
ARTICLE

“LOOKING BACKWARD” TO 1938

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INTRODUCTION

It is a pleasure to contribute to this celebration of the seventy-fifth anniversary of the Federal Rules. As one who has been something of a rulemaking insider for over twenty percent of the seventy-five years since the Federal Rules came into effect, I suppose I incline towards being an apologist—at least regarding recent developments.

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I intend to focus mainly on the introduction and evolution of broad discovery. In part, that's because discovery has been an almost constant focus of rulemaking for forty years and also is the most acute pressure point in the acidic relations the United States has had with the rest of the world due to distinct procedural arrangements. In addition, our broad discovery can serve as an avatar for the most aggressive visions of the peculiar American institution of private litigation as a force for good or evil. Not surprisingly, my general view is that the rulemakers have sought (fairly successfully) to steer a middle course between the most aggressive supporters and critics. Today, though, it may be that Silicon Valley is the source of greater challenges for discovery rules than either camp of critics.

I take my theme for this Essay¹ from Edward Bellamy. In 1888, fifty years before the Federal Rules went into effect, Bellamy published a book called *Looking Backward*.² Many today have never read it, perhaps never even heard of it. But when it appeared, it was an instant and enduring sensation. According to Erich Fromm,

[I]t is one of the few books ever published that created almost immediately on its appearance a political mass movement. Between 1890 and 1891 one hundred and sixty-five 'Bellamy Clubs' sprang up all over the United States, devoted to the discussion and propagation of the aims expressed in *Looking Backward*. The Populist Party, which at its peak attracted over one million votes throughout the States, was to a large extent influenced by Bellamy's ideas, and got many of its votes from his adherents.³

I invoke Bellamy because his book provides a contrast for our reflections in this symposium. The book is a first-person description by a wealthy Bostonian from 1888 who, due to miraculous circumstances, goes to sleep that year and awakens in 2000 to find himself in an utterly transformed

¹ This is an essay in the sense that it deals with a variety of topics that have been exhaustively discussed in legal literature for a century. I do not intend to try to provide comprehensive citations for what I say and will often draw on my personal experience as Associate Reporter of the Advisory Committee on Civil Rules since 1996. I should emphasize that I speak here solely for myself and not for anyone else, in particular the Advisory Committee. In addition, I note that this was written in September 2013, before the public comment period for pending rule amendment proposals had produced much commentary. There was a great deal of commentary later, and the amendment proposals were revised.

² See generally EDWARD BELLAMY, *LOOKING BACKWARD* (Signet ed., 1960) (1888).

³ Erich Fromm, *Foreword* to BELLAMY, *supra* note 2, at vi. Fromm adds that it was the most popular book in late nineteenth century America after *Uncle Tom's Cabin* and *Ben-Hur* and that Charles Beard, John Dewey, and Edward Weeks independently listed the book as second on their rankings of "most influential" nineteenth century books, eclipsed only by Karl Marx's *Das Kapital*. See *id.* at v.

Boston. Although the "Robber Baron" epoch into which the narrator was born was characterized by divisions between rich and poor considerably starker than those in the United States today, Bellamy's Boston of 2000 was completely different. Humanity had finally learned the lessons that the mid-nineteenth century "rationalists" had urged, and everyone was contented, well-fed, and well-supported—with retirement at age forty-five. Not only was there universal health care, but almost all other needs were met, and people led fulfilled lives. Had he been able to visit to the actual Boston of 2000, Bellamy would surely have been sorely disappointed. The consequences of the Great Recession since then would only deepen his distress.

As Voltaire supposedly said, "the perfect is the enemy of the good," and utopians may be the bane of all reformers who operate in the world as it is rather than as it might be in the imagination of those with uncommon imaginations. But it seems to me a useful device to reflect on our seventy-five-year experiment with the Federal Rules by thinking about how the framers of that breakthrough, who almost surely were familiar with Bellamy's book, would react to our contemporary litigation world if they could visit it. Would they be similarly disappointed? My guess is that they would not—though they would probably be quite surprised by many things that we take as commonplace.

In this Essay, I first sketch what appear to be the attitudes of the framers. I then explore what has happened to change litigation since 1938 and consider the ways in which discovery reform has responded to the challenges of those developments. Finally, I will explore the new discovery challenges of the twenty-first century that may justify a reconsideration of some assumptions about getting "all" the relevant information. I conclude that the gradual adjustments we have seen and may see are true to the framers' vision and don't deserve denunciation, even by those who think some of them wrong-headed.

I. THE BEGINNINGS

Professor Subrin cogently set the scene for the rulemakers in a 1997 presentation:

Although the drafters did have large cases in mind, I think it is fair to say that the drafters as a group would be amazed at how immense many cases now become and how prominent a role discovery plays in that process. Some things they could not have known: the advent of copying machines and computers; the huge size of law firms and litigation departments; the many factors leading to the large overhead of major firms; and the enormous growth and change in substantive law. I think the drafters also would

have been surprised at the role of civil claims as, to use Professor Hazard's words, 'an integral part of law enforcement in this country . . . [T]he scope of discovery determines the scope of effective law enforcement in many fields regulated by law.'⁴

Regarding discovery, the record confirms what Subrin said. Discovery surely existed before 1938. There were even treatises about it in the nineteenth century.⁵ As shown in a three-part study by Dean Langdell in the 1890s, however, the discovery provisions that existed then look now like a cavalcade of minutiae.⁶ A comprehensive 1928 examination of the same basic subject by a young Professor Fleming James, stressing American provisions, does not appear much different.⁷ Surely the variety of specific differences and qualifications that these articles enumerate were important to the practitioners of the day, but they seem alien to us now.

The Federal Rules broke with that past, enabled by the 1934 adoption of the Rules Enabling Act, which Professor Burbank has chronicled so ably.⁸ Although the Enabling Act's path to adoption was long and tendentious, it was not much preoccupied with the detail of the rules to be adopted. In particular, the Enabling Act did not focus on discovery.⁹ Roscoe Pound's famous 1906 speech to the American Bar Association, which many credited with prompting the reform drive that led to adoption of the Enabling Act nearly thirty years later, similarly did not focus on discovery, even though it enumerated myriad reasons why the American public would be dissatisfied with the administration of justice and particularly criticized extreme adversarial behavior.¹⁰

⁴ Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 743-44 (1998) (quoting REPORT OF THE CONFERENCE ON THE FEDERAL RULES OF CIVIL PROCEDURE 3 (Geoffrey C. Hazard, Jr., reporter, Mar. 30-31, 1995)). This article was a presentation during the conference on discovery held by the Advisory Committee on Civil Rules at Boston College on September 4-5, 1997.

⁵ See generally EDWARD BRAY, *THE PRINCIPLES AND PRACTICE OF DISCOVERY* (1885) (examining discovery in English courts).

⁶ See generally C.C. Langdell, *Discovery Under the Judicature Acts, 1873, 1875* (pts. 1-3), 11 HARV. L. REV. 137, 205 (1897), 12 HARV. L. REV. 151 (1898).

⁷ See generally Fleming James, *Discovery*, 38 YALE L.J. 746 (1929).

⁸ See Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁹ See Subrin, *supra* note 4, at 692-94.

¹⁰ See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906). Many of the causes Pound discussed were universal, such as "the necessarily mechanical operation of legal rules," *id.* at 397, and the "popular impatience of restraint," *id.* at 401-02. Among native propensities, he reported, "the worst feature of American procedure is the lavish granting of new trials." *Id.* at 413. The absence of significant opportunities for discovery did not seem similarly important to Pound, although he did denounce trial by surprise.

Everyone recognizes that the post-1938 reality has brought discovery to the fore. After denouncing "fishing expeditions" in 1911,¹¹ the Supreme Court concluded within a decade of the adoption of the Federal Rules that "the time-honored cry of 'fishing expedition'" should not prevent discovery.¹² In 1965, Professor James published the first edition of his civil procedure treatise, which continues to thrive to this day under the leadership of Professor Hazard. In his preface, Professor James explains that a new treatise was needed because Dean Clark's code pleading treatise had been eclipsed by developments in litigation; pleading problems (Clark's focus) had yielded in importance to the needs of discovery.¹³ One "great development" that explained this shift and "changed the face of procedure" was "the federal rules of civil procedure together with their many state counterparts."¹⁴

II. THE CONTEMPORARY LITIGATION REALITY

"[L]itigation in the federal courts has become a world unimagined in 1938."

—Arthur Miller¹⁵

Since contemporary discovery functions in the broader world of litigation, it is useful to reflect on some of the distinctive trends that have emerged since the framers did their groundbreaking work. At least four developments deserve attention: the "heroic model" of litigation in the Civil Rights era, the rise of private attorneys general, the beginning of mass tort litigation, and the increase in corporate litigation. Some of them may, indeed, have depended in part on changes wrought by the Federal Rules. For our purposes, the key question will be whether discovery played a critical role in this development.

Discovery surely was identified early on as a source of problems; the 1951 Prettyman Report identified coping with huge volumes of evidence as one of the hallmarks of "protracted litigation" that judges should strive to control.¹⁶ But as we continue to deal with efforts to constrain over-discovery, it

¹¹ See *Carpenter v. Winn*, 221 U.S. 533, 540 (1911).

¹² *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

¹³ FLEMING JAMES, JR., *CIVIL PROCEDURE*, at v (1st ed. 1965).

¹⁴ *Id.*; see also *id.* at 184 ("The federal discovery provisions have been adopted in whole or substantial part by more states than has any other part of those rules.").

¹⁵ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *DUKE L.J.* 1, 7 (2010).

¹⁶ See Prettyman Report, 13 *F.R.D.* 62, 74-79 (1951) (referring to "bulk documentary evidence"); see also *The Practical Operation of Federal Discovery*, 12 *F.R.D.* 131 (1951) (examining discovery problems in big cases).

is useful to remember that the concerns have been with us almost as long as the Rules.

A. *The Heroic Model: Civil Rights Litigation*

Brown v. Board of Education was the ultimate symbol of using litigation to surmount barriers to progress. In a way it has become a cultural icon; “it is surely the only Supreme Court case that has its own National Historic Site.”¹⁷ Despite its singularity, it is fair to say that such litigation was the model Professor Chayes contemplated when he examined the procedural implications of “public law litigation” in his 1976 article.¹⁸ For others, such as Professor Fiss, that sort of litigation was the main or sole legitimate function of the public court system.¹⁹

One way of looking at the middle third of the twentieth century is that it was a period that persistently aspired toward the sorts of ideals that Edward Bellamy embraced. Roosevelt’s New Deal, Truman’s Fair Deal, Kennedy’s New Frontier, and Johnson’s Great Society each had aspects that Bellamy would have endorsed. But it would be difficult to say that these aspects always triumphed, and more difficult yet to say that they triumphed in an environment in which human contentiousness had been put to rest, as Bellamy foresaw could happen by the end of the twentieth century.

To the contrary, the civil rights legislation that today seems a critical watershed development on the road toward equality was won only by hard-nosed legislative maneuvering by Lyndon Johnson, one of the greatest maneuverers of them all.²⁰ To a large extent, however, breakthroughs came

¹⁷ Reuel E. Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 *LAW & HIST. REV.* 415, 416 (2008).

