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COMMENT

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TAILORING DISCOVERY: USING NONTRANSSUBSTANTIVE  
RULES TO REDUCE WASTE AND ABUSE

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## INTRODUCTION

The current system of discovery in the federal courts can produce enormous costs for both litigants and the court system. These costs stem from the overuse of both discovery in general and costly mandatory discovery procedures that are relevant in only a small subset of litigation. The alleged costs of discovery have spawned a number of articles and studies in recent years condemning the federal system of broad discovery.<sup>1</sup>

In a pair of recent cases, the Supreme Court responded to the criticism of rising discovery costs by instituting a heightened pleading standard meant to prevent meritless litigation from reaching the discovery stage.<sup>2</sup> Unfortunately, this crude attempt to rein in unnecessary discovery also threatens to kick much meritorious litigation out of the courts by preventing under-resourced plaintiffs from invoking the authority of the courts to gather basic information crucial to their cases.<sup>3</sup> Better solutions to the problem of discovery costs would address the system of discovery itself.

The primary problem with the current rules of discovery is that they sweep too broadly. Because the Federal Rules of Civil Procedure are

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<sup>1</sup> See, e.g., AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2-3 (2009) [hereinafter IAALS REPORT], available at [http://iaals.du.edu/library/publications/ACTL-IAALS\\_Final\\_Report\\_rev\\_8-4-10.pdf](http://iaals.du.edu/library/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf) (noting that “discovery can cost far too much and can become an end in itself”); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 522-32 (2010) (discussing the costs imposed by a broad system of discovery and suggesting reforms to limit “over-discovery”).

<sup>2</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (noting that conclusory statements and threadbare allegations of wrongdoing will not suffice to “unlock the doors of discovery for a plaintiff”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (concluding that a requirement of more specific allegations at the pleading stage is probably the only way “to avoid the potentially enormous expense of discovery” in frivolous cases).

<sup>3</sup> See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 140-66 (2011) (presenting data showing that cases that are more likely to be dismissed under the new heightened pleading standard are just as likely to be ultimately successful as those that would survive the new heightened pleading standard).

transsubstantive—meaning that the same rules apply in every type of case—the discovery rules are not narrowly tailored to the requirements of any particular case. Transsubstantivity was one of the guiding tenets in the creation of the original Federal Rules of Civil Procedure, but the principle has come under attack more recently.

The creation of substance-specific (nontranssubstantive) rules, especially in the area of discovery, holds promise for reducing costs by replacing broad rules with rules that are narrowly tailored to particular types of litigation. Narrowly tailored rules will help reduce waste and abuse in the discovery process. A system of nontranssubstantive rules will also allow rulemakers to make deliberate choices about how discovery can be used as a tool to promote goals of substantive and procedural fairness, thereby allowing rulemakers to decide when costly discovery would or would not be appropriate.

The drafting of nontranssubstantive rules would also present rulemakers with many challenges. The extent of discovery permitted in litigation can have an enormous effect on the course and outcome of a case. Therefore, rulemakers would have to make value-based decisions about how much and what types of discovery to allow in any given substantive area. This process would undoubtedly be beleaguered by heightened interest group lobbying.<sup>4</sup>

Rulemakers recognize at least two kinds of transsubstantivity.<sup>5</sup> “Case-type” transsubstantivity means that the same rules apply regardless of the subject matter of the litigation (e.g., securities fraud, employment discrimination, breach of contract). “Case-size” transsubstantivity implies that the same rules apply regardless of the amount in controversy or the complexity of the suit.<sup>6</sup> In this Comment, I seek to show that the federal system of discovery would benefit from nontranssubstantivity of both types, with a primary emphasis on case-type nontranssubstantivity. Ultimately, I argue that the discovery rules should be different for different types of litigation.

In Part I, I provide a brief review of the current federal discovery rules by discussing their importance to litigation and the breadth of the system of discovery. I also review some of the most important criticisms that scholars

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<sup>4</sup> To some extent, lobbying of rulemakers already occurs. Because the substance-specific rulemaking process would have to deal more openly with the value judgments associated with procedure, and because interested parties would be able to target more narrowly the procedures in which they have an interest, it is highly likely that substance-specific rulemaking would be susceptible to even more lobbying. See *infra* note 112.

<sup>5</sup> See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 378 (2010) (noting these two types of transsubstantive rules).

<sup>6</sup> This Comment uses the term “transsubstantivity” to mean case-type transsubstantivity, unless otherwise specified. Correspondingly, “nontranssubstantive” rules are those that apply differently depending on the subject matter of the litigation.

and practitioners have leveled at the discovery procedures. Part II of this Comment focuses on transsubstantivity by examining the history of transsubstantive rules in the federal system and discussing the advantages and problems associated with transsubstantive rules. In Part III, I give examples of state jurisdictions that use nontranssubstantive discovery rules and examine a number of possible models.

In order to place the nontranssubstantivity suggestion in a broader context, Part IV examines two alternative reforms to the discovery rules. Analysis will show that the judicial discretion over discovery through active case management results in a waste of resources and impairs the ability of the courts to manage cases fairly and consistently. Reforms that would impose nontranssubstantivity of the case-size variety—that is, by applying different rules depending on the amount in controversy—should be successful in lowering the cost of discovery and streamlining case management. The implementation of case-size nontranssubstantivity alone, however, would be insufficient to address the problems plaguing the current discovery system. Such a reform would do little to curb costs in the largest cases where broad discovery would still be available to litigants.

In Part V, I propose a system of nontranssubstantive discovery rules that takes advantage of the benefits offered by these two alternative reform strategies. A nontranssubstantive system of discovery rules will reduce the overall cost of discovery through narrowly tailored rules. It will also allow rulemakers to allocate the costs of discovery in order to promote the substantive goals underlying the litigation, particularly for causes of action that Congress has previously sought to encourage through devices such as fee-shifting. The Comment goes on to discuss the process that the creation of nontranssubstantive discovery rules would entail. I assert that the primary challenge that rulemakers will face will be in making decisions that will determine how discovery rules should affect substantive law and substantive rights. I suggest a number of practical reforms that could be implemented in a nontranssubstantive system to reduce costs.

Finally, this Comment proposes that the rulemaking committee that would be best equipped to craft a nontranssubstantive system of discovery rules would bring together experts and practitioners from all sides of the issue. Because of the substantive decisions that the committee would have to make and the political pressures from interest groups that it would have to confront, the rulemaking body would be best situated in the legislative branch. Although reform of the discovery system of the type recommended in this Comment would require a major overhaul of the federal discovery rules, nontranssubstantivity holds out the promise of narrowly drawn

procedures that would reduce costs while still providing litigants with the tools necessary for the efficient development of their cases.

## I. A REVIEW OF THE CURRENT SYSTEM OF DISCOVERY AND CRITICISMS THEREOF

### A. *The Importance of Discovery in American Litigation*

Discovery plays an essential role in the modern system of American litigation. Modern American procedure assumes that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”<sup>7</sup> Discovery is aimed at providing both the litigants and the factfinder with the information necessary to reach an accurate determination of the issues. In addition, ensuring that parties have access to all relevant facts to present to a neutral factfinder may further the important goal of procedural fairness.<sup>8</sup>

Broad discovery is essential to a notice-pleading system in which a plaintiff is not required to know the facts necessary to succeed on his claim before initiating litigation. Broad discovery allows a plaintiff who knows merely that he has been wronged to leverage the power of the courts to gain access to the information that will allow him to prosecute a successful case.<sup>9</sup> Extensive discovery is thus essential to an effective system of notice pleading designed to provide advantages to under-resourced plaintiffs who cannot afford the private discovery required by a fact-pleading system.

To the extent that the extensive system of federal discovery allows plaintiffs easier access to courts, discovery supports the political role that private litigation plays in the United States.<sup>10</sup> In this system, the powerful

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<sup>7</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>8</sup> Litigants who feel that they have been able to present a full picture to the factfinder are more likely to find the proceeding fair and to accept the determination of the factfinder. *See infra* subsection V.B.1.

<sup>9</sup> The recent decisions in *Twombly* and *Iqbal* may have significantly altered the notice-pleading system and raised the bar for notice pleading, partly in an effort to curb the rising costs of discovery. *See supra* note 2 and accompanying text. However, to the extent that the plaintiff need not provide all of the evidence at the pleading stage, discovery will still be essential in allowing him to build his case.

<sup>10</sup> *See* SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 21-31 (2010) (describing how congressional choices to encourage private litigation affect the level of enforcement of federal law); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *DUKE L.J.* 1, 71-77 (2010) (describing the importance of pleading standards with regard to statutorily authorized private litigation); Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 *RUTGERS L. REV.* 595, 600-01 (2002) (“Pretrial information gathering is critical, not only to individual cases, but also to the political role litigation plays in the United States.”).

force of private litigation can be harnessed, through legislative choice, as a method of enforcement of statutory and administrative law.<sup>11</sup> Private litigation has indeed often been used as an alternative to a more bureaucratic state.<sup>12</sup> Dean Carrington has noted the privatization of enforcement, especially in the areas of antitrust, consumer protection, securities regulation, civil rights, and intellectual property law.<sup>13</sup> In particular, Carrington argues that private litigation is most effective in protecting civil liberties and the rights of those with fewer resources, because private litigants cannot be co-opted by powerful interest groups as easily as administrative agencies.<sup>14</sup> Discovery is a powerful tool in enabling private litigants to vindicate their rights because it gives them investigative abilities that their limited resources would otherwise render unavailable.<sup>15</sup>

### B. *The Breadth of the American Discovery System*

To support a notice-pleading system and private enforcement of statutory law, the Federal Rules of Civil Procedure necessarily prescribe an extremely broad system of discovery in which litigants can use multiple mechanisms to discover a vast range of information. Edson R. Sunderland, the main architect of the rules of discovery in the initial Federal Rules of Civil Procedure, created a uniquely extensive system of discovery by incorporating into the rules access to all of the known American, and perhaps English, devices of discovery.<sup>16</sup> Whereas previous systems of discovery might have provided for one or two of these discovery mechanisms (such as either interrogatories or depositions, but not both), Sunder-

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<sup>11</sup> See FARHANG, *supra* note 10, at 71-72 (“[W]ith private enforcement regimes Congress can hope to achieve its aims on the cheap, and to minimize blame for what implementation costs are borne by the government.”).

<sup>12</sup> For a larger discussion of the role of private litigation in the enforcement of statutory and administrative law and the legislative choices involved in such an allocation of enforcement power, see *infra* subsection V.B.2. Farhang notes that job discrimination lawsuits are the largest source of litigation in federal courts other than habeas petitions. See FARHANG, *supra* note 10, at 3. Although the legal bases for such suits are often federal statutes, 98% of these suits are litigated by private parties. See *id.*

<sup>13</sup> See Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) (“Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy.”).

<sup>14</sup> See *id.* at 54-55 (“[I]t was confirmed a thousand times in the first half of this century that regulatory agencies tend to be co-opted by those whom they regulate.”).

<sup>15</sup> See Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEV. 61, 84 (2002) (comparing discovery to the broad investigatory power given to administrative agencies).

<sup>16</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 718 (1998).

land's initial rules provided litigants in the federal system with access to any and all devices that might be of use to them.<sup>17</sup> Sunderland's motivation was his support for a notice-pleading system and his belief in discovery as a way to cure problems of "waste, delay, and unfairness."<sup>18</sup> By making all of the issues in dispute and relevant facts known to each of the parties and the court prior to trial, discovery would allow judges to dispose of meritless litigation through summary judgment, and permit attorneys to focus their efforts and time on better arguing the most important issues in those cases that did proceed to trial.<sup>19</sup>

Due to various criticisms regarding the cost and time involved in such broad discovery, reform efforts since the 1970s have largely served to limit discovery.<sup>20</sup> Thus, recent amendments have enhanced sanctions for discovery abuse, imposed numerical limits on the use of certain devices (depositions and interrogatories),<sup>21</sup> and explicitly barred the use of disproportionate discovery.<sup>22</sup>

The scope of discoverable materials has also been narrowed from the very broad "relevance to the subject matter" standard, although the court retains discretion to order subject matter discovery.<sup>23</sup> The current rules still afford broad discovery by making discoverable "any nonprivileged matter that is relevant to any party's claim or defense."<sup>24</sup> Furthermore, discovery is still not limited to material that would be admissible at trial.<sup>25</sup> All the

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<sup>17</sup> See *id.*

<sup>18</sup> Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 597-98 (2004).

<sup>19</sup> *Id.*

<sup>20</sup> See Moskowitz, *supra* note 10, at 607 ("The thrust of the amendments to the federal rules since then has been toward containing the cost and time expended on the exchange of pretrial information.").

<sup>21</sup> Presumptive limits for certain discovery mechanisms have proven effective in reducing the use of those types of discovery. JUDICIAL CONF. ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 9 (2010) [hereinafter 2010 CIVIL LITIGATION CONFERENCE REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf>. Some have proposed placing such limits on other discovery devices, such as document requests and requests for admission. *Id.*

<sup>22</sup> See generally Moskowitz, *supra* note 10, at 607.

<sup>23</sup> Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts*, 32 MCGEORGE L. REV. 1051, 1060-62 (2001). The effect of this narrowing of the basic scope of discovery is still debated. 2010 CIVIL LITIGATION CONFERENCE REPORT, *supra* note 21, at 8.

<sup>24</sup> FED. R. CIV. P. 26(b)(1).

