

DISCOVERY AS REGULATION

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This article develops an approach to discovery that is grounded in regulatory theory and administrative subpoena power. The conventional judicial and scholarly view about discovery is that it promotes fair and accurate outcomes and nudges the parties towards settlement. While commonly held, however, this belief is increasingly outdated and suffers from limitations. Among them, it has generated endless controversy about the problem of discovery costs. Indeed, a growing chorus of scholars and courts have offered an avalanche of reforms, from cost shifting and bespoke discovery contracts to outright elimination. Recently, Judge Thomas Hardiman quipped that if he had absolute power he would abolish discovery for cases involving less than \$500,000. These debates, however, are at a standstill and existing scholarship offers incomplete treatment of discovery theory that might move debates forward.

The core insight of the project is that in the private enforcement context—where Congress deliberately employs private litigants as the main method of statutory enforcement—there is a surprisingly strong case that our current discovery system should be understood in part as serving regulatory goals analogous to administrative subpoena power. That is, discovery here can be seen as an extension of the subpoena power that agencies like the SEC, FTC, and EPA possess and is the lynchpin of a system that depends on private litigants to enforce our most important statutes. By forcing parties to disclose large amounts of information, discovery deters harm and, most importantly, shapes industry-wide practices and the primary behavior of regulated entities. This approach has a vast array of implications for the scope of discovery as well as the debate over costs. Scholars and courts should thus grapple with the consequences of what I call “regulatory discovery” for the entire legal system.

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Introduction

Discovery is the backbone of American litigation and sits at the center of a constellation of procedural doctrines. It has shaped pleading standards, qualified immunity, and summary judgment jurisprudence, and, as a practical matter, determines settlement negotiations, case outcomes, and the prevalence of trials.¹ Across a range of contexts, from civil rights to antitrust and employment claims, discovery is often outcome determinative. Perhaps because of its centrality in the system, no single procedure generates more controversy. Critics cast discovery as unconstrained, burdensome, overly costly, intrusive, and “nuts.”² Supporters, by contrast, argue that complaints about discovery costs are empirically unproven and that discovery provides “public benefits.”³ A growing chorus of commentators from both camps and even courts have offered an avalanche of reforms ranging from cost shifting and bespoke discovery contracts to outright abolition.⁴ But despite such offers, existing scholarship on discovery theory, to the extent it might serve as a guide to those reforms, is incomplete. Addressing discovery’s fundamental underpinning is essential to any clear-eyed assessment of proposed changes. The resulting challenge is apparent: how can we rationalize our discovery system and the core purposes it serves?

This Article tackles the discovery morass with the goal of building a firm theoretical footing for parts of the discovery system. My most basic aim is to complement discovery’s traditional foundations in principles of fairness, equality, and settlement with a reconceptualization that draws on regulatory theory and administrative subpoena power. With a better understanding of how discovery could and should work, I hope to then reassess our most important discovery doctrines and scholarly debates in a fuller and more helpful light. The Article thus undertakes the following two goals, among many others:

First, it aspires to clarify the burdens of a current obsession with discovery costs—including the judicial creation of satellite doctrines that close access to court, like qualified immunity and higher

¹ John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 527 (2012).

² Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 637 (1989); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

³ Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684-85 (1998). See generally STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

⁴ See e.g., Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS. L. REV. 1317 (2019); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

pleading standards. While the Supreme Court dodges deeper questions about discovery, it often focuses on the back end of the system—its costs. This dearth of theory and constitutional analysis has atrophied discovery discourse. From the Supreme Court’s decisions to raise pleading standards in *Twombly* and *Iqbal*, to the attempt to protect police officers from time-consuming depositions, discovery costs have become a justification for restrictive procedure. But tethering discovery to other doctrines like pleading and qualified immunity is potentially destabilizing. It means that as technological changes like machine learning⁵ or Advisory Committee amendments potentially reduce discovery costs, discovery-dependent doctrines should immediately adjust: *Twombly* and *Iqbal* would be redundant; rules that encourage settlement unnecessary; qualified immunity obsolete; and even “rigorous” policing of class actions outdated. Although this cascading effect is logically necessary, courts are likely to ignore the consequences and leave in place outdated doctrines.

Second, the Article offers a theoretical structure and new vocabulary to move debates over discovery forward into new territory—that is to say, more productive discussions that engage with the ultimate goals of the system and whether the rules are serving those goals. When it comes to discovery, courts often glide by underlying theories, embracing the simplified view that discovery can be justified because a full exchange of information results in a fair and accurate resolution of a dispute, promotes the ends of equal justice,⁶ and ameliorates asymmetries between one-shot plaintiffs and repeat player defendants.⁷ Moreover, by forcing the parties to reveal all their arguments and evidence, discovery narrows issues for trial and nudges the parties towards settlement.⁸ But this fairness-accuracy-settlement mantra suffers from significant limitations because it overlooks the role that discovery plays in private enforcement cases. Taking that role into account transforms the ultimate goals of parts of the system and

⁵ See David Freeman Engstrom & Jonah Gelbach, *Legal Tech, Civil Procedure, and the Future of American Adversarialism* 30-41 (on file with author).

⁶ See *infra* notes xx-xx; Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1302 (1978).

⁷ See *infra* notes xx-xx; Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 287 (2004).

⁸ See *infra* notes xx-xx; Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 436 (1994). Langbein, *Disappearance*, *supra* note xx, at 533; Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 950-54 (2004). The main drafter of the discovery rules, Edson Sunderland, argued that broad discovery would be a boon because it would make trials unnecessary. Edson R. Sunderland, *Improving the Administration of Civil Justice*, in 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 75 (1933). See also Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 734, 736 (1998).

offers a dose of comfort: within the American private enforcement scheme—one that relies on private litigants to enforce important statutes—our discovery rules make sense and offer an array of benefits.

At the center of the Article is a theory of private discovery that addresses these questions with a regulatory model grounded in administrative power.⁹ A long and rich literature has described how the United States depends largely on private plaintiffs to enforce important statutes in contexts like employment, environmental protection, antitrust, and civil rights.¹⁰ In these cases, private lawsuits become a regulatory tool and the legal system transforms from one where “one citizen can seek redress from another in an orderly fashion,”¹¹ into one where citizens or groups of citizens can enforce the law for systemic regulatory purposes.¹² I extend this literature to argue that in a lawsuit-as-regulation system, discovery is the lynchpin of private enforcement. By forcing parties to disclose large amounts of information, the discovery system deters harmful behavior, structures the regularized production of information within corporations, and, most importantly, shapes the primary behavior of regulated entities.¹³ Discovery

⁹ Some scholars have previously argued in favor of—but not fully explored—this justification. *See, e.g.*, Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997) (“Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.”); Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) (“Private litigants do in American much of what is done in other industrial states by public officers working within an administrative bureaucracy.”); BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note xx, at 70 (“Discovery under the 1938 Federal Rules conferred on private litigants and their attorneys the functional equivalent of administrative subpoena power.”); Stephen B. Burbank, *Proportionality and the Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 651-54 (2015) (noting the agency subpoena’s strength as a regulatory tool and arguing that, to ensure “proportionality [does not] become a deregulatory tool,” judges must “resist the temptation to privilege . . . private over public interests” in discovery rulings). However, this theory and its many implications have not been fully developed.

¹⁰ *See infra* notes xx. *See also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 9 (2001) (emphasizing litigant participation as central to the “American way of law”); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1141 (2012) (arguing that private enforcement mechanisms are “often an institutional feature of our public law”). *See also* Nora Freeman Engstrom, *When Cars Crash: The Automobile’s Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 305-308 (2018) (discussing the “much larger regulatory fabric,” enforced by private causes of action, around auto claims).

¹¹ Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL’Y 67, 69 (2000).

¹² This is, of course, a contested view rejected by eminent scholars. For example, Martin Redish challenges the legitimacy of such a view and argues that litigation cannot have a regulatory role, especially through procedural vehicles like class actions, without violating the Rules Enabling Act. *See e.g.*, MARTIN REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE CLASS ACTION LAWSUIT (2009). I set these debates aside here.

¹³ Among others, I draw on three literatures that have produced related insights. First, research finding that discovery can unearth otherwise-hidden information on

therefore serves an important purpose in a legal system that relies on private litigants to enforce the law.

While this view of discovery-as-regulation has been discussed by some scholars, the Article at its core pushes the theory forward and fully develops it by focusing on the analogy to administrative subpoena power.¹⁴ That power is the absolute “backbone of an administrative agency’s effectiveness,” because it gives agencies “the ability to investigate rapidly the activities of entities within the agency’s jurisdiction.”¹⁵ Agencies can issue *ex parte* subpoenas for vast amounts of regulated entities’ information.¹⁶ The SEC, for example, routinely requests burdensome productions of financial documents.¹⁷ The FTC demands thousands of pages related to any potential merger. The EPA,

corporate misconduct and lead to internal corporate reforms. *See e.g.*, Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law,”* 63 EMORY L.J. 1383 (2014) (arguing that discovery has shaped corporate law); Joanna Schwartz, *Introspection through Litigation*, 90 NOTRE DAME L. REV. 1055 (2015) (arguing that litigation allows companies to engage in “introspection” about internal behavior that would otherwise go unrecognized). Scholars have studied this phenomenon in several areas, including medical malpractice, *see* TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2005); Joanna C. Schwartz, *A Dose of Reality for Medical Malpractice Reform*, 88 N.Y.U. L. REV. 1224 (2013); gun litigation, *see* Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837 (2008); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693 (2007); clergy-sexual-abuse litigation, *see* Lytton, *Regulatory Policy Making*, *supra* note xx; and breast implant litigation, *see* Wagner, *supra*, at xx. Second, the long line of works that describe litigation more generally as a form of regulation. *See e.g.*, *infra* note xx; Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005); SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 60, 64-65 (2010); Glover, *Structural Role*, *supra* note xx. Finally, work in the intersection of torts and civil procedure that focuses on litigation’s public benefits in a variety of tort-related contexts. *See generally* ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (2017); *see also* Engstrom, *When Cars Crash*, *supra* note xx, at 328-335 (auto); Robert L. Rabin, *Poking Holes in the Fabric of Tort: A Comment*, 56 DEPAUL L. REV. 293, 302 (2007) (asbestos, tobacco, and medical instruments).

¹⁴ Steve Burbank and Sean Farhang have previously noted this resemblance. BURBANK & FARHANG, *RIGHTS AND RETRENCHMENT*, *supra* note xx, at 70 (“[d]iscovery under the 1938 Federal Rules conferred on private litigants and their attorneys the functional equivalent of administrative subpoena power.”); Burbank, *Proportionality and the Benefits of Discovery*, *supra* note xx, at 651-54. But the analogy remains underexplored and this Article is the first to undertake a comprehensive comparison between private discovery and administrative subpoena power.

¹⁵ Jack Campbell, *Revoking the “Fishing License.” Recent Decisions Place Unwarranted Restrictions on Administrative Agencies’ Power to Subpoena Personal Financial Records*, 49 VAND. L. REV. 395, 396 (1996).

¹⁶ *See infra* notes xx.

¹⁷ *See infra* notes xx.

too, makes regular inquiries into environmental polluters. Civil discovery's broad scope is partly an extension of this power. Congress enacted a wide variety of broad statutes and has delegated enforcement to private plaintiffs rather than agencies.¹⁸ In order for these statutes to succeed, just as the FTC, EPA, and SEC possess subpoena powers, so too plaintiffs need powerful discovery tools. Beyond individual cases, discovery promotes regulatory goals by influencing the way that companies run internal investigations, how management structures operations, and how regulators formulate new rules.¹⁹ To be sure, plaintiffs lack the democratic and public legitimacy of agency officials so their private tools cannot, and do not, fully mirror agency power. But I argue extensively that, for many reasons—including the distorted incentives of public enforcers and the fact that Congress's choice to arm private plaintiffs with this discovery power confers a measure of democratic legitimacy in itself—this difference does not weaken the legitimacy or effect of regulatory discovery.

Conceptualizing discovery as a regulatory tool should transform our current understanding of litigation as regulation and also changes the problem of discovery costs into a comparative question. Whether discovery costs are too high should depend less on a case's amount in controversy and more on whether the case generates proportional regulatory benefits and fewer costs *than a comparable agency investigation*. In discovery disputes, courts and litigants should explicitly consider this comparison. This is not to say that agency costs are optimal, but only that an agency investigation is the conceptual alternative to private enforcement and is therefore a good point of reference. Costs, in this sense, have little to do with the individual interests of litigants. They instead must take into account the systemic benefits of enforcing a statute in a context where Congress chose private plaintiffs to investigate wrongdoing. Thus, complaints about discovery costs must grapple with the burdens of agency subpoena powers in the first place. Discovery is an alternative to—and an outsourced version of—administrative regulation.

The bulk of the Article discusses the intricacies of regulatory discovery, but a brief example demonstrates its implications. In a 2005 case against Disney, plaintiff-shareholders claimed that the company had corruptly awarded \$140 million dollars to an outgoing executive.²⁰ Discovery in the case was substantial: 9,000 pages of transcripts, extensive business records, and detailed private correspondence. Under a traditional understanding of discovery—the fairness-accuracy-settlement view—all of this information exchange was a waste because the court ultimately found (at trial) that Disney was *not*

¹⁸ FARHANG, LITIGATION STATE, *supra* note xx at xx.

¹⁹ See Gorga & Halberstam, *supra* note xx at xx.

²⁰ *Id.* at 1401.

liable. But take a regulatory and systemic view and things look very different. Disney’s board, along with a series of competitors and peers, completely reformed their governance structures based on documents produced in discovery.²¹ This extensive information also allowed the court to “articulate[] new standards of fiduciary duty,” gave lawyers new tools “to get their clients to accept better conduct and procedures,” and even informed new SEC regulations.²² Discovery, in other words, regulated system-wide corporate behavior.

With this discovery theory in view, the Article then offers a few primary contributions. To begin, whereas discovery scholarship focuses on individual issues, such as costs or the language of Rule 26, this Article is the first to tie background justifications together into a single theoretical framework—one that can inform each court’s discovery analysis. This discussion of theory highlights discovery’s relationship to values like accuracy, regulation, and fairness. This also allows the Article to make a normative case for how courts should carry out discovery inquiries. Discovery is a plural device with multiple justifications and both individual as well as systemic implications. For example, whereas fairness and equality theories sound in individual rights, regulatory discovery, by contrast, is only systemic. So in private enforcement cases, courts should err on the side of broad discovery by interpreting “proportionality” in relation not only to the needs of the specific case, but to the needs of the relevant statutory regime and industry. Moreover, the breadth of discovery should be related to whether the statutory regime depends largely, somewhat, or only scarcely, on private enforcement. The more a regime depends on private enforcement, the broader discovery should be, and *vice-versa*. The Article otherwise adds to an emerging literature on the fruitful interaction between administrative law and civil procedure.²³

Additionally, the Article develops a better vocabulary for describing regulatory discovery’s implications, so that public discussions can be better informed. Just in the past year, arguments about discovery have gone mainstream. Judges Hardiman and Thapar recently proposed to abolish discovery for cases “worth less than \$500,000.”²⁴ Judge Hardiman lamented the loss of jury trials, too. But

²¹ *Id.* at 1402.

²² *Id.* at 1427, 1427 (citations omitted).

²³ See e.g., David Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403 (2019); Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017); Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013).

²⁴ Debra Cassens Weiss, *Judge on Trump’s Supreme Court Short List Proposes Discovery Ban for Cases Worth Less Than \$500K*, A.B.A. JOURNAL (Dec. 10, 2018), http://www.abajournal.com/news/article/judge_on_trumps_supreme_court_shortlist_proposes_discovery_ban_for_cases_wo.

these critiques overlook many of discovery's core purposes. With an institutional view in mind, it's clear that discovery can limit trials in order to save costs and avoid the burden of impaneling a jury. Similarly, under regulatory discovery, the amount in controversy may be irrelevant—what matters more is whether a plaintiff is enforcing a statute that depends on private claims. Cases worth less than \$500,000 can nonetheless have significant positive spillovers on the law and regulated industries by spurring deterrence, corporate reforms, and better regulation by agencies.²⁵ For instance, documents and depositions in the seminal sexual harassment case *Faragher v. City of Boca Raton*—with an amount in controversy below \$500,000—became the basis for widespread reforms to sexual harassment policies and personnel practices. Besides, agencies routinely issue subpoenas in cases worth less than \$500,000 and private discovery may otherwise be much less burdensome than a thorough investigation by, say, the SEC or EEOC.

Before proceeding, a word about the Article's limitations is in order. Although the Article explores the regulatory theory of discovery, it does not argue that the current amount or breadth of discovery is systemically optimal. There may be areas where waste needs cutting back and others where broader discovery is needed. Nor does the Article argue that that *ex post* regulation via litigation is preferable to *ex ante* regulation via the administrative state. It necessarily sets this question—along with associated empirical questions—to the side. Relatedly, the Article relies on important examples like the *Disney*, *Argentina*, and *Faragher* cases, where discovery was beneficial, but does not claim that regulatory discovery is always beneficial. Indeed, in the analogous agency context, critics of the administrative state have long complained about protracted and wasteful agency investigations that serve only to justify the initial decision to initiate an investigation. The Article's claim is only that discovery serves regulatory purposes comparable to administrative subpoena power, *for better or worse*.

As a final limitation, the Article makes a claim about regulatory discovery in the context of private enforcement statutes that may be distinct from common law or tort claims. While discovery surely can serve as regulation in mass torts, the analytic framework and its underlying legitimacy is somewhat different. Private enforcement derives legitimacy from Congress's deliberate choice to empower private plaintiffs either to complement or replace administrative

²⁵ Cf. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 399, 409, 411 (2011) (proposing categorical restrictions on discovery “for ‘simple’ cases”—defined by amount in controversy—but excluding private enforcement cases, where “broader discovery . . . may be necessary for adequate enforcement”).

agencies.²⁶ This choice is why private discovery in those claims is analogous to administrative subpoenas. Tort claims, by contrast, rely on a long common law tradition based mostly on state law. Discovery in that context must therefore be grounded in a different theory that may or may not support an analogy to agency subpoena power. Nonetheless, discovery in mass torts cases produces similar *effects* so it may be illustrative of regulatory discovery. For that, and other reasons, the Article uses examples from the tort context but leaves the necessary theory building to future research.

The discussion that follows proceeds in four Parts. Part I frames the problem of discovery costs and the Supreme Court’s turn to doctrine to solve it. This Part situates the project within existing discovery scholarship, and sketches the framework around which discovery theory must operate. That theory is then developed in Part II, with the three traditional theories of fairness, equality, and trial narrowing. Part III—the heart of the article—introduces an approach to discovery based on regulation. Finally, Part IV pulls these threads together to provide a novel way to address discovery disputes.

I. Identifying the Problem: Discovery Costs Disputes

For better or worse, discovery is the central and often outcome determinative procedure in American litigation.²⁷ It has a long history rooted in equity, where flexibility was paramount.²⁸ Away from the danger of common law juries, equity judges developed procedures that allowed parties to engage in a protracted process of producing information from and to each other. Whether through depositions or broad document requests that extended even to third-parties, equity saw discovery as the definitive device for setting the tables of a judicial decision. By contrast, the common law world emphasized pleadings and trials as the information flushing events to decide a case.

²⁶ FARHANG, LITIGATION STATE, *supra* note **Error! Bookmark not defined.**, at 64 (“[L]egislators deploy private litigants and plaintiffs’ attorneys as a source of state capacity . . . contemplat[ing] a high degree of intentionality.”).