¹⁸ Professor Chayes recognized that public law litigation was not the only sort of litigation that fit his new model:

School desegregation, employment discrimination, and prisoners’ or inmates’ rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1284 (1976).

¹⁹ Owen M. Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 30 (1979) (urging that using public courts for mere dispute resolution is “an extravagant use of public resources”).

²⁰ It is a given that hard political fighting attended enactment of civil rights legislation in the 1950s and 1960s. For a discussion of the legislative horse-trading that led to primary reliance on

in court, not in legislative halls. *Brown v. Board of Education* is the most famous of many court victories, but only one of many.

Whether the framers should have foreseen this role for litigation is uncertain. By 1949, the problem of "protracted litigation" had prompted the Judicial Conference to appoint a committee to study these resulting problems of judicial administration.²¹ When Professor Chayes announced in 1976 that "[w]e are witnessing the emergence of a new model of civil litigation" because "the object of litigation is the vindication of constitutional or statutory policies,"²² Professors Eisenberg and Yeazell responded that similar litigation had been around for a long time.²³ But as Professor Kagan has chronicled repeatedly,²⁴ America is unique in the world in turning to its independent judiciary to make decisions about public policy. One might ascribe this development to failures of the more political branches of government, but it surely has contributed to charges of "judicial imperialism."

As the recent fiftieth anniversary of the March on Washington reminds us, there is more to be done to achieve the ideals we espouse. But it is considerably more difficult to say that this "Eyes on the Prize" sort of litigation looms large in the twenty-first century. The California prison litigation is a notable example of the continuing power of this form of litigation.²⁵ But that example is an exception; "structural" litigation has largely disappeared from our courtrooms and from the headlines. In part, one may ascribe the decline of blockbuster litigation to more "careful" or "restrictive" attitudes towards class certification embodied in the Supreme

private litigation rather than agency action to enforce Title VII of the 1964 Civil Rights Act, see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* 94-128 (2010). For discussion of the political fights that accompanied enactment of the rather toothless 1957 civil rights legislation, see generally ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE*, 895-989 (2002). For additional discussion on these issues, see, for example, TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1998); CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

²¹ The resulting report, the Prettyman Report, *supra* note 16, was published in 1951.

²² Chayes, *supra* note 18, at 1282, 1284.

²³ Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Reform Litigation*, 93 HARV. L. REV. 465 (1980).

²⁴ See, e.g., Robert A. Kagan, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

²⁵ See generally *Brown v. Plata*, 131 S. Ct. 1910 (2011). Professor Issacharoff has labeled this case "the most significant class action litigation of the past decade." Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 375 (2012).

Court's recent *Wal-Mart*²⁶ and *Comcast*²⁷ decisions. These cases highlight the ongoing difficulty of fitting aggregation within our adversarial litigation structure.²⁸

To a considerable degree, however, it may also be that society has moved beyond the structural injunction model. What we are told is the “new” civil rights history has as its chief characteristics “decentering the Supreme Court, *Brown v. Board of Education*, and the NAACP’s campaign for school desegregation.”²⁹ One need not claim that we have achieved a “color blind” society to expect that discrimination litigation will increasingly depend on individual lawsuits for individual relief instead of mega-lawsuits for mega-relief. As Professor Farhang recognizes in the first sentence of his path-breaking book, *The Litigation State*, employment discrimination lawsuits are the largest category of civil actions in the federal courts after prisoner petitions.³⁰ Those thousands of cases are overwhelmingly individual suits, rather than massive class actions. For American litigation, this trend seems to be the wave of the present, and perhaps also the future. That is not to say litigation today is not heroic, but it is not heroic on a scale comparable to the heroic era.

B. *The Private Attorney General Model*

The civil rights litigator has been displaced by a new hero (or villain, according to one’s view)—the private attorney general. As Professor Rubenstein has chronicled, the expression “private attorney general” first appeared only after the Federal Rules went into effect,³¹ so it seems unlikely

²⁶ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (overturning certification of a class of more than one million present and former female employees of Wal-Mart asserting claims of endemic gender discrimination).

²⁷ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013) (overturning certification of a class of cable television subscribers in an antitrust case).

²⁸ For discussion, see generally Richard Marcus, *Still Confronting the Consolidation Conundrum*, 88 NOTRE DAME L. REV. 557 (2012) (exploring enduring tensions of aggregating claims).

²⁹ Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2320 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2013)).

³⁰ FARHANG, *supra* note 20, at 3.

³¹ William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130 n.2 (2004) (citing the Supreme Court’s first use of the term in a 1943 dissent, and “Judge Jerome Frank’s original use of the phrase in a Second Circuit decision [*Associate Industries of New York v. Ickes*, 134 F.2d 694 (2d Cir. 1943)] rendered several months earlier”).

that the framers could have foreseen this idea—although *qui tam* and other devices offered analogies.³²

But the original idea of a private attorney general has certainly spread, perhaps partly as a result of a legislative compromise that looks different in retrospect than it did at the time and explains why a civil rights suit today is more likely to be an individual action than a class action. As Professor Farhang has detailed, debates in the Senate over enforcement of Title VII held up the passage of that anti-discrimination legislation in 1964.³³ Liberal proponents of the bill wanted the chief enforcer to be the Equal Employment Opportunity Commission (EEOC), but they needed Republican votes to pass the legislation. The Republicans, in turn, were extremely worried that the EEOC would resemble the National Labor Relations Board, which the business community viewed as siding almost reflexively with unions. Similarly zealous pro-employee action by the EEOC was anathema to them. So the Republicans insisted on making private suits by employees the chief method of enforcement.³⁴ The liberal proponents of the bill were reluctant to permit this shift, but eventually had no choice.

The liberals changed their minds about the private enforcement model rather quickly, and installed it in a wide variety of new legislation during the 1960s and 1970s. To measure the importance of the private attorney general idea, Professor Rubenstein used Westlaw references to the private attorney concept, finding a huge increase starting in the 1970s. This was not because of the “heroic” litigation described above: “the phrase explodes in the 1970s not because of public law litigation but because it takes root in new attorneys’ fees statutes and doctrines. Once loosed as a matter of money, the private attorney general concept’s diffusion was limited only by the imagination of lawyers seeking attorneys’ fees.”³⁵ But the courts were not authorized to provide this incentive on their own. In 1975, the Supreme Court recognized that “Congress has opted to rely heavily on private enforcement to implement public policy” while holding that federal judges had no authority to award attorneys’ fees in the absence of a statutory provision for them.³⁶ Congress responded swiftly with the Civil Rights Attorney’s Fees Awards Act of 1976.³⁷

³² See *id.* at 2134 n.26 (citing ways in which private citizens assisted in the enforcement of criminal laws throughout American history).

³³ See FARHANG, *supra* note 20, at 94-128.

³⁴ *Id.*

³⁵ Rubenstein, *supra* note 31, at 2136.

³⁶ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 263 (1975).

³⁷ 42 U.S.C. § 1988 (2006).

The statutory model that fuels this activity often includes minimum recoveries as well as attorneys' fee awards to prompt private enforcement. The setup can magnify both fees and enforcement impact when litigation is packaged as a class action. A recent example involves theft of a computer from a medical office in California. Because the computer had records of four million patients on its hard drive and California's Confidentiality of Medical Information Act provides nominal damages of \$1,000 per individual for negligently released data, the theft could lead to a \$4 billion liability.³⁸ Legislators who offer the inducement of a minimum recovery probably do not think about the class action wrinkle. That surely seems to have been the case with the federal Truth in Lending Act; Congress eventually cabined class action exposure under that statute.³⁹ Efforts to use class actions under similar statutes have met a mixed reception in the courts.⁴⁰

³⁸ See Scott Graham, *Court to Weigh Price Tag for Data Breach*, RECORDER, Jan. 28, 2013, at 1 (describing this litigation).

³⁹ See Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a)(2)(B), 88 Stat. 1500, 1518 (codified as amended at 15 U.S.C. § 1640(a)(2)(B) (2012)) (setting a ceiling of \$100,000 or 1% of creditor's net worth for awards in class actions). The maximum amount was later raised to \$500,000. See Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4(3), 90 Stat. 257, 260 (codified as amended at 15 U.S.C. § 1640(a)(2)(B) (2012)).

⁴⁰ Recent class actions asserting failure to comply with the Fair and Accurate Credit Transactions Act (FACTA) requirement that a retailer block all but the last four digits of a credit card number illustrate the potential magnitude of damage awards in class actions involving a statutory minimum recovery. In *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), the court reversed a district judge who ruled that a class action would not be "superior" within the meaning of FED. R. CIV. P. 23(b)(3) because the defendant acted in good faith and should not face a liability of between \$29 million and \$290 million. *Id.* at 710, 723-24.

Notwithstanding this appellate directive, in *Rowden v. Pacific Parking Systems, Inc.*, 282 F.R.D. 581 (C.D. Cal. 2012), a district judge in the Ninth Circuit refused to certify a class action in a FACTA suit, citing congressional history describing hundreds of suits filed charging technical violations. *Id.* at 583-84. Plaintiff claimed that the municipal parking lot operator violated FACTA because parking receipts included the expiration date of credit cards—information that should not have appeared on tickets. *Id.* at 582-83. Judge Carney reasoned:

Mr. Martin seeks \$15 million from a small municipality for its alleged FACTA violations. Nobody in Mr. Martin's proposed class, however, has ever experienced any of the harm for which FACTA was enacted to protect against. Moreover, after learning of the possible FACTA violations, Laguna Beach eventually took corrective measures. There is no evidence to suggest that Laguna Beach acted maliciously or in bad faith. Nevertheless, Mr. Martin demands that Laguna Beach defend itself in a time-consuming and expensive class action. But to do so could severely limit Laguna Beach's ability to protect the health, safety, and welfare of the city.

Laguna Beach does not have unlimited resources to participate in contentious class discovery, extensive law and motion, and a prolonged trial. Nor does Laguna Beach have the financial wherewithal to satisfy and survive an adverse \$15 million judgment. Indeed, \$15 million is twice the balance of Laguna Beach's general fund reserves

More generally, the bloom has come somewhat off the rose for this form of litigation as well, even though the litigation remains commonplace. Trying to determine whether it is effective in achieving enforcement goals is beyond the scope of this paper; as Professor Lemos has written, there is a "vast literature" on the choice between public and private enforcement.⁴¹ As she has written more recently, the public enforcement alternative raises some serious questions.⁴² Meanwhile, others have launched attacks on the use of the class action as a method of enforcing public norms,⁴³ prompting Professor Redish to characterize this attorney activity as "capitalistic socialism."⁴⁴

There may be a division on the Supreme Court about whether to foster or neuter this form of litigation. The Court's starting point, of course, was implying private causes of action when Congress did not itself authorize them, most famously in *J.I. Case Co. v. Borak*, which held that private parties could sue for losses caused by violations of the antifraud provisions of the Securities Exchange Act of 1934.⁴⁵ By the 1970s, the Court had become more circumspect about implying private causes of action,⁴⁶ but it had not

and more than this year's entire budget for the city's police department. Satisfying a \$15 million judgment will compromise Laguna Beach's ability to respond to emergencies and provide necessary public services. In particular, the areas affected will include payment of workers' compensation and employee medical insurance claims, response to natural disasters, and the provision of vital municipal services. The Court is at a loss to understand how Mr. Martin can seriously suggest that it is 'fair' to subject Laguna Beach to such burdensome class litigation and expose the city to such ruinous liability.