<sup>25</sup> *Id.*

original discovery devices are still available to litigants, even if some of them have been limited by subsequent amendments.<sup>26</sup>

The current discovery process begins with initial disclosures. Except in certain exempted types of cases,<sup>27</sup> each party must disclose the names of all individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses.<sup>28</sup> Each party must also disclose a copy of all the documents it may use to support its claims or defenses, a computation of damages claimed, and any insurance agreement under which an insurer may be liable for part of a possible judgment.<sup>29</sup> In addition, each party must disclose to the other parties the names of any expert witnesses it may use at trial.<sup>30</sup> Each expert witness must usually prepare a report about himself and the testimony he will offer at trial for inclusion in this disclosure.<sup>31</sup> Each party must also make a pretrial disclosure that lists the witnesses and exhibits that it plans to present at trial.<sup>32</sup>

As early as possible in a proceeding, the parties are to confer to plan the discovery.<sup>33</sup> At this meeting, the parties arrange for the required initial disclosures, discuss any issues about preservation of discoverable material, and develop a discovery plan.<sup>34</sup> The discovery plan should describe the parties' views on the proper scope and schedule of discovery, potential changes to the limitations on discovery imposed by the rules, and other discovery issues.<sup>35</sup> This discovery plan may be followed by one or more pretrial conferences with the presiding judge.<sup>36</sup> The district judge should issue a scheduling order that may modify the timing and extent of disclosures and discovery, among other matters.<sup>37</sup>

The federal rules provide for discovery through a limited number of oral depositions,<sup>38</sup> depositions by written questions,<sup>39</sup> or written interrogatories to parties.<sup>40</sup> A party can also request that another party produce documents or physical evidence or permit entry onto property for inspection or

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<sup>26</sup> Compare FED. R. CIV. P. 26–37 (1938), with FED. R. CIV. P. 26–37 (2010).

<sup>27</sup> Exempted cases are listed in FED. R. CIV. P. 26(a)(1)(B).

<sup>28</sup> *Id.* 26(a)(1)(A).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* 26(a)(2).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* 26(a)(3).

<sup>33</sup> *Id.* 26(f)(1).

<sup>34</sup> *Id.* 26(f)(2).

<sup>35</sup> *Id.* 26(f)(3).

<sup>36</sup> *Id.* 16(a)(1).

<sup>37</sup> *Id.* 16(b)(3).

<sup>38</sup> *Id.* 30.

<sup>39</sup> *Id.* 31.

<sup>40</sup> *Id.* 33.

testing.<sup>41</sup> The court can order a party to submit to a mental or physical examination, the report of which may be available to all parties.<sup>42</sup> The final method of discovery under the Federal Rules of Civil Procedure allows parties to request that other parties admit the truth of certain pertinent matters; this device allows the parties to narrow the scope of the issues in question.<sup>43</sup>

The court may usually alter the limitations on discovery.<sup>44</sup> In particular, the court should limit discovery on its own or at the motion of a party when the burden of proposed discovery would be unreasonable.<sup>45</sup> The court can issue a protective order forbidding or modifying discovery that could cause embarrassment or excessive burden to a party.<sup>46</sup> A court can also issue an order to compel a resisting party to make the required disclosures and to respond to discovery requests.<sup>47</sup>

The discovery system under the federal rules is broad in both the scope allowed and the variety of methods permitted. The disclosure requirements seek to expedite the process by requiring parties to turn over certain materials without making the opposing party submit a discovery request. The scheduling and pretrial conferences are also intended to make the process work more efficiently and predictably. However, there are numerous circumstances that necessitate the court's involvement in the discovery process, and the court is often expected to play some role in limiting discovery.

### C. Criticisms of the Current System of Discovery

In the last thirty to forty years, the American system of broad discovery has come under attack as unfair, inefficient, and costly.<sup>48</sup> Some scholars and practitioners, mostly defendants' organizations, argue that parties are able to use the broad tools of discovery to impose costs on their adversaries that

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<sup>41</sup> *Id.* 34(a).

<sup>42</sup> *Id.* 35.

<sup>43</sup> *Id.* 36.

<sup>44</sup> *Id.* 26(b)(2)(A).

<sup>45</sup> *Id.* 26(b)(2)(C).

<sup>46</sup> *Id.* 26(c)(1).

<sup>47</sup> *Id.* 37(a).

<sup>48</sup> According to one recent study, fewer than half of the trial lawyers surveyed opined that the discovery system works well. IAALS REPORT, *supra* note 1, at 9. Seventy-one percent thought that discovery is sometimes used to push an opposing party to settlement. *Id.* But see CTR. FOR CONST. LITIG., NINETEENTH CENTURY RULES FOR TWENTY-FIRST CENTURY COURTS? 1-2 & n.6 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/CCL,%2019th%20Century%20Rules%20for%2021st%20Century%20Courts.pdf> (questioning the neutrality of the organization that published the *IAALS Report*).

push those adversaries toward settlement.<sup>49</sup> Parties are incentivized to settle rather than incur the costs of litigation, even if they know that they would prevail on the merits. As Justice Souter asserted in *Bell Atlantic Corp. v. Twombly*, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”<sup>50</sup> The discovery costs for litigants should not only be measured in the cost of producing requested documents, answering interrogatories, or sitting for depositions; litigants are also burdened by the delay that discovery can create in litigation.<sup>51</sup>

But the concern that blameless defendants may be pushed to settlement by the threat of discovery has been questioned. There is not enough empirical evidence to support these claims, and the evidence that does exist is ambiguous.<sup>52</sup> Perhaps for that reason, critics of extensive discovery often resort to anecdotal evidence.<sup>53</sup> A recent survey by the Federal Judicial Center found that 27.4% of plaintiffs’ attorneys and 30% of defendants’ attorneys reported that the costs of discovery increased the likelihood of settlement in a recent case about which they were questioned.<sup>54</sup> However, the number of these cases in which the settlement was unfair is unclear.

Discovery that exposes private corporate or personal information to the eyes of the public may also be deemed unfair.<sup>55</sup> This type of discovery may

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<sup>49</sup> See, e.g., Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 647 (1989) (“The paradigm impositional discovery request comes from a party thinking it has a relatively small chance of prevailing . . . but wanting to convey the message: ‘This suit will cost you \$1 million whether I win or not; we can split that in settlement.’”); Netzorg & Kern, *supra* note 1, at 523.

<sup>50</sup> 550 U.S. 544, 559 (2007).

<sup>51</sup> Some of the increase in the median length of litigation in recent years has been attributed to the time required for extensive discovery. See Netzorg & Kern, *supra* note 1, at 523. In 1992, the median number of months before a civil case came to trial was fifteen; in 2008, the median case waited almost twenty-five months before coming to trial. *Id.* at 523-24.

<sup>52</sup> Miller, *supra* note 10, at 62-63 (“[T]he costs may be somewhat overstated—or partially self-inflicted—and certainly they are not universally imposed across the litigation universe . . . . The truth is that no one really knows. The empirical research has not investigated that deeply and it may prove difficult to reach beyond the impressionistic.”).

<sup>53</sup> *Id.* at 63 (noting that “there is no common definition of what is abusive or frivolous or excessive or purely tactical”); see, e.g., Mark Herrmann, James M. Beck, & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 156-57 (2009) (Herrmann & Beck, Closing Statement), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf> (citing the twenty million documents contained in the “electronic document depository in the *Enron Securities Litigation*”).

<sup>54</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 32 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

<sup>55</sup> See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989) (“[P]roduction of the documents violates a principle of privacy which corporate and governmental officials consider ought to protect them.

subject the decisions of corporate and governmental officials to second-guessing by the public and may lead government agencies and corporations to refrain from creating written communications or leaving paper or electronic records.<sup>56</sup> Parties may be pushed to settle out of fear that their sensitive documents will be released in discovery.

The current system of broad discovery is also likely to be inefficient in some cases, because it places the cost on the producing, rather than the requesting, party. Because this allocation of cost externalizes the cost of demanding more discovery, economic theory suggests that parties would conduct an inefficient amount of discovery.<sup>57</sup> The limited ability of judges to predict the value of as-of-yet undiscovered information and the costs involved in litigating protective-order motions make Rule 26(b)(2)(C)—which requires judges to limit discovery that would impose a burden that outweighs its potential benefit<sup>58</sup>—an imperfect solution to the inefficiency problem.<sup>59</sup> Scholars and practitioners have come to terms with the idea that not every fact should be discoverable. Endless discovery mining for the missing nugget that might provide the factfinder with an additional fact may not be worth the cost; furthermore, it can often price litigants out of the system.<sup>60</sup> The problem of inefficient discovery may also be compounded by the perverse incentives on attorneys to stretch out the discovery process in order to run up their clients' bills.

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Corporate and government documents that are worth discovering express the thoughts of people with burdensome responsibilities making confidential decisions about tough and often insoluble problems.”); Kersch, *supra* note 15, at 85 (noting that the “sweeping and unprecedented, state-supported powers to gather facts” that private lawyers possess on behalf of their private clients “clearly rais[e] anxieties about the value of privacy”). An early book on discovery published a few years before the promulgation of the original Federal Rules of Civil Procedure noted that discovery abuse was a concern in certain types of cases, even at that time. See GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 30-31 (1932). In some types of actions—especially those relating to seduction, malicious prosecution, divorce proceedings, or election contests—depositions were sometimes threatened as blackmail. *Id.* at 31. Newspapers would print sensational material obtained through the parties' discovery, thereby embarrassing the litigants. *Id.* However, this type of abuse was infrequent, and to protect the parties' privacy interests, the court could order depositions be kept confidential and sealed until offered into evidence. *Id.*

<sup>56</sup> Hazard, *supra* note 55, at 2242-43 (noting how the risk of such wide exposure has resulted in careful usage of written language).

<sup>57</sup> Easterbrook, *supra* note 49, at 637-38 (“Notice that both normal and impositional requests may inflict on the responding party costs substantially greater than the social value of the information.”).

<sup>58</sup> FED. R. CIV. P. 26(b)(2)(C).

<sup>59</sup> See Easterbrook, *supra* note 49, at 638-39 (“Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests.”).

<sup>60</sup> See Netzorg & Kern, *supra* note 1, at 517-18 (noting that in order to make the civil justice system available to litigants with small claims, as well as those with large claims, “not every conceivably relevant fact should be discoverable”).

Even an attorney acting in furtherance of his client's interests may exploit the delays accompanying discovery in order to increase the costs for the other party. Such conduct is tolerated by current professional responsibility rules. The American Bar Association's Model Rules of Professional Conduct instruct a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client."<sup>61</sup> Such delaying conduct is also not necessarily subject to sanction by a court.<sup>62</sup>

The main criticisms of a system of broad discovery focus on its costs. In particular, document discovery is the most costly form of discovery, especially in an increasingly digitized world. Preserving and gathering the massive amounts of e-mails and electronic records produced by corporations can run the costs of some litigation into the millions of dollars.<sup>63</sup> This problem is particularly perplexing due to the importance of document discovery, which often helps parties figure out which questions to ask in depositions.<sup>64</sup>

The strength of the cost argument is unclear, however, because it is difficult to identify how many cases involve disproportionate discovery.<sup>65</sup> There are certainly some cases in which the cost of discovery is enormous. These cases may involve dozens of depositions, thousands of pages of documents, and hundreds of gigabytes of digitized information.<sup>66</sup> However, many suits—perhaps one-half to one-third—involve no discovery, and in "the vast majority of cases," discovery is in fact limited to a reasonable amount.<sup>67</sup> Indeed, a report to the Advisory Committee on Civil Rules from the late 1990s suggests that discovery was not used at all in almost 40% of cases.<sup>68</sup> However, discovery was costly in cases in which it was employed—when actively utilized, discovery can represent as much as 90% of a case's

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<sup>61</sup> MODEL RULES OF PROF'L CONDUCT R. 3.2 (1983) (emphasis added).

<sup>62</sup> Cf. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 325 (1985) ("Within the limits of professional propriety, causing delay and sowing confusion not only are [the lawyer's] right but may be his duty." (quoting Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1288 (1975))).

<sup>63</sup> See Herrmann et al., *supra* note 53, at 156-57 (Herrmann & Beck, Closing Statement) (noting the authors' personal and second-hand experience with litigation involving document preservation and e-discovery costs in the millions of dollars).

<sup>64</sup> See Hazard, *supra* note 55, at 2239.

<sup>65</sup> Subrin, *supra* note 5, at 392-93 ("We do not know if the so-called large cases constitute five percent, ten percent, or more of the entire federal docket.").

<sup>66</sup> See *id.* at 392 ("[T]here [is] a substantial number of cases in which the amount of discovery is overwhelming by any standard . . .").

<sup>67</sup> *Id.*; see also 2010 CIVIL LITIGATION CONFERENCE REPORT, *supra* note 21, at 7 ("Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases.").

<sup>68</sup> H.R. Doc. No. 106-228, at 53 (2d Sess. 2000).

litigation costs. The excessive costs of discovery in such active cases means that, despite the fact that no discovery was used in many other cases, discovery nonetheless comprised about half of the total litigation costs in all cases.<sup>69</sup>

A more recent survey of lawyers in recently closed cases, undertaken by the Federal Judicial Center (FJC), estimated that, at the median, discovery accounted for 20% to 27% of the costs of litigation.<sup>70</sup> However, discovery expenditures only amounted to, at the median, between 1.6% and 3.3% of the stakes involved for the parties—a seemingly small price to pay.<sup>71</sup> Furthermore, although some defendants' groups may make a lot of noise about the costs of discovery, the FJC survey suggests that most practitioners questioned regarding a representative sample of cases did not think that discovery was too expensive.<sup>72</sup> Instead, over 50% of both plaintiffs' and defendants' attorneys questioned thought that the amount of information generated by discovery was "just the right amount," and over 50% of both plaintiffs' and defendants' attorneys thought that the costs of discovery were "just right" compared to their clients' stakes in the litigation.<sup>73</sup>

Other criticisms of the federal system of discovery focus not on the use of discovery itself, but on the inefficiency and delay caused by the rules regulating discovery. Mandatory steps in the discovery process, such as initial disclosure and pretrial conferences,<sup>74</sup> may cause unnecessary expense and delay in those cases where discovery is relatively simple.<sup>75</sup> Additionally, much expense is generated by satellite litigation seeking to clarify the applicability of the discovery rules or in adjudicating motions for protective orders or orders to compel discovery.

