-reviewed journal of legal systems, theory, and institutions, published quarterly online by MDPI: "The Chief Justice of the Supreme Court plays a critical role in shaping national politics and public policy. While political scientists tend to focus on the ways in which the chief affects the Court's jurisprudence, **relatively little attention has been devoted to the unique administrative aspects of the position that allow for strategic influence over political and legal outcomes**. This article examines the role of the chief justice as the head of the Judicial Conference, which is the primary policy making body for federal courts in the United States." https://www.mdpi.com/2075-471X/7/2/15/htm

Dawn M. Chutkow, "The Chief Justice as Executive: Judicial Conference Committee Appointments," *Journal of Law and Courts* 2, no. 2 (2014): 301–25. doi:10.1086/677172: "This article is the first comprehensive empirical study of chief justice appointments to the Judicial Conference committees of the US Courts, entities with influence over substantive public and legal policy. Using a newly created database of all judges appointed to serve on Judicial Conference committees between 1986 and 2012, the results indicate that a judge's partisan alignment with the chief justice matters, as do personal characteristics such as race, experience on the bench, and court level. **These results support claims that Judicial Conference committee selection, membership, and participation may present a vehicle for advancing the chief justice's individual political and policy interests."**

https://www.jstor.org/stable/10.1086/677172?seq=1#page_scan_tab_contents

[1]. "extreme vigilance against **treading on contested fact issues or mixed questions of law and fact-even arguable ones-reserving them for evidentiary hearings** . . . [u]nless the parties settled, disputes regarding intent, state-of-mind, and credibility were virtually always tried, often before a jury."

Paul W. Mollica, Federal Summary Judgment at High Tide, 84 MARQ. L. REV. 141,147 (2000)

"A well-chronicled, decades-long effort ultimately led to the passage of the Rules Enabling Act of 1934 . . . The Federal Rules of Civil Procedure became law four years later . . . "the drafters of the Federal Rules wanted cases to be **resolved on the merits**" . . . those "core values of [federal] rules have **been eviscerated by judicial decisions, interred by antipathy, and eulogized** by none other than Wright and Miller" . . . "**Federal Rules were premised on the notion that, once the parties learned the relevant facts, cases would either settle or go to trial**."

Stephen N. Subrin & Thomas O. Main, The Fourth Era of American Civil Procedure, 162 U. PA. L. REV. 1839 (2014)

"In 1951, the median time from filing to disposition for tried cases was 12.2 months. In 1962, that number was sixteen months. Since 1990, the median time to disposition for all terminated cases is only seven to eight months. But as of 2012, the median time from filing to disposition remains twenty-three months in those cases where there is a trial, which, of course, these days are only one percent of all cases."

Harold Hongju Koh, The Just, Speedy, and Inexpensive Determination of Every Action? Yale Law School Faculty Scholarship (2014)