²⁷ Nora Freeman Engstrom, *The Lessons of Lone Pine*, YALE L.J. (forthcoming 2019) (“By the late 1980s . . . [i]t was *discovery*, not trial—the *deposition*, not the cross-examination—that became the focal point of American civil litigation.”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1076 (2003) (making the same point); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 637-39 (similar). For purposes of this paper, I am referring almost entirely to pre-trial discovery. I set aside the quite different world of post-judgment discovery. *See generally* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293 (2015).

²⁸ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005).

The Federal Rules of Civil Procedure drafters combined common law and equity discovery procedures into one whole, and the system later evolved into the modern Rules 26-37, which allow parties to obtain broad information on the central facts of a case before trial. One defining feature of the current system—amended several times post-1938—is that discovery is “extremely broad,”²⁹ allowing parties to obtain information “regarding any matter, not privileged, that is relevant to the subject matter involved in the action, whether or not the information sought will be admissible at trial.”³⁰ The main drafter of the discovery rules, Edson Sunderland, argued that “[t]he new federal rules . . . authoriz[e] parties themselves to employ an almost unlimited discovery.”³¹ The rules seek a comprehensive exchange of information led by the parties. That is why the rules authorize initial disclosures (a recent development adopted in the 1990s), subpoenas, depositions, interrogatories, physical examinations, property inspections, and requests for admissions, and even an iterative process where parties can engage in new information requests based on old requests. All of this leads to a far-reaching release of information related to the case and claims.

It is difficult to overstate the uniquely American nature of this information disclosure system. Discovery has become an integral part of the American concept of due process—so much so that some argue discovery is of constitutional foundation.³² Other countries, however, consider it anathema. In common law countries, discovery can sometimes include broad document productions and mandatory disclosures, but it is typically limited by “specific pleading, the short time limit imposed for document production, and the definition of the obligation to produce.”³³ The combination of these factors result in a “considerably narrower” exchange of information *vis-à-vis* the United States.³⁴ In civil law countries, there is no broad exchange of documents or disclosures and the process is wholly supervised by a judge who makes it her goal to keep the case constrained and focused.³⁵ These inquisitorial systems give parties very little power to engage in wide-ranging information requests and they prohibit depositions.³⁶

²⁹ FRIEDENTHAL ET AL. CIVIL PROCEDURE CASES AND MATERIALS at xx.

³⁰ FRIEDENTHAL ET AL. CIVIL PROCEDURE CASES AND MATERIALS at xx (citing the pre-2015 discovery language that has been amended).

³¹ Edson R. Sunderland, *Discovery Before Trial under the New Federal Rules*, 15 TENN. L. REV. 737, 738 (1939) (emphasis added).

³² Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1673 (1998); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts*, 52 DEPAUL L. REV. 299 (2002).

³³ Hazard, *supra* note xx, at 1673.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1261 (2005) (discussing French civil procedure, among others).

Differences between our broad discovery system and the narrow approach prevalent in every other country have thus provoked significant foreign critiques.³⁷

Setting foreign comparisons aside, to speak of broad discovery as a homogeneous coherent procedure is misleading because there is no single process that is invariant from case to case. There are large complex litigation cases—a diverse set in itself that often involves mass torts and statutory enforcement cases—where discovery can take up years and produce millions of records and dozens of depositions. But these are a small minority of all cases in the federal docket. In the run of the mill case, litigants “employ[] no discovery at all” and a “substantial percentage’ of the [federal] docket employ[s] very little.”³⁸ Cases often settle immediately or in the early stages of discovery. Other cases need no discovery and summary judgment is sufficient with only a few documents at hand. Yet other cases need only documentary discovery and no depositions at all. To understand discovery we have to understand its inherent pluralism and case-dependent nature. Below, I address (a) scholarly and judicial debates about discovery costs, (b) the judicial development of doctrines meant to control discovery, and (c) its problematic consequences.

A. The Discovery Costs Debates

Despite this pluralism, complex cases with extensive discovery have long shaped struggles over the role of discovery in public law litigation and its attendant costs. Indeed, despite discovery’s rich heritage, debates for the past four decades have been bogged down almost entirely on the question of costs.³⁹ After the emergence of class actions and the public law bar in the late 1960s, litigation became embroiled in a battle between corporate defendants and newly-empowered plaintiffs’ attorneys. In these litigation wars, corporate defendants launched attacks against any procedures that empowered plaintiffs’ attorneys, including not just class actions but also private rights of actions. Discovery, too, became entangled in this struggle over the role of litigation in the enforcement of public law statutes.

³⁷ Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT’L L. 157, 164-67 (2016).

³⁸ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 62 (2010).

³⁹ Endo, *Discovery Hydraulics*, *supra* note xx, at 1343-44; Danya Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1123-24 (2012); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1063-71 (2016).

Recently, scholarly articles about discovery have mostly focused on the problem of costs.⁴⁰ As Seth Endo summarized, an avalanche of discovery reform proposals all focus on solving the alleged cost problem, including: limits to the amount of discovery in all cases, a proportionality requirement, linking requests to the amount in controversy, mandatory stays pending a motion to dismiss, information sampling, dividing the process into phases, empowering judges (and availability of sanctions), ADR, expanding the use of bespoke discovery contracts, predictive coding and other machine learning, cost-shifting, *quantum meruit* cost recovery, and others.⁴¹

All of these scholarly proposals draw from a four-decade long debate about the appropriate scope of discovery. Beginning with the 1976 Pound Conference on civil procedure, “proposals for amendment to the rules have generally involved retreats from the broadest concept of discovery.”⁴² The Pound conference prompted the creation of a variety of working groups and conferences with the sole goal of controlling discovery costs.⁴³ The Carter administration followed these efforts with a directive to a new Antitrust commission, asking for a “revision of discovery practices in order to limit expensive and time-consuming inquiry into areas not germane to contested issues.”⁴⁴ These efforts, and others, built substantial momentum for discovery reform that spread like a contagion and led to recurrent amendments to the rules.⁴⁵

Since the turn of the century, discovery costs debates have been reshaped by the emergence of electronically stored information.⁴⁶ Modern technologies have expanded the generation of information within corporations and regulated entities. This expansion has transformed discovery into a much more complicated process where “[t]raditional practices” have been unable to “keep up with the

⁴⁰ See Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1813 (2018) (“[M]uch of the energy in U.S. procedural reform for the past thirty-five years has been directed toward solving the cost problem in discovery.”).

⁴¹ Endo, *Discovery Hydraulics*, *supra* note xx, at 1343-68. See also Jessica Erickson, *Bespoke Discovery*, 71 Vand. L. Rev. 1873 (2018); David Engstrom & Jonah Gelbach, *Legal Tech*.

⁴² Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747 (1998).

⁴³ *Id.* at 752–53.

⁴⁴ *Id.*

⁴⁵ See generally STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Stephen B. Burbank & Sean Farhang, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery, in WHO WILL WRITE YOUR RULES: YOUR STATE COURT OR THE FEDERAL JUDICIARY?—24TH ANNUAL FORUM FOR STATE APPELLATE COURT JUDGES* (2017), available at <http://poundinstitute.org/sites/default/files/docs/2016%20Forum/pound-forum-report-2016-final.pdf>.

⁴⁶ See Endo, *Discovery Hydraulics*, *supra* note xx.

explosion in the universe of discoverable material.”⁴⁷ Advisory Committee debates have responded to ESI with renewed proposals to address the problem of discovery costs. All told, the Committee has changed the discovery rules over a dozen times between 1980-2015.⁴⁸

Whether discovery costs are an actual problem—or just a proxy fight over the role of litigation in society—depends on how one slices up the federal docket.⁴⁹ Of course, abusive discovery exists and discovery does impose significant costs in some cases.⁵⁰ But “the extent of the costs may be somewhat overstated—or partially self-inflicted—and certainly they are not universally imposed across the litigation universe.”⁵¹ Most empirical discovery studies consist of attorney or judicial surveys and very few peer into actual case data.⁵² But a review of existing studies of federal litigation produces a few common conclusions:

- Most civil cases (>50%) involve no discovery or very limited discovery;⁵³
- Cases with discovery typically implicate costs that are proportional to the total stakes (median of discovery costs is 3.3% of the amount in controversy for defendants);⁵⁴

⁴⁷ *Id.* at 1320.

⁴⁸ *Id.* at 1327; see also Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 657 & n. 79 (2013).

⁴⁹ As Danya Reda has discussed, concerns about discovery costs have never really matched actual empirical data showing that the system is not overly costly. *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1123-24 (2012). Here, I draw on Reda’s ideas in the specific context of discovery.

⁵⁰ See Joshua M. Koppel, *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 254 (2012).

⁵¹ *Id.* at 252 n.52 (quoting Miller, *From Conley to Twombly to Iqbal*, *supra* note xx, at 62-63).

⁵² See e.g., EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009); FEDERAL JUDICIAL CENTER, T. WILLGING, J. SHAPARD, D. STIENSTRA, & D. MILETICH, DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE 1–2, 4, 8, 14–16 (Tables 3–5) (1997); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 5.2, at 288 & n.7 (5th ed. 2001); Mullenix, *supra* note xx at 684-85; Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 790–92 (1998); Reda, *supra* note xx, at 1123-24.

⁵³ See e.g., PAUL CONNOLLY ET AL., FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (1978); JOSEPH L. EBERSOLE & BARLOW BURKE, FEDERAL JUDICIAL CENTER, DISCOVERY PROBLEMS IN CIVIL CASES (1980); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72 (1983); JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (1998).

⁵⁴ LEE & WILLGING, PRELIMINARY REPORT, *supra* note xx at xx; Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 768 (2010); Reda, *supra* note xx, at 1089.

- The median litigation costs (including discovery and attorneys' fees) for defendants is \$20,000;⁵⁵
- High discovery costs are rare (less than 5% of cases);⁵⁶
- In cases with "high" discovery costs, expenditures may account for 32% or more of the amount in controversy;⁵⁷
- Cases with voluminous discovery often involve complex litigation;⁵⁸
- Lawyers perceive that e-discovery has increased costs;⁵⁹
- Despite little empirical support, many judges⁶⁰ and lawyers⁶¹ perceive discovery abuse as a significant problem.

The available evidence seems to show that "the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost is proportional to the amount at stake."⁶² Costs remain an issue in a minority of complex litigation cases that account for the discovery costs contagion.

B. Discovery Avoidance

For decades, the Supreme Court and lower courts have actively participated in and shaped discovery costs debates. In many cases, courts have used discovery as a cudgel to shape nearly every facet of the modern civil litigation system, including in some of the most important procedural and substantive cases. Courts have developed two tracks in their attempts to fight discovery. At first, courts and the advisory committee focused on the idea of judicial management of the discovery process.⁶³ But more recently, courts have engaged in a

⁵⁵ LEE & WILLGING, PRELIMINARY REPORT, *supra* note xx, at 2.

⁵⁶ KAKALIK ET AL., *supra* note xx, at 621.

⁵⁷ *Id.*

⁵⁸ See EBERSOLE & BURKE, *supra* note xx. This Federal Judicial Center study doesn't define complex litigation itself, but it refers to the *Manual for Complex Litigation*, which notes that "the term 'complex litigation' [is not] susceptible to any bright-line definition" (at 1), although it clearly includes both private enforcement and mass tort litigation (at 2).

⁵⁹ AM. COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note xx, at [page].

⁶⁰ Ronald Ellington, *A Study of Sanctions for Discovery Abuse* (1979) (report submitted to the Office for Improvements in the Administration of Justice, United States Department of Justice); THE BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989).

⁶¹ LOUIS HARRIS AND ASSOCIATES, INC., PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM III (Humphrey Taylor and Gary L. Schmermund project directors, Project No. 881023 Mar. 1989); LITIGATION SECTION, AMERICAN BAR ASSOCIATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT (2009); LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES (2010).

⁶² Reda, *supra* note xx, at 1089.

⁶³ Miller, *From Conley to Twombly to Iqbal*, *supra* note xx, at 54; Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303 (1994).

systematic attempt to control discovery costs by raising pre-discovery barriers, including pleading standards, qualified immunity, and arbitration. I term these efforts “discovery avoidance.” This has led to the proliferation of doctrines parasitic to discovery across the litigation landscape.

Take, for example, the recently re-stated foundations of qualified immunity doctrine. The Court has repeatedly imputed to qualified immunity a prophylactic role against the burden of discovery costs on police officers. As recently detailed by Joanna Schwartz, the Court has “focused increasingly on . . . the need to protect government officials from nonfinancial burdens associated with discovery and trial. This desire has arguably shaped qualified immunity more than any other policy justification for the doctrine.”⁶⁴ The doctrine has progressively incorporated discovery costs as a larger concern. In the seminal case *Harlow v. Fitzgerald*, the Court justified qualified immunity as a bulwark against “the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,” as well as the possibility that lawsuits would affect officials’ discharge of their duties.⁶⁵ As a second order concern, the court also warned of the danger of “broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues.”⁶⁶ Only three years later, the Court emphasized the danger of discovery to “be avoided if possible,”⁶⁷ but still focused on its other justifications. By contrast, in the recent *Ashcroft v. Iqbal*, the court claimed that “[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery.”⁶⁸ This evolution shows discovery’s newfound role in qualified immunity.

Another example of this kind of marriage between discovery and other procedures is found in the securities litigation context. Specifically, one of the bluntest and most significant discovery filtering mechanisms is the Private Securities Litigation Reform Act.⁶⁹ That statute contains a package of reforms intended to diminish the power of plaintiffs’ attorneys in securities litigation, especially by weakening pre-trial discovery. The House Report is littered with references to the danger of discovery costs: “[t]he abuse of the discovery process to impose

⁶⁴ Joanna Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017). See also Joanna C. Schwartz, *Civil Rights Ecosystems*, MICH. L. REV. (2020) (discussing qualified immunity among the legal rules and remedies that define “civil rights ecosystems”—collections of interconnected and interactive legal actors).

⁶⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

⁶⁶ *Id.*

⁶⁷ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

⁶⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

⁶⁹ Gorga & Halberstam, *supra* note xx, at 1394; Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA’s Internal-Information Standard on ’33 and ’34 Act Claims*, 76 WASH. U. L.Q. 537, 552–53 (1998).

costs [is] so burdensome that it is often economical for the victimized party to settle”; “The cost of discovery often forces innocent parties to settle frivolous securities class actions,”; “[t]he House and Senate heard testimony that discovery in securities class actions often resembles a fishing expedition.”⁷⁰ Accordingly, the statute raises pleading standards for securities claims and obligates courts to issue a discovery stay while a motion to dismiss is pending. The Supreme Court noted about these Congressional changes to pleading that “[t]he basic purpose of the heightened pleading requirement . . . is to protect defendants from the costs of discovery and trial in unmeritorious cases.”⁷¹ Again, through both of these means, discovery is completely avoided.

Qualified immunity and the PSLRA are only two of a constellation of similar changes intended to blunt discovery, including in the contexts of pleading, class actions, *Lone Pine* orders, and arbitration. A very similar kind of logic has been at work in the Supreme Court’s pleading jurisprudence. As is by now widely known, the Supreme Court heightened pleading standards in *Twombly* and *Iqbal*, largely because of a concern over discovery costs. The Court embraced the implicit theory that pleading should serve as a filter that reserves discovery for cases that can meet an initial threshold.⁷² In the class actions world, federal courts developed the idea of a “rigorous review” of certification motions in the 1990s partly because certification was perceived as opening the door to crippling discovery costs. Along the same lines, courts began to enforce the Federal Arbitration Act aggressively, allowing defendants to opt out of the litigation system entirely.⁷³ In an arbitration world divorced from the federal rules of civil procedure, discovery avoidance became paramount. In yet another context, courts faced with mass torts claims have developed “*Lone Pine*” orders, requiring plaintiffs to supply evidence of injury, exposure, and causation under penalty of dismissal—sometimes before discovery. This can be seen as yet another example of discovery avoidance.⁷⁴ In these cases, policing class

⁷⁰ H.R. CONF. REP. NO. 104-369, at 31 (1995), reprinted in 1995 U.S.C.G.A.N. 697. Gorga & Halberstam, *supra* note xx, at 1394 (“The costs and abuses of discovery were . . . a key focus of the debates concerning the . . . (PSLRA).”).

⁷¹ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 335–36 (2007).

⁷² See, e.g., Jonah B. Gelbach, *Locking the Door to Discovery: Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2285 (2012); Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC’s Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 780 & n.211 (2011); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 25 (2010).

⁷³ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015).

⁷⁴ See Nora Freeman Engstrom, *The Lessons of Lone Pine*, YALE L.J. (2019).

claims before they are certified, requiring more evidence early on, and forcing plaintiffs' into arbitration became a way to avoid discovery.

Setting these examples aside, we may worry that discovery concerns are merely window dressing in these cases—in what is more likely a struggle over the role of litigation in society. Although that is likely true for many judges, there are also reasons to believe judicial concerns about discovery are real. Decades of survey work have found that a significant percentage of federal judges voice strong concerns about discovery as “unnecessary,” “expensive,” and overly “burdensome.”⁷⁵ This apparent judicial attitude correlates with over a dozen initiatives to address discovery costs: from Justice Burger’s Pound Conference on litigation costs in 1976, to the 1990s disclosure amendments, all the way to the 2015 proportionality amendments to the rules. Moreover, this judicial perception of discovery does not seem to be an entirely partisan phenomenon. *Twombly*’s attack on discovery costs was authored by the centrist Justice Souter in a 7-2 decision (although *Iqbal* was 5-4); discovery reforms have mostly been the product of judicial consensus; and the judiciary has otherwise attempted to control discovery through amendments to the rules. This indicates that perhaps concerns in this context are genuine. But even if some of the concerns about discovery are sincere, the way judges have operationalized those concerns have created downstream harms that may be disproportionate to the problem.

C. The Problem with an Obsession over Costs

The combined developments of rule amendments, discovery avoidance and management, as well as the nearly complete domination of scholarly debates by costs, have imposed procedural hurdles that stand in the way of a plaintiff’s day in court and have disfigured case law and rulemaking.⁷⁶ There are a flurry of problems with the changes spurred by the discovery costs rhetoric, including the following three:

First, creating or reinforcing doctrines tethered to discovery runs the destabilizing risk of tying slow moving legal principles to a quickly moving target. Legal devices like pleading standards, qualified immunity, or the PSLRA are now fixed deeply into the U.S. Code or court precedents. But discovery, by contrast, can change quickly due to technological developments or advisory committee changes. Thus, affixing these doctrines to the vagaries of the discovery process is potentially destabilizing. Because discovery now sits at the center of a network of doctrines, any changes to its reach should (but may not)

⁷⁵ See *infra* notes xx [empirical findings discovery]; Ellington, A Study of Sanctions for Discovery Abuse, *supra* note xx.

⁷⁶ Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64 (2010) (“The reason why the Supreme Court has pushed this change seems fairly obvious: the Court is concerned with high discovery costs.”).

provoke concomitant changes throughout the litigation system. For example, if technological changes like machine learning reduce discovery costs, discovery-dependent doctrines like pleading standards should immediately adjust, rendering existing case law outdated. Even more, the advisory committee proposes rule changes on a regular basis. An amendment to Federal Rule 26 that successfully reduces costs should have a cascading effect on every doctrine that was justified as a prophylactic against costly discovery: *Twombly* and *Iqbal* would be redundant; rules that encourage settlement unnecessary; qualified immunity obsolete; and even “rigorous” policing of class actions outdated. The difficulty, of course, is that discovery avoidance doctrines will not adapt and therefore the system will be miscalibrated based on an outdated picture of discovery.

The expansion of these discovery-avoidance decisions or statutes creates the danger of doctrinal accretion. Doctrines can pile up on top of other doctrines. For instance, a current class action case against the police runs the danger of running into three separate discovery-dependent doctrines: plausibility pleading, qualified immunity, and rigorous review of class certification. A plaintiff in this case is thus faced with three independent, but now accreted, doctrines that are supposed to fight off the same thing—discovery costs. This overdeters claims, is inefficient, and over complicates litigation.

