Tailoring Discovery: Using Nontranssubstansitive Rules to Reduce Waste and Abuse

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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 both the overuse of discovery and the overuse of procedures associated with discovery that are mandatory in every case but relevant in

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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.¹

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 getting to the discovery stage.² Unfortunately, this crude attempt at a fix also threatens to keep much meritorious litigation out of the courts by not allowing under-resourced plaintiffs the opportunity to use the authority of the court system to gather basic information crucial to their case.³ 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 discovery rules, like all of the Federal Rules of Civil Procedure, are transsubstantive—meaning that the same rules apply in every type of case—they cannot be narrowly tailored to the requirements of any particular case. Transsubstantivity was one of the general 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

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² Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (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).
³ See Alexander A. Reinert, The Costs of Heightened Pleading, 86 IND. L.J. 119, 140-66 (2011) (presenting data that show that cases that are more likely to be dismissed under the new heightened pleading standard are just as likely to be successful as those that would survive the heightened standard).
costs by replacing broad rules with rules that are more narrowly tailored to particular types of litigation.

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. Rulemakers, therefore, will 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.4

As noted, transsubstantivity means that the same set of rules applies to every type of case. In fact, there are at least two kinds of transsubstantivity.5 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. In this Article, 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.6 That is, the discovery rules should be different for different types of litigation.

In Part I, I give a brief review of the current federal discovery rules, discussing their importance to litigation and the breadth of the system of discovery. I also review some of the most important criticisms leveled at the discovery procedures by scholars and practitioners. Part II of this Article focuses on transsubstantivity, examining the history of transsubstantive rules in

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4 To some extent, lobbying of rulemakers already occurs. Because the substance-specific rulemaking process would more openly have to deal with the value judgments associated with procedure and because interested parties would be able to target more narrowly the procedures that they have an interest in, however, it is highly likely that substance-specific rulemaking would be susceptible of even more lobbying. See infra note 108.


6 This Article primarily uses the term “transsubstantivity” to mean case-type transsubstantivity. Thus, in this Article “nontranssubstantive” rules are those which apply differently depending on the subject matter of the litigation.
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, examining 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 great discretion that is given to judges when they are asked to oversee 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, applying different rules depending on the amount in controversy, on the other hand, should be successful in helping to lower the cost of discovery and streamline case management. The implementation of case-size nontranssubstantivity alone, however, would be insufficient to address the problems plaguing the system of discovery. Such a reform would do nothing 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. The Article 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. The Article suggests a number of practical reforms that could be implemented in a nontranssubstantive system to reduce costs. Finally, this Article 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 interests groups to which the committee
would be subjected, the rulemaking body would be best situated in the legislative branch. Although reform of the discovery system of the type recommended in this Article would require a major overhaul of the federal discovery rules, nontrans substantivity 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 takes as a given that “[m]utual knowledge of all of the relevant facts gathered by both parties is essential to proper litigation.”\(^7\) Discovery is aimed at providing both the litigants and the factfinder, whether judge or jury, 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 achieve an important goal in terms of process values.\(^8\)

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

\(^8\) 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 Part V.B.1.
\(^9\) 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. To whatever extent it is that the plaintiff need not provide all of the evidence at the pleading stage, however, discovery will still be essential in allowing him to build his case.
To the extent that the extensive system of federal discovery allows plaintiffs easier access to courts (through a notice pleading system), discovery supports the political role that private litigation plays in the United States.\(^\text{10}\) In such a system, the powerful force of private litigation can be harnessed, through legislative choice, as a method of enforcement of statutory and administrative law.\(^\text{11}\) Private litigation has indeed often been used as an alternative to a more bureaucratic state.\(^\text{12}\) Dean Carrington has noted the privatization of enforcement especially in the areas of antitrust, consumer protection, securities regulation, civil rights, and intellectual property laws.\(^\text{13}\) 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 as easily be co-opted by powerful interest groups as administrative agencies.\(^\text{14}\) Discovery is a powerful tool in enabling private litigants to vindicate their rights because it gives them investigative abilities that would otherwise be impossible with their limited resources.\(^\text{15}\)

**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


\(^{11}\) See Farhang, supra note 10, at 3 (“It is a *legislative choice* to rely upon private litigation in statutory implementation.”).

\(^{12}\) See infra Part V.B.2 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. Farhang notes that job discrimination lawsuits are the largest source of litigation in federal courts other than habeas petitions. Farhang, supra note 10, at 3. Although the legal bases for such suits are often federal job discrimination statutes and other federal laws, 98% of these suits are litigated by private parties. Id.


\(^{14}\) Id. at 54-55.

in which litigants can use multiple mechanisms to discover a broad 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 devices of discovery.16 Whereas previous systems of discovery might provide for one or two of these discovery mechanisms (such as either interrogatories or depositions, but not both), Sunderland’s initial rules provided litigants in the federal system with access to any and all of the devices that could be of use to them.17 Sunderland was motivated by his support for a notice-pleading system and by his belief in discovery as a way to cure problems of waste and delay.18 Discovery would make all of the issues in dispute and facts relevant to them known to each of the parties and to the court prior to trial, allowing judges to dispose of meritless litigation through summary judgment prior to trial and allowing attorneys better to focus their efforts and time on arguing the most important issues at trial.19

Due to varying criticisms regarding the cost and time involved in such broad discovery, reform efforts since the 1970s, however, have largely been to contain discovery.20 Thus, recent amendments have enhanced sanctions for discovery abuse, imposed numerical limits on the use of certain devices (depositions and interrogatories),21 and explicitly barred the use of

17 Id.
19 Id.
20 Moskowitz, supra note 10, at 607.
disproportionate discovery.\textsuperscript{22} The scope of discoverable materials has also been narrowed from the very broad “relevant to the subject matter” standard, although the court still has discretion to order subject matter discovery.\textsuperscript{23}

The current rules still afford broad discovery, making discoverable “any nonprivileged matter that is relevant to any party’s claim or defense.”\textsuperscript{24} Furthermore, discovery is still not limited to material that would be admissible at trial.\textsuperscript{25} All of the original discovery devices are still available to litigants, even if some of them are somewhat limited.

The current discovery process begins with initial disclosures. Except for in certain exempted types of cases,\textsuperscript{26} 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.\textsuperscript{27} Each party must also disclose a copy of all the documents the disclosing party has that it may use to support its claims or defenses, a computation of damages claimed by the disclosing party, and any insurance agreement under which an insurer may be liable for part of a possible judgment.\textsuperscript{28} In addition, each party must disclose to the other parties the names of any expert witnesses the disclosing party may use at trial.\textsuperscript{29} Each expert witness must usually prepare a report about himself and the testimony he will offer at trial, to be included in this disclosure.\textsuperscript{30} Each party

\begin{thebibliography}{9}
\bibitem{22} Moskowitz, supra note 10, at 607.
\bibitem{24} Fed. R. Civ. P. 26(b)(1).
\bibitem{25} Id.
\bibitem{26} Exempted cases are listed in Fed. R. Civ. P. 26(a)(1)(B).
\bibitem{27} Fed. R. Civ. P. 26(a)(1)(A).
\bibitem{28} Id.
\bibitem{29} Fed. R. Civ. P. 26(a)(2).
\bibitem{30} Id.
\end{thebibliography}
must also make a pretrial disclosure that lists the witnesses and exhibits that it plans to present at trial.\textsuperscript{31}