Id. at 587 (footnotes and citations omitted). The judge distinguished the Ninth Circuit's decision in *Bateman* (described above) as involving a "billion-dollar movie theater company [that] . . . print[ed] receipts displaying eight digits of consumers' credit card numbers." *Id.* at 587-88 n.9.

It is perhaps not surprising to find judges resisting such draconian results.

⁴¹ See generally Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782 n.1 (2011).

⁴² See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (exploring the various possible difficulties with relying on attorneys general to enforce public norms rather than leaving the task to private litigants).

⁴³ See, e.g., John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441 (2005) (arguing that state attorneys general are preferable enforcers because they are not responding to profit motive and are subject to constraints that do not affect private attorneys pursuing fee awards).

⁴⁴ See Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 EMORY L.J. (forthcoming 2014).

⁴⁵ 377 U.S. 426, 430-31 (1964).

⁴⁶ See *Cort v. Ash*, 422 U.S. 66, 81-85 (1975) (limiting implied private causes of action to statutes that contain indicia that Congress intended to authorize such claims, and inclining against such an inference if such a claim would traditionally be relegated to state law).

necessarily retreated from its prior commitments. Thus, although Congress seemed perturbed by use of the private right to sue when it adopted the Private Securities Litigation Reform Act (PSLRA) in 1995,⁴⁷ the Court still thought the message of *Borak* was crucial when it interpreted the strict pleading requirements of PSLRA in 2007. Justice Ginsburg began the Court's 2007 opinion in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* by observing that "[t]his Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."⁴⁸ One might regard PSLRA as something of a rebuke to the Court for creating the problem and think it a bit cheeky for the Court to treat its preferences as the starting point in interpreting what Congress imposed on its creation.

If *Tellabs* suggests that the private enforcement attitude remains alive and well in the Court, the 2013 decision in *American Express Co. v. Italian Colors Restaurant*⁴⁹ veers the other way. That case involved a suit under the Clayton Antitrust Act, which *explicitly* authorizes private suits and sweetens the pot in such actions by offering treble damages.⁵⁰ Yet the Court enforced a class action waiver provision despite seemingly undisputed evidence that developing the expert analysis necessary to support the antitrust claim would cost more than \$1 million while the individual plaintiff's claim was (even after trebling) \$40,000, so a class action would be the only economically feasible method of suing.⁵¹ The 5–4 majority noted that class actions did not exist as an enforcement tool when the Clayton Act was passed more than a century before—and in any event was not concerned about nullifying private enforcement:

[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Congress has taken some measures to facilitate the litigation of antitrust claims—for example, it enacted a multiplied-damages remedy. In enacting such measures, Congress has told us that it is

⁴⁷ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2012)). Among other things, this legislation imposed strict pleading standards and a discovery stay pending ruling on a motion to dismiss in securities fraud litigation.

⁴⁸ 551 U.S. 308, 313 (2007).

⁴⁹ 133 S. Ct. 2304 (2013).

⁵⁰ *Id.* at 2309; *see also* 15 U.S.C. § 15 (2012).

⁵¹ *Italian Colors*, 133 S. Ct. at 2308, 2310.

willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice.⁵²

The dissenters, speaking through Justice Kagan, emphasized that private enforcement of the antitrust laws is designed "not solely to compensate individuals but to promote 'the public interest in vigilant enforcement of the antitrust laws.'"⁵³ The majority's attitude toward the crippling effect its ruling could have on effective enforcement, she said, was "admirably flaunted rather than camouflaged: Too darn bad."⁵⁴

At least in the federal courts, then, the growth era for private attorney general activity may be over.

C. Tort Litigation

Tort litigation has always been with us. But since World War II it has changed, in significant measure due to academic influence and law and economics analysis that stresses "internalizing" costs. The thrust of modern products liability law is that tort litigation would prompt manufacturers to make their products safer. Certainly that is what plaintiffs' lawyers claim they have done.⁵⁵ If their claims to have changed would-be defendants' behaviors are not persuasive, consider the frequent objection that various activities have been stopped because of fear of suits.⁵⁶ At least at the level of claimed effects, then, there is a surprising agreement between the plaintiff-side and defendant-side on bottom-line results; the disagreement is about whether this effect is desirable.

At the same time, the tort model has grown beyond traditional automobile tort and similar personal injury claims. A proliferation of new tort-like claims provides both compensation and deterrence. Suits for workplace harassment, intentional infliction of emotional distress, bad faith refusals to settle by insurance companies, and the like bespeak the growing importance of tort claims. Whether these should be considered "public interest" claims

⁵² *Id.* at 2309 (citation omitted).

⁵³ *Id.* at 2313 (Kagan, J., dissenting) (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)).

⁵⁴ *Id.*

⁵⁵ For an illustration, see AM. ASS'N FOR JUSTICE, DRIVEN TO SAFETY: HOW LITIGATION SPURRED AUTO SAFETY INNOVATIONS (2010), available at http://www.justice.org/cps/rde/xbcr/justice/Driven_to_Safety.pdf (reporting the views of a leading plaintiffs' attorneys group).

⁵⁶ These claims are so common that citations are hardly necessary.

akin to those sketched in the previous sections can be debated.⁵⁷ Whether one classes consumer deception claims in this same category could also be debated,⁵⁸ but some private claims authorized by statute seem to blend into tort claims. Consider, for example, *Castano v. American Tobacco Co.*,⁵⁹ in which plaintiffs asserted a collection of cutting-edge tort theories against the tobacco industry. The court held that these newly minted claims could not provide the basis for a massive class action,⁶⁰ but the effort illustrates the range of tort litigation innovation that might serve to achieve “public law” results.⁶¹

D. *The New World of Corporate Litigation*

“Next to war, commercial litigation is the largest item of preventable loss in civilization.”

—Herbert Hoover⁶²

President Hoover⁶³ was echoing a recurrent theme of pre-World War II corporate America—business corporations did not sue business corporations. One consequence of this pervasive attitude was that litigation departments were poor step children in major law firms. The “real” lawyers were the corporate lawyers; the litigators were invited in only when necessary to defend against outsiders such as shareholders, people claiming injury due to the company’s products, or the government.

Two decades ago Dean Garth described the remarkable change in corporate attitudes toward litigation. By the 1980s, corporate clients began to shop for lawyers, producing competition among law firms to land corporate

⁵⁷ See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 671-75 (1988) (exploring the question of whether tort litigation could be seen as public law litigation).

⁵⁸ See, e.g., *Pelman ex rel. Pelman v. McDonald’s Corp.*, 396 F.3d 508, 511 (2d Cir. 2005) (holding that claims under the New York Consumer Protection Act alleging that defendant falsely claimed that its food products were part of a healthy diet were not claims of “fraud” within FED. R. CIV. P. 9(b)).

⁵⁹ 84 F.3d 734 (5th Cir. 1996).

⁶⁰ *Id.* at 752.

⁶¹ In somewhat the same vein, consider *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 5 (Scalia, Circuit Justice 2010), in which Justice Scalia granted a stay against enforcement of a Louisiana state court class action judgment against the tobacco companies.

⁶² INST. OF LAW: THE JOHNS HOPKINS UNIV., SURVEY OF CIVIL JUSTICE IN NEW YORK 1 (1931).

⁶³ Hoover was Secretary of Commerce at the time he made this statement.

litigation business. Meanwhile:

[T]he business world's increased competitiveness made businesses eager to take advantage of whatever was available for economic warfare, including the law

Business litigation increased, and there was competition within business litigation. The principal forms of innovation in litigation, it appears, were methods that escalated legal conflicts. Every aspect of lawsuits became contested.⁶⁴

Some attributed this development to the declining ability of lawyers to dissuade their clients from pursuing litigation—or at least to dissuade them from pursuing it in a scorched earth manner.⁶⁵

Five years later Dean Garth elaborated on the relationship between this development and the escalating discovery problems reported in some cases:

[L]awyers in the ordinary cases have learned how to manage time and expense. They have had to do so, since their clients will not pay for scorched earth tactics. On the other hand, the high-stakes, high-conflict cases involve clients who pay for the services of lawyers as warriors, and that is what they usually get. In terms of the legal services market and the civil discovery problem, it appears that clients seek the elite of the bar only when they believe that the nature of the problem and the stakes are sufficiently high to justify a major investment in legal services (or, in the contingent fee area, are sufficient for the lawyer to invest substantially in the case). It is likely that only a fraction of lawyers can claim the fees or attract the cases that justify (in terms of the stakes) investment in litigation as full-scale warfare⁶⁶

The current marketing vogue for "bet the company" lawyers confirms that these forces are still at work. Sometimes the litigations involved fit into the prior categories, involving mass tort or toxic tort claims (particularly multidistrict litigation), private enforcement of public norms (as in securities

⁶⁴ Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 *BROOK. L. REV.* 931, 942 (1993).

⁶⁵ See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *MD. L. REV.* 869, 899-903 (1990); see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 290 (1993) (lamenting the declining ability of lawyers to influence or guide their clients in making business decisions, as opposed to facilitating decisions the clients made without lawyer guidance).

⁶⁶ Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 *B.C. L. REV.* 597, 605 (1998).

fraud litigation), or twenty-first century ideological litigation like the Ecuador cleanup suit involving Chevron Corporation.⁶⁷

Increasingly, however, they represent a new model of business-to-business litigation, a situation that sometimes prompts considerable critical attention. A prime recent example is the concern with “patent troll” litigation, exhibiting characteristics typical of the more general criticism of litigation. In June 2013, the White House reacted to this development with a report entitled *Patent Assertion and U.S. Innovation*,⁶⁸ concerning the potential impact of suits by “patent assertion entities,” or nonpracticing holders of patents, which increased 250% in two years and now account for nearly two-thirds of all patent infringement suits.⁶⁹

Other developments suggest the magnitude of this trend. In January 2012, *The Wall Street Journal* reported that prominent Kirkland & Ellis and Weil, Gotshal & Manges partners left their lucrative niches defending patent infringement suits and founded new firms to acquire patents and file patent infringement suits.⁷⁰ The former Kirkland & Ellis partner said he was making “much more” at his new firm than he had at Kirkland. His move showed that, “by crossing over to plaintiffs work, a seasoned defense lawyer could get some skin in the game and nab a fortune unattainable in Big Law.”⁷¹ The former Weil partner reportedly left behind a \$5 million per year draw to found his new venture.⁷²

Whether one should worry about this development is unclear and beyond the scope of this Essay. In June 2013, the Federal Trade Commission announced that it was planning an inquiry into frivolous patent lawsuits.⁷³ In July 2013, *The New York Times* ran a profile of the owner of a prominent patent infringement plaintiffs’ firm that had supposedly sued 1638 companies over the past five years.⁷⁴ Although the story details some bare-knuckle tactics by its subject, Erich Spangenberg,⁷⁵ it also offers an example of

⁶⁷ For those who have not heard of this litigation, a primer on its issues appears in the *Stanford Journal of Complex Litigation*, Symposium, *Lessons from Chevron*, 1 STAN. J. COMPLEX LITIG., 195-523 (2013).

