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THE REVIEW OF LITIGATION

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Introduction: The AALS Litigation Section's Program on "The Future of Discovery"

Ronald G. Aronovsky*

I am delighted to write this Introduction to a fine collection of papers about discovery appearing in this issue of the Review of Litigation. These papers were generated in connection with the Association of American Law Schools (AALS) Section on Litigation program on "The Future of Discovery" held at the 2015 AALS Annual Meeting.

In many respects, discovery is the lynch-pin of modern U.S. civil litigation systems. Discovery can facilitate a streamlined role for pleading, provide the opportunity for reducing informational asymmetry between parties, enhance informed settlement negotiations, and set the stage for the pre-trial disposition of weak claims or defenses through summary judgment.

But discovery is also controversial. Some maintain that broad and robust discovery is essential to ensure meaningful access to justice and the resolution of disputes on their merits. Others criticize current discovery practice as a hyper-technical and needlessly intrusive, time-consuming, and expensive process that inflates transaction costs and undermines Rule 1's command that the Federal Rules of Civil Procedure (FRCP) be administered "to secure the just, speedy and inexpensive determination of every action and proceeding."[1] In many ways, these disputes about the proper role of discovery reflect underlying disagreements about the appropriate structure of the civil litigation system and can operate as a surrogate battlefield regarding the availability of courts to vindicate or elucidate public law rights. These tensions also demonstrate that a meaningful discussion about the future of discovery cannot be conducted in isolation, but rather with a healthy regard for discovery's potential impact on broader dispute resolution values implicit in this debate.

For decades, these competing views have dominated much of the discussion about discovery among practitioners, judges and academics, particularly when coincident with proposed changes to

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1. FED. R. CIV. P. 1.

FRCP discovery rules. It appears that the immediate future of discovery will be re-shaped yet again by new FRCP discovery rules which took effect on December 1, 2015.[2] Several of these changes will have a particularly significant impact on the future of discovery.

For instance, the amendment to Rule 26(a)(1) will permit discovery of matters relevant to a party's claim or defense but only to the extent that the matter is "proportional to the needs of the case."[3] This change reflects the criticism that discovery is unwieldy and needlessly expensive —a perspective that has manifested itself in recent years in important ways beyond periodic changes to the FRCP. For example, the Supreme Court introduced (or identified) a "plausibility" pleading requirement embedded in Rule 8(a)(2) in part out of concern that defendants should not be subjected to expensive discovery regarding facially implausible claims (at least in large cases).[4] District court judges have become much more proactive in case management in part out of concern that parties cannot efficiently regulate discovery on their own. Indeed, concerns about the time and transaction costs potentially consumed by discovery have contributed to the abandonment of the court system altogether and correspondingly expanded the use of alternative dispute resolution (ADR) processes such as arbitration, with its promise of streamlined discovery, or the discovery-free environment of mediation.

In a similar vein, amendments to Rules 16(b)(3), 26(f)(3) and 37(e) confront the increasingly difficult problems created by e-

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2. The amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2015 (both discovery and non-discovery rules) make changes to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37 and 55, and abrogate Rule 84 along the associated Appendix of Forms.

3. The amendment to Rule 26(a)(1) further provides that measuring "proportionality" should take into account "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweigh its benefit."

4. Bell Atlantic v. Twombly, 550 U.S. 544, 558 (2007) (dismissing antitrust claim as failing to plausibly allege a claim for relief and observing that "... it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a [Sherman Act] § 1 claim.") (Citations omitted.).

discovery, generating positive law obligations and burdens regarding duties to preserve electronically stored information and sanctions for failing to meet those duties. In many respects, the greatest logistical and cost-efficiency problem facing litigants, attorneys, and courts regarding the future of discovery is the search for a process to accommodate discovery of 21st century data generation and storage technology using a rules framework adopted in the mid-20th century. This conundrum affects not only the evolution of discovery rules, but also the nature of civil litigation practice itself as law firms and clients encounter the perceived need to employ e-discovery specialists and explore ways to outsource e-discovery "document" review and coding work once done primarily (if not exclusively) by law firm attorneys.

With these issues in mind, evaluating the future of discovery in many respects yields more questions than answers. Will integration of a "proportionality" requirement to the scope of permissible discovery reduce transaction costs while still ensuring a fair information exchange process? Will the promise of proportional discovery affect pleading standards? How will the courts interpret FRCP e-discovery duties and how aggressively will they sanction non-compliance? What will be the effect of an increasingly "paperless" business world on law schools and continuing education regarding the litigation practice training of present and future lawyers? How will e-discovery continue to shape the business of law practice? Will the changes to the FRCP discovery rules make civil litigation a more attractive dispute resolution process option, or will fears about discovery delays and transaction costs continue to encourage litigants to employ alternative dispute resolution processes?

The immediate future of discovery will be dominated by such questions. Many of these questions and other important issues are explored in the excellent papers contained in this compendium from the proceedings of the AALS Section on Litigation Future of Discovery program.

The first paper in this compendium is "Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind" by Professor Stephen B. Burbank. Professor Burbank's paper explores the access to justice implications of the proportionality requirement. Professor Burbank takes issue with a view of the proportionality requirement that would place significant, if not determinative, weight

on the private economic costs of discovery. Instead, he examines the importance in any proportionality analysis that should be given to the social benefits of discovery policy and the role that discovery rights can play in implementing Congressional decisions to provide for public enforcement of statutory rights.

The second paper is "'Just a Bit Outside': Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts" by Professor Bernadette Bollas Genetin. Professor Genetin's paper focuses on problems that will arise from judicial administration of the proportionality requirement. Professor Genetin explores the separation of powers implications of the proportionality requirement, addressing the risk that courts may lack the institutional competence to determine the permissible scope of discovery under such a standard on an ad hoc basis. Professor Genetin observes that to the extent the proportionality requirement will mandate that courts calibrate permissible discovery boundaries on a case-by-case basis without meaningful guidance it will require judges to make normative choices about the scope of discovery for different types of claims based on necessarily incomplete information. Professor Genetin concludes by offering short term and long term suggestions for navigating these fundamental structural problems.

The third paper is "Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure" by Professor Paul B. Radvany. Professor Radvany's paper addresses arbitration as an alternative to civil litigation, with particular attention to the role discovery practice plays in each process. Professor Radvany compares common assumptions about arbitration models with the picture he paints of the realities of current arbitration practice. Professor Radvany observes that arbitration increasingly resembles traditional litigation practice with regard to discovery and discusses the need for arbitration to return to its roots as a more informal and efficient dispute resolution process. Professor Radvany examines the potential impact that the 2015 discovery rule amendments might have on federal court discovery. He then explores the possible effect that these rule changes might have on arbitration discovery, such as by narrowing the potential scope of discovery in arbitration and encouraging more pro-active arbitrator case management relating to discovery.

The fourth paper is "How the Anchoring Effect Might Have Saved the Civil Rule-Makers Time and Money (And Face)" by Professor Danya Shocair Reda. Professor Reda's paper explores lessons learned from proposals that did not survive the amendment process to lower the presumptive limits on depositions and interrogatories and to introduce a limit on requests for admissions. Professor Reda considers how taking into account psychological literature on decision-making and the anchoring effect might have allowed the Advisory Committee on the Federal Rules of Civil Procedure ("Advisory Committee") to better anticipate the extensive opposition generated by these proposals. Professor Reda explores the genesis of the presumptive limits proposals as part of an effort to prevent perceived wasteful discovery and reset party expectations about what amount of discovery commonly should be necessary. The paper then reviews the objections received by the Advisory Committee to the proposed limitations amendments and the seeming disconnect between those responses and the Advisory Committee's initial deliberations leading to the limits proposals. Professor Reda examines how the Advisory Committee would have been better-served by attention to cognitive heuristics and a systematic assessment of how the proposed limits likely would impact party and judicial behavior, and how such tools could benefit the Advisory Committee in connection with crafting future proposals.

The final paper is "Rationalizing Cost Allocation in Civil Discovery" by Professor A. Benjamin Spencer. Professor Spencer's paper focuses on the change to Rule 26(c) that would make explicit the court's power to issue protective orders shifting the costs of production to the requesting party. Professor Spencer examines the potential that this change could be the first step in undoing the long-standing presumption that the producer pays the cost of complying with discovery requests. In his paper, Professor Spencer surveys current law governing federal civil litigation discovery costs and addresses objections to the legitimacy and constitutionality of the producer-pays presumption. Professor Spencer then proposes a framework for the rational allocation of discovery expenses among litigants, including the potential (at least in some cases) for judicial pre-screening of discovery requests, expanding the scope of recoverable litigation costs to include

e-discovery expenses incurred by a prevailing producing party, and more pro-active judicial pre-trial case management.

These thought-provoking papers explore a variety of important issues relating to the immediate and long-term future of discovery. They should be of interest to civil procedure scholars, judges, and litigation attorneys alike.

Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?

Stephen B. Burbank*

In a paper on the "Law and Economics of Proportionality in Discovery," Jonah Gelbach and Bruce Kobayashi do a superb job "elaborat[ing], from an analytical perspective, the economic considerations that arise from the [proportionality] standard as written."[1] The paper is as refreshing as it is analytically acute. Claims concerning the private and social costs of discovery have dominated the discovery retrenchment campaign narrative that gained traction following the 1976 Pound Conference.[2] These claims pay little, if any, attention to discovery's private and social benefits.[3] Indeed, not even the methodologically sound empirical

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* David Berger Professor for the Administration of Justice, University of Pennsylvania Law School. This brief comment is based on remarks made at a panel on the future of discovery sponsored by the Section of Litigation of the Association of American Law Schools on January 3, 2015. I appreciate the helpful suggestions of Tess Wilkinson-Ryan.

1. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law & Economics of Proportionality in Discovery* 19 (Univ. of Penn. Inst. for Law & Econ., Research Paper No. 15-1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520.

2. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1588–89, 1598 (2014) [hereinafter Burbank & Farhang, *Litigation Reform*]; Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1864–66 (2014). The potential catalyzing effect of the 1976 Pound Conference suggests the usefulness of periodic conferences to bolster support for retrenchment, as does the 2010 Duke Conference. *See* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1593-94 (2015) [hereinafter Burbank & Farhang, *Federal Court Rulemaking*] (discussing the 2010 Conference on Civil Litigation organized by the Advisory Committee, which has been repeatedly invoked as cover for some of the recent discovery amendments).

3. *See, e.g.*, Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); *see also* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1102–16, 1122–23 (2012) ("The very questions implicated by the cost-and-delay narrative—that is, whether civil justice is worth the burdens that it entails—are not questions susceptible to empirical verification. This limitation helps to explain the persuasiveness of the cost-and-delay narrative in the face of empirical data that seems to contradict it."). For experimental evidence that "one can get the public to focus on those issues one thinks are important by never mentioning other issues," see Baruch Fischoff, Paul Slovic & Sarah Lichtenstein,

studies that have consistently undermined the costs story rigorously engage the question of benefits.[4] Such a skewed view likely enabled the chair of the Judicial Conference's Standing Committee, without apparent irony, repeatedly to invoke discovery amendments that were proposed in 2013[5] as an important contribution to the goal of access to court.[6]

Observing that "one effect of the partial externalization of litigation costs is to generate litigation activity whose aggregate social costs exceed its aggregate social benefits," the authors quickly add that "this tendency to overuse the legal system may be offset by differences between the private and social *benefits* of litigation."[7] The authors refer to statutes in which Congress provides "features such as damage multipliers and fee-shifting, which encourage litigation of statutorily created causes of action," suggesting that they

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Fault Trees: Sensitivity of Estimated Failure Probabilities to Problem Representation, 4 J. EXPERIMENTAL PSYCHOL. 330, 343 (1978). For the possibility that this phenomenon resulted from the exploitation of "availability cascades" by "availability entrepreneurs," see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 687 (1999) (discussing availability entrepreneurs' focus on large punitive damages awards in order to win support for tort reform).

Of course, some interested observers have pointed out, without attempting to quantify, the benefits that could be lost in discovery retrenchment. *E.g.*, Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 819–20 (1981); Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51 (1997); Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1 (1997).

4. *See* Reda, *supra* note 3, at 1102, 1122–23.

5. For a summary of the Proposed Rules as approved for publication and comment in 2013, see REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2013.pdf. For the Proposed Rules that were submitted to and approved by the Judicial Conference in 2014, see REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULE OF PRACTICE AND PROCEDURE (2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.

6. *See Inadequate Court Resources Hurt Access to Justice, Say Nation's Top Jurists*, A.B.A., http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/inadequate_courtres.html (last visited Mar. 2, 2015).

The author attended this American Bar Association Showcase Program. Although other panelists discussed the effect of resource constraints and the high costs of legal representation on access to court, Judge Sutton, the Chair of the Standing Committee, repeatedly touted the Advisory Committee's discovery proposals.

7. Gelbach & Kobayashi, *supra* note 1, at 6.

"spring[] from a view that certain favored types of litigation bring substantial social benefits that are external to the litigants themselves."[8]

The recent work by Sean Farhang that the authors cite for this proposition[9] makes clear that the standard Chamber of Commerce anti-litigation narrative, of which the discovery abuse story is an important chapter, is radically incomplete, if not simply wrong.[10] Farhang's work shows a tight correlation between the large increase in federal civil litigation that started in the late 1960s and the incidence of statutory fee-shifting or multiple damages provisions.[11] It also demonstrates, both quantitatively and qualitatively, that congressional decisions to include such provisions were animated by concern, in periods of divided government, that exclusive reliance on public enforcement would put the new substantive rights that Congress created across the entire federal regulatory landscape at risk of subversion by an ideologically distant Executive.[12]

The original Federal Rules on discovery reflected the social, political, and jurisprudential views of those who fashioned them. Their primary architect was Edson Sunderland, a member of the Advisory Committee, not the Committee's Reporter, Charles Clark. Sunderland was a Progressive before he was a legal realist, and he embraced the Progressives' campaign for "legibility," a central tenet of which was that effective regulation requires adequate information about the subject of regulation.[13] Thus, it is no surprise that the 1938 discovery rules favored private enforcement even when that phenomenon was much more sparingly encouraged as a tool of federal regulatory policy.[14] It is also no surprise that, when the Advisory Committee turned back to the

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8. Gelbach & Kobayashi, *supra* note 1, at 6.

9. *See id.* at 6 n.11 (citing SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Burbank & Farhang, *Litigation Reform*, *supra* note 2).

10. *See* FARHANG, *supra* note 9, at 13–14, 69; Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1586.

11. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1548 (Figure 1).

12. *See* FARHANG, *supra* note 9, *passim*; Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1547–50.

13. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1583–85.

14. *See* FARHANG, *supra* note 9, at 66 (Figure 3.1).

discovery rules in the late 1960s, their efforts made the rules even more favorable to private enforcement.[15] Evidence of the effectiveness of private enforcement was mounting, and with it, awareness of how central broad discovery is to that effectiveness.[16]

The Supreme Court is fond of reminding us that Congress legislates against the background of the Federal Rules,[17] which, in a world of both the goose and the gander, means not only that Congress is deemed to be aware of the procedural rules with which its statutes will interact (and must clearly manifest an intent to displace them), but that it may rely on those rules in devising regulatory policy. To be sure, those responsible for rulemaking under the Enabling Act[18] are not forever saddled with their predecessors' policy choices.[19] In considering different policy choices about discovery, however, the rule makers must recognize that the social benefits "external to litigants themselves"[20] are not mere abstractions or the stuff of formal models. They are the intended fruits of conscious legislative policy. If discovery retrenchment results in substantially less enforcement of federal statutes, who will take up the slack, and how will the alternative

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15. *See* Burbank & Farhang, *Federal Court Rulemaking*, *supra* note 2, at 1566.

16. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1588–89 (discussing 1971 memorandum written by Lewis Powell for the Chamber of Commerce and Justice Powell's 1980 dissent from "tinkering changes" to the discovery rules); Carrington, *supra* note 3; Higginbotham, *supra* note 3.

17. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 672, 700 (1979) ("We do not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure.").

18. 28 U.S.C. §§ 2072–75 (2012).

19. For evidence that the changes to the Enabling Act process in the 1980s resulted in part from the desire of certain interest groups and legislators to protect pro-access, pro-private-enforcement Federal Rules from consequential amendment, see Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1595–97; *cf.* McNollgast & Daniel R. Rodriguez, *Administrative Law Agonistes*, 108 COLUM. L. REV. SIDEBAR 15, 15–16 (2008) ("[A] serious normative dispute remains about whether and to what extent [an] enacting coalition should be preferred over the current coalition in Congress. In the end, it is one thing to say that Congress tries to stack the deck in favor of certain interests and policies; it is another thing to say that we ought to let Congress get away with it.").

20. *See supra* text accompanying note 8.

enforcement be paid for?[21] Put otherwise, the social benefits of discovery in policy areas where Congress has sought to stimulate private enforcement include avoiding the large expenditures, higher taxes, and bureaucratic state-building that are essential to adequate public enforcement.[22] This assumes, of course, that those who favor discovery retrenchment share the regulatory goals of the Congresses that deployed private enforcement regimes.[23]

Business does not like legibility, and it does not like regulation.[24] However, it is difficult to quash a subpoena from a federal agency. If proportionality is not to become a deregulatory tool in cases in which federal regulatory policy is implicated,[25]

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21. "Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress." Higginbotham, *supra* note 3, at 5. "Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct." Carrington, *supra* note 3, at 54.

22. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–63 (2013) (discussing potential advantages of private enforcement, including the fact that it "shift[s] the costs of regulation off of governmental budgets and onto the private sector").

> As compared to constructing and financing bureaucratic regulatory enforcement machinery and endowing it with coercive powers, for example, to investigate, prosecute, adjudicate, and issue cease-and-desist orders, an enforcement regime that is founded instead on allowing aggrieved persons to prosecute their own complaints in court may be likely to attract broader support. If there are pivotal lawmakers prepared to obstruct enactment of regulatory policy that entails bureaucratic state-building, utilizing private enforcement regimes may facilitate overcoming such obstructions.

Id. at 666.

23. *See supra* note 19 and accompanying text.

24. *See* Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 254 (1999) ("The tie between discovery and enforcement is no coincidence, and assuredly not a surprise to those groups seeking change. Business groups seek to limit discovery precisely *because* those limits will make it more difficult for plaintiffs to prevail in products liability suits. Having failed to pass substantive tort reform legislation, these groups seek procedural advantage; if the law cannot be changed, maybe it can be made unenforceable." (footnotes omitted)).

25. *See* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 606–10 (2010) (arguing that "the motives of many of those seeking reform of discovery practice were primarily

judges must resist the temptation to privilege costs over benefits, and private over public interests. The temptation is great because one naturally tends to focus on the interests of those who are present to the detriment of the interests of those who are absent,[26] and on variables that appear quantifiable over those that do not.[27] It may also be great at a time when the Supreme Court's decisions "interpreting" the Federal Rules are more inflected with ideology than their decisions about matters much more obviously central to private enforcement,[28] when the chance of securing a pro-enforcement decision from the Court has declined precipitously to match the voting record on those issues of conservative Justices,[29] and when the chance of securing a pro-enforcement proposal from the Advisory Committee in 2011 was precisely zero.[30] These circumstances cast in relief the numerous parts of proportionality analysis that, as Professors Gelbach and

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substantive rather than procedural: they sought economic advancement, perhaps especially their own, if at the cost of decreasing civil justice").

26. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 137–45 (2011) (discussing the availability heuristic); Fischoff, et al., *supra* note 3, at 333, 343 (describing experimental support for the availability hypothesis, "that what is out of sight is also out of mind"); *supra* note 3 ("availability cascades").

27. *See* Gelbach & Kobayashi, *supra* note 1, at 16–17 (discussing difficulties of "quantifying benefits implicated by intrinsically nonquantifiable factors"); Reda, *supra* note 3, at 1122–23. For experimental research testing the "evaluability hypothesis," which "shows that when two options involving a trade-off between a hard-to-evaluate attribute and an easy-to-evaluate attribute are evaluated, preference between these options may change depending on whether these options are presented jointly or separately" and that "the direction of this change can be predicted, and can even be manipulated," see Christopher K. Hsee, *The Evaluability Hypothesis: An Explanation for Preference Reversals Between Joint and Separate Evaluation of Alternatives*, 67 J. ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 247, 256 (1996).

28. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1571–80, 1606–12 ("The effect of ideology in Federal Rules cases went from about half the effect in other private enforcement cases in the 1970–1994 period, to about the same in the 1995–2013 period. Indeed, . . . after 2000 ideology had a materially *larger* effect in the Federal Rules cases.").

29. *See id.* at 1574, 1609.

30. *See* Burbank & Farhang, *Federal Court Rulemaking*, *supra* note 2, at 1579 ("After increasing in the early 1960s, the predicted probability that a proposed amendment would favor plaintiffs declined from 88 percent in 1963 to zero by the end of the series.").

Kobayashi point out, inescapably tap into the normative views of judges.[31]

I have considered recommending that rulemaking under the Enabling Act be brought within the larger world of delegated federal legislation[32] by subjecting some proposals to a requirement of formal cost-benefit analysis. I have not done so because such analysis of federal regulations under the pertinent legislative and executive requirements has proved to be difficult and inconsistent,[33] because the rulemakers lack the information and qualifications to conduct it,[34] and because, even if they did not, such a requirement would be

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31. *See* Gelbach & Kobayashi, *supra* note 1, at 16–18 ("[T]he proportionality standard . . . provides judges with explicit equitable discretion to consider normative issues . . . that implicate justice, speed, and expense.").

32. On federal court rulemaking under the Enabling Act as an exercise of delegated legislative power (as opposed to "inherent power"), see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1679–89 (2004).

33. *See, e.g.*, Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?* (AEI-Brookings Joint Center for Regulatory Studies, Working Paper 04-01, 2006), *available at* https://www.law.upenn.edu/academics/institutes/regulation/papers/hahn_paper.pdf.

The authors of this empirical study of cost-benefit analyses of federal regulations found that "[t]he RIAs [Regulatory Impact Analyses] did not present estimates of benefits as consistently as costs . . . . While 100 percent of the RIAs monetized at least some costs, only half that number monetized at least some benefits. The number of RIAs that quantified at least some benefits was significantly higher—exceeding 80 percent for all three administrations. This suggests that some benefits are not easily monetized and/or that the agency is reluctant to monetize some benefits." *Id.* at 11. In a footnote, the authors observe: "Benefits are considered to be quantified if they are expressed in some countable unit, such as dollars, lives saved or tons of pollution reduced. They are considered monetized if those units are assigned monetary values. Note that monetization implies quantification, but not vice versa." *Id.* at 11 n.36. For the legal requirements governing cost–benefit analyses of federal regulations, see *id.* at 4 ("To encourage the development of more effective and efficient regulations, Presidents Reagan, Bush, and Clinton have directed agencies to perform economic analyses of major regulations that show whether a regulation's benefits are likely to exceed its costs and whether alternatives to that regulation are more effective or less costly.").

34. Of course, the rulemakers' disabilities in this respect pale in comparison to those of the Supreme Court when amending Federal Rules in the guise of interpreting them in order to resolve a case. *See* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116 (2009) ("The Court acting as such under Article III was even less well-positioned to estimate the procedural costs and benefits of a general rule of plausible

the source of substantial delay in a process that is already lengthy. If, however, proportionality is not to be window dressing or a cloak for deregulation, similar challenges are unavoidable, and they will be presented in adjudication, not rulemaking, which is to say, again and again. Even more than in rulemaking, there is danger that case-by-case cost–benefit calculations will give short shrift to those elements of the analysis that, because they are out of sight, are also out of mind, or are difficult to quantify—in particular, social benefits.

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pleading, let alone the non-procedural costs and benefits of such a rule, substance-specific or general.").

"Just a Bit Outside!": Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts

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I. INTRODUCTION

Federal discovery reform is yet again at the forefront of procedural debate. As has been said about personal jurisdiction, discovery "used to seem so easy."[1] The original Federal Rules of

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1. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444 (1988); *see also* Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 30 (1994) (concluding that "[t]he idea behind discovery seemed simple" to Professor Sutherland, who wrote the first draft of the discovery provisions, and George Ragland, whose work on discovery was important to Sutherland; "[l]awyers

Civil Procedure, as adopted in 1938, were intended to minimize procedural default and promote resolution of cases on the merits.[2] The discovery rules had two oft-articulated goals—to assist in ascertaining the truth and to permit courts to do justice.[3] Pleading was deemphasized, requiring only notice to the opposing party of the conduct giving rise to the claim, with the majority of the sorting of strong and weak claims to occur in discovery.[4] The original discovery rules enabled these goals by allowing parties to obtain all relevant, non-privileged information before trial,[5] but little heed was paid to the costs that broad discovery might create.

The discovery provisions of the original Federal Rules played an important role in the federal courts' transition from trial by surprise—the so-called "sporting theory of justice"—to trial on the merits.[6] As some concluded, the advent of discovery allowed litigants in the federal courts to play their hands "with all the cards on the table."[7]

Those that sought to limit discovery under the nascent Federal Rules claimed the Rules allowed fishing expeditions; however,

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wanted to 'hide the ball,'" but effective litigation and resolution of cases required that parties share information).

2. *See, e.g.*, Abraham E. Freedman, *Discovery as an Instrument of Justice*, 22 TEMP. L.Q. 174, 175 (1948); *see also* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 88 (1997) ("The Federal Rule reformers wanted the complete story to come out in litigation.").

3. Alexander Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 577–78 (1954).

4. *Id.*

5. FED. R. CIV. P. 26(b) (1970) (amended 1970) (deponents may be examined "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"). In 1970, Rule 26(b)(1) was amended to provide explicitly that this broad scope of discovery applied to all discovery devices. FED. R. CIV. P. 26(b)(1) (2010).

6. Irving Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 115, 125 (1961); Holtzoff, *supra* note 3, at 576–79; Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059–60 (1955); Subrin, *supra* note 1, at 30.

7. Freedman, *supra* note 2, at 175; *see also* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939) (noting that discovery would result in each party's "lay[ing] all his cards upon the table, the important consideration [then] being who has the stronger hand, not who can play the cleverer game").

courts and commentators alike concluded that discovery requests were not "'fishing expedition[s],' if there appear[ed] any reasonable possibility that there [might] be a fish in the pond."[8] Broad discovery had become an essential element in the federal courts' commitment to doing justice.

The civil litigation landscape has changed dramatically since the original Federal Rules were promulgated. Cases now vary widely in size and in kind.[9] Litigation and discovery strategies have changed, trials are rare,[10] and attorneys sometimes wonder if truth can be defined in the litigation context.[11] Even methods of creating, saving, and using information have changed, resulting in an avalanche of information that is available—in varying formats—for discovery. Moreover, there is disagreement about the extent of discovery costs: indeed, although it has been contended for decades that discovery costs have soared, empirical research has established that discovery costs are not "significant or disproportionate," except

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8. Freedman, *supra* note 2, at 175; *accord* Holtzoff, *supra* note 3, at 577–78 ("fishing is permitted if there is a reasonable prospect of fish being caught"); Kaufman, *supra* note 6, at 115 ("[T]he federal rules authorize 'fishing expeditions,' so long as the fish may become bait with which to catch admissible evidence, and so long as certain rules to prevent outrageously unsportsmanlike conduct are not overstepped."); *see also* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (discussing the historical development of discovery, particularly how facts uncovered by one party are subject to discovery from the opposing party).

9. *See, e.g.*, Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 601–02, 605–06 (2010) (offering a number of explanations for the increased amount and variety of cases on the federal docket); Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691, 1695–1707 (2014).

10. *See, e.g.*, Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.–C.L. L. REV. 399, 399–401 (2011) (narrating law firm's shift from away from trial based advocacy).

11. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 744 (1998) (identifying, as a "conceptual flaw" in the outlook of the drafters of the original discovery rules, that they "treated facts as if they were a static, knowable item to be found[,] [with] discovery . . . compared to an x–ray that reveals the inner nature of the body," while "contemporary scientific and literary notions invite one even to be suspicious that there are objective 'facts'").

in a small number of complex, high-stakes cases.[12] As it has become apparent, however, that federal discovery will not and perhaps should not provide for obtaining all relevant discovery in all cases, the debate focuses on appropriate methods for calibrating discovery.

The Advisory Committee on the Federal Rules of Civil Procedure (Advisory Committee) recently responded to renewed contentions that discovery is often disproportionate to the needs of cases filed in federal court in a manner consistent with rulemakers' responses since the early 1980s: by proposing amendments to the discovery rules[13] and judicial-case-management

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12. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012); *see also* Stephen B. Burbank, Sean Farhang, & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 658 (2013) (discussing how empirical research over the last 40 years has indicated that disproportionately expensive discovery is only a problem in a small slice of litigation—high stakes, complex cases) (citing Robert W. Gordon, *The Citizen Lawyer – A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1440–42 (1994); Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 151 (2012) (discussing how empirical studies since the 1960s have found that discovery is extensive and burdensome only in a small percentage of civil cases, and the possibility that in a majority of civil cases, no discovery takes place at all); Stephen N. Subrin, *The Limitations of Trans-substantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption,* 87 DENV. U. L. REV. 377, 392 (2010) (indicating that "[a]bout a half or a third of civil lawsuits (depending on the study) have no discovery, and the cases that utilize discovery frequently do not have more than two or three discovery incidents, perhaps a deposition or two and a set of interrogatories.").

13. The revisions include amendments to the following discovery provisions of the Federal Rules: (1) Rule 26(b)(1) (amending, *inter alia*, the "scope" of discovery to revise and relocate the so-called "proportionality" factors from Rule 26(b)(2)(C) to Rule 26(b)(1)); (2) Rule 26(c)(1)(B) (enlarging items that may be included in a protective order to include "allocation of expenses" or cost–shifting); (3) Rule 34 (specifying various changes when responding to discovery requests); (4) Rule 37(a)(3)(B)(iv) (providing rule–based authority for an order to compel production if "a party fails to produce documents" as requested); and (5) Rule 26(d)(2) (providing that parties may serve Rule 34 production requests before the Rule 26(f) meeting between the parties). *See* Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure on the Proposed Amendments to the Federal Rules of Civil Procedure, B-4 to B-11, B-30

provisions[14] of the Federal Rules of Civil Procedure. The 2015 Federal Rule amendments (2015 Rule Amendments) became law on December 1, 2015.[15] The 2015 Rule Amendments include multiple changes to the discovery and case management features of the Federal Rules: (1) promotion of earlier discovery, which is intended to permit more informed discussions between the parties at the Rule 26(f) conference and with the judge at the initial case management conference, and to facilitate earlier judicial case management;[16] (2) encouragement of direct communication between judges and attorneys;[17] (3) encouragement of greater cooperation by parties in achieving Rule 1's goals of "just, speedy, and inexpensive

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to B-36 (June 14, 2014) (*available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09–2014–add.pdf) [hereinafter Judge Campbell Memorandum].

14. Rule 16 was amended to: (1) to encourage case management conferences with direct exchanges between the parties and the judge; (2) to move forward the time for the initial case management conference to 90 days after any defendant has been served or 60 days after any defendant has appeared, absent good cause for a later case management conference; (3) to add preservation of electronically stored information and discussion of potential agreements under Fed. R. Evid. 502 to the list of items that may be included in a case management order; and (4) to include in the list of items for discussion at an initial case management conference the issue of whether parties should be required to confer with the court before filing discovery motions. FED. R. CIV. P. 16. Amendments to Rule 4(m) reduce the time for serving the summons and complaint and to Rule 1 encourage cooperation among parties during litigation. FED. R. CIV. P. 4; *see* Judge Campbell Memorandum, *supra* note 13, at B-11 to B-13, B-21 to B-29 (discussing proposed changes to the Federal Rules of Civil Procedure that emphasize that the initial case management meeting may be conducted by any means of direct simultaneous communication; change the time for holding scheduling conferences from 120 days to 90 days or 60 days after the defendant has appeared; and change the time limit for serving the summons and complaints from 120 days to 90 days).

15. The Supreme Court sent notices of its adoption of the amendments to Congress on April 29, 2015. Order Amending the Federal Rules of Civil Procedure, 575 U.S. __ (2015). *See* 28 U.S.C. § 2074(a) (1988).

16. FED. R. CIV. P. 26(f); *see* Judge Campbell Memorandum, *supra* note 13, at B-11 to B-13.

17. FED. R. CIV. P. 16; *see* Judge Campbell Memorandum, *supra* note 13, at B-12.

resolution of every action";[18] and (4) facilitation of greater proportionality between the needs of a case and the permissible extent of discovery through amendments to the scope-of-discovery provision in Rule 26(b)(1).[19]

This Article focuses primarily on the fourth aspect of the 2015 Rule Amendments—the requirement that the parties or judges make a "proportionality" analysis in each case to determine the scope of permissible discovery. Amended Rule 26(b)(1) authorizes parties to obtain discovery regarding "any non-privileged matter that is relevant to any party's claim or defense," if that matter is also "proportional to the needs of the case," based on the following factors: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the discovery outweighs its likely benefit."[20] This amendment, combined with other amendments to Rule 26(b)(1), completes the move in the federal courts from a default philosophy of broad and liberal discovery to a landscape in which there is no default or guiding principle, other than an open-ended appeal to proportionality.[21] The 2015 version of Rule 26(b)(1) requires

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18. FED. R. CIV. P. 1. Rule 1 previously provided that the rules should "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1 (2014). Rule 1 now provides that "[the rules should] be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. The Committee Note regarding Rule 1 indicates that the changes are intended to encourage lawyers and parties to cooperate to achieve the goals of a "just, speedy, and inexpensive" resolution of actions. Judge Campbell Memorandum, *supra* note 13, at B-13. *See generally* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 297 (2010) (concluding that Fed. R. Civ. P. 1's principle of achieving the "just, speedy, and inexpensive" resolution of cases provided meaningful guidance when considered in the context of the goals and beliefs of the original federal rulemakers, but that, in the modern litigation landscape, the potentially conflicting goals of "just," "speedy," and "inexpensive" litigation require trade-offs that the rule makers should address directly).

19. FED. R. CIV. P. 26(b)(1); *see* Judge Campbell Memorandum, *supra* note 13, at B-4 to B-5.

20. FED. R. CIV. P. 26(b)(1); *see* Judge Campbell Memorandum, *supra* note 13, at B-30.

21. *See generally* Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012

unelected federal court judges to make unguided policy decisions that directly impact the winners and losers of the substantive claims before them. Rule 26(b)(1) promotes proportionality but lacks the normative guideposts that could instruct a judge's proportionality decisions, defaulting instead to a balancing-of-factors process that requires parties or judges to balance various relevant factors but that provides minimal guidance on the priority among factors or the weight to be accorded to the factors.

I conclude that the policymaking required of judges to determine the permissible scope of discovery under the proportionality standard is at the boundaries of the institutional competence of the federal courts, at variance with the separation-of-powers instinct and requirement of the Rules Enabling Act,[22] and may decrease the deference due to substantive state law under the *Erie* doctrine.[23] The new proportionality standard[24] permits and requires

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MICH. ST. L. REV. 933, 975 (2012) (suggesting that federal rulemakers adopt proportionality limits on the scope of discovery and that the proportionality provision adopted in the Utah Civil Procedure Rules would provide a useful pattern); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. U. L. REV. 513, 513, 528–32 (2010) (advocating the elimination of the default of "broad and liberal" discovery and replacing it with a "principle" of "proportionality"). *But see* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990–96, 2016 (2007) (concluding that, when rulemakers delegate discretion to judges to make procedural choices by balancing listed factors, the result may be an "ad hoc weighing that lacks meaningful constraint and jeopardizes principled consistency over the system as a whole," unless the rulemakers also provide clear guiding principles); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1222, 1228 (2013) (acknowledging that federal courts have institutional limitations that prevent them from being able to, in particular cases, make a contextualized cost-benefit analysis, measure results of applying a substance-specific rule, evaluate normatively resulting data, or estimate the probable results of applying substance-specific rules).

22. 28 U.S.C. §§ 2072–2074 (2014); *see* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700–01 (1988).

23. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

24. Recognizing that "proportionality" factors have been included in the Federal Rules of Civil Procedure since 1983, I, nevertheless, occasionally refer to the proportionality balance required of parties and judges under Rule 26(b)(1) as "new". This is because the new positioning of the proportionality balancing factors

judges to set different boundaries for different types of substantive claims in individual cases. It thus requires judges to make normative choices about the scope of discovery, based on the necessarily incomplete information that will be available in the confines of federal court litigation. Moving far from the neutral umpire analogy in which a judge calls balls and strikes based on a standard strike zone,[25] the proportionality amendment to Rule 26(b)(1) essentially permits and requires judges to create different discovery strike zones for each batter—sometimes making the strike zone narrower than home plate and sometimes constricting the height of the standard strike zone—before ruling on balls and strikes. It, moreover, requires judges to narrow the permissible discovery zone based on relative concepts of "proportionality" that provide minimal normative guidance and based on insufficient information.[26] My call? "Just a bit outside"[27] the institutional capacity and role of federal judges—even for judges who

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as part of the definition of discoverable matter, rather than as a limitation on otherwise discoverable information, will in all likelihood result in that balance playing a new and critical role in determining the extent of discovery. *See* Marcus, *supra* note 9, at 1717 (discussing the increase in attention paid to proportionality, and tracing it to rule changes and the difficulty of application); *see also* Bernadette Bollas Genetin, *Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1120 (2010) (observing, with respect to Rule 56 regarding summary judgment, that when the text of the Rule provides a limitation, judges take heed).

25. Major League Baseball defines its standard strike zone as "that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap." http://mlb.mlb.com/mlb/official_info/umpires/rules_interest.jsp. *See, e.g.*, Bone, *supra* note 21, at 1972–73 (noting that the "dominant paradigm of party-controlled litigation . . . envisioned a fairly limited role for the trial judge as detached and neutral umpire and thus a limited domain over which judicial discretion would operate"). *But see* Freedman, *supra* note 2, at 181 (federal trial judge was not to play the role of the neutral umpire, but was given latitude to do justice in individual cases).