Second, discovery avoidance empowers judges to create new doctrines out of thin air and sidelines the expertise and flexibility of the Advisory Committee. When discovery control rests on the wording of the Federal Rules of Civil Procedure, the Advisory Committee can carefully consider reforms and recalibrate the system to fit new technologies or legal developments. But the Supreme Court’s turn to doctrine to control discovery weakens that equilibrium and empowers ideological judges. As previous scholarship has explored, the Reagan and Bush administration began appointing judges committed to litigation reform in the 1980s.⁷⁷ Many of these judges shared the view that plaintiffs’ attorneys had too much leeway under our procedural paradigm. They therefore embraced the idea of a judicial retrenchment of civil procedure as a remedy. Debates over discovery costs have given these judges—rather than the advisory committee—a tool to effect procedural change. Changes to qualified immunity or the PSLRA are all etched on the case law. That move disempowers the Committee and also constitutes a shift away from Advisory Committee

⁷⁷ See, e.g., Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1264-1274; cf. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PENN. L. REV. 1543, 1551-55 (2014) (discussing litigation reform during the Reagan Administration more generally).

review of empirical studies of discovery. That development contributes, yet again, to the miscalibration of the discovery process.⁷⁸

Finally, a sustained overemphasis on discovery costs has weakened the discovery process more generally and robs the system of necessary improvements. While the Court initially recognized that discovery rules “[a]re to be accorded a broad and liberal treatment,” it has now moved towards a much more constrained process.⁷⁹ And this goes beyond its embrace of discovery avoidance. Beginning with a Justice Powell concurrence that raised the specter of “undue and uncontrolled discovery,”⁸⁰ the Supreme Court has complained about broad discovery more generally, culminating with the Chief Justice’s⁸¹ embrace of the 2015 reforms to discovery that were intended to constrain the process. This subtle shift from avoidance towards rejection is likely to weaken the entire discovery process.

* * *

All of this means that discovery has helped install a series of procedural doctrines that stand in the way of a plaintiff’s day in court, and on the way has disfigured case law and the rule making process.⁸²

II. Traditional Theories of Discovery

Stepping back from the marriage of discovery and costs, the core difficulty is how to move the debate forward—how to actually determine whether we have an optimal discovery system. This question cannot solely be answered by discussions about costs but must also be based on theory.⁸³ For when it comes to assessing discovery, we should understand that it is a plural device that serves many purposes at once that, at first sight, are difficult to see. Only theory can allow us to properly weigh discovery costs against other values in litigation and can ground the basic question: why do we have a discovery system and what are we attempting to achieve? In this Part I focus on this question but use the word theory loosely to refer to background justifications or rationales. Many of the “theories” discussed below could rightly be described as values that are nested within broader political theories.

⁷⁸ Crawford-El v. Britton, 523 U.S. 574, 595 (1998).

⁷⁹ Hickman v. Taylor, 329 U.S. 495 (1947).

⁸⁰ ACF Industries, Inc. v. EEOC, 439 U.S. 1081 (1979) (Powell, J., dissenting from denial of certiorari).

⁸¹ See *Twombly*.

⁸² Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64 (2010) (“The reason why the Supreme Court has pushed this change seems fairly obvious: the Court is concerned with high discovery costs.”).

⁸³ Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008).

As noted earlier, existing discovery jurisprudence does not provide a full theoretical account because it relies on an incomplete view that discovery exists to promote fairness, accuracy, and settlements. That traditional view argues that discovery is beneficial because a full exchange of information results in a fair and just resolution of a dispute,⁸⁴ a more accurate outcome,⁸⁵ and allows one-shot plaintiffs to obtain critical information from repeat player defendants.⁸⁶ Moreover, by forcing the parties to reveal all their arguments and evidence, discovery renders trials redundant and nudges the parties towards settlement.⁸⁷ Despite its prominence, however, the fairness-accuracy-settlement conventional wisdom suffers from significant limitations—*see infra* Part X—because it misses the role that discovery has grown to play in complex litigation and private enforcement cases.⁸⁸ My goal in this section is to very briefly explain the conventional view of discovery, which is based on the promotion of: (1) fairness; (2) equality; and (3) trial narrowing or settlements. This exploration lays the groundwork for the full development of regulatory discovery in Part III.

⁸⁴ Brazil, *supra* note xx, at 1298; Irving R. Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 125 (1962) (“The federal rules are designed to find the truth”); Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1811 (2018) (“Principally, [discovery] ensures a rational and accurate process for adjudicating or settling claims.”); Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2045 (2018); E. Donald Elliott, *How We Got Here: A Brief History of Requester-Pays and Other Incentive Systems to Supplement Judicial Management of Discovery*, 71 VAND. L. REV. 1785, 1788 (2018). This justification was clearly on the mind of the Federal Rules’ framers. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. REV. 691, 745 (1998); Alexander Holtzhoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205 (1942). The Supreme Court has also repeatedly endorsed the fairness rationale for discovery. *See* *Cheney v. United States District Court*, 542 U.S. 367, 392 (2004); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). *See also* *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 143 (8th Cir. 1968) (“The purpose of our modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial justice”).

⁸⁵ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *Greyhound Lines, Inc. v. Miller*, 402 F.2d 134 (8th Cir. 1968); *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1302 (1978).

⁸⁶ *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 287 (2004).

⁸⁷ Cooter & Rubinfeld, *supra* note xx at 436.

⁸⁸ Although scholars have admirably explored some justifications. *See* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 488–89 (2003); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 436 (1994); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331 (2003); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646–47 (1985). This Article draws on this literature but attempts to fully develop the regulatory theory, *see infra* at xx, and brings all theories together in a comprehensive analysis.

Fairness. The most obvious justification for liberal discovery is that a full exchange of information results in a fair resolution of a dispute and promotes the ends of justice.⁸⁹ As Justice Stevens noted, “[b]road discovery should be encouraged when it serves the salutary purpose of facilitating the prompt and fair resolution of concrete disputes.”⁹⁰ Fairness could be understood to promote goals that are consonant with procedural justice, including participation, accuracy, and efficiency.⁹¹ A fair process is one that “guarantees[] rights of meaningful participation,” and “notice and opportunity to be heard.”⁹² With an accuracy-participation-efficiency mantra as the north star of the system, it follows that discovery should be broad rather than narrow.⁹³ *Ex ante* the more information that can be produced, the more the factfinder can achieve an accurate outcome. In theory, limits to discovery might be antithetical to fairness. Although this fairness theory has been fundamental to doctrinal developments in discovery, it has always failed to account for the entirety of the discovery process.

Equality. Broad discovery has the potential to serve as an equalizer of litigant resources. This justification is closely related to the fairness one and is sometimes treated as the same in the literature. But unlike the fairness account, this justification for discovery begins with the observation that the litigation system is riddled with resource asymmetries.⁹⁴ The role of discovery and procedure is to ameliorate those asymmetries, create a level playing field, eliminate trial “surprises,” and give different litigants equal access to justice.⁹⁵ It is, in other words, to promote equality.⁹⁶ That concept is of course

⁸⁹ Brazil, *supra* note xx, at 1296.

⁹⁰ *Cheney v. United States District Court*, 542 U.S. 367, 392 (2004).

⁹¹ Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 237, 244-60 (2004); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 567 (2001).

⁹² Solum, *Procedural Justice*, *supra* note xx, at 237, 244-60.

⁹³ *See* Brazil, *supra* note xx.

⁹⁴ For the traditional treatment of resource asymmetries from the law and society scholarship, see Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974). For the traditional law and economics approaches, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56 (1982) (describing the cost-benefit analyses parties engage at each stage of litigation); Benjamin Klein & George Priest, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1, 20 (1984) (hypothesizing that there will be a “tendency toward 50 percent plaintiff victories” among litigated cases).

⁹⁵ Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 287 (2004). *See also* Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959) (arguing that discovery under the 1938 Rules “d[id] away with ‘surprise’ as a tactical advantage in litigation as a game”); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 73-86 (2010) (proposing a new form of discovery to deal with information asymmetries in the wake of heightened pleading).

⁹⁶ *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (“Modern procedural practices themselves can also have equality-enhancing consequences. This is most obvious in the Federal Rules’ embrace of

“notoriously slippery . . . and its procedural implications are puzzling.”⁹⁷ But in the context of discovery we should be concerned with the concept that William Rubenstein calls “equipage equality.”⁹⁸ That is the idea that adversarialism requires “a real battle between equally-armed contestants . . . [with] some measure of equality in the litigants’ capacities to produce their proofs and arguments.”⁹⁹ This kind of equality is not concerned with substantive outcomes or even equality of treatment across cases.¹⁰⁰ Rather, Rubenstein argues that its focus is on the procedural equipment that the system gives litigants—the arrows that litigants can have in their quiver. Discovery can arm litigants with tools to remedy the inherent asymmetry between plaintiffs and defendants.¹⁰¹ It is a powerful fact-finding measure that provides small litigants access to documents or witness information that is otherwise only in the hands of a corporate defendant.¹⁰² Discovery thus attempts to remedy informational asymmetries.

Narrowing Trials and Promoting Settlement. An institutional and historical account of discovery sees it as a tool that can narrow the scope of trial, promote settlement, and perhaps sometimes replace common law trials and juries.¹⁰³ At common law, there was no robust

notice pleading and liberal discovery.”); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *Yale L.J.* 455, 484 (1986) (“One value that might conceivably be fostered by procedural due process is the goal of equality.”).

⁹⁷ Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *B.U.L. REV.* 885, 899 (1981).

⁹⁸ Rubenstein, *Equality*, *supra* note xx, at 1867.

⁹⁹ *Id.* at 1867-68. *See also, e.g.*, Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 *U. PA. L. REV.* 2119, 2136 (2000) (“Equipage for civil litigants—from filing fees to investigation to counsel for experts—s generally left either to the legislature or to the market.”). *See also* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights-Part 1*, 1973 *DUKE L.J.* 1153.

¹⁰⁰ Although equality may not promote justice or fair outcomes. *See, e.g.*, Paul Stancil, *Substantive Equality and Procedural Justice*, 102 *IOWA L. REV.* 1633 (2017).

¹⁰¹ Robert G. Bone, *Modeling Frivolous Suits*, 145 *U. PA. L. REV.* 519, 542 (1997); *See also* Rubenstein, *Equality*, *supra* note xx, at 1880 (“Broad discovery has the effect of equalizing the information available to each side in the lawsuit.”).

¹⁰² Of course, confidentiality provisions can defeat this. *See Seth Endo* on confidentiality. And discovery “can also work against poorer litigants [who] can be flooded with discovery requests.” Rubenstein, *Equality*, *supra* note xx, at 1881.

¹⁰³ *See* Engstrom, *supra* note 24; Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 *J. EMPIRICAL LEGAL STUD.* 943, 950-54 (2004). *Cf.* Langbein, *Disappearance*, *supra* note xx, at 533 (discussing how discovery substituted for the disclosure function of pleading in the Federal Rules). This rationale was frequently invoked by the framers of the Federal Rules. *See also* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 *TENN. L. REV.* 737, 737-38 (1939) (describing a system that waits for trial to flush out information as “economically extravagant” and a “wasteful method of civil litigation” and distinguishing the Federal Rules); Edson R. Sunderland, *The New Federal Rules*, 45 *W. VA. L.Q.* 5, 19-28 (1938); James. A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 *COLUM. L. REV.* 1179 (1938)

discovery and trial was instead the defining information-flushing event of a case. In a system with jurors and no discovery, however, trials were expensive, burdensome, and allowed for potential late-stage surprises. One way to remedy that problem was by expanding the pre-trial stage and allowing the parties to fully explore relevant documents and witnesses, narrowing issues for trial or even avoiding it. Some of the Federal Rules drafters sought to avoid the burdens of the common law trial by infusing the system with equity's flexibility and broad discovery.¹⁰⁴ In other words, they sought to make the pre-trial stage the fundamental information-exchanging event. Borrowing heavily from equity and the common law trial, the federal rules allowed broad document requests and regularized the concept of oral depositions, allowing the parties to directly interview the main witnesses outside of judicial supervision.¹⁰⁵ The main drafter of the discovery rules, Edson Sunderland, argued that broad discovery would make trials narrower or even sometimes unnecessary,¹⁰⁶ and may, along with other pretrial procedures, "bring parties to a point where they will seriously discuss settlement."¹⁰⁷

As expected, discovery has come to serve as one of the main pro-settlement nudges in the procedure toolkit. While discovery and trials are separate stages of litigation, they are nonetheless closely related because discovery shapes the parties' decision whether to settle or litigate.¹⁰⁸ A legal case can generally be decided via dismissal, settlement, or a final judicial decision. If the claim is meritorious, settlement can be highly efficient because it saves the high transaction costs of trials. Under a standard economic view of litigation, parties decide to file suit (and settle or litigate) depending on their probability of success at trial, amount in dispute, and costs of litigation.¹⁰⁹ By forcing the parties to engage in a thorough exchange of information, discovery shapes the parties' calculation of probable success at and therefore "increases settlements and decreases trials,"¹¹⁰ even if it also

(endorsing the 1938 Rules on similar grounds); James A. Pike, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297 (1940) (same).

¹⁰⁴ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 956-61 (1987).

¹⁰⁵ Kessler, *supra* note xx at 1230-31, 1253 (discussing how depositions mutated away from masters to party led questioning). See also Robin J. Effron, *Ousted: The New Dynamics Of Privatized Procedure And Judicial Discretion*, 98 B.U. L. REV. 125, 139 (2018) ("the FRCP not only tolerate private procedural ordering during discovery, but are designed to promote it.").

¹⁰⁶ Edson R. Sunderland, *Improving the Administration of Civil Justice*, in 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 75 (1933). See also Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 734, 736 (1998).

¹⁰⁷ Sunderland, *supra* note xx, at xx; Tidmarsh, (discussing Edson Sunderland's pro-settlement views).

¹⁰⁸ See Yeazell, *supra* note xx.

¹⁰⁹ Landes-Posner-Gould.

¹¹⁰ Cooter & Rubinfeld, *supra* note xx at 436.

forces the parties to reveal weaknesses in their case. Discovery allows the parties to share the trial transaction costs as bargaining surplus.

Since at least 1938, thanks partly to broad discovery, the system has slowly evolved away from trials and towards an increasing number of dispositive motions or settlements. It is possible to justify this shift, and expensive discovery, because it avoids the greater costs of impaneling juries and conducting trials.¹¹¹ But displacing trials and juries brings its own tradeoffs. The drafters may have miscalculated by importing expensive inquisitorial discovery devices “into a common-law-based adversarial framework after 1938.”¹¹² Moreover, discovery may not always be a full or adequate substitute for trials, because it deprives judges and juries from the cases necessary to update the common law.¹¹³ Despite these tradeoffs, the record shows that it was part and parcel of the project to create new procedural rules that discovery would often promote settlement and narrow trials.¹¹⁴

* * *

These three theories (or more properly, rationales or justifications) have a wide variety of implications explored in Part IV. For now, it is sufficient to note that they are based on different principles—fairness, equality, and judicial economy (or narrowing trials)—and lead to distinct background values for discovery.

III. Discovery as Regulation

This Part explores in a systematic manner an additional way to conceptualize discovery. My main argument is that one of discovery’s core purposes in private enforcement cases is actually divorced from adversarial litigation and is, instead, entirely about systemic regulation.¹¹⁵ In the private enforcement context, Congress uniquely chose private claims, and attendant discovery, rather than agency regulation as the main administrative mechanism.¹¹⁶ In those cases, litigation is a regulatory tool and broad discovery transforms into an essential regulatory device comparable to the administrative subpoena. By forcing parties to disclose large amounts of information, discovery deters harmful behavior and, most importantly, structures the primary behavior of regulated entities. As I discuss later, this means that courts

¹¹¹ *But see* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 533 (2007).

¹¹² Kessler, *supra* note xx at 1184.

¹¹³ Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

¹¹⁴ Langbein, *Disappearance of Civil Trial*, *supra* note xx, at 547.

¹¹⁵ *See e.g.*, Burbank, *supra* note xx at xx. To be clear, this kind of discovery is only relevant in cases that implicate public interests, not in private cases where individuals sue each other without any significant statutes or public norms at stake.

¹¹⁶ *See infra* notes xx.

should be more permissive with discovery requests in private enforcement cases rather than typical litigation.

Discovery even manifests in similar ways in the private action and administrative contexts. Both agency bureaucrats and private plaintiffs are engaged in the work of flushing out information using analogous tools in order to enforce some broad statutory mandate. Courts have thus treated private and public regulators in similar ways. In this section, I explain that discovery serves regulatory purposes in at least two ways: (1) it delegates to private plaintiffs government subpoena power to investigate wrongdoing; (2) it has significant positive spillover effects on regulated entities and markets. Discovery therefore serves an important purpose in a system that relies on private litigants to enforce the law.¹¹⁷

A. Discovery as the Lynchpin of Private Enforcement

As many have recognized, the United States employs litigation as a regulatory tool by allowing private litigants to enforce important statutes in the contexts of antitrust, environmental law, business competition, and employment, among other areas, building what some scholars call a “litigation state.”¹¹⁸ As I argue below, discovery is the lynchpin of this private enforcement system because it is necessary to enforce these statutory regimes, shapes litigants’ *ex ante* expectations, structures plaintiffs attorneys’ choices, and influences the behavior of regulated entities. While discovery plays this unique role in this enforcement context, it likely lacks the same underlying legitimacy in other cases, like mass torts or state-law claims.

In contrast to European and most other countries, where bureaucracies regulate *ex ante*, U.S. private litigants enforce the law *ex post* and without much government involvement. Although plaintiffs pursue their own individual interests in litigation, they promote social

¹¹⁷ Several scholars have made some headway into the regulatory justification. Carrington, *supra* note xx at 54; BURBANK & FARHANG, RIGHTS AND RETRENCHMENT; Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 819-20 (1981); Higginbotham, *supra* note xx. *See also* Burbank, Farhang & Kritzer, *supra* note xx at 662-63; Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647 (2015); Farhang, *supra* note xx, at 8; Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 1007 (2017); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 950-54 (2004) (“The system, though essentially private and adversarial, can marshal facts in a manner that resembles an administrative investigation.”).

¹¹⁸ FARHANG, THE LITIGATION STATE 64-65 (2010); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 6-9 (2d Prtg. 2003); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1140 (2012).

welfare by enforcing the law and deterring wrongdoing.¹¹⁹ Most importantly, private litigation is a regulatory tool *because* Congress and courts have deliberately empowered litigants through private rights of action, fee-shifting provisions, and other incentives—thus building a litigation state.¹²⁰ That is, in some of our most important statutes, Congress had the choice whether to create new agencies or rely on plaintiffs through a private right of action. And while in some cases Congress did create agencies like the EPA or Federal Trade Commission, in other statutes Congress instead delegated joint or sole enforcement power to private plaintiffs.¹²¹

Within the litigation state, private lawsuits transform into a kind of regulatory tool. Most scholars define the word regulation as including “any governmental effort to control behavior by other entities, such as business firms, subordinate levels of government, nonstate entities (such as political campaigns or civil society actors), or individuals.”¹²² Such a working definition encompasses litigation when it is deliberately employed by Congress. Conceiving litigation as regulation transforms the legal system from one where “one citizen can seek redress from another in an orderly fashion,”¹²³ into one where citizens or classes of citizens can enforce the law for systemic regulatory purposes. For example, lawsuits by private parties against businesses under competition or antitrust statutes can be aimed to shape behavior for legitimate governmental ends—controlling market entry or prices, limiting monopolies, or improving efficiency.¹²⁴ More broadly, regulation through litigation can influence entities by prohibiting wrongdoing, forcing companies to internalize the full costs of their conduct, or incentivizing certain behavior. The role of private parties as regulators is even clearer when they operate side-by-side with agencies and bureaucracies that enforce the very same statutes. Just like the SEC and securities class actions often aim to prevent securities fraud to preserve efficient markets, so too do EPA and the National Environmental Law Center both aim to safeguard the environment.