As early as possible in a proceeding, the parties are to confer to plan the discovery.\textsuperscript{32} At this meeting, the parties are to arrange for the required initial disclosures, discuss any issues about preservation of discoverable material, and develop a discovery plan.\textsuperscript{33} 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.\textsuperscript{34} This discovery plan may be followed by one or more pretrial conferences with the presiding judge.\textsuperscript{35} The district judge then must usually issue a scheduling order that may modify the timing and extent of disclosures and discovery, among other matters.\textsuperscript{36}

The federal rules provide for discovery through a limited number of oral depositions,\textsuperscript{37} depositions by written questions,\textsuperscript{38} or written interrogatories to parties.\textsuperscript{39} Parties can also request that another party produce documents or physical evidence, or permit entry onto property for inspection or testing.\textsuperscript{40} The court can order that a party submit to a mental or physical examination, the report of which may be available to all parties.\textsuperscript{41} The final method of discovery under the Federal Rules of Civil Procedure is for parties to request that other parties admit the

\textsuperscript{31} \textit{Fed. R. Civ. P.} 26(a)(3).
\textsuperscript{32} \textit{Fed. R. Civ. P.} 26(f).
\textsuperscript{33} \textit{Fed. R. Civ. P.} 26(f)(2).
\textsuperscript{34} \textit{Fed. R. Civ. P.} 26(f)(3).
\textsuperscript{35} \textit{Fed. R. Civ. P.} 16.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Fed. R. Civ. P.} 30.
\textsuperscript{38} \textit{Fed. R. Civ. P.} 31.
\textsuperscript{39} \textit{Fed. R. Civ. P.} 33.
\textsuperscript{40} \textit{Fed. R. Civ. P.} 34.
\textsuperscript{41} \textit{Fed. R. Civ. P.} 35.
truth of certain pertinent matters; this allows the parties to narrow the scope of the issues in
question.\footnote{FED. R. CIV. P. 36.}

The court may usually alter the limitations on discovery.\footnote{See FED. R. CIV. P. 26(b)(2) (allowing a court to “alter the limits in these rules”).} In particular, the court is
supposed to limit discovery on its own or at the motion of a party when the burden of proposed
discovery would be unreasonable.\footnote{FED R. CIV. P. 26(b)(2)(C).} The court can issue a protective order forbidding or
modifying discovery that could cause embarrassment or excessive burden to a party.\footnote{FED. R. CIV. P. 26(c)(1).} A court
can also issue an order to compel a resisting party to make the required disclosures and to
respond to discovery requests.\footnote{FED. R. CIV. P. 37(a).}

The discovery system under the federal rules is broad in both the scope of discovery
allowed and the variety of methods of discovery that parties can employ. 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 occurrences that might also 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.\footnote{According to one recent study by a group with some affiliation to the Chamber of Commerce, fewer than half of 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 CONSTITUTIONAL LITIG., NINETEENTH CENTURY RULES FOR TWENTY-FIRST CENTURY COURTS? 1-2 & n.6 (2010) (questioning the neutrality of the organization that published the IAALS REPORT).} 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 push the adversary toward settlement.\textsuperscript{48} Parties are incentivized to settle rather than incur the costs of litigation, even if they know that they will prevail on the merits. As Justice Souter asserted in a recent case, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”\textsuperscript{49} The costs for litigants should not only be measured in the cost of producing requested documents, answering interrogatories, or sitting for depositions; they are also imposed in the delay that discovery can create in litigation.\textsuperscript{50}

The concern that blameless defendants may be pushed to settlement by the threat of discovery has been questioned, however. Not enough empirical evidence is available to support these claims, and the evidence that exists is ambiguous.\textsuperscript{51} Critics of extensive discovery often resort to anecdotal evidence.\textsuperscript{52} A recent survey by the Federal Judicial Center found that 27.4\% of plaintiff attorneys and 30\% of defendant attorneys reported that the costs of discovery increased the likelihood of settlement in a recent case about which they were questioned.\textsuperscript{53} However, it is unclear in how many of these cases the settlement was unfair.

Discovery that exposes private corporate or personal information to the eyes of the public may also be deemed unfair.\textsuperscript{54} This may subject the decisions of corporate and governmental

\textsuperscript{48} See, e.g., Frank H. Easterbrook, \textit{Discovery as Abuse}, 69 B.U. L. REV. 635, 636-37 (1989) (“The prospect of these higher [discovery] costs leads the other side to settle on favorable terms.”).
\textsuperscript{50} Some of the increase in the median length of litigation in recent years has been attributed to the time required by extensive discovery. Netzorg & Kern, \textit{supra} note 1, at 523. In 1992, the median number of months before a civil case came to trial was 15; in 2008, the median case waited almost 25 months before coming to trial. Id.
\textsuperscript{51} Miller, \textit{supra} note 10, at 62-63.
\textsuperscript{54} See Geoffrey C. Hazard, Jr., \textit{Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure}, 137 U. PA. L. REV. 2237, 2242-43 (1989) (“[P]roduction of the documents violates a principle of privacy which corporate and governmental officials consider ought to protect them. 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, \textit{supra} note 15, at 85 (noting that the “sweeping and
officials to second guessing by the public and may lead government agencies and corporations not to create written communications or leave paper or electronic records. Again, parties may be pushed to settlement out of fear of sensitive documents being released in discovery.

The current system of broad discovery is also likely to be inefficient, at least 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 level of discovery. 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) an imperfect solution to the inefficiency problem. Scholars and practitioners have come to terms with the idea that not every fact should be discoverable. Endless discovery in search of the missing fact that might provide the factfinder with an additional nugget of information may not be worth the cost to the system; furthermore, it can often price litigants out of the system. The problem of inefficient discovery may also be compounded by the perverse incentives of attorneys to stretch out the discovery process in order to run up their clients’ bill.

unprecedented, state-supported powers to gather facts” that private lawyers possess on behalf of their private clients “clearly rais[es] anxieties about the value of privacy”). An early book on discovery published a few years before the original Federal Rules of Civil Procedure were promulgated noted that discovery abuse was a concern in certain types of cases, even at that time. 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 for the purpose of blackmail. Id. at 31. Newspapers would print sensational material obtained through the parties’ discovery, embarrassing the litigants. Id. However, this type of abuse was infrequent and privacy interests could be protected by the court ordering depositions to be kept confidential and sealed until offered into evidence. Id.