Critics of the current system of expansive discovery thus level attacks at the system on the basis of its unfairness, inefficiency, and cost. These criticisms are certainly accurate to some degree or in some cases, although the extent of the asserted problems is unclear. But even if the system of discovery is problematic only in a small subset of litigation, reforms should still attempt to lower the cost of discovery in those cases. Additional

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<sup>69</sup> *Id.*

<sup>70</sup> LEE & WILLGING, *supra* note 54, at 2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 27-28.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.*, FED. R. CIV. P. 16 (providing for pretrial conferences and orders meant, in part, to modify the extent and timing of discovery); *id.* 26(a)(1) (listing items that parties must disclose even before receiving a discovery request).

<sup>75</sup> *See* 2010 CIVIL LITIGATION CONFERENCE REPORT, *supra* note 21, at 9; Subrin, *supra* note 5, at 389 (asserting that additional steps in the discovery process imposed to constrain the system only cause more expense).

empirical research should shed light on the extent of the problems and the types of cases in which they are most prevalent.<sup>76</sup> Although the research currently available does not suggest that the system of federal rules permitting broad discovery is completely broken, it does support serious consideration of reform.

## II. TRANSSUBSTANTIVITY AND ITS LIMITS

### A. *A History of Transsubstantive Rules and Transsubstantive Discovery*

The English common law system was distinctly nontranssubstantive; different writs were litigated pursuant to their own distinct procedures.<sup>77</sup> In 1848, the drafters of the Field Code in New York chose to break with the English common law tradition and employ transsubstantive rules of procedure.<sup>78</sup> The Field Code was eventually adopted by over half the states.<sup>79</sup> The drafters of the original Federal Rules of Civil Procedure also chose transsubstantivity in the mid-1930s.<sup>80</sup>

The Rules Enabling Act authorized the Supreme Court to promulgate “general rules” for “practice and procedure.”<sup>81</sup> Based on this text, the Advisory Committee that drafted the Rules debated and ultimately rejected the contention that it could create different rules to be applied in district courts of different states. However, the Advisory Committee simply assumed, without debate, that the Rules should also be case-type transsubstantive.<sup>82</sup> It is not clear whether the Advisory Committee thought that the Rules Enabling Act required it to draft transsubstantive rules—as there is no record of any debate on the matter—but there are a number of explanations for its choice to draft the rules in this way.

It took the English common law writs centuries to evolve procedures specific to each cause of action; it would be nearly impossible for a fourteen-person committee to create substance-specific procedures in just a few

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<sup>76</sup> In particular, class action, mass torts, and antitrust cases are reported to be particularly problematic in terms of discovery cost and abuse. Herrmann et al., *supra* note 53, at 156 (Herrmann & Beck, Closing Statement).

<sup>77</sup> See Subrin, *supra* note 5, at 379.

<sup>78</sup> *Id.* at 378-81.

<sup>79</sup> *Id.* at 378.

<sup>80</sup> *Id.*

<sup>81</sup> Rules Enabling Act, Pub. L. No. 73-415, § 2, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)) (emphasis added).

<sup>82</sup> Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110-11 (2009).

years.<sup>83</sup> Furthermore, simplicity was one of the primary goals underlying the push for a uniform set of federal procedures.<sup>84</sup> The pre-1938 rules were extremely complicated: federal courts sitting in equity applied one set of rules while courts at law had to conform to the procedural codes of the states, which could contain thousands of sections.<sup>85</sup> Additionally, there were “federal practice rules” for instances where the state code was inapplicable to the federal litigation.<sup>86</sup> The Advisory Committee achieved the goal of simplicity through a single set of procedures to be used for all causes of action.<sup>87</sup>

Another reason for the choice of transsubstantivity was that prevailing conceptions at the time held that procedure and substantive law were distinct entities.<sup>88</sup> Procedure was not supposed to influence substantive outcomes.<sup>89</sup> This conceptual distinction between procedure and substance was easiest to entertain if the procedures employed were not determined by the subject matter of the action.<sup>90</sup> To create substance-specific procedure might admit that there were multiple valid ways to litigate and that the choice of procedure was based on substantive values.<sup>91</sup> On a related point, to the extent that procedures crafted to fit a particular cause of action influenced the outcome of that litigation, the original rulemakers might have feared that the promulgation of nontranssubstantive rules would violate the Enabling Act’s directive to the Supreme Court not to “abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>92</sup>

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<sup>83</sup> Subrin, *supra* note 5, at 383.

<sup>84</sup> *See id.*

<sup>85</sup> *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 371 (2010) (“[A] federal judge in New York, for example, would have juggled equity rules, a procedural code with 1,536 sections, and special ‘federal practice rules’ for instances when the state code was inoperable or inapplicable for federal litigation.” (footnotes omitted)).

<sup>86</sup> *Id.*

<sup>87</sup> The Rules Enabling Act specifically authorized the Supreme Court to create one set of rules for all causes of action, whether they were “cases in equity” or “actions at law.” Pub. L. No. 73-415, § 2, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

<sup>88</sup> *See* Subrin, *supra* note 5, at 384.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* (“If different rules were to be drafted for different types of substantive cases, then procedure and substance look considerably less distinct . . .”).

<sup>91</sup> *See* Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929, 945 (1983) (book review) (“If there is more than one scientifically valid way to litigate, then the choice of one or the other procedural system must be based on values; in other words, the selection of one mode of proceeding over another is a political choice.”).

<sup>92</sup> Rules Enabling Act § 1; *see* Subrin, *supra* note 5, at 384.

At common law, the rules of discovery were historically always transsubstantive.<sup>93</sup> By contrast, most matters of procedure traditionally followed the substance-specific dictates of writs.<sup>94</sup> Thus, an important 1932 book by George Ragland on discovery in America and England noted that the norm in most jurisdictions was that discovery was available in any type of civil action.<sup>95</sup> Although discovery was much more common in certain types of actions, particularly those involving automobile accidents or personal injury, the rules of discovery were transsubstantive.<sup>96</sup> Ragland noted that there was discovery abuse at that time in certain types of cases—including seduction, malicious prosecution, and divorce proceedings—although it was considered infrequent.<sup>97</sup>

The assumption that the federal rules should be transsubstantive has remained, despite recent calls for substance-specific reform in certain discrete rules.<sup>98</sup> Congress has more recently enacted laws altering procedure in specific substantive areas, such as prison litigation<sup>99</sup> and securities litigation.<sup>100</sup> Many states have heightened pleading requirements in medical

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<sup>93</sup> See RAGLAND, *supra* note 55, at 27 (“There are no prohibitions or restrictions upon the use of discovery, as far as the type of action is concerned, in most jurisdictions which have procedures for discovery before trial.”).

<sup>94</sup> See *supra* notes 77 & 83 and accompanying text.

<sup>95</sup> RAGLAND, *supra* note 55, at 27.

<sup>96</sup> See *id.* at 27-28 (noting the frequency of discovery in various types of actions). There were a few exceptions to this norm of transsubstantivity. Discovery was not permitted in actions to enforce forfeitures or penalties in England and Ontario on the grounds that courts of equity should not assist in the enforcement of penalties. *Id.* at 28; EDWARD BRAY, *THE PRINCIPLES AND PRACTICE OF DISCOVERY* 346 (London, Reeves & Turner 1885). These considerations gave rise to splits among the courts in whether there could be discovery in certain types of litigation. See RAGLAND, *supra* note 55, at 28-30. The Indiana courts did not permit discovery in divorce proceedings. *Id.* at 29; see also *Simons v. Simons*, 8 N.E. 37, 37 (Ind. 1886) (describing the use of interrogatories in divorce actions as “improper” because outside of the statutory scheme). Discovery was not permitted in summary actions in New York because the delay it entailed was deemed to be inconsistent with the legislative purpose in creating such actions. *Dubowsky v. Goldsmith*, 202 A.D. 818, 818-19 (N.Y. App. Div. 1922); RAGLAND, *supra* note 55, at 29.

<sup>97</sup> RAGLAND, *supra* note 55, at 31.

<sup>98</sup> Burbank, *supra* note 82, at 111.

<sup>99</sup> See, e.g., Prison Litigation Reform Act, Pub. L. No. 104-134, sec. 802, § 3626(e)(2), 110 Stat. 1321-66, 1321-68 (1996) (codified as amended at 18 U.S.C. § 3626(e)(2) (2006)) (allowing for automatic stay of prospective relief upon motion to modify or terminate such relief); 42 U.S.C. § 1997e(d) (limiting the amount of compensable attorney’s fees); § 1997e(g) (allowing for waiver of reply). The Prison Litigation Reform Act was meant to address the burden on the courts posed by an overwhelming amount of prisoner lawsuits and the problem of prison micromanagement by judges. Marcus, *supra* note 85, at 404-06.

<sup>100</sup> The Private Securities Litigation Reform Act of 1995 altered procedure in an attempt to prevent abusive claims. Pub. L. No. 104-67, § 101, 109 Stat. 737, 737; see H.R. REP. 104-369, at 31-32 (1995) (Conf. Rep.). Its provisions heighten pleading standards, 15 U.S.C. § 78u-4(b)(1), allow for a stay of discovery pending disposition of a motion to dismiss, 15 U.S.C. § 78u-4(b)(3)(B), and

malpractice suits.<sup>101</sup> But no one is advocating a return to a system with totally different procedural rules for different areas of substantive law.<sup>102</sup>

Nevertheless, there has recently been a push for substance-specific rules of discovery. Thus, although they have largely copied the procedures found in the federal rules since their promulgation in 1938, states have recently begun to abandon the federal model of transsubstantive discovery rules.<sup>103</sup> There are currently hundreds of variations among discovery rules throughout the country.<sup>104</sup>

A push for nontranssubstantive discovery rules has also been seen at the federal level. In recent months, with the encouragement of the Judicial Conference Advisory Committee on Federal Rules of Civil Procedure, a team formed by the National Employment Lawyers Association (NELA) has begun working on pattern interrogatories and pattern requests for production for use in employment discrimination litigation.<sup>105</sup> A plaintiff in a relevant case would have the opportunity to submit these standardized interrogatories or requests for production to the defendant with his complaint, and the defense could then attach its own set of pattern interrogatories or requests to his answer.<sup>106</sup> The goal of this project is to identify those types of discovery requests standard in employment discrimination cases

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lay out the requirements for the selection of the lead plaintiff in a class action, 15 U.S.C. § 78u-4(a)(3)(B).

<sup>101</sup> See Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 222-25 (2010) (surveying state certificate of merit statutes that require the plaintiff to consult with an expert prior to or just after filing suit); see also Marcus, *supra* note 85, at 407-09 (noting that many state legislatures passed the certificate of merit statutes as part of a larger program of substantive reform of medical malpractice liability, thereby underscoring the use of procedural rules as a mechanism to influence substantive outcomes).

<sup>102</sup> Burbank, *supra* note 82, at 111.

<sup>103</sup> See Marcus, *supra* note 85, at 404 (“[S]tate legislatures have enacted substance-specific procedural reforms to accomplish particular goals of substantive policy.”); see also Weber, *supra* note 23, at 1052 (describing the interest of the California Law Revision Commission in discovery reform and suggesting models of nontranssubstantivity after surveying variations in the discovery laws in each of the states).

<sup>104</sup> Weber, *supra* note 23, at 1052 (noting the “hundreds of differences” in discovery rules across the states).

<sup>105</sup> Memorandum from Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 14 (Dec. 6, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2010.pdf>; see *infra* notes 134-39 and accompanying text for discussion regarding pattern interrogatories.

<sup>106</sup> Memorandum from Joseph D. Garrison, NELA Liaison to the Advisory Comm., & Rebecca M. Hamburg, NELA Program Dir., to Mark R. Kravitz, Chair, Judicial Conf. Advisory Comm. on Fed. Rules of Civil Procedure 2 (Oct. 20, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf> at 627.

that are least objectionable to the parties.<sup>107</sup> Strong presumptions in favor of the appropriateness of discovery contained in these protocols would discourage disputes at this stage.<sup>108</sup> The use of pattern discovery would make the discovery process for this information quicker and less costly. NELA hopes that upon completion of the pattern discovery sets, a pilot project will be undertaken to test the workability of pattern discovery.<sup>109</sup> While the use of pattern discovery may speed the initial discovery process in certain cases by identifying what material is likely to be most relevant to the litigation, the project does not seek to alter the underlying discovery rules, which would remain generally applicable. Nevertheless, this project evidences a first attempt in the federal system to tailor discovery mechanisms to the substance of the litigation.

### B. *The Case for Transsubstantivity*

The main arguments for transsubstantivity remain those that likely influenced the Advisory Committee when it drafted the original Federal Rules of Civil Procedure.<sup>110</sup> Promulgating a single set of transsubstantive rules greatly simplifies the federal judicial system for practitioners. Lawyers and judges must learn only a single set of rules, and need not grapple with the question of which rules should apply when substantive categories of law overlap. Retaining the transsubstantive system means that Congress (or a rulemaking committee) does not have to take on the burdensome task of debating and enacting rules for each cause of action.

As briefly noted above, transsubstantive rules also have the benefit of largely, though not completely, removing value judgments from the task of crafting procedure. Transsubstantive rules force rulemakers to work at a level of abstraction at which it is difficult to affect materially the outcomes in a particular substantive area of law.<sup>111</sup> Because the rulemakers are not asked to make political or social decisions, transsubstantivity reduces the risk of interest groups asserting pressure to influence particular areas of law.<sup>112</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> *See id.* at 3 (noting the potential for pattern discovery to reduce the need for costly multiple rounds of motions).