26. Bone, *supra* note 21, at 1990–96 (describing problems of information access that hamper federal judges in attempts to create case–specific procedure); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 917–18, 926–30 (1999); Marcus, *supra* note 21, at 1230–31; Singer, *supra* note 12, at 183. *See also* Bryan L. Adamson, *Federal Rule of Civil Procedure 52(a) as an Ideological Weapon*, 34 FLA. ST. L. REV. 1025, 1045 (2007) (noting that the appellate courts, rather than district courts, are charged with norm declaration or norm elaboration).

27. MAJOR LEAGUE (Paramount Pictures 1989).

have been granted a wide measure of discretion under the Federal Rules.[28]

In Section II, this Article briefly examines the evolution of the discovery rules since their adoption in 1938. In Section III, the Article discusses the 2015 amendments to Rule 26(b)(1) and, in particular, the relocation of the proportionality balancing factors to operate as part of the definition of discoverable information under Rule 26(b)(1). It also reviews other discovery-limiting amendments to Rule 26(b)(1). Section IV then explores the institutional limitations of the federal courts, concluding that the proportionality amendment to Rule 26(b)(1) asks judges to assume a role that is at odds with the federal courts' institutional competence and requires decision making that may often exceed the federal judges' normative lawmaking authority. In Section IV, the Article also considers that the way forward may be along a path that requires both (1) judicial decision making that acknowledges the values embedded in existing law; and (2) additional rulemaking that provides greater guidance regarding proportionality. First, in making decisions regarding proportionate discovery, judges should further the normative preferences of Congress and other lawmakers in cases involving favored statutory claims[29] and should also promote rights otherwise recognized in the substantive law.[30]

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28. *E.g.*, Bone, *supra* note 21, at 1962, 1967 (concluding that "[c]ase-specific discretion has been at the heart of the Federal Rules ever since they were first adopted in 1938"); *see also id.* at 1968–70 (observing that the Federal Rules include both explicit delegations of "broad discretion" and "vague language inviting case–specific interpretation"); Subrin, *supra* note 1, at 35–36; Subrin, *supra* note 12, at 377, 382, 391.

29. *See* Subrin, *supra* note 12, at 400 (discussing Congress's preference for energetic enforcement of some statutes "by providing for multiple damages or fee shifting for successful plaintiffs"); *see also* Burbank & Subrin, *supra* note 10, at 405–06, 411 (discussing Congress's use of private enforcement actions to aid in enforcement of important social goals and recommending that such actions be exempted from any "simple track" procedural options which provide for lesser discovery).

30. *See* Burbank, Farhang & Kritzer, *supra* note 12, at 644, 646–48 (discussing the federal government's increasing reliance on private enforcement in both statutory and administrative law in four different periods—during and after the Civil War; "during the Progressive Era, [bridging] the nineteenth and twentieth centuries;" "during the Great Depression in the 1930s;" and "following the Civil Rights and 'Great Society' period in the 1960s"—and suggesting that judicial action,

Second, judges should articulate the rationale underlying their proportionality decisions to, among other things, promote development of the law regarding proportionality in discovery; enhance appellate review of proportionality decisions; and provide the necessary flexibility in proportionality decisions, while revealing the extent of court adherence to normative preferences of Congress and other lawmakers. Finally, the rulemakers should achieve the goal of proportionality by providing greater instruction regarding application of the proportionality factors or by creating a general set of discovery procedures for most cases and supplementing the general procedure with substance-specific protocols for selected substantive claims that exhibit recurring discovery problems.[31]

II. A SHORT HISTORY OF THE FEDERAL DISCOVERY RULES

The original discovery rules were promulgated as part of a procedural system whose drafters wanted the complete story of the litigation to be told. The optimal procedural system, they believed, should ensure that the party deserving to prevail on the merits would prevail, whether the dispute was resolved through trial, settlement, or

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including some case management tools, could "subvert the policy preferences of the enacting Congress"); *see also* Marcus, *supra* note 21, at 1228–30 (noting that courts, when creating substance–specific process law rather than following a general, trans-substantive rule of procedure, tend to resort to their own normative policy preferences that may clash with existing preferences of Congress or that are, in any event, "better left to coordinate branches"); Subrin, *supra* note 12, at 400.

31. *E.g.*, Burbank, *supra* note 22, at 716–18; Burbank & Subrin, *supra* note 10, at 409–10, 412; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547–48 (1986); Subrin, *supra* note 1, at 28–29, 45–56; Subrin, *supra* note 12, at 399–405; *see also* Stephen S. Gensler & Lee H. Rosenthal, *Four Years After Duke: Where Do We Stand on Calibrating the Pretrial Process?*, 18 LEWIS & CLARK L. REV. 643, 650–51, 654–57 (2014) (supporting the proportionality balancing, but suggesting that it should be complimented by "scheme–based reform efforts"); Singer, *supra* note 12, at 200–02. In fact, while working on the 2015 Rule Amendments, the Advisory Committee worked with the National Employment Lawyers Association and the Institute for Advancement of the American Legal System to create discovery protocols for use in employment cases alleging adverse action. Gensler & Rosenthal, *supra*, at 654–55; *see also* Judge Campbell Memorandum, *supra* note 13, at B-3 (discussing that these protocols "include substantial mandatory disclosures required of both sides at the beginning of employment cases").

otherwise.[32] The original federal rulemakers, however, also aspired to create a procedural system that was simple, uniform, and flexible enough to apply to all cases, both legal and equitable.[33] A byproduct of these goals was the generality and trans-substantivity of the resulting Federal Rules.[34]

To minimize technical default and, at the same time, facilitate the resolution of cases on the merits, the original federal rulemakers drafted rules that simplified pleading; established broad, party-managed discovery; promoted liberal joinder of claims and parties; and encouraged trial on the merits with the full facts.[35] Indeed, the watchwords of the original federal rulemakers were "generosity" and "liberality,"[36] which they achieved (in large measure) by giving discretion to judges.[37]

The discovery rules, acknowledged by the rulemakers as "revolutionary," were an important element of the bold new procedural system.[38] Discovery would provide justice to those who lacked evidence, permit parties to uncover the truth, and provide for

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32. Subrin, *supra* note 2, at 88; Subrin, *supra* note 1, at 35.

33. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1019, 1025–26 (1982); Bone, *supra* note 21, at 1971–72; Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 690 (2002); Subrin, *supra* note 12, at 382.

34. Subrin, *supra* note 12, at 383, 385.

35. Subrin, *supra* note 1, at 30-32.

36. The rules made "generous and liberal provisions" for counterclaims and cross claims; included a "liberal provision" regarding third–party practice; contained, in Rule 16, "a device with magnificent potentialities" that would permit the judge to "control[] the subsequent course of the action;" included, in Rule 18, a joinder of claims provision that was "especially liberal;" and established "generous" rules relating to depositions and discovery that could be termed "revolutionary." Armistead M. Dobie, *The Federal Rules of Civil Procedure,* 25 VA. L. REV. 261, 267–71, 275, 279 (1939).

37. Bone, *supra* note 21, at 1967–70.

38. Dobie, *supra* note 38, at 275; *see also* Sunderland, *supra* note 7, at 738–39 (noting that the original discovery rules permitted parties to seek "almost unlimited discovery" and that, combined with pretrial innovations in the original Federal Rules, "[t]hey mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial").

resolution of controversies on the merits.[39] Professor Stephen Subrin has chronicled the narrowly circumscribed access to discovery in American and British courts before the promulgation of the original Federal Rules.[40] He notes that Edson R. Sunderland, the principal drafter of the discovery provisions of the original Federal Rules, drew from discovery tools available in various states and ultimately incorporated in the Federal Rules an amalgam of virtually every type of discovery provision, often discarding constraints that limited a particular discovery device.[41] The resulting Rules included an impressive array of discovery devices that were much broader in scope than any existing state procedural system and were fully equipped to meet the goal of uncovering the truth and facilitating resolution of cases on the merits.[42]

The liberal discovery provisions of the original Federal Rules, thus, exhibited the normative goal of achieving correct substantive outcomes as well as the trans-substantive nature of the Federal Rules. The discovery rules applied to all cases, regardless of subject matter or case size, by relying on highly generalized rules that remitted many procedural issues to the discretion of judges in individual cases.[43] The trans-substantive premise that discovery could be had regarding "any matter, not privileged, which [was] relevant to the subject matter involved in the pending action,"[44] paralleled the general purpose of the Federal Rules to enable the deserving party to prevail in the case.

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39. Freedman, *supra* note 2, at 175; Subrin, *supra* note 11, at 716 (enumerating the benefits claimed for broad discovery, which include: "elimination of surprise; preserving testimony so it will be available in case of the death or other unavailability of a witness; diminishing the importance of pleadings; increasing 'the effectiveness of the summary judgment'; focusing the trial on 'the main points in controversy'; and permitting each side to assess the strengths and weaknesses of their cases in advance, frequently making trials unnecessary because of informed settlement" (quoting Edson R. Sunderland, *Improving the Administration of Civil Justice,* 167 ANNALS AM. ACAD. OF POL. & SOC. SCI. 60, 74–75 (1933)).

40. Subrin, *supra* note 11, at 694, 698–705.

41. *Id.* at 714–19; Subrin, *supra* note 1, at 30–33.

42. Subrin, *supra* note 11, at 719.

43. Bone, *supra* note 21, at 1972; Stephen B. Burbank, *The Costs of Complexity—Complex Litigation: Cases and Materials on Advanced Civil Procedure*, 85 MICH. L. REV. 1463, 1473–74 (1987); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1613 (2014).

44. FED. R. CIV. P. 26(b) (1970) (amended 1970) (providing scope of discovery for depositions).

It also gave clear direction to district courts—judges were to enforce broad discovery in all cases. The original federal rulemakers, therefore, made the normative decision that courts were to provide broad and liberal discovery sufficient to permit the uncovering of all relevant, non-privileged information.

Broad discovery, moreover, gave primary emphasis to enforcing the substantive goals of the governing law.[45] In some cases, the commitment to broad discovery increased the cost or length of the case, but the original rulemakers apparently accepted such consequences as appropriate costs of enhancing just outcomes.[46] They probably also thought that cases would remain relatively small, thus limiting discovery costs.[47] Notwithstanding a subsequent growth in types and sizes of cases, the procedural system created under the original Federal Rules, including its provision for liberal discovery, worked relatively well through the 1970s.[48]

Increased litigation in the 1970s, largely based on use of the statutory private enforcement provisions created by Congress and class-action lawsuits made possible by the 1966 revisions to Rule 23, however, resulted in calls to address the rising numbers of cases and the supposedly excessive litigation costs.[49] In response, in 1976, Chief Justice Burger convened the Pound Conference, titled, "Causes of Popular Dissatisfaction with the Administration of Justice," which focused on overcrowded courts, excessive litigation, and the costs and delays of litigation.[50] The conference was a critical element of what would later be referred to as the "counterrevolution of the late

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45. *See* Bone, *supra* note 21, at 1981 (indicating that the "primary goal of procedure is to produce outcomes that enforce the substantive law properly").

46. *See* Bone, *supra* note 18, at 293 n.26 (discussing that the original rulemakers might not have foreseen the broad discovery associated with complex litigation and may have been content with expanding discovery because they thought it would reduce costs by encouraging settlement).

47. *Id.*

48. *See* Burbank & Farhang, *supra* note 45, at 1586–87 (noting that the statutory private enforcement provisions and the broadened class action rule of 1966 led to increased litigation).

49. *Id.* at 1547, 1587–48, 1587–88; Carrington, *supra* note 9, at 601–02, 605–06.

50. Reda, *supra* note 12, at 1091–92.

[t]wentieth [c]entury's discovery reform movements."[51] The 1970s had brought claims of excessive litigation and discovery abuse, and, as a consequence, the liberal discovery principle of the original Federal Rules came under attack.[52] The Pound Conference produced a number of recommendations for improving litigation and provided them to the "Pound Conference Follow-Up Task Force" for further refinement.[53] The Follow-Up Task Force made recommendations that would introduce "fundamental changes" into the justice system, including recommendations to improve judicial case management and restrict discovery in order to address the perceived problems of excessive litigation costs and discovery abuse.[54]

Empirical evidence consistently establishing that discovery costs were not excessive, except in a small group of complex, high-stakes cases,[55] did not dispel the notions of excessive discovery costs. Thus, from the 1980s to the present, calls for litigation and discovery reform spurred successive Federal Rule amendments aimed at broadening judicial case management authority and restricting discovery. In 1983, for instance, Rule 26(b)(1) was amended to add the first "proportionality" limitations on discoverable information to the Federal Rules. The proportionality factors were not included in the definition of discoverable material, which continued to provide that parties could obtain discovery "regarding any matter, not

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51. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 537–38 (2001).

52. *Id.* at 542–43.

53. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 279–80, 288–90 (1977).

54. Reda, *supra* note 12, at 1094 (citing AM. BAR ASS'N, REPORT OF THE POUND CONFERENCE FOLLOW–UP TASK FORCE (1976), *reprinted in* 74 F.R.D. 159, 191 (1976)).

55. *See, e.g.*, John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 552 (2000) ("Discovery problems were . . . much more likely to be reported in cases with higher stakes. . . . Where a lot of money is at stake, where the issues involve personal injury or matters of principle, where the relationships are contentious and the issues complex, here we see more discovery and more problems with discovery.") (quoting THOMAS E. WILLGING ET AL., FEDERAL PROPOSALS FOR CHANGE: A CASE BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 21 (1997)); Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 75–76 (2001); Reda, *supra* note 12, at 1088–90.

privileged, which is relevant to the subject matter involved in the pending action."[56] Instead, the proportionality factors were included in a subsequent paragraph that permitted courts to limit the "frequency or use of discovery methods" if it determined that certain discovery-limiting principles had been established:[57]

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that
>
> > (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
> >
> > (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
> >
> > (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act on its own initiative after reasonable notice or pursuant to a motion under subdivision (c).[58]

Though these restricting principles permitted both increased judicial discretion to manage cases and broader authority to limit discovery, the provisions were rarely used. Commentators have attributed the ineffectiveness of the proportionality factors to parties'

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56. FED. R. CIV. P. 26(b)(1) (amended 1993).

57. *Id.*

58. *Id.* The 1983 amendments also added Rule 28(g), which provided that an attorney's signature on discovery requests, responses, and objections constituted various certifications regarding the discovery, some of which paralleled the new proportionality limitations, and which also provided sanctions for violations of the certifications. *Id.*

strategic reluctance to involve judges in discovery issues, the inability of parties to convey complete information to judges about discovery disputes, and the complexity of the proportionality factors, as well as to insufficient information about the merits of the case at the time of discovery.[59] Additional changes seeking to curb discovery and litigation expenses were implemented in 1993. For the purposes of this Article, the most relevant change was the moving of the proportionality limitations from their location in Rule 26(b)(1) to Rule 26(b)(2).[60]

In 2000, additional discovery amendments narrowed the scope-of-discovery provision of Rule 26(b)(1). This time, the narrowing was based on a proposal originally put forth by the American College of Trial Lawyers in 1977 and subsequently renewed by the American Bar Association Section on Litigation.[61] Under this amendment, the scope of discovery that parties could obtain without a court order was reduced from all non-privileged matter relevant to the "subject matter involved in the action," to all information relevant to "any party's claim or defense."[62] Under the amendment, parties could still obtain information relevant to the "subject matter" of the action, but only on motion and a showing of "good cause."[63] This amendment, like other discovery amendments

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59. *See e.g.*, Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 905, 911–26 (2009) (concluding that proportionality balancing has not worked well because the balance requires information about the merits of the case, which is not available at the time that the judge makes discovery decisions and which also cannot be communicated well to the judge); Singer, *supra* note 12, at 147–48, 180–86 (concluding that proportionality limits on discovery have been ineffective because of the parties' strategic reluctance to submit discovery issues to judges; the "unavoidable information gap" that arises from the parties' inability to convey complete information about discovery disputes to judges; and the complexity of the proportionality factors).

60. FED. R. CIV. P. 26(b)(2). Other changes included the addition of initial disclosures to Rule 26(a)(1) and the inclusion of presumptive limits on interrogatories and depositions. FED. R. CIV. P. 26(a)(1); FED. R. CIV. P. 34(a); FED. R. CIV. P. 30(a).

61. Thomas D. Rowe, Jr., *A Square Peg in a Round Hole?: The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 15 & n.12 (2001).

62. FED. R. CIV. P. 26(b)(1) (2010) (amended 2010).

63. *Id.*

since 1983, sought to rein in discovery costs and provide greater judicial supervision of discovery.[64]

Section III completes this review of the evolution of the discovery rules by examining the 2015 amendments to Rule 26(b)(1), which introduce proportionality balancing as part of the definition of the scope of discovery and implement other changes that appear to limit the scope of available discovery.

III. CASE-SPECIFIC DECISIONS ON PROPORTIONALITY TAKE CENTER STAGE

The 2015 Rule Amendments reveal the continued commitment of the Advisory Committee to proportional discovery and early, active judicial management of cases.[65] A primary component of this commitment is the amendment's relocation of the existing proportionality factors from Rule 26(b)(2)(C)(iii) to the scope-of-discovery provision in Rule 26(b)(1).[66] In a memorandum explaining the proposals to return the proportionality factors to Rule 26(b)(1), Judge David G. Campbell, Chair of the Advisory Committee on the Rules of Civil Procedure, underscored that reasonable and proportionate discovery has been a goal under the Federal Rules for over thirty years.[67] Indeed, Judge Campbell emphasized that "three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee—that

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64. Rowe, *supra* note 64, at 16. *See also id.* at 20–21, 24–27, 29–30 (concluding, based on then-available decisions, that discovery had not been diminished appreciably by Rule amendments precluding "subject matter" discovery absent a motion and showing of good cause because, among other things, of the parties' ability to plead claims and defenses on information and belief; court reliance on material in the Committee Note that seemed to permit borderline issues to be characterized as relevant to a claim or defense; the courts' continuing reliance on general principles of broad and liberal discovery; and the courts' reliance on the provision of Rule 26(b)(1) that permitted discovery of information "reasonably calculated to lead to discovery of admissible evidence").

65. Judge Campbell Memorandum, *supra* note 13, at B-4 to B-6.

66. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-7 to B-8.

67. Judge Campbell Memorandum, *supra* note 13, at B-6.

proportionality is an important and necessary feature of civil litigation in federal courts."[68] In the 2015 Rule Amendments, the advisory committee pursued the goal of proportionality by installing the proportionality factors as "an explicit component of the scope of discovery, [thus,] requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes."[69]

In this Part, I acknowledge the importance of discovery that is proportional to the needs of a case. I conclude, however, that the 2015 Rule Amendments remove the default of liberal discovery, and fail to replace it with a guiding touchstone or clear principle for parties to reference when negotiating discovery boundaries or for judges to consider in making proportionality decisions.[70] Rule 26(b)(1) thus seeks to achieve discovery proportionate to the needs of each case by permitting case-specific balancing. In doing so, however, it sacrifices the use of either a trans-substantive background principle or a set of guiding principles that could provide direction to parties negotiating the extent of discovery and to judges making proportionality decisions and which could also counterbalance the federal courts' institutional limitations when required to craft case-specific procedures.[71] In Part

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68. Judge Campbell Memorandum, *supra* note 13, at B-8.

69. *Id.*

70. Although I concentrate primarily on the incompatibility of the balancing test with the institutional competence of federal court judges, I note as well that the absence of a normative decision, or set of decisions, by the Advisory Committee establishing a default or a set of guidelines for making the proportionality calculation, means that parties, who will also be in the trenches in determining the proportionality issue, have no baseline for negotiating the scope of discovery. *See, e.g.*, Subrin, *supra* note 2, at 89–90, 94 (discussing the importance to parties of predictability of discovery); Singer, *supra* note 12, at 181–84 (defining predictability as a core value of civil litigation). Likewise, Professor Bone has concluded that Rule 1, which is "meant to guide [the trial judge's] discretion in socially productive ways," has today become vague and misleading because it fails to make the value choices that could provide guidance to judges regarding whether and when to pursue the conflicting goals of just outcomes, speed, and inexpensive litigation. Bone, *supra* note 18, at 288–89, 292–97.

71. Marcus, *supra* note 21, at 1195, 1228–33 (recognizing that trans-substantive procedural rules provide a means of counterbalancing the institutional limitations of the federal courts, including limitation of lawmaking authority, competence (including the ability to obtain complete information and evaluate it empirically), and uniformity); *see also* Burbank, *supra* note 45, at 1473–76 (noting that the case-specific approach encompassed in the new trend for the rules of procedure does not produce a higher likelihood that the party's substantive rights

III(A), I discuss the amendment to insert case-specific balancing of proportionality factors as the primary determinant of the scope of discovery, and in Part III(B), I discuss other changes to Rule 26(b)(1) that narrow discovery.

A. Proportionality Returns to Rule 26(b)(1)

The Advisory Committee correctly highlights that proportionality in discovery has been pursued by federal rulemakers in three previous decades.[72] The Committee Note, however, spends more time establishing that using proportionality factors to define the scope of discovery is not new, than it spends justifying the appropriateness of limiting discovery scope through case-specific balancing of multiple factors.[73] In Part III(A)(1), I discuss the Advisory Committee's purpose for relocating the proportionality standard to Rule 26(b)(1). In Part III(A)(2), I focus on the textual changes and the explanatory material regarding proportionality in the Committee Note.

1. Proportionality in Discovery: 1983 to the Present

The Committee Note points out that in 1983, federal rulemakers added the proportionality factors to Rule 26(b)(1), which ultimately came to be referred to as the "proportionality rule."[74] Intended to reduce "overdiscovery" and "redundant or

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will be achieved). Some commentators also favor dispensing with the trans-substantive principle for discovery and replacing it with a set of procedures that cover a wide range of cases that would then be supplemented by additional substance–specific protocols. *See supra* note 44 (explaining the need to supplement discovery rules with substantive-specific protocols to truly achieve proportionality). This combination of discovery practices would also provide policymaking restraint on judges' discovery decisions and address the institutional limits of the federal courts.

72. Judge Campbell Memorandum, *supra* note 13, at B-7, B-16 to B-19 (providing the text of the amended Committee Note, which traces the history of the proportionality factors in the discovery rules).

73. *Id.*

74. *Id.*; Singer, *supra* note 12, at 179.

disproportionate discovery" as well as "to encourage judges to be more aggressive in identifying and discouraging discovery overuse,"[75] the 1983 proportionality factors permitted courts to limit discovery upon determining that "the discovery [was] unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."[76]

In an ensuing reorganization of Rule 26(b) in 1993, these proportionality factors were moved from Rule 26(b)(1) to Rule 26(b)(2)(C)(iii).[77] The 1993 amendments also added two new factors—"whether 'the burden or expense of the proposed discovery outweighs its likely benefit' and 'the importance of the proposed discovery in resolving the issues.'"[78] Additionally, the 1993 Committee Note stressed the continued importance of proportionality in limiting discovery, providing that "the revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery."[79]

By 2000, the Advisory Committee came to believe that courts were not using the proportionality "limitations" as contemplated[80] and added a sentence in Rule 26(b)(1) to alert litigators and courts to the existence of the proportionality factors and to highlight their importance in determining appropriate limits on discovery.[81] Despite these efforts, survey results of attorneys and judges shared at the 2010 Duke Civil Litigation Conference[82] led the Advisory Committee to

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75. Judge Campbell Memorandum, *supra* note 13, at B-7, B-37 to B-38.

76. FED. R. CIV. P. 26(b)(1) (1993) (amended 1993); *see also* Judge Campbell Memorandum, *supra* note 13, at B-37 (discussing the intent and substance of the 1983 provisions).

77. *Id.*

78. Judge Campbell Memorandum, *supra* note 13, at B-7.

79. *See id.* (discussing the 1993 revision of Rule 26(b)(2)).

80. *Id.*; *accord* Moss, *supra* note 62, at 905; Singer, *supra* note 12, at 180–88.

81. FED. R. CIV. P. 26(b)(1) (2000) (amended 2000) (adding the following text to Rule 26(b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)"); *see also* Judge Campbell Memorandum, *supra* note 13, at B-7, B-19, B-39 (discussing the purpose of the 2000 Rule 26 amendment).

82. The Advisory Committee organized a Conference on Civil Litigation that was held at Duke University Law School and has come to be called the "Duke Conference." The purpose of the conference was to seek "better means to achieve [Fed. R. Civ. P.] 1's goal of just, speedy, and inexpensive determination of every action." Judge Campbell Memorandum, *supra* note 13, at B-1 to B-2; *see also*

conclude that additional proportionality in discovery was needed and that returning the proportionality factors to Rule 26(b)(1) and making other amendments to Rule 26(b)(1) would improve discovery.[83] These survey results seem contrary to consistent empirical studies revealing that discovery is not disproportionately costly, except in a small percentage of high-value, complex cases.[84]

2. Proportionality as the Primary Constraint on Discoverable Matter

As noted above, the 2015 Rule Amendments return the proportionality factors to Rule 26(b)(1) and insert the factors as an element of the definition of the scope of discoverable matter in order

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Gensler & Rosenthal, *supra* note 33, at 645, 647–50 (discussing the goal of the Duke Conference). The Advisory Committee ultimately reported "near–unanimous agreement . . . that the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management." Judge Campbell Memorandum, *supra* note 13, at B-2. The Advisory Committee ultimately created two subcommittees, including the "Duke Subcommittee" that was charged with considering recommendations resulting from the 2010 Duke Conference. *Id.* The Advisory Committee developed proposed amendments with the assistance of the Duke Subcommittee, which included (1) proposed numerical limits on discovery that were later withdrawn; (2) proposed amendments to Rule 26(b)(1); (3) recognition in Rule 26(c)(1) that "the allocation of expenses" may be included as a term of a protective order; (4) amendments to Rule 34 regarding "specificity" of objections to requests for production of documents or electronically stored information, a provision specifically permitting parties to produce copies of documents or ESI and a requirement that parties state whether they are withholding documents based on objections made; (5) a provision for early discovery requests; and (6) amendments to Rules 4 and 16 to permit earlier judicial case management. *Id.* at B-4 to B-14.

83. Judge Campbell Memorandum, *supra* note 13, B-6 to B-7. *See also* Gensler & Rosenthal, *supra* note 33, at 645–66 (concluding that the Duke Conference resulted in "clear and broad consensus," based on complaints regarding the length and cost of cases, that procedure should be changed to "increase judicial engagement and supervision in the cases that need it, when it is needed").

84. *See supra* note 12 (citing multiple sources of empirical research on the cost of discovery).

to increase proportionality and enhance judicial management.[85] Interestingly, neither the Rule text nor the Committee Note reference discovery costs or discovery abuse as a basis for making the proportionality factors a critical component of the scope of permissible discovery. Instead, the Committee Note indicates that proportionality itself has become the goal.[86] "Proportional" discovery, however, embraces two elements – (1) normative standards defining the desired balance between substantive justice and efficient and cost-effective discovery (or other procedural goals); and (2) a process for attaining the desired normative standards. The amendments to Rule 26(b)(1) do not articulate the normative standards for achieving proportional discovery, but provide only a process—the balancing of proportionality factors—for determining whether to permit discovery. Rule 26(b)(1), thus, requires parties and judges, in each case, to first make unguided value choices about whether to privilege substantive outcomes or less costly litigation (or other procedural goals) and then to use the results of that value determination to guide decisions regarding the extent of permissible discovery.

Under Rule 26(b)(1), the scope of permissible discovery will be measured by whether the material is relevant, non-privileged, and "proportional to the needs of the case,"—considering the following factors:

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85. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-8 (concluding, as part of the basis for returning the proportionality factors to Rule 26(b)(1), that "proportionality is an important and necessary feature of civil litigation in federal courts. . . . [but it] is still lacking in too many cases."); *see also* Gensler & Rosenthal, *supra* note 33, at 647–48 (noting the general belief that the rules themselves are sound, but in practice, their application could be more consistent).

86. *See supra* notes 80–84, and accompanying text. The Advisory Committee Report dated June 14, 2014, emphasizes proportionality as the goal of discovery. *See* Judge Campbell Memorandum, *supra* note 13, at B-2 to B-3, B-5 to B-6 (indicating the conclusion in reports prepared for the Duke Conference: "[p]roportionality should be the most important principle applied to all discovery" and that three prior Advisory Committees had concluded that "proportionality is an important and necessary feature of civil litigation in federal courts"). The only suggestions that the purpose of proportionality standard is to control discovery costs or respond to discovery abuse appears in instances in which the Committee Note references or quotes prior Committee Notes that accompanied previous discovery Rule Amendments. *Id.* at B-37 to B-39, B-41.

(1) the importance of the issues at stake in the action;

(2) the amount in controversy;

(3) the parties' relative access to relevant information;

(4) the parties' resources;

(5) the importance of the discovery in resolving the issues; and

(6) whether the burden or expense of the proposed discovery outweighs its likely benefit.[87]

Combined with other 2015 amendments to the scope-of-discovery provision,[88] Rule 26(b)(1) completes the elimination of the default discovery principle of broad and liberal discovery that was established with the adoption of the original Federal Rules. The amendment substitutes proportionality for substantive outcomes as the normative principle of highest priority, but neither the text of Rule 26(b)(1) nor the Committee Note supplies a normative default principle to govern the proportionality balance in most cases or even

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87. FED. R. CIV. P. 26(b)(1), *see* Judge Campbell Memorandum, *supra* note 13, at B-8. Rule 26(b) provides as follows:

> **(1) Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This amended language includes one new proportionality factor—"the parties' relevant access to relevant information." FED. R. CIV. P. 26(b)(1); *see* Judge Campbell Memorandum, *supra* note 13, at B-8.

88. *See infra* notes 113–126, and accompanying text.

a subset of cases. Thus, the definition of discoverable matter lacks the predictability that many conclude is vital to discovery.[89] It is possible to view the proportionality amendment and other 2015 Rule Amendments that slim the text of Rule 26(b)(1) and the scope of discovery as creating a default of less discovery.[90] The proportionality limits were certainly born of a conviction that their consistent application would limit discovery abuse and, thus, discovery costs.[91] They have been nurtured over the years by continued contentions that judicial case management, including judicially-set, case-specific discovery limits, would curb high discovery costs and discovery abuse.[92]

Nevertheless, neither the text of Rule 26(b)(1) nor the Committee Note supplies an explicit default to less discovery. To the contrary, the text provides factors that may tug toward either more or less discovery (or in both directions), given the context of the case. This explicitly remits the decision regarding breadth of discovery to trial courts (and, of course, to the negotiating strength of litigating parties) in particular cases. In this way, the proportionality standard invites district court judges to make normative decisions about the claims at issue. For example, in a given case, the first factor—"the importance of the issues at stake in the action"—may conflict with the second, "the amount in controversy." A judge must determine whether the issues are important, and, if so, how important. The judge must then weigh that level of perceived importance against the amount in controversy, and, of course, must determine whether that amount is high, low, or somewhere in between. Opinions will differ. Indeed, the determination of the importance of the issue involves a judicial policy determination regarding the importance of particular

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89. *See, e.g.*, Bone, *supra* note 26, at 918; (criticizing the management model for its failure to sufficiently defend the strength of trial judges' procedure-making abilities); Subrin, *supra* note 2, at 89–90, 94 (discussing the importance to parties of predictability of discovery); Singer, *supra* note 12, at 181–84.

90. *See infra* notes 113–126, and accompanying text.

91. Judge Campbell Memorandum, *supra* note 13, at B-8. *See also* Singer, *supra* note 12, at 177–78 (discussing the goals associated with revising the proportionality factors from the Rules).

92. Judge Campbell Memorandum, *supra* note 13, at B-8; *see also* Burroughs, *supra* note 58, at 83–84 (noting that, except in a rare number of high stakes cases, discovery expenses are generally not excessively high).

substantive claims, and the weighing of issue "importance" against amount in controversy involves another value determination.[93]

Discussion of the potential conflict between these two factors in the 2015 Committee Note restates the "caution" of the 1983 Committee Note that "monetary stakes are only one factor" for courts to consider and underscores the substantive impact that scope-of-discovery decisions may have.[94] The 1983 Committee Note emphasized that, in addition to the monetary stakes at issue, judges must consider various other measures of issue importance:

> [T]he significance of the substantive issues, [may be] measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters may have importance far beyond the monetary amount involved.[95]

The 2015 Committee Note adds to that caution, recognizing that "[m]any other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values."[96] Thus, the 2015 version of Rule 26(b)(1) and the 2015 Committee Note

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93. Judge Campbell Memorandum, *supra* note 13, at B-41 to B-42; *see* Burbank & Subrin, *supra* note 10, at 405–06 (emphasizing the "attack on democracy [that] results from [procedure that] undercut[s] the effectiveness of congressional statutes designed to compensate citizens for injury or to enable private enforcement of important social norms"); Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery* 16–17 (Univ. of Pa. Inst. For Law & Econ., Research Paper No. 15-1, 2014), *available at* http://ssrn.com/abstract=2551520 (offering suggestions for judges in weighing relative factors); Moss, *supra* note 62, at 912–13 (suggesting that the "amount in controversy" and "importance of the issues" analysis are uncertain at the time of any decision under the proportionality rule); Singer, *supra* note 12, at 180–86 (noting that the unpredictability of proportionality determinations complicate the analysis of the utility of the proportionality rule); *see also* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 464–66 (2010) (suggesting that proportionality is underutilized).

94. Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42.

95. *Id.* at B-41 to B-42.

96. *Id.*

suggest that, in cases involving "philosophic, social, or institutional" issues and in cases seeking to "vindicate vitally important personal or public values," the importance of the issues at stake may outweigh the monetary stake and, presumably, other factors.[97] Neither, however, requires this balance for any particular substantive claim, ostensibly leaving the decision to the unguided discretion of each district court judge and the parties in each case, though these are the precise types of value judgments that vary by individual judge and on which the parties generally assume diametrically-opposed views.

The Rule or the Committee Note should have established normative guidelines, balancing priorities, or more helpful factors to prevent judges from encroaching on the substantive prerogatives of Congress or state policymakers. For instance, for cases in which Congress has created "statutory fee-shifting or damage-enhancement provisions,"[98] Congress has indicated a normative commitment to the substantive claim at issue and has indicated, moreover, that costs should not be the overriding consideration. The Rule text or Committee Note could have indicated, in these cases, that courts should default to permitting discovery of all non-privileged matter relevant to the claim or defense of any party (or to the subject matter of the claims in the action), thus, explicitly indicating a high level of deference to congressional policy determinations and removing the burden of the initial value choice before proportionality balancing.[99] Such a guideline would have left ample room for case-based discretion under proportionality balancing, but would have (1) relieved the federal district courts, which have limited substantive lawmaking authority, from having to make normative discovery decisions that could undermine congressional policy choices, and (2) facilitated

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97. Judge Campbell Memorandum, *supra* note 13, at B-41 to B-42.

98. *See supra* notes 34 to 39, and accompanying text.

99. *See* Stephen B. Burbank, *Proportionality and the Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 654 (2015) (expressing concern that the the 2015 Rule Amendments could lead to an emphasis of cost over benefits); Gelbach & Kobayashi, *supra* note 96, at 6; *see also* Subrin, *supra* note 12, at 400 (suggesting that drafters should consider parties' time limitations); Burbank & Subrin, *supra* note 10, at 405–06, 411 (2011) (discussing Congress's use of private enforcement actions to aid in enforcement of important social goals and recommending that such actions be exempted from any "simple track" procedural options that provide for lesser discovery).

increased uniformity for claims that Congress has identified as favored.

Further, even assuming that the importance-of-the-issues factor and the amount-in-controversy factor were aligned or were otherwise determined to favor broad or relatively broad (whatever that compromise might mean) discovery, courts might conclude that other factors listed in the Rule 26(b)(1) proportionality balance favor lesser discovery, such as the extent of "the parties' resources," the "importance of the discovery in resolving the issues," or "whether the burden or expense of discovery outweighs its likely benefit."[100] In fact, the importance of the discovery in resolving the issues would seem to be quite important in resolving proportionality issues. As is discussed below, however, complete information on this factor will be hard to obtain because, among other factors, parties often lack information early in the case and fail to realize the full importance of the information they do have. These additional factors may point in different directions in any single case. The 2015 Committee Note, however, sheds little light on the priority or weight to be accorded to these factors or on the situations in which each should be considered more highly.[101]

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100. FED. R. CIV. P. 26(b)(1).

101. With respect to the "extent of resources" factor, one would generally expect that discovery should be commensurate with resources under a proportionality principle, but the Committee Note hastens to provide also that discovery may be directed "to an impecunious" party and that discovery directed to "a wealthy party" would not be "unlimited." Judge Campbell Memorandum, *supra* note 13, at B-42. With respect to the importance of the discovery in resolving issues in the case, the Committee Note indicates that the producing party may not have information about the importance of the discovery, but it does not address the very common circumstance in which a requesting party may not have a full appreciation of the uses for the discovery until he receives the discovery or until later in the case. *See id.* at B-42. Similarly, the Committee Note acknowledges, with respect to the burden or expense of discovery, that this information may not be available at the beginning of the case, and that the responding party may have the only information about this factor. *See id.* at B-40. But, the Committee Note makes no reference to the recognized inclination of parties to withhold information, especially before access to discovery can level the information playing field. *See infra* notes 140–141, and accompanying text.

The Committee Note does, by contrast, provide relatively clear guidance regarding the parties' "relative access to relevant information," a new factor that provides "explicit focus" on cases involving "information asymmetry."[102] The Committee Note indicates that in some cases, one party will have large amounts of information, while the other party has limited information.[103] The Committee Note acknowledges that some of the information may be easily accessed while some may be more difficult to access, and concludes simply that "these circumstances *often mean* that the burden of responding to discovery lies heavier on the party who has more information."[104] The Committee Note carefully leaves the decision for individual cases, but the clear import is that in most cases involving information asymmetry, the party lacking information should be permitted significant discovery.