⁶⁸ EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION (2013), available at http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf.

⁶⁹ *Id.* at 5.

⁷⁰ Ashby Jones, *When Lawyers Become ‘Trolls,’* WALL ST. J., Jan. 23, 2012, at B1.

⁷¹ Julia Love, *For Piece of the Action, Powers Need Patents*, RECORDER, Aug. 26, 2013, at 11.

⁷² Jones, *supra* note 70; see also Love, *supra* note 71 (reporting that the Weil partner may not be encountering quite as much success as the Kirkland & Ellis lawyer, who made his move earlier).

⁷³ Cf. Edward Wyatt, *F.T.C. Is Said to Plan Inquiry of Frivolous Patent Lawsuits*, N.Y. TIMES, June 20, 2013, at B1.

⁷⁴ David Segal, *Has Patent. Will Sue.*, N.Y. TIMES, July 14, 2013 (Sunday Business), at 1.

⁷⁵ *Id.* (quoting Spangenberg as saying, “[o]nce you go thug, though, you can’t unthug”).

Spangenberg coming to the defense of a victim of a patent troll. The White House report recommended three methods for resolving the problem it identified, including "reduc[ing] disparity of litigation costs."⁷⁶ That may remind us of another observation by Dean Garth about scorched earth business litigation more generally:

Lawyers c[an] make life very difficult for any opposing business by taking advantage of the open-ended nature of discovery under Federal Rule 26, proliferating depositions and requests for documents or fighting aggressively to resist such requests. Discovery practice in the 1970s became the key to the practice of corporate litigation.⁷⁷

III. THE CENTRAL ROLE OF DISCOVERY

Discovery was central to the original Federal Rules' reform package. We are told repeatedly that it is also central to effective litigation reform⁷⁸; hence the longstanding place discovery has had on the Advisory Committee's agenda. One looking at the present and to the future must recognize that discovery has surely achieved many of the goals that the framers hoped it would achieve. Thus, in the 1960s, when scholars intensely studied the question of whether to relax the tethers on the discovery rules, the empirical research commissioned by the Advisory Committee showed that discovery did much good, but hardly solved all problems. Already conflict over scope had become a principal source of controversy.⁷⁹ But other aspects of the 1960s research may surprise contemporary observers. The chief objections then were to interrogatories, not document requests:⁸⁰ "Interrogatories are the only device that causes the average recipient to work at least as hard as the sender. . . . [R]ecipients suspect that senders are shifting the burden to them, instead of doing the work of document inspection themselves."⁸¹

⁷⁶ EXEC. OFFICE OF THE PRESIDENT, *supra* note 68, at 13.

⁷⁷ Garth, *supra* note 64, at 942.

⁷⁸ I base this statement on my seventeen years of service as Associate Reporter of the Advisory Committee on Civil Rules, focusing throughout that time on discovery rules. I am characterizing what I have heard in that capacity and found in the Committee's files. For developments before I took this position in 1996, see Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) (detailing discovery reforms between 1976 and 1996).

⁷⁹ See WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 161 (1968) ("Disputes over scope may be inherent in the adversary system, since each side tries to define the subject matter in its own self-interested way.")

⁸⁰ *Id.* at 149.

⁸¹ *Id.* at 151-52.

But at that time depositions were “the central device in discovery,”⁸² and it appeared that defendants used discovery more frequently than did plaintiffs and gained more from it.⁸³ The pro- and anti-discovery views were already well established, however. As the empirical study on which the rulemakers relied for their 1960s reforms described the situation then: “[t]he critics ‘know’ that discovery is abused generally and should be abolished. The admirers ‘know’ that discovery is unblemished by misuse. But facts sometimes confound all faiths.”⁸⁴ As in the 1960s, more recent research generally confirms that discovery costs are relatively reasonable in much federal court litigation.⁸⁵

That 1960s insight led to the revision of the discovery rules effective in 1970, the high water point for discovery liberality. Since then, the main impulse has been to contain and constrain discovery.⁸⁶ In terms of the various kinds of litigation identified in Part II that the framers probably could not foresee, these changes address issues primarily related to three of the kinds of litigation—private attorney general suits, tort litigation, and corporate litigation. The first category—“impact” or “structural” litigation—has generated far more ire about “imperial” federal judges than about discovery burdens. Indeed, it is not clear that most of the early impact litigation even depended much on discovery. *Brown v. Board of Education* introduced the notion of “legislative fact,”⁸⁷ something that the Court could find through library research, not something depending on discovery in the case.

More recently, the line between “impact” litigation (the first category) and private attorney litigation designed to enforce public norms more generally (the second category) has blurred. At least some cases seem to fit

⁸² *Id.* at 52.

⁸³ *Id.* at 51, 83, 90.

⁸⁴ *Id.* at 117.

⁸⁵ See Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1102-16 (2012) (examining 1997 and 2009 Federal Judicial Center closed case studies).

⁸⁶ For a review of these developments through 1993, see generally Marcus, *supra* note 78. The 2000 discovery amendments largely continued this trend, as did the proposals in the 2013 *Preliminary Draft*, *infra* note 93.

⁸⁷ In 1942, Professor Kenneth Culp Davis introduced the idea of “legislative facts” to describe courts’ actions in engaging in semi-factual research that goes beyond the formal evidence contained in court records. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 407 (1942). That sort of activity became central to cases like *Brown v. Board of Education*. See Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966).

into both categories. For example, *Wal-Mart Stores, Inc. v. Dukes*⁸⁸ was both a private employment discrimination case and an effort to have a very broad impact, perhaps to shift employment discrimination law. But the failure of the class certification effort in the *Wal-Mart* case was surely not a result of lack of discovery.⁸⁹ To the contrary, the emerging abandonment of the idea that courts cannot evaluate merits issues in connection with class certification seems likely to open a door for plaintiff discovery in class actions that had, until recently, been shut.⁹⁰ So for the twenty-first century version of "impact" litigation, considerable discovery may be necessary early in the case.⁹¹

Because the classic version of "impact" litigation has faded in importance, it is the other three types of litigation identified in Part II that probably constitute a major portion of the "problem" cases that prompt objections to broad discovery. As many have noted, careful research by the Federal Judicial Center Research Division in the late twentieth and early twenty-first centuries has shown that discovery does not seem to be a significant problem in "normal" litigation, probably of the sort the framers would have anticipated. Of course, the 1951 Prettyman Report's focus on the burdens of massive evidentiary showings⁹² demonstrates that the calm did not long endure or at least that disruptive new forces soon intruded—although the stress in 1951 was not on discovery burdens borne by responding parties.

Much of the response to concerns about overdiscovery has depended on numerical cutting back and judicial management. Both techniques continue to be important.⁹³ But neither really qualifies as a breakthrough idea that

⁸⁸ 131 S. Ct. 2541 (2011).

⁸⁹ *Id.* at 2561. No claim was made that plaintiffs were denied needed discovery. It seems they must have had quite a lot; their statistical expert "conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers." *Id.* at 2555. That information must have come from discovery.

⁹⁰ See generally Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324 (2011) (tracing the increasing willingness of lower courts to probe "merits" issues when deciding whether to certify a class).

⁹¹ An example may be useful. In *Beach v. Healthways, Inc.*, defendants had already produced 1.7 million pages of documents and anticipated a total production of 6.8 million pages during pre-certification discovery. 264 F.R.D. 360, 362 n.1 (M.D. Tenn. 2010). Pointing to this effort, defendants argued that, "if a class is ultimately not certified or if the class period were shortened, the defendants will have spent millions of dollars for naught." *Id.* at 362. One doubts that the defendants would regard this effort as going "for naught" if it led to denial of class certification, though they would surely prefer to reach that result by a less costly route.

⁹² See Prettyman Report, *supra* note 16.

⁹³ Thus, the package of proposed amendments published for public comment in August 2013 included revisions of numerical limitations for interrogatories and depositions and introduction of

the framers might find distinctive. Judicial management surely was known to them: Rule 34 did not originally permit document requests without advance judicial approval, and Rule 35 examinations of a party still require judicial approval unless the parties stipulate.⁹⁴ So it cannot be said that these recent adjustments move in a qualitatively distinctive direction. Of the variety of measures that have been introduced since 1970, I think that attention can most profitably focus on two—initial disclosure and proportionality.

A. Initial Disclosure

Before the 1970s, clamor about overly burdensome discovery was not particularly prominent, and concerns about secrecy seemed more pressing. Certainly American lawyers' penchant for adversarial maneuver and surprise at trial irked Roscoe Pound, who denounced it during his famous 1906 speech.⁹⁵ An abiding question is whether that penchant can be changed, and whether it should be changed. Curiously, in the very case in which it declared that the cherished cry of "fishing expedition"—used by those seeking to defeat discovery—could no longer hold sway, the Supreme Court simultaneously enshrined the work product doctrine as a basis for resisting discovery.⁹⁶ At least some lawyerly secrets could be kept under wraps.

From one perspective, this gamesmanship lies at the heart of most of the contemporary cavil about discovery. Repeatedly, the defense-side argument stresses the overbreadth of plaintiffs' discovery requests, particularly Rule 34 requests. The argument, understandably, is that it is expensive to have to find and turn over reams of material, and particularly galling when most of that material never reappears in the case (either as exhibits in depositions or

numerical limits for requests for admissions. See COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 284-86 (2013) [hereinafter COMM. ON RULES, PRELIMINARY DRAFT] (proposing amending Rule 16 to reduce the time before a scheduling order is entered and adding preservation and orders under FED. R. EVID. 502 to the agenda for contents of a scheduling order); *id.* at 300 (proposing amending Rule 30 to reduce the number of depositions without leave of court from ten to five); *id.* at 305 (proposing amending Rule 33 to reduce the number of interrogatories from twenty-five to fifteen); *id.* at 310 (proposing amending Rule 36 to limit requests for admissions to twenty-five). Note that after the public comment period, some of these proposals were revised or withdrawn.

⁹⁴ See FED. R. CIV. P. 35.

⁹⁵ Pound attacked "our American exaggerations of the common law contentious procedure," including partisan witnesses and slashing but spurious cross-examination. See Pound, *supra* note 10, at 404-05. He also denounced "deciding cases on points of practice." *Id.* at 408.