<sup>109</sup> *Id.*

<sup>110</sup> *See supra* notes 83-92 and accompanying text.

<sup>111</sup> *See Marcus, supra* note 85, at 379.

<sup>112</sup> *See Miller, supra* note 10, at 124-25 (noting that reform to a nontranssubstantive system would likely be influenced by client interests); Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 *FORDHAM L. REV.* 943, 1011 (2004) (“[I]f the federal rulemakers considered rules targeted at specific kinds of litigation, the resulting rules would favor the interests of those groups that were best able to influence the rulemaking

Because transsubstantive rules must be broadly formulated in order to be applicable to every substantive area, Geoffrey Hazard has asserted that an additional benefit of these rules is that they allow for change and legal development from unexpected avenues.<sup>113</sup> Thus, one advantage of broad discovery rules, as opposed to narrowly tailored rules, is that they allow for more flexibility and creativity in unexpected ways. Lawyers practicing under broad rules are less constrained by rulemakers who may be stuck in traditional ways of thinking.

### C. *The Limits of Transsubstantive Rules*

The problems associated with transsubstantive rules largely arise from the fact that such rules are by necessity overly broad when applied in any particular case.<sup>114</sup> Because the rules must fit any type of litigation, they lack the crisp applicability and incisiveness of narrowly drawn rules, and can thereby result in a waste of time and money.<sup>115</sup> The broad rules are often not sufficient to guide the course of litigation, and therefore the system depends on additional limiting procedures and judicial discretion to give

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process.”). To some extent, special interest groups already lobby Congress to enact procedural reforms that most benefit them. See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1705 (2004) (“[L]obbying by lawyers and others led members of Congress to perceive that some issues of court practice and procedure either could be used to generate political support among certain interest groups or in any event might require attention in order to preserve such support.”). It is true that even in a transsubstantive system, interest groups can and will make calculations about how particular rules will help them in those cases that matter to them. For example, the Chamber of Commerce might calculate that heightened pleading standards would help large corporations by protecting them from shareholder suits. See Brief of the Chamber of Commerce of the U.S. et al. as Amici Curiae Supporting Petitioners at 18-26, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126) (urging the Court to consider the risk of abusive litigation and adopt a higher pleading standard). Even though such standards might hurt business in other types of cases, such as contract disputes, the Chamber might have calculated that on average heightened pleading standards help big business. The effects of such lobbying, however, are likely dampened in a transsubstantive system because interest groups and rulemakers must work at a certain level of generality. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 837 (1991) (arguing that if the Civil Rules Advisory Committee makes the transition to nontranssubstantive rules, “[i]nterest group lobbyists represent[ing] partisan interests . . . will pressure for interest-specific procedural rules”).

<sup>113</sup> Hazard, *supra* note 55, at 2246-47 (“Formulation of new theories of legal rights is simpler, virtually by definition, under a pleading system that is not constructed in terms of old legal categories, as was code pleading and common law pleading. Proof of new theories of liability likewise is simpler with the aid of comprehensive discovery.” (footnote omitted)).

<sup>114</sup> See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 41 (1994) (“It is this perceived need to cover all cases with one rule which leads to less effective restraints throughout the process.”).

<sup>115</sup> Subrin, *supra* note 5, at 388.

sufficient guidance. Disclosure, discovery conferences, scheduling conferences, and pretrial conferences are all meant to provide additional opportunities to narrow the application of the rules, but they also require additional expenditure of resources.<sup>116</sup> In the absence of such narrowing processes, disputes over the applicability of the rules are likely to arise, thereby causing only more delay and cost.<sup>117</sup>

If narrowly crafted rules provided sufficient direction to litigation *ex ante*, however, these expensive and time-consuming narrowing procedures could be avoided. For example, if there were particular rules for discovery in medical malpractice suits, discovery conferences in such cases might be unnecessary to prevent discovery abuse because the parties would already be limited by narrowly drawn rules.

A further problem inherent in employing overly broad rules is that much discretion is necessarily left to the judge in determining how the rules should be narrowed and applied in a particular case.<sup>118</sup> Discretion can be problematic, as similar cases may be treated differently depending on the presiding judge.<sup>119</sup> Because procedure can have a great effect on outcome, transsubstantive rules may, ironically, sacrifice uniformity of result.<sup>120</sup> Although a certain amount of flexibility may be desirable, such flexibility should be built into the rules intentionally, rather than as a necessary safety valve for overbroad rules.

Some critics of the transsubstantive nature of the federal rules note that some of the factors that motivated the original Advisory Committee to use transsubstantive rules are no longer applicable. Simplicity may not be as necessary today as it was in 1938 because modern lawyers and many judges focus their practices on specialized areas of law.<sup>121</sup> Thus, lawyers and judges will have no problem learning and employing the relevant procedures. Furthermore, substance-specific rules may be more necessary now because more complicated fields of litigation, requiring more specialized procedures,

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<sup>116</sup> See *id.* at 389.

<sup>117</sup> See Subrin, *supra* note 114, at 40 (noting the “interpretive disputes” caused by the automatic disclosure provisions). As an example of the uncertainty caused by the overbroad rules, Subrin notes that the automatic disclosure rules are drafted so broadly that in complex cases like product liability, toxic tort, patent, and securities class actions, automatic disclosure rules, in the absence of any limiting principle, may create endless piles of disclosed documents. *Id.* at 38-40.

<sup>118</sup> For a discussion of problems inherent in active judicial case management, see *infra* Section IV.A.

<sup>119</sup> See Subrin, *supra* note 5, at 391.

<sup>120</sup> *Id.*

<sup>121</sup> Marcus, *supra* note 85, at 372-73.

have arisen since 1938.<sup>122</sup> A primary example of this phenomenon is the class action lawsuit, which can involve millions of plaintiffs.<sup>123</sup>

In contrast to transsubstantive rules, substance-specific rules can be narrowly tailored to the needs of the particular type of litigation. Fewer disputes over the applicability of the rules and less need to further narrow the requirements of the rules would allow judges to be less involved in discovery—thus giving them more time to hear other cases on the merits—and would save money and time.<sup>124</sup>

### III. JURISDICTIONS WITH NONTRANSSUBSTANTIVE DISCOVERY RULES

To a limited extent, some of the federal rules of discovery are already nontranssubstantive: in particular, some of the disclosure rules are nontranssubstantive. Federal Rule of Civil Procedure 26(a)(1)(B) exempts nine types of cases from the initial disclosure requirements. These types of cases include petitions for habeas corpus, actions to quash an administrative summons, and actions to enforce an arbitration award.<sup>125</sup> In amending the disclosure provisions to include these exceptions in 2000, the Advisory Committee intended to identify cases where there was likely to be little or no discovery and thus where disclosure would not contribute to the effective development of the case.<sup>126</sup> Because the rules prior to the 2000 amendments permitted local rules to alter the requirements of disclosure, the committee looked to the categories of cases that had been excluded by local rules.<sup>127</sup> At the time, the committee thought that these exceptions would be applicable in about one third of all civil filings.<sup>128</sup>

A number of states have also experimented with nontranssubstantive discovery rules to some extent. Various states exempt broad classes of cases from disclosure requirements. Alaska rules create an exemption from state disclosure requirements in adoption,<sup>129</sup> paternity, custody, small claims, and

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<sup>122</sup> See *id.* at 372 (noting “enormously complicated fields of litigation that beg for specialized procedural treatment”).

<sup>123</sup> *Id.*

<sup>124</sup> See Subrin, *supra* note 114, at 50 (“Finally, judges can begin to return to their proper roles—deciding, or facilitating the decision of cases on their merits; making decisions about cases that apply to more than the one case that is in front of them; and having rules to guide them in their future decisions.”).

<sup>125</sup> FED. R. CIV. P. 26(a)(1)(B).

<sup>126</sup> See *id.* 26 advisory committee note (2000 amend.).

<sup>127</sup> See *id.*

<sup>128</sup> *Id.*

<sup>129</sup> ALASKA R. CIV. P. 26(a).

eminent domain cases, among other types of litigation.<sup>130</sup> The Colorado rules exempt mental health, water law, forcible entry and detainer, and certain other proceedings from the normal disclosure procedures.<sup>131</sup> Alaska and Colorado both have separate disclosure rules that dictate different disclosure procedures for divorce and legal separation cases.<sup>132</sup> In addition to exempting cases in some of the categories already mentioned, Utah further exempts from the disclosure requirements actions for reviewing proceedings of an administrative agency, for post-conviction or extraordinary relief, to enforce an arbitration award, and for water rights adjudication.<sup>133</sup>

Another popular device among the states is uniform or pattern interrogatories, which set out a list of standard questions to be answered by the litigants in certain types of cases.<sup>134</sup> Some states require parties to answer the standard interrogatories, while others only encourage their use. For instance, Arizona incentivizes the use of the "Uniform Interrogatories" in medical malpractice, personal injury, and contract cases<sup>135</sup> by providing that each uniform interrogatory and its subparts shall be counted as only one interrogatory toward the forty interrogatory limit, while any subpart to a nonuniform interrogatory will be counted as its own interrogatory.<sup>136</sup>

Connecticut, in contrast, limits the use of interrogatories in personal injury actions arising from the operation or ownership of a motor vehicle or the ownership of real property exclusively to its uniform interrogatories, unless a judge orders otherwise.<sup>137</sup> The rule does not require that the uniform interrogatories be used in every case, and a party only need answer the interrogatories if served with them.<sup>138</sup> The New Jersey rules demon-

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<sup>130</sup> *Id.* 16(g).

<sup>131</sup> COLO. R. CIV. P. 26(a).

<sup>132</sup> ALASKA R. CIV. P. 26.1; COLO. R. CIV. P. 16.2(e).

<sup>133</sup> UTAH R. CIV. P. 26(a)(3)(A).

<sup>134</sup> Seymour Moskowitz, *Discovery in State Civil Procedure: The National Perspective*, 35 W. ST. U. L. REV. 121, 125-26 (2007). As mentioned *supra* in notes 105-09 and accompanying text, a recent effort is underway to experiment with nonmandatory pattern discovery in the federal courts.

<sup>135</sup> The rules provide forms of interrogatories labeled with these categories. However, the rules provide that the uniform interrogatories can be used in any type of proceeding. ARIZ. R. CIV. P. 33.1(f).

<sup>136</sup> ARIZ. R. CIV. P. 33.1(a), 84 forms 4-6. Colorado and Maryland have similar rules. See COLO. R. CIV. P. 33(e) ("Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any subpart to a non-pattern interrogatory shall be considered as a separate interrogatory."); MD. R. CIV. P. 2-421(a) ("Each form interrogatory contained in the Appendix to these Rules shall count as a single interrogatory.").

<sup>137</sup> CONN. R. CIV. P. 13-6(b). The relevant forms are located in the appendix to the rules. *Id.*

<sup>138</sup> *Id.* 13-6(a) ("In any civil action . . . any party *may* serve . . . written interrogatories . . .") (emphasis added); see also *id.* 13-6(c) (setting forth the procedure for serving the form interrogatories on a party represented by counsel).

strate a third variation, in which the parties in an action subject to uniform interrogatories are automatically deemed to have been served with the uniform interrogatories, which they must then answer, upon being served with the complaint or answer to the complaint.<sup>139</sup>

Some states limit requests for production in a similar manner. In Connecticut, requests for production are limited in certain types of cases to those set out in forms.<sup>140</sup>

Many states have medical malpractice “certificate of merit” statutes that require a plaintiff in a malpractice action to consult with an expert when filing suit.<sup>141</sup> These statutes may alter the general discovery rules by determining the timing of expert-report disclosures and permitting (or requiring) the discovery of advice from nontestifying experts, even where the discovery rules might otherwise preclude such discovery.<sup>142</sup> Some states, such as Arizona, further modify the discovery rules for medical malpractice cases.<sup>143</sup>

The U.S. District Court for the Middle District of Florida has a case management system that separates cases into three tracks depending on their complexity.<sup>144</sup> The first track is reserved for actions for review of an administrative record, habeas corpus petitions or other challenges to a criminal conviction, actions brought without counsel by a person in custody, actions to enforce or quash an administrative summons, actions by the United States to recover benefit payments or collect on student loans, proceedings ancillary to proceedings in other courts, and actions to enforce an arbitration award.<sup>145</sup> The third track contains class action, antitrust, securities, mass tort, and other complex litigation, as well as actions

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<sup>139</sup> N.J. R. CIV. P. 4:17-1(b)(2). England has pre-action protocols that describe standard disclosures that the parties should undertake even before commencing an action. See CIV. P.R., Practice Direction: Pre-Action Conduct 1.2 (Eng.), available at [http://www.justice.gov.uk/civil/procrules\\_fin/contents/practice\\_directions/pd\\_pre-action\\_conduct.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm) (stating that it is a goal of the Practice Direction to encourage parties to exchange information prior to suit); see also, e.g., CIV. P.R., Pre-Action Protocol for Personal Injury Claims, Annex B (Eng.), available at [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_pic](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic) (listing standard information to be disclosed by the parties prior to the commencement of various types of personal injury actions).

<sup>140</sup> CONN. R. CIV. P. 13-9(a) (providing that in all vehicular and real property-related personal injury actions, all requests for production “shall be limited to those set forth in Forms 204, 205 and/or 206 of the rules of practice, unless, upon motion, the judicial authority determines that such requests for production are inappropriate or inadequate”).

<sup>141</sup> Grossberg, *supra* note 101, at 218.

<sup>142</sup> *Id.* at 257-60.

<sup>143</sup> See ARIZ. R. CIV. P. 26.2 (mandating the exchange of certain records and limiting discovery in medical malpractice cases).