Further hindering a district court in making the proportionality analysis are the following considerations: parties may have imperfect information regarding the factors, may not comprehend fully the import of the information in the initial stages of discovery, and will often evaluate each factor differently, arguing for contradictory conclusions on each factor.[105] The 2015 Committee Note, again, provides little direction on how to ameliorate these imbalances and differences, concluding, instead, that it will be "[t]he court's responsibility, using all the information provided by the parties, . . . to consider . . . all the . . . factors in reaching a case-specific determination of the appropriate scope of discovery"[106] and that the "burden or expense of proposed discovery should be determined in a realistic way."[107]

In short, the 2015 Committee Note is careful not to urge limited discovery or to premise the proportionality balance on an intent to curb either discovery abuse or excessive costs in discovery. Instead, it steadfastly remits decisions on discovery scope to a determination of proportionality in the context of each particular case.

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102. Judge Campbell Memorandum, *supra* note 13, at B-40.

103. *Id.*

104. *Id.* at B-40 to B-41 (emphasis added).

105. *See* Gelbach & Kobayashi, *supra* note 96 at 13 (recognizing that courts will have to make difficult judgment calls as to the assignment of weight for more subjective factors); *see also infra* notes 139–142, and accompanying text.

106. Judge Campbell Memorandum, *supra* note 13, at B-40.

107. *Id.* at B-42.

The benefit of the proportionality standard is that it permits district court judges to create reasonable, case-specific discovery boundaries. This coincides with Professor Subrin's observation that one discovery size does not fit all.[108] The disadvantages of the proportionality principle are (1) that it permits judges to privilege either the substantive claim at issue or fiscal factors over substantive interests; and (2) that, given the institutional limitations of the federal courts, which I discuss below,[109] district court judges may not be particularly good at making these case-specific determinations.

In summary, instead of serving as a means to an articulated procedural goal or value, "proportionality"—which privileges case-specific discretion—has itself become the goal of Rule 26(b)(1). Indeed, the Advisory Committee Report concludes that "[s]ince the [Duke] conference, the Committee and others have sought to promote cooperation, proportionality, and active judicial case management."[110] More emphatically, the Advisory Committee reported at the conclusion of the Duke Conference that "[p]roportionality should be the most important principle applied to all discovery."[111] Of course, cooperation, proportionality, and active case management may be goals in themselves. Conversely, they may be a means of achieving other desired objectives of litigation, such as efficient and cost-effective litigation in federal courts for the litigating parties, or sufficient evidence production to ensure that the proper party prevails. As used in support of procedural goals like these, the terms "cooperation," "proportionality," and "active case management" would provide some guidance.

When used as the goal itself, a requirement that discovery be "proportional" based on factors that may cut in different directions in different cases reduces, at best, to a requirement that discovery be reasonable, and, at worst, to unguided discretion to privilege cost considerations, substantive outcomes, or other procedural values.

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108. Subrin, *supra* note 12, at 378 (concluding that the trans-substantive discovery model should be "readjusted" and suggesting a "simpler procedural track for some cases and non-binding protocols for discovery and other procedural incidents for some of the more expansive and expensive case-types").

109. *See infra* notes 127–138 and accompanying text.

110. Judge Campbell Memorandum, *supra* note 13, at B-2 to B-3.

111. *Id.* at B-6.

Reasonable or "proportional" discovery is a worthy goal, but, unlike the clear discovery objective in the original Federal Rules,[112] it is not one that provides the parties or federal judges with an understanding of the guiding procedural values and, thus, of the conduct required or the types of orders that should issue in the varying types of claims filed in federal courts.

B. The 2015 Amendments to Rule 26(b)(1) Eliminate Remaining Imprints of Liberal Discovery

In addition to installing proportionality as the principal determinant of the scope of discovery, the 2015 amendments to Rule 26(b)(1) eliminate the remaining vestiges of the liberal discovery principle by removing or modifying three provisions of the former Rule 26(b)(1) that could support a continuing notion (in at least some instances) of a broad discovery default principle.

First, amended Rule 26(b)(1) removes the nonexclusive description of the type of information that is discoverable regarding "any party's claim or defense."[113] Former Rule 26(b)(1) provided, in part, as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—*including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.*[114]

The italicized language above has been removed from the 2015 version of Rule 26(b)(1). The relevant portion of the 2015 Committee Note indicates that this excision removes textual material that has been rendered extraneous by common use and understanding, noting that discovery of this information is "so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule

112. *See supra* notes 43–48, and accompanying text.

113. FED. R. CIV. P. 26(b)(1); *see also* Judge Campbell Memorandum, *supra* note 13, at B-42 to B-43.

114. FED. R. CIV. P. 26(b)(1) (2014) (emphasis added).

26 with these examples."[115] Immediately thereafter, however, the Committee Note indicates a discovery-limiting effect of the amendment—the Note provides that discovery of this "deeply entrenched" matter "*should* still be permitted" when "relevant and proportional to the needs of the case."[116] Thus, the removal of this language both makes discovery of this matter subject to the proportionality analysis and eliminates textual material courts might have relied on in determining whether discovery meets the new proportionality requirement. This amendment, again, underscores that proportionality is the key determinant of discoverable information and reinforces the perception that the text of Rule 26(b)(1) provides little guidance to judges in making the proportionality decision.[117]

Second, amended Rule 26(b)(1) likewise eliminates the "reasonably calculated" language, which currently provides that parties may discover information that "appears reasonably calculated to lead to the discovery of admissible evidence."[118] The full provision states: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[119] Amended Rule 26(b)(1) removes this "reasonably calculated" qualifier. The 2015 version of Rule 26(b)(1), as discussed above, requires that discoverable matter be relevant, non-privileged, *and* proportional to the needs of the case.[120] The Rule removes the ability to obtain material that "appears reasonably calculated to lead to the discovery of admissible evidence" and provides, instead, that information that is determined to be discoverable—i.e., that is relevant, non-privileged, and within the new scope of proportional discovery—"need not be admissible in evidence

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115. Judge Campbell Memorandum, *supra* note 13, at B-43.

116. *Id.* (emphasis added).

117. *See* Genetin, *supra* note 24, at 1119–20 (discussing, in the context of proposed amendment to Federal Rule of Civil Procedure 56 regarding summary judgment, that guidance in the text of the Federal Rules is important to consistent application of the Rules).

118. FED. R. CIV. P. 26(b)(1) (2014).

119. *Id.* This language was added to Rule 26(b)(1) in 1948. *See* FED. R. CIV. P. 26(b) 1948 advisory committee's note.

120. *See supra* notes 85–87, and accompanying text.

to be discoverable."[121] The first version of the "reasonably calculated" language was added to Rule 26(b) in 1946, with the stated purpose to "make clear the broad scope" of discovery.[122] The amendment, by contrast, reinforces restrictions on discoverable information.

Third, amended Rule 26(b)(1) eliminates textual Rule recognition of the ability of parties, upon a showing of good cause, to obtain discovery relevant to "the subject matter involved in the pending action," thus limiting discovery to information that is relevant to "any party's claim or defense."[123] Although rarely invoked in the years since, discovery of material relevant to "subject matter" was removed from information automatically available for discovery,[124] this provision for obtaining "subject matter" discovery upon a showing of good cause was originally designed by the Advisory Committee "to involve the court more actively in regulating the breadth of sweeping or contentious discovery."[125] Retention of the parties' ability to obtain discovery relevant to the subject matter of the action seems to fully support newly amended Rule 26(b)(1)'s increased emphasis on both case-responsive discovery and more active judicial management of the discovery process. Nevertheless, the Advisory Committee indicates that discovery of material relevant to the parties' "claims and defenses" should be sufficient, "given a proper understanding of what is relevant to a claim or defense."[126] The exclusion of "subject matter" discovery, thus, eliminates express textual authority to exercise discretion to extend discovery to meet the needs of a particular case, while the inclusion of the proportionality factors underscores textual authority to limit discovery.

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121. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-30 to B-31.

122. FED. R. CIV. P. 26(b)(1) (2014) & 1948 advisory committee's note.

123. Prior to the amendment, Rule 26(b)(1) provided that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." This language has been removed from Rule 26(b)(1). FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-30 to B-31.

124. *See supra* notes 62–64 and accompanying text.

125. Judge Campbell Memorandum, *supra* note 13, at B-9; *see also* Rowe, *supra* note 64, at 16–17.

126. *Id.* at B-43. *See also* Rowe, *supra* note 64, at 20–21, 24–27, 29–30 (concluding, shortly after promulgation of Rule amendments precluding "subject matter" discovery absent a motion and showing of good cause, that there was little evidence that the amendment had narrowed discovery appreciably and suggesting factors that might account for the limited impact).

In summary, the text of amended Rule 26(b)(1), with its adoption of a proportionality principle and its excision or restriction of other textual provisions, reveals that the transition away from the default of broad and liberal discovery in federal procedure is complete. Indeed, three amendments to Rule 26(b)(1) remove or revise language in the previous Rule 26(b)(1) and provide further evidence of discovery limits. It may be that the elephant in the Rule and Committee Note is an inclination toward—but not a default principle of—more limited discovery, a goal that has driven changes to the scope of Rule 26(b)(1) discovery provisions since 1983.

IV. PROPORTIONALITY AND THE INSTITUTIONAL CAPACITY OF FEDERAL COURTS

Absent meaningful direction in the text or Committee Note of Rule 26(b)(1),[127] a district court judge must engage in case-specific balancing of the factors set forth in the Rule. The rulemakers purposefully included a wide variety of factors that should be considered in crafting proportional discovery. They also declined, in both the Rule text and Committee Note, to provide significant guidelines regarding application of most of these factors.[128] This proportionality amendment might be optimal for decision makers who: (1) gather all information relevant to the scope of discovery decisions; (2) invite or require participation by the range of relevant stakeholders; (3) spend resources and time assessing results and comparing alternatives; and (4) make normative policy decisions regarding the substantive claims at issue. These characteristics, however, do not describe federal district court judges, magistrate

127. Some judges would not consider Committee Notes, though the Supreme Court frequently references them. *See, e.g.*, Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1141–42, 1152–69 (2002) (noting that proposed Committee Notes go through notice-and-comment review along with proposed Rule text, and advocating that material in the Committee Notes be accorded "authoritative weight" in interpreting Federal Rules).

128. See *infra* notes 151–160, and accompanying text, for an analysis of the guidance provided in the text of Rule 26(b)(1) and the Committee Note.

judges, or their assistants who resolve pretrial issues in particular cases.

Indeed, Professor David Marcus has recognized that trans-substantive, rather than case-specific, process law helps to "ameliorate[] . . . institutional limitations" of federal courts arising from limits on their "legitimacy, competency, and effectiveness" in creating substance-specific procedure.[129] Trans-substantive process law would include the textual and background principle of liberal discovery across cases, which was a premise of the original discovery rules and which supplied clear direction to judges making scope-of-discovery decisions. In the current litigation context, many accept that broad discovery in all cases is not optimal. Courts nevertheless require some guidance. Professor Robert Bone has concluded that when the Federal Rules delegate discretion to judges through multi-factor balancing tests, rulemakers should provide guidance by limiting the available factors, identifying principles that guide decision making, or both.[130] Such guidance would counterbalance the institutional impediments that district court judges will encounter in making case-specific, scope-of-discovery decisions using the multi-factor proportionality standard. In this Part, I briefly review the institutional impediments of federal courts that work to prevent good, case-specific decisions regarding proportional discovery, suggest means of ameliorating these institutional deficits, and conclude that Congress and the Advisory Committee are better suited, institutionally, to make these decisions.[131]

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129. Marcus, *supra* note 21, at 1220.

130. Bone, *supra* note 21, at 2015–16; Bone, *supra* note 18, at 300–03; *see also* Burbank, *supra* note 45, at 1473–74 (suggesting that courts should recognize that procedural rules are not neutral and should explicitly identify their impact).

131. *See generally infra* Section IV.A.1. *See also* Burbank & Subrin, *supra* note 10, at 412 (recommending that the Advisory Committee, in conjunction with plaintiffs' and defendants' attorneys, fashion discovery protocols for various substantive claims, and suggesting that the Advisory Committee probably has the authority to do so under the Rules Enabling Act and, if not, recommending that Congress should delegate that authority); *see also* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1194–1215 (2012) (comparing the institutional competencies of the Supreme Court in its adjudicatory capacity and in its rulemaking capacity and concluding that rulemaking is the superior policymaking tool in most circumstances because it is better suited to making policy, obtaining information, permitting broad participation, determining necessary tradeoffs, and

A. Institutional Limits of District Courts

1. Limited Normative Decision Making Authority

Federal district court judges have limited substantive lawmaking authority as compared to state lawmakers (including state courts) and their political counterparts at the federal level. When determining discovery scope under the proportionality analysis, however, district court judges will be required to make numerous normative judgments on a regular basis. As indicated above, the individual proportionality factors include elements requiring policy decisions, and the ultimate balance of individual factors will require additional normative trade-offs and value choices.[132]

The first and second factors are among the proportionality factors that will require normative decision making and will affect the parties' ability to succeed on different substantive claims.[133] The first factor requires a judge to determine the importance of the issues and will include normative line-drawing regarding the importance of the issue to the parties and society. The second factor requires the judge to determine importance based on the monetary value of the claim at issue, which also requires a judge to set value-based boundaries.

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creating comprehensive solutions); Struve, *supra* note 130, at 1141–42, 1152–69 (noting that proposed Committee Notes go through notice–and–comment review along with proposed Rule text and advocating that material in the Committee Notes be accorded "authoritative weight" in interpreting Federal Rules).

132. *See supra* notes 93–101, and accompanying text; *see also* Burbank, *supra* note 99, at 650–51; Gelbach & Kobayashi, *supra* note 96, at 12–18; Moss, *supra* note 62, at 896 (in making the proportionality calculation, judges must consider both value to the parties and to society).

133. *See generally supra* Section III.A.2. Additionally, even assuming that the judge could obtain adequate information to determine an issue's importance to both the parties and society, (which I explore below—*see infra* notes 142–145) judicial policymaking will not end with the judge's determination of the issue's importance, but will recur as the judge makes further decisions essential to the proportionality decision, including whether the amount in controversy (factor 2) outweighs the issue's importance; the extent of discovery to provide parties (often plaintiffs) in instances of "information asymmetry" (factor 3); whether the parties' resources (factor 4) justify more or less discovery; and whether the burden or expense of discovery (factor 6) outweighs its likely benefit.

Other factors, too, will require normative decision making. Factor three, for example, which assesses the extent of parties' access to relevant information and focuses on cases of information asymmetry, will inevitably involve a trade-off between one party's (typically, the plaintiff's) ability to obtain sufficient discovery to prove a claim and the opposition's discovery costs. These factors implicate the limited lawmaking authority of district court judges.

The decisions may, at the same time, encroach on the substantive policy choices of Congress or the states to use private adjudication (often in conjunction with administrative enforcement) to enforce substantive policy.[134] For example, Congress has created private attorney general provisions in many statutes and has also induced suit through attorney fee provisions and enhanced damages awards.[135] These provisions represent Congress's determination that the social benefit of enforcing the claim at issue exceeds the private benefit and cost of litigation for the individual parties.[136] Judicial decisions to limit discovery in these cases could encroach on both the policy decisions of Congress and the civil enforcement methods

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134. *See e.g.*, Burbank & Farhang, *supra* note 45, at 1545, 1547–50 ("[T]he choice of private over administrative enforcement may afford protection to congressional policy long after the governing majority has been replaced by legislators with different preferences."); Burbank, Farhang, & Kritzer, *supra* note 12, at 640, 644–47 (providing historical background of the increase in federal statutory and administrative law and observing that the increase coincided with "the federal government's reliance on private enforcement").

135. *See e.g.*, Subrin, *supra* note 12, at 395–97 (arguing that trans-substantive procedures are not the best fit for the United States); Burbank, Farhang & Kritzer *supra* note 12, at 640 (concluding that "the desirability of authorizing private actions involves difficult policy judgments and is likely to depend on a number of context-specific factors" and that "[m]aking such determinations therefore requires familiarity with the nature of the particular policy problem, the substantive goals of the regulatory scheme, and the likely interaction of private lawsuits with other elements of the government's enforcement strategy").

136. *See, e.g.*, Gelbach & Kobayashi, *supra* note 96, at 3 (asserting that courts determining the proportionality of discovery should consider "the divergence between social and private benefits of discovery, e.g., in litigation with important precedential or social value that will not be internalized by the litigants"); Burbank, *supra* note 99, at 651 (concluding that one of the social benefits of private enforcement, pursuant to congressional legislation, is the avoidance of the huge "expenditures, higher taxes, and bureaucratic state-building that are essential to adequate public enforcement.").

selected by Congress.[137] Commentators emphasize, moreover, that congressional decisions to pursue substantive goals through private enforcement often include concurrent decisions not to fund alternative public means of enforcing the claims through increased taxes.[138]

Consequently, when making proportionality decisions, district courts must calculate and weigh the private and social benefits and costs. These calculations will not be easy to make in the context of particular cases; the decisions could involve decisions contrary to those of Congress and state policymakers; and such decisions will often require information that will be unavailable to the parties and the judge.

2. Lack of Access to Information

Judges, who must rely to a large extent on information from the parties, will often lack access to the information necessary to make informed decisions when implementing the proportionality standard.[139] The litigation process thus compares less favorably to

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137. *See, e.g.*, Bone, supra note 26, at 927 (discussing the limitations of case–specific rule–making); Burbank, Farhang & Kritzer, *supra* note 12, at 648 (indicating that "those with the power to determine the efficacy of private enforcement regimes in action may subvert the policy preferences of the enacting Congress"); Moss, *supra* note 62, at 896; Subrin, *supra* note 12, at 395–97 (concluding that "'[c]alibration of discovery is calibration of the level of enforcement of the social policy set by Congress'" (quoting Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997)).

138. *See, e.g.*, Burbank, *supra* note 99, at 651–52; Burbank & Farhang, *supra* note 45, at 1547–49; Carrington, *supra* note 9, at 603–06 (concluding that "[a] nation that often eschews the idea of strong or intrusive government may require [statutorily granted suits by private citizens]. . . to constrain harmful business practices"); Subrin, *supra* note 12, at 387, 396–97.

139. *See* Bone, *supra* note 21, at 1986–2001 (discussing "bounded rationality constraints, information access obstacles, and strategic interaction effects" as obstacles to a district court judge's effective "exercise of discretion"); Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006) (registering skepticism about delegating broad discretion to district court judges, based on doubts that judges "can gather and process the information necessary to craft case–specific procedures that produce good outcomes in the highly strategic environment of litigation"); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 537, 561 (2009) (concluding that the Supreme Court, in the context of judicial interpretation, "is ill

other institutions that have broader authority to request or require provision of information, such as Congress and the federal rulemakers acting under the Rules Enabling Act.

Further, parties themselves often lack complete information in the context of litigating particular cases, thus limiting the judge's ability to make sound normative decisions. Additionally, parties have incentives to withhold information,[140] further limiting the information available to the judge when making complex determinations under the proportionality standard. Moreover, parties will benefit most from withholding information early in the case and before the opposing party has the ability to obtain that information through discovery.[141] This is precisely the time that the judge formulates his or her initial views and makes case management and discovery decisions that often dictate the case's course. Indeed, because the 2015 amendments to the Federal Rules also encourage earlier sharing of information and earlier judicial case management, incentives to withhold information early in the case could be intensified. In addition, early discovery decisions made on the incomplete information available to the judge will impact later stages of the litigation, including the strength of the parties' positions at settlement, summary judgment, and trial.[142]

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equipped to gather the range of empirical data, and lacks the practical experience . . . that [is] implicated in considering standards for the adequacy of pleadings"); Marcus, *supra* note 21, at 1222–1233 (reviewing trans-substantivity and judicial upkeep or process law); Singer, *supra* note 12, at 183 (discussing the institutional limitations that prevent courts from "legitimately, competently, and effectively designing substance-specific process law").

140. *See* Bone, *supra* note 21, at 1990–91, 1993 (noting that withholding information is advantageous to parties because it both requires other parties to incur costs in obtaining the information and it prolongs any existing information asymmetry); Gelbach & Kobayashi, *supra* note 96, at 14–15 (noting, regarding the access to information factor, that it may be difficult for judges to gauge the extent of the producing party's access to information and that requesting parties will have incentives to understate ability to obtain information or to exaggerate the costs of obtaining it).

141 . Bone, *supra* note 21, at 1990; Moss, *supra* note 62, at 896.

142. Bone, *supra* note 21, at 1993; Bone, *supra* note 26, at 927; *see also* Moss, *supra* note 62, at 910–12 (concluding that court decisions regarding proportionality are "doomed to be suboptimal" because, *inter alia*, in applying the proportionality standard, courts must consider the probative value of evidence, the size of the case, and the likelihood that plaintiff will prevail at trial, but courts cannot make a good evaluation of the likelihood of success at trial until they obtain the evidence at issue).

Moreover, some information crucial to making a good decision under the proportionality standard will not be in the possession of the parties. This includes information regarding the social costs and benefits of claims created by Congress and other decision makers. For this type of information, it could be crucial to obtain participation of other stakeholders, but litigation provides few opportunities to invite or require broad participation.

Even if judges could obtain complete information, however, they would still suffer from a comparative inability to conduct empirical assessment of the information, compare their discovery limits to other alternatives, and use that information to inform ultimate proportionality decisions.[143] Absent sufficient time, information, and resources to assess the information empirically, judges will likely resort to schemas and heuristics that introduce bias into their decision making.[144] Moreover, because a single judge acts as the decision maker in trials, there are not structural checks and balances that could lessen the effect of bias.[145]

Finally, case-specific application of the proportionality standard will require enormous costs in terms of judicial time and effort for results that, given information access and assessment limitations, will not be optimal and will result in disuniformity of discovery procedure across the federal system.

3. Little Opportunity for Meaningful Appellate Review

The nature of appellate review in federal courts will also ensure little opportunity for meaningful review of district court decisions implementing the proportionality standard. Appellate review generally supplies corrective oversight and instruction regarding controlling legal principles. Additionally, for issues subject

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143. Marcus, *supra* note 21, at 1230; *see also* Bone, *supra* note 21, at 1986–87 (discussing the issues broad discretion creates).

144. Bone, *supra* note 18, at 301, 307–08; Bone, *supra* note 21, at 1987–90; Marcus, *supra* note 21, at 1230.

145. Bone, *supra* note 21, at 1989–90; Marcus, *supra* note 21, at 1231.

to an abuse of discretion standard, appellate review may, over time, provide guidance by narrowing the scope of permissible discretion.[146]

The appellate court's ability to provide error correction and guidance regarding the application of the proportionality standard in discovery rulings, however, will be diminished. First, review will often not be available. Discovery issues, which are rarely subject to immediate appeal, will often fade in importance as the case progresses and will not be appealed. Second, many cases settle, precluding appeal of even important proportionality issues. Third, even if a case is appealed on the application of the proportionality standard, the district court's proportionality decision will typically be reviewed under the abuse of discretion standard, which triggers the appellate court's substantial deference to the district court's determinations. These general constraints will limit the opportunity for appellate courts to compare various proportionality decisions from the laboratory of the district courts, to identify stronger decisions, and to impose a level of consistency or uniformity in proportionality decisions.

Moreover, in the event that a party successfully appeals a proportionality standard issue, the appellate court's review will be limited by the district court's record. That is, the reviewing court's decision will be impacted by the following limitations on the district court: lack of access to complete information, parties' incentives to withhold information, and inadequate resources to assess the information provided. These constraints will, in turn, impede the ability of appellate courts to provide corrective review or guidance regarding proportionality issues. Finally, federal appellate courts, like district courts, have limited substantive lawmaking ability. Thus, appellate decisions, like district court decisions, may encroach upon the substantive policy decisions of Congress or other decision makers.

B. Moving Forward with Proportionality

Notwithstanding the institutional obstacles that district courts and other decision makers will confront in applying the proportionality standard, courts will need to apply the standard regularly. In this Part, I conclude that in the short term, district courts should defer to the pre-existing policy choices of Congress and other

146. Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1568 (2003).

decision makers regarding substantive claims and to the limited guidance in Rule 26(b)(1) and in the Committee Note. In the long term, the Advisory Committee should reclaim the issue of proportionality in discovery and provide guidance by creating general discovery procedures to cover the broad run of cases and substance-specific protocols to govern specific substantive claims.

In the short term, district courts should conclude that their discretion in creating discovery that is proportionate to the substantive claims at issue is limited. Courts should resolve proportionality issues against the backdrop of the values underlying the applicable substantive law and in light of the values furthered by the judicial system. Though the American judicial system promotes many values, one of the most important is the goal of resolving cases in accord with the substantive rights of the parties.[147] Thus, in implementing the proportionality standard, courts should determine and enforce the policy objectives of Congress and other lawmakers. The choices of other decision makers will not provide definitive guidance regarding resolution of all discovery disputes, but they will provide background principles to guide decisions in some segments of cases. Moreover, furthering the existing normative choices of Congress and other decision makers when making proportionality decisions parallels the federal courts' role, when adjudicating disputes, of enforcing the values underlying authoritative texts or otherwise existing in practice.[148] District courts, thus, should make discovery decisions that do not undermine the value choices in existing substantive law.

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147. *E.g.*, Bone, *supra* note 18, at 302; Bone, *supra* note 26, at 913–14.

148. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (concluding that the role of judges and other court decision makers "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them"); *accord* Bone, *supra* note 18, at 302–03 ("[P]rivate dispute resolution is not the primary goal of procedure under any sensible account of American civil adjudication. . . . It is meant to enforce the substantive law, and the substantive law is meant to further public goals such as deterring socially undesirable behavior and providing morally justified compensation."); *see also* Bone, *supra* note 26, at 940–43, 949 (concluding that both a "rights–based metric" and a "process–based metric" for determining procedural issues would support the argument that procedural rulemakers should make procedural choices by referring to existing practice of

Adherence to normative preferences of other policymakers is also consistent with the Advisory Committee's statement that, in the "importance of the issue" factor, the district courts should consider "philosophic, social, or institutional" concerns and that some substantive claims will "vindicate vitally important personal or public values."[149] But there is a caveat. It would require judges to promote the existing protections for substantive claims,[150] rather than to substitute their own normative choices. It would also require judges to determine, to the extent possible, how those substantive preferences play into the necessary cost–benefit analysis of the proportionality standard and, further, how those preferences may guide on-the-ground discovery disputes such as the number of permissible depositions, scope of permissible document requests, and sequence of discovery.

District courts should also consider any guidance provided in the text of the Rule or Advisory Committee Notes.[151] The text of Rule 26(b)(1), as discussed above, provides little direct guidance. The rulemakers did, however, place the "importance of the issues" factor first, to underscore the importance of that factor and to prevent any conclusion that the amount in controversy was the most important factor.[152] The Committee Note similarly emphasizes the "significance

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protection for substantive values, and concluding that court–based, committee–centered rulemakers would fare better at the exercise than judges exercising discretion in the context of particular cases); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 735 (1975); Marcus, *supra* note 21, at 1238–39 (positing that courts might vary from a trans–substantive standard to create substance–specific procedure if the more specific rule would support "the policy objectives . . . of an antecedent regime").

149. Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42; *see also supra* notes 94–99, and accompanying text.

150. Bone, *supra* note 142, at 1162. *See also* Bone, *supra* note 26, at 935–37, 951–52 (concluding that in measuring outcome, in a rights-based court-rulemaking model, the procedural rulemakers should "construct from existing practice a coherent general theory of value that fits and justifies the pattern of protection given to interests by the legal system as a whole"); Marcus, *supra* note 21, at 1228–30 (indicating that when judges make substance-specific procedure, they should do so to support policies in existing law, i.e., to support "an antecedent regime's policy objectives," in order to avoid establishing their own policy preferences and exceeding their lawmaking authority).

151. Struve, *supra* note 130, at 1141–42, 1152–69.

152. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42 (internal quotations omitted).

of the substantive issues."[153] Here, the Advisory Committee recognized that "many cases in public policy spheres, such as employment practices, free speech, and other matters may have importance far beyond the monetary amount involved" and that a number of other substantive areas may present cases seeking little or nothing of monetary value.[154] The Committee Note, thus, may be read to imply that the courts are not to make their own value choices, but are to promote the value choices in existing law.

Additionally, the Committee Note reveals little purpose to reduce discovery costs through proportionality, but instead proposes to seek greater coincidence between claims and discovery.[155] Likewise, consistent empirical evidence reveals that discovery costs are not excessive except in a small set of complex cases.[156] The lack of purpose to address radical imbalances in discovery costs also supports the notion that district courts should seek to further substantive policy choices of superior normative decision makers. Acting at the boundaries of their lawmaking authority and without evidence of excessive discovery costs in the majority of cases, district courts should exercise restraint in limiting discovery in areas where Congress or other policymakers have created favored claims.

The text of Rule 26(b)(1) and the Committee Note also provides some guidance regarding cases involving "information asymmetry."[157] Rule 26(b)(1) includes a new factor—"the parties' relative access to relevant information."[158] This factor was included to highlight the issue where "[o]ne party—often an individual plaintiff—may have very little discoverable information," while the opposing party may have a substantial amount of information.[159] In these circumstances, the Committee Note advises courts that, "the

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153. Judge Campbell Memorandum, *supra* note 13, at B-8, B-41 to B-42 (internal quotations omitted).

154. *Id.* at B-41 to B-42.

155. *Id.*

156. *Id.* at B-6 to B-7.

157. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-40.

158. FED. R. CIV. P. 26(b)(1); Judge Campbell Memorandum, *supra* note 13, at B-30.

159. Judge Campbell Memorandum, *supra* note 13, at B-40 to B-46.

burden of responding to discovery [will] lie[] heavier" on the party with more information in most cases.[160] District courts should follow this guidance.

In addition to deferring to existing substantive policy choices and to guidance in the Rule and Committee Note, courts should provide rulings that make clear the rationale of their proportionality decisions. Articulating the reasons underlying proportionality decisions will serve several purposes. First, since lawmaking is commonly incremental, clarity regarding the basis for opinions will permit the development of a body of law regarding proper interpretation and application of the proportionality factors, which may be critical given the likely lack of appellate guidance. Thus, district courts may, given the narrow opportunity for review of discovery issues, be critical actors in creating the law governing proportionality in discovery and in developing principles from which the Advisory Committee may be able to craft more helpful normative guidelines, create more helpful balancing factors, and provide clarity regarding priority of balancing factors. Second, decisions that clearly indicate the bases for proportionality rulings would also provide a body of law for appellate courts to consider in the limited circumstances in which proportionality issues reach appellate review. Third, transparency of the rationale for proportionality decisions would help ensure that the district judges obtain the best information possible and rely on that information, rather than resorting to judicial intuition, heuristics, and schemas.[161] Fourth, providing the reasoning underlying decisions would also help ensure that district courts adhere to the existing policy choices of superior policymakers, rather than substituting their own choices. Explicit rationale for proportionality decisions would, thus, enhance the legitimacy of courts' proportionality decisions. Indeed, in other instances in which district courts act at the boundaries of their authority—such as Rule 56, regarding summary judgment; Rule 65, regarding injunctions; and Rule 23, regarding class action certification—procedural rules have

160. Judge Campbell Memorandum, *supra* note 13, at B-41.

161. *See* Bone, *supra* note 21, at 1986–90 (explaining obstacles to effective exercise of procedural discretion).

required or practice has provided more transparent decision making.[162]

Fifth, a primary justification for court-made procedural rulemaking under the Rules Enabling Act, despite its inevitable impact on substantive rights, is its foundation in reasoned deliberation.[163] To the extent the proportionality standard substitutes case-specific judicial discretion regarding proportionality for committee-based, predetermined discovery standards,[164] court opinions, too, should reveal the grounds for the decisions. Indeed, commentators have suggested that even the Supreme Court, as Congress's expressly delegated rule maker, should pay close attention to existing law when promulgating rules and should provide a clear statement of the

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162. *See* Marcus, *supra* note 21, at 1241 (suggesting that rules promote reasoned deliberation); *accord* Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 981–82 (2010) (indicating that the judge's explicit reasoning regarding the "process, the inputs, and the challenges" in ruling on a motion for an injunction as well as on each required factor for the injunction permits judicial flexibility, but also provides an "effective constraint on individual judgment in decisionmaking"); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 651–56 (1995). *See* FED. R. CIV. P. 52(a)(1). *Accord* Adamson, *supra* note 26, at 1045 (noting that FED. R. CIV. P. 52(a)(1), which requires district courts to issue findings of fact and conclusions of law in actions tried without a jury or with an advisory jury and for interlocutory injunctions, reinforces the trial court's superiority in finding facts and the appellate court's superiority in norm declaration and norm elaboration). *See also* FED. R. CIV. P. 23(c)(1) (requiring that a court must "determine by order whether to certify the action as a class action" and specifying that the order must "define the class, the class claims, issues, or defenses, and appoint class counsel"); FED. R. CIV. P. 56(a) (amended in 2010 to include a new directive that the court "should state on the record the reasons for granting or denying" a motion for summary judgment, which the accompanying Committee Note indicated accorded with practice already implemented by most courts).

163. *See* Bone, *supra* note 26, at 940–41, 951–52 (suggesting that rulemakers creating rules through the rulemaking process should use reasoned deliberation to create Rules that promote a set of legal principles that do not "deviate too much from existing practice"); Bone, *supra* note 142, at 1160–63; Cover, *supra* note 151, at 734–36; Mulligan & Staszewski, *supra* note 134, at 1246–51; Struve, *supra* note 130, at 1110–14.

164. Bone, *supra* note 26, at 917–18, 926–29, 951–52; *see also* Struve, *supra* note 130, at 1119–20, 1120 n.72 (suggesting that district courts should have less discretion to interpret rules).

grounds for its procedural rulemaking choices.[165] The rule makers' articulation of reasoning is critical to compliance with the Rules Enabling Act, which provides that rules enacted pursuant to the Act "shall not abridge, enlarge, or modify any substantive right."[166] Reasoned decision making assists in legitimizing the federal rule makers' procedural choices and rule makers' discretion because it reveals their substantive choices, reveals the extent to which rulemakers adhered to existing normative decisions of Congress, and permits Congress to change the procedural choices in particular cases if it deems change necessary.[167] Because the Advisory Committee has declined, in Rule 26(b)(1), to make normative choices and has instead delegated those choices to district courts, the district courts should justify their case-specific choices under the proportionality standard by articulating the reasons for their proportionality decisions.

Further, because appellate review will be relatively rare, it might also be beneficial for district courts to flag their proportionality decisions for study by the Federal Judicial Center and other commentators. Such a study could provide the legitimacy-enhancing benefits discussed above while also helping to provide a measure of uniformity and systemic coherence—two procedural values that are sacrificed when rule makers authorize case-specific discretion.

In the long term, however, the Advisory Committee should return to the issue of proportional discovery and should provide additional guidance regarding application of the proportionality factors or should create (1) uniform general discovery standards for most cases and (2) substance-specific discovery protocols for recurring substantive claims that often present difficult discovery issues.[168] Indeed, the Federal Judicial Center's October 2015 report

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165. Bone, *supra* note 26, at 950–52; Bone, *supra* note 142, at 1159; Cover, *supra* note 151, at 734–40; Mulligan & Staszewski, *supra* note 134, at 1247–51.

166. 28 U.S.C. § 2072(b) (2012).

167. Bone, *supra* note 26, at 950–51; Bone, *supra* note 142, at 1157–59; Cover, *supra* note 151, at 734–36.

168. *See, e.g.*, Burbank & Subrin, *supra* note 10, at 409–12 (suggesting a "simple case" track with limited discovery for cases under a certain dollar amount, with little opportunity for litigants to alter the limits by agreement or court order, which would be supplemented by substance-specific protocols for case types that engender burdensome discovery); Subrin, *supra* note 1, at 28–29, 45–56; Subrin, *supra* note 12, at 399–405; *see also* Bone, *supra* note 21, at 1994–96 (contending that general discovery rules and substance–specific discovery protocols, which provide discretion for trial courts to vary from the established norms in special cases,

on the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action provides support for further exploration of pattern discovery protocols.[169] The Advisory Committee, acting in concert with plaintiffs' attorneys, defendants' attorneys, and other relevant stakeholders, would enjoy institutional advantages unavailable to district court judges acting in the context of particular cases. Through the rulemaking process of the Rules Enabling Act,[170] the Advisory Committee, which is composed of a range of lawyers and judges,[171] can and does invite broad participation in rulemaking activities. It gives notice of proposed rules, provides opportunity for comment on rule proposals, and holds public hearings.[172] The Advisory Committee may also obtain empirical assessments in support of proposed rules, and its proposed rules are subject to multiple layers of review.[173]

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would be superior to delegating case–specific discretion to judges); Gensler & Rosenthal, *supra* note 33, at 650–51, 654–57 (supporting proportionality balancing but suggesting supplementation by use of "scheme–based" protocols).

169. Emery G. Lee III and Jason A. Cantone, FEDERAL JUDICIAL CENTER, REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 1 (2015) (comparing cases by federal judges who voluntarily adopted the discovery protocols and those who did not and concluding, *inter alia*, (1) motions to dismiss and for summary judgment were "less likely to be filed" in cases under the protocols; (2) the average number of discovery motions filed in cases under the protocols was about half that of the comparison cases; (3) it appeared that cases under the protocols were more likely to settle but the time to settlement was not faster; and (4) there was "no statistically significant difference in case processing times" between the two sets of cases).

170. 28 U.S.C. §§ 2072–2074 (2012).

171. 28 U.S.C. §2073(a)(2) (2012).

172. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1672 (1995).