55 Hazard, supra note 54, at 2242-43.
56 Easterbrook, supra note 48, 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.”).
57 See id. at 638-39 (“Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests.”). Rule 26(b)(2)(C) requires judges to limit discovery that would impose a burden that outweighs the potential benefit of the proposed discovery. FED R. CIV. P. 26(b)(2)(C).
58 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, we must understand that “not every conceivably relevant fact should be discoverable”).
Even an attorney acting in furtherance of his client’s interests may exploit the opportunity that discovery provides for causing delay in litigation, 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.”59 Such delaying conduct is also not necessarily subject to sanction by a court.60

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 digitalized world. Preserving and gathering the massive amounts of e-mails and electronic records produced by corporations can be an extremely costly enterprise—with a bill that can run into the millions of dollars in some litigation.61 This problem is particularly perplexing due to the importance of document discovery, the device that so often helps parties figure out which questions to ask.62

The strength of the cost argument, however, is unclear. There certainly are some cases where the cost of discovery is enormous—these cases may involve dozens of depositions, thousands of pages of documents, and hundreds of gigabytes of digitalized information.63 However, there are also many suits (perhaps one-half to one-third) that involve no discovery, and

61 See Herrmann et al., supra note 52, at 157 (noting the authors’ personal experience with litigation that involves e-discovery costs in the millions of dollars).
62 See Hazard, supra note 54, at 2239 (“[T]he broad access to document repositories is the most powerful weapon in the Rules discovery armory . . . . This is because documents discovery is not only a vital disclosure mechanism in itself, but because it feeds the deposition process by providing clues as to whom to question and what questions to ask.”).
63 See Subrin, supra note 5, at 392 (noting that “there are a substantial number of cases in which the amount of discovery is overwhelming by any standard”).
in those suits that do, discovery will often be limited to just a few incidents.\textsuperscript{64} The empirical
evidence is unclear as to just what percentage of cases involves an inordinate amount of
discovery.\textsuperscript{65}

A report to the Advisory Committee on Civil Rules from the late 1990s suggested that
discovery was not used at all in almost 40\% of cases.\textsuperscript{66} However, in cases where discovery was
employed, it was costly. The cost of discovery represented approximately 90\% of the litigation
costs in cases where discovery was actively employed, and despite the fact that no discovery was
used in many cases, discovery represented about half of the litigation costs in all cases.\textsuperscript{67}

A more recent survey of lawyers in recently closed cases, undertaken by the Federal
Judicial Center, estimated that, at the median, discovery accounted for 20\% to 27\% of the costs
of litigation.\textsuperscript{68} However, discovery expenditures amounted to, at the median, only between 1.6\% and
3.3\% of the stakes involved for the parties, a seemingly small price to pay.\textsuperscript{69} Furthermore,
although some defendants’ groups, especially, may make a lot of noise about the costs of
discovery, the FJC study suggests that most practitioners questioned regarding a representative
sample of cases did not think that discovery was too expensive.\textsuperscript{70} Over 50\% of both plaintiff and
defendant attorneys questioned thought that the amount of information generated by discovery
was “just the right amount,” and over 50\% of both plaintiff and defendant attorneys thought that
the costs of discovery were “just right” compared to their client’s stakes in the litigation.\textsuperscript{71}

\textsuperscript{64} 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.”).
\textsuperscript{65} Subrin, supra note 5, at 392-93.
\textsuperscript{67} Id.
\textsuperscript{68} LEE & WILLGING, supra note 53, at 2.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 27-28.
\textsuperscript{71} Id.
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, may cause unnecessary expense and delay in those cases where discovery is relatively simple. Additionally, much expense is generated by satellite litigation seeking to clarify the applicability of the discovery rules or adjudicating motions for protective orders or orders to compel discovery.

Critics of the current system of expansive discovery thus level attacks at the system concerning its fairness, efficiency, and cost. Certainly these criticisms are accurate to some degree or in some cases, although it is not clear to what extent the asserted problems exist. Even if the system of discovery is only problematic in a small subset of cases, however, reforms should attempt to lower the cost of discovery in those cases. Additional empirical research should shed light on the extent of the problems and the types of cases in which they are most prevalent. Although the research that is currently available does not suggest that the system of federal rules that permits broad discovery is completely broken, it does support serious consideration of reform.

72 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); FED. R. CIV. P. 26(a)(1) (listing items that parties must disclose even before receiving a discovery request).
73 See 2010 CIVIL LITIGATION CONFERENCE REPORT, supra note 21, at 9 (“A number of Conference participants argued that the result [of recent reforms of the disclosure rule] is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents.”); Subrin, supra note 5, at 389 (asserting that additional steps in the discovery process imposed to constrain the system only cause more expense).
74 In particular, class actions, mass torts, and antitrust cases are reported to be particularly problematic in terms of discovery cost and abuse. Herrmann et al., supra note 52, at 156.
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 using their own distinct procedures.\(^75\) 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.\(^76\) The Field Code was eventually adopted by over half of the states.\(^77\) The drafters of the original Federal Rules of Civil Procedure also chose transsubstantivity in the mid-1930s.\(^78\) The Rules Enabling Act authorized the Supreme Court to promulgate “general rules of practice and procedure”\(^79\) and although the Advisory Committee that drafted the rules debated and rejected, based on this phrasing, the contention that it was allowed to create different rules to be applied in district courts of different states, it simply assumed that the rules should also be transsubstantive.\(^80\)

It is not clear if the Advisory Committee thought that the Rules Enabling Act required it to draft transsubstantive rules—they did not debate transsubstantivity—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 years.\(^81\)

\(^75\) See Subrin, supra note 5, at 379 (describing the historic system of writs in the English common law system).
\(^76\) Id. at 378-79.
\(^77\) Id.
\(^78\) Id.
\(^81\) See Subrin, supra note 5, at 383 (“[I]t took the English centuries to evolve to the different writs with their different procedural incidents.”).
Furthermore, simplicity was one of the primary goals underlying the push for a uniform set of federal procedures. 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. Additionally, there were “federal practice rules” for instances where the state code was inapplicable to the federal litigation. The goal of simplicity was best achieved through a single set of procedures for all causes of action.

Another reason for the choice of transsubstantivity was that prevailing conceptions at the time held that procedure and substantive law were distinct entities. Procedure was not supposed to influence substantive outcomes. This bifurcation of procedure and substance was easiest to maintain if the procedures employed were not determined by the subject matter of the action. 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. 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 may have feared that the promulgation of nontranssubstantive rules might violate the Enabling Act’s directive to the Supreme Court not to “abridge, enlarge, nor modify any substantive rights of any litigant.”

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82 See id. (“[T]he whole atmosphere in which the Enabling Act was passed was infused with talk of simplicity.”).
84 Id.
85 See Subrin, supra note 5, at 384 (describing the “notion that procedure and substantive law were somewhat distinct legal categories”).
86 Id.
87 Id.
At common law, unlike most matters of procedure, which traditionally followed the substance-specific dictates of writs, the rules of discovery were historically always transsubstantive. Thus, an important book by George Ragland on discovery in America and England published in 1932 noted that the norm in most jurisdictions was that discovery was available in any type of civil action.\(^90\) 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.\(^91\) 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.\(^92\)

The assumption that the federal rules should be transsubstantive has remained, despite recent calls for substance-specific reform in certain discrete rules.\(^93\) Congress has more recently enacted laws altering procedure in specific substantive areas, such as prison litigation\(^94\) and securities litigation.\(^95\) Many states have heightened pleading requirements in medical

\(^90\) See RAGLAND, supra note 54, 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.”).

\(^91\) 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 (1885). This gave rise to a split among the courts in whether there could be discovery in patent litigation, because those proceedings enforce penalties. RAGLAND, supra note 54, at 28. 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 that discovery entailed was deemed to be inconsistent with the legislative purpose in creating such actions. Dubowsky v. Goldsmith, 195 N.Y.S. 67, 67 (N.Y. 1922); RAGLAND, supra note 54, at 29.

\(^92\) RAGLAND, supra note 54, at 31.

\(^93\) Burbank, supra note 80, at 111.


malpractice suits. But no one is advocating a return to a system with totally different procedural rules for different areas of substantive law.