<sup>144</sup> M.D. FLA. R. 3.05.

<sup>145</sup> *Id.* 3.05(b)(1).

affecting the public interest in a way that warrants heightened judicial attention, such as school desegregation or voting rights cases.<sup>146</sup> All other cases fall into track two.<sup>147</sup> Track-one cases are managed by the presiding judge or a magistrate judge according to the ordinary rules,<sup>148</sup> except that they are exempt from the initial disclosure requirements of Federal Rule of Civil Procedure 26(a)(1).<sup>149</sup> In track-two cases, counsel are additionally required to meet and file a Case Management Report that includes a detailed discovery plan and timeline, among other requirements.<sup>150</sup> The court may then order a preliminary pretrial conference with the parties before it issues a Case Management and Scheduling Order establishing a discovery plan, and additional pretrial conferences as necessary.<sup>151</sup> In track-three cases, the preliminary pretrial conference is required.<sup>152</sup>

States also use substance-specific discovery rules in other ways. The New York rules attempt to minimize the burden on producing parties in personal injury or injury to property cases by not permitting a party to serve interrogatories on and conduct a deposition on the same party.<sup>153</sup> Wisconsin places numerical limits specifically on discovery by prisoners appearing pro se and provides for an automatic stay of discovery upon a motion to dismiss or a motion for summary judgment, unless the court decides that the prisoner has a reasonable chance of prevailing on the merits.<sup>154</sup>

Numerous variations of nontranssubstantive discovery rules exist among the states, and the movement for nontranssubstantive discovery rules is growing. The most common rules exempt certain types of litigation from disclosure, streamline the discovery of basic information in simple cases through the use of pattern discovery, or limit the use of discovery to a certain number of incidents in particular kinds of cases.

#### IV. DISCOVERY REFORM ALTERNATIVES TO AND VARIATIONS ON NONTRANSSUBSTANTIVITY

The most balanced proposals for reform for the federal system of discovery focus on ways to give litigants direction in the discovery process in a

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<sup>146</sup> *Id.* 3.05(b)(3).

<sup>147</sup> *Id.* 3.05(b)(2).

<sup>148</sup> *Id.* 3.05(c)(1).

<sup>149</sup> *Id.* 3.05(d).

<sup>150</sup> *Id.* 3.05(c)(2)(B).

<sup>151</sup> *See id.* 3.05(c)(2)(D).

<sup>152</sup> *See id.* 3.05(c)(3)(C).

<sup>153</sup> *See* N.Y. C.P.L.R. § 3130 (McKinney 2012).

<sup>154</sup> *See* WIS. STAT. § 804.015 (2012).

more narrowly tailored manner. Aside from a shift to substance-specific rules, two other proposals have received attention by scholars and rule-makers. The first would have judges more actively manage discovery. The second would have different discovery rules apply to different cases, depending on the value of the claim. Neither of these proposals would do enough to rein in discovery costs, however, and each would raise new problems for the system.

### A. Active Judicial Case Management

One proposed solution to the abuse and overuse of discovery is to have judges take an active role in managing discovery.<sup>155</sup> Judges would examine discovery requests to ensure that they are reasonably aimed at uncovering useful information and that the cost of the requested discovery is reasonable in comparison to the expected value of the information sought. Such an approach would necessarily grant more discretion to judges to make individualized determinations in their cases. Case management has already taken a particularly central role in reforms aimed at e-discovery.<sup>156</sup> Amendments to the federal rules since the 1980s have sought to strengthen judicial case management by expanding the role of pretrial conferences and scheduling and granting the trial judge the authority to restrict excessive or redundant discovery.<sup>157</sup>

In some sense, judicial discretion itself breaks the transsubstantive nature of the rules because judges are able to authorize more discovery in areas of litigation that they feel to be more important, such as civil rights litigation.<sup>158</sup> On the other hand, as long as individual judicial proclivities balance each other out, the system as a whole will not be lending extra support to

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<sup>155</sup> For a discussion tracing the development of the case management system, see Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674-88 (2010). For a more in-depth discussion of the debate surrounding a system of rules that emphasizes case management and judicial discretion, see *id.* at 688-743.

<sup>156</sup> *Id.* at 682-83.

<sup>157</sup> See FED. R. CIV. P. 16 (providing for a pretrial conference and scheduling order); Miller, *supra* note 10, at 55 (“The 1983 amendments to the Federal Rules . . . were an attempt to reduce cost and delay by giving district judges the tools to prevent excessive discovery and to take a more active role in moving cases through pretrial and encouraging settlement.”).

<sup>158</sup> See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929 (1989) (arguing that federal procedure is not uniform because the rules “empower district judges to make ad hoc decisions”); Marcus, *supra* note 85, at 377 (noting scholars who make the argument that the rules are only superficially transsubstantive because of the discretion they give to judges).

particular substantive areas of litigation, as it would be with explicit, generally applicable nontranssubstantive rules.<sup>159</sup>

A 1996 report commissioned by the Judicial Conference of the United States contained a mixed analysis of active judicial case management: case management was reported to reduce delay in litigation, but add significantly to the cost to the courts.<sup>160</sup> One of the main purported advantages of case management is that the judge will set an earlier cut-off date for discovery, rather than let the parties extend discovery indefinitely. The report found, predictably, that a shorter time to discovery cut-off was associated with reduced time to case disposition and reduced lawyer work hours.<sup>161</sup> A shorter discovery period also reduced the cost to litigants.<sup>162</sup> However, a shorter period for discovery was not significantly associated with changes in either attorney or litigant satisfaction.<sup>163</sup>

Active judicial management of discovery, however, causes more problems than it solves. A judge supervising discovery cannot possibly know the true value of any particular discovery request before the information is produced.<sup>164</sup> Therefore, judicial case management inherently involves large amounts of uncontrolled judicial discretion, which raises concerns about fairness and impartiality.<sup>165</sup> Discovery orders are often made off the record or are announced without an opinion, making any partiality difficult to detect and control.<sup>166</sup> Discovery orders are usually not final and are thus not appealable; this insulation exacerbates any problems of partiality and variance among judges.<sup>167</sup>

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<sup>159</sup> See Marcus, *supra* note 85, at 378 (“[N]othing in the discretion that the Federal Rules provide manifests a systemic approval or disapproval of a particular substantive area of litigation.”).

<sup>160</sup> JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE?: AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 14 (1996), available at [http://www.rand.org/pubs/monograph\\_reports/2007/MR800.pdf](http://www.rand.org/pubs/monograph_reports/2007/MR800.pdf); see also Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 93 (1997) (citing KAKALIK ET AL., *supra*, at 1-2).

<sup>161</sup> KAKALIK ET AL., *supra* note 160, at 16.

<sup>162</sup> *Id.* But see *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[T]he success of judicial supervision in checking discovery abuse has been on the modest side.”).

<sup>163</sup> KAKALIK ET AL., *supra* note 160, at 16.

<sup>164</sup> See Easterbrook, *supra* note 49, at 638-39 (“Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests.”).

<sup>165</sup> See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982) (discussing the vast power granted to judges in a system with active case management and the concomitant threat to impartiality).

<sup>166</sup> Moskowitz, *supra* note 134, at 127.

<sup>167</sup> See *id.*; Resnick, *supra* note 165, at 380 (“[B]ecause managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority.”).

Active judicial case management also diminishes the predictability of litigation and the participatory roles of the community—in designing procedure—and the litigants—in controlling the manner in which their case is decided.<sup>168</sup> Furthermore, active management of litigation consumes large amounts of judicial resources<sup>169</sup> and takes away from the time that judges are able to devote to presiding over trials.<sup>170</sup> As Professor Arthur Miller, then the Reporter to the Advisory Committee, said, the federal rules have “sold the judges into slavery” by making them “gatekeepers” charged with controlling the extent of discovery.<sup>171</sup> Rules that *mandate* pretrial conferences and other forms of active case management are particularly problematic because they result in an expenditure of resources even in the large number of cases where discovery would otherwise play a minimal role.<sup>172</sup> Robert Bone has suggested that giving judges “discretionary control over discovery invites parties to contest discovery matters vigorously, which compounds litigation costs and creates opportunities for strategic abuse.”<sup>173</sup>

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<sup>168</sup> Subrin, *supra* note 160, at 94. Professor Subrin notes the ways in which judicial case management reduces community participation in litigation:

To the extent case management is truly ad hoc, the community, acting through advisory committees or Congress, has not participated in setting boundaries for the case. To the extent that settlement is not only facilitated in a friendly way, but “urged” in a more compelling fashion, party participation and community participation, through the jury, are diminished. To the extent that judges are case-managing, they are not deciding cases on the merits in open court, nor are they presiding over jury trials.

*Id.*

<sup>169</sup> See Subrin, *supra* note 5, at 398 (“[C]ase management for all cases has the flaw of requiring a good deal of judicial time.”). Subrin points out that in 1998, there were approximately one million lawyers in the United States and 10,000 judges. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 310 (2002). Thus, there are not nearly enough judges to assume the work of pretrial discovery currently performed by lawyers. *Id.*; see also Resnick, *supra* note 165, at 423-24 (“The judge’s time is the most expensive resource in the courthouse.”).

<sup>170</sup> See Carrington, *supra* note 13, at 61 (arguing that the most important function of district judges is to try cases and that it would be a great loss if increased case management responsibilities for judges took them away from that primary task). For a discussion of the negative effects of the diminishing rate of trials, see Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401-03 (2011).

<sup>171</sup> 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 (1984), available at [http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/\\$file/1983amnds.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/$file/1983amnds.pdf).

<sup>172</sup> See Subrin, *supra* note 160, at 93-94 (arguing that because most cases do not produce problematic discovery costs, it does not make sense to require judicial intervention in the average case); see also *supra* notes 65-67 and accompanying text (noting that a large number of cases involve minimal or no discovery).

<sup>173</sup> Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1964 (2007).

Indeed, the American legal system demonstrates an historic distrust of giving this much power to a single entity, such as the judge.<sup>174</sup> The right to a jury trial, the adversary system, and the principles of federalism and separation of powers are all meant to *control* the power of the judge.<sup>175</sup> Although certain amounts of judicial discretion will always be necessary, and most often harmless, allowing judges broad, unreviewable authority to control the course of discovery is neither a workable nor a wise solution to the problems associated with modern discovery.

### B. *Value-of-Claim Tracks*

A narrower variation on nontranssubstantivity, which until now this Comment has broadly taken to mean rules that apply different procedures in different types of cases, is to apply different procedures depending on the size of the claim. In such a system, cases are assigned to a track, with its own set of procedures, based on the value of the claim, without regard to the subject matter of the suit. Variations on this model might also take the subject matter of the suit into account when assigning the case to a track.

The authors of the Federal Rules of Civil Procedure designed the Rules for complex litigation to be applicable in all cases.<sup>176</sup> However, Professor Weber has argued that greater efficiency can be obtained through the creation of rules specifically for simple or low-stakes litigation.<sup>177</sup> The incentives for attorneys to use discovery to produce cost and delay for the opposing party are particularly strong in smaller cases, because an economically rational litigant will focus on the proportion of threatened litigation costs to the amount in controversy in deciding its settlement posture.<sup>178</sup> Therefore, rules aimed at limiting discovery in smaller cases may be particularly effective.

A number of states have implemented variations of the value-of-claim tracks model.<sup>179</sup> Texas has implemented a three track system which treats

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<sup>174</sup> Subrin, *supra* note 169, at 309.

<sup>175</sup> *See id.*

<sup>176</sup> *See* Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113, 115-26 (1994) (describing how the development of the Federal Rules of Civil Procedure resulted in their being tailored especially for complex litigation).

<sup>177</sup> *See id.* at 130 (suggesting that "special rules for smaller cases" would "increase speed and reduce cost in federal civil justice without seriously detracting from the quality of adjudication").

<sup>178</sup> *See id.* ("The tactical advantages of complexity and delay are greatest in small and mid-size cases because opponents who are economically rational will change their settlement posture when litigation costs threaten to exceed the amount to be gained or saved by the case.").

<sup>179</sup> *See* Moskowitz, *supra* note 134, at 125.

cases differently when the claim is valued under \$50,000, when the claim is for more than \$50,000, and when the case is “exceptional” and therefore subject to court-crafted discovery plans.<sup>180</sup> Alaska rules limit discovery specifically in personal injury or property damages cases for less than \$100,000.<sup>181</sup> South Carolina rules allow physical or mental examinations only in cases where the amount in controversy is greater than \$100,000<sup>182</sup> and oral depositions only where the amount in controversy is greater than \$10,000, unless the parties agree or the court orders the deposition.<sup>183</sup> Additionally, parties may serve nonuniform interrogatories on other parties only in cases valued at \$25,000 or more.<sup>184</sup>

England has also implemented a system that applies different procedures to cases based on the value of the claim. Prior to the reforms of 1999, document production procedure was based on the old English Judicature Acts of 1873 and 1875.<sup>185</sup> Disclosure operated in a manner similar to that in the American system, except that relevancy was defined more narrowly.<sup>186</sup> In 1999, however, the English procedural system underwent major reforms led by Lord Woolf.<sup>187</sup> The reforms were meant to emphasize case management and pretrial research.<sup>188</sup> Under the new rules, lawyers are subject to sanctions for filing frivolous writs.<sup>189</sup> The reforms also heightened the pleading standards.<sup>190</sup> The case management system operates along three tracks: small claims, mid-level claims worth £5000 to £15,000, and large claims worth over £15,000.<sup>191</sup> The small claims track is handled with minimal supervision.<sup>192</sup> The mid-level cases are put on a fast track to be adjudicated at a one-day hearing within thirty weeks of being assigned to that track.<sup>193</sup> The larger cases, however, are given extensive hands-on judicial management.<sup>194</sup> Thus, the English system combines value-of-claim tracking and active judicial case management. Anecdotal evidence suggests that the

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<sup>180</sup> See Weber, *supra* note 23, at 1064-65.