¹¹⁹ See ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION (2017). Cf. Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 585 (1997) (“[I]t may be socially desirable for more to be spent on suit than the amount at stake” when a lawsuit can “create substantial deterrence”).

¹²⁰ See Burbank & Farhang, COUNTERREVOLUTION, *supra* note xx, at 16; see also Burbank & Farhang, Rights and Retrenchment, *supra* note xx, at 15–16.

¹²¹ FARHANG, THE LITIGATION STATE, *supra* note xx, at 60, 64–65; ROBERT A. KAGAN, ADVERSARIAL LEGALISM, *supra* note xx, at 6–9.

¹²² Christopher Foreman, *Regulatory Agencies*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (2014). Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 3 (1998).

¹²³ Friedenthal, *Secrecy*, *supra* note xx at 69.

¹²⁴ Foreman, *Regulatory Agencies*, *supra* note xx.

Within this complex ecosystem of enforcement, private litigants have powerful litigation tools that they can employ against regulated entities, including broad discovery. Contingency fees, attorney advertising, class actions, punitive damages, and private rights of action make the initial filing of a claim feasible by incentivizing plaintiffs' attorneys with the potential for a large recovery.¹²⁵ Those devices are therefore a key entry into the litigation state. But discovery is the lynchpin of the private enforcement system because it shapes the parties' *ex ante* expectations of whether they will be able to flush out wrongdoing and effectively pursue their case. It can structure plaintiffs' attorneys choice whether to file a case on behalf of an aggrieved party or not. And it influences the behavior of regulated entities who understand the information flushing tools at plaintiffs' disposal. In areas like employment discrimination, for instance, plaintiffs' attorneys calculate whether discovery will produce evidence of biased treatment.

There is a necessary relationship between private enforcement statutes and broad discovery. Once past the pleading stage, discovery allows plaintiffs to effectively become quasi-government investigators, or as courts sometimes note in limited circumstances, private attorneys general. In situations of imperfect information, as I discuss below, broad discovery empowers plaintiffs with a variety of tools to seek out wrongdoing. Take, for example, three private enforcement regimes and the kinds of evidence plaintiffs need:

Title VII of the Civil Rights Act. Title VII prohibits employment discrimination on the basis of sex, race, color, national origin and religion.¹²⁶ Private suits are the overwhelming mode of enforcement, accounting for 98 percent of suits while government actions account for only 2 percent.¹²⁷ In disparate treatment cases, plaintiff-employees must establish that an employer made an adverse decision based on "a discriminatory intent or motive."¹²⁸ This question is heavily fact-dependent. But employers almost never leave a "smoking gun attesting to a discriminatory intent," so plaintiffs "must often build their cases from piece of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer."¹²⁹ Disparate impact cases also need specific data that can show "an employer's overall pattern of conduct."¹³⁰ Broad discovery over a wide

¹²⁵ See Owen Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996).

¹²⁶ Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352).

¹²⁷ Glover, Private Enforcement, *supra* note xx, at 1149-50.

¹²⁸ *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

¹²⁹ Marcus, Discovery Containment Redux, *supra* note xx, at 750 (citing *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990)).

¹³⁰ *Id.* at 750 (quoting *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 305 (5th Cir. 1973)).

array of employer documents are the *sine qua non* of these cases.¹³¹ For instance, comparative studies show that despite the presence of robust civil anti-discrimination laws in France, those statutes remain drastically underenforced because there is no expansive American-style discovery.¹³² The Supreme Court has even explicitly noted that specific causation in these cases is a fair requirement because “liberal civil discovery rules give plaintiffs broad access to employers’ records.”¹³³

Antitrust Laws. The Sherman Act gives plaintiffs a private right of action against individuals or firms engaged in a “contract, combination . . . or conspiracy, in restraint of trade or commerce.”¹³⁴ The Clayton Act similarly seeks to prevent or punish anticompetitive conduct by “bring[ing] to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate.”¹³⁵ Private claims “accounted for about 90% of antitrust filings in federal court each year between 1975 and 2012.”¹³⁶ And empirical studies “have confirmed that these private enforcement actions are effective in deterring anticompetitive behavior.”¹³⁷ Private claimants are often competitors or consumers harmed by anticompetitive conduct. Broad discovery is also necessary in these cases. For example, in cases alleging the existence of a cartel, the burden is on plaintiff to establish a conspiracy to restraint trade. In such cases, “only the defendant will know or have the means to discover . . . whether it actually conspired. Moreover, the plaintiff usually cannot ascertain this fact through a reasonable pre-filing investigation.”¹³⁸ To make matters more difficult for would-be-claimants, “[m]odern cartels employ extreme measures to avoid detection.”¹³⁹ Pre-trial discovery, however, can give plaintiffs access to schedules, communications, and emails that may evince a conspiracy.

¹³¹ *Id.* (“Indeed, on one level one could say that certain types of discrimination claims are only possible with such discovery.”).

¹³² See Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008) (“The main problem that arises for plaintiffs claiming discriminatory hiring in the [French] civil context is that parties cannot compel discovery of evidence in the adversary’s hands to acquire evidence that would prove the elements of one’s own case.”).

¹³³ *Id.* at 751 (citation omitted). See also Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719 (2012-2013).

¹³⁴ 15 U.S.C. § 1.

¹³⁵ Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987).

¹³⁶ Brief of Antitrust Scholars as Amici Curiae in Support of Respondents, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2018) (No. 17-204) 2018 WL 4773103, at *12.

¹³⁷ *Id.*

¹³⁸ Brief of the American Antitrust Institute as Amici Curiae in Support of Respondents, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), at *4.

¹³⁹ *Id.* at *10.

Broad discovery has thus become the main tool by which plaintiffs can ascertain the existence of certain antitrust violations.¹⁴⁰

Fair Labor Standards Act. Although the Department of Labor has concurrent enforcement power, it “investigates fewer than 1% of FLSA-covered employers each year,” and must instead “rely on private parties to take a lead role in enforcing wage and hours laws.”¹⁴¹ Private claims are in turn overwhelmingly enforced as class actions, allowing employees to band together in pursuit of backpay. Here’s where discovery steps in: in order to prove their work claims, employees must often rely on company records.¹⁴² In some cases, those records include detailed information about company practices, communications, and even videos.¹⁴³ Those records are only available because of broad discovery.

Congress has enacted some of these statutes, and subsequent amendments, on the open assumption that broad discovery was essential and would be available.¹⁴⁴ For example, during debates over the Equal Employment Opportunity Act of 1972, supporters of an EEOC litigation approach—rather than cease-and-desist enforcement—argued that “[t]he Federal Rules of Civil Procedure, with respect to discovery, would greatly facilitate the collection of evidence for trial.”¹⁴⁵ Similarly, some organizations that supported the Civil Rights Attorney’s Fees Awards Act of 1976 argued that attorney’s fees should be awarded to the prevailing party because “it is necessary for the plaintiff to engage in possibly staggering discovery costs,” and these costs “should not be put on the litigant, but instead should be paid by the defendant.”¹⁴⁶ By authorizing fee-shifting, the statute protected, enshrined, and legitimated broad discovery. Further, in debates over the Civil Rights Act of 1991, Senators accepted the availability of broad discovery and complained only that it was *was not enough* to ensure enforcement. For instance, Senator Jeffords asked “[h]ow realistic [wa]s the U.S. Supreme Court’s assertion that since you have discovery procedures now that really the plaintiff is able [] to

¹⁴⁰ *Id.* at *5.

¹⁴¹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1647 (2018) (Ginsburg, J., dissenting) (citing Maria Glover, *Private Enforcement Mechanisms*, *supra* note xx, at 1150-51).

¹⁴² *See e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1043 (2016).

¹⁴³ *Id.* at 1043.

¹⁴⁴ *See* Burbank & Farhang, *COUNTERREVOLUTION*, *supra* note xx, at xx; *see also* Burbank & Farhang, *Rights and Retrenchment*, *supra* note xx, at xx.

¹⁴⁵ *Equal Employment Opportunities Enforcement Act of 1971: Hearing on H.R. 1746*, 92nd Cong. 44 (1971) (minority views on H.R. 17555).

¹⁴⁶ *Legal Fees: Hearings before the Subcommittee on Representation of Citizen Interests of the House Committee on the Judiciary*, 93rd Cong. 1136-37 (1973) (statement of Sylvia Roberts, Attorney, Baton Rouge, L.A., Chairperson, Legal Defense Fund, National Organization for Women).

ascertain as to what the motives of the employer were?”¹⁴⁷ William H. Brown, former Chairman of the EEOC, observed that while “the discovery process [wa]s designed under the Federal [R]ules to ferret out certain kinds of information,” many of an employer’s reasons for making hiring decisions “are so obscure that no amount of discovery is going to be able to discover that.”¹⁴⁸ In these legislative debates, broad discovery was a fundamental background principle.

Not only has Congress continued to expand rights of action—for instance, by adding fee shifting to the Civil Rights Act in 1976 and 1991, or through alternative enforcement avenues in the Hart-Scott Radino Antitrust Act of 1976—but it has also considered and rejected proposals to limit private enforcement under the FLSA and other statutes.¹⁴⁹ And while Congress has altered the discovery rules in many contexts in the past few decades—including in bankruptcy, admiralty, and securities litigation (PSLRA)—it has not attempted to weaken broad discovery in these statutes.¹⁵⁰ Judicial narrowing of discovery for these statutory rights may therefore lack fidelity to the original legislative bargain.

Setting aside the link between these private enforcement regimes and discovery, there is even a close historical connection between a regulatory view of discovery and the litigation state. Many key statutes emerged largely in the mid 1960s and 70s, including the Civil Rights Act and an array of environmental protection laws.¹⁵¹ A 1970 Supreme Court decision also allowed private securities claims for the first time.¹⁵² These areas came to rely, at their core, on private enforcement. Just around that time, the Advisory Committee took the key historical step towards regulatory discovery. In 1970 the Committee amended the standards for document production, removing the long-standing requirement that parties needed prior judicial approval and a showing of “good cause.”¹⁵³ With those

¹⁴⁷ *Id.* at 178. Justice Stevens’ dissent in *Wards Cove* made a similar point. See 490 U.S. 642, 673 n.20 (1989) (“The Court discounts the difficulty its causality requirement presents for employees, reasoning that they may employ ‘liberal civil discovery rules’ to obtain the employer’s statistical personnel records. Even assuming that this generally is true, it has no bearing in this litigation, since it is undisputed that petitioners did not preserve such records.”).

¹⁴⁸ *Civil Rights Act of 1990: Hearing on S. 2104 before the S. Comm. on Labor and Human Resources*, 101st Cong. 178 (1989) (statement of William H. Brown).

¹⁴⁹ See, e.g., Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, 23 *STUD. AM. POL. DEV.* 23, 41 (2009); Glover, *Structural Role*, *supra* note xx, at 1150.

¹⁵⁰ [Footnotes; add more detail].

¹⁵¹ Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 *U. ILL. L. REV.* 185, 192.

¹⁵² *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971).

¹⁵³ Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 *ALA. L. REV.* 529, 540-41 (2001). The 1970 Amendments have been called the “apogee” of broad discovery, *id.* at 540-42, and the “highwater mark” of procedural

mechanistic requirements out of the way, plaintiffs were unleashed to enforce the constellation of new federal statutes that were emerging and consolidating in that era.

What about mass torts? This framework does not seem to apply in the common law, and especially mass torts, context. There is a distinction as to the source of *legitimacy* in these two types of claims. In mass torts cases, unlike private enforcement statutes, Congress has not deliberately chosen private plaintiffs as the primary enforcers,¹⁵⁴ nor has it established a uniform federal law on the topic.¹⁵⁵ Instead, whether regulatory discovery is legitimate may depend on the relationship between state common law and state and federal discovery. While there may be other reasons to recognize discovery as regulation in common law claims, it must be supported by a different set of arguments. One might worry, for instance, that even though mass torts serve deterrent purposes, tort theory was originally rooted in a conception of litigation that emphasized remedies for private wrongdoing.¹⁵⁶ Statutes like Title VII, by contrast, were explicitly meant to serve a broader purpose and have been interpreted to “focus on ‘systems and effects’ rather than tort-like individual wrongs.”¹⁵⁷ Moreover, because federal statutory claims are mostly enforced in federal court, their relationship to discovery can be uniform and informed by Congress.¹⁵⁸ State common law serves multiple masters: state courts and legislatures and federal courts.¹⁵⁹ So, again, the question of *legitimacy* is distinct and needs other supporting theories.

Setting legitimacy aside, however, the regulatory *effect* of discovery in mass torts cases may be very similar, or perhaps identical, to that in private enforcement cases. Just as antitrust claims can promote deterrence and industry regulation, products liability or mass torts claims can achieve the same results.¹⁶⁰ Because of this similarity

reform, Marcus, Discovery Containment Redux, *supra* note xx, at 748 (contrasting the scope of discovery before and after the 1970 Amendments).

¹⁵⁴ While tort can “exist[] alongside regulation,” it remains a separate, state-based mechanism. Engstrom, *When Cars Crash*, *supra* note xx, at 305-07.

¹⁵⁵ Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN ST. L. REV. 1, 37 (2008) (“Tort law allows states to develop diverse policies that suit the needs of their particular citizens.”)

¹⁵⁶ Fleming James Jr., *Damages in Accident Cases*, 41 CORNELL L. REV. 582, 582-83.

¹⁵⁷ Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretation of Title VII*, 63 VAND. L. REV. 363, 389, 397 (2010). *See also*, Justin D. Weitz, *A Necessary Supplement*, 21 WIDENER L. REV. 27, 31 (describing how private enforcement plays a broader role than torts in securities litigation because it seeks to punish wrongdoers).

¹⁵⁸ Lemos, *supra* note 157, at 430 (Agencies’ have the “ability to render a clear, uniform national rule on any given statutory question . . .”).

¹⁵⁹ De Armond, *supra* note 155, at 37 (“The common law . . . changing shape with each new decision.”); Rabin, *supra* note 12, at 294-95 (explaining how Congress can statutorily preempt state common law).

¹⁶⁰ *See infra* notes xx.

of outcome or effect, I retain examples from torts and common law cases as informative and illustrative of regulatory discovery.

B. Discovery as Administrative Subpoena Power

There are close similarities between private enforcement discovery and the administrative state, underlining discovery's regulatory role. The primary lesson of this Section is that discovery's resemblance to administrative subpoenas in the private enforcement context shows that we should conceptualize discovery as a regulatory device that shapes and structures the behavior of regulated entities.

The absolute "backbone of an administrative agency's effectiveness is the ability to investigate rapidly the activities of entities within the agency's jurisdiction."¹⁶¹ Although regulated entities usually provide information voluntarily,¹⁶² agencies' main investigatory tool is the administrative subpoena, an agency request compelling the production of documents or testimony without pre-approval from courts or grand juries.¹⁶³ That is why almost all agencies have subpoena power.¹⁶⁴ Agencies' authority to issue subpoenas is not inherent; it directly derives from congressional authorization in enabling acts (in addition to Section 555(d) of the Administrative Procedure Act).¹⁶⁵ Congress has provided agencies the authority to compel reports or internal documents since the Interstate Commission Act of 1887, setting a precedent for the later development of the administrative state.¹⁶⁶ According to the Department of Justice Office of Legal Policy, there are now "approximately 335 existing administrative subpoena authorities held by . . . executive branch entities under current law."¹⁶⁷

When regulated entities refuse to comply with a request, agency statutes either authorize agency officials to "apply directly to an appropriate U.S. district court for enforcement assistance," or "request the Attorney General's aid in applying to a U.S. district court for enforcement assistance."¹⁶⁸ In addition, agencies can issue Civil

¹⁶¹ Jack Campbell, *Revoking the "Fishing License:" Recent Decisions Place Unwarranted Restrictions on Administrative Agencies' Power to Subpoena Personal Financial Records*, 49 VAND. L. REV. 395, 396 (1996).

¹⁶² 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002).

¹⁶³ See U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES.

¹⁶⁴ WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 101 (6th ed. 2012).

¹⁶⁵ OFFICE OF LEGAL POLICY, *supra* note xx, at 5.

¹⁶⁶ 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002).

¹⁶⁷ U.S. DEPARTMENT OF JUSTICE OFFICE OF LEGAL POLICY, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 5 (2002).

¹⁶⁸ *Id.*

Investigative Demands, which are broad requests for information even *before* any investigation has officially begun.¹⁶⁹

The Supreme Court has recognized a broad administrative subpoena power that extends widely over regulated entities, an acknowledgement that “overbearing limitation of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.”¹⁷⁰ Agencies’ subpoena power is a critical element inexorably intertwined with broader regulatory schemes. The Occupational Safety and Health Administration (OSHA), EPA, and Department of Labor, for example, need a routine and uncontroversial method to investigate compliance with labor and environmental regulations. That is why parties cannot easily object to an administrative subpoena and why in most litigation regulatory agencies “have obtained essentially all the information they have sought from private parties.”¹⁷¹ In *Civil Aeronautics Board v. Hermann*, the Court emphasized that a determination of relevance should mostly be left to agencies, as long as they follow the appropriate procedure and their internal chains of command.¹⁷² Indeed, agencies have previously threatened to file sanctions against lawyers for opposing or refusing to comply with subpoenas on feeble grounds.¹⁷³

Civil discovery’s broad scope could be seen as an extension (or outsourced version) of administrative subpoena power, and one could say that private discovery is directly analogous to an administrative subpoena.¹⁷⁴ Congress has enacted statutes that deliberately depend on private plaintiffs to enforce them and in order for these statutes to succeed, just like agencies, private plaintiffs need broad and powerful tools to investigate legal violations.¹⁷⁵ Perhaps that power should be more or less constrained in the context of private parties—*see infra* Part xx—because they lack the public or democratic legitimacy of government officials. But if plaintiffs truly are exercising government power, discovery rules should look very similar to those governing administrative subpoena power. And, as expected, they do.

Administrative subpoena powers actually resemble private discovery across several dimensions: (i) *ex parte* issuance; (ii) breadth of

¹⁶⁹ See JOHN NIEMANN, A CLOSER LOOK AT THE CFPB CIVIL INVESTIGATIVE DEMAND (2016).

¹⁷⁰ OFFICE OF LEGAL POLICY, *supra* note xx, at 7 (citing *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)).

¹⁷¹ 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002).

¹⁷² 353 U.S. 322, 323 (1957) (per curiam).

¹⁷³ *Id.*

¹⁷⁴ BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note xx, at 70. See also Carrington, Renovating Discovery, *supra* note xx, at 54; Higginbotham, *supra* note xx, at 4-5.

¹⁷⁵ FARHANG, THE LITIGATION STATE, *supra* note xx, at 60, 64-65.

scope and judicial standards of review; (iii) specific tools and devices; and (iv) the costs of production. These dimensions serve regulatory functions by giving broad independence, flexibility, and scope to regulators. At the same time, as discussed below, administrative subpoenas and private discovery are different in significant ways that correct for private enforcers' lack of democratic legitimacy. There are a series of important distinctions between the two discovery devices—for instance, subpoena power exists prior to any litigation—that make the two kinds of discovery far from identical. I do not mean to suggest that private and public discovery are interchangeable, but only that they resemble each other in important ways that indicate a common regulatory foundation.