There has recently been a push for substance-specific rules of discovery, however. Thus, although states have largely copied the procedures found in the federal rules since their promulgation in 1938, more recently states have begun to abandon the federal model of transsubstantive discovery rules. There are currently hundreds of variations among discovery rules throughout the country.

A push for nontranssubstantive discovery rules has also been seen at the federal level. In recent months and with the sanction 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. 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 attach its own set of pattern interrogatories or requests to his answer. The goal of this project is to identify the types of discovery requests

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96 See Benjamin Grossberg, 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 83, 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, underscoring the use of procedural rules as a mechanism to influence substantive outcomes).

97 Burbank, supra note 80, at 111.

98 See Marcus, supra note 83, at 404 (noting that “state 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).


101 Memorandum from Joseph D. Garrison, NELA Liaison to the Advisory Committee, & Rebecca M. Hamburg, NELA Program Director, to Mark R. Kravitz, Chair, Judicial Conference Advisory Comm. on Fed. Rules of Civil
that are standard in employment discrimination cases and that are least objectionable to the parties.\textsuperscript{102} Strong presumptions in favor of the appropriateness of discovery contained in these protocols would discourage disputes at this stage.\textsuperscript{103} 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.\textsuperscript{104} The latest reports indicate that the project is still in its early stages. 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 Transubstantivity

The main arguments for transubstantivity remain those that likely influenced the Advisory Committee when it drafted the original Federal Rules of Civil Procedure.\textsuperscript{105} Promulgating a single set of transubstantive rules greatly simplifies the federal judicial system for practitioners. Lawyers and judges only have to learn a single set of rules, and there will be no decisions to be made about the rules to apply where substantive categories of law overlap. Retaining the transubstantive 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.

\textsuperscript{102}Id.

\textsuperscript{103}See id. at 3 (noting the potential to reduce the need for costly multiple rounds of motions).

\textsuperscript{104}Id. (recommending that twenty districts take part in the initial pilot project).

\textsuperscript{105}See supra text accompanying notes 81-89.
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. 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.

Geoffrey Hazard has asserted that an additional benefit of transsubstantive rules is that, because they must be broadly formulated in order to be applicable to every substantive area, such rules allow for change and legal development from unexpected avenues.

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. Because the rules

106 See Marcus, supra note 83, at 379 (noting that transsubstantive rules are “neutral[] with respect to substantive policy”).
107 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 process.”). To some extent, interest groups already lobby Congress to enact procedural reforms beneficial to special interests. 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 the generality of cases. 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 in Support of Petitioners at 18-26, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (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 calculate 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.”).
108 Hazard, supra note 54 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.”).
must fit any type of litigation, they lack the focus and incisiveness of narrowly drawn rules, resulting in a waste of time and money.\textsuperscript{110} The broad rules are often not sufficient to guide the course of litigation and the system depends on additional limiting procedures and judicial discretion to give 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 the expenditure of resources.\textsuperscript{111} In the absence of such narrowing processes, disputes over the applicability of the rules are likely to arise, causing only more delay and cost.\textsuperscript{112} If narrowly crafted rules provided sufficient direction to litigation ex ante, however, these expensive and timely 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.\textsuperscript{113} Discretion can be problematic because similar cases may be treated differently depending on the presiding judge.\textsuperscript{114} Because procedure can have a great effect on outcome, transsubstantive rules may, ironically, sacrifice uniformity of result.\textsuperscript{115} Although a certain

\textsuperscript{109} See Stephen N. Subrin, \textit{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.”).
\textsuperscript{110} Subrin, \textit{supra} note 5, at 388.
\textsuperscript{111} See \textit{id.} at 389 (noting that each of these mandatory procedures meant to constrain the broad system of discovery creates more attorney work and expense).
\textsuperscript{112} See Subrin, \textit{supra} note 110, 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, the potential scope of document disclosure required by the automatic disclosure rules may be virtually unlimited. \textit{id.} at 38-40.
\textsuperscript{113} See discussion \textit{infra} Part IV.A on the problems inherent in active judicial case management.
\textsuperscript{114} Subrin, \textit{supra} note 5, at 391.
\textsuperscript{115} \textit{Id.}
amount of flexibility may be desirable, such flexibility should be built into the rules intentionally, rather than as a necessary concomitant to 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 even judges to some extent, focus their practices on specialized areas of law. Thus, they 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 have arisen since 1938, requiring more specialized procedures. A primary example of this is the class action, which can involve millions of plaintiffs.

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 cases, giving them more time to hear other cases on the merits, and would save money and time.

III. Jurisdictions with Nontranssubstantive Discovery Rules

A number of states have experimented with nontranssubstantive discovery rules to some extent. One major area of such rules is disclosure. This is, in fact, the only area of discovery where the federal rules are in some ways nontranssubstantive. Federal Rule of Civil Procedure 26(a)(1)(B) exempts from the initial disclosure requirements nine types of cases including

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116 Marcus, supra note 83, at 372-73.
117 See id. at 372 (noting “enormously complicated fields of litigation that beg for specialized procedural treatment”).
118 Id.
119 See Subrin, supra note 110, 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.”).
petitions for habeas corpus, actions to quash an administrative summons, and actions to enforce an arbitration award.\textsuperscript{120} 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.\textsuperscript{121} 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.\textsuperscript{122} At the time, the committee thought that these exceptions would be applicable in about one third of all civil filings.\textsuperscript{123}

Various states also exempt broad classes of cases from disclosure requirements. Alaska rules create an exemption from state disclosure requirements in paternity, custody, adoption, small claims, and eminent domain cases, among other types of litigation.\textsuperscript{124} The Colorado rules exempt mental health, water law, forcible entry and detainer, and certain other proceedings from the normal disclosure procedures.\textsuperscript{125} Alaska and Colorado both have separate disclosure rules that dictate different disclosure procedures for divorce and domestic relations cases.\textsuperscript{126} In addition to exempting cases in some of the categories already mentioned, Utah further exempts from the disclosure requirements litigation based on a contract where the amount in controversy is less than $20,000.\textsuperscript{127}

\textsuperscript{120} \textit{Fed. R. Civ. P.} 26(a)(1)(B).
\textsuperscript{121} \textit{Fed. R. Civ. P.} 26 advisory committee’s note.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Alaska R. Civ. P.} 16(g), 26(a).
\textsuperscript{125} \textit{Colo. R. Civ. P.} 26(a).
\textsuperscript{127} \textit{Utah R. Civ. P.} 26(a)(2)(A).
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. 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 by providing that each uniform interrogation and its subparts shall be counted as only one interrogation toward the forty interrogation limit, while any subpart to a non-uniform interrogatory will be counted as its own interrogation.

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. Other interrogatories may be used in those cases only with judicial approval. The rule does not require that all of the uniform interrogatories be used in every case, and a party only need answer the interrogatories if served with them. The New Jersey rules demonstrate 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.

129 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).
130 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.”).
131 CONN. R. CIV. P. 13-6(b). The relevant forms are located in the appendix to the rules. Id. at Forms 201, 202, and 203.
132 CONN. R. CIV. P. 13-6(b).
133 N.J. R. CIV. P. 4:17-1(2). England has pre-action protocols that describe standard disclosures that the parties should undertake even before commencing an action. See Civ. P. R. (Eng.), Pre-Action Conduct, ¶ 1.2 (2010), available at 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,
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. 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 that. Some states, such as Arizona, further modify the discovery rules for medical malpractice cases.