173. The Judicial Conference, which is assisted by a Standing Committee and five advisory committees, including the Advisory Committee on the Federal Rules of Civil Procedure, takes the lead in the Rule amendment process. Proposed rules are considered first by the appropriate advisory committee and are, thereafter, sent to the Standing Committee. If approved by the Standing Committee, the proposed Rule is sent to the Judicial Conference for approval. The Judicial Conference transmits approved rules to the Supreme Court, which has seven months to review and transmit the Rule to Congress. Congress then has seven months in which to delay, amend, or veto the proposals. Absent such action by Congress, a proposed Rule takes effect. *See* Struve, *supra* note 130, at 1103–19, 1140 (suggesting that

The rulemaking process, therefore, provides better access to information, greater resources to aid in empirical assessment of information obtained, broader participation by relevant members of the legal community and public, and multiple tiers of review. General discovery limits and substance-specific discovery protocols created through this rulemaking process would provide ample room for judicial discretion but would also provide for better, more-informed rules, sharpened guidance to district court judges, and heightened uniformity across the federal system. Such rulemaking, though creating some substance-specific procedural rules, is likely within the Court's rulemaking authority under the Rules Enabling Act.[174] If it is not within the Court's authority, however, commentators have pragmatically suggested that Congress could either amend the Rules Enabling Act to confer such authority, or it could directly enact the proposed rules.[175]

V. CONCLUSION

The 2015 amendments to Rule 26(b)(1) install largely unguided proportionality balancing as the primary determinant of discoverable information in the federal courts and also eliminate textual provisions that favored broader discovery. The text of the 2015 amendment to Rule 26(b)(1) and the text of the Committee Note provide some minimal guidance regarding the importance of the proportionality factors, their weight, and their application, but the Rule, in the main, remits these decisions to the parties and the district

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rulemaking provides for greater deliberation than adjudication); *see also* Genetin, *supra* note 35, at 689–90 (providing background of Rules Enabling Act).

174. *See, e.g.*, Bone, *supra* note 142, at 1159–60 (emphasizing that Professor Cover's "deeper point" was that sometimes the justification for a procedural choice "necessarily ha[s] to take account of substantive policies, and in such cases, judges should explain their choices publicly and make the connection to substantive policy explicit"); Bone, *supra* note 26, at 950–53 (discussing limits of court rulemaking); Burbank, *supra* note 35, at 1124–25, 1193 (proposing that, ironically, changes to rulemaking advanced under the Rules Enabling Act should come through administrative law); Cover, *supra* note 151, at 734–36. *But see*, Joshua M. Koppel, Comment, *Tailoring Discovery: Using Non Trans-substantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 285–87 (2012) (questioning the Supreme Court's authority to promulgate substance-specific discovery rules and also concluding that Congress is, as an institutional matter, better-suited to the task).

175. Burbank & Subrin, *supra* note 10, at 412.

court judge or magistrate judge in the context of particular (perhaps idiosyncratic) litigation. Although the proportionality standard permits district courts to establish discovery that meets the needs of each case, district courts face institutional challenges in creating case-specific procedure that trump the supposed benefits of determining proportionality through case-specific balancing of listed factors.

Aiming for the outside corner of federal court authority, the amendments came in wide of the mark. District court decision makers are at a comparative disadvantage vis-à-vis the political branches and the Advisory Committee in such endeavors because they have a narrower range of lawmaking authority, have little ability to obtain broad-based information or broad participation of relevant stakeholders, and have limited resources to devote to evaluating information, making normative predictions about future events, and creating policy. Further, appellate courts will rarely review discovery decisions. When they do, they too will be hindered by initial failures of access to information by the district court and by lack of policymaking authority.

I, thus, recommend that district courts promote, to the extent possible, the normative preferences of Congress and other policymakers, and defer to the admittedly limited guidance available in the text of Rule 26(b)(1) and the Committee Note. I recommend as well that district court decision makers articulate the reasons underlying their proportionality decisions. I also join the chorus of those suggesting that application of proportionality in discovery would be better achieved by the Advisory Committee's promulgating discovery principles applicable to most cases and substance-specific protocols uniformly applicable to particular substantive claims. If the discovery zone is to be narrowed for some players in the litigation game, rulemakers who can invite broad participation, access comprehensive information, and obtain sophisticated assessment of the information, should make those decisions on a system-wide basis.

Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure

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INTRODUCTION

Arbitration occupies an important place in the landscape of dispute resolution options for commercial and financial disputes. Over the past few decades, the number of traditional trials has dropped, leading the academic community to discuss the

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phenomenon of the "vanishing trial"[1] and a concomitant "Quiet Revolution"[2] in the usage of alternative dispute resolution. Arbitration is a well-established method for resolving disputes, particularly within the business community. The conventional wisdom is that arbitration offers a faster, less-expensive, more private, flexible, and party-controlled means of resolving disputes, with the further added advantage of being a less-adversarial process, which helps to amicably preserve beneficial business relationships between parties.[3]

However, recent surveys of arbitrators and counsel alike have indicated that, despite this conventional wisdom, arbitration can play out differently in practice.[4] The adoption of arbitration in business-to-business commercial disputes is not as widespread as some in the legal community believe. Some surveys indicate that some of the in-house and outside counsel collectively responsible for litigating arbitrations are concerned that arbitration increasingly resembles traditional litigation.[5] As a result, some have argued that the arbitration community needs to address these concerns in order to ensure that arbitration remains a uniquely beneficial method of dispute resolution and retains its comparative advantage over litigation in terms of costs and duration.[6] In short, large-scale

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1. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (tracing the decline in trials across various American fora).

2. *See* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 2–3 (2014) (discussing the transformation of American conflict resolution at the end of the twentieth century).

3. *Id.*

4. *See* discussion *infra* Part III(A) (revealing recent trends toward longer and more costly arbitration).

5. *Id.*

6. *See* Thomas J. Stipanowich, *Arbitration: "The "New Litigation,"* 2010 U. ILL. L. REV. 1, 58–59 (2010) (concluding that arbitration's shift towards being a "New Litigation" style of dispute resolution has "led to the frustration of many users who find their arbitration experience wanting when measured in terms of its conventional attributes such as speed and economy of process," and that therefore there is a need to "understand and address arbitration in a more nuanced and sophisticated way, . . . not as a unitary concept, but as a spectrum of possibilities and a realm of choice that demands more active participation by those who use, regulate, and comment on the arbitration processes").

business-to-business arbitration has drifted, in some instances, closer to litigation on the procedural end of the spectrum, and thus, it may be necessary for arbitration to return to its roots.

Of the various concerns held by counsel involved in arbitrations, many relate to the discovery phase of the arbitration process. This Article will describe the ways in which different arbitration regimes attempt to provide the appropriate level of discovery necessary to resolve commercial disputes. It will also compare discovery in arbitration to discovery in federal litigation in order to provide a basis for determining the advantages or disadvantages of arbitration. Further, this Article will describe the various problems parties occasionally encounter while conducting discovery in arbitration, and will show how such problems are sometimes the result of parties seeking expansive discovery, and arbitrators either shying away from using their discretion to limit discovery, or believing that they lack the authority to prevent parties from engaging in certain practices.

Part I of this Article outlines the revisions to the Federal Rules of Civil Procedure (Federal Rules). Part II describes the arbitration rules promulgated by two different arbitration regimes, and then compares them to the revisions of the Federal Rules. Finally, Part III explains recent responses to concerns that arbitration increasingly resembles litigation, and how changes to the Federal Rules may have a spill-over effect on arbitration proceedings through helping to limit discovery and allowing arbitrators to take more of a managerial role during discovery.

I. THE 2015 REVISIONS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Proposed amendments and revisions to the Federal Rules have come out of committee, finished a period of public comment, and gone into effect on December 1, 2015.[7] These amendments aim

7. *See* COMM. ON RULES OF PRACTICE & PROC., REPORT TO STANDING COMM. ON RULES OF PRACTICE & PROC., app. B-1 to B-3 (2014) [hereinafter SEPT. 2014 RULES REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf (explaining the proposed amendment and requesting consideration by the Supreme Court).

to bring about a less costly, less protracted, and less burdensome civil litigation process.[8] A 2009 survey by the American Bar Association's Section of Litigation concluded that there was a high level of dissatisfaction with the current state of civil litigation in federal courts.[9] Judicial inattentiveness to discovery is often lamented by practicing attorneys nationwide.[10] Additionally, attorneys complain that the nature of discovery has fundamentally

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8. *See* ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROC., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 4, 12 (2010) [hereinafter 2010 REPORT TO THE CHIEF JUSTICE], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf ("[The goals of the amendments] are the goals of Rule 1: to secure the just, speedy, and inexpensive determination of every civil action and proceeding in the federal courts.").

9. *See* Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make A Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 495–96 (2013) (mirroring a similar survey jointly conducted by the American College of Trial Lawyers, and the Institute for the Advancement of the American Legal system, which found that the civil justice system was "in serious need of repair," and "takes too long and costs too much," while finding that practicing attorneys singled out discovery as "the primary cause for cost and delay" (internal quotation marks omitted)); *see also* A.B.A. SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT, (2009) 5, 6, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf ("Discovery . . . is seen as the primary cause for cost and delay."); AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&CContentI=4008 ("In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally . . . From the outside, the system is often perceived as cumbersome and inefficient.").

10. *See* Grimm & Yellin, *supra* note 11, at 505–06 (discussing the 2010 survey by the Federal Judicial Center, which found that two-thirds of respondents agreed that judges do not invoke Rule 26 discovery limitations on their own, and just under one half further agreed that judges "do not enforce Rule 26 to limit discovery." (citing REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L. EMPT. LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 3, 11 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf)).

changed due to developments in the size and complexity of litigation, the technological progress connected to the rise of electronically stored information, and the legal culture pushing the bounds of "broad" discovery over a period of more than seventy years.[11]

Over the past twenty years, the discovery phase of traditional civil litigation has increased in duration and cost due to a number of factors. First, the amount of potentially discoverable material has increased, especially due to the tremendous growth in electronically stored information.[12] Second, parties are increasingly making broad discovery requests, while their adversaries are making routine objections, leading to more disputes.[13] Finally, as the number of trials has declined, discovery has sometimes become the forum for "zealous" and "hyper-adversar[ial]" attorney behavior.[14] The Federal Rules aim at philosophically "broad"[15] discovery, but some

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11. *See* Grimm & Yellin, *supra* note 11, at 507–08.

12. *See* David F. Herr & Jolynn M. Markinson, *E-Discovery Under the Minnesota Rules: Where We've Been, Where We Might Be Headed*, 40 WM. MITCHELL L. REV. 390, 406-07 (2014) (discussing "the continued application of Moore's Law and the ever-decreasing cost of mass computer storage," and how "[t]here are now exponentially more records involved in litigation than would once have been possible.").

13. *See* Herr & Markison, *supra* note 14, at 407 ("It is easy to draft a plausible-sounding document request that might call for production of a million documents."); *see also*, Andrew Mast, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. S 1920*, 56 WAYNE L. REV. 1825, 1839 (2010) (discussing how "the current scheme encourages excessively broad discovery requests"); Matthew L. Jarvey, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 914 (2013) ("One of the most rampant abuses of the discovery process is the use of boilerplate objections to discovery requests.").

14. *See* Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 189 (2013) ("As the number of cases going to trial continues to decline, discovery becomes the context within which this 'zealous advocacy' plays out."); *see also*, Brian Morris, *The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery*, 41 N. KY. L. REV. 133, 140 (2014) ("Litigants will be urged to curtail 'hyper-adversary behavior' while encouraged to work directly with opposing counsel.").

15. *See* Grimm & Yellin, *supra* note 11, at 507–08.

parties have used that leeway tactically to impose burden, delay, and cost upon opposing parties.[16]

In 2010, the Advisory Committee on the Federal Rules (Advisory Committee) convened the "Duke Conference," which included judges, representatives from big law firms, public interest groups, and both plaintiff and defense counsel.[17] The goal was to produce guiding principles for a new package of rule changes to the Federal Rules, meant to "refocus both the Federal Rules and litigators on the mandate set forth in Rule 1 for the 'just, speedy, and inexpensive determination' of federal civil litigation."[18] The conference determined that there was a need for "(1) early and active judicial case management, (2) proportionality in discovery, and (3) cooperation among lawyers."[19] In 2013, the Advisory Committee decided to recommend the "Duke Rules Package," which included suggested changes to the Rules themselves, for publication to the Standing Committee.[20] The suggested rule revisions encompassed the three themes identified by the conference.[21] In June of 2014, after a period of further review, a finalized set of proposed amendments was forwarded by the Advisory Committee for consideration by the Judicial Conference, the Supreme Court, and Congress.[22]

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16. The Duke Committee's 2010 REPORT TO THE CHIEF JUSTICE contrasts how defense side parties perceive plaintiff parties with little information to be discovered as "hav[ing] the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility . . . to reimburse the costs," with how plaintiff sides perceive much of the cost of discovery to arise from defense "efforts to evade and 'stonewall' clear and legitimate requests," as well as filing motions "to impose costs rather than to advance the litigation." 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 8, at 4.

17. *See* Morris, *supra* note 14, at 133–34 (describing the Duke conference, and the individuals and entities whose attendance was "welcomed").

18. *See id.* at 134 (quoting 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 9 at 12) (discussing how abundant costs, burdens, and delays to litigation in federal courts led to the Duke Conference).

19. *Id.*

20. *Id.* at 136–37.

21. *See id.* at 134 (discussing how the Duke themes "are the crux of the new proposals that the Standing Committee approved for comment.").

22. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-1 (stating that the text of the proposed rules and the proposed Advisory Committee Notes

A. Changes to Federal Rules 26 and 34

The most significant changes to the Federal Rules concern Rules 26 and 34. Some commentators go so far as to argue that these changes may affect the scope and nature of discovery, and constitute a "sea change" in philosophically broad discovery.[23] However, given the suggested changes and the Advisory Committee's comments, it remains to be seen whether the rules will cause such a "sea change." Nevertheless, the various changes to these two rules represent the Advisory Committee's attempt to strengthen considerations of proportionality.

The Committee's recommendations made several changes to Rule 26, with four key changes occurring in Rule 26(b)(1). First, the recommendations elevate the "proportional[ity]" factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) in order to make them "part of the scope of discovery."[24] Second, the recommendations eliminate the language concerning the discovery of sources of information, finding the language "unnecessary."[25] Third, the Committee eliminates the language distinguishing between discovery of information "relevant to the parties' claims or defenses," and discovery of information "relevant to the subject matter of the action, on a showing of good cause" by deleting the latter provision.[26] Finally, the recommendations remove the provision for discovery of information "reasonably calculated to lead to the discovery of admissible evidence."[27] A memo released by the Advisory Committee indicates the changes made with the new wording of the rule:

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immediately following may be forward to the Judicial Conference, the Supreme Court, and Congress).

23. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331 (2013) (commenting that the substantive plausibility requirement drastically effects a plaintiff's ability to survive the pleading stage).

24. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-4.

25. *See id.* ("[L]anguage regarding the discovery of sources of information is removed as unnecessary[.]").

26. *Id.*

27. SEPT. 2014 RULES REPORT, *supra* note 7. at app. B-4.

> (b)(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~[28]

The underlined language represents the addition of the new proportionality threshold. Proportionality was previously found in Rule 26 (b)(2)(C)(iii), but was not frequently employed by judges.[29] However, the additional language attempts to make consideration of proportionality part of the threshold analysis, by discussing the "needs of the case," "amount in controversy," "parties' relative access to relevant information," "parties' resources," "importance of the issues at stake in the action," and whether the "burden or expense of the proposed discovery" in fact "outweighs its likely benefit".[30]

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28. SEPT. 2014 RULES REPORT, *supra* note 7. at app. B-30–31. The proposed additions are underscored and the proposed deletions are struck-through.

29. *See* Morris, *supra* note 14, at 147 ("[T]he Advisory Committee noted that judges and litigants rarely use the provision.").

30. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-30–31.

This new text in Rule 26(b)(1), taken almost *verbatim* from the current text of Rule 26(b)(2)(C)(iii),[31] essentially casts proportionality as a threshold requirement, one which lawyers and judges will find harder to ignore.[32]

One new factor, however, has been added to (b)(2)(C)(iii)—a requirement that courts must consider the parties' relative access to information.[33] This factor was included in part as an

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31. In the revised rules, the language of 26(b)(2)(C)(iii) has been changed to reflect the modification to 26(b)(1), so as to avoid redundancy. The new (C)(iii) rule now reads:

> (C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * *
>
> (iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-32.

32. The questions of how to effectively provide for proportionality within Rule 26 and where to do so has been debated for quite some time. The proportionality factors—although not the term itself—were originally added by the Committee in the 1983 revisions to Section (b)(1). However, in 1993, although two new factors—whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues"—were added, the Committee moved the proportionality factors to Rule 26(b)(2)(C). SEPT. 2014 RULES REPORT, *supra* note 7, at app. B–5. In the 2000 revisions however, the Committee again amended (b)(1), feeling the need to add what it acknowledged to be an "otherwise redundant cross-reference" directing that "[a]ll discovery is subject to the limitations imposed by Rule26(b)(2)(i), (ii), and (iii) [not Rule 26(b)(2)(C)]," because "courts were not using the proportionality limitations as originally intended[.]" *See generally id.* at app. B-7. In the current round of amendments, the Advisory Committee mentions something which may explain this decades-long tension over how to encompass proportionality; that during the Duke Conference, "discussions at the mini-conference sponsored by the Subcommittee revealed significant discomfort with simply adding the word 'proportional' to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder." As a result, the committee for this newest round of amendments decided to include the word itself, as well as the factors previously found in 26(b)(2)(C) in (b)(1). *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5.

33. *See id.* at app. B-30.

acknowledgement of the fact that some cases "involve what is often called an information asymmetry" at the outset of litigation and through the discovery phrase.[34] The Advisory Committee acknowledges that "[i]n practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information," but nevertheless this is cognizable under the rules.[35]

In the Committee Note regarding the initial draft of the proposed amendment to Rule 26, the Advisory Committee explained that while consideration of proportionality was supposedly "familiar," the purpose of this change is to incorporate proportionality into the scope of discovery in a fashion "that must be observed by the parties without court order,"[36] thereby attempting to ensure that the parties consider proportionality in every case, even before a judge weighs in.[37] Similarly, the narrowing of "relevan[ce]" also furthers the goals of philosophically "proportional" discovery—the Advisory Committee reasoned that if a matter is outside "[p]roportional discovery relevant to any party's claim or defense," then "[s]uch discovery may support amendment of the pleadings to add a new claim or defense that affects the scope of discovery."[38]

The struck-through language appears to narrow the meaning of "relevance" in the discovery context. The Federal Rules previously permitted wide discovery, but the removal of the "relevant to the subject matter" provision sends a message to judges and counsel alike that discoverable material must comport with a somewhat narrower definition of "relevance." Previously, court-ordered discovery "[f]or good cause" would include items "relevant to the subject matter involved in the action," and the discovery of inadmissible but "reasonably calculated to lead to"

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34. *See* SEPT. 2014 RULES REPORT, *supra* note 7. at app. B-40-41.

35. *See id.*

36. *See* JUDGE DAVID G. CAMPBELL, COMM. ON RULES OF PRACTICE & PROC., REPORT TO STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22 (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf [hereinafter "MAY 2013 RULES REPORT"].

37. *See* MAY 2013 RULES REPORT, *supra* note 36 at 22 ("[T]he change incorporates them into the scope of discovery that must be observed *by the parties* without court order.") (emphasis added).

38. MAY 2013 RULES REPORT, *supra* note 36 at 22.

admissible evidence was permitted by Rule 26(b)(1).[39] The Advisory Committee states that the "relevant to the subject matter" language was removed because, in their experience, it was "virtually never used."[40] However, parties have sometimes relied upon the "reasonably calculated" language to define the scope of discovery.[41] In those cases, such attempts contributed to the expensive, time-consuming discovery practices, which sometimes rose to the level of "fishing expeditions."[42]

According to the Advisory Committee, the revisions to Rule 26 seek to eliminate these practices, although it remains to be seen whether, these changes will in fact bring about a meaningful change in broad discovery in practice. The Advisory Committee contends that these changes will not represent a meaningful change in the scope of discovery, but this position may not reflect the practical reality of how attorneys have historically invoked previous iterations of the rules. Insofar as the Advisory Committee has determined that existing rules have sometimes been misused, their pronouncement that these revisions will not represent a major change rests on the assumption that the previous rules, as practiced, were interpreted and applied correctly.[43] Decades of revisions to both proportionality and relevance in Rule 26 indicates that the Advisory Committee has not been satisfied with the practical interpretation and application of

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39. *See* 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 9, at 8–9 (discussing the scope of Rule 26(b)(i) in 2000).

40. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-9, B-43 ("The Committee has been informed that [the subject matter] language is rarely invoked.").

41. *See id.* at app. B-9–10 (discussing the use of the "reasonably calculated" language by attorneys to expand the scope of discovery to anything that is reasonably calculated to be helpful in the litigation).

42. *See* Miller, *supra* note 23 at 353 ("Although that deletion appears innocuous, the elimination of the passage was read by some—with some justification—to negate any lingering notion that discovery was limitless and permitted 'fishing' expeditions.").

43. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 ("Most of the comments opposing this change complained that it would eliminate a 'bedrock' definition of the scope of discovery, *reflecting the very misunderstanding the amendment is designed to correct*." (emphasis added)).

either principle.[44] Thus, it remains to be seen what the actual effect of these revisions will be. If the changes to Rule 26 bring about the Advisory Committee's apparently longstanding intentions concerning proportionality and relevance, the changes may bring about a substantial change in how discovery is actually practiced. This is possible based on the Advisory Committee's repeated pronouncements that parties' reading, interpretation, and usage of its rules have often been incorrect.[45]

The changes to Rule 26 could potentially be abused by parties with tactics such as vague proportionality objections, absent corresponding revisions elsewhere. However, the Advisory Committee makes such changes in Rule 34, by recommending two additions to Section (b)(2). In Rule 34(b)(2)(B), parties objecting to the production of items or categories of items must now explain the

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44. *See supra* notes 29–36 and accompanying text (describing the history of proportionality revisions from 1983 to the present). In terms of the Advisory Committee's longstanding attempts to provide for the proper scope of relevance, the "reasonably calculated" language was first added in 1946, and initially intended to cure the problem of parties using inadmissibility to bar relevant discovery. After 1946, however, parties simply shifted to relying upon the new language to define the scope of discovery, prompting a further attempt by the Committee during the 2000 revisions to clarify their original intent, which the Committee acknowledges also failed. *See also* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 ("Despite the original intent of the sentence and the 2000 clarification, lawyers and courts continue to cite the 'reasonably calculated' language as defining the scope of discovery. Some even disregard the reference to admissibility, suggesting that any inquiry 'reasonably calculated' to lead to something helpful in the litigation is fair game in discovery.").

45. Interpreting its own 2000 Committee Note which stated that "relevant means within the scope of discovery as defined in this subdivision [(b)(1)][,]" the 2014 Committee states that "[t]hus, the 'reasonably calculated' phrase appli[d] only to information that [was] otherwise within the scope of discovery set forth in Rule 26(b)(1); it *d[id] not broaden the scope of discovery*." SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 (emphasis added). However, that interpretation of the Note was not always practiced. Rather, the scope of discovery continued to be abused not only by lawyers, but by courts as well. *See supra* notes 32, 39–43 (discussing the misinterpretation of the proportionality limitations by courts). Thus, the 2014 Advisory Committee's intent is that "[t]he proposed amendment will eliminate this *incorrect reading of Rule 26(b)(1)* while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information." SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-10 (emphasis added).

basis for their objections "with specificity."[46] Under the revised Rule 34(b)(2)(C), if such an objection is made, the objection must further state whether any responsive materials are being withheld.[47] The memo released by the Advisory Committee indicates how the new rule will read:

> [(b)(2)] Responses and Objections.
> (A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or—if the request was delivered under Rule 26(d)(2)—within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.
> (B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.
> (C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.[48]

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46. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-53 ("Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity.").

47. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-53 ("The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection.").

48. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-51–53. The proposed additions are underscored and the proposed deletions are struck-through.

The first portion of underlined language in Section (B) and the underlined language in Section (C) will serve to prevent parties from responding to certain discovery demands with boilerplate, non-specific objections.

The Advisory Committee explains that adding the "specificity" requirement and the requirement to state what, if anything, is being withheld are both collectively necessary to eliminate the burdens imposed when the producing party—for tactical reasons—makes several vague, conclusory, or non-specific objections, yet still produces some information.[49] In such a situation, the requesting party is burdened because they are uncertain whether any relevant and responsive information has been withheld, and if so, what information, and on what basis.[50]

The revised Rule 34 also enumerates what the Advisory Committee describes as the "common practice" of parties producing copies of documents or electronically stored information instead of allowing inspection.[51] This revision has a corollary amendment, found in Rule 37, which will be discussed further below.[52]

B. The Duty of Cooperation: Federal Rules 1, 37, 26(f), and 26(g)

The changes to the Federal Rules seek to ensure that parties cooperate more than they have under the current rules in order to resolve discovery disputes. In an attempt to increase cooperation among parties, one of the changes to Rule 1 attempts to highlight the parties' purported duty to cooperate.[53] The Duke Conference identified and sought to remedy the overall problem of parties engaging in improper behavior during the discovery phase of litigation. Thus, the Duke Conference attempted to ensure that all entities—now including the parties themselves—involved in a lawsuit must cooperate lest they violate the spirit of the rules. The new rule reads: "Rule 1. Scope and Purpose. [These rules] should be construed, ~~and~~ administered, and employed by the court and the

49. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-11.
50. MAY 2013 RULES REPORT, *supra* note 36, at 26–27.
51. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-54.
52. *See infra* Part I(B).
53. Morris, *supra* note 14, at 140.

parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[54] With this change, the Advisory Committee hopes to "emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."[55]

It remains to be seen whether this revision will greatly affect the manner in which discovery is conducted, given that the ideal of cooperation and the duty to act in good faith is already contained in the Federal Rules. Elsewhere in the rules, there are commands that parties cooperate in order to prevent unnecessary cost, delay, and judicial time that is spent resolving disputes. Federal Rule 37(a)(1) already requires that parties certify in any motion to compel disclosure or discovery that they have "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain [disclosure or discovery] without court action."[56] A revision to Rule 37(a)(3)(B)(iv), added to mirror the previously discussed addition to Rule 34(b)(1) concerning inspection of documents, now provides that a motion to compel a discovery response may be made if "a party fails to produce documents or fails to respond that inspection will be permitted."[57]

Another change to Rule 26(f)(2) makes parties "jointly responsible" for "attempting in good faith to agree on the proposed discovery plan," an outline of which must be submitted to the court in writing within fourteen days after the Rule 16 scheduling conference.[58] The existing Rule 26(g)(1)(B), which requires attorneys' signatures on discovery requests, responses, and objections, forbids parties' attorneys from engaging in dilatory or disingenuous discovery activities.[59] Rule 26(g)(1)(B)(i) requires that requests, responses, and objections be consistent with the rules, laws,

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54. MAY 2013 RULES REPORT, *supra* note 36, at 17 (presenting the Duke Rules Package to the standing committee).

55. *Id.* (describing the purpose of the amendments to Rule 1).

56. FED. R. CIV. P. 37(a)(1).

57. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-55 (underlined text is newly added to existing rule).

58. FED. R. CIV. P. 26(f)(2).

59. FED. R. CIV. P. 26(g)(1)(B).

or some other "nonfrivolous argument" for modifying the existing law.[60] Rule 26(g)(1)(B)(ii) requires that parties not interpose requests, responses, or objections for "improper purpose[s]," such as harassment, delay, or needless increase of cost.[61] Lastly, the existing version of Rule 26(g)(1)(B)(iii) explicitly requires that parties consider proportionality.[62]

Cooperative duties, similar to those found in Rule 37 and envisioned by the revised Rule 1, are sometimes also apparent in local rules of specific courts. The District Courts for the Southern and Eastern Districts of New York make provisions for efficient and cooperative resolution of discovery disputes, although these provisions vary slightly. The Eastern District requires parties to attempt to resolve disputes before the court will hear discovery motions, while the Southern District requires the parties to attempt to resolve any disputes before seeking assistance from the court.[63] The District Court of Maryland also features a local rule requiring conference between counsel before the court will consider any motion.[64]

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60. FED. R. CIV. P. 26(g)(1)(B)(i).

61. FED. R. CIV. P. 26(g)(1)(B)(ii).

62. *See generally* FED. R. CIV. P. 26(g)(1)(B) ("[Attorneys must acknowledge discovery is] neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.").

63. *Compare* S.D.N.Y. & E.D.N.Y. LOCAL CIV. R. 37.3, 38, *available at* http://www.nysd.uscourts.gov/rules/rules.pdf ("Prior to seeking judicial resolution of a discovery or non-dispositive pretrial dispute, the attorneys for the affected parties or non-party witness shall attempt to confer in good faith in person or by telephone in an effort to resolve the dispute, in conformity with Federal Rule of Civil Procedure 37(a)(1).") *with* S.D. & E.D.N.Y. LOCAL CIV. R. 37.2, 37, *available at* http://www.nysd.uscourts.gov/rules/rules.pdf ("No motion under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall be heard unless counsel for the moving party has first requested an informal conference with the Court by letter-motion for a pre-motion discovery conference . . . and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference.").

64. *See* D. MD. LOCAL R. 104.7, 12 (Supp. 2012), *available at* http://www.mdd.uscourts.gov/localrules/LocalRules-Oct2012Supplement.pdf ("Counsel shall confer with one another concerning a discovery dispute and make sincere attempts to resolve the differences between them. The Court will not consider any discovery motion unless the moving party has filed a certificate reciting (a) the date, time and place of the discovery conference, and the names of all persons participating therein, or (b) counsel's attempts to hold such a

C. Increased Involvement of the Judge: Rules 4 and 16

The Duke Conference also concluded that "sustained, active, hands-on judicial case management" was essential to improving the disposition of civil actions under the Federal Rules.[65] As a result, the revisions to Rules 4 and 16 intend to ensure that judges become more involved, and involved earlier.[66]

The Committee also made various changes to Rule 16, deleting the provision that allowed the initial case management conference to be held "by telephone, mail, or other means," in order to foster a more direct, in-person series of exchanges between parties.[67] However, the Committee Note to the revised rule nevertheless provides that "[t]he conference may be held [...] by telephone, or by more sophisticated electronic means," so long as it remains consistent with the Committee's view that "[a] scheduling conference is more effective if the court and parties engage in direct simultaneous communication."[68] As such, it appears that a live video teleconference would still be permissible, especially if other alternatives would be unnecessarily burdensome.

Additionally, the rule reduces the timeframe for holding the conference. Under the rule, the conference must occur within the earlier of 90 days after any defendant has been served, or 60 days after any defendant has appeared; while the current rule provides that the conference must occur within the earlier of 120 days and 90 days, respectively.[69] The revisions to Rule 4 also reduce the

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conference without success; and (c) an itemization of the issues requiring resolution by the Court.").

65. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-2–3 (noting that after a year of reviewing several forms of data, there was near-unanimous agreement that the disposition of civil actions could be improved by early judicial case management).

66. *See* SEPT. 2014 RULES REPORT, supra note 7, at app. B-12 (discussing how the Committee recommended to reduce the time limit for serving the summons from twelve days to eight days).

67. *See* SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-25, B-27 ("A scheduling conference is more effective if the court and parties engage in direct simultaneous communication.").

68. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-27 (quoting the Committee Note).

69. *Id.* at B-25–26.

timeframe for serving summons and complaints from 120 days to 90 days.[70]

Finally, the revised Rule 16(b)(3)(B) provision discussing what the judge's scheduling order may include has a new addition that also speaks to heightened judicial case management. The new Rule 16(b)(3)(B)(v) provides that the scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court."[71] Thus, the revised rules envision an earlier and more active engagement of judges in discovery.

D. Withdrawn Changes: Discovery Mechanisms and Scheduling Timeframes

Certain proposed changes were withdrawn from the final draft of the rules after the comment period, in the face of strong opposition. These changes sought to dramatically limit the time and cost of discovery, and likely would have done so if adopted. Rule 30 currently governs the presumptive number of depositions and presently provides each party the opportunity to conduct ten depositions, with seven hours per deposition, whereas the rejected revision permitted each party to conduct five depositions, with six hours per deposition.[72] Rule 33 governs the permissible number of interrogatories, and presently provides for up to twenty-five per party whereas the rejected revision provided for fifteen interrogatories per party.[73] Rule 36 governs requests to admit, and currently has no standing numerical limit whereas the rejected revision had a presumptive limit of twenty-five requests to admit per party.[74]

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70. SEPT. 2014 RULES REPORT, *supra* note 7. at app. B-23.

71. *Id.* at B-27.

72. *See* MAY 2013 RULES REPORT, *supra* note 36, at 24 (discussing the Advisory Committee on Civil Rules Report to the Standing Committee for Rule 30).

73. *See* MAY 2013 RULES REPORT, *supra* note 36, at 25 ("The purpose [of the reduction in the presumptive number of interrogatories] . . . is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery devices.").

74. *See id.* at 27; *see also* Schaffer & Schaffer, *supra* note 14, at 198–99 ("Under the proposed revision, a party could serve on any other party twenty-five requests to admit, but the numerical limit would exempt requests to admit the authenticity of documents.").

Under the original proposed new rules, parties seeking discovery above and beyond the new permissible amounts would have had to seek leave from the judge. To the degree that judges—in light of the other rule changes—might have been hesitant to grant such extensions, these changes would likely have saved time and money in many cases, if adopted.[75] However, even if these proposed rules had been adopted, parties would still have been free to stipulate to more depositions for various reasons such as when "the need for more depositions is obvious where both parties require more depositions for expert witnesses or when the case involves complex litigation."[76]

E. Analysis

It is difficult at this stage to predict how the rule changes will affect discovery. It appears they will likely result in somewhat fewer discovery disputes and an overall decrease in the cost and length of discovery; however, the limited nature of the changes suggests that the impact may actually not be dramatic. The "Duty of Cooperation" change to Rule 1, for example, which does not even explicitly use the word "cooperation," although its purported purpose was to create a meaningful duty to do so, may be insufficient to achieve its purpose. As noted above, the duty to cooperate already exists in the current version of the Federal Rules but has proven ineffective at preventing detrimental behavior of counsel. Moreover, what constitutes a breach of the revised "duty" under the revised rule is unclear and leaves it to judges to determine whether or not a breach

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75. *See* Morris, *supra* note 14, at 156 ("Requesting more depositions or discovery devices when leave from the court is required, however, is more difficult. Such a request would be subject to the new proportionality requirement that balances cost, burden, benefit, previous opportunity to obtain the requested information, and whether the request is duplicative or cumulative.").

76. *Id.*; *see also*, Advisory Comm. on Rules of Civil Procedure, Draft Agenda Book of the April 11-12, 2013 Meeting of the Advisory Committee on the Rules of Civil Procedure, 95 (2013)), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf (describing how the changes to Rule 30 would have continued to direct the court that it "must" grant leave to take more depositions to the extent consistent with Rule 26(b)(1) and (2), and that "Rule 30(a)(2)(A) continues to recognize that the parties may stipulate to a greater number").

has occurred, and whether sanctions would be an appropriate remedy.[77]

Beyond the obvious problems of uniformity and consistency, at present, imposing sanctions upon attorneys for clear misbehavior is currently a relatively limited occurrence due to what appears to be a fairly high standard; the available examples suggest that the rules would need to provide a more explicit command for judges to impose sanctions more often to be successful.[78] As the current Rules 26, 34, and 37 stand, commentators have argued that although sanctions are clearly appropriate in some situations—such as boilerplate objections or refusals to respond to discovery requests—the rules are "much less helpful when it comes to regulating subtle discovery abuses," and because of the "good cause" standard of Rule 26(b)(1), "courts tend to let the vast majority of discovery requests pass without in-depth review."[79] Even the previously discussed District of Maryland, whose courts have "'stressed the importance of cooperation during discovery' and have indicated the

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77. *See* Grimm & Yellin, *supra* note 11, at 506 (discussing how there are "common complaints" that sanctions for failure to follow the discovery rules are "seldom imposed," based on a "reluctance to impose sanctions for discovery violations" by the courts).

78. In the context of "spoliation" discovery sanctions, the Advisory Committee indicates that the desire to maintain a uniform standard has led the rules to require "'reasonable steps,' which can be seen as a form of culpability." *See* Judicial Conference of the U.S., Minutes of the Advisory Committee on Rules of Civil Procedure 23 (April 10–11, 2014), http://www.uscourts.gov/file/15093/download (stating that "the revised proposal . . . is limited to circumstances in which a party failed to take reasonable steps to preserve, . . . thus embracing a form of 'culpability'"). In practice, Judges have long been reluctant to sanction even conduct which crossed the line of objective "bad faith," although there is evidence that they pay attention to such a showing as an important part of the calculus. *Compare* Day v. Allstate Ins. Co., 788 F.2d 1110, 1113 (5th Cir. 1986) (dismissing a claim where failure to cooperate amounted to "willful, in bad faith, and 'in callous disregard for the obligations of [the other] party. . .'") *with* Eby v. Target Corp., No. 13-10688, 2014 WL 941906, at *5 (E.D. Mich. Mar. 11, 2014) (refusing to sanction for failure to preserve "without a showing of culpability"). The rarity of judges sanctioning attorney conduct has, finally, given rise to some anecdotes based on cases where judges have actually done so. *See* Morris, *supra* note 14, at 141 n.82 (citing a 2011 "Above the Law" article describing how a judge once ordered attorneys to a "kindergarten party" because they failed to be reasonable and civil to one another).

79. Mitchell London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS 837, 853 (2013).

appropriateness of sanctions such as precluding a party's experts from testifying at trial and granting summary judgment to 'deter severely abusive litigation practices,'"[80] seems to "require a higher threshold—of subjective bad faith or lack of substantial justification—to sanction attorneys for discovery misconduct under the Rules."[81]

Some commentators have also raised the question of a potential burden shift concerning which party must first demonstrate proportionality. Previously, the burden was "on the producing party to make a 'particular and specific demonstration of fact' supporting any contention that discovery [requests were] disproportionate. The party seeking a protective order 'ha[d] the burden of demonstrating good cause' and must [have] offer[ed] specific support for its motion beyond mere conclusory statements."[82] The revisions to Rules 26 and 34 arguably could reverse these roles. At least one state has already enacted discovery reforms which mirror the federal changes, and this state construed its own rules to mean that the "'party seeking discovery always has the burden of showing proportionality and relevance.'"[83]

There is at least some basis to argue that such a reversal could happen as a result of the 2015 revisions. In *Oppenheimer Fund, Inc. v. Sanders*, the Supreme Court explained that a district court judge could, under certain circumstances, require the requesting party to pay for discovery costs, stating:

> Under [the discovery rules], the presumption is that the responding party must bear the expense of complying with discovery requests, but he may

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80. Paul W. Grimm, Ilan Weinberger & Lisa Yurwit, *New Paradigm for Discovery Practice: Cooperation*, MD. B.J., Nov.–Dec. 2010, at 26, 30 (quoting PAUL W. GRIMM, CHARLES FAX & PAUL MARK SANDLER, MARYLAND DISCOVERY PROBLEMS AND SOLUTIONS 245 (2008)).