⁹⁶ See *Hickman v. Taylor*, 329 U.S. 495 (1947).

at trial or in connection with summary judgment motions). Understandably, one argument is that discovery should focus mainly on the much smaller number of items that will be used in that way in the case, even if it is not limited solely to those things.⁹⁷

It seems undeniable that much discovery yields more than the party seeking production really wants. To take a fifty-year old case as an illustration: in the MER/29 litigation in the early 1960s, plaintiffs' lawyers in the consolidated discovery obtained sixty-five rolls of microfilm with more than 100,000 documents for shared review.⁹⁸ Under counsel's coordination agreements, this material was reviewed by a "trustee" who "spent virtually two summers reading and copying pertinent documents on the film, even then reading only half."⁹⁹ A decade later, in the Bendectin litigation, things seemed not to have changed a great deal because of the differences in resources between plaintiffs' counsel and defendant Merrell:

This difference in resources is graphically illustrated by the way in which one of the [individual plaintiff's] lawyers dealt with production of the lengthy new drug applications produced by Merrell: he rented a microfilm machine in Florida, loaded it in his car, drove to New York where Merrell's lawyers had their office, and microfilmed the documents himself. . . . [T]ry as they did, plaintiffs' lawyers in the individual suit "did not have the resources or capacity that Merrell did." The formation of the plaintiffs' litigation committee in connection with the multidistrict litigation "afforded plaintiffs' lawyers a far more level playing field in terms of

⁹⁷ In that vein, consider the recent revision of the scope of discovery under MINN. R. CIV. P. 26.02(b), effective July 1, 2013 (new matter italicized; deleted matter overstricken):

Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against 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. Subject to these limitations, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Upon a showing of ~~For~~ good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

⁹⁸ Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 127-29 (1968).

⁹⁹ *Id.* at 130.

stakes and available resources,” and plaintiffs’ discovery in the multidistrict action was accordingly much broader than in the individual suit.¹⁰⁰

Although these rudimentary techniques and the relatively small volume may seem quaint, it is likely that the experience is repeated today—those who receive massive amounts of discovery may be overwhelmed by it. Even though the plaintiffs’ bar today seems much better organized and financed than it was in the 1960s through the 1980s, it surely can still be overwhelmed by production under Rule 34. Why, one might ask, don’t these lawyers limit their requests to what they really need and want? One answer sometimes suggested by the defense side is that the breadth of plaintiff requests is designed to defeat resolution of cases on their merits. In the new world of plaintiff networks created by the American Association for Justice and other organizations, the contention runs, the plaintiffs’ lawyers already have the documents they really need. What they are doing, we have been told, is trying to lay the groundwork for a sanctions motion when overwhelmed defendants fail to produce some of the documents that plaintiffs’ counsel already have, enabling them to seek a default judgment or other advantage for failure to produce.¹⁰¹ Thus overbroad discovery requests might be used to club the defendant into submission in two ways—by the sheer cost of compliance, and due to the additional fear that even a huge effort to comply will not prevent a sanction foreclosing defense on the merits.

Plaintiffs’ lawyers do not always respond to these arguments by claiming that they make narrow discovery requests. They do argue persuasively that because few of them are being paid by the hour, they have no incentive to generate more work for their side. They might say that the fact they do not even review everything they get is simply a sign that they are engaged in sensible triage. And even though some of them acknowledge that the plaintiffs’ bar is much better organized and financed than it was in the 1960s and 1970s, they emphasize that defense counsel nevertheless routinely outguns them.

The basic problem, plaintiffs’ lawyers say, is that narrow requests will not produce the needed information; they must request lots of chaff to make certain they get the wheat. For one thing, they cannot request that defendant produce “the 100 documents that best show that defendant should be found

¹⁰⁰ Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 243-44 (1997) (citations omitted) (reviewing and quoting MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996)).

¹⁰¹ I distinctly remember defense-side lawyers making this argument during the Advisory Committee’s September 1997 conference on discovery.

liable.” That simply is not a request that would satisfy Rule 34’s particularity requirement.¹⁰² Moreover, it seems to intrude precisely into opinion work product, the most sacrosanct precinct.¹⁰³ How could one side require the other side’s lawyer to reveal judgments about which documents would be most damning? Certainly that is a topic on defense counsel’s mind during trial preparation, but it is also precisely the sort of insight that the protection of opinion work product is designed to keep secret. Plaintiffs’ lawyers would not be receptive to reciprocal discovery requests that may reveal the holes in their cases.

So from the plaintiffs’ point of view, what is necessary is to cast a wide net and try as best as possible to identify in the mass of discovered information the things that one cannot ask defense counsel to cull for the plaintiffs—the triage referred to above. Moreover, plaintiffs’ counsel emphatically argue that too many defense counsel engage in games of their own, holding back “hot” documents on spurious grounds,¹⁰⁴ sending up a smoke screen of distracting objections, or over-producing to magnify the chore for plaintiffs’ counsel who are trying to find the relatively few really important documents in the mass of marginally relevant or totally irrelevant documents. This is not a good state of affairs, the plaintiffs’ side says, but it is better than not getting what you need at all. As Judge Facciola has noted, “like the Rolling Stones, [plaintiffs’ counsel] hope that if they ask for what they want, they will get what they need. They hardly need any more encouragement to demand as much as they can from their opponent.”¹⁰⁵

In short, we seem to have reached an impasse. The plaintiff-side arguments that defense counsel engage in their own discovery games seems sufficient to warrant a response of some sort.¹⁰⁶ At the same time, it is hard

¹⁰² FED. R. CIV. P. 34(b)(1)(A) (mandating that a request “describe with reasonable particularity each item or category of items to be inspected”).

¹⁰³ See FED. R. CIV. P. 26(b)(3)(B) (directing the court to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney” even where it finds that production of work product is warranted).

¹⁰⁴ Such spurious grounds might include exploiting the other side’s use of narrowly tailored requests to support the argument that the bombshell document was not requested.

¹⁰⁵ *McPeck v. Ashcroft*, 202 F.R.D. 31, 33-34 (D.D.C. 2001).

¹⁰⁶ On this score, note that the pending package of amendment proposals includes proposed amendments to address such behavior. See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93, at 307-08 (amending Rule 34 to require that responding parties “state the grounds for objecting to the request with specificity” and also “state whether any responsive materials are being withheld on the basis of that objection”).

At least some judges appear receptive to ending such avoidance games. Consider *Silicon Knights, Inc. v. Epic Games, Inc.*, 917 F. Supp. 2d 503 (E.D.N.C. 2012), where the judge exhibited

to believe that either side is entirely innocent of the sort of behavior charged by the other side. Has it *never* happened that a plaintiff's lawyer designed a discovery demand partly to impose burdens on defendant, or that a defense lawyer adopted an unduly narrow interpretation of a discovery request to excuse turning over damaging information? But one might hope for a method better tailored to avoid the game-playing by both plaintiff and defense lawyers.

In the early 1990s, the Advisory Committee tried to find such a method, and it hit upon initial disclosure. To some extent, this general idea may have mirrored the United Kingdom's system of "disclosure," which relies on counsel to be relatively forthcoming. Indeed, in the wake of the Lord Woolf reforms to U.K. procedure in the late 1990s, there are now "pre-action protocols" that "encourage the exchange of early and full information about the prospective legal claim."¹⁰⁷ Congress itself had chimed in with the Civil Justice Reform Act of 1990, which encouraged individual districts to adopt "principles" including "encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."¹⁰⁸ Judge Schwarzer, a leader in litigation reform, had urged similar principles in a 1989 paper.¹⁰⁹

Thinking along the same lines, the Advisory Committee published a 1991 proposed amendment adding a requirement of initial disclosure, without the need for a formal discovery request, regarding any person likely

little tolerance for plaintiff's avoidance gaming, reacting:

In addition to boilerplate objections, Silicon Knights also added specious responses to some discovery requests. For example, in response to Epic Games's eighth and ninth requests for production, Silicon Knights stated that, "[s]ubject to and without waiving any of [its] objections . . . , [Silicon Knights] will endeavor to identify and produce appropriately responsive documents." . . . This vague, open-ended response merely "state[s] an intention to make some production at an unspecified date of [Silicon Knights's] own choosing [and] is not a complete answer as required by Rule 34(b) and, therefore, pursuant to Rule 37(a)(3) is treated as a failure to answer or respond."

Id. at 533-34 (alteration in original) (quoting *Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 247 (M.D.N.C. 2010) (citations omitted)).

¹⁰⁷ See NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM 7-8 (2003) (describing the new approach, and noting that the pre-action protocols operate in the shadow of "the Damoclean sword of costs and other sanctions") (internal citations omitted).

¹⁰⁸ 28 U.S.C. § 473(a)(4) (2006).

¹⁰⁹ See William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989) (proposing adoption of a rule requiring disclosure of all relevant information without the need for a formal discovery request).

to have “information that bears significantly on any claim or defense” and a description of any documents “likely to bear significantly on any claim or defense.”¹¹⁰ That proposal may seem innocuous—at least when compared with the supposedly immense burdens of contemporary discovery—but it was received with great alarm by both sides of the bar.¹¹¹ The Advisory Committee retreated and decided to limit the disclosure requirement to information and documents “relevant to disputed facts alleged with particularity in the pleadings,” seemingly encouraging more informative pleading.¹¹² Justices Scalia, Souter, and Thomas denounced that more limited proposal because it did “not replace the current, much-criticized discovery process; rather, it add[ed] a further layer of discovery.”¹¹³ Worse yet, they thought, it threatened to undermine the entire fabric of American litigation ethics:

By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side.¹¹⁴

Notwithstanding these concerns, the amendment went into effect—but only because one senator refused to waive the Senate’s rules and the bill striking initial disclosure from the package therefore failed to pass.¹¹⁵ And the amended rule permitted district courts to secede from initial disclosure by local rule, which many did, producing a patchwork practice across the federal judicial system that the Federal Judicial Center attempted to monitor on an annual basis.¹¹⁶ To restore national uniformity, the initial disclosure rule was revised in 2000 to make it apply nationwide but only to witnesses or documents that the disclosing party may use to support its case; each side

¹¹⁰ *Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 87-88 (1991).

¹¹¹ See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 808-09 (1993) (describing tumult).

¹¹² Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 431-32 (1993).

¹¹³ *Id.* at 510.

¹¹⁴ *Id.* at 511.

¹¹⁵ See Paul D. Carrington & Derek P. Aponovitch, *The Constitutional Limits of Judicial Rule-making: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 485 (1997) (describing how one senator’s refusal to consent to suspending the rules prevented legislation that would have removed initial disclosure from the 1993 rule amendment package).

¹¹⁶ See, e.g., DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS’ RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1998) (describing and categorizing local regimes of initial disclosure).

would still need conventional discovery to obtain material helpful to its case.¹¹⁷

This is not a happy history. True, the broadest of disclosure regimes may ask lawyers to do something that genuinely conflicts with their ingrained instincts.¹¹⁸ But unless something like this can break the impasse, it may be that moderate refinements seem safer than dramatic changes. On the moderate refinement front, the recent development of disclosure protocols for individual employment discrimination litigation¹¹⁹ may pave the way toward workable solutions, but more work will need to be done before those solutions exist in most cases.

B. Proportionality

In 1961, when it published its massive *Developments in the Law—Discovery*, the *Harvard Law Review* noted at the outset that “[e]ven when invoked sparingly, discovery may impose upon both parties and nonparties burdens of cost and inconvenience that are disproportionate to the signifi-

¹¹⁷ See FED. R. CIV. P. 26(a)(1)(A).