The United States District Court for the Middle District of Florida has a case management system that separates cases into three tracks depending on their complexity. 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. The third track contains class action, antitrust, securities, mass tort, and other complex litigation, as well as actions affecting the public interest in a way that warrants heightened judicial attention, such as school desegregation or voting rights cases. All other cases fall into track two. Track one cases are managed by the presiding judge or a magistrate judge according to the ordinary rules, except that they are exempt from the initial disclosure requirements of Federal Rule of Civil Procedure 26(a)(1). 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. 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. In track three cases, the preliminary pretrial conference is required.

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. Wisconsin places numerical limits specifically on discovery by prisoners 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.

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 more narrowly tailored manner. Aside from a shift to substance-specific rules, two other proposals have received attention by scholars and rulemakers. The first would have judges more actively manage discovery. The

142 M.D. Fla. R. 3.05(c)(2).
143 Id.
144 M.D. Fla. R. 3.05(c)(3).
146 Wis. Stat. § 804.015 (2010).
second proposal would have different discovery rules apply to 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.\textsuperscript{147} 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 taken a particularly central role in reforms aimed at e-discovery.\textsuperscript{148} 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.\textsuperscript{149}

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.\textsuperscript{150} On the other hand, however, as long as individual judicial proclivities balance each other out, the system as a whole will not be lending

\textsuperscript{147} For a discussion tracing the development of the case management system, see Steven S. Gensler, \textit{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 \textit{id.} at 688-743.

\textsuperscript{148} \textit{Id.} at 682-83.

\textsuperscript{149} \textit{See} FED. R. CIV. P. 16 (providing for a pretrial conference and scheduling order); Miller, \textit{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.”).

\textsuperscript{150} \textit{See} Stephen B. Burbank, \textit{The Transformation of American Civil Procedure: The Example of Rule 11}, 137 U. PA. L. REV. 1925, 1929 (1989) (arguing that the federal rules are not uniform because they “empower district judges to make ad hoc decisions”); Marcus, \textit{supra} note 83, at 377 (noting scholars who make the argument that the rules are only superficially transsubstantive because of the discretion they give to judges).
extra support to particular substantive areas of litigation, as it would be with explicit, generally applicable nontrans substantive rules.\textsuperscript{151}

A 1996 RAND 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.\textsuperscript{152} 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 RAND report found, predictably, that a shorter time to discovery cut-off was associated with reduced time to case disposition and reduced lawyer work hours.\textsuperscript{153} A shorter discovery period also reduced the cost to litigants.\textsuperscript{154} However, a shorter period for discovery was not significantly associated with changes in either attorney or litigant satisfaction.\textsuperscript{155}

Active judicial management of discovery, however, causes more problems than it solves. A magistrate judge or judge supervising discovery cannot possibly know the true value of any particular discovery request before the information is produced.\textsuperscript{156} Therefore, judicial case management inherently involves large amounts of uncontrolled judicial discretion, which raises concerns about fairness and impartiality.\textsuperscript{157} Discovery orders are often made off the record or

\textsuperscript{151} See Marcus, \textit{supra} note 83, at 377 (“[N]othing in the discretion that the Federal Rules provide manifests a systemic approval or disapproval of a particular substantive area of litigation.”).
\textsuperscript{154} Id. \textit{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.”).
\textsuperscript{155} Kakalik et al., \textit{supra} note 154, at 16.
\textsuperscript{156} See Easterbrook, \textit{supra} note 48, at 638-39 (“Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests.”).
\textsuperscript{157} See Judith Resnick, \textit{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).
are announced without an opinion, making any partiality difficult to detect and control.\textsuperscript{158} Discovery orders are usually not final and thus not appealable, which exacerbates any problems of partiality and variance among judges.

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.\textsuperscript{159} Furthermore, active management of litigation consumes large amounts of judicial resources\textsuperscript{160} and takes away from the time that judges are able to devote to presiding over trials.\textsuperscript{161} 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.\textsuperscript{162} 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

\textsuperscript{158} Moskowitz, \textit{supra} note 129, at 127; see also Resnick, \textit{supra} note 158, 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.”).

\textsuperscript{159} Subrin, \textit{supra} note 153, 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.

\textit{Id.}

\textsuperscript{160} See Subrin, \textit{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, \textit{Discovery in Global Perspective: Are We Nuts?}, 52 \textit{DePaul L. Rev.} 299, 310 (2002). Thus, there are not nearly enough judges to replace lawyers as the primary drivers behind pretrial discovery. \textit{Id. See also} Resnick, \textit{supra} note 158, at 423-24 (“The judge's time is the most expensive resource in the courthouse.”).

\textsuperscript{161} See Carrington, \textit{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, \textit{Litigation and Democracy: Restoring a Realistic Prospect of Trial}, 46 \textit{Harv. C.R.-C.L. L. Rev.} (forthcoming 2011) (manuscript at 4-8).


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would otherwise play a minimal role.\footnote{See Subrin, supra note 153, 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 note 64 and accompanying text (noting that a large number of cases involve minimal or no discovery).} Robert Bone has suggested that giving judges discretionary control over discovery leads parties to contest decisions, which increases costs and compounds the opportunities for strategic abuse.\footnote{Robert G. Bone, Who Decides? A Critical Look at Procedural Discretion, 28 CARDOZO L. REV. 1961, 1964 (2007).}

Indeed, the American legal system demonstrates a historic distrust of giving this much power to a single entity, such as the judge.\footnote{Subrin, supra note 161, at 309.} 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.\footnote{Id.} Although certain amounts of judicial discretion will always be necessary, and will most often be 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 variation on nontranssubstantivity, which until now this Article has 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 take the subject matter of the suit into account when assigning the case to a track in certain situations.

So that they would be applicable in all cases, the Federal Rules of Civil Procedure were designed for complex litigation.\footnote{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).} Professor Weber has argued, therefore, that greater efficiency
can be obtained through the creation of rules specifically for simple or low-stakes litigation.\textsuperscript{168}

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.\textsuperscript{169} Rules aimed at limiting discovery in smaller cases may be particularly effective, therefore.

A number of states have implemented variations of the value-of-claim tracks model.\textsuperscript{170} Texas has implemented a three track system which treats differently cases wherein the claim is valued under $50,000, those where the claim is for more than $50,000, and exceptional cases that are subject to court-crafted discovery plans.\textsuperscript{171} Alaska rules limit discovery specifically in personal injury or property damages cases involving under $100,000.\textsuperscript{172} South Carolina rules only allow physical or mental examinations in cases where the amount in controversy is greater than $100,000\textsuperscript{173} and oral depositions where the amount in controversy is greater than $10,000 unless the parties agree or the court orders the deposition.\textsuperscript{174} Additionally, parties may only serve nonuniform interrogatories on other parties in cases valued at $25,000 or more\textsuperscript{175}

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

\textsuperscript{168} 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”).

\textsuperscript{169} 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.”).

\textsuperscript{170} Moskowitz, supra note 129, at 125.

\textsuperscript{171} See Weber, supra note 23, at 1064-65 (describing Texas’ tracking system).