<sup>181</sup> See ALASKA R. CIV. P. 26(g).

<sup>182</sup> See S.C. R. CIV. P. 35(a).

<sup>183</sup> See *id.* 30(a)(2).

<sup>184</sup> See *id.* 33(b)(9).

<sup>185</sup> See Subrin, *supra* note 169, at 303-04 (describing recent developments in the English rules).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 304.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 305.

<sup>191</sup> *Id.*

<sup>192</sup> Miller, *supra* note 10, at 121.

<sup>193</sup> *Id.*

<sup>194</sup> Subrin, *supra* note 169, at 305.

reforms are working, with lawyers spending more time thinking about case strategy rather than engaging in a discovery war of monetary attrition.<sup>195</sup>

Professors Stephen Burbank and Stephen Subrin have suggested implementing a tracking system based on the value of the claim in the federal system.<sup>196</sup> Like the British, they would adopt proportionality as the foundational principle behind the discovery rules.<sup>197</sup> The tracking system would help to ensure that discovery expenses are not disproportionate to the value of the underlying claim. Track assignments would be made along strict (if arbitrary) monetary guidelines,<sup>198</sup> with the exception that cases in which private litigants play a role in enforcing public law would always be placed in the complex track.<sup>199</sup> Track assignments would be made by federal judges—rather than court clerks—and would be unreviewable, ensuring that those assignments would not lead to additional disputes and create delay and expense.<sup>200</sup>

For the simple-track cases, the expansive breadth of discovery currently available under the federal rules would not be proportional. The cost of the discovery allowed would greatly outweigh the significance of the case. Lower limits might be set on the number of depositions or interrogatories permissible.<sup>201</sup> The rules might require more specificity in document requests.<sup>202</sup> Because the simple cases usually involve little discovery under the current rules, the real cost savings would probably come in the ability to eliminate the many procedural requirements—such as mandatory disclosure,

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<sup>195</sup> See *id.*

<sup>196</sup> Burbank & Subrin, *supra* note 170, at 408-12.

<sup>197</sup> *Id.* at 409. The British system places an emphasis on proportionality “(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party.” CIV. P.R. 1.1(2)(c) (Eng.), available at [http://www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part01.htm#IDATBTQ](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm#IDATBTQ).

<sup>198</sup> Acknowledging that the line would need to be arbitrarily drawn, Professors Burbank and Subrin suggest that cases involving less than \$500,000 in controversy be assigned to the simple track. Burbank & Subrin, *supra* note 170, at 411-12.

<sup>199</sup> Objective factors, such as statutory multiple damages provisions or fee-shifting provisions, would determine when a private litigant was helping to enforce a public law. *Id.* at 411-12; Subrin, *supra* note 5, at 400; see also Weber, *supra* note 176, at 133 (noting that “not all cases that fall below the threshold should be subject to the small case rules” because “[s]ome cases, particularly civil rights and discrimination matters, embody claims for vindication that go beyond the dollar amount sought for recovery”).

<sup>200</sup> Burbank & Subrin, *supra* note 170, at 411 (noting that, to reduce “the likelihood of costly satellite litigation” over tracking decisions, courts must “provide sufficiently objective and determinate criteria for the initial decision and not . . . permit any appeal”).

<sup>201</sup> *Id.* at 410; Subrin, *supra* note 5, at 399.

<sup>202</sup> Subrin, *supra* note 5, at 399.

discovery conferences, and pretrial conferences—that have been implemented in an attempt to control discovery in complex cases.<sup>203</sup>

Value-of-claim tracks can be very useful in ensuring the proportionality of discovery. To the extent that the applicable procedures are determined solely based on the amount in controversy, such a system will ensure proportionality to the amount involved. The system will only allow for a vast expenditure of resources on discovery where the potential benefit or liability, measured by the potential outcome of the case, justifies such expenditure.

However, a value-of-claims approach to nontranssubstantivity would not be enough to fix the discovery system. Discovery procedures that track only the amount in controversy might lead to the available procedures being disproportionate to the importance of the case, as measured not by the potential monetary award but rather by social gain or other factors.<sup>204</sup> Therefore, a value-of-claims system must be modified to create exceptions for certain types of cases, such as those involving private enforcement of public law, as suggested by Professors Burbank and Subrin.<sup>205</sup>

Even a value-of-claims approach that accounts for nonmonetary measures of the importance of a case, however, would not ensure that discovery is proportionate to the complexity of the issues involved. For example, it may be necessary to afford broader discovery mechanisms in a securities fraud case valued at \$50 million than a simple contract case valued at the same amount. To achieve proportionality that actually corresponds to the importance of the case, the procedures must be attuned to the *type* of case.

A pure value-of-claims approach would also fail to tailor the available discovery devices as narrowly as possible to the substance of the litigation. For instance, it may be that the proper limitations on discovery in a medical malpractice case would permit more physical examinations but would limit the potential for document discovery. Assigning procedures to cases based solely on the value of the claim would not allow for a way to make these adjustments.

Finally, as Professors Burbank and Subrin note, a value-of-claims system would not rein in the costs of discovery in high-stakes cases on the complex

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<sup>203</sup> See Burbank & Subrin, *supra* note 170, at 409-10; Subrin, *supra* note 5, at 399-400.

<sup>204</sup> Moreover, it would be difficult to value claims for injunctive relief. Professor Weber has suggested dealing with this problem by exempting almost all cases for injunctive relief from the simple-claims track. Weber, *supra* note 176, at 134.

<sup>205</sup> See Burbank & Subrin, *supra* note 170, at 411-12 (recommending that “cases implicating the private enforcement of public law” not be termed “simple” cases because “broader discovery than that available in the simple case track may be necessary for adequate enforcement”).

track.<sup>206</sup> The complex track would still need to allow for a range of broad discovery procedures for the cases that actually require them. Other cases that are placed on the complex track based on a high amount in controversy and that do not actually require expansive discovery would still present the potential for inefficient overuse or abuse of discovery.

## V. CREATING A SYSTEM OF NONTRANSSUBSTANTIVE RULES TO FIT MODERN DISCOVERY

### A. *A Nontranssubstantive Discovery Alternative*

A system of nontranssubstantive discovery rules that will provide for efficient case management and reduce the overuse and abuse of discovery will begin with case-type-specific discovery rules, but will also likely need to include elements of both an active judicial case management model and a value-of-claim tracking model. The base of the discovery system should be nontranssubstantive at the case-type level so that the discovery devices and their permitted scope will respond most closely to the issues that are most important to the claims. Because each type of claim will present different needs, case-type-specific nontranssubstantive rules will permit rulemakers to craft discovery procedures more narrowly.

However, it may be necessary to make alterations in the discovery rules based on the value of the claim even once the procedures are narrowed in type and scope to the needs of the substantive area. These further alterations would diminish the opportunity for overuse of discovery. Value-of-claims distinctions can also ensure that discovery-narrowing mechanisms, such as disclosure or discovery conferences, are not employed where their cost is disproportionate to the amount in controversy. Thus, even though different discovery rules will apply in different types of litigation, more general rules might declare that, regardless of the applicable set of rules, automatic initial disclosures will not be required in any case where the amount in controversy is less than \$250,000.<sup>207</sup>

Finally, active judicial management will also be necessary in certain types of complex litigation. Discovery in the most complex types of cases with a large amount in controversy cannot be totally delimited *ex ante*. The particular demands of these cases will sometimes require a judge to consider the discovery demanded in the context of the case. Prior to the start of

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<sup>206</sup> Burbank & Subrin, *supra* note 170, at 412.

<sup>207</sup> Such mechanisms will not necessarily be available for every type of case. Litigation in some substantive areas may be so simple that a discovery conference would be unnecessary regardless of the value of the claim.

discovery, judges may also need to take an active role in clarifying the procedures to be followed in cases that touch upon multiple substance areas. Although judicial discretion will give rise to concerns of partiality, a certain degree of unpredictability, and the other problems discussed above,<sup>208</sup> such discretion can never be totally eliminated. The goal of crafting narrow, nontranssubstantive rules is to reduce the amount of discretion that individual judges will need to exercise, thereby lessening these concerns.

A system of layered nontranssubstantivity like that proposed would help to ensure proportionality in a number of different ways.<sup>209</sup> The base of case-type-specific rules will ensure that discovery is proportional to the complexity of the issues and the social importance of the litigation. Rulemakers would allow for broader discovery in types of litigation where the issues are not as clear, but narrow the scope of discovery in litigation where the issues are more likely to be straightforward, thus limiting the opportunity for abuse.

Rules that apply differently based on the size of the claim will ensure that the resources spent in the conduct of litigation are proportionate to the value of the judgment at stake. Further, active judicial case management will allow judges to tailor the rules to the particulars of the case at bar and ensure that discovery remains proportional to the resources of the individual parties.

#### B. *Accounting for Value-Based Judgments in the Creation of Nontranssubstantive Rules*

As discussed above, one of the major advantages of using nontranssubstantive rules is the possibility of reducing waste and abuse by narrowly tailoring discovery procedures to the needs of particular types of cases. Another of the major advantages of using nontranssubstantive rules is that they allow rulemakers to curb discovery costs selectively by limiting discovery in some types of cases while allowing more expansive discovery in others. In so doing, rulemakers can consider the substantive goals of the laws. Rulemakers might decide that high discovery costs are acceptable in certain types of litigation but unnecessary or counterproductive in others. In making these determinations, rulemakers should consider both how discovery can promote procedural justice as well as how it can aid in the effective enforcement of the laws. Rather than trying to separate procedure

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<sup>208</sup> Largely unfettered judicial discretion takes desirable control away from litigants and imposes an undesirable burden on judicial time and resources. *See supra* notes 164-75 and accompanying text.

<sup>209</sup> For a description of different measures of proportionality considered by the British procedural system, *see infra* text accompanying note 216.

from substantive law, rulemakers can embrace the impact that discovery rules can have on the outcome of litigation. If discovery is going to be an expensive process, the costs should be targeted to where they can be most effective, both in giving the parties access to information and in promoting substantive goals.

### 1. Using Discovery to Promote Procedural Justice

Before rulemakers create a system of nontranssubstantive rules, they must first determine which factors to consider. In many ways, these guiding principles will be the same as those that are always employed when rulemakers craft procedural rules. However, because nontranssubstantive rules will be narrowly crafted to fit the substance of litigation, their potential effect on outcomes will be more obvious. As opposed to the drafting of transsubstantive rules, where rulemakers can pretend that procedure is a value-free science,<sup>210</sup> the crafting of substance-specific procedures will require rulemakers to confront openly the challenge of making value judgments.

Stephen Subrin identifies ten values that procedure may be designed to serve:

- (1) resolving and ending disputes peacefully;
- (2) efficiency;
- (3) fulfilling societal norms through law-application;
- (4) accurate ascertainment of facts;
- (5) predictability;
- (6) enhancing human dignity;
- (7) adding legitimacy and stability to government and society;
- (8) permitting citizens to partake in governance;
- (9) aiding the growth and improvement of law;
- (10) restraining or enhancing power.<sup>211</sup>

I would add to this list the value of equal treatment of the parties. Rulemakers may also take a sociological approach by designing procedure that keeps in mind the political, social, and economic effects of the rules.<sup>212</sup>

In designing substance-specific procedure, rulemakers will have the opportunity and challenge of deciding which of these values will be given primary emphasis in each type of litigation. Rulemakers may decide to create discovery rules for civil rights litigation that will place more emphasis on human dignity or community participation. Conversely, the procedure to be utilized in contract disputes may place more emphasis on predictability.

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<sup>210</sup> See *supra* text accompanying notes 88-91 (discussing the view that procedure and substantive law are separate and distinct in the context of the Rules Enabling Act and the Federal Rules of Civil Procedure).

<sup>211</sup> Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 140 (1999).

<sup>212</sup> *Id.* at 142.

More extensive discovery might thus be needed in civil rights litigation to impart a feeling of transparency in such matters. On the other hand, predictability might be obtained in contract disputes by strictly limiting discovery to a certain set of documents so that the parties know *ex ante* what facts the counterparty will be able to obtain in any litigation that might result.

Discovery, like many areas of procedure, presents an opportunity for rulemakers to craft processes that will contribute greatly to procedural justice. If litigants are to come away from the courts feeling that they were afforded a fair adjudication of their claim, they must feel that they were given an adequate opportunity both to obtain the facts critical to their case and to present those facts to an impartial court. Unnecessarily limited discovery procedures may leave litigants with the feeling that they were helpless in their quest to find and convince the court of the truth. This concern looms especially large in litigation where a party with fewer resources files suit against a more powerful, better-resourced adversary. The smaller party must be made to feel that it has been given the opportunity to develop fairly the factual record in spite of the inequalities. Of course, this concern needs to be balanced against the needs of their counterparties, usually corporations or government, to be free from harassing, meritless lawsuits. Procedural justice also dictates that defendants not leave the courts feeling that they can be bullied by frivolous but expensive lawsuits.

A recent study by the Federal Judicial Center asked attorneys whether they believed that the discovery produced in one of their recent closed cases increased the fairness of the outcome in that case.<sup>213</sup> About 45% of plaintiffs' attorneys and 39% of defendants' attorneys agreed or strongly agreed that the discovery increased the fairness of the outcome.<sup>214</sup> Only about 12% of plaintiffs' attorneys and 14% of defendants' attorneys disagreed or strongly disagreed with the statement, with the rest ambivalent or declining to answer.<sup>215</sup> Further research should determine in which types of cases discovery contributed the most to perceived fairness of outcome. Such data could greatly assist rulemakers in crafting discovery rules that would best leave litigants with the feeling that they were afforded procedural justice, regardless of the outcome of their case.