1. Ex parte Issuance

Both private plaintiffs and agencies can issue subpoenas *ex parte*—a court only becomes involved *ex post* if the responding party moves to quash or for a protective order. The ability to issue discovery requests without any prior judicial approval is one of the most distinctive aspects of American discovery. And it has grown to be both powerful and essential in the context of regulation. Regulated industries generate vast amounts of information on a day-to-day basis. Prior judicial approval would constitute a substantial impediment that would increase transaction costs, decrease the amount of relevant information, and potentially disrupt the regulatory process.

Agencies can both require entities to produce some information on a regular basis or for specific investigatory purposes. For example, the SEC requires publicly listed companies to submit an array of forms regarding their financial performance or activities.¹⁷⁶ The FTC too requires the submission of a collection of documents related to potential mergers. But outside these regularized channels, in order for agencies to even begin to understand their relevant industries, let alone identify wrongdoing, they must probe regulated entities with information requests. Courts have thus upheld agency powers to subject companies to searches or even inspections in the context of regulated commercial activity.¹⁷⁷ And agencies have expanded their power to collect information from “those who are not the custodians of required records and who do not have any *sua sponte* reporting duties.”¹⁷⁸ That is why in *United States v. Morton Salt. Co.*, the Court upheld broad administrative powers to obtain pre-suit information,

¹⁷⁶ 2 Richard J. Pierce, Jr., *ADMINISTRATIVE LAW TREATISE* § 4.1 (4th ed. 2002).

¹⁷⁷ *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *New York v. Burger*, 482 U.S. 691 (1987).

¹⁷⁸ Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 *VAND. L. REV.* 573 (1994).

even if they constitute “fishing expeditions.”¹⁷⁹ This power is fundamentally independent of the judicial process unless and until a party challenges an administrative action in court.

Internal agency procedures for issuing administrative subpoenas or civil investigative demands are expansive and relatively unconstrained. To issue an investigative demand, the Federal Trade Commission needs only a “reason to believe” that the targeted entity has “relevant” information to “unfair or deceptive acts or practices affecting commerce.”¹⁸⁰ These suspicions can be triggered by newspaper articles or employee tip-offs.¹⁸¹ And the FTC’s internal procedure only requires a signature by “a Commissioner pursuant to a Commission resolution.”¹⁸² Similarly, in National Labor Relations Board proceedings, Regional Directors as well as “any person filing a charge or petition under the NLRA,” including employers or employees, can apply to the Board for a subpoena “in order to obtain evidence that relates to any matter under investigation or in question” within the NLRB.¹⁸³ The Postmaster General of the U.S. Postal Service can issue subpoenas after an “appropriate supervisory and legal review of request.”¹⁸⁴ SEC commissioners (and designated officers) “may subpoena witnesses, take evidence, and require the production of documentary evidence deemed relevant or material to an investigation under the Act.”¹⁸⁵ Agency investigations can be triggered by “little more than official curiosity”¹⁸⁶ and often result from random inspections.¹⁸⁷ And EPA administrators “may require a person who owns or operates any emission source . . . who the Administrator believes may have information necessary for the purposes set forth in this subsection” to submit records and information related to air pollution.¹⁸⁸ These agencies generally require approval through internal processes that only sometimes involve high level officials.¹⁸⁹

Private discovery resembles agency power in that it is a fundamentally independent process that, after pleading, is not

¹⁷⁹ 338 U.S. 632, 641 (1950).

¹⁸⁰ OFFICE OF LEGAL POLICY, *supra* note xx, at 5.

¹⁸¹ Eric L. Yaffe, Christopher A. Nowak, *The Unwelcome Phone Call-Responding to Regulatory Audits and Investigations*, 37 FRANCHISE L.J. 393, 394 (2018).

¹⁸² OFFICE OF LEGAL POLICY, *supra* note xx, at Appendix A2.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 2 AM. JUR. 2D ADMINISTRATIVE LAW § 107; Statement of Paul R. Berger, Former Assoc. Dir. of U.S. Securities and Exchange Comm’n, U.S. S. Comm. on the Judiciary (Dec. 5, 2006), *available at* <http://judiciary.senate.gov/testimony.cfm?id=2437&wit-id=5922.a>.

¹⁸⁷ Therese Maynard, *SEC v. Jerry T. O’Brien, Inc.: Has the Supreme Court Overruled United States v. Powell?*, 18 LOY. L.A. L. REV. 643, 646-47 (1985).

¹⁸⁸ OFFICE OF LEGAL POLICY, *supra* note xx, at Appendix A2.

¹⁸⁹ [Research ongoing].

constrained by prior judicial approval. The 1938 discovery rules embodied the progressive conviction—also embraced by regulatory agencies—that “effective regulation was impossible without access to the facts concerning the regulated enterprise.”¹⁹⁰ From 1938 until 1970, however, the federal discovery rules required prior judicial approval for any document subpoena, “upon a showing of good cause.”¹⁹¹ But, as discussed above, the Advisory Committee eliminated this requirement in 1970, allowing private parties to request any information that could plausibly be relevant. To be sure, unlike administrative subpoena power, private plaintiffs must first file a complaint and potentially survive a motion to dismiss under Federal Rule 8. But even in that context, just as courts after *Twombly* and *Iqbal* require that a complaint must meet a “plausibility” standard before discovery sets in, many courts have required agencies to make “plausible arguments” in support of their jurisdiction.¹⁹² Still, this plausibility analysis only takes place after a subpoena is issued while in private enforcement cases the defendant can move to dismiss prior to any discovery. But some statutes have empowered plaintiffs to obtain discovery *prior* to filing any lawsuit at all. For example, FRCP 27 allows a party to take a presuit deposition to perpetuate testimony.¹⁹³

On the whole, both administrative subpoena power and private discovery are unburdened by prior judicial approval, allowing private and public regulators to investigate wrongdoing.

2. Scope & Standards of Review

Judicial *ex post* review of discovery requests is broadly deferential to both private and public regulators. Courts give agencies “great latitude in supplying justification for the issuance” of administrative subpoenas.¹⁹⁴ Specifically, the Supreme Court has only required a good faith or reasonable issuance, asking lower courts to review whether an agency investigation promotes a legitimate purpose, the information is reasonably relevant, and the agency has followed the requisite administrative steps.¹⁹⁵ In *United States v. Powell*, the Court rejected the applicability of a probable cause standard to agency

¹⁹⁰ Burbank & Farhang, Counterrevolution, *supra* note xx at 69.

¹⁹¹ Friedenthal, *Secrecy*, *supra* note xx, at 80 n.44.

¹⁹² *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991).

¹⁹³ FED. R. CIV. P. 27.

¹⁹⁴ Stephen V. Wilson & A. Howard Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, in PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS 29, 35 (Neil A. Kaplan et al. eds., 1981).

¹⁹⁵ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). *See also* OFFICE OF LEGAL POLICY, *supra* note xx.

subpoenas.¹⁹⁶ That is why agency statutes allow officials to seek broad subpoenas over information:

- FTC: “relevant to unfair or deceptive acts or practices,”¹⁹⁷
- NLRB: “that relates to any matter under investigation,”¹⁹⁸
- SEC: “deemed relevant or material to an investigation under the [Securities] Act,”¹⁹⁹ and
- FEC: “relating to the execution of the Commission’s duties.”²⁰⁰

Regulated entities almost never succeed in challenging an administrative subpoena on scope, burden, or other reasons.²⁰¹ In the seminal decision *Endicott Johnson Corp. v. Perkins*, the Court held that a district court has the duty to enforce an administrative subpoena as long as it is not “plainly incompetent or irrelevant to any lawful purpose.”²⁰² Even the most exacting courts have only required agencies to make a “plausible argument in support of its assertion of jurisdiction,” before enforcing a subpoena.²⁰³ Other courts have required much less. In *United States v. Sturm, Ruger & Co.*, the First Circuit rejected a challenge against an OSHA subpoena, noting that “[a]s long as the agency’s assertion of authority is not apocryphal, a procedurally sound subpoena must be enforced.”²⁰⁴ For this reason, courts have been largely deferential to agency subpoenas. For example, the SEC’s power is so vast in scope that some have claimed there is “little that the SEC cannot obtain.”²⁰⁵ Courts accept this broad scope even when there is no agency interest in litigation because agencies can use investigative powers “for valid broader purposes,” including issuing new rules in the future.²⁰⁶

Courts police private discovery requests more closely but are often similarly deferential. The general standard under Rule 26 is that plaintiffs can obtain “discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”²⁰⁷ Information “need not be admissible in evidence

¹⁹⁶ *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

¹⁹⁷ OFFICE OF LEGAL POLICY, *supra* note xx.

¹⁹⁸ OFFICE OF LEGAL POLICY, *supra* note xx.

¹⁹⁹ OFFICE OF LEGAL POLICY, *supra* note xx.

²⁰⁰ OFFICE OF LEGAL POLICY, *supra* note xx.

²⁰¹ 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002).

²⁰² *Endicott Johnson Corp. v. Perkin*, 317 U.S. 501 (1943).

²⁰³ *Kloster Cruise Ltd.*, 939 F.2d at 922.

²⁰⁴ 84 F.3d 1 (1st. Cir. 1996).

²⁰⁵ DAVID F. LINOWES, PRIVACY IN AMERICA: IS YOUR PRIVATE LIFE IN THE PUBLIC EYE? 85 (1989).

²⁰⁶ 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.2 (4th ed. 2002) [CITE CASES].

²⁰⁷ FED. R. CIV. P. 26.

to be discoverable.”²⁰⁸ Prior to the 2015 amendments—which shifted the proportionality analysis and eliminated other language—the rule explicitly noted that requests could be “reasonably calculated” to lead to admissible evidence. It is unclear whether the 2015 amendments have substantially constrained the discovery process.²⁰⁹ Either way, the standard triggers flexible judicial review over “whether good cause exists for authorizing [a request] so long as it is relevant to the subject matter of the action.”²¹⁰ Under this standard, courts often impose the burden on the “party opposing discovery to show that it is not relevant.”²¹¹ On the whole, the limits of private discovery are difficult to ascertain, but are nonetheless liberally construed by most courts.

3. Specific Tools and Devices

Beyond similarities in issuance and judicial review, there is also significant overlap in the tools available to private litigants via discovery and administrative officials via the subpoena power. At the core of both systems are two types of subpoena: *ad testificandum*, requiring testimony (depositions), and *duces tecum*, requiring the production of documents. These two types of subpoena constitute the lifeblood of the administrative and litigation states.²¹² Both agencies and private parties can also issue third party subpoenas, allowing agencies and litigants to seek documents from non-parties—for instance, a bank, internet service provider, or a business in possession of personal documents—related to the target of an agency investigation.²¹³

Granted, the similarities should not be overstated. Discovery powers within the administrative state exceed the subpoena power and are more diverse than anything available in the private context. The subpoena power is just one of an agency’s broad investigative powers independent of the initiation of formal action.²¹⁴ Others include

²⁰⁸ *Id.*

²⁰⁹ For a discussion of the amendments’ relationship to judicial discretion and delegated procedural power, see Effron, *supra* note xx at xx.

²¹⁰ Fed R. Civ. P. 26 advisory committee’s note (2000). See also § 2008 *Relevancy to the Claims or Defenses—Admissibility not Required*, in 8 FED. PRAC. & PROC. CIV. § 2008 (3d ed.) (collecting cases).

²¹¹ See, e.g., *Everest Indem. Ins. Co. v. QBE Ins. Corp.*, 980 F. Supp. 2d 1273 (W.D. Wash. 2013); *Silicon Knights, Inc. v. Epic Games, Inc.*, 917 F. Supp. 2d 503 (E.D.N.C. 2012), *affirmed on other grounds*, 551 Fed. Appx. 646 (4th Cir. 2014). See also § 2008 *Relevancy to the Claims or Defenses—Admissibility not Required*, in 8 FED. PRAC. & PROC. CIV. § 2008 (3d ed.) (collecting cases).

²¹² Abraham Tabaie, *Protecting Privacy Expectations and Personal Documents in SEC Investigations*, 81 S. CAL. L. REV. 781, 786 (2008).

²¹³ 2 Am. Jr. 2d *Administrative Law* § 114 (Aug. 2019 Update).

²¹⁴ 7 WEST’S FED. ADMIN. PRAC. § 7402 (citing *United States v. Oncology Services Corp.*, 60 F.3d 1015, 1019 (3d Cir. 1995); *NLRB v. Carolina Food Processors Inc.*, 81 F.3d 507, 511 (4th Cir. 1996); *EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449, 451 (11th Cir. 1996)).

requirements for recordkeeping (for instance, records necessary for those seeking to deduct expenses on tax returns) and reporting (for instance, IRS Form 1040),²¹⁵ and the power to conduct periodic (and usually unannounced) inspections of persons and businesses within their jurisdiction.²¹⁶

The administrative subpoena power is also not uniform. It is typically understood to “include all powers, regardless of name, that Congress has granted to federal agencies to make an administrative or civil investigatory demand compelling document production or testimony.”²¹⁷ Agency organic statutes sometimes provide only broad language that does not differentiate among different subpoena types. For example, the FTCA confers power on the FTC to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation,” and “to require, by general or special orders, corporations . . . to file with the Commission . . . reports or answers in writing to specific questions.”²¹⁸ Ultimately, agency subpoena authorities vary by (1) source and scope, (2) applicable enforcement mechanisms, (3) notification provisions and other privacy protections, and (4) standards governing issuance.²¹⁹ Additionally, some statutes “limit or forbid delegation of the authority [to issue subpoenas] to lower-ranking officials within the agency.”²²⁰ The number of agency officials required to sign off on a subpoena may also differ.²²¹

Despite their differences, visualizing all of the different private and public discovery tools in their entirety shows that there is significant overlap between them. That is, there are private analogues to many of the available agency subpoena tools. Below, Table [X] explores this comparison:

²¹⁵ See ADMINISTRATIVE LAW AND PRACTICE § 3:14.

²¹⁶ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Because the Fourth Amendment does not require a probable cause showing to make an inspection without consent, most investigative targets consent to inspections. Still, inspections may be more closely scrutinized than other requests for information, and, in many circumstances, a warrant will be required. See ADMINISTRATIVE LAW AND PRACTICE, § 3:13.

²¹⁷ DOJ REPORT, *supra* note xx at xx.

²¹⁸ 2 Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002).

²¹⁹ DOJ REPORT, *supra* note xx at xx.

²²⁰ DOJ REPORT, *supra* note xx at 7.

²²¹ *Id.*

Table 1: Comparison of Administrative and Private Discovery

Admin. Subpoena Power²²²	Private Discovery²²³
Reporting Requirements ²²⁴	Initial Disclosures
Civil Investigatory Demands ²²⁵	No Analogue
Documents ²²⁶	Documents
Testimony or Depositions ²²⁷	Testimony or Depositions
Interrogatories ²²⁸	Interrogatories
Inspections ²²⁹	Property Inspections
No Analogue	Physical Examinations
No Analogue	Requests for Admissions
Forthwith Subpoena ²³⁰	No Analogue

The agency tools that have no private analogues tend to be aggressive exercises of state power. For example:

- Forthwith Subpoenas: A forthwith subpoena “direct[s] the person to whom it is addressed to appear immediately either

²²² See generally *Report to Congress on the Use of Administrative Subpoena Authorities*, *supra* note xx.

²²³ FED. R. CIV. P. 26-36.

²²⁴ Not part of an agency’s subpoena power but nonetheless comparable to automatic disclosures. See *infra* at xx.

²²⁵ See, e.g., 16 C.F.R. § 2.7 (authorizing CIDs in FTC investigations); 15 U.S.C. §§ 1311-1314 (authorizing CIDs under the Antitrust Civil Process Act); 31 U.S.C. § 3733 (authorizing the Attorney General to issue CIDs under the False Claims Act).

²²⁶ See generally *Report to Congress on the Use of Administrative Subpoena Authorities*, *supra* note xx.

²²⁷ See, e.g., 7 C.F.R. §§ 1.319 (concerning authority to conduct a hearing under the Program Fraud Civil Remedies Act); 25 C.F.R. § 900.164 (likewise, under the Indian Self-Determination and Education Act); 33 U.S.C. § 919(d) (Longshore and Harbor Worker’s Compensation Act); 49 U.S.C. § 31133.

²²⁸ See, e.g., Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*; 5 U.S.C. § 1204 (governing the Merits Systems Protection Board); False Claims Act (FCA), Publ. L. 99-562 §6(a) (Oct. 27, 1986), 31 U.S.C. §3733.

²²⁹ See, e.g., 50 U.S.C. Appx § 2155(a) (authorizing the Department of Energy to inspect premises to enforce the Defense Protection Act of 1950); 30 U.S.C. § 1211(c)(1) (authorizing the Secretary of the Interior to make “those investigations and inspections necessary” to ensure compliance with the Surface Mining Control Reclamation Act of 1977).

²³⁰ See *infra* notes xx.

to testify or bring subpoenaed items with him.”²³¹ It typically applies in the criminal investigation context. SEC, for instance, has the power to immediately seize documents, computer hard drives, and digital devices without any *ex ante* notice, increasing the level of disruption among regulated entities.²³² (The SEC’s Enforcement Manual counsels that forthwith subpoenas “should only be used in exigent circumstances.”²³³).

- Civil Investigatory Demands (CID): A CID, like a subpoena, is a pre-suit device to compel production of documents, written responses to interrogatories, or sworn testimony.²³⁴ One purpose of a CID is to allow the government “to assess quickly, and at the least cost to the taxpayers or to the party from whom the information is requested, whether grounds exist for initiating” suit.²³⁵ Some courts and agencies consider CIDs merely another form of subpoena unless a contrary intent is made clear.²³⁶

On the whole, the similarities of tools and devices across the administrative and litigation states underlies their common purposes: to shape and structure the behavior of regulated entities. And while there are significant differences (more fully explored below), there are more similarities across the two systems that support the legitimacy of broad discovery as an exercise of delegated government power.

4. Producer Pays & Costs

American discovery uniquely imposes the costs of production on the producing party.²³⁷ Under Rule 26, private plaintiffs can engage

²³¹ Charles Doyle, Administrative Subpoenas in Criminal Investigations: A Brief Legal Analysis, CRS Report for Congress (Mar. 17, 2006), CRS-12 n.45.

²³² Stephen Dockery, *SEC’s Use of Rare “Forthwith” Subpoena Raises Red Flags for Defense Counsel*, DOJ Anti-Corruption Blog (Nov. 7, 2013), available at <https://www.scribd.com/document/208801215/SEC-s-Use-of-Rare-Forthwith-Subpoena-Raises-Red-Flags-for-Defense-Counsel>; John Reed Stark, *When to Say When: Handling Emerging Technology-Related SEC Enforcement Tactics*, Bloomberg BNA Securities Reg. & Law Rep., 45 SRLR 1737, September 23, 2013.

²³³ SECURITIES AND EXCHANGE COMMISSION DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 50 (Nov. 28, 2017).

²³⁴ See, e.g., 31 U.S.C. § 3733(a). CIDs are often used by the FTC, the Antitrust Division of the DOJ, and the Commercial Litigation Branch, Civil Division of the DOJ. See MARK A. RUSH, CORPORATE RESPONSES TO INVESTIGATIVE REQUESTS BY THE FEDERAL GOVERNMENT 8 (K&L Gates White Paper).

²³⁵ *United States v. Markwood*, 48 F.3d 969, 979 (6th Cir. 1995). See also H.R. Rep. No. 660, 99th Cong. 2d Sess. 26 (1986) (stating a CID is a tool for the government “to determine whether enough evidence exist[s] to warrant the expense of filing, as well as to prevent the potential Defendant from being dragged into court unnecessarily”).

²³⁶ ADMINISTRATIVE LAW AND PRACTICE, § 3:12.