\textsuperscript{172} ALASKA R. CIV. P. 16(g).

\textsuperscript{173} S.C. R. CIV. P. 35(a).

\textsuperscript{174} S.C. R. CIV. P. 30(a)(2).

\textsuperscript{175} S.C. R. CIV. P. 35(b)(9).
based on the old English Judicature Acts of 1873 and 1875. Disclosure operated in a manner similar to the American system, except that relevancy was defined more narrowly. In 1999, however, the English procedural system underwent major reforms led by Lord Woolf. The reforms were meant to emphasize case management and pre-trial research. Under the new rules, lawyers are subject to sanctions for filing frivolous writs. The reforms also heightened the pleading standards. The case management system operates along three tracks: small claims, claims worth £5,000 to £15,000, and claims worth over £15,000. The small claims track is handled with minimal supervision. 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. The larger cases, however, are given extensive hands-on judicial management. Thus, the English system combines value-of-claim tracking and active judicial case management. Anecdotal evidence suggests that the reforms are working, with lawyers spending more time thinking about case strategy rather than engaging in a discovery war of monetary attrition.

Professors Stephen Burbank and Stephen Subrin have suggested implementing a tracking system based on the value of the claim in the federal system. Like the British, they would adopt proportionality as the foundational principle behind the discovery rules. The tracking

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177 Id.
178 Id. at 304.
179 Id.
180 Id.
181 Id. at 305.
182 Id.
183 Miller, supra note 10, at 121.
184 Id.
185 Subrin, supra note 161, at 305.
186 See id. (citing “[t]he head of litigation of a national firm in the United Kingdom” as saying that under the reformed rules law firms spend more time strategizing before beginning discovery).
187 Burbank & Subrin, supra note 162 (manuscript at 16-21).
188 Id. (manuscript at 15-16). 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
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, with the exception that cases in which private litigants play a role in enforcing public law, as identified by specific factors such as statutory multiple damages provisions, would always be placed in the complex track. Track assignments would be made by federal judges (rather than court clerks) and would be unreviewable, ensuring that those assignments do not lead to additional disputes and create delay and expense in themselves.

For the simple track cases, the breadth of discovery currently available under the federal rules would not be proportional, so lower limits might be set on the number of depositions or interrogatories permissible. The rules might require more specificity in document requests. Because the simple cases usually involve little discovery under the current rules, the real cost savings would probably come in being able to eliminate the many procedures, such as mandatory disclosure, discovery conferences, and pretrial conferences, that have been implemented in an attempt to control discovery in complex cases.

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

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189 Acknowledging that the line would of necessity 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 162 (manuscript at 20).
190 Id. (manuscript at 20); Subrin, supra note 5, at 400. See also Weber, supra note 168, 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”).
191 Burbank & Subrin, supra note 162 (manuscript at 19).
192 Id. (manuscript at 17-18); Subrin, supra note 5, at 399.
193 Burbank & Subrin, supra note 162 (manuscript at 19); Subrin, supra note 5, at 398.
194 Burbank & Subrin, supra note 162 (manuscript at 17); Subrin, supra note 5, at 399-400.
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.

A value-of-claims approach to nontranssubstantivity, however, would not be enough to fix the discovery system. Unless such a system is 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, discovery procedures that only track the amount in controversy might lead in some situations to the available procedures being disproportionate to the importance of the case, as measured not by the potential monetary award but by social gain or other factors. Even a value-of-claims approach that accounts for non-monetary 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 these types of proportionality, the procedures must be attuned to the case type.

A pure value-of-claims approach would also not 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 procedure to cases based solely on the value of the claim would allow for no way to make these adjustments.

Moreover, it would be difficult to valuate 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 168, at 134 (“Perhaps all cases for injunctive relief other than those seeking recovery of specified property worth less than a given dollar amount ought to be excepted from the operation of the small claims rules.”).
Finally, as Professors Burbank and Subrin note, a value-of-claims system would not rein in the costs of discovery in cases on the complex track (high-stakes cases).\textsuperscript{196} The complex track would still need to allow for a range of broad discovery procedures in order to provide for the cases that actually need 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 the 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 tracks model. The base of the discovery system should be nontranssubstantive at the case-type level so that the discovery devices and scope permitted 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 most narrowly.

Even once the procedures are narrowed in type and scope to the needs of the substantive area, however, in certain types of cases it may be necessary to make alterations in the discovery rules based on the value of the claim to 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,

\textsuperscript{196} Burbank & Subrin, \textit{supra} note 162 (manuscript at 20).
automatic initial disclosures will not be required in any case where the amount in controversy is less than $250,000.\footnote{Such mechanisms will not necessarily be available for every case-type. Litigation in some substantive areas may be so simple that a discovery conference would be unnecessary regardless of the value of the claim.}

Finally, active judicial management will also be necessary in certain types of complex litigation. Discovery in the most complex types of cases, when dealing 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 particular discovery demanded in the context of the case. Judges may also need to take an active role, prior to the start of discovery, 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,\footnote{See supra notes 157-67 and accompanying text.} such discretion can never be totally eliminated. The goal of crafting narrow, nontrans substantive rules will only be to reduce the amount of discretion that individual judges will need to exercise to the greatest degree possible.

A system of layered trans substantiveity like that proposed is necessary to ensure proportionality in a number of different ways.\footnote{See infra text accompanying note 207 (describing different measures of proportionality).} 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 restricting the opportunity for abuse. Rulemakers might also allow for broader discovery in civil rights litigation, for instance, determining that a socially-optimal allocation of resources dictates that more time and money be spent resolving those controversies.
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. The final layer of 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

1. Using Discovery to Promote Procedural Justice

Before rulemakers create a system of nontranssubstantive rules it must first be determined what factors the rulemakers will consider. In many ways, these guiding principles will be the same that are always employed when rulemakers craft procedural rules. However, because nontransubstantive rules will be narrowly crafted to fit the substance of the 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,\(^\text{200}\) in crafting substance-specific procedure, rulemakers will have to make value judgments and should confront this challenge openly.

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.\(^\text{201}\)

I would add to this list the value of equal treatment. Rulemakers may also take a sociological approach, designing procedure keeping in mind the political, social, or economic effects of the

\(^{200}\) See supra text accompanying notes 85-88.

rules. 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. More extensive discovery might thus be needed in civil rights litigation to impart a feeling of transparency in such matters. Predictability might be obtained in contract disputes, on the other hand, 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. It is especially important in litigation where a party with fewer resources files suit against a more powerful, better-resourced adversary, that the smaller party be made to feel that it has been given the opportunity to develop fairly the factual record despite 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.

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202 Id. at 142.
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.\(^{203}\) About 45% of plaintiff attorneys and 39% of defendant attorneys agreed or strongly agreed that the discovery increased the fairness of the outcome.\(^{204}\) Only about 12% of plaintiff attorneys and 14% of defendant attorneys disagreed or strongly disagreed with the statement, with the rest ambivalent or refusing to answer.\(^{205}\) 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 will 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 nontranssubstantive discovery rules is proportionality. Since the reforms of 1999, the British procedural system seeks to attain four types of 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.”\(^{206}\) As discussed above, nontranssubstantive rules are particularly well suited to provide proportionality in each of these areas.\(^{207}\)

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 (defendants usually have access to the information and are thus the

\(^{203}\) LEE & WILLGING, supra note 53, at 29-30.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) Civ. P. R. (Eng.) 1.1(2) (2010).
\(^{207}\) See supra text accompanying note 200.
producing party). Rulemakers will need to be conscious of how this choice will affect incentives to litigate or to settle.\textsuperscript{208}

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.\textsuperscript{209} 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.