¹¹⁸ Consider the following “letter” to a client that an Arizona lawyer offered as a parody of what state court disclosure rules there would require:

[W]e should schedule a meeting at the earliest possible opportunity, at which time you should be prepared to provide an outline, which I will immediately provide to plaintiff’s attorney, of all facts which tend to support the claims for relief the plaintiff has set forth in the complaint.

[I]f the plaintiff has failed to pursue any appropriate claims against your company, we should also gather and pass on to plaintiff’s counsel all facts which he would want to know that he might amend his claim to pursue any additional theories of relief against your company.

Robert J. Bruno, *The Disclosure Rule Is a Mistake*, MARICOPA LAW., Aug. 1992, at 6. A plaintiff’s lawyer responded that it was “ridiculous” and that “such efforts were so clearly silly that no reasonable advocate would expect a defense lawyer to engage in them.” JoJene Mills, *Practical Implications of the Zlaket Rules from a Plaintiff’s Lawyer’s Perspective*, 25 ARIZ. ST. L.J. 149, 163 (1993).

¹¹⁹ See FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 2 (2011). As described in the introduction:

The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant’s responsive pleading or motion. While the parties’ subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship.

cance of the litigation to those who must bear such burdens.”¹²⁰ Twenty years later, Professor Arthur Miller, then Reporter of the Advisory Committee, “perceive[d] the need for imposing some restraint on cumulative and excessive discovery.”¹²¹ This was the prompt for the proportionality provisions installed in the discovery rules in 1983. At the time, Professor Miller announced that these changes heralded a “180-degree shift” in federal discovery.¹²²

In all likelihood, Professor Miller was premature in that announcement. When I prepared the second edition of the *Federal Practice & Procedure* volumes addressing discovery a decade later, I added a new section dealing with proportionality, but had to report that “[t]he [proportionality] amendment itself seems to have created only a ripple in the case law.”¹²³ But by the time the third edition appeared in 2010, things had changed, and I could report that the “attention to the proportionality provisions has grown since 1994, and endorsement of their use has widened.”¹²⁴

In part, this expansion of attention to proportionality can be traced to rule changes. In 2000, a cross-reference to the proportionality provisions was added to Rule 26(b)(1), the basic rule on scope of discovery.¹²⁵ The 2013 proposed amendments relocate that proportionality in Rule 26(b)(1), elevating it more directly into the basic definition of the scope of discovery.¹²⁶ If this change is adopted, the existing trend to emphasize proportionality may accelerate.

Perhaps more basically, there is great appeal to the concept of proportionality. But that does not mean that it is easy for judges to apply. For one thing, the “value” of a case is uncertain, particularly at the outset. Although we recognize that the monetary amount claimed by the plaintiffs suffices to

¹²⁰ *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

¹²¹ 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, 354 (2013).

¹²² ARTHUR R. MILLER, FED. JUDICIAL CTR., *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 32-33 (1984).

¹²³ 8 CHARLES WRIGHT, ARTHUR MILLER & RICHARD MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 2008.1 (2d ed. 1994).

¹²⁴ 8 CHARLES WRIGHT, ARTHUR MILLER & RICHARD MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 2008.1 (3d ed. 2010).

¹²⁵ See FED. R. CIV. P. 26(b)(1) (“All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”).

¹²⁶ See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93, at 289-90.

satisfy the amount in controversy requirement for diversity jurisdiction,¹²⁷ the relaxed standard seems manifestly insufficient for determining whether highly burdensome or costly discovery is warranted.

The “value” of proposed discovery also may be debated. Although economists may urge that any discovery foray that does not promise to provide more “value” in evidence than it would cost the other side to provide be regarded as “abusive,”¹²⁸ that determination is often elusive. Until discovery is done, it is surely difficult to predict with confidence what it will produce, and results might depend in some cases on whether the responding party actually complies with its discovery obligations. The question whether “overbroad” requests are necessary to procure the essential information remains salient. Moreover, measuring the prospective benefit against the cost requires some confidence about what those costs will be; it may be that the responding party has a strong incentive to magnify those costs in hopes of making the entire exercise unnecessary. So many mechanical obstacles lie in the way of actual proportionality decisions.

Beyond these difficulties, there may be value judgments that complicate the calculus. The rule acknowledges that one of the things the court should focus on is “the importance of the issues at stake in the action.”¹²⁹ Perhaps in a case like *Brown v. Board of Education*, that is easy to take into account; had extensive discovery been needed (as seems not to have been the case), one would have a strong argument that the sky should be the limit. In other cases, things may not be so easy, as Professor Sherman pointed out when proportionality was first added to the rules:

What values should be used in deciding whether, for example, the plaintiff in a \$10,000 personal injury case should be limited in the number of depositions he may take, or the plaintiff seeking reinstatement in an employment discrimination case should be prohibited from discovering documents only tangentially related to the claim, or the defendant in a \$10,000,000 product liability case should be allowed to require answers to voluminous interrogatories involving the most searching details of plaintiff’s past life?¹³⁰

¹²⁷ *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938) (holding that, for purposes of satisfying the amount in controversy requirement of 28 U.S.C. § 1332, the court must accept plaintiff’s claim for more than that amount so long as it is made in “good faith”).

¹²⁸ See Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 61 (1995) (urging such an approach).

¹²⁹ FED. R. CIV. P. 26(b)(2)(C)(iii).

¹³⁰ Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80’s—Making the Rules Work*, 95 F.R.D. 245, 276 (1982).

Some may recoil at the notion that a dollar value provides meaningful guidance about the pursuit of justice. As Judge Learned Hand famously intoned, "Thou shalt not ration justice."¹³¹ But surely that aspiration must be limited, at least with regard to wide-ranging discovery, by the possibility that litigation expense may itself frustrate or prevent justice. Even litigators should concede that it would not be sensible for *all* of society's assets to be consumed by the transaction costs of litigation.

A tricky but central problem is to determine when discovery that seems "reasonable" in terms of providing needed evidence is nonetheless too costly or burdensome given the small stakes involved. As noted above, it must be true that plaintiffs' lawyers make such calculations every time they decide whether to take on a contingent-fee case, asking whether the prospective recovery justifies the cost and effort of pursuing it in court. Part of that expense will be the cost of discovery; in 1997, the Federal Judicial Center's research study suggested that discovery actually often costs plaintiffs more than defendants.¹³² For decades, however, litigants seeking discovery have invoked Rule 26(b)(1)'s seeming invitation to do any discovery "reasonably calculated to lead to the discovery of admissible evidence" and argued that what they wanted was so calculated.¹³³ Actually, that phrase was not included in the rule to support this sort of argument, and the current amendment package proposes removing it to eliminate this confusion.¹³⁴

The question may remain, however: should proportionality concerns prevent discovery that is "reasonable" in terms of producing admissible evidence? The English experience provides an analogy that may be instructive. In the U.K., of course, the full indemnity principle has prevailed for

¹³¹ Judge Hand made this statement in his seventy-fifth anniversary address to the Legal Aid Society of New York on February 16, 1951. See Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 421 (2012) (quoting Judge Hand).

¹³² See 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, 548 tbl.3 (1998) (showing that at the 95th percentile, the discovery cost for plaintiffs was one-third higher than for defendants). A recent illustration comes from Timothy McDonald, *Alternative Approaches in Responding to Medical Errors*, TRIAL, May 2013, at 34, an article for plaintiffs' lawyers who sue for medical malpractice. Written, it seems, from the perspective of a hospital, the article endorses a more forthcoming approach from hospitals. In service to that goal, it also appears to use discovery costs as a reason for plaintiffs' lawyers to tread softly: "Once the patient obtains counsel, defense attorneys will deny and defend any and all allegations against their client. This often results in a protracted discovery process over many years where the defense employs legal maneuvers to keep information away from the patient, family, and their counsel." *Id.* at 36.

¹³³ See FED. R. CIV. P. 26(b)(1).

¹³⁴ See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93, at 289-90.

centuries—the winning litigant gets to recover its costs of suit, including attorneys’ fees, from the loser. Although that indemnity principle was hedged a bit by the idea that only “reasonable” expenditures on litigation could be charged to the other side, indemnity still ruled the day in most instances. But Lord Woolf’s revisions to U.K. practice installed proportionality as a central concern in the late 1990s.¹³⁵

The question shortly arose whether disproportionate expenditures on litigation could be recovered from the other side if they were reasonably calculated to assist in winning the case. Speaking for the court, Lord Woolf himself explained in 2002 that the standard should be “necessity,” adding that “the threshold required to meet necessity is higher than that of reasonableness.”¹³⁶

Despite the centrality of proportionality to Lord Woolf’s reforms, the problem of excessive costs did not go away, and in 2009, Lord Justice Jackson was assigned the task of studying ways to improve the handling of costs. Declaring that the effect of Lord Woolf’s test “was to insert the Victorian test of necessity into the modern concept of proportionality,” Lord Justice Jackson rejected Lord Woolf’s 2002 conclusion and recommended that the U.K. make a change:

Disproportionate costs do not become proportionate because they were necessary. If the level of costs incurred is out of proportion to the circumstances of the case, they cannot become proportionate simply because they were “necessary” in order to bring or defend the claim. It will be recalled . . . that the Legal Services Commission applies a cost/benefit test when deciding whether to support a case with public funds. Any self funding litigant would do the same. The fact that it was necessary to incur certain costs in order to prove or disprove a head of claim is obviously relevant, but it is not decisive of the question whether such costs were proportionate.¹³⁷

¹³⁵ See ADRIAN AS ZUCKERMAN, CIVIL PROCEDURE 1-3 (2003) (describing the new code’s emphasis on proportionality as a “radical departure from past practice”).

¹³⁶ Home Office v. Lownds, [2002] EWCA (Civ) 365, [37] 1 W.L.R. 2450.

¹³⁷ RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 37 (2009). Since the Jackson Report, the rules have been revised to include the following in Civil Procedure Rule 44.3(2):

Where the amount of costs is to be assessed on the standard basis, the court will—
(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

It may be that American judges will increasingly be called upon to make such judgments in deciding what discovery should be ordered.¹³⁸ A recent paper by Judge Wistrich and Professor Rachlinski suggests that such efforts may be necessary due to what they call "nonconsequentialist reasoning"—"the heuristic that more information must be better, without regard for the cost of that information or the need for it":

Litigators thus suffer from a double distortion: they overvalue the additional information and undervalue the costs incurred by the responding party in providing the information. Lawyers also likely do not realize that the additional information might hinder or distort their own judgment.¹³⁹

Perhaps a reorientation could rekindle interest in more vigorous initial disclosure requirements. For their part, Judge Wistrich and Professor Rachlinski endorse that reform and favor tightening numerical limits on discovery and enhanced judicial management.¹⁴⁰ The latter two were, of course, significant features of the 2013 package of proposed amendments.¹⁴¹

IV. THE TWENTY-FIRST CENTURY PERSPECTIVE

The twentieth century concerns examined above are still with us, and we have added some twenty-first century concerns to their ranks. For one thing, debate about discovery does not seem likely to become more restrained. Already this year, the existing discovery rules have been attacked as "un-

Civil Procedure (Amendment) Rules 2013, 2013, S.I. 2013/262 (Eng. & Wales). For discussion of this effort, see John Sorabji, *Prospects for Proportionality: Jackson Implementation*, 32 CIV. JUST. Q. 213 (2013).