Another factor that should be taken into account in crafting non-transsubstantive discovery rules is proportionality. Since the reforms of 1999, the British procedural system has sought to attain four types of

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<sup>213</sup> LEE & WILLGING, *supra* note 54, at 29-30.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

proportionality: “(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party.”<sup>216</sup> As discussed above, nontranssubstantive rules are particularly well-suited to provide proportionality in each of these areas.<sup>217</sup>

Other considerations for rulemakers include looking at who has access to the information and how much discovery is necessary to make that information available to both parties. Additionally, in crafting rules of discovery, rulemakers will have to confront the question of deciding who should bear the cost of discovery. The 1938 rules shifted the cost of discovery to the producing party. Rulemakers must acknowledge that this is a normative choice that will usually favor plaintiffs, because defendants usually have access to the information and are thus the producing party. Rulemakers will need to be conscious of how this choice affects incentives to litigate or to settle.<sup>218</sup>

Finally, rulemakers need to recognize that more information is not always better. There is an endless amount of information and at some point the cost of uncovering that information outweighs the marginal benefit.<sup>219</sup> There must be limits to discovery and its potentially enormous costs, even at the risk of missing critical information in some cases. Thus, it is time to reconsider Sunderland’s effort to make all types of discovery available to every litigant.<sup>220</sup>

When crafting substance-specific procedure, rulemakers are forced to make value-based decisions about what processes to implement in different types of litigation. One danger in crafting procedure in this way is that it opens up the process to influence from interest groups. However, this problem can be dealt with through transparency and by allocating the task of rulemaking to the correct bodies.<sup>221</sup>

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<sup>216</sup> CIV. P.R. 1.1(2)(c) (Eng.), available at [http://www.justice.gov.uk/civil/procrules\\_fin/contents/parts/part01.htm#IDATBTQ](http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm#IDATBTQ).

<sup>217</sup> See *supra* text accompanying note 209.

<sup>218</sup> See generally Avery Wiener Katz & Chris William Sanchirico, *Fee Shifting in Litigation: Survey and Assessment* (Univ. of Pa. L. Sch. Inst. for L. & Econ., Research Paper No. 10-30, 2010), available at <http://dx.doi.org/10.2139/ssrn.1714089> (surveying economic literature on the effects of fee-shifting on incentives to expend resources in litigation, decisions to bring suit, settlement strategies, and incentives for efficient primary behavior).

<sup>219</sup> Cf. Subrin, *supra* note 211, at 147 (suggesting that this insight likely comes from the law and economics movement).

<sup>220</sup> On Sunderland as the main architect of the federal discovery rules, see *supra* Section I.B.

<sup>221</sup> See *infra* Section V.D (proposing and highlighting the benefits of a potential structure for such a rulemaking body).

## 2. Using Discovery to Promote Substantive Goals

Procedure can be used to promote substantive goals and achieve substantive fairness the same way that it can be designed to optimize procedural fairness. In designing nontranssubstantive rules, rulemakers must determine to what degree they want to craft procedures that will promote the substantive goals of litigation. Framed another way, rulemakers will have to consider whether they want to allow more discovery in certain types of cases—and thus higher discovery costs—in order to promote the substantive goals underlying the litigation. Private litigation that enforces federal statutes constitutes a particular set of cases in which rulemakers may want to further substantive goals.

Recent literature has recognized that it is often a matter of legislative choice to encourage private litigation as an enforcement mechanism for federal law.<sup>222</sup> In a recent book on the topic, Professor Sean Farhang notes that there has been a shift since the 1960s from a bureaucracy-centered approach to enforcement to a private litigation approach.<sup>223</sup> When Congress encourages private litigation, it in effect enlists citizens as law enforcement officials.<sup>224</sup> For example, by allowing private citizens to file suit for employment discrimination in violation of Title VII of the Civil Rights Act, Congress created less need for federal agencies to oversee compliance.<sup>225</sup>

Congress can encourage such private litigation by influencing access to the plaintiff status,<sup>226</sup> the expected benefits of litigation,<sup>227</sup> the probability of prevailing,<sup>228</sup> or the expected cost of the litigation.<sup>229</sup> Granting broad discovery rights in this kind of litigation confers upon private litigants the kind of investigatory powers normally bestowed upon federal agencies, such as the power to compel sworn testimony or the production of documents.<sup>230</sup>

<sup>222</sup> See FARHANG, *supra* note 10, at 3 (“The existence and extent of private litigation enforcing a statute is to an important degree the product of legislative choice over questions of statutory design.”).

<sup>223</sup> *Id.* at 4.

<sup>224</sup> *Id.* at 9.

<sup>225</sup> See *id.* at 4, 98-114 (describing Congress’s choice to encourage a robust scheme of private enforcement of the Civil Rights Act in lieu of a stronger administrative enforcement authority).

<sup>226</sup> Access to plaintiff status can be affected by granting broader citizen standing, lengthening statutes of limitations, or allowing for class actions. *Id.* at 25-28.

<sup>227</sup> Providing for minimum damages or triple damages will raise the potential award for a successful plaintiff. *Id.* at 28-30.

<sup>228</sup> The probability of prevailing can be influenced through, among other things, changing burdens of proof, standards of proof, or rules of evidence. *Id.* at 28 & tbl.2.2.

<sup>229</sup> Filing fees and attorney fee-shifting provisions are examples of ways in which the expected cost of litigation can be altered. *Id.*

<sup>230</sup> *Id.* at 8.

Granting broader discovery rights will increase the probability of a plaintiff prevailing.

Allowing for private litigation in this manner is a conscious and substantive choice by the legislature to increase the level of enforcement of the underlying law. Professor Farhang notes that the reasons a legislature would favor enforcement through private litigation are political.<sup>231</sup> Conflicts between the legislative and executive branches will push Congress to rely on private litigation as a method of statutory implementation, as a way to bypass the enforcement role of a hostile executive branch.<sup>232</sup> Derailing private enforcement can only be done through the difficult legislative process of repeal and cannot be accomplished by the Executive alone.<sup>233</sup>

Professors Burbank and Subrin would create exceptions in their value-of-claim tracking system for litigation where Congress meant to encourage private enforcement (seen through statutory damages, attorney fee-shifting provisions, or other objectively identifiable signals).<sup>234</sup> They see broader discovery rules for these cases as a way of promoting the legislative intent of “adequate enforcement.”<sup>235</sup> Although procedural rules can and should be used as a means of affecting underlying substantive rights by modifying the level of enforcement, this is an area in which the judicial branch should avoid interfering. If a robust system of private enforcement is the result of conflict between the political branches of government, the judicial branch may be best served by not taking sides. The decision to allow more robust discovery in certain types of cases is better left to Congress than judicial rulemakers.<sup>236</sup>

Nontranssubstantive rules have the advantage that procedures can be crafted in ways that will promote the substantive goals of particular sets of law. Discovery rules should be utilized to encourage citizen enforcement of the laws, and should be seen as an effective tool in the attainment of litigant rights in many substantive areas. Procedure plays a large role in influencing substantive outcomes. In crafting nontranssubstantive rules, rulemakers will certainly have to, and should, decide how they can influence the rights of the parties through the rules. Indeed, Congress has shown its willingness to

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<sup>231</sup> See *id.* at 19-20.

<sup>232</sup> *Id.* at 36.

<sup>233</sup> *Id.* at 5.

<sup>234</sup> Burbank & Subrin, *supra* note 170, at 411.

<sup>235</sup> *Id.*

<sup>236</sup> Recognition of these concerns may explain why courts of equity have traditionally seen it as outside of their role to promote the enforcement of penalty provisions. See *supra* note 96. As noted above, penalty provisions can be a mechanism used by the legislature to adjust the level of private enforcement of the law. See *supra* note 228 and accompanying text.

alter procedure as a method of accomplishing its substantive goals.<sup>237</sup> However, one should be wary about allowing rulemakers in the *judicial* branch to make these determinations, as Congress has demonstrated that it will alter procedural rules where it finds such adjustment necessary to calibrate the level of enforcement of particular statutes.<sup>238</sup>

### C. Discovery Reforms that Will Reduce Costs

There are a number of possible changes to the discovery rules that rulemakers should consider in their efforts to reduce the cost of discovery. First, where the type or size of a case makes initial required disclosures unnecessary or inefficient, the disclosure rules should not apply. For those types of cases where certain sets of information will always aid the litigation process, a required core of discovery should mandate disclosure of that information with as much specificity as possible.<sup>239</sup>

Further, pattern interrogatories and pattern requests for production should be developed to make basic discovery more efficient and less costly.<sup>240</sup> Pattern discovery rules would set forth the types of requests that should be honored quickly and without dispute.<sup>241</sup> Parties would use pattern discovery requests as necessary. There would be a strong presumption that interrogatories and requests for production set out in such rules would be

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<sup>237</sup> See *supra* notes 99-100 and accompanying text (discussing procedural reforms in the context of prison litigation and securities litigation).

<sup>238</sup> The rulemaking committee should therefore be situated in the legislative branch. See *infra* Section V.D.

<sup>239</sup> See Subrin, *supra* note 114, at 48 (advocating a clear description of the required core discovery in particular types of cases).

<sup>240</sup> See *supra* notes 105-08 and accompanying text (describing recent efforts to develop pattern discovery for employment discrimination litigation); *supra* notes 134-39 and accompanying text (describing pattern interrogatories in the states). The recent efforts to develop pattern discovery in the federal system represent an important start to this process. Pattern discovery should be developed for litigation in a wide range of substantive areas.

<sup>241</sup> An initial proposal by the National Employment Lawyers Association demonstrates the types of pattern interrogatories and pattern requests for production that might be used in an employment discrimination case. Pattern interrogatories might ask the defendant to state the reasons for the adverse action taken against the plaintiff, describe any workplace misconduct allegedly committed by the plaintiff, and list the identities of any other employees against whom the defendant took the challenged responsive action. Memorandum from Garrison & Hamburg, *supra* note 106, at attachment 2, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf> at 630-35. Pattern requests for production might ask the defendant to produce the plaintiff's personnel file, the plaintiff's compensation records, documents and communications related to any investigation of any complaint made by the plaintiff, and any documents describing the reasons for the adverse action taken against the plaintiff. *Id.* at attachment 3, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2010-11.pdf> at 636-39.

reasonable; parties would thus be discouraged from disputing such requests. Parties to litigation would know to expect requests for the materials set forth in the pattern discovery rules and would be expected to answer interrogatories or produce requested records quickly. Pattern discovery would speed the initial stages of discovery and, by reducing discovery disputes at this stage, reduce the cost of initial discovery. Pattern discovery also has the added benefit of making clear to pro se litigants the basic materials that will help them to develop their cases.

While many cases may not require discovery beyond that prescribed in the required core discovery or pattern discovery provisions, further reforms are necessary for those cases that will require extensive discovery beyond those initial requests. A recent report by the American College of Trial Lawyers Task Force on Discovery and the Institute for Advancement of the American Legal System listed nine suggested reforms to cut the costs of discovery:

- (1) limitations on scope of discovery (i.e., changes in the definition of relevance);
- (2) limitations on persons from whom discovery can be sought;
- (3) limitations on the types of discovery (e.g., only document discovery, not interrogatories);
- (4) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);
- (5) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;
- (6) limitations on the time available for discovery;
- (7) cost shifting/co-pay rules;
- (8) financial limitations (i.e., limits on the amount of money that can be spent—or that one party can require its opponent to spend—on discovery); and
- (9) discovery budgets that are approved by the clients and the court.<sup>242</sup>

These limitations would generally be presumptive rules subject to alteration by the court upon a showing of good cause.<sup>243</sup> Examining specific types of cases would allow rulemakers to consider what information is generally known to the parties at different stages of the litigation and what the norms are for the numbers of depositions and interrogatories or the types or

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<sup>242</sup> IAALS REPORT, *supra* note 1, at 10-11.

<sup>243</sup> See Subrin, *supra* note 114, at 48 (“Although cases of certain varieties have predictable, normal characteristics, presumptive rules would permit parties to seek, and judges to order, variations when the case has unique problems.”).

amounts of documents subject to discovery.<sup>244</sup> Rulemakers would also be able to gauge the level of specificity with which litigants should be able to make discovery requests in different types of litigation.<sup>245</sup> Using this kind of empirical evidence to create limiting rules will constrain parties and reduce abuse of the discovery system. It will also provide clients, lawyers, and judges with more predictability.

Another reform might be to simplify discovery procedures in types of cases in which pro se representation is more common or encouraged.<sup>246</sup> For instance, discovery rules might be simplified in certain types of prisoner litigation, in which over 93% of cases are filed pro se.<sup>247</sup> This would aid litigants unfamiliar with the technical procedures of the courts.

The greatest source of cost and the most difficult discovery device to limit is document discovery.<sup>248</sup> Requiring greater specificity in demands for documents, where possible, may help reduce the costs of searching for and producing those documents.<sup>249</sup> Another possible reform would be to set a presumptive time window for discoverable documents (i.e., documents created within a set number of years prior to the alleged illegal or harmful conduct).<sup>250</sup> Creating nontranssubstantive rules would allow each of these reforms to reflect the unique opportunities and problems presented by varying types of litigation. Narrowly tailored rules would reduce the need for judicial case management, although the rules would be subject to alteration by the court for good cause, to allow for needed flexibility in unusual or unforeseen circumstances.

#### D. The Rulemaking Body

The complexity of nontranssubstantive rules and the challenge that they present in making value judgments keyed to specific areas of litigation will require innovative rulemaking processes. Professors Burbank and Subrin have suggested that rulemakers work with the plaintiffs' and defendants'

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<sup>244</sup> See generally *id.* at 49.