²³⁷ Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011). The producer-pays presumption is “largely an accident of history.” Gordon McKee, Anne Glover

in broad discovery requests without any financial liability. This rule has generated an avalanche of commentary, some of it criticizing the rule for misaligning incentives and allowing requesting parties to externalize the costs of their actions.²³⁸ Critics have even accused this particular rule of fomenting gamesmanship and allowing parties to offensively impose crippling costs on opposing parties to force settlement.²³⁹ Like civil discovery, however, administrative subpoenas have always operated on the producer pays rule. This symmetry signals, again, that private discovery is serving an enforcement agenda.

Administrative subpoena powers operate under a producer pays rule even though they can be exceptionally costly and disruptive.²⁴⁰ For instance, the SEC, FTC, EPA, and CFPB routinely demand significant document productions.²⁴¹ In this context, courts have developed a test that asks whether a subpoena imposes an “undue burden.” Courts sometimes focus on the defendants’ resources, asking whether “the actual costs of discovery are unreasonable in light of the particular size of the respondent's operations.”²⁴² Thus, for example, in *NLRB v. AJD*, the court enforced broad NLRB subpoenas against McDonalds despite the fact that they imposed allegedly “astronomical costs” of over “\$1 million,” would “seriously disrupt their business operations,” sought “160,000 pages of documents,” and McDonalds’ maximum liability could not rise beyond \$50,000.²⁴³ The court emphasized that the NLRB needed to investigate “labor violations at certain McDonald’s franchises” and defendant had not shown a lack of capacity to “handle the costs.”²⁴⁴ Over the past few years the SEC has increasingly relied “on broadly defined subpoenas instead of informal information requests.”²⁴⁵

5. Important Differences

Of course, administrative subpoena power also differs from discovery in a variety of important and multifaceted ways. It is important not to understate these differences which are, by some estimation, significant. Among others, the differences between the two include the fact that administrative subpoenas are issued prior to

& Francis Rouleau, *A Comparative Discussion of Who Pays for Document Discovery in Australia, Canada, Guernsey (Channel Islands), and Singapore and its Effect on Access to Justice*, 71 VAND. L. REV. 2145, 2147 (2018).

²³⁸ See e.g., Redish & McNamara, *Back to the Future*, *supra* note xx, at 774.

²³⁹ Easterbrook, *Discovery as Abuse*, *supra* note xx, at 637.

²⁴⁰ Yaffe & Nowak, *The Unwelcome Phone Call*, *supra* note xx, at 394.

²⁴¹ Joseph T. III Lynyak & Rebecca Tierney, *Dealing with Civil Investigative Demands from the CFPB: Rules, Responses, and Practice Considerations*, 130 BANKING L.J. 771 (2013).

²⁴² *N.L.R.B. v. AJD, Inc.*, No. 15 MISC. 326 JFK, 2015 WL 7018351, at *5 (S.D.N.Y. Nov. 12, 2015).

²⁴³ *Id.*; Yaffe & Nowak, *The Unwelcome Phone Call*, *supra* note xx, at 394.

²⁴⁴ *N.L.R.B. v. AJD*, 2015 WL 7018351, at *5.

²⁴⁵ Dockery, *supra* note xx.

litigation while private discovery can only occur within litigation and that subpoena power is more expansive and varied than private discovery. Perhaps these differences, and their underlying justification, emerge from the premise that private discovery is wielded by profit-motivated attorneys while subpoena power is a public tool that operates under political checks. Although courts have not explicitly recognized this political distinction, it seems evident from the case law that judges have implicitly incorporated it into their discovery calculus.

Courts treat administrative subpoenas as more legitimate and broader than private discovery in many ways. For example, courts tolerate “fishing expeditions” in the administrative context but not in private discovery.²⁴⁶ Although administrative subpoena power “was once viewed with a great deal of suspicion,”²⁴⁷ this restrictive theory of administrative power was “rejected many years ago, and ha[s] not been revived.”²⁴⁸ Indeed, courts find that “official curiosity . . . [can be] ground for a[n] [agency] request for information.”²⁴⁹ On the other hand, as Edson Sunderland recognized in 1932, “[h]ostility to ‘fishing expeditions’ before trial is a traditional and powerful taboo.”²⁵⁰ And, despite evidence that Sunderland and the Rules drafters sought to create a legal universe that “frequently seemed to require discovery fishing expeditions,”²⁵¹ the taboo remains.²⁵²

Courts’ acceptance of administrative fishing expeditions reflects their perception that agency subpoena power is broader, more varied, and more regularized than private discovery. The administrative subpoena is only one of several tools agencies use in the ordinary course of their business to regulate private conduct, alongside

²⁴⁶ See *United States v. Morton Salt Co.*, 338 U.S. 632, 641-64 (1950) (rejecting the argument that since “[t]he courts [sh]ould not go fishing,” neither should agencies). *But compare* *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”), *with* *McGee v. Hayes*, 43 Fed. Appx. 214, 217 (10th Cir. 2002) (arguing that district courts are not “required to permit [a] plaintiff to engage in a ‘fishing expedition’ in the hope of supporting his claim.”).

²⁴⁷ Jack W. Campbell, *Revoking the “Fishing License.” Recent Decisions Place Unwarranted Restrictions on Administrative Agencies’ Power to Subpoena Personal Financial Records*, 49 *VAND. L. REV.* 395, 398 (1996).

²⁴⁸ *ADMINISTRATIVE LAW AND PRACTICE* § 7402 (citing *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-509 (1943) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946)).

²⁴⁹ 2 *AM. JUR. 2D ADMINISTRATIVE LAW* § 107.

²⁵⁰ Edson R. Sunderland, *Foreword to* George Ragland, Jr., *DISCOVERY BEFORE TRIAL* at iii (1932).

²⁵¹ Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 *B.C.L. REV.* 691, 739 (1998). *See generally id.*

²⁵² *See, e.g., S.E.C. v. Goldstone*, 301 F.R.D. 593 (D.N.M. 2014) (“[D]iscovery is not intended to be a fishing expedition . . .”). *See also* Elizabeth G. Thornburg, *Just Say ‘No Fishing’: The Lure of Metaphor*, 40 *U. MICH. J. L. REFORM* 1, 3 (2006) (suggesting the legal profession reject the fishing metaphor).

recordkeeping and reporting requirements, physical inspections, and the separate work of an agency's Inspector General. Unlike the discovery system, "an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it."²⁵³ In contrast, even if judicial *ex post* review of discovery requests is broadly deferential to both private and public regulators, discovery requests in private litigation are still tethered to the lawsuit in which they appear. A lawsuit must be filed, and motions litigated, before private discovery may begin to serve its regulatory ends.

Despite the similarities discussed above, public discovery is also distinct from private discovery in its diversity and scope. Whereas the Federal Rules apply uniformly across federal courts (even if interpretation differs within districts and circuits), agencies do not share the same subpoena power. Moreover, because it exists outside litigation, an administrative subpoena "may serve the full range of administrative processes,"²⁵⁴ including conducting "investigations to make rules, to determine policy, to recommend legislation, and to illuminate areas in order to find out whether something should be done and if so what."²⁵⁵ While the Article argues that private discovery also serves these purposes, courts have mostly recognized these benefits in the agency context only. Courts' recognition of this investigative breadth reflects the thinking that "regulation c[annot] be intelligent unless the regulators ha[ve] access to information that only the regulated business could supply."²⁵⁶

6. The Democratic Legitimacy Problem

As previously discussed, when public officials exercise subpoena power they enjoy a public and democratic check that private plaintiffs lack, creating an obvious legitimacy gap between the two types of discovery. At first glance, this appears to be a significant additional difference between the two types of enforcement. But, as I discuss here, this asymmetry is not as important as once thought and Congress may have already accounted for this difference.

Courts may implicitly accept wider administrative subpoenas because while plaintiffs' attorneys are only motivated by profit, there is a political and democratic check on agency officials. Scholars have

²⁵³ *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993).

²⁵⁴ ADMINISTRATIVE LAW AND PRACTICE, §3:12 (citing ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 68 (1947)).

²⁵⁵ 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002). *See also* *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

²⁵⁶ 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.1 (4th ed. 2002) [Again, might be helpful to cite to cases.].

long argued that while public enforcers take social costs into account and exercise prosecutorial discretion, private enforcers are only willing to litigate for private gain, and will even to file unmeritorious claims in search of settlement.²⁵⁷ A plaintiffs' private benefit could exceed the need for deterrence in a particular context, leading to an excessive and inefficient amount of lawsuits.²⁵⁸ In this stylized view, private enforcers can exploit broad discovery because there are no analogues to the institutional and political constraints that agencies face.²⁵⁹ Steven Shavell, for instance, has argued that where private incentives to litigate exceed the social benefits that would result, restrictions should be implemented, including, notably, "procedural rules limiting discovery."²⁶⁰ Similarly, Matthew Stephenson has argued that private suits—as compared to administrative enforcement—can lead to overenforcement, disrupt existing regulatory regimes, and "raise concerns about the democratic accountability of law enforcers, since private plaintiffs are not subjected to the same electoral checks that constrain executive officials."²⁶¹ This "democratic accountability" and "political check" critique has been at the center of private/public enforcement debates for at least two decades.

A recent spate of scholarship, however, has cast doubt on the significance of the democratic accountability problem and the political asymmetry between private and public actors.²⁶² The fact that private enforcers are motivated by financial gain may not be a perverse incentive; it instead gives plaintiffs' attorneys a reason to be selective about the cases they choose to bring, screening closely for worth and merit. William Hubbard, for instance, argues that "[a] plaintiffs' attorney working on contingency must offset the entire cost of litigating every case with a fraction of the judgments in the successful cases . . . [this] magnifies the incentive to screen cases for quality . . . because the lawyer gets paid only if the plaintiff wins or obtains a settlement (both of which are more likely if the case is stronger)."²⁶³ To be sure, even this calculation leaves plenty of room for attorneys motivated by the possibility of settlement to bring "strike" or

²⁵⁷ See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 (1997); Matthew C. Stephenson, *Public Regulation of Private Enforcement*, *supra* note xx, at 114. *Cf.* Engstrom, *Litigation Gatekeepers*, *supra* note xx at 630-34 (arguing that this zealotry critique of private enforcement is, "in its full-throated form, overblown and indeterminate" but acknowledging that, "[a]s a first-order generalization," it has "much truth").

²⁵⁸ Shavell, *supra* note xx, at 578.

²⁵⁹ *Cf.* Engstrom, *Litigation Gatekeepers*, *supra* note xx.

²⁶⁰ Shavell, *supra* note xx, at 579.

²⁶¹ Matthew Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114 (2005).

²⁶² See *e.g.*, BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (2019).

²⁶³ *Id.* at 706-07.

“nuisance” suits that defendants can pay off. But the key is that private plaintiffs must invest time and resources and are therefore at least partly disincentivized from filing unmeritorious claims.²⁶⁴ Plaintiffs’ firms are generally not paid by the hour either so they have no clear incentive to over request documents.²⁶⁵

Plaintiffs’ financial motivation and other distortions are also not asymmetrical—they exist in the administrative state too. While the underlying assumption of the democratic accountability critique is that public officials are not financially motivated because they do not pocket damages awards, Maggie Lemos and Max Minzner have argued that public enforcers may seek large monetary awards for self-interested reasons divorced from the public interest in deterrence.²⁶⁶ This occurs most often when agencies can retain all or some of the proceeds of enforcement; but even when they must turn over their winnings to the general treasury, there are reputational reasons to focus on and publicize dollars earned in judgments.²⁶⁷ Agency heads have an interest in aggressive enforcement because it maximizes their agency’s budget, and this interest is shared by lower-level employees because the benefits of a larger budget trickle down to them through enhanced career opportunities.²⁶⁸ In order to build up a reputation as an effective enforcer—in the eyes of the legislature, executive officials, and judges—an agency will emphasize easily measurable accomplishments, like large monetary awards in enforcement, rather than “more amorphous forms of success.”²⁶⁹ High recoveries, in an individual case or in the aggregate, can make an enforcement program appear effective and might increase an agency’s autonomy from oversight.²⁷⁰ An additional reason to question the alleged financial motivation asymmetry is the long literature on the danger of agency capture and its distortive consequences for enforcement.²⁷¹ All of this means that an agency’s cost-benefit analysis is not optimal, as it is infected by reputational concerns and financial motives and may reliably err on the side of action or overenforcement.²⁷²

²⁶⁴ Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 2070 n. 118 (citing Jonathan R. Macey & Geoffrey P. Miller).

²⁶⁵ Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1712 (2014).

²⁶⁶ Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 854 (2014).

²⁶⁷ Lemos & Minzner, *supra* note xx at 854.

²⁶⁸ Lemos & Minzner, *supra* note xx at 870-71.

²⁶⁹ Lemos & Minzner, *supra* note xx at 876.

²⁷⁰ Lemos & Minzner, *supra* note xx at 877.

²⁷¹ David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1314 (2012); BRIAN FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (2019).

²⁷² *Id.* at 898. See also FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (2019).

Accepting that both private and public enforcers face reputational consequences, it is unclear which of the two kinds of actors has better incentives. For private plaintiffs, there are costs to overfilling meritless claims in the aggregate litigation world, including losing future clients.²⁷³ Public enforcers, by contrast, may face little individual accountability for overbroad subpoenas and could potentially waste the massive resources of the government. Its therefore not as clear as it may first seem whether private or public enforcers would be more likely to abuse the discovery process.

Not only do private and public enforcers face potentially negative financial and reputational incentives, Congress may have already accounted for the lack of democratic legitimacy in private enforcement. As an initial matter, Congress, by choosing to arm individuals with private enforcement power, confers a modicum of democratic legitimacy on the process.²⁷⁴ But setting that aside, it appears that Congress writes statutes with greater specificity when granting primary enforcement and interpretive authority to individuals and courts, thus limiting potential “drift” by private enforcers.²⁷⁵ Sean Farhang recently argued that Congress addresses the democratic legitimacy problem by “resolv[ing] more policy issues in the legislation, elaborating substantive statutory law in greater detail, and leverage[ing] more administrative rulemaking expertise.”²⁷⁶ This potentially mitigates the democratic legitimacy concern, because “the actual state of the world is one in which federal regulation implemented through litigation regimes is more informed by institutional policy-making capacity in the legislature, more often attended by expert rulemaking, and more tied to democratic governance, than previously thought.”²⁷⁷

Finally, any remaining concerns over the democratic accountability deficit of private litigants are already implicitly addressed

²⁷³ [CITE].

²⁷⁴ David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 638 (2013).

²⁷⁵ Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 *CALIF. L. REV.* 1529 (2018). Discovery as regulation also has implications for this literature. Scholars often describe the choice of private vs. regulatory enforcement as a choice between enforcement through the judiciary or agencies. See e.g., Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 *VAND. L. REV.* 363 (2010); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 *HARV. L. REV.* 1036 (2006). This rich literature sees private enforcement of statutes as delegation to courts and judges rather than bureaucrats. But if discovery is the lynchpin of private enforcement and a truly regulatory tool, then private enforcement is often not delegation to the judiciary but to private plaintiffs who operate under little supervision and ultimately settle cases.

²⁷⁶ *Id.* at 1534.

²⁷⁷ *Id.* at 1602.

because the system has built-in safeguards in the context of private enforcement that do not exist in public enforcement:

First, as discussed above, prior to broad discovery, plaintiffs must meet the *Twombly* and *Iqbal* plausibility standard. This is a significant roadblock that agencies do not face. Agencies can request information at any time without meeting any pleading threshold. If pleading operates correctly, then it is filtering all of the unmeritorious claims that agencies or bureaucrats would not file.

Second, in recognition of agency democratic legitimacy, regulatory subpoenas can have much broader powers that a private plaintiff lacks. SEC officials, for example, can immediately seize documents or devices subject only to an *ex post* judicial hearing.²⁷⁸

Finally, agency subpoenas are as a practical matter much more powerful than private discovery because regulated entities have reputational and repeat player reasons to maintain an amicable relationship with regulators. Facing an agency subpoena, most regulated entities choose to cooperate rather than seek judicial review.²⁷⁹ In the face of private complaints, by contrast, businesses have no reason not to seek judicial review and to challenge broad discovery requests. Administrative subpoenas are also more burdensome because, unlike in private discovery, parties cannot engage in reciprocal cost imposition.²⁸⁰ Just like a plaintiff can force a defendant to bear the costs of searching through thousands of emails, so can a defendant increase costs by seeking expansive discovery of the plaintiff.²⁸¹ Both parties, then, have an incentive to keep discovery within reasonable bounds lest it cause an endless series of information requests. But this inherent limit does not exist in the agency context where a regulated entity has no ability to impose costs on regulators. Moreover, while courts have carved out exceptions to the producer pays presumption, there doesn't seem to be a similar development in the agency context.²⁸²

All of these differences seem to alleviate the apparent asymmetries between private discovery and administrative subpoena power and, regardless, agency subpoenas enjoy an added weight that private enforcers lack—a difference that is justified by remaining democratic and institutional reasons to trust agencies.

²⁷⁸ Dockery, *supra* note xx.

²⁷⁹ Choi & Pritchard, *supra* note xx.

²⁸⁰ See Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037 (2018).

²⁸¹ *Id.* at 2040.

²⁸² Jonathan Remy Nash & Joanna Shepherd, *Aligning Incentives and Cost Allocation in Discovery*, 71 VAND. L. REV. 2015 (2018).

7. The Diffusion Asymmetry

One final potential distinction between agency and private discovery is that private enforcers are diffused, lack economies of scale, and can impose redundant discovery costs on companies by filings hundreds or thousands of uncoordinated lawsuits. Public enforcers, the argument goes, can avoid these problems by concentrating regulation in single agencies or coordinating across separate agencies. Bureaucrats also understand the underlying purposes of statutes and can therefore better decide when to expend organizational resources to file an enforcement claim.²⁸³

This diffusion-redundancy critique misses the fact that a significant amount of private enforcement takes place through aggregation devices like class actions or multidistrict litigation. Whether in the context of antitrust, civil rights, or securities litigation, the main (and sometimes only) enforcement tool for private plaintiffs is to proceed as a class or through MDLs. Given that these devices often bind other plaintiffs through preclusion, private enforcers are partly limited from engaging in guerilla litigation. Aggregation also gives private plaintiffs economies of scale. In addition, discovery can sometimes be expensive because of the time spent searching, gathering, and preserving internal documents (including review by counsel).²⁸⁴ So even if multiple plaintiffs can file related claims with similar discovery requests, they are likely not imposing redundant costs—a regulated entity needs only to produce documents it has already searched and gathered in response to prior requests. This casts doubt on the costly redundancy critique of private enforcement.

Private enforcers also have a potentially significant advantage in the context of discovery: they are often “organizational insiders” with better incentives and knowledge of what information is relevant.²⁸⁵ Administrative agencies must constantly solicit information from regulated entities, issue subpoenas or investigative demands, and stay acquainted with their industries because they are one step removed from regulated entities. They are outsiders to the process. Private litigants, by contrast, are often insiders: employees, consumers, and competitors. They can understand better than any agency whether a competitor, employer, or manufacturer is violating a statute.²⁸⁶ We may

²⁸³ Engstrom.

²⁸⁴ See William H.J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 *Cath. U. L. Rev.* 867 (2015).

²⁸⁵ Engstrom, *supra* note xx; KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW 37-107 (2003); Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 *COLUM. L. REV.* 1384, 1387 (2000).

²⁸⁶ See Effron, *supra* note xx at 139 (“The [discovery rules assume] that the parties themselves are in the best position to know and negotiate how much discovery is

thus expect *ex ante* that their discovery requests might be more targeted than that of agencies. If we are worried about costs, this may justify empowering private rather than public enforcers with discovery.

* * *

Taking all of these similarities together, and acknowledging existing significant differences, it is not difficult to see discovery as a regulatory device intertwined with private and public enforcement. Both agencies and private plaintiffs inevitably need information that only regulated entities hold. Consequently, some of our most important statutory regimes depend on private litigants who can obtain broad information from regulated entities. Discovery in these areas operates as a regulatory tool.