81. *See id.* (noting a difference in thresholds on discovery abuse sanctions, even though the Maryland and Federal rules "yield parallel sanctions").

82. Morris, *supra* note 14, at 148 n.150 (citing Cartel Asset Mgmt. v. Ocwen Fin. Corp., No. 01-CV-01644-REB-CBS, 2010 WL 502721, at *10 (D. Colo. Feb. 8, 2010); Aikens v. Deluxe Fin. Servs., Inc., 217 F.R.D. 533, 534 (D. Kan. Aug. 5, 2003)) (footnote omitted).

83. Morris, *supra* note 14, at 147 (quoting UTAH R. CIV. P. 26(b)(1)–(3)).

> invoke the district court's discretion under Rule 26(c) to grant orders protecting him from "undue burden or expense" in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.[84]

Looking at this text anew and integrating the revised versions of Rules 26(b) and 34, the discretionary protection (for which the producing party must currently attempt to argue) becomes significantly less discretionary if it is possible to argue the requesting party sought disproportionate discovery in the first place. Under the revised rules, it appears that a party moving for protection under Rule 26(c) could argue that the requesting party failed to meet the proportionality requirement now explicitly stated in Rule 26(b)(2), rather than the previous, weaker requirement which was buried in a later part of Section (b), and therefore often ignored by judges. These factors could result in a de facto burden reversal: a judge who consistently applies the revised Rule 26(b)(1) as a matter of course might *not* allow discovery if the requesting party cannot, at the time it makes a discovery request, explain why its request is "proportional."

The current Supreme Court arguably might endorse such a reading and hold that, under a revised rule, the burden to show proportionality is on the party seeking discovery. The argument for this is based upon the Court's various civil procedure decisions since 2007. In a recent article, Arthur Miller argues that compared to the 1938 language, the 2000 changes to Rule 26 "sen[t] a signal . . . with rather Delphic qualities" with regard to the question of burden.[85] Shifting to the pending changes as they appeared in 2013, Miller then highlights the conceptual similarity of placing the burden to show proportionality on the party seeking discovery with placing what Miller sees as a quasi-factual burden upon the plaintiff during the pleadings before discovery occurs.[86]

According to Miller, in the pleadings stage of litigation, *Twombly* and *Iqbal* effectively, but impermissibly, re-wrote Rule 8

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84. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

85. Miller, *supra* note 23, at 355.

86. *See* Miller, *supra* note 23, (discussing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

in a way that forces plaintiffs to "protectively negate potential defenses" at the pleadings stage.[87] Miller added that to do so created "too much potential for inappropriate merit determinations—based only on the complaint—in the *Iqbal* regime."[88] This type of doctrine was "inappropriate," because, in Miller's view, because questions of the "plausibility" of "facts" under *Twombly* and *Iqbal* can potentially make motions to dismiss "morph into a trial-type inquiry" before discovery has actually occurred.[89] There is an obvious, inherent "information asymmetry" at the outset of most litigation, which *Twombly* and *Iqbal* can fairly be said to have protected in favor of the original vital information holder at the pleadings stage. By doing this, *Twombly* and *Iqbal* made cases less likely to proceed, and therefore less likely to be resolved on the merits.[90]

The *Twombly* and *Iqbal* holdings favored certain institutional entities depending on the case because information which is legally necessary for plaintiffs to have to survive pleadings, is typically "entirely in the defendant's possession and unavailable to the plaintiff."[91] This mirrors discovery concerns if—as it appears might happen under the new rules—discovery is revised to require plaintiffs to speak intelligently about proportionality before they know what information is potentially discoverable. As a result, Miller argues for a conceptual link between what occurred in *Twombly* and *Iqbal* and what might happen as a result of the amendments pertaining to discovery. However, Miller reasons that

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87. Miller, *supra* note 23, at 355.

88. *Id.* at 333–34, 335–36.

89. *See id.* at 338–39 ("What seems to have been overlooked in the current rush to judgment is that sometimes what appears implausible on the face of a complaint proves quite plausible when illuminated by discovery."); *see also* Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 1016–17 (2012) ("Because the requesting party did not know what would be produced, it was impossible to know in advance whether it would produce relevant information.").

90. *See* Miller, *supra* note 23, at 340–41 ("Twombly and Iqbal have shifted this information-access balance so that it favors those defendants best able to keep their records, conduct, and institutional secrets to themselves.").

91. *See id.* (noting that "[i]n many contemporary litigation contexts," the information needed is complex and unavailable to the plaintiff, and that it is "futile and a bit absurd to tell someone to plead what he or she does not know and cannot access").

"judicial 'common sense' suggests that, when a plaintiff has no economically or logistically reasonable way of unearthing important information that is in the possession of the defendant, the plausibility barrier needs to be lowered somewhat *to allow some contained discovery*."[92]

By similar logic, that same outcome arguably might result from the revised discovery rule. *Twombly* and *Iqbal* "offered three propositions to justify the changes they were making in the pleading regime: (1) the threat of abusive litigation behavior and frivolous lawsuits is present; (2) the possibility of extortionate settlements against businesses must be avoided; and (3) litigation is expensive."[93] These concerns effectively mirror some of the concerns that caused the push for discovery reform. Some of the discovery practices that led to the revised rules would also fall well within the ambit of "abusive litigation behavior."[94] In addition, some commentators and the participants at the Duke Conference explicitly noted broad discovery has driven up the price of litigation.[95] Given these clear similarities, there is a good basis upon which to argue that if the revised Rule 26 is adopted, the Court could find that the burden to satisfy strengthening proportionality and narrowing "relevance" requirements will indeed fall upon the party seeking the discovery, for reasons similar to those which contributed to the outcomes seen in *Twombly* and *Iqbal*.

The Advisory Committee was aware of these (and similar) arguments, and attempted to establish a clear position that such burden reversals would not result from the revised rules. The Committee acknowledged arguments that the new proportionality calculus would favor defendants, become a new "blanket objection" to all discovery requests, "impose[s] a new burden on the requesting party to justify each and every discovery request," or that cost shifting—consistent with *Oppenheimer*, which the Committee

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92. Morrison, *supra* note 89, at 341 (emphasis added).

93. *Id.* at 360.

94. *See* Miller, *supra* note 23, at 361 (linking "abusive litigation behavior" to some cases of "motions and discovery requests and objections that should not have been made.").

95. *See* 2010 REPORT TO THE CHIEF JUSTICE, *supra* note 9, at 7 (noting that the Conference discussions included the "costs, delays, and abuses imposed by overbroad discovery demands").

specifically mentioned—would become a common practice.[96] As a result, the Committee Note explains:

> Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.
>
> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.[97]

Later on in the same note, the Committee also emphasized that as far as cost-shifting is concerned, "[r]ecognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the cost of responding."[98]

II. DIFFERENT ARBITRATION REGIMES AND CHALLENGES POSED BY PARTY CHOICE

Attempting to generally describe rules that govern discovery in arbitrations would be akin to attempting to generally describe a set of rules which apply to all types of professional sports. First, there are many different contexts in which arbitrations occur: international, domestic, securities, consumer, small claims, and court-annexed programs, to name a few. Second, various organizations administer arbitrations, and each has its own sets of rules. Third, the nature of arbitration—a party-driven dispute resolution mechanism—does not lend itself to establishing a set of rules that will apply in all contexts. Thus, it is beyond the scope of this Article—or perhaps any article—to examine the rules and regimes for all arbitrations because in the context of arbitration, a

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96. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5, B-11.
97. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-39.
98. *Id.* at B-45.

one-size-fits-all approach to arbitration does not exist and, for reasons discussed below, would be impracticable.

This Part focuses on the Judicial Arbitration and Mediation Services' (JAMS)[99] and the American Arbitration Association's (AAA) rules used for commercial arbitrations to describe the regimes used to decide many domestic commercial disputes, before finally comparing these rules to the revisions to the Federal Rules.[100]

A. JAMS

Founded in 1979, JAMS is the "largest private alternative dispute resolution (ADR) provider in the world," and employs almost 300 full-time neutrals, including retired judges and attorneys.[101] JAMS arbitration and mediation services provide various sets of rules and procedures, including the comprehensive and streamlined rules and procedures to govern arbitrations.[102]

The Comprehensive Arbitration Rules and Procedures (Comprehensive Rules) govern binding arbitrations administered by JAMS unless the parties provide for other rules in their arbitration agreements.[103] Under the Comprehensive Rules, discovery is largely controlled by Rule 17, which is titled: "Exchange of Information."[104] Rule 17 states that parties "shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ('ESI')) relevant to the dispute or claim immediately after

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99. JAMS was formerly known as Judicial Arbitration and Mediation Services.

100. Although arbitration is used extensively to resolve international disputes, it is beyond the scope of this Article to discuss international arbitration. Thus, this Article focuses on domestic commercial arbitration.

101. *About JAMS*, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/aboutus_overview/ (last visited Apr. 5, 2015).

102. ADR Clauses, Rules, and Procedures, JAMS ARB., MEDIATION, & ADR SERVICES, http://www.jamsadr.com/rules-clauses/ (last visited Apr. 5, 2015 (referring to specific rule bodies, the "Comprehensive" and "Streamlined" rules. JAMS also features "Class Action," "Construction," and "Employment" arbitration rules, which are not discussed in this Article).

103. JAMS COMPREHENSIVE ARB. R. 1 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

104. *Id.*

commencement of the Arbitration."[105] The Rule also provides that "[e]ach Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party," and that "[t]he necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options[,] and the burdensomeness of the request on the opposing Parties and the witness."[106]

Under the "Streamlined Rules,"[107] exchange of information is governed by Rule 13.[108] Rule 13 initially provides the same language as Rule 17, and states that parties "shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information ('ESI')) relevant to the dispute or claim";[109] thereafter, these two rules differ. Under Rule 13, parties must provide:

> copies of all documents in their possession or control on which they rely in support of their positions or that they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim[,] and the names of all experts who may be called upon to testify or whose reports may be introduced at the Arbitration Hearing.[110]

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105. JAMS COMPREHENSIVE ARB. R. 17 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/ (internal quotation marks omitted).

106. *Id.*

107. The streamlined rules "govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds $250,000, not including interest or attorneys' fees, unless other Rules are prescribed." JAMS STREAMLINED ARB. R. 1 (2014), *available at* http://www. jamsadr.com/rules-streamlined-arbitration/.

108. JAMS STREAMLINED ARB. R. 13. (2014), *available at* http://www. jamsadr.com/rules-streamlined-arbitration/.

109. JAMS STREAMLINED ARB. R. 13 (2014), *available at* http://www. jamsadr.com/rules-streamlined-arbitration/.

110. *Id.*

This Rule states that the parties and the arbitrator must make every effort to conclude the document and information exchange process within fourteen calendar days after all pleadings and notice of claims have been received, and that the necessity of any additional information "shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options[,] and the burdensomeness of the request on the opposing Parties and the witness."[111] There is no provision in the Streamlined Rules that explicitly provides for depositions.

JAMS allows, through mutual agreement by both parties, the use of two rules providing for "Expedited Procedures," which are found in Rules 16.1 and 16.2 of the Comprehensive Rules.[112] JAMS has included these two rules within the Comprehensive rules since 2010.[113] Pursuant to Rule 16.1, these two Expedited Procedures take effect if they "are referenced in the Parties' agreement to arbitrate or are later agreed to by all Parties."[114] Rule 16.2 narrows discovery in terms of both timeframe and subject matter.[115] Under the Expedited Procedures, the arbitrator "shall require" parties to "confirm in writing" that they have complied with the Rule 16.2(a) duty to cooperate in a good-faith, voluntary exchange of documents and information, and parties must do so prior to the arbitrator conducting the preliminary conference.[116]

JAMS Rule 16.2 limits document requests to documents "directly relevant to the matters in dispute or to its outcome," which are "reasonably restricted in terms of time frame, subject matter[,] and persons or entities to which the requests pertain," and prohibits

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111. JAMS STREAMLINED ARB. R. 13 (2014).

112. JAMS COMPREHENSIVE ARB. R. 16.1–2 (2010), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Comprehensive_Arbitration_Rules-2010.pdf..

113. Meredith N. Reinhardt, *JAMS Issues New Optional Expedited Arbitration Procedures*, IN-HOUSE LITIGATOR, Winter 2011, at 1, 1.

114. JAMS COMPREHENSIVE ARB. R. 16.1 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

115. JAMS COMPREHENSIVE ARB. R. 16.2 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/ (limiting document requests to documents "directly relevant to the matters in dispute or to its outcome," and requiring that they be "reasonably restricted in terms of time frame, subject matter, and persons or entities to which they pertain," and prohibiting the use of "broad phraseology," or extensive "definitions" or "instructions").

116. *Id.*

the use of "broad phraseology."[117] The rules limit e-discovery and include a proportionality requirement relating to e-discovery.[118] Finally, although the expedited rules do not eliminate the single deposition provided by Rule 17(b) provides—the language of Rule 16.2(d)(i) contains strong language directing the arbitrator to limit depositions—these expedited rules direct the arbitrator to examine the amount in controversy, the complexity of the factual issues, the number of parties, the diversity of parties' interests, and whether any of the claims may have merit to justify the time and expense of the requested discovery.[119]

The two Expedited Rules are optional, and are invoked at the will of all parties.[120] In situations where the parties do not invoke the Expedited Rules, however, the normal Rule 16 states that at the request of any party, or at the direction of the arbitrator, a preliminary conference will be conducted.[121] This conference may address matters such as the exchange of information pursuant to Rule 17, the discovery schedule "as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law," pleadings, any agreement to clarify or narrow the issues at stake in the arbitration, scheduling of the hearing, potential dispositive motions, attendance of witnesses, and various other matters which parties or arbitrators suggest.[122] However, parties are not required to confirm prior compliance in writing before the preliminary conference occurs, as they would be under the Expedited rules.[123] By confirming compliance in writing under the Expedited Rules, parties enter the preliminary conference essentially having stated that they have either completed discovery, or having identified "any

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117. JAMS COMPREHENSIVE ARB. R. 16.2 (2014).

118. *See id.* ("Where the costs and burdens of e-discovery are disproportionate to the nature of . . . the materials requested, the Arbitrator may either deny such requests or order disclosure on the condition that the requesting Party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.").

119. *Id.* at 16.2(d)(i).

120. JAMS COMPREHENSIVE ARB. R. 16.1 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

121. JAMS COMPREHENSIVE ARB. R. 16 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

122. *Id.*

123. *See* JAMS COMPREHENSIVE ARB. R. 16.2 (2014).

limitations on full compliance and the reasons therefor," ensuring immediate attention to those issues.[124] In contrast, under the normal Rule 16, it is possible that parties are still in the process of exchanging information and discovery disputes may subsequently arise.

B. The American Arbitration Association

The American Arbitration Association (AAA) functions similarly to JAMS, in that it provides both arbitration services, as well as various bodies of rules for parties that opt to arbitrate their disputes. The AAA's "Commercial" rules include "Expedited Procedures," by which—similar to the JAMS Rules 16.1 and 16.2—parties may opt to be governed.[125]

The AAA discovery rule, R-22, governs "Pre-Hearing Exchange and Production of Information" and provides that "[t]he arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses."[126] This rule further provides that "[t]he arbitrator may, on application of a party or on the arbitrator's own initiative" require parties to exchange documents, update their exchanges, exchange non-disclosed documents, or produce documents in a particular form.[127]

Comparing the AAA rules to JAMS, the AAA R-22 adopts an arbitrator-defined conception of relevance while suggesting that the arbitrator consider proportionality, by directing the arbitrator to maintain an overall "view to achieving an efficient and economical resolution of the dispute."[128] In contrast, JAMS Rule 17 adopts a more objectively defined conception of relevance by outlining the meaning of the term itself; the JAMS rule requires that discovered

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124. JAMS COMPREHENSIVE ARB. R. 16.2 (2014).

125. AAA COMMERCIAL ARB. R. & MEDIATION P. R-1 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 ("Parties may, by agreement, apply the Expedited Procedures. . .").

126. AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

127. *Id.*

128. *Id.*

material be "relevant to the dispute or claim," and that the material be something "on which [the parties] rely in support of their positions" language.[129] The AAA rule states that an arbitrator must "[safeguard] each party's opportunity to fairly present its claims and defenses," but it does not contextualize the "claims and defenses" language further, and does not directly use the word "relevance."[130]

The AAA's R-33 permits dispositive motions at the arbitrator's discretion "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose[s] of or narrow[s] the issues in the case."[131] The AAA Rules do not explicitly prohibit depositions, but the rule only mentions depositions in the rules governing "Large, Complex Commercial Disputes."[132] Under Rule L-3, "In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of the arbitration, the arbitrator may order depositions . . . ."[133]

C. JAMS, the AAA, and the Federal Rules

JAMS and the AAA, because of the diversity of commercial disputes that their rules are meant to govern, simply cannot provide for very specific discovery rules applicable to all commercial arbitrations. Moreover, arbitration is meant to be a more flexible process tailored to the individual case and the parties' preferences. Nevertheless, the two rule regimes touch on the same fundamental points in attempting to describe and constrain discovery during arbitration. When they do so, they attempt to use—or, as the case may be, specifically distinguish from—concepts familiar to the Federal Rules: specifically, the concepts of party cooperation and the consideration of proportionality, and the definition of relevance.

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129. JAMS COMPREHENSIVE ARB. R. 17 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

130. AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

131. AAA COMMERCIAL ARB. R. & MEDIATION P. R-33 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

132. AAA COMMERCIAL ARB. R. & MEDIATION P. L-3(f) (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

133. *Id.*

Accordingly, before proceeding further, this subpart will compare those concepts, in light of how the different regimes contrast with the revisions to the Federal Rules.

1. Relevance

The current, non-revised Federal Rules permit broad discovery, which can involve documents that are not directly relevant to a claim or defense, but which have the potential to lead a party to other documents that do contain such information.[134] The 2015 revisions limit this language by removing the "subject matter" provision.[135] However, given that this provision is rarely invoked, this change is unlikely to lead to substantial changes. For JAMS, the relevance language contained in the two optional expedited rules appears similar to the revised definition of the 2015 Federal Rules. The JAMS rules explicitly state that document requests shall be limited to documents "directly relevant to the matters in dispute or to its outcome," be "reasonably restricted" in terms of "subject matter," and "not include broad phraseology."[136] Whereas the changes to Federal Rule of Civil Procedure 26 wholly eliminates mention of discovery for items "relevant to the subject matter,"[137] the JAMS rule preserves mention of subject matter; but, the use of the words "directly relevant" still indicates a fairly narrow conception of relevance.

However, the two "Expedited" JAMS rules contained in Rule 16 are only binding when parties agree to them; if they are not invoked, then parties will be operating under either the "Comprehensive" or "Streamlined" rules. Those rules rely upon "voluntary exchange" by parties cooperating in "good faith."[138] Both Rule 13 of the Streamlined Rules and Rule 17 of the

134. *See* discussion *supra* Part I(A) (discussing the "relevant to the subject matter" and "reasonably calculated to lead to" provisions).

135. *See* discussion *supra* Part I(A) (discussing the revised Rule 26 where the "reasonably calculated to lead to" admissible evidence provision is removed).

136. JAMS COMPREHENSIVE ARB. R. 16.2 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

137. *See* discussion *supra* Part I(A) (describing the revised text of Federal Rule of Civil Procedure 26).

138. JAMS STREAMLINED ARB. R. 13 (2013), *available at* http://www.jamsadr.com/rules-streamlined-arbitration/; JAMS COMPREHENSIVE ARB. R. 17 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

Comprehensive Rules provide that parties should be prepared to exchange all non-privileged documents and other information "relevant to the dispute or claim."[139]

The AAA's discovery rule, R-22, does not use the word "relevance" in Section (a) of the rule, and does not define "relevance" when it uses the word in Section (b) of the rule. In Section (a), R-22 frames the process of discovery in a way where the "arbitrator shall manage" whatever exchange of information takes place with a view towards economic efficiency, and equality of treatment; it does not approach the concept of relevance from a definitional perspective, but rather from that of the arbitrator's discretion.[140] Later in the R-22(b) when the word "relevance" is actually used, it defines relevance in relation "to the outcome of disputed issues."[141] By making initial discovery exchanges fully within the control of the arbitrator but providing for subsequent discovery of arguably "relevant" material not yet disclosed, the AAA rules are perhaps able to prevent more significant, extended discovery disputes later in the arbitration.

ii. Proportionality

The changes to proportionality contained in the 2014 revisions to the Federal Rules could arguably be considered a change without meaningful impact because a proportionality analysis was always intended by the framers of the Federal Rules—or it could be viewed as the latest in a process seeking to actually make substantive changes to the meaning of discovery.[142] At present, while

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139. JAMS STREAMLINED ARB. R. 13 *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/; JAMS COMPREHENSIVE ARB. R. 17.

140. *See* discussion *supra* Part II(B) (describing the text of the AAA rule).

141. *See* AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 (providing only that the arbitrator may require production of documents which are "relevant and material to the outcome of disputed issues").

142. *See, e.g.*, Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396, 404 (2001) ("The change in the language of Rule 26(b)(1) and its drafting history, including the debate over efforts to drop the change, all clearly suggest that the scope of discovery under new Rule 26(b)(1) is designed to be narrower than under old Rule 26(b)(1)."); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV.

proportionality exists in Rule 26(b)(2)(C)(iii), as previously discussed, there has been concern that it is not rigorously applied, arguably based on where it is located in the text of Rule 26 itself.[143] However, the Advisory Committee has made it clear that it is not seeking to bring about broad change—because proportionality has always been a consideration—but, instead, explains that these revisions merely seek to clarify how the proportionality provision is supposed to apply, and potentially increase the rate at which judges actually apply the provision.[144]

Both of the arbitration regimes discussed above have explicitly provided for some conception of proportionality within their rules. JAMS's Comprehensive Rules do not use the word "proportionality," but they use other words which clearly implicate the concept; the word "disproportionate" is used in Rule 16.2(c)(iv), which is one of the rules only applicable within the context of the optional, "expedited" procedures, and is only applicable to e-discovery.[145] Reference to "burden" or "burdensomeness" is made three times throughout the comprehensive rules: once in Rule 16.2(c)(iv); again in Rule 17(b) in the context of a party request for depositions above and beyond the single deposition provided for; and a third time in Rule 21, as a consideration for an arbitrator ruling on an objection to producing a subpoenaed person as a witness, or to other evidence.[146]

747, 747 (1998) ("[S]ince 1976, proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery . . . ."); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 191 (2006) ("The frequency of changes to the discovery rules—in 1983, 1991, 1993, 2000, and again in 2006—reflects an ongoing struggle to find fair and reliable means to contain discovery and keep it reasonably related to the needs of particular cases.").

143. *See* discussion *supra* Part I(A) (discussing Federal Rule of Civil Procedure 26).

144. *See* discussion *supra* Part I(A) (discussing Federal Rule of Civil Procedure 26).

145. *See* JAMS COMPREHENSIVE ARB. R. 16.2 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/ ("When the costs and burdens of e-discovery are disproportionate to the nature of the dispute . . . the Arbitrator may . . . deny such requests.").

146. JAMS COMPREHENSIVE ARB. R. 16.2(c)(iv), 17(b), 21 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/ (noting that Rule 16.2(c)(iv) is concerned with when "the costs and burdens of e-discovery are

To the degree that the financial burdens inflicted by burdensome or disproportionate discovery are arguably part of the question of proportionality in the eyes of the Federal Rules,[147] JAMS and AAA do not seem to address costs in the discovery context. Under JAMS's rules, costs are mentioned in the context of e-discovery, but afterwards only mentioned in non-discovery situations such as Rule 22(k)(i), which provides that a party requesting a stenographic record bears the cost unless there is some agreement to share the cost among the parties.[148] The only other usage of the word "cost" in the discovery context is in Rule 24(g), which authorizes an arbitrator to determine reasonable attorneys' fees in part based on "the failure of a Party to cooperate reasonably in the discovery process and/or comply with the [a]rbitrator's discovery orders" when this "caused delay to the proceeding or additional costs to the other [p]arties."[149]

The AAA perhaps takes a slightly stronger stance on including proportionality as an explicit requirement to be considered in all discovery contexts, but when it does so, it adopts language different than the term "proportionality." In R-22, the AAA commands the arbitrator to "manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute."[150] This is similar to the revisions to the 2015 rules in that the concept itself—regardless of the words chosen to represent it—makes an appearance in the

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disproportionate"; Rule 17 is concerned with "the burdensomeness of the request on the opposing Parties and the witness"; and Rule 21 is concerned with weighing "the burden on the producing Party and witness" with the proponent's need for the evidence).

147. *See* discussion *supra* Part I(A) (discussing how after being revised to strengthen proportionality, Rule 26(b)(1) mentions "burden or *expense* of the proposed discovery" as one of the factors to be considered) (emphasis added) *and* discussion *supra* Part I(A) (acknowledging, under *Oppenheimer*, that the default rule is that costs will be paid by the party responsible for production).

148. JAMS COMPREHENSIVE ARB. R. 22 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

149. JAMS COMPREHENSIVE ARB. R. 24 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

150. AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013) (emphasis added), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

primary text of R-22, immediately following the name of the rule.[151] Furthermore, in R-23, which lays out the enforcement powers of the arbitrator, the AAA gives arbitrators the license to "[i]ssue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation: . . . (c) allocating *costs* of producing documentation, including electronically stored documentation."[152]

iii. Objections to Discovery

The 2015 revisions to the Federal Rules make clear that objections to requested production must clarify what documents are being withheld and state the reasons for withholding such documents.[153] JAMS and the AAA lack any such standard for objections.

iv. Cooperation

As noted above, the changes to Rule 1 of the Federal Rules are meant to create a duty of cooperation, but this does not appear to be a strong mandate. However, it may have the effect of strengthening other mandates for judges to enforce cooperative practices by parties, such as those found in Rule 37 and Rule 26 (f)–(g).[154] JAMS's rules rely upon "voluntary exchange" by parties cooperating in "good faith."[155] In contrast, AAA's rules are framed from the arbitrator's perspective;[156] starting with an emphasis on what the arbitrator may or may not permit, arguably suggesting a more arbitrator-centered mode of control which is akin to some of

151. *See* AAA COMMERCIAL ARB. R. & MEDIATION P. R-22 (2013) (discussing the balancing required of an arbitrator).

152. AAA COMMERCIAL ARB. R. & MEDIATION P. R-23(c) (2013) (emphasis added), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103.

153. *See* discussion *supra* Part I(A) (discussing the specificity requirement).

154. *See* discussion *supra* Part I(B) (discussing the duty of cooperation).

155. *See* JAMS COMPREHENSIVE ARB. R. 17 (2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/ ("The Parties shall cooperate in good faith in the voluntary and informal exchange of . . . information.").

156. *See supra* Part II(C)(1) (construing R-22).

the efforts under the Federal Rules to increase managerial judging.[157] Such a reading of the AAA rules is, however, consistent with AAA's advocacy of what it refers to as "muscular arbitration," which aims to make arbitration discovery less costly and more efficient by empowering arbitrators to forcefully take charge of proceedings through use of discretion.[158]

III. RECENT EFFORTS TO MAKE DISCOVERY IN ARBITRATION LESS COSTLY

Arbitration is largely susceptible to the parties' deliberate choices. Parties sometimes insist upon broad discovery, and arbitrators sometimes believe they are obligated to permit practices that are detrimental to an efficient, cost-effective resolution of the dispute because of the apparent will of the parties. Also, many arbitrators simply believe that it is not their place to take a strong, "managerial" approach to their duties, absent the parties' explicit consent.[159] Over the past ten to fifteen years, commercial arbitrations have arguably become increasingly similar to litigation because of these factors. This Part will first seek to describe this trend. It will then examine some of the ways in which various institutions have attempted to address it. Finally, it will suggest that the revisions to the Federal Rules, if taken to heart by the legal

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157. *See supra* note 21 and accompanying text (discussing the Duke Conference's determination that there was a need for "early and active judicial case management").

158. *See infra* Part III(B) (discussing "muscular arbitration" as one of the ways to lower the cost of arbitration by reversing the litigation trend in arbitration discovery).

159. *See* DISPUTE RESOLUTION SECTION, N.Y. STATE BAR ASS'N, GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF DOMESTIC COMMERCIAL ARBITRATIONS AND GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS 11 (2010), *available at* http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf ("Section 10 of the Federal Arbitration Act provides that one of the very few ways an arbitration award can be vacated is 'where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy.' Some arbitrators tend to grant extensive discovery out of concern that any other approach might lead to a vacated award under Section 10.").

community, may inevitably have an effect upon arbitration and be marginally helpful towards reversing this trend.

A. Evidence of the Litigation Trend in Arbitration

Recently, arbitrations have become more like litigation, particularly in the realm of discovery. The arbitration discovery process has become lengthier and more costly. In a recent article, Thomas Stipanowich and Ryan Lamar describe two separate surveys of corporate counsel; the first was circulated in 1997 and the second in 2011.[160] The original 1997 survey was taken during the "Quiet Revolution," a term used to describe the transformation of American conflict resolution during the latter decades of the twentieth century, a period that also saw the "Vanishing Trial" partially due to the rise of ADR and the costs of litigation.[161] The 1997 survey suggested that at that particular point in time, "almost seventy percent [of respondents] indicated they chose arbitration because it saved time (68.5%) or saved money (68.6%)."[162] A majority indicated that arbitration "afforded a more satisfactory process than litigation and limited the extent of discovery."[163]

Perhaps ominously, the 1997 respondents "expressed views that arbitration might be improved by introducing elements analogous to litigation," despite the fact that the "Quiet Revolution" was "[s]purred by the need to develop alternatives to the high costs and risks associated with litigation"[164]—in particular, from discovery. By the time of the 2011 survey however, a somewhat different picture of the respondents' perceptions of arbitration had emerged. This perception appeared to have reversed that particular position on litigation-style discovery: In the 1997 survey, 59.3% of respondents stated that "limited discovery" was a compelling reason to use arbitration over litigation; by 2011, that percentage had dropped to 51.5%.[165] Although still more than half, the downward

160. STIPANOWICH & LAMARE, *supra* note 2, at 4–5.

161. *See id.* at 9–10 (discussing the "unprecedented changes" to conflict resolution procedures happening at the time of the "Quiet Revolution").

162. *Id.* at 16–17.

163. *Id.*

164. *Id.* at 8–9.

165. *Id.* at 37.

shift is an indication of the degree to which discovery practices changed over the fifteen years between the two surveys.

At the time of the 1997 survey, many corporate attorneys were either less experienced or wholly inexperienced with the arbitration process.[166] Whereas by 2011 "during the course of repeatedly using and participating in ADR processes, attorneys ha[d] actually changed those processes. In some cases the transformation ha[d] made alternatives to litigation more like the very thing they were designed to replace—more formal, more adversarial, lengthier and more expensive."[167] Across the board, more companies "viewed cost as a barrier to the use of arbitration."[168] Although from the mid-1980s to 1997, arbitration seemed to ride a rising tide of widespread usage, the 2011 survey reported that "half of the survey respondents [thought] it unlikely that their company [would] use arbitration in the future."[169]

While these surveys are very useful, it is unclear to what extent they indicate that in-house counsel have significantly decreased their use of arbitration. Although the 2011 survey indicated that since 1997 leading businesses had decreased the use of binding arbitration across several different types of disputes, the number of commercial arbitrations administered by the AAA has not changed significantly.[170] Since 2003, the AAA's commercial arbitration caseload has fluctuated between a high of 13,600 (2003) and a low of 11,355 (2007). Most recently, the caseload number was 12,680 in 2012.[171]

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166. This factor—counsel's better familiarity with litigation and litigation style discovery—potentially explains, at least in part, the expressed desire in 1997 to see the introduction into arbitration of some elements analogous to litigation discovery.

167. STIPANOWICH & LAMARE, *supra* note 2, at 40.

168. *Id.* at 54.

169. *Compare id.* at 63 (discussing survey results), *with* DAVID LIPSKY & RONALD SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 29 (1998), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=icrpubs ("More than 29 percent said they were unlikely or very unlikely to use arbitration in the future. . . .").

170. STIPANOWICH & LAMARE, *supra* note 2, at 19–22.

171. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* 6 (Pepperdine

B. *Attempts to Reverse the Litigation Trend in Arbitration Discovery*

Although arbitration has experienced a trend towards litigation, in the past five years there has been a push back against that trajectory. However, because arbitration is inherently a party driven process, it is difficult to curtail undesirable litigation-style discovery practices through changes in the arbitration rule regimes themselves. Parties must choose to arbitrate under JAMS or the AAA rules for their respective rules to apply, but those parties can at the same time contractually modify how those rules will actually be implemented; as such, if a party wishes to provide for the AAA rules, but with discovery "consistent with the Federal Rules" in the governing contract, no arbitrator would be able to ignore such a command. If JAMS or the AAA were to adopt an inflexible discovery regime and prohibit parties from attempting to modify discovery rules, it would undermine the inherent principle of arbitration and drive potential users away. Because their rules must apply to a very broad array of disputes, arbitration providers like JAMS and the AAA cannot severely or unilaterally attempt to restrict discovery through the mechanism of their rules.

At present, one set of solutions focuses upon the arbitrators themselves. Although arbitrators cannot blatantly ignore explicit provisions that parties add into an arbitration provision, by training and reminding them that discovery in arbitration is meant to be more limited than discovery in litigation, it is perhaps possible to prevent arbitrators from innocently or negligently allowing parties to employ litigation-style discovery.

Both JAMS and the College of Commercial Arbitrators (CCA)—a collective of experienced professional arbitrators—have produced protocols for arbitrators and parties alike.[172] These protocols cannot change the realities of the contractual nature of arbitration, but they do explain to arbitrators the nature of the problem, which, perhaps, has arisen in part through the lack of arbitrator awareness of their own contributions to allowing broader and more costly discovery.

University Legal Studies Research Paper No. 2014/29), *available at* http://ssrn.com/abstract=2519084.

172. Stipanowich, *supra* note 171, at 15, 30.

The JAMS "Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases," which was released in 2010, emphasizes that "good judgment of the arbitrator" is a "key element" in preserving the cost-efficient, expedited nature of arbitration, and explains that, particularly with respect to discovery matters, arbitrator discretion must be exercised in a manner consistent with limiting discovery when possible.[173] The JAMS Protocols identify the fact that "party preferences" can lead to overly broad arbitration discovery and indicate to the arbitrator that, when not explicitly bound by the contract, the arbitrator's proper role is to resist parties' attempts to subvert the aims and goals of arbitration. The JAMS Protocols also stress "Early Attention to Discovery by the Arbitrator,"[174] advise arbitrators to "establish[] the ground rules," and remind the arbitrators that the JAMS Comprehensive rules "lack the specificity that one finds, for example, in the Federal Rules."[175] The JAMS protocols also discuss depositions and stress that while parties are entitled to one deposition, if an arbitrator chooses to grant leave for more discovery, the arbitrator must weigh this decision carefully because it can make the arbitration "extremely expensive, wasteful and time-consuming."[176]

The 2010 CCA Protocols also attempt to raise arbitrator awareness of some of the specific ways in which parties have brought litigation-style practices into arbitration. The CCA Protocols explain:

> [m]any skilled and experienced attorneys, while happy to accept the foregoing advantages of arbitration, nonetheless generally want to try cases in arbitration with the same intensity and the same tactics with which they were conducted in court. Thus, expanded arbitral motion practice and discovery have developed within the framework of

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173. JAMS, JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES 2–3 (2010), *available at* http://www.jamsadr.com/arbitration-discovery-protocols/.

174. *Id.* at 3.

175. *Id.*

176. *Id.* at 6.

> standard commercial arbitration rules which tend to afford arbitrators and parties considerable 'wiggle room' on matters of procedure. As a consequence, practice under modern arbitration procedures is today often a close, albeit private, analogue to civil trial.[177]

The Protocols go on to explain that despite these practices, arbitrators are supposed to be "deliberate and proactive" in resolving disputes, and must maintain a focus on controlling discovery and motion practice where possible.[178]

For the AAA, members of the organization's leadership have been lending their voices to the debate by specifically emphasizing "muscular arbitration." A 2013 article from the Dispute Resolution Journal, written in part by Robert Matlin, a senior vice president of the AAA, states that "[t]he challenge of protecting the time and cost advantages of arbitration will continue until parties and arbitration counsel learn to think of arbitration as a process that is distinct from litigation and arbitrators learn to be more 'muscular' and disciplined managers of the process and themselves."[179] Calling upon arbitrators to embrace being "muscular" and to take a more forceful, aggressive approach to managing arbitrations from the beginning will deter parties from engaging in discovery practices which are antithetical to arbitration's intended purpose.

The recent emphasis by JAMS, the AAA, and CCA on how arbitrators and parties ought to conduct discovery is likely to have a positive effect towards making discovery more cost efficient and faster, but it is perhaps too early to see results. In order to maintain a competitive advantage over federal court litigation, arbitration must remain, in the aggregate, a less costly and quicker method of resolving disputes—although, as mentioned above, there are numerous other reasons parties choose arbitration to settle domestic commercial disputes that have nothing to do with costs.

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177. COLL. OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS 5 (Thomas J. Stipanowich, et al, eds., 2010).

178. *Id.* at 22.

179. Mitchel Marinello & Robert Matlin, *Muscular Arbitration and Arbitrators Self-Management Can Make Arbitration Faster and More Economical*, 67 DISP. RES. J., no. 4, 2013, at 69.