<sup>245</sup> *Id.*

<sup>246</sup> Cf. S.C. R. FAM. CT. 25 (prohibiting formal depositions or discovery in family court proceedings, except upon stipulation of the parties or order of the court).

<sup>247</sup> See *Judicial Business* tbl.S-23, U.S. COURTS, [http://www.uscourts.gov/Statistics/JudicialBusiness/2009/tables/S23Sep09.pdf](http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/tables/S23Sep09.pdf) (last visited Oct. 11, 2012) (providing data on pro se filings across the states).

<sup>248</sup> See *supra* notes 63-64 and accompanying text.

<sup>249</sup> See Burbank & Subrin, *supra* note 170, at 411.

<sup>250</sup> *Id.*

bars to develop discovery protocols.<sup>251</sup> Their proposal presents the possibility that through discussion and negotiation, innovative solutions can be found to address the rising burdens of discovery.<sup>252</sup> It also ensures that the most knowledgeable experts in each substantive field of litigation have a role in shaping the procedures to be used. This proposed process for discovery reform is similar to that used by administrative agencies in negotiated rulemaking.<sup>253</sup> Because nontranssubstantive discovery rules will necessarily be more complex and will have to respond to the particularities of different types of litigation, this process of expert-based reform would be a much better method of crafting rules than leaving the job solely to procedural generalists.

There have been previous efforts to make rules through committees of this kind. An effort led by the National Employment Lawyers Association brings together various stakeholders to develop pattern discovery for employment discrimination litigation.<sup>254</sup> A group composed of members of the plaintiffs' employment bar, NELA is working with a group from the Institute for the Advancement of the American Legal System, a group of management-side attorneys.<sup>255</sup> This effort seeks to identify which discovery requests are acceptable on all sides and can be streamlined. Including judges in a committee of this type would help to determine what works from the judiciary's perspective.<sup>256</sup>

There is a further question regarding whether the judicial branch can properly make nontranssubstantive discovery rules. The Rules Enabling Act, which authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure, directs that procedural rules "shall not abridge, enlarge

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<sup>251</sup> *Id.* at 412; see also Subrin, *supra* note 5, at 405 (suggesting also possibly including clients in the rulemaking process).

<sup>252</sup> But see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 916 (1999) ("[I]nsofar as consensus involves accommodating conflicting interests, it aligns court rulemaking so closely with legislation that it is unclear why the rulemaking task should be given to the courts at all.").

<sup>253</sup> See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7 (1982) (proposing that regulatory rules be made by "group consensus" reached through "negotiation among representatives of the interested parties, including administrative agencies").

<sup>254</sup> See *supra* notes 105-09 and accompanying text (discussing NELA's attempt to tailor discovery mechanisms to the substance of the litigation).

<sup>255</sup> See Memorandum from Garrison & Hamburg, *supra* note 106, at 1-2 (describing the formation of an Employment Protocols Committee); Memorandum from Kravitz, *supra* note 105, at 14 (describing the committee as "including strong representation of both plaintiff and defense lawyers").

<sup>256</sup> Civil Rules Advisory Comm., Draft Minutes 32 (Nov. 15-16, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf> at 56.

or modify any substantive right.”<sup>257</sup> Under the Supreme Court’s current interpretation of this clause, the proper test for determining the validity of a judicially promulgated rule is “whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”<sup>258</sup> Although case-type-specific discovery rules might be permissible under this wooden reading of the Rules Enabling Act, they might modify substantive rights. In nontranssubstantive rulemaking, rule-makers would undoubtedly be forced to make value judgments in their determinations of which rules should apply in which types of cases. The discovery system that resulted from such a practice would surely “modify” substantive rights.

By directing that procedures promulgated by the Supreme Court should avoid modifying the substantive law, the Rules Enabling Act implies that value neutrality is possible (and indeed desirable) in procedure.<sup>259</sup> As noted above, the goal of value neutrality was one factor that pushed the drafters of the original federal rules toward transsubstantivity.<sup>260</sup> But more recently, scholars have attacked the notion of value-neutral procedures.<sup>261</sup> The substantive nature of procedure becomes even more obvious, however, in nontranssubstantive rules, and it is inevitable that in crafting nontranssubstantive rules, rulemakers will be forced to make value-based decisions affecting substantive rights. The substantive nature of such rules would be more apparent still if rulemakers were to shape discovery rules to respond to signs in legislation—such as fee-shifting provisions or statutory damages—and strengthen a legislative intent to promote private litigation as an enforcement mechanism of statutory law.<sup>262</sup> To the extent that more expansive discovery encourages litigation by increasing the chances that the plaintiff will prevail, it modifies the existing rights and liabilities of those governed by the laws. Thus, under the current statutory scheme allocating

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<sup>257</sup> 28 U.S.C. § 2072(b) (2006).

<sup>258</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

<sup>259</sup> See Marcus, *supra* note 85, at 395-97 (describing contemporary views about the “substance–procedure dichotomy”).

<sup>260</sup> See *supra* text accompanying notes 88-92 (describing reasons for the rulemakers’ choice of transsubstantive rules).

<sup>261</sup> See Bone, *supra* note 252, at 907-14 (“The traditional belief in a procedural ideal and a clear normative divide between procedure and substance is no longer persuasive.”); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472-73 (1987) (book review) (challenging the neutrality thesis). The Supreme Court, too, has noted that court rules are “substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.” *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

<sup>262</sup> See *supra* subsection V.B.2.

rulemaking authority to the Supreme Court, Congress would probably be required to enact nontranssubstantive discovery rules itself.

Even if Congress were to grant expanded authority to the Supreme Court to promulgate discovery rules along the lines outlined in this Article, the legislative branch would nevertheless be the more appropriate forum for the development of such rules.<sup>263</sup> Nontranssubstantive rules provide expanded opportunities for interest groups to influence rulemakers.<sup>264</sup> They also present opportunities for negotiation and compromise among interested groups.<sup>265</sup> The legislative branch is the more appropriate institution for consensus-building and managing the politics of competing interest groups.<sup>266</sup> Nevertheless, the judiciary should be actively involved in the

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<sup>263</sup> There will certainly be some rules that can be made properly by a committee situated in the judicial branch. Some rules are truly procedural in that they deal with how the courts conduct their business. Compliance with these rules is simple for all parties interested in duly pressing their claims or defenses; these rules neither modify the substantive rights of the parties nor affect their chances of prevailing in the litigation. Examples of such rules might include time limits for simple filings, requirements that the parties use certain forms, or rules governing the ways in which the parties communicate with each other or the court. These rules are best formulated by a committee in the judicial branch, whose members are more likely to be acquainted with court procedure in a way that helps them formulate rules for the expedient functioning of the courts. The Rules Enabling Act currently provides that federal rules take effect automatically after promulgation by the Supreme Court and a waiting period in which Congress can override the proposed rules. 28 U.S.C. § 2074 (2006). For truly procedural rules, this system works best in that rules designed to aid the conduct of judicial business can be made effective without Congress having to undertake the slow legislative process of statutory enactment. This Comment asserts only that rules that will have more of a substantive effect on litigants' rights, including substance-specific discovery rules that impact a litigant's access to information that may be critical to his case, are better crafted in a legislative committee and enacted by Congress. Cf. Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 145-46 (1994) (suggesting a two-tiered system in which rules more properly made through legislation would be formulated and recommended by the current rulemaking committee, but would require legislative action before taking effect).

<sup>264</sup> Cf. *supra* notes 111-112 and accompanying text (explaining how transsubstantive rules reduce the risk of interest group influence).

<sup>265</sup> See *supra* notes 251-56 and accompanying text.

<sup>266</sup> Professor Paul Stancil argues that committee rulemaking helps to lessen the influence of interest groups. See Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 119-21 (2010) ("[C]ommittee rulemaking enjoys substantial advantages over other potential forms of procedural system design in the form of expertise advantages and insulation from interest group risk."). Professor Stancil points out two factors that may lead to interest groups having less influence over committee rulemaking than rulemaking by Congress members: (1) because of Congress members' lack of expertise in judicial procedure and the scarcity of Congress's time, Congress relies on interest groups for information, thereby opening up Congress members to misinformation; (2) unlike Congress members, the judges and academics who make up the rule advisory committees do not rely on campaign contributions from interest groups to get reelected. *Id.* at 120. To the extent that lobbying does take place even in committee rulemaking, and to the extent that it would increase with a nontranssubstantive system, a committee of judges, academics, and lawyers located in the legislative branch would benefit from

rulemaking process, as it is clearly better equipped to evaluate existing procedures and create an integrated system of rules.<sup>267</sup> Thus, the ideal rulemaking body would be a committee created by Congress and subject to congressional oversight, but led by representatives of the judiciary and composed of judges, law professors, members of the relevant bars, and major repeat clients interested in the substantive field.

### CONCLUSION

The demand for discovery reform is widespread and the need for such reform, at least in some types of cases, is apparent. To some, the problems with the current system of discovery stem from abuse and overuse of the system that costs litigants unreasonable amounts, thereby keeping plaintiffs with meritorious suits out of court and forcing defendants who should prevail on the merits to the settlement table. Although exorbitant discovery does occur in some cases, the degree to which runaway discovery costs actually accrue and create these pressures on litigants is uncertain; more empirical research is necessary. To others, the problems with discovery stem from needless procedures that make the cost of litigation in simple cases too high for many plaintiffs and drain the resources of the federal courts and judiciary. Although the empirical evidence of the costs created by needless discovery procedures is uncertain, these charges are also surely accurate in some cases.

Nontranssubstantive discovery rules, and in particular subject matter-specific discovery rules, could provide a useful mechanism through which rulemakers redraft discovery rules more narrowly. A nontranssubstantive system of discovery rules would begin with rules that vary based on type of case and respond to the unique needs and circumstances presented by different types of litigation. Some further layer of value-of-claim tracking would ensure that discovery is kept proportional to the value of the case. Active judicial case management would be appropriate only in the most complex cases and for issues that cannot be predicted by rulemakers creating a system *ex ante*. These reforms would prevent some of the abuse

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the same insulating factors as a committee located in the judicial branch. Because such lobbying is certain to occur, moving the rulemaking process to the legislative branch would protect the character and reputation of the judicial branch. Additionally, a closer relationship with Congress should help the rulemaking committee consider competing interests openly and reach satisfactory compromises. See Bone, *supra* note 252, at 916-17 (“The legislature is the institution in our democracy that is designed to accommodate interests . . .”).

<sup>267</sup> See Bone, *supra* note 252, at 890 (“Court rulemaking is better suited than legislation to the task of inferring general principles from existing practice and designing an integrated system of rules based on those principles.”).

of discovery in cases in which discovery costs are currently too high by narrowly tailoring rules to case type. They would ensure that discovery is kept relevant to the issues at hand and is conducted in the most efficacious manner given the unique needs of such litigation. A nontranssubstantive discovery system would also help to eliminate unnecessary discovery procedures in cases in which minimal or no discovery is needed, thereby helping to reduce costs for small-claims plaintiffs and the judicial system. These savings would also allow judges to spend more time fulfilling their primary function of overseeing trials.

A system of nontranssubstantive rules as described above would surely be much more complex than the current system of discovery. However, procedure in small claims would often be made simpler by nontranssubstantive rules, and the specialist lawyers who litigate the more complex cases would easily be able to comprehend the intricacies of the discovery rules relevant to their line of work. Furthermore, because discovery rules would be more narrowly tailored to the needs of the case, the rules would apply in a more logical way to the particular litigation.

To say only that a nontranssubstantive system will reduce waste and abuse through the creation of narrowly tailored rules, however, is to ignore one of the major advantages of nontranssubstantive rules: substance-specific rules will also allow rulemakers to allocate the costs of discovery. More expensive discovery could be allowed, or even encouraged, in certain types of cases in order to promote goals of substantive and procedural fairness. In this way, the discovery process can be harnessed as a tool to promote the underlying goals of the substantive law. More extensive discovery might be allowed in cases in which it is necessary to achieve procedural justice for the parties or those in which it will result in better enforcement of the law.

A primary difficulty that would certainly arise in drafting nontranssubstantive rules is that rulemakers would need to make value-based decisions in crafting those rules. The rulemaking process would become the target of interest group activity even more than it already is. The rulemaking process outlined above, which gathers key players together to draft the rules through a process of negotiation and compromise, would help to smooth the process of reform. Placing a rulemaking committee entrusted with this kind of reform of the discovery procedures in the legislative branch would best comport with functional and political realities.

Discovery reform toward nontranssubstantive rules would be a massive undertaking. The result would be a much larger set of discovery rules, although the set of discovery rules applicable to any particular case would be smaller. Such a reform would probably take a considerable amount of

time.<sup>268</sup> Rulemakers could start by creating discovery rules applicable in broad categories of cases (e.g., personal injury, employment) and then subdivide those categories with more particular sets of rules as necessary. Further research should demonstrate in which types of cases discovery leads to the most waste and abuse; rulemakers should focus their initial efforts on these types of cases.<sup>269</sup>

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The current discovery system imposes costs on litigants and the court system that are too burdensome to ignore. Although a move to non-transsubstantive discovery rules would be a radical change for the federal court system, movement in that direction has already occurred at the state level and, to a minimal degree, at the federal level. Such a system offers the promise of lower costs for litigants and the federal courts. Nontrans-substantive rules would also ensure that the remaining costs would be allocated in a more deliberate and effective manner. Rather than condemning all discovery, perhaps it is time to tailor discovery rules to litigation.

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<sup>268</sup> Such a large undertaking would not be unprecedented. The restyling project, which sought to change the words and style of nearly all of the federal rules, took nearly a decade and a half to complete. Jeremy Counsellor, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 521 (2009).

<sup>269</sup> See *supra* note 76 and accompanying text.