C. Regulatory Discovery's Spillover Effects

Once we reconceptualize one of discovery's roles as regulation, many of its features become easier to understand. At the core of regulatory discovery is neither fairness, accuracy, judicial economy, nor equality. Rather, regulatory discovery seeks to promote deterrence of harmful behavior and aims to shape the primary behavior of regulated entities to achieve better compliance with existing laws and norms. In this sense, discovery has positive spillover effects—social rather than private benefits—that go beyond each specific case and can shape regulated entities' behavior, expose wrongdoing, and influence industry-wide practices and the development of substantive law.

While our current discovery paradigm is well-armed to recognize discovery's negative spillovers—providing tools like protective orders or motions to seal the record—what it lacks is a vocabulary, underlying theory, and proper tools to recognize *positive* spillovers. So while it is undoubtedly difficult or perhaps impossible to measure whether regulatory discovery is systemically optimal, this Section's goal is to argue that discovery can operate as regulation that produces broad and positive effects that we currently undervalue.

One benefit that gains more prominence within a regulatory discovery paradigm is deterrence, which has long been one of the main justifications for private enforcement. The logic is simple: the threat of a lawsuit from a plaintiff with broad investigatory powers, and the prospect of lawyers examining internal documents and witnesses, should dissuade regulated entities from violating the law. To be sure, identifying discovery's incremental deterrent value is a challenging and

needed, what materials fall within the scope of discovery, and when and where discovery events should take place.”).

a nearly “imponderable” question.²⁸⁷ But for our purposes we need only understand that discovery can promote both specific deterrence—by ensuring that a defendant’s misdeeds are exposed—and general deterrence—by increasing the costs of litigation and changing the probability of success at trial.²⁸⁸ Indeed, discovery’s investigatory role may be the most important aspect of litigation deterrence. Discovery can uniquely increase the probability of exposing wrongdoing. Neither class actions nor pleading standards can do that. In that sense, information exchange practices can have considerable influence on the cost-benefit analyses of regulated entities. If deterrence is at the heart of discovery, then discovery costs that are even higher than the cost of the lawsuit can be justified when they create sufficient deterrence “that leads actors to take steps to reduce injuries by an amount that exceeds the costs of the lawsuit.”²⁸⁹

Discovery’s regulatory and deterrent effect is broad and can be conceptualized by its influence on (1) primary behavior, (2) transparency, and (3) the substantive law. While I recognize the possibility of (4) negative spillovers, I agree that we already have sufficient tools to address or limit their consequences.

1. Discovery and Primary Behavior: The Disney, Faragher, and Argentina Cases

Discovery can influence, change, or structure the primary behavior of regulated entities. This effect is most clear in the context of corporate litigation. In a broad study of corporate law, Erica Gorga and Michael Haberstam found that “modern discovery . . . has had a profound impact on the evolution of shareholder litigation, corporate governance, and the culture of corporate disclosure in the United States.”²⁹⁰ Discovery has not only been a powerful tool for plaintiffs’ attorneys, but has also restructured corporate expectations and the way that companies collect and produce information. Litigation over corporate decisions can smoke out internal emails, accounting techniques, records, and employee secrets (in depositions).²⁹¹ Vast amounts of corporate information thus expose companies’ internal decision-making and forces them to change methods in order to comply with routine discovery requests.²⁹² Gorga and Haberstam argue

²⁸⁷ Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481 (1994).

²⁸⁸ BRIAN FITZPATRICK, DO CLASS ACTIONS DETER WRONGDOING? (2017); Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 Ga. L. Rev. 1093 (2016).

²⁸⁹ Jay Tidmarsh, *The Litigation Budget*, 68 Vand. L. Rev. 855, 861 & n.18 (2015) (citing Shavell, *supra* note xx, at 585).

²⁹⁰ Gorga & Halberstam, *supra* note xx, at 1386.

²⁹¹ *Id.* at 1429.

²⁹² *Id.*

that “episodic legal demands for detailed corporate internal information have induced incremental improvements in corporate governance practices, including more exacting decision procedures, internal monitoring, recordkeeping, and securities disclosure.”²⁹³

Even more, discovery has influenced how companies conduct internal investigations and has produced information that has directly shaped new regulations.²⁹⁴ For example, the discovery that followed scandals such as Enron uncovered facts regarding internal corporate malfeasance that informed ensuing statutes and regulatory reforms.²⁹⁵ Discovery produced in this scandal shaped the SEC’s new compensation rules.²⁹⁶ Gorga and Halberstam highlight how in one particular case against Disney (where the company was found *not* liable), discovery resulted in over nine thousand pages of transcripts, business records, and correspondence that forced the Board to dismiss the CEO and completely reform their governance structure.²⁹⁷ Analyzing this case from a purely adversarial angle would paint discovery as a giant waste. But from the regulatory point of view, discovery was wildly successful. For one, discovery allowed the court to “articulate[] new standards of fiduciary duty in board decision-making” that would inform other companies—an otherwise difficult endeavor.²⁹⁸ These kinds of decisions also allow lawyers “to get their clients to accept better conduct and procedures,”²⁹⁹ and can have a disciplinary effect by “forc[ing] managers to answer questions they do not want to answer,” and “challeng[ing] their power and authority in a public setting.”³⁰⁰

Discovery has the potential to lead to both internal reforms and industry wide reforms. Internally, companies engage in “introspection through litigation,” by reviewing information produced in lawsuits “to better understand weaknesses in personnel, training, management, and policies.”³⁰¹ This is particularly useful in large and complex organizations where information is “decentralized and held by a number of different people and entities.”³⁰² One anecdote from a legal profession study captures discovery’s potential as a vehicle for internal reform:

²⁹³ *Id.* at 1395.

²⁹⁴ *See generally id.*

²⁹⁵ *Id.* at 1396.

²⁹⁶ *Id.* at 1427.

²⁹⁷ *Id.* at 1401-06.

²⁹⁸ *Id.* at 1427.

²⁹⁹ *Id.* (internal quotation omitted).

³⁰⁰ *Id.* at 1429.

³⁰¹ Joanna Schwartz, *Introspection through Litigation*, 90 *Notre Dame Law Review* 1055 (2015).

³⁰² *Id.* at 1060.

A litigation partner in a New York firm told us that in the course of defending a product liability action, he learned facts that led him to seek out the company's chief executive officer to tell him that the corporate product safety and quality control systems 'were a mess.'³⁰³

As Joanna Schwartz has argued, “[f]or organizations interested in learning about their performance, lawsuits are, in essence, unsolicited audits by deeply dissatisfied customers who are highly motivated”³⁰⁴ These “audits” are—in the language of regulatory discovery—a private version of an agency audit. For example, in the airline context, investigations and reporting requirement by the Federal Aviation Administration lead to regular changes among airlines.³⁰⁵ But lawsuits complement this regulation in areas that the FAA otherwise does not cover.³⁰⁶ Discovery has played a similarly complementary regulatory role in the realms of car manufacturing defects, aircraft accidents, and hospital malpractice.³⁰⁷ So, just like an FAA bureaucrat or lawyer can force regulated companies to reform their behavior, both a company’s own lawyers as well as opposing counsel can use discovery to uncover internal information that leads to corporate reform.

But discovery’s effects are not cabined to internal reform of the single company in litigation—they also inform external decisions by management in other companies.³⁰⁸ This extraordinary transparency affects companies’ reputations, internal behavior, and has arguably bolstered U.S. financial markets and corporate behavior. In a recent study of sovereign debt litigation, Sadie Blanchard found that creditors often complain that the system is flawed because debtor states are almost never forced to pay outstanding debt.³⁰⁹ Nonetheless, market actors repeatedly claim to value this kind of litigation. Why? Because, among other things, discovery in sovereign debt cases reveals information about states’ credit-worthiness, “mitigate[] information asymmetries about debtor behavior,” and shapes reputational

³⁰³ Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 432 (1985).

³⁰⁴ Schwartz, *Introspection through Litigation*, *supra* note xx at 1057-58. *See also* Joanna C. Schwartz, *A Dose of Reality*, *supra* note xx, at 1283 (“[L]awsuits can be a useful tool for auditing the effectiveness of . . . hospital data sources.”).

³⁰⁵ Schwartz, *Introspection through Litigation*, *supra* note xx, at 1063.

³⁰⁶ *Id.* at 1063 & n.32 (considering, for instance, injuries from turbulence and emergency descents that have not been found in National Transportation Safety Board and FAA reports and so “may only come to an airline’s attention when described in a lawsuit”).

³⁰⁷ Schwartz, *Introspection through Litigation*, *supra* note xx at 1067-1070.

³⁰⁸ *Id.*

³⁰⁹ Sadie Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 2018 BYU L. REV. 497 (2019).

governance and market decisions by third parties.³¹⁰ The key to courts' role in these cases is not their power to bind their parties or ultimately resolve the case; it is instead that they can force states to reveal information that “other reputation-shaping institutions do not provide and that matters to investors and other third parties with sanctioning power.”³¹¹ In one case against Argentina, U.S. creditors used discovery to reveal corruption schemes around the world, which then influenced the debt market, prosecutors, and newspapers. In these cases, discovery updates, shapes, and reorganizes the market—it *regulates*.

Cases do not need to have a high amount in controversy in order for regulatory discovery to serve its purposes. In the seminal case *Faragher v. City of Boca Raton*, a former city lifeguard sued her employer and the city for sexual harassment under Title VII, a provision that relies on private enforcement.³¹² Plaintiff requested only nominal, compensatory, and punitive damages of unnamed amounts but likely in the tens of thousands of dollars. Nonetheless, extensive discovery produced a formidable record that the city had failed to publicize its sexual harassment policy among employees, track the conduct of supervisors, or create a reasonable process for handling sexual harassment complaints.³¹³ Documents and depositions also painstakingly detailed Boca Raton's internal hierarchy, supervision standards, hiring and personnel practices, facilities, and internal memoranda.³¹⁴ After the Court sided with plaintiff against the City, and explicitly questioned the City's sexual harassment policy, details produced in the case became the basis for a revolution in employment and personnel practices. State governments, cities, and employers developed new comprehensive sexual harassment policies, dissemination processes, harassment training, comprehensive background checks, and policies for reviewing supervisory actions.³¹⁵ Discovery, and a bench trial, in *Faragher* led to an array of reforms.

2. Discovery, Transparency, and Public Benefits

Discovery exposes wrongdoing to the public eye, securities market, and regulators, reinforcing reputational consequences for

³¹⁰ *Id.* at 497.

³¹¹ *Id.*

³¹² 524 U.S. 775 (1998).

³¹³ *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1558 (S.D. Fla. 1994).

³¹⁴ *Faragher*, 864 F. Supp. at 1558.

³¹⁵ Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481 (2018); David Sherwyn, Michael Heise & Zev G. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1300–1301 (2001); Susan Bisom-Rapp, *Essay, Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. 62 (2018).

regulated entities. Litigation has public effects beyond a judicial finding of liability. By concentrating public attention on alleged wrongdoing, “litigation can and frequently does inflict nonlegal harms on defendants such as harm to their reputation.”³¹⁶

Discovery is at the center of this reputation effect because it is the mechanism by which internal records and decisions can become public during litigation.³¹⁷ Courts have traditionally recognized that access to court proceedings and documents is presumptively public.³¹⁸ But most discovery takes place outside court,³¹⁹ so it is not part of the “public trial.” The public ordinarily can access key litigation documents and depositions only when one of the parties chooses to share them³²⁰ or they are “used in [a court] proceeding.”³²¹ Moreover, a party seeking to restrict the other parties in litigation from receiving discovery or distributing received discovery may do so through a protective order (discussed further *infra* Part X).³²² Absent a protective order, parties can distribute or use information exchanged in discovery for any legal purpose.³²³ And in some cases, attorneys and the press have simply disregarded protective orders and leaked important discovery material.³²⁴ This means that there are a variety of avenues by which discovery information reaches the public: open court proceedings, documents attached to summary judgment motions or other filings,

³¹⁶ Russell M. Gold, *Compensation’s Role in Deterrence*, 91 NOTRE DAME LAW REVIEW 1997, 2007-2023 (1997).

³¹⁷ *Cf.* A.T.&T. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979) (“[P]retrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.”). *But see* Seattle Times v. Rhinehart, 467 U.S. 20, 34-35 (1984) (“Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”)

³¹⁸ *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) (“historically both civil and criminal trials have been presumptively open.”); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (discussing the historical roots of the right to access).

³¹⁹ Fed. R. Civ. P. 5(d)(1)(A) (“[D]iscovery requests and responses must not be filed until they are used in the proceeding or the court orders filing.”).

³²⁰ ROBERT TIMOTHY REAGAN, FEDERAL JUDICIAL CENTER, CONFIDENTIAL DISCOVERY: A POCKET GUIDE ON PROTECTIVE ORDERS 2 (2012) (citing Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988) (“Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants.”)).

³²¹ FED. R. CIV. P. 5(d).

³²² *Id.* 26(c)(1). *See also* REAGAN, *supra* note xx, at 2-3.

³²³ *See, e.g.,* Seattle Times Co., 467 U.S. at 35. Third-party access to discovery—mainly by the media—under Rule 24 is another essential avenue of information. *See* FED. R. CIV. P. 24; *see also, e.g.,* Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 810 (1990) (discussing Public Citizen’s attempt to secure Rule 24 intervenor status to challenge the modification of a protective order in the Agent Orange litigation); Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 784-87 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989).

³²⁴ William G. Childs, *When the Bell Can’t Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565, 565-66 (2008).

deliberate sharing by parties, document leaks, and dissemination by Rule 24 intervenors (often the press).

A recent spate of scholars have recognized that discovery can produce “social benefits” by forcing regulated entities to produce information of public consequence that shapes reputations.³²⁵ For instance, Maria Correia and Michael Klausner found in an empirical analysis of securities class actions that “CEOs, CFOs, and other officers often lose their jobs in the wake of class actions and thus bear those costs.”³²⁶ Those reputational consequences are influenced by detailed information on executives’ actions produced in discovery. Prior studies of securities fraud cases have even found that class action filings have an immediate impact on share prices because of the potential discovery of fraud.³²⁷ As mentioned above, other studies have also found that sovereign debt markets are shaped by litigation involving debtor states.

Courts have similarly emphasized the importance of discovery in producing information relevant for public welfare.³²⁸ Congress has even considered bills to limit the issuance of protective orders where discovery is related to public health.³²⁹ Examples abound in the employment discrimination context, wage claims under the FLSA, civil

³²⁵ See *supra* notes xx. See also TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 162 (2005); Timothy D. Lytton, Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits, 86 *TEX. L. REV.* 1837, 1843–58 (2008); Wendy Wagner, When All Else Fails: Regulating Risky Products Through Tort Litigation, 95 *GEO. L.J.* 693, 711–27 (2007).

³²⁶ Maria Correia & Michael Klausner, *Are Securities Class Actions "Supplemental" to SEC Enforcement? An Empirical Analysis* (2012).

³²⁷ Choi & Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 *J. L. STUDIES* 27 (2016); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 *HARV. L. REV.* 963 (1994).

³²⁸ See, e.g., *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975) (“[C]ertain civil suits may be instigated for the very purpose of gaining information for the public.”); Richard L. Marcus, *Bomb Throwing, Democratic Theory, and Basic Values - A New Path to Procedural Harmonization?*, 107 *NW. U. L. REV.* 475, 477-78 (2013). Scholars have also advocated litigation’s information-flushing function in several areas of tort law. See, e.g., Engstrom, *When Cars Crash*, *supra* note xx, at 328-335 (auto); Robert L. Rabin, *Poking Holes in the Fabric of Tort: A Comment*, 56 *DEPAUL L. REV.* 293, 302 (2007) (asbestos, tobacco, and medical instruments); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841, 890 (2012) (police misconduct); Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 271, 271 (gun control). *But see* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 *HARV. L. REV.* 1437, 1473 (2010) (suggesting there is little evidence that product liability suits have enhanced product safety for aircrafts, automobiles, and the DPT vaccine).

³²⁹ Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order*, 7 *TUL. J. INT’L & COMP. L.* 153 (1999).

enforcement of RICO claims, and sexual discrimination.³³⁰ For instance, in *Barcume v. City of Flint*, evidence of widespread sexual harassment only became public during discovery in a separate claim for sexual discrimination.³³¹ Although outside the scope of the Article, the torts context is again informative here. One recent example is a mass torts lawsuit against Monsanto over its herbicide, Roundup, where plaintiffs’ attorneys publicized “hundreds of company emails obtained through . . . discovery,” that showed a tantalizing link between Roundup and cancer.³³² Although such information can be strategically deployed by plaintiffs’ attorneys to force settlement, it can often amplify accurate information with effects on social welfare.³³³

3. Discovery’s Other Positive Spillovers

As a result of the two effects discussed above, discovery has other positive spillovers that are unrelated to the specific case at hand—such as prompting changes in substantive law. Discovery increases the amount of public information about regulated entities, allowing system designers to update, improve, and even develop new regulations.³³⁴ As Jack Friedenthal once argued, “over the years developments in areas such as . . . employment discrimination, and consumer protection have been the result at least partly of broad-ranging discovery provisions.”³³⁵ The Supreme Court even justified changes to employment discrimination law—forcing plaintiffs to show actual cause—by highlighting the availability of discovery.³³⁶ By generating new methods of enforcing statutes, plaintiffs’ attorneys can become engines of legal reform and can engender support for new legislation or judicial decisions.³³⁷

4. Discovery’s Negative Spillovers

³³⁰ *See infra*.

³³¹ *Barcume v. City of Flint*, 819 F. Supp. 631, 637 (E.D. Mich. 1993) (disallowing an amended complaint adding sexual harassment claims after discovery).

³³² Jacob Bunge & Ruth Bender, *Roundup, the World’s Best-Selling Weedkiller, Faces a Legal Reckoning*, WALL STREET JOURNAL (Apr. 8, 2019), available at <https://www.wsj.com/articles/roundup-the-weedkiller-that-changed-farming-faces-a-reckoning-11554735900>.

³³³ *But see* Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT. L. REV. 331 (2006) (arguing against a default rule that discovery information is public).

³³⁴ Marcus, *Discovery Containment Redux*, *supra* note xx, at 749.

³³⁵ Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981).

³³⁶ *See* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-58 (1989); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981). *See also* Marcus, *Discovery Containment Redux*, *supra* note xx, at 751 (arguing from these cases that “the very structure of employment discrimination law seems to have been founded partly on the availability of broad discovery”).

³³⁷ Friedenthal, *supra* note xx, at 818.

Of course, discovery can also generate negative spillovers and significant systemic costs. But the system has built a series of safeguards to keep those negative effects in check. So while courts and existing doctrines seem to lack an underlying recognition of discovery's positive spillovers—and a theory to support them—the system already accounts for the costs or negative effects side of the ledger.

There is an extensive literature highlighting discovery's potential to force unfair settlements, deter socially beneficial behavior, and to eliminate trials.³³⁸ Even setting aside cost asymmetries between plaintiffs and defendants, regulatory discovery may also expose companies to public relations fiascos via revelations of perfectly legal behavior. For example, tort law obligates companies to adopt only those safety measures whose costs are justified by their social impact; companies may calculate the potential loss of life or injuries and nonetheless proceed with their corporate activities.³³⁹ It is perhaps concerning that companies fearful of future discovery may balk at doing anything that even appears inappropriate to the public eye. Widespread deterrence of socially beneficial behavior could ensue. We may worry, too, that once negative spillovers are tallied and added to the costs of litigation that would mount if we embrace broad discovery, we risk reverting to an unclear view of discovery as regulation.