The issues raised in U.K. litigation are not the same as in American discovery, where the court has since 1983 been directed by Fed. R. Civ. P. 26(b)(2)(C) to limit disproportionate discovery in advance. Thus, Professor Andrews has objected to the new U.K. regime on the ground that "proportionality is a criterion imposed after-the-event (as distinct from costs management exercised during the earlier stages of litigation in a particular case, or other ex ante constraints such as case management restrictions on the scope of the litigation and its intensity, or costs capping). Neil Andrews, *On 'Proportionate' Costs* 11 (Univ. of Cambridge Faculty of Law Legal Stud., Research Paper No. 22/2014, 2014) (citation omitted), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399061.

¹³⁸ A possible analogy is to the handling of requests for "disproportionate" attorneys' fee awards in cases governed by a fee-shifting statute. For decades, "billing judgment" was to guide these decisions, but the basic problem continues.

¹³⁹ Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 604-06 (2013).

¹⁴⁰ *Id.* at 623-27.

¹⁴¹ See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93, at 267-68. It should be noted, however, that the numerical limit changes were removed after the public comment period.

American”¹⁴² and a proposed amendment designed to constrain discovery has faced the same criticism.¹⁴³ Meanwhile, some seem still to regard discovery and litigation as a way to shine a “spotlight” on practices they dislike,¹⁴⁴ and the idea that there may be an important First Amendment right to obtain information through discovery and disseminate it may be returning.¹⁴⁵ Perhaps taking such ideas to heart, a pro se litigant recently filed a suit in which one of his “counts” was for discovery. The district court dismissed, explaining that “discovery is not a claim one can make in a complaint; it is a process litigants undertake after they have filed their initial pleadings and dispositive motions.”¹⁴⁶ Perhaps some things never change.

Some developments, however, did occur. For example, defendants sometimes recognize that they too like American discovery. A striking example arose out of the venomous litigation against Chevron Corporation regarding pollution in Ecuador. Employing a statute enabling litigants to obtain discovery here for use in litigation outside this country,¹⁴⁷ Chevron embarked on what the Third Circuit called a discovery effort “unique in the annals of American judicial history.”¹⁴⁸ In a February 2013 law school conference about this litigation, a lawyer who has represented Chevron issued a warning to plaintiffs inclined to file such suits: “Even if you are a defendant litigating

¹⁴² See Comments of Lawyers for Civil Justice, to the Civil Rules Advisory Committee and the Discovery Subcommittee (Apr. 1, 2013) (stating that the American requirement that the responding party usually pays for the cost of responding to discovery is “the Un-American Rule”); see also Jessica D. Miller et al., *Can E-Discovery Violate Due Process (Part 2)*, L. TECH. NEWS, June 10, 2013, at 1 (arguing that “forcing a defendant to pay significant discovery expenses (without any contribution from the plaintiff) absent any finding of liability arguably infringes the defendant’s right to due process”).

¹⁴³ Letter from John R. Cady & Christopher Aulepp, Cady Law Firm, LLC, to Jonathan Rose, Admin. Office of the U.S. Courts (Aug. 14, 2013), available at <http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0263> (asserting that “[t]he proposed change to Rule 26(b) is un-American”).

¹⁴⁴ See, e.g., BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* 42 (2005) (referring to a national human rights litigator who “used litigation like a spotlight, dragging government officials and what he considered to be their wrongheaded policies into the glare”).

¹⁴⁵ See Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348168 (arguing that a recent Supreme Court statement breathes new life into the public access idea). For counterarguments, see Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

¹⁴⁶ *Finley v. Kondaur Capital Corp.*, 909 F. Supp. 2d 969, 976 (W.D. Tenn. 2012).

¹⁴⁷ See 28 U.S.C. § 1782 (2012).

¹⁴⁸ *In re Chevron Corp.*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

in a foreign tribunal, discovery is available in the United States."¹⁴⁹ And a recent practitioners' article on how to defend class actions suggested that discovery is a way for defendants to win such cases.¹⁵⁰

These issues continue to attract attention from on high. For example, in December 2011, a subcommittee of the House Judiciary Committee held a hearing on the "Costs and Burdens of Civil Discovery."¹⁵¹ Before the next meeting of the Advisory Committee on Civil Rules, the Chairman of this subcommittee wrote to the judges who head the Advisory Committee and the Standing Committee on Rules of Practice and Procedure expressing hope that the committees "will recommend enacting rule reforms to address the principal concerns discussed at the hearing. Such reforms would free Americans to devote their financial resources to job creation and more productive, economic uses."¹⁵²

Proposed amendments had been under study since the Advisory Committee's conference at Duke Law School in May 2010, and were published for public comment in August 2013.¹⁵³ Much public commentary followed, showing that there is fervent disagreement on a number of points. It may be that the framers would have expected nothing less. But in at least two ways, the present issues probably differ from what they would have anticipated.

A. *The Digital Revolution*

We are regularly told that there has been a digital "revolution" and that everything is different as a result. For more than thirty years, computer technology has changed the way lawyers work. It remains unclear whether the legal profession will undergo a revolution as a result,¹⁵⁴ although there is

¹⁴⁹ Theodore J. Boutros, Jr., *Ten Lessons From the Chevron Litigation: The Defense Perspective*, 1 STAN. J. COMPLEX LITIG. 219, 234 (2013) (capitalization altered for readability).

¹⁵⁰ See Kenneth Sulzer & Laura Reathafor, *How to Defend Regional Class Actions*, S.F. DAILY J., Aug. 23, 2013, at 5 ("Discovery is also often a battleground in litigating the size of the class and many times can be the 'win' the employer needs to get the case resolved.")

¹⁵¹ *Costs and Burdens of Civil Discovery: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011).

¹⁵² Letter from Rep. Trent Franks, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary, to Judge Mark R. Kravitz, Chairman, U.S. Judicial Conference Comm. on Rules of Practice & Procedure, and Judge David G. Campbell, Chairman, Civil Rules Advisory Comm. (Mar. 21, 2012).

¹⁵³ See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93.

¹⁵⁴ For ruminations on the subject, see Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827 (2008).

a passable argument that digital technology has revolutionized the medical profession.¹⁵⁵

But there is good reason to conclude that digital technology has revolutionized discovery in the last two decades or so. As recently as 2000, I was buttonholed by prominent litigators who urged that the Federal Rules be revised to state explicitly that email is discoverable; they told me that their corporate clients would not take their word for it. Fairly soon, Corporate America clearly got the word. In 2006, amendments were added to deal explicitly with discovery of this form of evidence.¹⁵⁶ Rather quickly, most of the states adopted very similar provisions.

Rule changes are not a sufficient measure of the prominence of e-discovery. A better measure is money. From next to nothing in 2000, an e-discovery industry has arisen that is expected to be worth \$9.9 billion in 2017.¹⁵⁷ That figure does not represent attorneys' fees, but rather the revenues of e-discovery providers. True, this development is part of a larger information-management evolution,¹⁵⁸ but it is a very large part. It is large enough to get the attention of law firms; many of them now have e-discovery departments. It is also large enough to get the attention of law schools; at least sixty of those now (like Hastings) offer courses in e-discovery. In 2012, the RAND Corporation published a study of the costs of e-discovery (and of the attorney time involved in reviewing its fruits) and concluded that only predictive coding offered the promise of significantly curbing those costs.¹⁵⁹ Since then, predictive coding has been the hottest topic on the e-discovery market; many vendors tout their products as "the best."

This new industry meets a need, and that need is mainly fueled by American discovery, although governmental investigations and other activities play a part. In the era of television shows like CSI, it may seem to many jurors that every important activity leaves electronic footprints, so

¹⁵⁵ See Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 265-73 (2009) (contrasting the impact of computers on what doctors do).

¹⁵⁶ For discussion, see Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

¹⁵⁷ See Sean Doherty, *Research Group Claims E-Discovery Market to Reach \$9.9B in 2017*, L. TECH. NEWS, Aug. 9, 2013, available at LEXIS. Of that worldwide figure, \$7.2 billion was forecast as the U.S. share. *Id.*

¹⁵⁸ See, e.g., *Coping with Asian Languages in E-Discovery, Uncovering Fraud, Intrusions and More*, METROPOLITAN CORP. COUNS., Sept. 2013, at 22 (describing e-discovery technology that can also be used to detect hacking and fraud).

¹⁵⁹ See NICHOLAS M. PACE & LAURA ZAKARAS, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 97-99 (2012).

that they should be presented with digital evidence (ideally video footage) to prove what happened. Certainly the remarkable use of video footage to identify the bombers in the Boston Marathon bombing attack illustrated how important this material can be to resolving disputes that end up in court. Similarly, the furor about NSA spying on email and related communication activity that followed Edward Snowden's leaks underscores how much "confidential" information Americans commit to digital memory.

The framers were probably up-to-date on technological innovations of their time that affected law practice in general and litigation in particular, and they probably also marveled at how much practice had changed in their lifetimes. But when they talked about the burdens of discovery, they spoke mainly of the intrusion it threatened.¹⁶⁰ In the age before the photocopier and the electronic typewriter, the quantity of documents that existed by the 1970s would not be imaginable. The mass use of computers since the 1980s has compounded the amount of possibly discoverable information manyfold. And things continue to change; a 2013 survey of in-house counsel reported that nearly all expect e-discovery to be different in 2015.¹⁶¹

Unless one entirely rejects the proportionality notions explored above,¹⁶² this change must affect how discovery is conducted. If predictive coding achieves reliability and acceptance, it may in a sense supplant the Rule 34 request, for the real focus will be on the algorithm, not the request, and the undertaking will be to produce information identified by the algorithm, not on producing "each and every" item described by the request.¹⁶³ Already, courts are beginning to require parties to agree on search terms used to identify responsive information, seemingly recognizing that at least this "first cut" technique is essential to sensible discovery in the Digital Age.¹⁶⁴ We have not seen the end of this evolution.

¹⁶⁰ See Subrin, *supra* note 4, at 721-22 (describing concerns).

¹⁶¹ ARI KAPLAN, *ADVICE FROM COUNSEL: TRENDS THAT WILL CHANGE E-DISCOVERY (AND WHAT TO DO ABOUT THEM NOW)* 4 (2013), available at http://www.legaltechnology.com/wp-content/uploads/2013/03/whitepaper-2013-advice-from-counsel_FINAL.pdf (reporting that nearly all in-house legal professionals interviewed in a survey expect "e-discovery to be different in 2015").

¹⁶² See *supra* Section III.B.

¹⁶³ On this score, consider the recent observation by an experienced e-discovery practitioner:

In effect, requesting parties regard an agreement to use queries as an agreement to treat those queries as requests for production. Producing parties who reject this thinking would nevertheless be wise to plan for opponents (and judges) who embrace it.

Craig Ball, *Are Keywords Just Filters?*, L. TECH. NEWS, June 1, 2013, at 25, available at LEXIS.