Both arbitration organizations and the Advisory Committee are aware that the relative costs of arbitration (as compared to litigation) affect parties' determination of which fora to bring disputes. Arbitrators "must strike a delicate balance . . . working to ensure that the discovery will allow the case to be resolved *more quickly and less expensively than it would be in litigation*"[180] because, unless arbitration is "significantly faster and more cost effective than litigation[,] . . . arbitration will lose much of its value."[181] As noted above, JAMS and the AAA have taken steps to ensure that arbitration continues to have a competitive advantage over litigation. It is equally clear that the Advisory Committee, in proposing revisions to the Federal Rules, seeks to make changes in part to ensure that litigation becomes less costly lest litigants choose arbitration. The Advisory Committee acknowledged that the relative costs are important to litigants in its June 14, 2014 Memorandum to the Standing Committee on the Rules of Practice and Procedure.[182] In discussing the public comments in favor of the proposed proportionality changes, the Memorandum explained that these comments "stated that disproportionate litigation costs bar many from access to federal courts and have resulted in a flight to other dispute resolution fora such as arbitration."[183]

The revisions to the Federal Rules will perhaps only have a marginal effect on how arbitrations are conducted. As explained above, the revisions may not bring about a significant change to the way discovery is conducted in federal courts, or the revisions may too vaguely state their philosophy of cooperation between adversaries, or they may fail to resonate within the hearts and minds of lawyers schooled to think as adversaries, not problem-solvers. However, in the recently released *2015 Year-End Report on the Federal Judiciary*, those hoping for a meaningful change in the wake

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180. John Wilkinson, *Arbitration Discovery: Getting it Right*, 21 DISP. RES. MAG., no. 1, 2014 at 4 (emphasis added).

181. *See id.* at 1 (discussing the issues with incorporating elements of litigation in arbitration).

182. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5.

183. SEPT. 2014 RULES REPORT, *supra* note 7, at app. B-5.

of the rule revisions gained a potentially-influential and high profile supporter: Chief Justice John Roberts.[184]

The Chief Justice dedicated much of the December 31st memo to describing his earnest desire for the legal community to heed the cooperative message embodied in the rule revisions. Acknowledging that while over the past 80 years, most amendments of the Federal rules have been "modest and technical, even persnickety," Roberts states that "the 2015 amendments to the Federal Rules of Civil Procedure are different."[185] Roberts recites the history of the 2010 Duke Conference, notes the resulting findings of a need for cooperation, proportionality, judicial case management, as well as the burgeoning problem of electronically stored information, before giving his own personal analysis of the 2015 revisions:

> The amended rules, which . . . went into effect one month ago . . . mark significant change, for both lawyers and judges, in the future conduct of civil trials.
>
> The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report.[186]

Roberts speaks favorably of how "by a mere eight words," the modified Rule 1 "make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation."[187] Roberts characterizes the new Rule 26 as "crystaliz[ing] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality[,]" one which relies upon a "careful and realistic assessment of actual need."[188] Roberts affirmatively acknowledges that this assessment "may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide

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184. *See generally,* John Roberts, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015) [hereinafter 2015 CHIEF JUSTICE REPORT], *available at* http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

185. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 4.

186. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 5.

187. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 6.

188. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 6–7.

decisions respecting the scope of discovery[,]" which is aided by the fact that the amended rules "accordingly emphasize the crucial role of federal judges in engaging in early and effective case management."[189]

Roberts acknowledges, however, that the revisions to the rules are not guaranteed. Successfully achieving the goal of Rule 1 will occur "only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change."[190] Roberts concludes with further remarks affirming the need for "genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share," before later charging the legal community to share in the need to "engineer a change in our legal culture."[191]

Thus, despite the passionate advocacy from an individual possessing a powerful pulpit to spread a message to the legal community, the effect of the revised federal rules remains murky at best. If the legal community is able to follow in the words of the Chief Justice and pull collectively to bring about real change on a meaningful and wide-spread level, it seems that such a philosophy would almost inevitably spill over into the realm of arbitration. However, if the effect of the rule revisions is relatively minor, then any spill-over effect on how arbitrations are conducted will be correspondingly minimal.

CONCLUSION

Arbitration is a flexible means of resolving disputes quickly and efficiently, and if used properly, it has the capacity to provide exceptional value to financial, commercial, and business users. However, engaging in certain litigation-style discovery practices may cause any given arbitration to spiral out of control in terms of

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189. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 7. The Chief Judge coyly applauds the use of informal conferences between parties and judges before the filing of formal motions as settings which can "obviate the need for a formal motion—a well times scowl from a trial judge can go a long way in moving things along crisply." 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 7.

190. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 9.

191. 2015 CHIEF JUSTICE REPORT, *supra* note 184, at 10, 11.

cost and time. In these situations, the resulting process is one no less protracted or expensive than civil litigation—yet one which lacks the procedural safeguards and appellate options which arguably justify the higher costs and extended timeframes of civil litigation.

Parties themselves may be unwilling to sacrifice meaningful control over discovery, either in a pre-dispute contract providing for arbitration or a post-dispute agreement to arbitrate. The former makes it difficult to predict the discovery needs of a future dispute, and the latter goes against the grain of most litigation-familiar attorneys by sacrificing tactical options. Moreover, the rules promulgated by various arbitration service providers like JAMS and AAA—even those rules which are "Streamlined," "Expedited," or "Accelerated"—are limited because they must maintain the flexibility to apply to myriad different types of disputes with varying discovery needs. Providers cannot risk driving parties away by adopting rigid rules.

Thus, the arbitration community has focused on solutions in the past several years that include providing better information to arbitrators on the true nature of their role, the ways in which arbitrators' discretion should be utilized, and various methods of either coping with party misbehavior or forestalling abusive discovery practice by adopting a more aggressive, managerial stance in order to take control of and enforce the arbitration schedule. While the 2015 revisions to the Federal Rules potentially will not only limit discovery in traditional civil litigation, but also carry over into arbitration and help to limit discovery in arbitral proceedings as well, due to the relatively minor changes to the Federal Rules, it seems unlikely that arbitrators and organizations which administer arbitrations will feel the need to reduce discovery costs even further, unless it comes in the wake of the larger legal community engaging in the difficult task of reigning in civil discovery and cooperating with one another to bring about real change.

How the Anchoring Effect Might Have Saved the Civil Rule-Makers Time, Money, and Face

Danya Shocair Reda*

I. INTRODUCTION

In December 2015, substantial amendments to the Federal Rules of Civil Procedure took effect. This latest round of reforms by the Advisory Committee on the Rules of Civil Procedure (the "Advisory Committee") has been nothing if not controversial and has been heavily analyzed and contested.[1] Yet, in considering the future of discovery and the Rules, it is also helpful to examine a set of amendments that did *not* survive the amendment process—the proposed amendments to Rules 30, 31, 33, and 36 that would have lowered presumptive limits on depositions and interrogatories and would have introduced a limit on requests to admit.[2]

It may seem curious to devote attention to the only parts of this significant package that will not control practice anytime soon. However, the presumptive-limits proposals and their subsequent withdrawal offer a unique opportunity to look back on the process

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1. For a summary of the volume and tenor of the public comments, see CTR. FOR CONST. LITIG., PRELIMINARY REP. ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE (2014), *available at* http://www.cclfirm.com/files/Report_050914.pdf.

2. Advisory Committee on Rules of Civil Procedure, Agenda Book of the Apr. 10–11, 2014 Meeting of the Advisory Committee on Rules of Civil Procedure, 79 *available* at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf (hereinafter *2014 Agenda Book*).

that the Rules Committee went through to understand how the Advisory Committee's own deliberations might be further improved. This Article contends that the Advisory Committee and the public it serves would have realized significant benefits had the Advisory Committee made use of the psychological literature on decision-making to analyze the likely effects of its proposals. Since the presumptive-limits amendments seek to alter decision-making for several actors—the parties and the court—attention to scholarship that explores human decision-making and judgment should prove promising. Specific to the proposals for Rules 30, 31, 33, and 36, the Advisory Committee might have better anticipated both the response to its proposals and the likely impact of implementing those proposals in practice. In particular, attentiveness to the anchoring effect would have made a difference to Advisory Committee deliberations, which could have led to considerable savings of time and resources for both the Advisory Committee and the public. Perhaps equally important, a more rigorous analysis could have bolstered the Advisory Committee's reputation and avoided the negative impact on its legitimacy.

II. THE ANCHORING EFFECT

Consider a simple question: You are asked to estimate the average annual temperature in San Francisco—a city where you have never lived. If I ask you an absurd question to begin—is the annual average temperature in San Francisco greater or less than 558 degrees Fahrenheit—should this question affect your ultimate estimate? Perhaps it *should* not, but we know today, definitively, that it will.[3] My absurd suggested temperature will affect your estimate upward due to a well-documented cognitive heuristic called the anchoring effect.

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3. *See generally* Daniel M. Oppenheimer, Robyn A. LeBoeuf & Noel T. Brewer, *Anchors Aweigh: A Demonstration of Cross-Modality Anchoring and Magnitude Priming*, 106 Cognition 13 (2007) (discussing the findings of G.A. Quattrone et al., Explorations in Anchoring: The Effects of Prior Range, Anchor Extremity, and Suggestive Hints (1984) (unpublished manuscript) (on file with Stanford University)).

Cognitive heuristics are shortcuts or mental "rules of thumb" that all human beings use when involved in complex cognitive tasks.[4] Although cognitive heuristics are useful to individuals as they evaluate difficult problems, these mental shortcuts also are responsible for systematic and predictable errors.[5] As the temperature of San Francisco example illustrates, even "implausible (hence, clearly uninformative) anchors can still bias estimates."[6] The full range of cognitive heuristics could provide useful guidance for rule makers, since these heuristics offer critical insights into human decision-making and should therefore be helpful in efforts to anticipate the likely effects of Rules amendments.[7] For the purposes of this Article, however, consideration of the anchoring effect will suffice.

Anchoring and adjustment is a cognitive heuristic in which a person's "numerical judgments are inordinately influenced by an arbitrary or irrelevant number."[8] The individual focuses on a reference point—the "anchor"—and adjusts upwards or downwards from the anchor point.[9] The systematic error occurs because these

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4. RICHARD THALER & CASS SUNSTEIN, NUDGE (2008). These were originally presented in Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

5. Tversky & Kahneman, *supra* note 4, at 1124.

6. Oppenheimer et al., *supra* note 3, at 2.

7. Professor Thomas has recently suggested the value of considering the role of confirmation bias in understanding some of the Committee's analyses and choices. Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1154–55 (2015). For an excellent discussion of the difficulties that proportionality analysis will pose for judges, see Stephen Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight, Out of Mind?*, 34 REV. OF LITIG. 647, 652 (2015) (discussing what might be expected of proportionality analysis based, in part, on the availability heuristic and the evaluability hypothesis).

8. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 519 (1996).

9. Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1669 (2013); *see* Tversky & Kahneman, *supra* note 4, at 1124.

adjustments are usually insufficient and the initial anchor, therefore, has a disproportionate influence on future and final assessments.[10]

It is helpful when considering presumptive limits to be aware that parties may be susceptible to anchoring and to attempt to understand how that might affect negotiation and decision-making. We should expect that the presumptive limit serves as an anchor for parties when assessing how many depositions (or interrogatories, etc.) to agree to. Traditionally, any errors that might arise from such anchoring are thought to be cured through judicial intervention. Indeed, the Advisory Committee's numerical-limits proposals were aimed not only at minimizing the amount of discovery that parties engage in, but also at facilitating judicial management.[11] The Advisory Committee wanted to invite increased judicial intervention to have judges determine whether a case warrants additional discovery (whether through depositions, interrogatories, or requests to admit).[12] A judge's intervention is intended to resolve any problems that might arise in cases where the presumptive limits are inappropriate.

To the extent that such limits rely on judges to ensure that parties are able to obtain discovery appropriate to their case, we must consider the effect that anchoring will have, not only on party behavior, but on judicial decision-making as well. In the past it was possible to speculate that judges, given their demonstrated analytical capabilities, their high levels of training, and the discipline prescribed by their role, might not be prone to such systematic cognitive errors or at least not as susceptible as other actors in the legal system.[13] But any such optimism has since been soundly rebuffed. Numerous studies demonstrate that cognitive heuristics influence federal judges, just as they influence lay subjects.[14]

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10. Miller, *supra* note 9, at 1670.

11. *See infra* Part II.

12. *See infra* Part II.

13. Even well-respected scholars have been prone to this faulty assumption. In explaining the vulnerability of juries to anchoring effects, Cass Sunstein and his co-authors suggested that shifting punitive damages determinations to judges might be an effective reform. Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2079–80 (1998).

14. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 781 n.21 (2001).

A 2001 study of 167 magistrate judges tested for the influence of anchoring on the subjects' decision-making.[15] The study provided each judge the same description of a personal injury suit in which only damages were at issue.[16] To provide a sense of how the anchoring effect can influence judges, consider the following example from the study:

> Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant's trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization, and pain and suffering, but has not specified an amount. Both parties have waived their rights to a jury trial.[17]

Judges were randomly assigned to either an "Anchor" or a "No Anchor" group. All judges were asked: "[H]ow much would you award the plaintiff in compensatory damages?"[18] The Anchor group was additionally told that "[t]he defendant has moved for dismissal of the case, arguing that it does not meet the jurisdictional

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15. Guthrie et al., *supra* note 14, at 778. The study also tested hindsight bias, the representativeness heuristic, framing, and egocentric biases, finding that each affected judges' decision-making. Judges were less susceptible to framing effects and the representativeness heuristic than laypersons or other experts, but even these had "a significant impact on judicial decision making." *Id.*

16. *Id.* at 790–91.

17. Guthrie et al., *supra* note 14, at 790.

18. *Id.* at 790–91.

minimum for a diversity case of $75,000."[19] The Anchor group judges were asked to rule on the motion to dismiss, and were instructed: "[i]f you deny the motion, how much would you award the plaintiff in compensatory damages?"[20] The fact pattern was designed to indicate that the plaintiff had clearly suffered damages greater than $75,000. Thus, the motion to dismiss was intended to be meritless.[21] Nevertheless, damages awards between the Anchor and No Anchor groups differed significantly. The No Anchor group provided an average award of $1,249,000, whereas the Anchor group awarded an average of $882,000.[22] The study authors found that the jurisdictional minimum anchored judges' damage awards: "In this hypothetical case, asking the judges to rule on this frivlous [sic] motion depressed average damage awards by more than $350,000 (or 29.4%)."[23]

There are at least two reasons why rule makers should be sensitive to these findings. First, many arguments about errors in judicial decision-making appear to suggest bad faith, or something akin to abuse of power; that is, decisional error that is politically motivated or aimed at privileging particular interests, or self-interest, over the law. However, literature on cognitive biases makes clear that systematic errors will occur in particular conditions even when the judge is highly competent and acting in good faith. Second, these errors are not the product of a particular judge's idiosyncrasies, but rather the product of a generalizable phenomenon. As the 2001 study of magistrate judges explains: "[J]udges make decisions under

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19. Guthrie et al., *supra* note 14, at 791.

20. *Id.*

21. The study subjects appear to have read the facts this way; only two of 166 judges granted the motion to dismiss. "By voting overwhelmingly to deny the motion to dismiss, the judges indicated that the $75,000 jurisdictional minimum contained no reliable information regarding the plaintiff's damages." *Id.* at 791–92.

22. The difference between the two groups was statistically significant. *Id.* at 791.

23. *Id.* at 792. None of this is meant to imply that a meritless motion to dismiss would have this type of effect in practice. The passage of time between the two judicial determinations in a live litigation would mitigate any anchoring effect of the initial motion, and this is to say nothing of the other anchors that might intervene throughout the course of the litigation. *Id.* at 793.

uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment."[24]

III. LOWERING PRESUMPTIVE LIMITS

A. The Proposal

The Advisory Committee's proposed amendments to Rules 30, 31, and 33 would have lowered presumptive limits on the number of interrogatories [25] and the number and duration of depositions.[26] The proposed amendment to Rule 36 would have added, for the first time, a numerical limit on requests to admit.[27] The proposals sought to reduce the presumptive limit on depositions from ten to five and to reduce the length of depositions from one day of seven hours to one day of six hours.

These proposals arose as part of the Committee's efforts to operationalize insights gained from the 2010 Duke Conference. The Committee identified three themes that had emerged out of the Conference: cooperation, earlier case management, and proportionality.[28] The presumptive limits on discovery were aimed at serving the latter goal of proportionality.[29] As Judge Campbell explained to the Standing Committee early in the process, the Committee's interest in this set of proposals stemmed from a belief that "just reducing the presumptive limits may reduce the amount of

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24. Guthrie et al., *supra* note 14, at 783.

25. Advisory Committee on Rules of Civil Procedure, Agenda Book of the Apr. 11–12, 2013 Meeting of the Advisory Committee on Rules of Civil Procedure 96 (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf (hereinafter *2013 Civil Agenda Book*).

26. *Id.* at 94–95.

27. *Id.* at 82. No numerical limit is imposed on requests for admission related to the genuineness of documents. *Id.*

28. *2013 Civil Agenda Book*, *supra* note 25, at 3.

29. *Id.* at 7, 10.

discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything."[30]

These numerical limits proposals were aimed primarily at promoting proportionality in discovery, thereby curbing wasteful or abusive practices.[31] The notion that depositions, interrogatories, and requests for admission could be beneficially reduced stemmed out of discussion at the 2010 Duke Conference by judges who compared deposition-reliant civil practice unfavorably with criminal practice. For these judges, civil lawyers appeared to over-rely on depositions, believing they need to depose every potential trial witness.[32] Yet, the judges explained that they see lawyers in criminal trials effectively cross-examine witnesses without the opportunity to depose them beforehand.[33]

Data collected for the Duke Conference bolstered the Committee's faith that reductions in numbers of depositions would be feasible.[34] Based on data collected as part of the 2009 Federal Judicial Center Closed Case Study,[35] the Advisory Committee noted that less than a quarter of civil cases involve more than five depositions by any party.[36] Nearly 80% of these involved ten or fewer depositions.[37] Moreover, there was some indication that in cases with more depositions, attorneys are more likely to believe discovery is disproportionate.[38] If a rule could encourage a reduction in such additional depositions that judges view as unnecessary, and that parties perhaps ultimately determine are unnecessary, then not only would costs be lessened, but perhaps the feeling of

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30. Committee on Rules of Practice and Procedure, Minutes of the June 11–12, 2012 Meeting 37, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2012-min.pdf.

31. *Id.* at 36–37.

32. *2013 Civil Agenda Book*, *supra* note 25, at 85.

33. *Id.*

34. *Id.*

35. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

36. *2013 Civil Agenda Book*, *supra* note 25, at 85.

37. *Id.*

38. The FJC data indicated that each additional deposition increases the cost of an action by roughly 5%, and that as depositions increase so do attorney impressions that discovery costs in the matter were "too high." *Id.*

disproportionate discovery could also be reduced. Since there are a significant number of cases in which each party conducts between five and ten depositions and the parties believe the costs of litigation are disproportionate to the stakes involved, the Committee aimed to "reset" the expectations of the parties through lower presumptive limits per case.[39]

Committee members expected that many cases would continue to warrant more than five depositions.[40] In such cases, the Committee believed, "General experience suggests that agreement of the parties is forthcoming, both when experienced litigators realize the practicalities of a case and when they yield to the expectation that the court will authorize a greater number and will not be pleased with the failure to agree."[41]

The Committee analysis can be summarized in four points. First, in most cases, parties will agree to additional discovery when it is warranted.[42] Second, having a limit that is closer to actual use in most cases will ensure that parties have a realistic understanding of the volume of typical discovery.[43] Third, limited discovery will also force parties to discuss the amount of discovery taken, which the Committee hoped would foster greater cooperation.[44] Finally, where such cooperation was not forthcoming, a judge would intervene and fix the problem by granting necessary or worthwhile discovery, thereby facilitating that elusive judicial supervision that the parties have been craving.[45]

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39. *2014 Agenda Book*, *supra* note 2, at 117.

40. *Id.*

41. *Id.*

42. *Id.* ("General experience suggests that agreement of the parties is forthcoming").

43. *Id.*

44. *See 2013 Civil Agenda Book*, *supra* note 25, at 86 (deeming benefits of the rule change to be "inducing reflection on the need for depositions, in prompting discussions among parties, and—when those avenues fail—in securing court supervision").

45. *See id.* (finding that when parties fail to agree on a higher number of depositions, the lower presumptive limit would be useful "in securing court supervision" and addressing concerns of the proposal's opponents by through a committee note providing that leave to take more than five depositions "must be granted when appropriate.")

Whether these expectations would be met turned, in the Committee's view, upon a two-fold question. First, "Will the parties behave *sensibly*, agreeing to increase the number in cases that deserve more than 5 depositions, while perhaps thinking more carefully about the need [for additional depositions] . . . ?"[46] Second, "Will courts continue to recognize that it is proper to exceed the specified limit, and indeed recognize that there are more cases that need more than 5 depositions than there have been cases that need more than 10?" [47] The Committee answered both questions affirmatively.

B. The Response

The Committee's assumptions about party and court decision-making were not shared by early, pre-publication comments received from the bar. Preliminary feedback on deposition numbers suggested that "the present limit of 10 depositions works well—that leave is readily granted when there is good reason to take more than 10, and that parties do not wantonly take more than 5 depositions simply because the presumptive limit is 10."[48]

Moreover, the Committee received early opposition to these proposed reductions. The Department of Justice registered its opposition to numerical limits.[49] The Committee also received preliminary comments from lawyers who represent individual employment discrimination plaintiffs stating that they "commonly" will need to take more than five depositions to establish their claims.[50] The amount of early feedback was "somewhat surprising," because, as noted, the 2009 Closed Case Study found the median number of depositions taken per side in a litigation is below five.[51] Yet correspondence with the Committee described many cases in which attorneys need more than five depositions.[52] Those writing to the Committee argued that reducing limits would increase motion

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46. *2013 Civil Agenda Book*, *supra* note 25, at 118–19 (emphasis added).
47. *Id.*
48. *Id.* at 85.
49. *Id.* at 118.
50. *Id.* at 86.
51. *Id.* at 118.
52. *Id.*

practice.[53] They also expressed concerns that lower limits would make it more difficult to obtain permission to take additional depositions over the proposed five-deposition limit.[54] As one Committee member described: "There is a profound lack of confidence on the part of some that courts will follow the rule."[55]

Early commenters described situations in which greater numbers of depositions are necessary: when one party controls the relevant information; when the relevant events occurred over a long period; and, finally, in employment litigation cases that address multiple actions against the employees (e.g., discipline, demotion, discharge). A theme of this feedback was that the number of depositions required would not be reduced by cooperation—the depositions remained necessary to pursuing and proving the claims.[56] At the March 2012 meeting of the Advisory Committee, an observer expressed frustration with the solution proposed—seeking leave from the court to take more depositions than allowed under the presumptive limit.[57] The observer asked, "[W]hy should I have to go to court to get [leave]?"[58] The Advisory Committee responded, "[T]his is the beauty of Rule 1 cooperation, and the informal conference before a discovery motion: if you need 12 depositions, cooperation should generate authorization for them."[59]

Comments also expressed concern that judges will not willingly grant additional depositions, with the Department of Justice commenting not only that they often need to take more than 5 depositions, but that they experience "real difficulty [currently] in getting leave to take more than 10 depositions . . . with many judges

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53. *2013 Civil Agenda Book*, *supra* note 25, at 118.

54. *Id.* at 119.

55. *2013 Civil Agenda Book*, *supra* note 25, at 119.

56. Civil Rules Advisory Committee, Minutes of the March 22–23, 2012 Meeting 27, *available at* http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-march-2012.

57. *Id.*

58. *Id.*

59. *Id.*

who seem to view 10 depositions *as a fixed limit*, not a point that suggests the need for involved case management."[60]

After considering these early concerns, the Advisory Committee voted to move ahead with proposed numerical limits, publishing them for comment.[61] The Advisory Committee believed fears of adversarial party behavior were unfounded.[62] "[P]arties regularly stipulate to more than 10 depositions … in many courts, leave is routinely granted to take more than 10 depositions in cases that deserve more."[63] One Advisory Committee member "enthusiastically" expressed his support, explaining that in his experience as a judge "when one side wants to take more than 10 depositions, the other side usually also wants to take more than 10. Usually the need is obvious. A 5-deposition limit will work as well as the 10-deposition works."[64]

The Advisory Committee also found concerns about judicial reluctance to grant additional discovery to be, at best, overblown.[65] To the extent a court might view the presumptions as fixed limits, a Committee Note could resolve any such difficulty. The Note would emphasize that leave to take more than five depositions must be granted where warranted.[66] Thus, the Advisory Committee concluded:

> The fear that lowering the threshold will raise judicial resistance seems ill-founded. Courts are willing now

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60. *2013 Civil Agenda Book*, *supra* note 25, at 30. This concern about judges viewing the "presumptive limits as firm limits" was voiced not only by the Department of Justice but also by numerous commenters. *Id.* at 34. An observer at the April 2013 Committee meeting expressed it this way: "[T]here are many judges who are literalists, who will not let us negotiate upward." *Id.* at 30.

61. *2013 Civil Agenda Book*, *supra* note 25, at 119–120.

62. *Id.* at 119.

63. *Id.*

64. *Id.* at 11–12.

65. In response to the Department of Justice's concerns that it would be difficult to get the necessary depositions in many of its cases, "it was noted that in the kinds of complex cases that involve the Department it is not hard to get leave to take more than 10 depositions under the present rule, and it should not be hard to get leave to take more than 5 under the proposed rule." *Id.* at 122. The Department countered that its concerns stem from "experience in different courts all across the country." *Id.*

66. *Id.* at 86.

> to grant leave to take more than 10 depositions per side in actions that warrant a greater number. The argument that they will become reluctant to grant leave to take more than 5, or more than 10, is not persuasive.[67]

After publication, criticisms of the numerical limits proposals poured in.[68] Post-publication comments tracked the feedback the Advisory Committee had already received pre-publication.[69] Comments emphasized that in many cases it is difficult to obtain the information needed to prosecute a case, a fact exacerbated by information asymmetries. Reductions in the amount of discovery that is presumptively allowed will make this process even more difficult. Since many cases will require discovery greater than the proposed limits, commentators argued, the Advisory Committee should expect that the amendment would inhibit enforcement of rights in a not-insignificant number of cases. Relatedly, comments predicted that the lower limits would lead to an increase in discovery disputes and discovery motion practice. Finally, when faced with these discovery disputes, judge will be less likely to grant necessary discovery, because the message that the proposals send is that there is too much discovery, including too many depositions.[70]

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67. *2013 Civil Agenda Book*, *supra* note 25, at 86.

68. ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 12–13 (May 2, 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2014.pdf.

69. *See 2014 Agenda Book*, *supra* note 2, at 270-320.

70. The Report of the Duke Conference Subcommittee laying out its recommendation to move forward with most of the published proposals and recommending withdrawal of the numerical-limits proposals, summarized the comments thus:

> Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that any agreement among the parties might be reached only by paying inappropriate trade-off prices in other areas; and that the rule would be seen to express a presumptive judgment that 5 depositions ordinarily are the ceiling of reasonableness—that the sort of showing now required to justify an 11th

IV. WHAT CAN BE LEARNED?

Ultimately, in light of the "fierce resistance" expressed throughout the public comment period, the Advisory Committee recommended that the Advisory Committee withdraw the package of amendments that would have introduced new limits on discovery and lowered already-existing limits.[71] These were the only proposals recommended for withdrawal.[72] It is tempting to think that this was a no-harm, no-foul situation, or even better, a demonstration of the Rules process working well. After all, the overwhelming thrust of the public comment was in opposition to the numerical limits proposals and the Advisory Committee responded by withdrawing the proposed amendments. However, the right outcome in this instance was reached at considerable cost. The Advisory Committee itself spent much time considering the limitations, seeking data from the Federal Judicial Center, soliciting feedback, and refining the proposed amendments. It did so without engaging in a systematic assessment of how a lower numerical limit would likely impact the behaviors of the parties and the judge. As a result, the Advisory Committee did not find preliminary feedback persuasive that might have resonated more fully had it factored in anchoring effects.

For example, a typical comment objecting to lowering the presumptive limits raised concerns that judges would be more reluctant to grant necessary depositions.[73] Judge Koeltl voiced a representative response from the Committee:

> [T]he rules say that the court must [grant more than 10 depositions] if the discovery is consistent with the rules. Why do you think that judges would be more reluctant to give you the same number of depositions when the presumptive limit is five rather than 10? The judge is still looking at the same case. The judge

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or 12th deposition would come to be required to justify a 6th or 7th deposition.

2014 Agenda Book, *supra* note 2, at 89.

71. *2013 Civil Agenda Book*, *supra* note 25, at 79.

72. *Id.*

73. *See generally 2014 Agenda Book*, *supra* note 2, at 270-320.

> is still going to have to make the determination that this is the number of depositions that is the reasonable number in this case. The judge is going to have to say in fact I must do this if the amount of depositions is consistent with the purposes of the rules.[74]

These responses from the Advisory Committee fail to factor in the expected anchoring effect that a lower limit should have. Furthermore, once anchoring bias is factored in, two key conclusions that were instrumental in the Advisory Committee's decision to publish the presumptive limit proposals become harder to accept. Recall that the Committee framed the questions it needed answered this way: "Will the parties *behave sensibly*, agreeing to increase the number in cases that deserve more than 5 depositions" and "Will courts continue to recognize that it is proper to exceed the specified limit?"[75] These are indeed key questions to ask when considering a presumptive limit, whether the proposal involves instituting a new limit for the first time or altering a pre-existing limit. However, the manner in which the Committee answered this question ignored helpful insights that could have been harnessed from cognitive heuristics. The framing of the question as whether parties would "behave sensibly" is notable because it suggests that determining the appropriate number of depositions is merely a matter of common sense and civility. What we know, however, is that every sensible person is prone to being excessively influenced by a numerical input, even when the number is irrelevant to the question at hand.[76]

We would expect the presumptive limit to serve as an anchor, priming the decision-maker to view the appropriate amount of discovery devices in a given case closer to the presumptive limit than they otherwise might. This is particularly the case since the decision-maker will have reason to think that the presumptive limit is

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74. Advisory Committee on Rules of Civil Procedure, Transcript of Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure 115–16 (Nov. 7, 2013), *available at* http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/transcripts.

75. *2013 Civil Agenda Book*, *supra* note 25, at 118–19.

76. Guthrie et al., *supra* note 14, at 806.

providing relevant information, given that it is enshrined in a procedural rule and selected by the deliberative Rules Committee. Thus a decision-maker, whether judge or adversary, will be more open to considering the appropriateness of the anchor.[77] Although this may very well be what the Advisory Committee hoped to achieve (driving deposition numbers in more cases down toward the average), the Advisory Committee discussions do not reflect any rigorous assessment of how this might work. Moreover, they seem to ignore the reality that once the anchor is shifted from ten to five depositions, a decision-maker will be much less likely to view eleven depositions as warranted, even if the facts and claims remain the same. In light of what is known about anchoring effects, the Advisory Committee's assumptions about the likelihood that parties act "sensibly" and that judges continue to see the appropriateness of an eleventh or twelfth deposition seem improbable.

This raises a significant cost beyond the time expended on drafting and considering the withdrawn proposals: reputational cost. The Committee appears rightfully concerned with acting, and assuming it is in fact acting, fairly and responsively to public input. Many comments in Advisory Committee meetings reflect this: "[T]he Subcommittee took its work very seriously . . . . This is a good-faith package of proposals to reduce cost and delay."[78] Discussion of the possibility for extensive comments suggested different approaches for compiling extensive comments to "facilitate the important task of making sure that the Committee takes maximum advantage of comments from all parts of the profession, and that no group feel[s] left out of the process."[79] In finally deciding to withdraw the presumptive limits proposals, the Committee Report appears to suggest that these proposals should be withdrawn in order to avoid the appearance of unnecessary

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77. *See* Guthrie et al., *supra* note 14, at 806. This is problematic because the number selected for the presumptive limit may not provide any relevant information in a given lawsuit. The fact that most cases require fewer than five depositions may not tell us anything about the number of depositions needed in a particular case.

78. Civil Rules Advisory Committee, Minutes of the April 11–12, 2013 Meeting 16, *available at* http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2013.

79. *Id.* at 35.

limitations on discovery.[80] Finally, the Committee expressed satisfaction that it had acted responsively to the public comment, including its withdrawal of the presumptive limits proposals.[81]

The Advisory Committee's discussion of the proposals was sufficiently out of step with some practitioner concerns, however, that the discussion appeared disingenuous. While withdrawal could be viewed as legitimacy-enhancing, showing a responsiveness to public comment and concerns, there is reason to think this set of proposals did not accomplish that aim. To take but one expression of cynicism, the numerical limits were described publicly as a "stalking horse," designed to distract unwanted attention from other controversial proposed reforms, by one of the nation's pre-eminent proceduralists and commentators on the Rules.[82]

Even disregarding the Advisory Committee's own resources and reputation the numerical limits proposals garnered overwhelming opposition, with high volumes of commentators writing or testifying in opposition. There were over 1,100 written comments concerning the proposed amendment to Rule 30(a) (more than for any other proposed amendment in the package), with nearly 90% of these comments expressing opposition to the proposed amendment.[83] This response required an enormous investment of human resources that might have been better-allocated elsewhere, even other Committee work and Rules proposals.

It is notable that concerns about judicial reluctance to authorize additional discovery were described in Advisory Committee materials in terms akin to intransigence (doubt "that courts will follow the rule") or incompetence (some judges will understand it as a "firm limit.").[84] On this view, any difficulties with judicial leave to take more discovery should be limited to the

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80. Civil Rules Advisory Committee, Minutes of the April 11–12, 2013 Meeting 30.

81. *Id.* at 31.

82. Remarks of Stephen Burbank, AALS Section on Litigation Program, AALS Annual Conference (Jan. 3, 2015); *see* Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law (see e.g., The Lack of Judicial Restraint in Wal-Mart, Twombly, and Ricci)*, 48 WAKE FOREST L. REV. 989, 1020 (2014).

83. CTR. FOR CONST. LITIG., *supra* note 1, at 9.

84. *2013 Civil Agenda Book*, *supra* note 25, at 15.

members of the bench who are deliberately ignoring the rule (one would hope they are not too many in number), or misunderstanding it (also, hopefully, a small number). In either case, such errors would not generate widespread problems.

One of the important insights provided by acknowledging an anchoring effect is that systematic errors do not require bad faith or incompetence. On the contrary, they are systemic, affecting the full range of judicial decision-makers, as well as parties.

V. CONCLUSION

The Advisory Committee has been urged over the years to begin to make use of empirical data in the rulemaking process. The Advisory Committee has taken these exhortations to heart. Even the numerical-limits proposals discussed here were designed by taking into account FJC data on the average numbers of depositions and their costs in closed federal cases. This is a development that should be lauded and a trend that ought to continue. However it is now time to begin thinking about what other analytical tools the Advisory Committee might have at its disposal in attempting to forecast the effects of proposed rules, or when debating what form those rules ought to take. This Article considered one single insight from cognitive psychology that could help the committee better anticipate how a proposed amendment might operate in practice, as well as enabling it to better anticipate public response, so that a more productive collaboration with the public might develop. The presumptive-limits proposals were certainly not the only ones that might have been susceptible to beneficial insights from cognitive psychology, and the anchoring effect is but one single heuristic that can be helpful. A more systematic assessment would be useful, and the introduction of these concepts into Advisory Committee deliberation would be a welcome refinement of current rules analysis.

Rationalizing Cost Allocation in Civil Discovery

Benjamin Spencer*

I. INTRODUCTION

> "Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional . . ."[1]

A movement is afoot to revise the longstanding presumption that in civil litigation the producing party bears the cost of production in response to discovery requests. An amendment to Rule 26(c)—which took effect in December 2015—makes explicit courts' authority to issue protective orders that shift discovery costs away from producing parties.[2] But this authority is not new;[3] what

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1. The Legal Tender Cases, 79 U.S. (7 Wall.) 457, 552 (1870).

2. *See* FED. R. CIV. P. 26(c), ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (B) specifying terms, including time and place *or the allocation of expenses*, for the disclosure or discovery." (emphasis added)).

3. *See id.* committee note, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf ("Rule 26(c)(1)(B) is amended to

is new is what may be coming next—an undoing of the producer-pays presumption itself. Thus far, the sentiment to move in this direction has been slightly below the radar, advocated by pro-business interest groups and advocates before the Advisory Committee on Civil Rules in letters urging the Advisory Committee to place this issue on its agenda. A letter from the U.S. Chamber of Commerce is representative of this movement:

> We also suggest that as the Committee contemplates proposals in the future, it should consider amendments that address the root cause of our broken discovery system: the rule that the producing party bears the cost of production. This system, under which a plaintiff can propound broad and costly discovery requests on a defendant before there is any finding of liability, not only encourages unwieldy and costly discovery requests, but also runs afoul of a defendant's fundamental right to due process. As a result, the Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court.[4]

The topic was treated even more extensively in a letter addressed to the Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) from John H. Beisner, a

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include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority."); *see also, e.g.*, CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320, 1338 (Fed. Cir. 2013) ("Rule 26(b)(2)(B) limits discovery on electronically stored information from sources not 'reasonably accessible,' and provides the court discretion to order discovery and specify cost-shifting to obtain that discovery."); Spears v. City of Indianapolis, 74 F.3d 153, 158 (7th Cir. 1996) (noting that even absent a party's bad faith, Federal Rule of Civil Procedure 26 grants of "considerable discretion in determining whether expense-shifting in discovery production is appropriate in a given case.").