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. This problem can be dealt with through transparency and by allocating the task of rulemaking to the correct bodies, however.\textsuperscript{210}

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. Designing nontranssubstancive rules will present rulemakers with the question of to what degree they want to craft procedures that will promote the substantive goals of litigation. Private litigation that enforces federal statutes constitutes a particular set of cases in which rulemakers may want to further substantive goals.


\textsuperscript{209} Cf. Subrin, \textit{supra} note 202, at 147 (suggesting that this insight likely comes from the Law and Economics movement).

\textsuperscript{210} See infra Part V.D.
Recent literature has recognized that it is often a matter of legislative choice to encourage private litigation as an enforcement mechanism for federal law.\textsuperscript{211} 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.\textsuperscript{212} When Congress encourages private litigation, citizens are being enlisted as law enforcement officials.\textsuperscript{213} 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.\textsuperscript{214}

Congress can encourage such private litigation by influencing access to the plaintiff status,\textsuperscript{215} the expected benefits of litigation,\textsuperscript{216} the probability of prevailing,\textsuperscript{217} or the expected cost of the litigation.\textsuperscript{218} Granting broad discovery rights in this kind of litigation confers upon private litigants the kind of investigatory powers normally bestowed upon federal agencies, giving citizens the power to compel sworn testimony or the production of documents.\textsuperscript{219} 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.\textsuperscript{220} Conflicts between the legislative and executive branches will push Congress to rely on private

\textsuperscript{211}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.”).
\textsuperscript{212}Id. at 4.
\textsuperscript{213}Id. at 9.
\textsuperscript{214}See id. at 4 (describing Congress’ choice to encourage a robust scheme of private enforcement of the Civil Rights Act).
\textsuperscript{215}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.
\textsuperscript{216}Providing for minimum damages or triple damages will raise the potential award for a successful plaintiff. Id.
\textsuperscript{217}The probability of prevailing can be influenced through, among other ways, changing burdens of proof, standards of proof, or rules of evidence. Id.
\textsuperscript{218}Filing fees and attorney fee-shifting provisions are examples of ways in which the expected cost of litigation can be altered. Id.
\textsuperscript{219}Id. at 8.
\textsuperscript{220}Id. at 5.
litigation as a method of statutory implementation, as a way to bypass the enforcement role of a hostile executive branch.\textsuperscript{221} Derailing private enforcement can only be done through the difficult legislative process of repeal and cannot be accomplished by the executive alone.\textsuperscript{222}

Professors and 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).\textsuperscript{223} They see broader discovery rules for these cases as a way of promoting the legislative intent. 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.\textsuperscript{224}

It truly is an advantage of nontranssubstantive rules 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 where that is the goal, and should be seen as an effective tool in the adjustment of litigant rights in many substantive areas. In crafting nontranssubstantive rules, rulemakers will certainly have to, and should, decide how they can influence the rights of the parties through the rules. It must be acknowledged that procedure plays a large role in influencing substantive outcomes. Indeed, Congress has shown its

\textsuperscript{221} Id. at 18.
\textsuperscript{222} Id. at 5.
\textsuperscript{223} Burbank & Subrin, supra note 162 (manuscript at 20).
\textsuperscript{224} Courts of equity have traditionally seen it as outside of their role to promote the enforcement of penalty provisions, perhaps because they recognized the close connection between such provisions and the enforcement of underlying substantive rights. See supra note 91.
willingness to alter procedure as a method of accomplishing substantive goals.\textsuperscript{225} Especially because Congress has demonstrated that it will alter procedural rules where it finds that necessary to adjust the level of enforcement of particular statutes, however, this Author is wary about allowing rulemakers in the \textit{judicial} branch to make these determinations.\textsuperscript{226}

C. \textit{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 case-types where certain sets of information will always aid the process of the litigation, a required core of discovery should mandate disclosure of that information with as much specificity as possible.\textsuperscript{227}

Further, pattern interrogatories and pattern requests for production should be developed to make more efficient and less costly the discovery of other basic materials.\textsuperscript{228} Pattern discovery rules would set forth the types of requests that should be honored quickly and without dispute.\textsuperscript{229} Parties would use pattern discovery requests as necessary. There would be a strong

\begin{small}
\textsuperscript{225} See \textit{supra} notes 94-95 and accompanying text.
\textsuperscript{226} See \textit{infra} Part V.D (advocating for a rulemaking committee situated in the legislative branch).
\textsuperscript{227} See Subrin, \textit{supra} note 110, at 48 (advocating a clear description of the required core discovery in particular case-types).
\textsuperscript{228} See \textit{supra} notes 100-05 and accompanying text (describing recent efforts to develop pattern discovery for employment discrimination litigation); \textit{supra} notes 129-34 and accompanying text (describing pattern interrogatories in the states). The recent efforts to develop pattern discovery in the federal system represent an important start in this process. Pattern discovery should be developed for litigation in a wide range of substantive areas.
\textsuperscript{229} 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 Joseph D. Garrison & Rebecca M. Hamburg to Mark R. Kravitz, \textit{supra} note 101, at Attachment 2. 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. \textit{Id.} at Attachment 3.
\end{small}
presumption that interrogatories and requests for production set out in such rules would be reasonable, thus discouraging parties 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 in 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 develop their case.

While many cases may not require discovery beyond that provided for in the required core discovery or pattern discovery, further reforms are necessary for those cases that will require extensive discovery beyond those initial requests. A recent report put out by the American College of Trial Lawyers Task Force on Discovery 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.\(^{230}\)

These limitations would generally be presumptive rules subject to alteration by the court upon a showing of good cause.\(^{231}\) Examining specific case-types would allow rulemakers to consider

\(^{230}\) IAALS REPORT, supra note 1, at 10-11.
\(^{231}\) See Subrin, supra note 110, 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.”).
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 amounts of
documents subject to discovery. 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. 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 where pro se
representation is more common, or is to be encouraged. For instance, discovery rules might be
simplified in certain types of prisoner litigation where over 93% of cases are filed pro se.

The greatest source of cost and the most difficult discovery device to limit is document
discovery. Requiring greater specificity in demands for documents, where possible, may help
reduce the costs of searching for and producing those documents. 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). Creating
nontrans substantive rules would allow each of these reforms to reflect the unique opportunities

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232 See id. at 49 (“Concentrating on specific case-types should enable the drafters to frame some rules which offer
more definition and constraint in advance of litigation, such as allegations deemed specific for the case-type. . .
normal lengths of time for litigation stages, norms for numbers of depositions and interrogatories, usual types of
witnesses and documents to be divulged, and the degree of specificity to be provided regarding witness
knowledge.”).

233 Id.

234 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).

235 See CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER
/2009/tables/S23Sep09.pdf (providing data on pro se filings across the states).

236 See supra notes 61-62 and accompanying text.

237 See Burbank & Subrin, supra note 162 (manuscript at 19) (“[A] rule requiring that document requests . . . be
specific may help to solve the problem of the cost of searching for responsive documents . . . .”).