¹⁶⁴ See, e.g., *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 134 (S.D.N.Y. 2009) ("This Opinion should serve as a wake-up call to the Bar in this District

But we can see that the advent of the Digital Age makes it more important to take account of proportionality concerns. That may be expressing itself first with regard to preservation. For reasons that are not entirely clear, preservation has become an extremely hot topic in litigation. As the person responsible for the discovery volumes of *Federal Practice & Procedure*, I have the pleasure each year of reading all reported federal discovery-related decisions, and I can report that the volume of sanctions motions regarding preservation has surged. As the Federal Judicial Center has reported,¹⁶⁵ there are still few decisions imposing severe sanctions for loss of evidence. Partly due to advertising efforts by vendors of preservation software, however, those decisions get a great deal of attention, and reports of extremely broad and expensive preservation abound. Partly as a result, the pending amendments package contains a proposed amendment to Rule 37 designed to guide preservation sanctions decisions.¹⁶⁶ The ultimate upshot of this effort cannot be predicted now. Similarly, it is not possible to say whether further rule changes will result from the advent of the Digital Age, but it is clear that this new era has produced a new discovery atmosphere.

B. *The Rest of the World*

"[A] lot of foreign companies like the U.S. judicial system. They like it for its openness, its fairness, and its vigorous discovery rules."

—John Bace¹⁶⁷

The above endorsement of American discovery is jarring; from what we are regularly told, foreign companies do *not* embrace our "vigorous discovery rules." To the contrary, the conventional view is that most of the rest of the world regards U.S. discovery as anathema. It is certainly possible to argue

about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce email and other electronically stored information.").

¹⁶⁵ See EMERY G. LEE III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOILIATION OF EVIDENCE IN CIVIL CASES (2011) (reporting on review of court dockets showing very low frequency of imposition of sanctions for spoliation).

¹⁶⁶ See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93, at 314-28. Note that this proposal was revised after the public comment period.

¹⁶⁷ *Cope with Complex Asian Issues Affecting E-Discovery by Using a Full-Service Provider*, METROPOLITAN CORP. COUNS., May 2013, at 14.

that the rest of the world is wrong; there is an entire book by a Korean scholar making just that argument.¹⁶⁸

For a long time, partly due to our exceptional discovery practices, the United States has practiced exceptionalism in procedure.¹⁶⁹ Particularly in relation to discovery, we may have to reconsider that parochial attitude. For some, the assumption seems to be that God granted the broadest of discovery, or at least that broad discovery is a critical attribute of a civilized nation. Undoubtedly it has become a striking feature of this nation, but largely because of the revolution wrought by the framers of the Federal Rules. Fervent efforts to preserve this status quo seem somewhat like efforts to preserve every aspect of the "social contract" in Western European nations where it has come under stress.¹⁷⁰

Except in times of global warming, it is risky to set up camp in front of a glacier, for halting the progress of a glacier is too difficult.¹⁷¹ The "American century" is over; at least some compromise with the prevailing attitude toward discovery in the rest of the world is worth considering. It is striking that some who otherwise oppose American unilateralism and exceptionalism in many areas embrace it with regards to discovery, thinking that our view is close to our essence as a people.¹⁷² Even if one fully embraces that notion, it

¹⁶⁸ See KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW (2003) (recommending that civil law countries adopt American-style discovery). For ruminations along the same lines, see R.L. Marcus, *Extremism in the Pursuit of Truth Is Our "Virtue": The American Infatuation With Broad Discovery* (exploring reasons why American discovery fits American litigation's emphasis on private enforcement), in TRUTH AND EFFICIENCY IN CIVIL LITIGATION: FUNDAMENTAL ASPECTS OF FACT-FINDING AND EVIDENCE-TAKING IN A COMPARATIVE CONTEXT 165-87 (C.H. van Rhee & A. Uzelac eds., 2012).

¹⁶⁹ See, e.g., Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005) (review essay); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153 (1999).

¹⁷⁰ Consider the following description of the current condition in France:

The Socialists have become a conservative party, desperately trying to preserve the victories of the last century. Many in the party, like the anti-globalization campaigner Arnaud Montebourg, now the minister in charge of industrial renewal—let alone those further to the left—seem to believe that France would be fine if only the rest of the world would just disappear, or at least work a little less hard.

Steven Erlanger, *A Proud Nation Ponders How to Halt Its Slow Decline*, N.Y. TIMES, Aug. 25, 2013, at A6.

¹⁷¹ Perhaps global warming will create a different risk—that huge chunks of ice will peel off the melting glacier and crush those in the vicinity.

¹⁷² This perspective can be supported by reference to a number of political theories. For discussion, see Richard Marcus, *Bomb Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 NW. U. L. REV. 475, 497-506 (2013) (exploring various justifications in political theory for retaining American procedural arrangements).

is difficult to believe that proportionality really goes out the window in service to the overriding importance of discovery at any cost. If the attitude toward preservation that some plaintiffs' lawyers endorse for corporate defendants were applied also to individual plaintiffs, many of them would be found wanting. Some swords have two edges.

More immediately, American discovery and attendant preservation are coming under increasing foreign pressure in the name of privacy. The Snowden disclosures have called to the attention of the larger electorate a dissonance between the U.S. attitude and the E.U. attitude toward privacy that has for some time bubbled in the background of American discovery. Increasingly, E.U. privacy directives forbid "processing" of digital data that American preservation law encourages or requires. Needless to say, actual production of the information also offends the E.U. privacy directives.

It is easy to inveigh against these European attitudes. Thus, two American plaintiffs' lawyers wrote an article entitled *Hiding Across the Atlantic*, warning that "[a]n American company that disseminates defective products in the United States, where we have liberal discovery rules, may attempt to hide behind the narrower foreign laws that protect an associated entity to prevent important discovery."¹⁷³ They argue that "[t]he plaintiff bar should be aware of this pernicious tactic and be armed with a strategy for a strong response."¹⁷⁴

But it is not so easy for enterprises that operate in both the United States and the European Union to shrug off the European attitude toward privacy.¹⁷⁵ One can ascribe the difference to the European experience with totalitarianism in the twentieth century, but that does not make it go away; even general interest publications have focused on it.¹⁷⁶ Thus, American corporations increasingly have a position called "chief privacy officer" whose job is attending to the legal requirements around the globe that corporations doing business in various countries adhere to their differing versions of privacy. Although some may regard "multinational" as an epithet,¹⁷⁷ it seems

¹⁷³ Ellen Relkin & Elizabeth O. Breslin, *Hiding Across the Atlantic*, TRIAL, June 2012, at 14.

¹⁷⁴ *Id.*

¹⁷⁵ Twenty years ago, Professor Burbank examined the sometimes unhappy history of American receptivity to the procedural attitudes of other countries. See Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103 (1994).

¹⁷⁶ See, e.g., Charles Batchelor, *Transatlantic Tensions Cast a Pall Over Data Sharing*, FIN. TIMES, June 1, 2012, at 3 (describing the tensions between the E.U. data protection directives and the U.S. Patriot Act).

¹⁷⁷ Cf. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852 n.1 (2011) ("Respondents portray Goodyear USA's structure [including foreign subsidiaries] as a reprehensi-

that we will have to adjust to companies doing business across borders. And legal institutions are beginning to take note as well.¹⁷⁸

This is not to say that American procedure should be revised to match the procedures of other nations,¹⁷⁹ but it does recognize that much that is distinctive about American procedure—not only broad discovery but also relaxed pleading and class actions (as fortified by rule amendment in 1966)—derives from what the framers did. The framers probably did not look beyond our shores (except for an occasional glance to England), but that attitude seems harder to justify in the twenty-first century.

CONCLUSION

“Our procedural ancestors discussed discovery problems, but rejected most of the solutions. This may now be a luxury we cannot afford.”

—Stephen Subrin¹⁸⁰

As we commune with the shades of the framers, we are also contemplating another set of proposed amendments to the Federal Rules regarding discovery.¹⁸¹ Edward Bellamy was looking for utopia, and he found it in his imaginary twenty-first century. Although it has been said that the framers of the Federal Rules “held a utopian combination of hopes about the gains from discovery,”¹⁸² as hard-headed lawyers they likely did not expect utopia to emerge by now. Bellamy posited a twenty-first century world in which human conflict had disappeared because humans had evolved beyond it. Being litigators, the framers probably did not even entirely want the world

ble effort to ‘outsource’ all manufacturing, and correspondingly, tort litigation, to foreign jurisdictions. Yet Turkey, where the tire alleged to have caused the accident-in-suit was made, is hardly a strange location for a facility that primarily supplies markets in Europe and Asia.” (citations omitted).

¹⁷⁸ For example, in December 2011, the Sedona Conference issued a draft set of recommended procedures for accommodating American discovery and E.U. privacy directives. See THE SEDONA CONFERENCE, INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION (2011), available at <https://thesedonaconference.org/system/files/sites/sedona.civicaactions.net/files/private/drupal/filesys/publications/IntlPrinciples2011.pdf>.

¹⁷⁹ That is the point of Marcus, *Bomb Throwing*, *supra* note 172.

¹⁸⁰ Subrin, *supra* note 4, at 745.

¹⁸¹ See COMM. ON RULES, PRELIMINARY DRAFT, *supra* note 93.

¹⁸² Glaser, *supra* note 79, at 234. Glaser noted in the 1960s that “[p]art of their hopes has been fulfilled,” but also that trials did not diminish in number despite discovery, as the framers hoped. *Id.* Perhaps the more recent and considerable decline in the trial rate would reassure them on this score as well.

to move beyond human conflict, and they almost certainly did not expect it would do so.

We live in the actual twenty-first century, and we know that human conflict has not stopped. We may therefore need to confront the question of whether we can still afford the “luxury” of postponing solutions to discovery problems. This Essay has identified four varieties of litigation that have been important since the framers did their work but probably did not exist at that time.¹⁸³ It has also noted the two seemingly new ideas about discovery that have emerged in the last seventy-five years,¹⁸⁴ and two important forces that have emerged since the framers did their work.¹⁸⁵ Meanwhile, as Professor Yeazell has recently noted, the contest about procedural reform often seems to degenerate into somewhat cartoonish posing with “[s]ome view[ing] civil litigation as the vindicator of rights, a way of speaking truth to power, and a guarantor of democratic values and freedoms. Others see civil litigation as a deadweight loss, a stick in the wheels of commerce, and a source of national shame.”¹⁸⁶ For those who seek actual reforms of the American litigation system, the challenge is to navigate between Scylla and Charybdis, and “reforming” discovery is likely to remain a central activity.

I began by asking whether the framers would be disconcerted by the actual twenty-first century as Edward Bellamy probably would have been had he been able to visit it. I suspect they might find some things striking and possibly unnerving, but they would not find current litigation realities nearly so surprising. Let us try to live up to their example as we move forward.

¹⁸³ See *supra* Part II.

¹⁸⁴ See *supra* Sections III.A–B.

¹⁸⁵ See *supra* Sections IV.A–B.

¹⁸⁶ Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1754 (2013).