4. U.S. Chamber Institute for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure 2 (Nov. 7, 2013).

partner at Skadden, Arps, Slate, Meagher & Flom who has testified before Congress on behalf of the U.S. Chamber of Commerce.[5] After setting forth his argument that the producer-pays rule violates due process, Mr. Beisner wrote:

> In light of the due process concerns raised by the current producer-pays discovery regime, the Committee should consider additional amendments to the federal rules. One solution would be to establish a general rule that each party pays the costs of the discovery it requests, subject to adjustments by the court.[6]

The Lawyers for Civil Justice, a self-declared proponent of "the corporate and defense perspective on all proposed changes to the FRCP," has expressly stated: "Our current federal rulemaking agenda is focused on reining in the costs and burdens of discovery through FRCP amendments [including] . . . development of incentive-based 'requester pays' default rules."[7] Needless to say, revising the default producer-pays rule in this way would turn the current approach on its head, presumptively saddling requesters with an *ex ante* burden of funding the expense associated with responding to their discovery requests.[8]

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5. *See Examination of Litigation Abuses Before the H. Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. (2013) (testimony of John H. Beisner), *available at* http://judiciary.house.gov/_files/hearings/113th/03132013/Beisner%2003132013.pdf.

6. Letter from John H. Beisner, partner, Skadden, Arps, Slate, Meagher & Flom LLP, to Johnathan C. Rose, Secretary of the Comm. on Rules of Practice & Procedure of the Admin. Office of the U.S. Courts (Jan. 2, 2014), [hereinafter Beisner letter], *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_skadden_arps_slate_meagher__flom._john_beisner_1.2.14.pdf.

7. *Federal Rules of Civil Procedure*, LAWYERS FOR CIVIL JUSTICE, http://www.lfcj.com/federal-rules-of-civil-procedure.html (last visited Mar. 19, 2015).

8. Critics of the producer-pays rules tend to argue that the expense associated with extensive electronic discovery coupled with the belief that most of the requested information is of little practical utility supports their desire to shift those costs onto the requesting party. To what extent is this cost/abuse narrative valid? Certainly, in some contexts—such as high stakes commercial litigation or cases involving one-way fee-shifting—discovery costs can run high. However, there is evidence that in ordinary cases the incidence of discovery as well as the

Given indications that the Advisory Committee will indeed take up the issue of cost-shifting in the context of civil discovery,[9] now is an apt time to evaluate the producer-pays rule and the claims of those urging its demise. Specifically, these questions are: To what extent is the producer-pays rule imposing costs on parties in litigation; are there fairness, policy, or constitutional considerations that warrant a revisiting of the rule; and, ultimately, what would a rational approach to discovery cost-allocation look like? In the passages that follow, we will explore the current landscape of discovery expenses in the federal system and the rules governing their allocation (Part I), followed in Part II by an exploration of the various purported difficulties with a producer-pays approach. Part III will then build on these discussions to develop a rational approach to cost allocation that appropriately balances the interests of litigants on all sides of civil disputes in federal court.

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associated costs tends to be lower than critics suggest. I recently addressed this issue in more detail in A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to* Twiqbal *Apologists*, 60 UCLA L. REV. 1710, 1730 (2013) ("[T]he very source cited by the Court in support of its claim of a discovery problem itself admits that discovery is nonexistent in 40 percent of the cases and is limited to three hours in a substantial additional percentage of cases . . . ."); *see also* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012) ("[T]he FJC reported that the median cost of litigation for defendants was $20,000, including attorneys' fees. For plaintiffs, the median cost was even less, at $15,000, with some reporting costs of less than $1600. Only at the ninety-fifth percentile did reported costs reach $280,000 for plaintiffs and $300,000 for defendants. The median estimate of stakes in the litigation for plaintiffs was $160,000, with estimates ranging from $15,000 at the tenth percentile to almost $4 million at the ninety-fifth percentile. The median estimate of the stakes by defendants' attorneys was $200,000, with estimates ranging from $15,000 at the tenth percentile to $5 million at the ninety-fifth percentile. . . . [T]he discovery costs that animated the Duke [Civil Litigation] Conference organizers and participants did not appear to be, in the vast majority of cases, significant or disproportionate.").

9. Private communication from those involved with the Advisory Committee's activities confirms that discovery cost allocation will be an agenda item over the next series of meetings. This should not be surprising, given the success the corporate defense bar has had in getting other civil rules priorities onto the Advisory Committee's agenda; the 2015 amendments are a testament to their efficacy in this regard.

II. THE EXISTING DISCOVERY COST-ALLOCATION LANDSCAPE

A. The "American Rule"

Under the standard practice known as the "American rule," each litigant in American courts pays his or her own attorneys' fees and expenses.[10] This practice contrasts with the longstanding approach in England (and most European countries) that has supported fee and cost awards to prevailing litigants for centuries[11]—a practice commonly referred to as the "English rule." The American approach has been justified principally as an access to justice device, meaning that the rule protects the ability of prospective plaintiffs to bring actions that may vindicate their rights and does not penalize defendants for merely defending themselves in a lawsuit.[12] Conversely, English rule defenders tend to highlight its

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10. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967) ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."); *see also* Fox v. Vice, 131 S. Ct. 2205, 2213 (2011) ("Our legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses. Indeed, this principle is so firmly entrenched that it is known as the 'American Rule.'"). This principle was first announced and embraced by the Supreme Court in 1796 in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 1796 WL 896, at *1 (1796), ("We do not think that this charge [for counsel's fees] ought to be allowed. The general practice of the United States is in opposition to it, and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.").

11. Successful plaintiffs in English courts have been entitled to expenses since the Statute of Gloucester in 1278, *see* Statute of Gloucester, 1278, 6 Edw. 1, c. 1, while prevailing defendants gained this entitlement in 1607 under the Statute of Westminster, *see* Statute of Westminster, 1607, 4 Jac. 1, c. 3.

12. *Fleischmann*, 386 U.S. at 714.

> In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.

purported ability to deter frivolous or weak claims while providing full compensation for prevailing parties.[13] Most states in the United States adhere to the American rule (generally speaking), with the exception of Alaska.[14]

Over time, the courts and Congress have created numerous exceptions to the American rule at the federal level, particularly regarding attorneys' fees. Numerous federal and state statutes provide for shifting the prevailing party's attorneys' fees onto a losing party in civil litigation.[15] The preponderance of fee-shifting statutes tend to be one-way, meaning they impose attorneys' fees on losing defendants more so than requiring losing plaintiffs to pay the prevailing defendant's legal expenses.[16] The objective of these provisions appears to be to encourage the private enforcement of the

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Id. at 718; *see also, e.g.*, R.M. Palmer Co. v. Ludens, Inc., 236 F.2d 496, 501–02 (3d Cir. 1956) ("It is clear that counsel fees should not be awarded as a matter of course, nor as a penalty against the loser who followed conventional procedure.").

13. *See, e.g.*, HB 145-Attorney Fees: Public Interest Litigants, Committee Minutes, Alaska H. Judiciary Standing Comm., 23rd Leg. (May 7, 2003) (statement of Benjamin Brown, Legislative Assistant, Alaska State Chamber of Commerce at 1:40 PM) ("The [Alaska State Chamber of Commerce] supports Rule 82 [attorney's] fees because this modification of the English rule puts an incentive into the litigation process that makes people not file frivolous suits and realize that there may be a downside to their causing others to spend money to defend a suit that is not likely to be prevailed upon."), *available at* http://www.legis.state.ak.us/pdf/23/M/HJUD2003-05-071340.PDF; W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 405 (1999) ("The English Rule today reflects the rationale that victory is not complete in civil litigation if it leaves substantial expenses uncovered.").

14. *See* ALASKA R. CIV. P. 82 ("Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.").

15. *See, e.g.*, Clayton Act § 4(a), 15 U.S.C. § 15(a) (2012) (antitrust cases); 42 U.S.C. § 1988(b) (2012) (civil rights cases).

16. *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROB. 321, 322 (1984) ("[T]he vast majority of state attorney fee shifting statutes allow fee shifting only to prevailing plaintiffs."). *See also, e.g.*, The Clayton Act § 4(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [sic] . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."); 29 U.S.C. § 216(b) (2012) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

federal statutes in which they are found.[17] That said, fee-shifting provisions that impose an obligation on plaintiffs to pay defendants' attorneys' fees can be found within substantive statutory provisions.[18]

Other two-way fee-shifting regimes tend to be connected with litigation conduct by either side that unnecessarily creates legal expenses for an adversary, thereby justifying an equitable imposition of such expenses on the culpable party. Examples of this approach can be found within the Federal Rules of Civil Procedure at Rule 4 (expenses and fees resulting from the failure to waive service without good cause),[19] Rule 11 (expenses and fees resulting from filings that violate the certification requirements of Rule 11),[20] Rule 16 (expenses and fees resulting from noncompliance with court

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17. *See, e.g.*, Parkinson v. Hyundai Motor America, 796 F. Supp. 2d 1160, 1171 (C.D. Cal. 2010) ("California's fee-shifting and private attorney general statutes incentivize counsel to take cases on behalf of plaintiffs who could not otherwise afford to vindicate their rights through litigation."); Turner v. D.C. Bd. of Elections and Ethics, 170 F. Supp. 2d 1, 7 (D.D.C. 2001) ("The fee shifting statute is designed to create an incentive for 'private Attorney Generals' to bring meritorious lawsuits by vindicating the citizens' rights when the government may be incapacitated by political or budgetary considerations from bringing them."); Rebel Oil Co., Inc. v. Atlantic Richfield Co., 133 F.R.D. 41, 43 (D. Nev. 1990) ("[Title 15 U.S.C. § 15(a)] also provides for treble damages and attorneys fees, creating incentives for private attorneys general.").

18. *See, e.g.*, 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."); 42 U.S.C. § 11113 ("In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.").

19. FED. R. CIV. P. 4(d)(2) ("If a defendant located within the United States fails, without good cause, to sign and return a waiver . . . the court must impose on the defendant . . . the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.").

20. FED. R. CIV. P. 11(c)(4) ("The sanction may include . . . an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.").

orders under Rule 16),[21] and Rule 37 (expenses and fees resulting from discovery misconduct),[22] as well as in the Judicial Code at 28 U.S.C. § 1447(c) (expenses and fees incurred for an improper removal),[23] and 28 U.S.C. § 1927 (expenses and fees resulting from vexatious attorney misconduct).[24] In the absence of express authorization, courts have identified circumstances when they have the inherent authority to impose fee awards on litigants.[25] These judicially-created exceptions to the American rule tend to involve instances of bad faith misconduct or equitable considerations that suggest the propriety of relieving a party of some or all of its obligation to bear the costs of legal services in a given case.[26]

With respect to ordinary litigation expenses beyond attorneys' fees or the costs arising out of litigation misconduct, there have been only limited deviations from strict adherence to the

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21. FED. R. CIV. P. 16(f)(2) ("Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule . . . .").

22. FED. R. CIV. P. 37(b)(2)(C) ("Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure . . . .").

23. 28 U.S.C. § 1447(c) (2012) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.").

24. 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

25. Chambers v. NASCO, 501 U.S. 32, 45 (1991) ("[A]n assessment of attorney's fees is undoubtedly within a court's inherent power . . .").

26. The Court in *Chambers* explained:

> [E]xceptions [to the American rule] fall into three categories. The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. Second, a court may assess attorney's fees as a sanction for the "willful disobedience of a court order." . . . Third, . . . a court may assess attorney's fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

Id. at 45–46 (citations omitted).

American rule. At least since 1853, Congress has authorized taxing the losing party for specified costs.[27] Today, a similar provision is codified at 28 U.S.C. § 1920 and Rule 54, under which "costs" such as fees for the clerk, witnesses, printing, and copying are reimbursable by the losing party to the prevailing party.[28] Dismissals for lack of jurisdiction can trigger an obligation of the dismissed party to reimburse an adversary for such costs,[29] as can appellate affirmances for litigants who lose on appeal.[30] Under Rule 68 an unaccepted offer of judgment that is followed by a less favorable final judgment will trigger an obligation to cover the costs incurred by the adversary from the time of the offer.[31] An important common thread in each of these provisions is the traditional understanding that the term "costs" does not ordinarily include attorney's fees, unless otherwise provided for by Congress.[32] Thus, Rule 68's allowance for costs only permits an award of attorney's fees if the underlying statute that animates the claim at issue defines "costs" to

27. Act of Feb. 26, 1853, 10 Stat. 161 ("That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed.").

28. 28 U.S.C. § 1920 (taxation of enumerated costs allowed); FED. R. CIV. P. 54(d)(1) ("[C]osts—other than attorney's fees—should be allowed to the prevailing party.").

29. 28 U.S.C. § 1919.

30. 28 U.S.C. § 1912.

31. FED. R. CIV. P. 68(d) ("If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.").

32. 28 U.S.C. § 1923 provides nominal amounts taxable as "Attorney's and proctor's docket fees," and thus provide a mild departure from the principle of taxable costs not including attorney's fees. 28 U.S.C. § 1923 (providing that "[a]ttorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows" and then delineating amounts of $5, $20, $50, and $100 of such fees depending on the disposition of the matter, e.g., by trial, by "discontinuance," by appeal in admiralty cases, or on motion for judgment, and a $2.50 fee "for each deposition admitted into evidence"); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975) ("[W]ith the exception of the small amounts allowed by § 1923, the rule 'has long been that attorney's fees are not ordinarily recoverable . . . .'" (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967))).

include such fees.[33] Absent the inclusion of attorneys' fees, these cost-shifting rules have tended to be of minimal impact on redistributing the financial burdens associated with litigation.[34]

B. The Discovery Cost-Allocation Experience under the American Rule

Notwithstanding the number of departures from the American rule discussed above, that rule has remained the default principle governing how the expenses associated with responding to discovery requests are borne. As the Supreme Court has noted, "[u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests. . . ."[35] This means that ordinarily, when a party receives a discovery request—such as a request for documents under Rule 34—the responding party must pay for all expenses associated with responding to that request, which may include search and retrieval, photocopying, forensic reconstruction, travel, human resources, and attorney supervision and review.[36] As previously mentioned, attorney's fees

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33. Marek v. Chesny, 473 U.S. 1, 9 (1985) ("[T]he term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."). There was an unsuccessful effort in 1995 to amend the diversity jurisdiction statute to permit the payment of an opponent's attorney's fees after a litigant received a judgment that was less favorable than one previously offered by that opponent. *See* ATTORNEY ACCOUNTABILITY ACT OF 1995, H.R. REP. No. 104-62 (1995), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt62/html/CRPT-104hrpt62.htm.

34. *See, e.g.*, FED. R. CIV. P. 68 advisory committee's note (Proposed Amendment 1984), *available at* 102 F.R.D. 407, 433–44 (1984) ("[Rule 68] has been considered largely ineffective as a means of achieving its goals. The principal reasons for the rule's past failure have been (1) that 'costs' [when they do not include attorney's fees] . . . are too small a factor to motivate parties to use the rule; and (2) that the rule is a 'one-way street,' available only to those defending against claims and not to claimants.").

35. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

36. Rule 26(b)(4)(E) provides a notable exception to this default rule by requiring "the party seeking discovery" to pay the fee of an opponent's expert for the time spent responding to certain expert discovery requests (e.g. a deposition of an opponent's expert). FED. R. CIV. P. 26(b)(4)(E).

and expenses arising from discovery misconduct are potentially reimbursable at the court's discretion under Rule 37.[37]

Although producers must bear these costs, the bulk of empirical data seems to indicate that overall, the costs of civil discovery in the federal system are not disproportionate or excessive,[38] tending to suggest that for most litigants the need to shift discovery expenses onto requesting parties is not compelling. However, to the extent the anticipated expenses associated with responding to a discovery request are thought to be excessive (either in an absolute or relative sense) in any given case, the federal courts—with some license and less guidance from the Federal Rules of Civil Procedure—have developed mechanisms for determining whether some or all of those expenses should be shifted to the requesting party.[39] The inquiry currently employed by federal courts involves a multi-factored consideration of issues such as the proportionality of the expense, the significance of the information sought, its availability from other sources, and the relative ability of the parties to cover and control the costs.[40] This analysis is typically

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37. *See* FED. R. CIV. P. 37(b)(2)(C) (imposing "reasonable expenses, including attorney's fees" in instances of discovery misconduct).

38. I previously discussed the evidence rebutting the notion that overall the costs of federal civil discovery are excessive in Spencer, *supra* note 8, at 1729–31, a discussion that pointed, in turn, to the work of the Federal Judicial Center and other scholars, *see* Danya Shocair Reda, *supra* note 8, at 1088–89 (2012); EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf; Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994).

39. *See, e.g.*, Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 317–18 (S.D.N.Y. 2003); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428–29 (S.D.N.Y. 2002) (articulating the factors relevant to determining the extent to which discovery costs should be shifted to the requesting party).

40. *Zubulake I*, 217 F.R.D. at 322. In *Zubulake I*, Judge Scheindlin set out a seven-factor test to be applied to cost-shifting determinations, which were themselves a modification of factors previously laid out in *Rowe*:

> 1. The extent to which the request is specifically tailored to discover relevant information;

applied in the face of electronic discovery that is argued to be not reasonably accessible,[41] most likely due to the fact that Rule 26(b)(2)(B) specifically protects parties against having to provide discovery from such sources when doing so would be unduly burdensome or costly.[42] However, Rule 26(c)(1)(B) also provides courts the authority to split or shift the costs of discovery—if "good cause" is shown—via a protective order,[43] an authority that is now explicit.[44] There was not widespread utilization of this authority prior to the advent of electronically stored information (ESI) and its

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2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.

Zubulake I, 217 F.R.D. at 322.

41. Zubulake v. UBS Warburg, LLC (*Zubulake III*), 216 F.R.D. 280, 284 (S.D. N.Y. 2003) ("It is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought. When a discovery request seeks accessible data—for example, active on-line or near-line data—it is typically inappropriate to consider cost-shifting.").

42. *See* FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

43. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (noting that a responding party "may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense' in [complying with discovery requests], including orders conditioning discovery on the requesting party's payment of the costs of discovery").

44. *See* FED. R. CIV. P. 26(c) (2014) (amended 2015) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (B) specifying terms, including time and place *or the allocation of expenses*, for the disclosure or discovery . . . ." (emphasis added)).

associated costs,[45] although some courts have engaged in cost-shifting beyond the ESI context.[46] Even with ESI, the imposition of cost-shifting orders seems to be the exception rather than a standard practice.[47] Further, the costs that are shifted or shared under these rules do not include attorneys' fees associated with retrieval and production in response to discovery requests,[48] although such fees can be shifted as a sanction for discovery misconduct under Rule 26(g) or Rule 37.

Beyond the cost-shifting that occurs to alleviate production expenses thought to be unduly burdensome, there is the statutorily authorized shifting of the costs for exemplification and for "making copies of any materials where the copies are necessarily obtained for use in [a] case" pursuant to 28 U.S.C. § 1920 section 4. Under this statute, courts may tax such expenses as "costs" awardable to the prevailing party under Rule 54.[49] This language unquestionably applies to the actual photocopying expenses associated with discovery but not preparatory costs leading up to the copying.[50] The

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45. Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 335–36 (E.D. Pa. 2012) ("Despite this broad authorization of cost shifting by the Supreme Court over thirty years ago, very few Courts took advantage of this authority before the advent of ESI.").

46. *See, e.g.*, Simms v. Ctr. for Corr. Health & Policy Studies, 272 F.R.D. 36 (D.D.C. 2011) (relieving producing party of obligation to make photocopies due to the associated expense and ordering requesting party to review and copy the material at its own expense); Schweinfurth v. Motorola, Inc., No. 1:05-CV-0024, 2008 WL 4449081 (N.D. Ohio Sept. 30, 2008) (ordering class action plaintiffs to pay half the costs of requested discovery because of the size and limited probative value of the information sought); Am. Int'l Specialty Lines Ins. Co. v. NWI–I, Inc., 240 F.R.D. 401 (N.D. Ill. 2007) (ordering the plaintiff and defendants to share equally the costs associated with discovery of a particular set of documents).

47. At least among published cases, online legal database searches do not reveal a significant number of cases in which the discovery costs are shifted.

48. *See, e.g.*, Melton *ex rel.* Dutton v. Carolina Power & Light Co., No. 4:11–cv–00270–RBH, 2012 WL 4322520, at *4 (D.S.C. Sept. 19, 2012) ("[T]he cost shifting contemplated by Rule 26(c) provides for shifting of discovery costs, not the shifting of attorney's fees."); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 577 (N.D. Ill. 2004) (awarding shifting of certain out-of-pocket discovery costs but providing that "[e]ach party will bear their own costs of reviewing the data....").

49. 28 U.S.C. § 1920(4) (2012); FED. R. CIV. P. 54(d)(1).

50. CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320, 1328 (Fed. Cir. 2013) ("But only the costs of creating the produced duplicates are included,

Third Circuit has articulated the dominant view of how § 1920 applies to the reproduction of electronic material:

> [O]f the numerous services the vendors performed, only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved "copying," and that the costs attributable to only those activities are recoverable under § 1920(4)'s allowance for the "costs of making copies of any materials."[51]

In other words, courts have not read § 1920 as a broad authorization to shift all of the costs associated with electronic discovery to a losing party but only the expenses associated with reproduction.[52] Section 1920 is thus a narrow provision not seen as a vehicle for broadly shifting the costs of discovery onto a losing opponent.[53]

In sum, although there are multiple opportunities for litigants to seek, and for courts to grant, the shifting of expenses associated with responding to discovery requests, they remain limited and stand as an exception to—rather than an upending of—the presumption that producing parties bear the obligation to incur those costs.

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not a number of preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication.").

51. Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 171 (3d Cir. 2012); *see also* Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 260 (4th Cir. 2013) (finding the Third Circuit's reasoning persuasive to not include imaging or metadata extraction costs).

52. *See Race Tires*, 674 F.3d at 171 ("Neither the language of § 1920(4), nor its history, suggests that Congress intended to shift all the expenses of a particular form of discovery—production of ESI—to the losing party. Nor can such a result find support in Supreme Court precedent, which has accorded a narrow reading of the cost statute in other contexts."); *see also, e.g.*, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987) ("Although there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so, either generally or in particular cases, under the cost statute.").

53. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2006 (2012); *Race Tires*, 674 F.3d at 170 ("Nor may the courts invoke equitable concerns . . . to justify an award of costs for services that Congress has not made taxable.").

II. REVERSING THE PRESUMPTION: SHOULD REQUESTERS HAVE TO PAY?

As noted at the outset, currently on the table is the question of whether the presumption that the producing party pays the costs of responding to discovery should be replaced with a default "requester-pays" rule.[54] Note that a move towards the English rule—which is a *post hoc* "loser-pays" regime saddling the culpable party with the costs of the victor's case—is not what proponents of change have proposed. Rather, the suggestion is that requesting parties should bear the costs of responding to the discovery requests they issue *ex ante* as a matter of course, not as an exceptional occurrence done only after a judicial assessment of the propriety of such an allocation. Whether the proposal structures itself as a default requester-pays rule or in the form of the traditional English rule[55] is material from a practical perspective (and to a lesser extent from a policy perspective) but not so much so from a theoretical and constitutional perspective. Below, we will review the various constitutional and policy considerations surrounding the proposal to move to a default requester-pays system in order to determine whether such a course is advisable, warranted, or perhaps even compelled.

A. Constitutional Considerations

A principal claim made by opponents of the producer-pays rule is that it is unconstitutional because it results in the deprivation of the producer's property—its financial resources associated with the cost of production—"absent any finding of liability and without adequate procedures."[56] As Professor Martin Redish and his co-author have stated, "impos[ing] the nonreimbursable costs of [a] plaintiff's discovery on the defendant on the basis of nothing more

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54. *See, e.g.*, *Federal Rules of Civil Procedure*, LAWYERS FOR CIVIL JUSTICE, http://www.lfcj.com/federal-rules-of-civil-procedure.html (last visited Mar. 19, 2015) (urging the "development of incentive-based 'requester pays' default rules").

55. Recall that the English rule is a post-hoc cost shifting mechanism whereby the producing party is subsequently reimbursed if it becomes the prevailing party.

56. Beisner Letter, *supra* note 6, at 8.

than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process" because these costs are imposed "without even a preliminary judicial finding of wrongdoing."[57] These are serious charges[58] with severe implications: If this procedural due process challenge[59] is correct, courts would not be permitted to force producing parties to bear the costs of responding to discovery requests, and such costs would presumably become the responsibility of the requester.

To evaluate the strength of this due process claim, we must begin with the meaning of the due process right. The text of the Fifth Amendment is familiar: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[60] The Supreme

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57. Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 807 (2011).

58. Other scholars have derided this argument as "laughable" and not one to be taken seriously because none of its proponents are invoking it as grounds for refusing to comply with a discovery request in an actual litigation. That said, the argument has been invoked repeatedly and likely will have rhetorical force that will permit those already inclined to oppose the producer-pays rule to invoke it as justification for making the policy change they desire—a move to a requester-pays rule. Thus, it is important that the argument be taken seriously and evaluated honestly rather than simply dismissed out-of-hand so that the results of the analysis herein will be less assailable.

59. None of the proponents of the due process argument appear to be claiming that the obligation to cover the expenses of responding to discovery requests constitutes a violation of substantive due process—nor could they. Substantive due process supplies heightened scrutiny only to impingements on "fundamental rights" "implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997) (internal quotation marks and citations omitted). No one could assert—in good faith—that the right not to cover the costs of discovery production is a fundamental right. Not being a fundamental right, rational basis scrutiny applies, meaning that the government action must be rationally related to a legitimate governmental interest. *Id.* at 728. The government's interest in eliciting evidence in civil cases heard by the federal courts is obviously a legitimate one and asking each party to cover associated expenses—with the opportunity to challenge particularly burdensome costs—is certainly a rational approach. *See also* Redish & McNamara, *supra* note 57, at 806 ("[T]he forced subsidization of its opponent's discovery costs gives rise to serious concerns about the procedural due process rights of the producing party.").

60. U.S. CONST. amend. V. The Fourteenth Amendment, which would apply to action by state courts, similarly provides "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

Court has stated that the "central meaning" of this "procedural due process" protection is that "'[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"[61] However, these protections apply only if there is a "deprivation" within the meaning of the Fifth (or Fourteenth) Amendment.[62] Thus, two issues present themselves when confronted with the claim that the producer-pays rule violates due process: First, does obligating a producing party to bear the costs associated with responding to civil discovery requests constitute a deprivation of the kind embraced by the Due Process Clause? Second, if it does, is the party suffering the deprivation afforded a constitutionally-sufficient opportunity to be heard in connection with the deprivation?

1. A Deprivation?

Our system of regulation in this country includes both public and private enforcement mechanisms. The civil justice system, at both the state and federal levels, is the principal means through which private wrongs are vindicated. All persons and entities are subject to this system, provided the requisites of jurisdiction can be satisfied to give a court authority over the defendants in a given case. Once lawful jurisdiction is established, all come under the obligation to appear and cooperate with the judicial process—including discovery—or face sanctions up to and including dismissal or a default judgment.[63] Appurtenant to that obligation will be the costs

61. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863)).

62. *Id.* at 84 ("The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection."); *id.* at 86 ("Any significant taking of property by the State is within the purview of the Due Process Clause."); *see also* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1990) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

63. FED. R. CIV. P. 37(b); *see also, e.g.*, Kafele v. Javitch, Block, Eisen & Rathbone, 232 F.R.D. 286, 289 (S.D. Ohio 2005) (holding that plaintiff's repeated, persistent, and willful refusal to participate in discovery process despite earlier sanctions warranted dismissal of action); Guy v. Abdulla, 58 F.R.D. 1, 2 (N.D. Ohio 1973) ("[A] defendant may not completely refuse to participate in pre-trial

of participating in that process, which include hiring counsel, mailing and filing documents, hiring expert witnesses, producing copies of requested information, and the like. Indeed, litigation expenses (such as those just described) are an inevitable cost of doing business in a society as reliant on private enforcement as the United States.[64] The question is whether the costs of compliance with the judicial process—which are incidental to that process rather than its object—can fairly be classified as a constitutional "deprivation" such that the protections of due process apply to their imposition.[65]

Whether such costs constitute a constitutional deprivation depends on the ends they serve. To the extent that the litigation expenses in question are expended for the benefit of the party incurring the cost, no constitutionally-cognizable deprivation can be said to have occurred. It is a well-established principle that property employed for the benefit of the complaining party is not a deprivation warranting due process protection. In *Moody v. Weeks*, the court articulated this principle in rejecting an inmate's due process challenge to being charged $5 per month to cover court costs: "The inmate is not absolutely 'deprived' of his funds when they are use[d] to pay court costs and fees because the funds are being used for the inmate's benefit."[66] In *Jensen v. Klecker*, the Eighth Circuit stated the principle more starkly in terms apropos

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discovery . . . ."). Of course, the complete failure to defend oneself in an action risks a default judgment. FED. R. CIV. P. 55.

64. This is why under appropriate circumstances litigation expenses are deductible against business income. 26 U.S.C. § 162 (2012).

65. Proponents of the due process argument, *to my knowledge,* have not addressed this particular point, assuming—rather than establishing—that a constitutionally cognizable deprivation occurs when a defendant is made to finance the expense of producing information requested by plaintiffs in the course of litigation. REDISH & MCNAMARA, *supra* note 57, at 807 ("To impose the nonreimbursable costs of plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process. The judicial process has imposed a financial burden on the defendant without even a preliminary judicial finding of wrongdoing.").

66. No. 1:09–cv–332, 2009 WL 1728102, at *2 (S.D. Ohio June 18, 2009); *see also* Browder v. Ankrom, No. Civ.A. 4:05CV-P9-M, 2005 WL 1026045, at *5 (W.D. Ky. Apr. 25, 2005), ("[S]uch debits are not 'deprivations' in the traditional sense because an inmate has been provided with a service or good in exchange for the money debited.").

here: "It is important to note that this issue does not involve a forfeiture of property or a penalty. Rather, it is in the nature of an assessment for value received."[67] Litigation expenses incurred for the benefit of the litigant spending them are not being forfeited to the government or to the adverse party, nor are they being imposed as a penalty for a wrong; rather, they are funds a litigant spends in the process of defending itself in court, a defense that provides a benefit to that litigant. Thus, ordinary litigation expenses cannot be characterized as a deprivation worthy of due process protection.[68]

But what of the costs associated with responding to a discovery request? Is there something unique about such costs that makes their imposition a deprivation that due process will recognize? The short answer is no, for three reasons: First, to the extent that producing information in response to a discovery request is beneficial to the producing party, no constitutional deprivation has occurred for the reasons stated above—self-serving expenditures are not classified as constitutional deprivations.[69] Under what circumstances would producing information in response to a discovery request be beneficial to the producing party? Clearly, such would be the case if the information produced were *exculpatory* from

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67. 648 F.2d 1179, 1183 (8th Cir. 1981); *see also* Bailey v. Carter, 15 F. App'x 245, 251 (6th Cir. 2001) ("We question whether the inmates were truly 'deprived' of their property, however. The copayment fee was deducted from their accounts in exchange for medical services."); Hampton v. Hobbs, 106 F.3d 1281, 1287 (6th Cir. 1997) ("Moreover, prisoners are not absolutely deprived of the use of their funds when those funds are applied toward the filing-fee requirements. The funds are being utilized for the prisoner's benefit just as a non-indigent's money is used by him to proceed in federal court.").

68. Professor Redish seems to concede this point in part when he writes,

> [I]t is important to distinguish the burdens caused by the forced subsidy [of the cost of production] from the normal costs incurred by a defendant in preparing his own case after a complaint is filed. Unlike the costs incurred by a defendant in mounting his own case, the costs involved in responding to a plaintiff's discovery requests are a financial benefit that the defendant is required—at the risk of severe sanctions—to provide to the plaintiff on the basis of nothing more than the unilateral filing of the plaintiff's complaint.

REDISH & MCNAMARA, *supra* note 57, at 810.

69. *See supra* text accompanying note 65.

the perspective of a producing defendant[70] or probative of the producing party's claims or defenses because in those circumstances the information would be supportive of the producing party's position in the litigation.[71] As a result, the expense would be beneficial to the producing party and thus not a constitutionally cognizable deprivation.[72]

Conversely, the information produced may be *inculpatory* or probative of the requesting party's claims or defenses and thus used against the producing party. In this situation, Professor Redish and his coauthor believe that producing parties are forcibly—without due process—being made to subsidize their adversaries: "Because each party bears the costs of producing the information that will be used against it by its opponent, each party effectively subsidizes that portion of its opponent's case."[73] However, when the information produced tends to confirm the defendant–producer's liability (or the meritlessness of the plaintiff's claims in the event the plaintiff is the producing party) this analysis should fail because the producer has unclean hands; a litigant should have no equitable claim to a right to withhold information tending to refute its litigation position or to

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70. Producing plaintiffs, having initiated the action, are likely not in a position to challenge the legitimacy of having to pay to produce material in response to proper discovery requests from the parties they have sued, given such plaintiffs' own invocation of the discovery process to prosecute and support their own claims.

71. This is a distinction that seems to be recognized, at least implicitly, by advocates of a requester-pays rule in their failure to complain (in the context of the contemporary debate) of having to pay the costs of producing documents pursuant to the initial disclosure obligations of Rule 26(a). Those disclosures are expressly limited to "information . . . that the disclosing party may use to *support* its claims or defenses," i.e. information whose production is beneficial to the producing party. FED. R. CIV. P. 26(a)(1)(i) & (ii) (emphasis added).

72. Such exculpatory information may not be exclusively beneficial to the producing party; the information might also be of some benefit to the requesting party's litigation position as well. However, so long as the information is of some benefit to the producing party, the claim of a constitutional deprivation cannot be maintained.

73. REDISH & MCNAMARA, *supra* note 57, at 792. Unmentioned is the fact that the taxpayers, in turn, subsidize these costs through their deductibility against tax liability as business expenses. *See* 26 U.S.C. § 162 (allowing deductions for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business").

saddle the requester with the expense of discovering such information.

More basically, though, the argument that having to bear the costs of production in civil litigation is a constitutional deprivation fails because if the information has evidentiary value in a live dispute, the court and all parties are entitled to access it, and those in possession of the information have a duty to provide it. As the Eleventh Circuit once stated, "[t]here is a fundamental responsibility of every person to give testimony, and the duty to provide evidence has long been considered to be almost absolute."[74] Further, this duty obtains notwithstanding the fact that it may be accompanied by burdens such as incurring expenses or opportunity costs. As one court explained the point:

> The Professor claims that having to produce his records and give testimony would be burdensome. He claims that to require him to be available in every lawsuit would create an extraordinary hardship on him and that the court should protect him. His claim must be kept in context with the way in which the system of administrating justice affects every citizen. Every person is burdened by having to disclose knowledge he acquires, even though it is acquired purely by accident. A person who sees an auto accident cannot refuse to testify because it burdens him. A person who witnesses a will cannot refuse to testify. All are burdened, yet some are burdened more than others.[75]

Clearly, the mere fact of a financial burden arising out of complying with lawful discovery obligations itself cannot constitute a constitutional deprivation. What the Constitution protects against, rather, is the imposition of *unreasonable* or excessive burdens.[76] So

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74. Klay v. All Defendants, 425 F.3d 977, 986 (11th Cir. 2005) (citation and internal quotation marks omitted).

75. Wright v. Jeep Corp., 547 F. Supp. 871, 876 (E.D. Mich. 1982).

76. *See* United States v. Dauphin Deposit Trust Co., 385 F.2d 129, 130 (3d Cir. 1967) ("If the Fourth and Fifth Amendments accord any protection it could only be from the imposition of an unreasonable and excessive financial burden.").

long as the information sought is relevant to the dispute and the costs of producing the requested information are reasonable, the expenses are an ordinary incident of doing business and a constitutionally cognizable deprivation cannot be said to have occurred.[77]

This test—whether the information is relevant to the dispute and the reasonableness of the costs of compliance—crystalizes for us the constitutionality of the default producer-pays rule in the federal courts because the discovery rules are designed to ensure that responding parties bear the cost of production only under these conditions. On the first point—relevance to the dispute—the Federal Rules of Civil Procedure permit only the discovery of information that is "relevant to any party's claim or defense;"[78] although a good-cause showing formerly could serve as grounds for expanding the scope of discoverable information to material relevant to "the subject matter involved in the action,"[79] that allowance was eliminated from the Rule.[80] Thus, the discovery requests to which parties have a duty to respond are only those seeking information relevant to a claim or defense actually asserted in the action. On the second point, the Federal Rules give producing parties the right to object to discovery that would impose unreasonable costs.[81]

Currently, then, if the information requested is useless, irrelevant, or too expensive, the Federal Rules afford a producing party a process whereby it can challenge—*ex ante*, in an adversarial process before an impartial judge—both the propriety of the request and the producer's obligation to cover the expenses associated with that request. Rule 26(c) entitles responding parties to seek protective orders when that party believes it is entitled to protection "from

77. *See* United States v. Bremicker, 365 F. Supp. 701, 703 (D. Minn. 1973) ("[T]he bank complains that the financial burden of compliance would be considerable, such that it would amount to a deprivation of property without due process of law. . . . Since the material sought by the Internal Revenue Service is relevant to a legitimate investigation, the bank has the duty of full cooperation, including the diligent search for and production of all records requested. The expenses incurred in producing such records are reasonably incident to the bank's normal operations and should be anticipated as a cost of doing business as a bank.").

78. FED. R. CIV. P. 26(b)(1) (2014) (amended 2015).

79. *Id.*

80. *See* FED. R. CIV. P. 26(b)(1) (lacking language permitting such an allowance).