238 See id. (suggesting “a time-window keyed to an objective characteristic of the litigation”).
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 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 bar to develop discovery protocols.\(^\text{239}\) The proposal presents the possibility that through discussion and negotiation, innovative solutions can be found to address the rising burdens of discovery.\(^\text{240}\) 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.\(^\text{241}\) Because nontranssubstantive discovery rules will of necessity be more complex and will have to respond to the particularities of different types of litigation, this 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.\(^\text{242}\) The National Employment Lawyers Association, a group composed of members of the plaintiffs employment

\(^{239}\) Id. (manuscript at 21); see also Subrin, supra note 5, at 405 (suggesting also possibly including clients in the rulemaking process).

\(^{240}\) But see Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 GEO. L.J. 887, 916-17 (1999) (arguing that Congress is the institution for consensus-building, and that consensus building in court rulemaking is unrealistic and may be unwieldy).

\(^{241}\) 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”).

\(^{242}\) See supra notes 100-05 and accompanying text.
bar, is working with a group from the Institute for the Advancement of the American Legal System, a group of management-side attorneys. 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.

The question also arises whether the judicial branch can properly make nontranssubstantive discovery rules. The Rules Enabling Act, which authorizes the Federal Rules of Civil Procedure, directs that procedural rules “shall not abridge, enlarge or modify any substantive right.” Under the Supreme Court’s current interpretation of this clause, the proper test to determine the validity of a judicially-promulgated rule is “whether a rule really regulates procedure, -- [sic] 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.”

Although case-type-specific discovery rules might be permissible under this wooden reading of the Rules Enabling Act, if rulemakers were forced to make value judgments in their determinations of which rules should apply in which types of cases, as they surely would be forced to do in nontranssubstantive rulemaking, the discovery system that resulted from such a system would surely “modify” substantive rights.

By directing that procedures promulgated by the Supreme Court should stay away from modifying the substantive law, the Rules Enabling Act implies that value-neutrality is possible in

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243 See Memorandum from Joseph D. Garrison & Rebecca M. Hamburg to Mark R. Kravitz, supra note 101, at 1-2 (describing the formation of an Employment Protocols Committee); Memorandum from Mark R. Kravitz to Lee H. Rosenthal, supra note 100, at 14 (describing the committee as “including strong representation of both plaintiff and defense lawyers”).


246 Sibbach v. Wilson, 312 U.S. 1, 14 (1941).
procedure. As noted above, the goal of value-neutrality was one factor that pushed the drafters of the original federal rules toward transsubstantivity. More recently, scholars have attacked the notion of value-neutral procedures. The substantive nature of procedure is even more obvious, however, in nontranssubstantive rules. The substantive nature of such rules would be more obvious still, if rulemakers were to shape discovery rules to respond to signs in legislation (such as attorney fee-shifting provisions or statutory damages) and strengthen a legislative intent to promote private litigation as an enforcement mechanism of statutory law.

To the extent that more expansive discovery encourages litigation by increasing the chances of the plaintiff prevailing, it modifies the existing rights and liabilities of those governed by the laws. Thus, under the current statutory scheme allocating 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.

Nontranssubstantive rules

247 See Marcus, supra note 83, at 395-97 (describing contemporary views about the “substance-procedure dichotomy”).
248 See supra text accompanying notes 85-89.
249 See supra Part V.B.2.
250 There will certainly be some rules that can properly be made 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 do not 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. Rules Enabling Act, 28 U.S.C. § 2074 (2011). For truly procedural rules, this system works best in that rules designed to aid the conduct of the judicial business can be made effective without Congress
provide expanded opportunity for interest groups to influence rulemakers.\textsuperscript{252} They also present the opportunity for negotiation and compromise among interested groups.\textsuperscript{253} The legislative branch is the more appropriate institution for consensus-building and managing the politics of competing interest groups.\textsuperscript{254} Nevertheless, the judiciary should be actively involved in the rulemaking process, as it is clearly better equipped to evaluate existing procedures and create an integrated system of rules.\textsuperscript{255} 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 bar, 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 likely. To some, the problems with the current system of discovery stem having to undertake the slow legislative process of statutory enactment. The Author only asserts 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. \textit{Cf.} Stephen B. Burbank, \textit{The Reluctant Partner: Making Procedural Law for International Civil Litigation}, \textsc{Law \& Contemp. Probs.}, Summer 1994, at 145-46 (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). \textsuperscript{252} \textit{Cf. supra} notes 107-08 and accompanying text. \textsuperscript{253} \textit{See supra} notes 240-44 and accompanying text. \textsuperscript{254} Professor Paul Stancil argues that committee rulemaking helps to lessen the influence of interest groups. \textit{See} Paul J. Stancil, \textit{Close Enough for Government Work: The Committee Rulemaking Game}, 96 \textsc{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, opening up Congress members to misinformation; (2) unlike Congress members, the judges and academics that make up the rule advisory committees do not rely on campaign contributions from interest groups to get reelected. \textit{Id.} at 120. To the extent that lobbying does take place even in committee rulemaking and would increase with a nontranssubstantive system, a committee of judges, academics, and lawyers located in the legislative branch would benefit from 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 to consider competing interests openly and reach satisfactory compromises. \textit{See} Bone, \textit{supra} note 241, at 916-17 (“The legislature is the institution in our democracy that is designed to accommodate interests . . . .”)

\textsuperscript{255} \textit{See Bone, supra} note 241, 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.”).
from abuse and overuse of the system that costs litigants unreasonable amounts, keeping worthy plaintiffs out of court and forcing worthy defendants to the settlement table. Although exorbitant discovery does occur in some cases, the degree to which runaway discovery costs actually occur 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 that drain the resources of the federal courts and judiciary. Although these charges are also certainly accurate in some cases, the empirical evidence of the costs created by needless discovery procedures is also uncertain.

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 case-type and that respond to the unique needs and circumstances presented by different types of litigation. Some further layer of value-of-claim tracks 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 the issues that cannot be predicted by rulemakers creating a system ex ante. These reforms would prevent some of the abuse of discovery in cases where discovery costs are currently too high by narrowly tailoring rules to case-type, ensuring 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 where minimal or no discovery is needed, helping to reduce costs for small-claims plaintiffs and the judicial system; this 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 such a system, and the specialist lawyers who run the more complex cases would easily be able to understand fully 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 given the needs of the particular litigation.

A primary difficulty that would doubtless arise in drafting nontranssubstantive rules is that rulemakers would need to make value-based decisions in crafting 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 probably make the most sense for functional and political reasons.

Discovery reform towards 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. Rulemakers could start by creating discovery rules to be 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

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256 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. See Jeremy Counseller, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 Miss. L.J. 519, 521 (2009) (“These amendments were the product of a decade and a half of work by members of the Standing Committee on Rules of Practice and Procedure, the Style Subcommittee, the Advisory Committee on Civil Rules, and their style consultants.”).
demonstrate in which types of cases discovery leads to the most waste and abuse; rulemakers should focus their initial efforts on these case types.\textsuperscript{257}

   The current discovery system imposes costs on litigants and the court system that are too burdensome to ignore. Although a move to nontranssubstantive 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, and greater predictability for lawyers and clients with regard to both the cost and conduct of litigation.

\textsuperscript{257} See supra note 74 and accompanying text.