81. FED. R. CIV. P. 26(c)(1).

annoyance, embarrassment, oppression, *or undue burden or expense*."[82] Thus, in the very circumstance when the costs and benefits of the requested information are in question, responding parties are not forced to pay for such information until after a hearing on their objection occurs. We will return to an expanded discussion of the constitutional sufficiency of this process below.[83]

Recall that we are exploring the reasons why bearing the costs of producing information in response to civil discovery requests is not ordinarily a constitutional deprivation. The first was that productions that benefit the litigation position of the producing party cannot be regarded as deprivations; equitable considerations preclude complaints about the costs of giving information harmful to one's litigation position; and when one might be able to claim a deprivation—the obligation to pay for discovery that is unreasonably expensive or not relevant to the dispute (or both)—the Federal Rules provide for a prior hearing that can result in a protective order against such an obligation. The second reason why the producer-pays rule is not a constitutional deprivation is that the Due Process Clause has always been understood to apply to government appropriations of, or impositions on, property or property rights, not to adverse economic consequences that are the mere incidents of lawful governmental action. Long ago, in the *Legal Tender Cases*, the Supreme Court stated:

> That provision [the Due Process Clause of the Fifth Amendment] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.[84]

From that time, it has been clear "that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action."[85] Thus, the incidental

82. FED. R. CIV. P. 26(c)(1) (emphasis added).
83. *See infra* Part II.A.2.
84. 79 U.S. (7 Wall.) 457, 551 (1870).
85. O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 789 (1980).

adverse economic consequences of enforcement of a statute cannot be challenged as unconstitutional deprivations of property.[86] Similarly, the incidents of complying with properly instituted judicial action may not be cast as deprivations warranting due process protections. This includes the obligation to comply with discovery orders; if the court orders a producing party to produce information relevant to the dispute, the expenses associated with doing so are nothing more than "consequential injuries resulting from the exercise of lawful power," not a constitutional deprivation.

Third, and most compelling, is the fact that giving evidence in aid of a judicial process is a universal duty owed by all, entitling none to a claim of compensation for the reasonable costs incurred thereby. The Supreme Court clearly indicated that the giving of evidence is an obligation. In *Blackmer v. United States*, the Court wrote, "It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."[87] Continuing in this vein, the Court in *United States v. Bryan* noted, quoting Wigmore:

> "For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving . . . ."[88]

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86. Detweiler v. Welch, 46 F.2d 71, 74 (D. Idaho 1930) ("[A] statute should not be rendered unconstitutional because the property of persons is subjected to restraint, or that expense results to individuals from the enforcement of the statute.").

87. Blackmer v. United States, 284 U.S. 421, 438 (1932); *see also* United States v. Bryan, 339 U.S. 323, 331 (1950) ("[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery.").

88. *Bryan*, 339 U.S. at 331 (quoting JOHN HENRY WIGMORE, EVIDENCE (3d ed.) § 2192 (1940)).

As a solemn public duty, the Court has admonished that "this obligation persists no matter how financially burdensome it may be. . . . 'The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.'"[89] As such, there is no due process right to be compensated for the costs of complying with the obligation to give evidence to a governmental authority pursuing lawful objectives: "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed."[90]

Applying this concept in the discovery context clearly precludes a claim of a due process problem simply based on having to bear the costs of producing information within the permissible scope of discovery in a civil action. When a bank raised such a challenge in response to an IRS summons seeking the production of certain business records, the court rejected the assertion that "requiring the Bank to expend the funds required to comply with the summons would amount to a taking of property without just compensation and deprive it of property without due process of law" and concluded that the bank had "no right to reimbursement under the Fifth Amendment."[91] That said, there does seem to be a need for the incidental costs of compliance to be reasonable.[92] As noted above, the Federal Rules provide producing parties every opportunity to object to paying the costs of production if they are unreasonable and to do so prior to having to bear the costs, in an adversary proceeding before the judge.[93] So, again, when the reasonableness of the production costs (or the relevance of the information) is in question—which are the only circumstances under which one might be exempted from the otherwise generally applicable obligation to give evidence—the Federal Rules provide for a process to resolve the matter. Thus, all that remains is to assess whether that process is sufficient from a constitutional perspective.

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89. Hurtado v. United States, 410 U.S. 578, 589 (1973) (footnote omitted) (quoting Blair v. United States, 250 U.S. 273, 281 (1919)).

90. *Hurtado*, 410 U.S. at 588.

91. United States v. Covington Trust & Banking Co., 431 F. Supp. 352, 354–55 (E.D. Ky. 1977).

92. *Id.* at 355 (holding that respondents had no right to reimbursement because "the summons imposes no unreasonable financial burden on the Bank").

93. FED. R. CIV. P. 26(c)(1).

2. A Constitutionally Sufficient Process?

Assessing the constitutionality of imposing the costs of responding to discovery on producing parties in civil litigation only partially depends on determining whether a constitutionally cognizable deprivation has occurred. Any deprivation that might be identified under such circumstances would have to occur in the absence of the requisite procedural protections to be unconstitutional. For those instances in which a litigant is compelled to produce material to another party at its own expense, the Federal Rules of Civil Procedure put in place an adversarial hearing at which a judge will determine the propriety of imposing that obligation.[94] Is this a constitutionally sufficient process?

The Federal Rules limit the scope of discovery to information relevant to a claim or defense[95] and afford parties the opportunity to object if a request exceeds that limit or would impose "undue burden or expense."[96] These restrictions cabin discovery within the boundaries of what the government—through the courts—has the right to demand of those who have evidence relevant to a pending judicial proceeding. Recall that within these confines, no constitutional deprivation occurs and all have a duty to cooperate without compensation.[97] However, the Federal Rules give producing parties the opportunity to assert that the requested production would fall outside of the permissible scope of discovery—either due to irrelevance or undue burden—prior to having to produce the information. This is done through a motion for a protective order; movants have the opportunity to present their arguments against having to comply with a discovery request to a judge.[98] Thus, an order compelling a party to produce material at its own expense comes only after a pre-deprivation hearing at which the producing party has had the opportunity to be heard. After this hearing, the court may order the discovery if appropriate or order that the costs of

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94. FED. R. CIV. P. 26(c)(1).

95. *Id.* In the current version of the Rules, there is no longer the ability to obtain discovery related to the subject matter involved in the action. *See supra* note 80 and accompanying text (discussing the grounds for expanding the scope of discovery that are eliminated from the new Rules.)

96. *Id.*

97. *Supra* text accompanying notes 87–90.

98. FED. R. CIV. P. 26(c)(1).

such discovery must be shared with or shifted to the requesting party.[99]

Is this type of hearing one that comports with due process? The Supreme Court has consistently indicated a threefold inquiry to assess the constitutional sufficiency of procedures that accompany governmental deprivations of property based on *Mathews v. Eldridge*: (1) consideration of "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[100] When the deprivation is at the behest of a private party, the third consideration is revised to embrace consideration of the interest of the party seeking the deprivation, along with "any ancillary interest the government may have in providing the procedure."[101]

For civil discovery requests, the private interest to be affected by the discovery is the financial costs associated with compliance. However, so long as the costs are not unduly burdensome and are connected with the production of information within the permissible scope of discovery, no constitutional deprivation occurs. Further, the hearing that Rule 26(c) provides minimizes the risk of an erroneous deprivation because it permits a judge to assess the propriety of the discovery request before the deprivation occurs, ensuring that it is consistent with the relevance and proportionality constraints the Federal Rules place on discovery.[102] Finally, the party requesting the information has an interest in receiving it to the extent it relates to a claim or defense actually raised in the action, as such information will further their ability to prosecute or defend against asserted claims. Similarly, the government has an interest in arriving at a

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99. FED. R. CIV. P. 26(c)(2) (2014) (amended 2015) ("If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery."). There is now an explicit authorization to order cost-sharing in Rule 26(c)(1)(B).

100. 424 U.S. 319, 335 (1976).

101. Connecticut v. Doehr, 501 U.S. 1, 11 (1991).

102. *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569–70 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").

resolution of the dispute on the merits, which can only be aided by having access to information relevant to the claims and defenses raised in the action. It seems beyond doubt, then, that in those instances where having to pay the costs of production would constitute a constitutional deprivation—the production of irrelevant or unduly burdensome information—an appropriate pre-deprivation hearing is provided consistent with what the Constitution requires.

As further protection, litigants only gain access to the entitlements of discovery after surmounting additional procedural hurdles that permit the dispute to be heard. Most obviously, civil defendants must be subject to the personal jurisdiction of the court before being bound.[103] More importantly, defendants are obligated to respond to complaints that meet the minimum pleading requirements of Rule 8(a) as interpreted by the Supreme Court. In the wake of *Bell Atlantic Corp. v. Twombly*[104] and *Ashcroft v. Iqbal*,[105] plaintiffs must substantiate their allegations with sufficient facts to make their claims plausible.[106] This obligation was developed expressly to address the supposed prior ability of plaintiffs to gain access to discovery on too thin of a basis.[107] The need for plaintiffs to articulate facts showing plausible entitlement to relief mirrors the similar obligation claimants had in *Mitchell v. W.T. Grant Co.*, in which a writ of sequestration could only issue when "the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by a verified petition or affidavit."[108] This

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103. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant . . . be subject to the personal jurisdiction of the court.").

104. 550 U.S. 544 (2007).

105. 556 U.S. 662 (2009).

106. *Id.* at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

107. *Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." (citation omitted)).

108. Mitchell v. W.T. Grant Co., 416 U.S. 600, 605 (1974) (internal quotations omitted).

safeguard, among others, was deemed to be important in legitimizing the deprivation occasioned by the writ in *Mitchell*, notwithstanding the absence of a pre-deprivation hearing for the adversely affected party.[109] In the context of civil discovery, plaintiffs have similarly specified the plausibility of their claims and—as noted above—must further demonstrate (if challenged) that the information they seek is within the relevance and proportionality limits of discovery to a judge. Thus, civil defendants in the federal system are compelled to respond to discovery requests only in those actions in which plaintiffs have demonstrated plausible entitlement to relief, not just any claims that a plaintiff may have imagined, and only after a court determines that the request does not fall beyond the proper scope of discovery. An adversarial, pre-deprivation hearing before a judge is the gold-standard of due process and cannot be seriously challenged as constitutionally deficient.

Although Professor Redish acknowledges the screening function of the *Twombly–Iqbal* ("*Twiqbal*") standard, he dismisses it as a constitutionally insufficient means of protecting defendants against the obligation to provide discovery at their own expense.[110] What he misses, however, is the fact that not all instances of self-financed compelled discovery production constitute constitutionally cognizable deprivations. Professor Redish also ignores the fact that prior to imposing production obligations that *would* constitute a deprivation—the production of irrelevant or unduly burdensome information—there indeed is an adversarial, pre-deprivation hearing before a neutral decision maker. Here, we make note of the threshold *Twiqbal* pleading hurdle not to indicate its status as a sufficient pre-deprivation protection against improper discovery; rather, the pleading requirement is cited for the role that it plays in ensuring that discovery is cabined by claims that have demonstrated plausibility rather than claims that are purely speculative in nature. That standard contributes to the assurance that the deprivation is not erroneous; that is, by permitting only plausible claims to gain access to discovery, the risk that discovery obligations are being imposed in aid of meritless or baseless claims is greatly reduced.

It is worth mentioning that in addition to the pre-deprivation hearing that a producing party may avail itself of under Rule 26(c),

109. *Mitchell*, 416 U.S. at 605.

110. REDISH & MCNAMARA, *supra* note 57, at 807–10.

the certification and sanctions provisions of Rule 26(g) provide an additional layer of protection against improper discovery requests that would constitute a constitutionally cognizable deprivation. Requesting parties must certify that their requests are consistent with the rule, not interposed to needlessly increase the cost of litigation, and are not unreasonable or unduly burdensome.[111] Violation of this certification requirement subjects the offending party to the imposition of sanctions, which can include the reasonable expenses—including attorneys' fees—caused by the violation.[112] Not only does this provision have deterrent value to the extent it discourages wayward discovery requests, it provides for a post hoc compensation scheme that makes the producing party whole in the event it incurs costs as a result of improper discovery requests. Certainly, the protection provided by Rule 26(g) will depend on how willing the court is to enforce it, a consideration to which we will return when considering discovery reforms below.

In sum, only requests outside the scope of discovery or those that are unduly burdensome constitute constitutionally cognizable deprivations. The Federal Rules provide for a pre-deprivation, adversary hearing before a judge to determine whether the discovery sought falls within or beyond this permissible scope. Only litigants who have demonstrated plausible entitlement to relief gain the right to invoke discovery with respect to their claims. Litigants who in fact interpose inappropriate discovery requests can be sanctioned in a way that makes the responding party financially whole. Needless to say, any effort to disparage this process as constitutionally insufficient is baseless.

B. Policy Considerations

Although there is no constitutional prohibition against requiring producing parties to bear the reasonable costs of responding to permissible discovery requests, that does not mean that such an approach is the most appropriate way to allocate these costs. The next question, then, is whether the producer-pays rule makes sense from a policy perspective. More specifically, what are the consequences of a producer-pays rule compared with a requester-

111. FED. R. CIV. P. 26(g)(1)(B).
112. FED. R. CIV. P. 26(g)(3).

pays approach, and how do those consequences bear on litigants' goals and on the goals we collectively have for civil litigation more generally? Civil litigation is a mechanism through which civil law enforcement objectives are achieved. These objectives include the encouragement of law compliance (specific and general deterrence); the peaceful resolution of disputes on their merits, the remediation of harm (compensation); and—derivatively—the development of the law.[113] A meta-objective would be the achievement of these objectives in a manner consistent with due process and with standards of efficiency and proportionality.[114] What role, if any, does the producer-pays approach play in furthering or frustrating the goals of civil litigation?

There are not studies to date—of which this Author is aware—that study the impact of the various discovery cost-allocation approaches discussed in this Article. However, there have been numerous writings that address the relative merits of the American rule versus the English rule, which allocate the overall legal expenses associated with litigation. Unfortunately, empirical studies attempting to measure the respective impacts of these competing regimes are limited and have reached seemingly inconsistent or inconclusive results.[115] For example, a Florida medical malpractice study suggested that under the English rule—which applied to

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113. *See* Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 426–27 (1999) ("Civil litigation accomplishes more than a simple resolution of the dispute. . . . [j]udicial adjudication generates specific and general deterrence, educates the public, creates precedent, develops uniform law, and forms public values.").

114. FED. R. CIV. P. 1 (2014) (amended 2015) ("[T]hese rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Rule 1 now reads, "These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." *See also* FED. R. CIV. P. 26(b)(1) (2014) (amended 2015); FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . .") (underlined portion indicates changes made).

115. Theodore Eisenberg et al., *When Courts Determine Fees in a System With a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA. L. REV. 1452, 1458 (2013) ("Although a vast theoretical literature exists on litigation costs, much of it need not be described here. The literature has been reviewed elsewhere and is of limited relevance to this study because it reaches few consistent predictions or prescriptions.").

medical malpractice claims in Florida—claim quality increased, settlement rates decreased, and plaintiffs obtained higher recoveries.[116] Another study focused on Alaska's loser-pays regime found little effect to the extent that tort filings were similar to other U.S. jurisdictions following the American rule.[117] An experiment that sought to mimic American and English rule environments demonstrated an increased likelihood of settlement under the English rule, a result that runs counter to the Florida malpractice study.[118] Theoretical treatments of the topic have similarly yielded inconsistent perspectives on the probable impact of varying approaches to cost allocation.[119] One scholar seemed to suggest the futility of attempts to make predictions in this area when he wrote:

> [T]he current state of economic knowledge does not enable us reliably to predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate.

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116. Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 378 (1990) [hereinafter Snyder & Hughes, *The English Rule*]; James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 225–26 (1995) [hereinafter Hughes & Snyder, *Litigation and Settlement*].

117. *See* SUSANNE DI PIETRO ET AL., ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE ATTORNEY'S FEE SHIFTING IN CIVIL CASES 81 (1995)("[A]laska's statewide tort filing trends resemble those in U.S. jurisdictions that do not shift attorney's fees. The similarity suggests that fee-shifting in Alaska does not cause differences between Alaska's trends and those elsewhere.").

118. Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161, 162 (1988).

119. Professor Herbert Kritzer summed this point up nicely when he wrote, "There is surprisingly little agreement among those who have undertaken these theoretical analyses. Some analysts argue that fee shifting should increase the likelihood of settlement, while others argue that it will increase the likelihood of cases going to trial. Some argue that fee shifting will decrease the number of cases filed, while others argue that the numbers of cases will increase." Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1948 (2002) (citing various articles).

> The reason for this agnostic conclusion is straightforward. Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place . . . . The combination of all these external effects are too complicated to be remedied by a simple rule of "loser pays." Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others.[120]

I make no attempt to improve upon existing theoretical or empirical assessments of the relative merits of the American versus the English rule here. I offer the above brief overview simply to indicate that we may not be able to obtain concrete guidance on that issue as we seek to determine the optimal approach for allocating the costs of civil discovery. That said, can we still attempt to reason toward some conclusions regarding what the impact of various discovery cost-allocation approaches might be?

Regarding the impact of discovery cost-allocation on claim initiation and claim quality, it seems reasonable to assume that from the perspective of a rational prospective litigant, the imposition of greater costs on litigating a claim would permit that litigant to proceed only if it could perceive a greater potential benefit to justify those expenses. This perception of one's own claim quality and likelihood of success may or may not comport with actual claim quality, but at a minimum, the claimant must have some increased measure of confidence in success to justify pursuing a claim at a cost of $x + n$ as opposed to a cost of x. For this to be true, prospective claimants would have to have reasonably accurate information about what those costs are likely to be, as well as some means of properly assessing the merits of their respective claims. Further, the magnitude of the increased costs—reflected in the likely discovery costs the claimant will have to bear—would have to be sufficient to matter to the decision to bring the claim; relatively negligible discovery costs or costs that would be largely outweighed by a recovery are less likely to deter the bringing of claims. Finally,

120. Avery Wiener Katz, *Indemnity of Legal Fees*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64–65 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

claimants could reduce the costs they bore under a requester-pays regime by modifying or narrowing their requests, which would potentially lessen the deterrent effect of such a regime. As this brief exercise demonstrates, the lament excerpted above that predicting the impact of the competing indemnification regimes is a fool's errand may have some merit: The array of factors, information deficits, and contingencies that bear on the decision to initiate a lawsuit may be too numerous, complex, and amorphous to isolate the impact of cost-shifting on that decision.

Although this may be so, I would surmise that there is a degree of discovery expense that, if placed at the feet of claimants, could be sufficiently large to discourage the bringing of some number of claims. It simply is unclear what that level would be in proportion to the value of the overall claim (although I would guess having to spend anything approaching, say, 50% of one's anticipated claim value might begin to deter one from pursuing a claim at all). What is clear is that were such a level to be reached, the impact would be the deterrence of some frivolous or meritless claims but also of some number of legitimate claims, particularly those that might have negative value (meaning the potential recovery is outweighed by the expense of pursuing the claim).

How would such an outcome impact the objectives of civil litigation outlined above? On the one hand, the elimination or reduction of frivolous claims would lessen the chance that litigants who are not entitled to a recovery under the law will nonetheless obtain a recovery due to financial incentives for the defendant to settle—an outcome that would promote greater resolution of disputes on their merits. On the other hand, however, to the extent valid claims would be deterred, under-enforcement would result. This means that a larger number of law-violators would go unpunished and thus undeterred, undermining the specific and general deterrence goals of civil litigation. The remedial goals of litigation would also be underserved, as actual victims would not obtain compensation for wrongs simply because the costs of seeking vindication were too high. All of this said, without being able to know where we are on the over-deterrence–under-deterrence spectrum, it is difficult to argue that more or less deterrence-through-cost-allocation is needed.

What of the narrower impact of discovery cost-allocation rules on discovery itself? If we assume that the impact of these rules

on case initiation and claim quality is indeterminate, might there be an independent and discernable impact such rules have on discovery, such as the overall cost of discovery, the number and scope of discovery requests, or the production of information useful to a resolution of the dispute on the merits? The goal of discovery is to produce information that permits a resolution of the dispute on its merits, which is an objective of civil litigation more generally. Discovery rules that facilitate the production of relevant and probative information further that goal, while rules that permit or encourage either the concealment of such information or the production of irrelevant information do not. Raising the costs of seeking and obtaining information from one's adversary likely would have the effect of forcing a party to narrowly confine its requests to those which are most likely to be useful to the requesting party.[121] That is a positive result in one sense, in that frivolous requests for information could be minimized. But an alternative impact could be a chilling effect on requests that might prevent useful information from being discovered, something that would impede the effort of the parties and the court to resolve the case on its merits and, likely, adversely impact enforcement objectives. A useful avenue for future empirical research would be to attempt to assess the impact of cost-allocation rules on the discovery process itself. That said, it seems clear that making it free to request information from one's adversary does nothing to incentivize requesting parties to limit their requests to the information they truly need. Indeed, requesting parties have an incentive (albeit an improper one)[122] to request more information of little to no utility given, that such requests impose costs on their respective adversaries[123]—costs that can alter the calculus of whether to proceed with or to settle a case.

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121. *See* Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 FLA. L. REV. 885, 894 (2012) ("[P]lacing the costs of discovery provisionally on the person asking for it . . . may . . . give incentives for the optimal production of information . . . .").

122. The Federal Rules prohibit making discovery requests for the purpose of driving up an adversary's costs. FED. R. CIV. P. 26(g)(1)(B)(ii) (requiring attorneys to certify that a discovery request is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation").

123. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603 (2001) ("[T]he fact that a party's opponent will have to bear

What conclusions, if any, can we draw from this brief discussion of how the various cost-allocation approaches might impact claim quality and the quality of discovery? It seems as if moving towards either end of the spectrum between raising and lowering costs for one litigant or the other simply modulates from achieving more or less deterrence from bringing claims or interposing discovery requests, which in turn may either frustrate or facilitate our larger law enforcement objectives. Such a situation calls for a balanced approach that takes the facts of a given case into account to determine the most appropriate allocation of costs under the circumstances. A flat rule that the producer pays under all circumstances—regardless of relevance or the reasonableness of the costs—would clearly be inappropriate, as it would permit requesting parties to saddle their adversaries with sufficient discovery costs to coerce them into acquiescing to their claims. But, a flat rule that the requesting party has to pay the costs associated with responding to its requests would be no less inappropriate, as such a rule would deter meritorious claims and legitimate discovery requests, and would permit producing parties to bury information in ways that make its recovery cost-prohibitive, as well as incentivize responding parties to drive up production costs as a means of burdening requestors.

Fortunately, the current discovery system opts for neither approach. Under the Federal Rules, litigants are not free to impose massive discovery expenses on their adversaries with impunity. Requesting parties are under an obligation to confine their requests to the relevant and the reasonable or face sanctions.[124] Producing parties can challenge compliance with those strictures before a judge prior to having to respond.[125] Are these protections sufficient? The fact that requested information might be relevant does not mean that the information is necessarily going to be useful to the case. Further, there will be times that relevant information will be costly to produce and yet a court may deem that those costs are reasonable, meaning producing parties will incur an obligation to pay significant sums to respond. In this situation, should producers have to pay? Finally, if,

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the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests . . . .").

124. FED. R. CIV. P. 26(b), (g).

125. FED. R. CIV. P. 26(c).

after having borne the costs of production in response to discovery requests, the producing party ultimately prevails in the litigation, might that party justly claim entitlement to the *reimbursement* of such expenses to be made whole? The next section fleshes out some possibilities for modifying the current approach to allocating discovery expenses that might address some of these concerns and more rationally align with the objectives of civil litigation and fairness to the litigants.

III. RATIONALIZING OUR APPROACH TO COST ALLOCATION

As noted above, it may be difficult to assess the impact of various approaches to allocating discovery expenses. My goal in this Part is to articulate a framework for the rational allocation of such expenses among litigants based on policy principles and fairness considerations. Rule 1 of the Federal Rules of Civil Procedure provides a useful starting point, as it commands that the Federal Rules should be "construed and administered . . . to secure the just, speedy, and inexpensive determination of every action."[126] In the discovery context, this means that discovery should facilitate a resolution of the dispute on its merits (just), should not be unduly time-consuming (speedy), and the expense associated with discovery should be minimized (inexpensive). The Federal Rules further these objectives by limiting discovery to information that is relevant to a claim or defense, requiring that discovery be "proportional to the needs of the case," and permitting producing parties to object to unduly burdensome discovery and obtain a court order reallocating associated costs.[127] What additional measures might further advance the goals of making discovery just, speedy, and inexpensive?

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126. FED. R. CIV. P. 1.

127. FED. R. CIV. P. 26(b) (2014) (amended 2015) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ."); FED. R. CIV. P. 26(c) (2014) (amended 2015) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."); FED. R. CIV. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case* . . . ." (emphasis added)); FED. R. CIV. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the

Justice is served by the full disclosure of information that will assist the court in resolving the dispute between the litigants on its merits. But justice is disserved by discovery requests not designed to yield useful information. Without commenting on the degree to which such impositional discovery requests[128] are interposed (for that is not knowable), it cannot be denied that the current rules permit (practically speaking) such requests to be made. One way to minimize the ability to make impositional discovery requests, of course, would be to saddle requesting parties with the cost of responding to those requests. However, as noted above, such an approach could deter legitimate requests that might contribute to a resolution on the merits. Further, making requesting parties bear that expense could provide an incentive to producing parties to manipulate such costs in a manner that unduly burdens the requester. Below, I briefly introduce three alternatives to a requester-pays approach that would better balance the interests of justice and cost-efficiency.

A. Judicial Prescreening of Discovery Requests

One of the most promising alternatives might be to reintroduce the judge into the discovery request process, at least in cases in which discovery is likely to be (or is certain to be) expensive and contentious. Prior to 1970, parties had to seek court orders to obtain discovery from another party and could only do so on a showing of good cause.[129] The 1970 amendment to Rule 34 eliminated the requirement to show good cause and removed the court from the process so that the rule could "operate

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following: . . . (B) specifying terms, including time and place *or the allocation of expenses,* for the disclosure or discovery." (emphasis added)).

128. I borrow this term from Frank Easterbrook, Comment, *Discovery As Abuse*, 69 B.U. L. REV. 635, 637–38 (1989) ("[A]n impositional request is one justified by the costs it imposes on one's adversary rather than by the gains to the requester derived from the contribution the information will make to the accuracy of the judicial process."). I do so without endorsing or embracing the range of views propounded by Judge Easterbrook in the piece.

129. The pre-1970 version of Rule 34 read, "Upon motion of any party showing good cause therefor . . . the court in which an action is pending may [] order any party to produce . . . any designated documents . . . which constitute or contain evidence relating to any of the matters within the scope of the examination permitted in Rule 26(b) . . ." FED. R. CIV. P. 34 (1969) (repealed 1970).

extrajudicially."[130] One could imagine returning to the pre-1970 version of the rule for discovery-intensive cases, requiring parties to submit their discovery requests to the court, which would then screen the requests for their propriety. Part of the good-cause showing would not only be a demonstration of the relevance of the information requested but an articulation of why it is needed and how it would advance a resolution of the claims. Certainly, having to convince a judge of the propriety of a discovery request would chasten litigants in what they seek, at least to a greater degree than the purely lawyer-directed discovery approach—where judicial intervention in discovery disputes is rare and often avoided.

To be sure, taking this approach would not be feasible or warranted in most cases, given that judicial dockets are overloaded and that most cases involve little discovery.[131] However, judges should be encouraged to identify cases in which such prescreening of discovery requests would make sense. There could also be a mechanism for parties to request such intervention. When it is deemed that prescreening discovery requests would be worthwhile but would be an overly time-intensive process for the court, magistrates or discovery special masters could be tasked with the job. Rule 16(c)(2) already provides district judges with this authority. Specifically, Rule 16(c)(2)(F) empowers a court to "take appropriate action" with respect to "controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37."[132] Further, Rule 16(c)(2)(H) permits judges to take action with respect to "referring matters to a magistrate judge or a master," which, of course, is buttressed by the authority given the court under Rule 72 and 28 U.S.C. § 636 for federal magistrate judges, and under Rule 53 for masters.[133] Indeed, there are cases in which special masters have been used to handle discovery;[134] under this suggestion,

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130. FED. R. CIV. P. 34 advisory committee's note to 1970 Amendment.

131. *See* Reda, *supra* note 8, at 1089 ("[At] the median, the reported costs of discovery . . . constituted 1.6% of the reported stakes for plaintiffs and 3.3% of the reported stakes for defendants.").

132. FED. R. CIV. P. 16(c)(2)(F).

133. FED. R. CIV. P. 16(c)(2)(H), 53, 72; 28 U.S.C. § 636 (2012).

134. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 94 F.R.D. 173, 174 (E.D.N.Y. 1982) ("After careful reflection, the court is satisfied that the magnitude

however, their role would not be limited to post hoc resolution of discovery disputes but rather to *ex ante* determinations regarding the propriety of requested discovery. It is important to understand that a blanket approach of prescreening is not being suggested, for most cases do not have discovery warranting this additional step. But for those that do, such pre-production intervention by a neutral third party could be helpful in facilitating meaningful, tailored discovery requests that do not impose undue expense.

B. Loser-Pays Cost-Shifting

In addition to strengthening judicial involvement in the discovery-request process in appropriate cases, it may be worth considering whether post-adjudication cost-shifting would fairly serve the interests of incentivizing appropriate and proportionate discovery requests while permitting an information exchange that leads to a decision on the merits. As previously discussed, Rule 54(d)(1) empowers courts to award "costs"—not including attorneys' fees—to "the prevailing party."[135] Costs, in turn, are defined in a very limited way in 28 U.S.C. § 1920 to include the following:

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of the case, the complexity of the anticipated discovery problems, the sheer volume of documents to be reviewed, many of which are subject to claims of privilege, the number of witnesses to be deposed, the need for a speedy processing of all discovery problems in order to meet the trial date established in this order, all argue in favor of using a special master to supervise discovery . . . .").

135. FED. R. CIV. P. 54(d)(1) ("[C]osts—other than attorney's fees—should be allowed to the prevailing party."). Compare this "prevailing party" language to provisions that make attorney's fees available for those who "substantially prevail." *See, e.g.*, Freedom of Information Act, 5 U.S.C. §§ 552(a)(4)(E)(i)–(ii) (2012) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."); Civil Asset Forfeiture Reform Act, 28 U.S.C. § 2465(b)(1)(A) (2012) ("[In] any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for reasonable attorney fees and other litigation costs reasonably incurred by the claimant."). It is unclear to what extent the slightly more liberal "substantially prevails" language impacts litigant behavior versus the impact of the "prevailing party" language in cases to which that latter standard applies.

> 1. Fees of the clerk and marshal;
>
> 2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> 3. Fees and disbursements for printing and witnesses;
>
> 4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
>
> 5. Docket fees under section 1923 of this title;
>
> 6. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.[136]

Given the realities of electronic discovery, there may be warrant for revising § 1920 to include a broader range of costs associated with producing material in response to discovery requests.[137] Rather than limiting reimbursable discovery costs strictly to those arising from reproduction, the fuller range of expenses connected with producing electronic discovery, such as the search and retrieval process and associated e-discovery vendor costs, would go much further in making a prevailing party whole. Further, the prospect of having to pay such expenses in the event of defeat should ensure that discovery requests are kept within the confines of what would be truly meaningful to the case.

Unfortunately, many of the problems that would result from moving to a requester-pays system would exist under a loser-pays rule. The prospect of having to pay such expenses on the back-end could over-deter discovery requests, leading requesting parties to fail to seek information that would be useful to the case for fear of having to pay. Further, for some plaintiffs in particular, there may be no realistic ability for them to cover what could be hundreds of

136. 28 U.S.C. § 1920 (2012).

137. Note that my proposal for post hoc shifting of discovery expenses is limited to expenses incurred responding to discovery requests; I am not suggesting that expenses incurred in building one's own case be shifted.

thousands of dollars or more in discovery expenses borne by their opponents that prevail in the litigation. As a result, some legitimate claims could be deterred altogether under such a regime.

Avoiding such an impact could be achieved in part by the development of some sort of after-the-event litigation insurance that one could purchase to cover the potential discovery-expense liability.[138] Another approach, could be for judges in such cases to be vigilant in making sure that the discovery expenses to be shifted are themselves reasonable and not unduly trumped up by the party who initially incurred them, an assessment courts already make under circumstances when currently authorized cost-shifting mechanisms are employed.[139] Additionally, an alleviating factor that would practically minimize the actual burden placed on litigants by post-judgment cost-shifting, would be the fact that the loser-pays rule would only be invoked upon a judgment after a trial, not on a summary judgment or other preliminary termination of the case (or, at least the rule could be written in a way that so limited its applicability). Judgments on verdicts after a trial are extremely rare;[140] thus, the instances in which post hoc cost-shifting would

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138. *See* Collin M. Davison, *Fee Shifting And After-The-Event Insurance: A Twist To A Thirteenth Century Approach To Shifting Attorneys' Fees To Solve A Twenty-First Century Problem*, 59 DRAKE L. REV. 1199, 1201–02 (2011) ("England has developed an insurance product known as after-the-event insurance to provide funding for litigants who cannot afford the cost of the other party's attorneys' fees should they be unsuccessful in litigation.").

139. For example:

> [I]n arriving at an appropriate award of reasonable fees and costs, the Court must strike a balance between the two considerations outlined above: namely, (i) the extent to which Plaintiffs and their counsel devoted excessive time and resources to the discovery effort at issue, and (ii) the extent to which the conduct of the City and its counsel thwarted Plaintiffs' reasonable attempts to secure the e-mails sought in their discovery request or, failing that, to obtain relief from the City's destruction of these emails.

Flagg v. City of Detroit, No. 05–74253, 2011 WL 6131073, at *3 (E.D. Mich. Dec. 9, 2011).

140. *See* ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. tbl. C-4 (2014), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C04

occur would be relatively rare as well. That said, the potential for cost-shifting post-trial will necessarily factor into each litigant's risk–reward assessment at earlier stages of litigation, which in turn will likely impact whether and how a case settles.[141] There may be other ways to blunt the potential of this proposal to over-deter legitimate claims and discovery requests, such as vesting judges with discretion to shift less than all (or none) of the discovery expenses to the losing party based on factors such as ability to pay or the reasonableness of the defeated claims or defenses.[142] But the underlying propriety of the approach in terms of fairness seems clear: After a party prevails in litigation, some degree of the costs incurred in supplying material to the losing party in discovery should be recoupable. Future research efforts should be designed to study what the range of impacts of a post-hoc cost-shifting regime might be and how they could be mitigated.

C. Better Case Management

Before concluding, it must be urged that judges have within their power the case-management tools necessary to address many of the discovery cost concerns that defendants have today. Phased discovery—which involves the prioritization of discovery with

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Mar14.pdf (showing that for the twelve-month period ending March 31, 2014 only 1.2% of all civil cases reached trial).

141. *See* Laura Inglis et al., *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 116 (2005) ("Our subjects tend to behave rationally when confronted with changes in the magnitude of court costs. The overall settlement rate under low costs was 58.7% compared to 77.7% under high costs. High costs increased the number of settlements across all treatment variables. This suggests that high court costs create strong incentives for settlement.").

142. Such a "judge-centered" approach characterizes what is done in Israel; their process and its impact was studied in Theodore Eisenberg et al., *When Courts Determine Fees in a System With a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 U.C.L.A. L. REV. 1452 (2013). The study's findings revealed that judges used their discretion in a variety of ways to vary how post hoc cost-shifting was implemented across different categories of cases and depending upon the nature of the parties involved. *See id.* at 1457–58 ("Our findings suggest that Israeli judges operate multiple de facto litigation cost systems: a one-way shifting system that dominates in most tort cases; a loser pays system that operates when publicly-owned corporations litigate; and a loser pays system with discretion to deny litigation costs in all other cases.").

respect to some matters whose resolution might eliminate the need for later discovery—is a potential means of minimizing the burden that producing parties will bear that courts should consider when appropriate and useful. Parties are encouraged to consider phased discovery within their discovery plans under Rule 26(f)(3)(B). Judges can and should enter protective orders under Rule 502 of the Federal Rules of Evidence to reduce the costs associated with overly meticulous pre-production privilege review.[143] Judges can require parties to tailor their discovery requests in a manner that will reduce the expense associated with responding to them. Pre-production cost-shifting is already permitted under the Federal Rules if the producing party is able to demonstrate undue burden; judges should not shy away from recognizing these burdens and ordering cost-shifting or sharing when appropriate.[144] When shifting the costs would be too burdensome for the requesting party to bear, judges can help the parties reach an agreement regarding the requests or protocols for identifying responsive material that might be able to reduce these costs. Clearly, there will be cases in which high discovery costs will be unavoidable and someone will have to bear them, and there may be no solution for such cases. But there is enough that can be done in most cases in which discovery is an issue either under the existing Federal Rules of Civil Procedure or under the approaches proposed above that recourse to an *ex ante* requester-pays rule would seem to be unnecessary.

IV. CONCLUSION

The principal purpose of this Article is to address the nascent argument that the producer-pays rule should be abandoned in favor of a requester-pays rule for constitutional and policy reasons. What is clear is that there is nothing unconstitutional about the producer-pays rule because unreasonable, inappropriate, or disproportionate discovery requests can be blocked by recourse to a protective order from the judge. Once declared to be within the scope of discovery

143. FED. R. EVID. 502(d) advisory committee's note ("Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery.").

144. Recall that there is explicit authorization to order cost-sharing under Rule 26(c)(1)(B) since amendments took effect on December 1, 2015.

and otherwise reasonable given the needs of the case, the producing party has had a hearing and no deprivation can be said to have occurred under such circumstances. The policy argument against moving to a requester-pays rule is equally strong: The over-deterrence of legitimate claims and appropriate discovery requests would fundamentally undermine access to justice and the resolution of disputes on their merits in ways that would ultimately compromise the larger law-enforcement objectives of the civil justice system.

Less clear is what alternatives can be employed to address the issue of excessive discovery expense when it is a problem in a case. Absent any rule changes, it seems that judges or their delegees will have to take responsibility for better policing this issue by shaping discovery in a way that minimizes expense and cabins discovery within confines that are reasonable given the needs of the case. However, the labor-intensiveness of such an approach, plus the potential for unduly constraining the ability of litigants to pursue information they feel would be helpful to their litigation position, may favor supplementing it with some form of post-judgment cost-shifting that requires the losing party to reimburse the winning party for some portion of its discovery expenses. Whatever approach is taken, let us hope that it is designed and implemented in a manner consistent with the need to nurture, rather than thwart, access to civil justice by those with legitimate claims.