Moreover, there are important caveats regarding all of the positive spillover benefits discussed above. First, in *Disney, Faragher*, and similar cases, regulatory discovery is not operating on its own. The high costs of litigation and reputational consequences—rather than the pure production of internal information—can also spur deterrence and internal corporate reforms. Companies grudgingly change arrangements and even fire executives because it helps to reduce the occurrence or cost of future lawsuits. It's unclear how much of this we should attribute to discovery. To be sure, trial remains an important avenue, and sometimes the only avenue, for the benefits of discovery to become truly transparent. But it is often the process of discovery, not trial, that does the hard work of getting parties to produce information. Second, there are surely many examples where a defendant absorbs the costs of regulatory discovery and, unlike the *Disney* case, there is no corresponding private and social gain.

But these negative spillovers and caveats are not only well-recognized in the literature, courts and Congress have also built a bevy of tools to deal with these problems. Parties can move for a protective order under Rule 26(c)—even if the information is relevant and proportional—that would require “that a trade secret or other confidential research, development, or commercial information not be

³³⁸ See *supra* notes xx.

³³⁹ [Footnote].

revealed or be revealed only in a specified way.”³⁴⁰ The Advisory Committee notes explicitly that “courts have recognized that interests in privacy may call for a measure of extra protection.”³⁴¹ Parties can move to seal produced records;³⁴² quash overbroad or unduly burdensome subpoenas;³⁴³ designate matters as privileged or work-product;³⁴⁴ and otherwise stipulate to keep information confidential.³⁴⁵ If anything, there is some suggestive evidence that courts are granting protective orders *too often*.³⁴⁶ This demonstrates that the system already accounts for the possibility of negative spillovers and what is missing is a better set of tools, theory, and vocabulary to recognize and promote positive spillovers, especially regulatory ones. One upshot of the regulatory theory of discovery is that a good measure of discovery public availability may be necessary in order to achieve general deterrence.

D. The Intersection of Private and Public Discovery

Private discovery and public enforcement have come to intersect in a variety of ways, further reinforcing the view that discovery could be conceptualized as a regulatory tool. At the heart of their intersection is piggyback litigation—situations where private or public enforcers ride the coattails of previous enforcement by filing claims after an action has been filed or resolved.³⁴⁷

Government enforcement cases have the potential to generate vast amounts of discovery that private enforcers can employ, lowering costs and expanding the breadth of information available.³⁴⁸ Although there are significant privacy and trade secret limits, a considerable amount of information produced in *litigation* against the government is inherently public. That information can become extremely useful to other litigants with overlapping or redundant private claims. For example, in the midst of litigation against tobacco companies in the 1990s, the state of Minnesota “[e]stablished a publicly accessible document depository containing over 35 million pages discovered in

³⁴⁰ FRCP 26(c).

³⁴¹ FRCP 26 (Adv. Notes).

³⁴² FRCP 26(C).

³⁴³ FRCP 45.

³⁴⁴ FRCP 26.

³⁴⁵ [TBD].

³⁴⁶ Endo, Confidentiality.

³⁴⁷ Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lanyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2 (2000); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 288 (2016) (“The Chamber of Commerce, no friend to the plaintiffs’ bar, has championed environmental citizen suits over EPA intervention.”).

³⁴⁸ The SEC actually discusses in its manual whether information obtained in investigations can be used by its own staff during litigation. See SEC. & EXCH. COMM’N DIV OF ENFORCEMENT, ENFORCEMENT MANUAL (2017).

its lawsuit.”³⁴⁹ Private plaintiffs then seized this information to build their own individual and class action cases against tobacco companies.³⁵⁰ This borrowing dramatically reduced litigation costs in follow-on litigation.

The obverse is also true—private enforcement can shed light on wrongdoing and therefore spur public regulatory action. Given that public regulators lack a functional panopticon, they often rely on signals from private plaintiffs and class actions to understand areas that need further public enforcement. A CFPB study identified hundreds of instances where public enforcement followed private actions and drew from their strategies.³⁵¹ For example, in the analogous mass torts context, private claims against faulty Firestone Tires triggered action by the National Highway Traffic Safety Administration.³⁵² Private discovery is crucial in these cases.

Setting aside information produced during litigation, some private litigants can also have access to information produced to agencies during administrative investigations. In the PSLRA context, where discovery is limited during a pending motion to dismiss, courts have nonetheless allowed discovery over information that has already been produced to the SEC.³⁵³ This has created an opening where private litigants can interact with agencies to amass necessary information in securities cases. Courts have allowed this under the theory that defendants suffer no undue burden or costs in producing information that they have already provided to government entities.³⁵⁴ Although producing entities often claim that documents are privileged, courts have refused to accept that theory.³⁵⁵ Indeed, FINRA has gone as far as to provide guidance on the discoverability of financial documents produced to agencies.

IV. A New Framework for Regulatory Discovery

This Part turns to the implications of reconceptualizing discovery as a device with multiple underlying justifications, including an important regulatory rationale. The analysis attempts to answer the question of how courts should exercise their supervisory powers over discovery to fully engage with its complexity. Specifically, this Part

³⁴⁹ Erichson, *Coattail Class Actions*, supra note xx, at 11.

³⁵⁰ *Id.* at 11-12.

³⁵¹ Clopton, *Redundant Public-Private Enforcement*, supra note xx, at 298.

³⁵² See Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 518 (2001).

³⁵³ See e.g., *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004).

³⁵⁴ *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004); Howard S. Suskin & Joseph H. Thompson, *Discovery Stays under the PSLRA*, SEC. LITIG. J. (2007).

³⁵⁵ *LaMorte v. Mansfield*, 438 F.2d 448, 451 (2d Cir. 1971); Philip M. Aidikoff et al., *Discovery of Regulatory Documents: Debunking the Myth of an “SEC Privilege” In Securities Arbitration*, 18 PIABA BAR J. 187 (2011).

addresses three domains: categorizing discovery disputes, understanding the relevance of costs, and grappling with regulatory discovery. Moving through these three domains elucidates a set of principles and tradeoffs that can guide judges in addressing discovery models. The analysis is not necessarily practical; it is also abstract and ignores several other important axes of dispute (confidentiality, trade secrets, etc.). The goal, however, is not to generate a comprehensive guide. Rather, it is to map some preliminary lines of analysis and offer some theoretical insights that can apply in real world disputes.

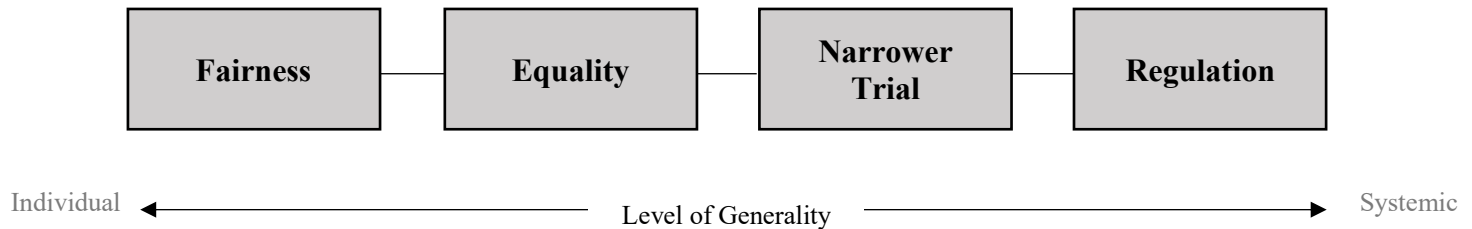
A. Discovery is a Plural Device

When judges intervene in discovery disputes, they must first understand the needs of the case and the relevant relationship between the substantive law and the specific discovery requests at issue. But, in order to answer this preliminary question, the theories developed above counsel that discovery is a plural device with multiple justifications and both individual as well as systemic implications. Its background theories sometimes overlap and sometimes point in different directions. But we cannot even begin to ask the question of discovery costs or breadth without first understanding which theory of discovery we are invoking. For discovery seeks to accomplish many ends that are moral, historical, economical, and institutional. The difficulty therefore lies in understanding when, exactly, these theories intersect and when they do not and then using that as a launchpad to reform the discovery system.

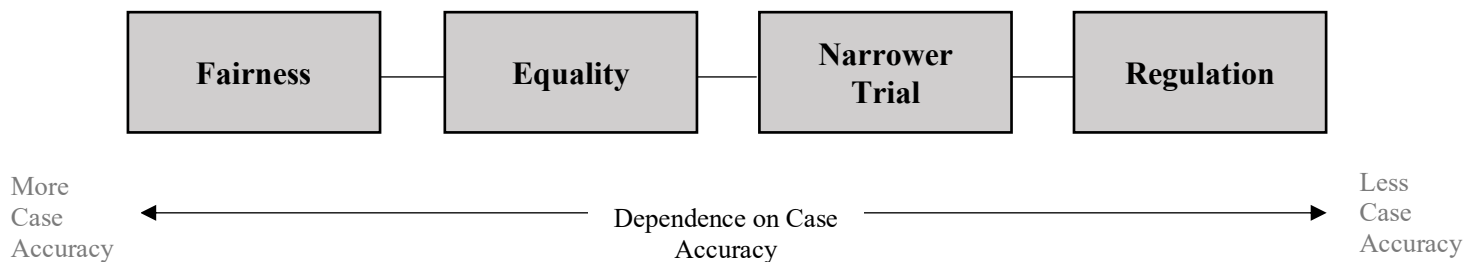
Let's begin with an understanding of why these discovery theories operate at different levels—some systemic and some individual. Fairness and equality are primarily concerned with the specific facts of the case and whether plaintiffs can obtain information that will allow them to build a legal case, gain a voice in front of a judge, and reach an accurate outcome. Participation values, are of course, more systemic. But the goal of any equitable discovery system is to make plaintiffs feel as if they received a fair shake in the legal system. Contrast that with the historical and economic idea of discovery as a way to narrow trial or make it redundant, which operates at both the individual and systemic level. But the core of discovery as a tool to narrow trials and promote settlement is mainly institutional—the role of discovery is to limit the inefficient jury and trial process.

Regulatory discovery, by contrast, is only systemic. Return, for example, to the Disney case where shareholders sued the board over executive pay. At the end of a case that produced large amounts of documents and depositions, Disney was found not liable. In hindsight, from a fairness point of view, it was neither efficient nor equitable to subject Disney to that amount of discovery. Nor did the costs force the parties to settle. Discovery seems wasteful under those two

theories. But regulatory discovery is only concerned with the effects of the case on the corporate law, deterrence, cost-benefit analyses of peer companies, and exposure of wrongdoing. By that measure, discovery was wildly successful because it led to significant improvements by the SEC and the practices of in-house lawyers in peer firms.



This systemic vs. individual difference also highlights the complex relationship with accuracy among these theories. A fairness justification is concerned mainly with accuracy and participation—broad discovery is appropriate because it maximizes the amount of information available to the fact-finder and gives parties a voice and ability to construct a case. By contrast, an equality justification is meant not to give parties a voice, but rather to help litigants overcome the asymmetries inherent between plaintiffs and defendants and one-shotters and repeat players. These goals are also related to accuracy but they can stand on their own; we may want equality for equality's sake. Where these asymmetries do not exist, as in business-to-business cases where parties have considerable information—e.g., a dispute over the meaning of a contractual term—then fairness may nonetheless promote broad discovery but equality would not. Similarly, an extremely expensive discovery process in a civil rights or employment discrimination case may not be justified under the efficiency prong of the fairness justification, but may nonetheless be supported by a concern for equality. Discovery's role as a settlement inducer is not overly concerned with accuracy; the goal is instead to limit another process (trials) for efficiency reasons. Finally, regulatory discovery is not closely related to accuracy (at least at the case level) at all. It is focused entirely on broader deterrence.



Interestingly, in both the trial substitution and regulatory theories, discovery stands in for something else, either common law trials or enforcement. This common thread connects these two theories and highlights that discovery is simply a tool that fulfills broader systemic and institutional goals.

B. Costs Reconsidered: Absolute vs. Relative Costs

With the four foundational discovery theories in view, the question of costs becomes radically different from that usually asked by courts and scholars. Recall that over the past four decades, discovery debates have centered on cost,³⁵⁶ usually defined as the money spent in litigation.³⁵⁷ Thus, although Rule 26(b) allows judges to consider six factors in assessing discovery requests³⁵⁸—of which “the monetary stakes are only one,” as the Advisory Committee takes pains to note³⁵⁹—scholars and judges tend to analyze discovery costs relative to the potential award in a particular case.³⁶⁰ As Judge Marrero of the Southern District of New York recently argued, “[t]he expense

³⁵⁶ See *supra* notes xx-xx and accompanying text.

³⁵⁷ See Endo, *Discovery Hydraulics*, *supra* note xx, at 1323 (citing Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1797-800; Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2073-74 (2002)). Granted, some have argued for more expansive understandings of costs and benefits in litigation (and especially discovery). See Coleman, *The Efficiency Norm*, *supra* note xx, at 1797-800; ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 33 (1984) (“Everybody understands you can have a case where the values at stake transcend the economics of the case, so this is not a pure dollar test”).

³⁵⁸ FED. R. CIV. P. 26(b) (requiring judges to consider “[1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties’ relative access to relevant information, [4] the parties’ resources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit”). See generally Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093 (2016) (using law and economics to analyze each factor within the proportionality standard).

³⁵⁹ FED. R. CIV. P. 26(b) advisory committee’s notes to 2015 amendment.

³⁶⁰ Michael Thomas Murphy, *Occam’s Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG. 89, 102 (2016) (“[A] natural tendency exists to use the amount in controversy as the dominant factor to determine proportionality. We are, after all, examining cost.”); JUDGE DAVID G. CAMPBELL, MEMORANDUM TO JUDGE JEFFREY SUTTON RE: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE at Rules Appendix B-6 (June 14, 2014) (reporting on a 2008 Federal Judicial Center survey finding that a quarter of attorneys in 3550 cases believed discovery costs were “too high” relative to the amount in controversy). Cf. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1111 (2016) (“In many cases—certainly, when money damages are the sole requested relief—the amount in controversy (factor 2) will be the most objectively determinable.”). But see *id.* at 1118 (arguing that Rule 26(b)(1)’s proportionality standard “functionally provides judges with equitable discretion to consider normative issues”).

[of litigation may be] disproportionate if it significantly exceeds the value of the issue in dispute, as measured by some objective standard.”³⁶¹ It would be irrational, the argument goes, to create a system where discovery costs are higher than the amount in controversy. So if a plaintiff in an employment case is asking for backpay in the amount of \$50,000, proportional discovery would counsel that depositions and the costs of producing information should not equal an amount remotely equivalent to \$50,000, let alone exceed it.³⁶² As discussed above, some of the empirical literature on discovery focuses precisely on this discovery-costs-to-stakes ratio. But fairness, equality, settlement, and regulation point in different ways when it comes to costs. These four theories therefore have complex relationships with costs that do not boil down to the discovery-costs-to-stakes ratio.

The fairness theory uniquely takes costs into account as an efficiency tradeoff; we should maximize accuracy and participation up until discovery costs outweigh them in a cost-benefits analysis. In a fairness paradigm, costs are determined by the discovery-costs-to-stakes ratio. Fairness is a two-way street that also includes the interests of the party responding to discovery requests. The concept of gamesmanship is almost purely used within the fairness theory. Indeed, most of the discovery costs literature worries about lawyers who strategically impose costs on opponents, thus making the entire system unwieldy and burdensome.

The equality theory hinges on an existing asymmetry between plaintiffs and defendants and between one-shotters and repeat players so it is, by its very nature, intended to impose unequal costs that are imposed on the defendant-repeat player. In other words, costs are the point in an equality sense because the deep pocketed or knowledge-possessing party must bear the costs of equalizing the litigation equipment of the other party. As with the fairness theory, however, costs should never exceed the stakes of the litigation.

Once we reach the view that discovery is meant to narrow issues for trial, the question of costs ceases to be about the stakes of the case or about absolute dollar numbers. The focus should instead be on a comparison of discovery costs and—hypothetically—trial costs if discovery did not exist. In other words, the question becomes entirely *comparative*. Discovery is substituting for what the Rules’

³⁶¹ Victor Marrero, *The Cost of Rules, The Rule of Costs*, 37 CARDOZO L. REV. 1599, 1627 (2016).

³⁶² *Cf.* Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co., 322 F.R.D. 1, 8 (D.D.C. 2017) (“Given the very substantial amount of damages that Oxbow seeks to recover in this case, its cost of complying with the discovery request to produce information relevant to Defendants’ defense of Oxbow’s claims does not strike the [court] as excessive.”).

drafters assumed would be a more expensive trial that involved cross-examinations and the production of documents in front of a judge or jury. *Ex ante* is there any reason to believe that modern discovery should be more costly than pre-1938 trials? Discovery does take much longer because it is an out of court process. It is also handled almost entirely by the parties, opening the doors to abuse, and it can be more expensive because it lacks the pressure of concentrating the entire case in a few days or weeks. On the other hand, the costs can be more predictable and parties can thoroughly litigate the burdens in motion practice away from the fact-finder. Moreover, discovery does not demand the kind of total commitment and preparation that trials require from lawyers.³⁶³ In the legal industry, trials are known to be extraordinarily expensive. Another trial problem is the presentation of surprising theretofore-unseen evidence, as well as the necessity of quickly deciding questions about relevance or admissibility. Moreover, discovery avoids the burden of impaneling a jury—a cost saving that goes beyond mere dollars and also must account for the imposition on the jurors. The 1938 drafters weighed these competing values and decided that discovery was likely systemically superior to jury trials.

Regulatory discovery, for its part, also completely reconceptualizes the problem of discovery costs as a comparative question. Discovery within a private enforcement paradigm is necessarily a government tool; its only counterpart is the administrative subpoena. The relationship between a particular case's amount in controversy and discovery is thus somewhat beside the point. Contra Judge Hardiman's suggestion that discovery is inappropriate for cases below \$500,000, regulatory discovery can produce significant positive spillovers in small cases. As discussed above, discovery in the sexual harassment case *Faragher v. City of Boca Raton*—with an amount in controversy below \$100,000—became the basis for widespread reforms to employment and personnel practices. The EEOC exercises its subpoena and enforcement powers in dozens of small cases every year.³⁶⁴ And, as discussed above, the NLRB once imposed subpoena costs of potentially \$1 million dollars on McDonalds even though the maximum penalty in the case was \$50,000.³⁶⁵

That is why the question of whether discovery costs are too high in a private enforcement case depends mostly on *whether the case generates more costs than a comparable agency investigation*. This isn't to say that agency costs are optimal, but only that an agency investigation is the realistic alternative to private enforcement and is therefore a good point of reference. Costs, in this view, have very little to do with the

³⁶³ John Bronsteen, Against Summary Judgment, 75 GEO. WASH. L. REV. 522, 533 (2007) (suggesting that discovery and pretrial costs exceed the costs of trial).

³⁶⁴ U.S. Equal Employment Opportunity Commission, *EEOC Press Releases*, available at <https://www.eeoc.gov/eeoc/newsroom/release/> (last visited July 21, 2019).

³⁶⁵ See *supra* notes xx.

individual interests of plaintiffs or defendants. They are instead better considered within the context of the systemic benefit of enforcing a statute in which Congress chose private plaintiffs in addition to, or instead of, agencies.³⁶⁶

Framing the question in a comparative way shows that private discovery costs can often be similar to agency subpoena costs. One area where critics have pilloried broad discovery is securities litigation. As discussed above, Congress oriented the PSLRA around the problem of discovery costs. In isolation, discovery requests in securities cases do seem to be extremely broad, expensive, and intrusive. But compared to SEC subpoenas—which can be litigation thermonuclear devices—private discovery appears positively tame. There is unfortunately no systematic SEC data that would allow for an accurate comparison. According to public information, however, the SEC routinely issues hundreds of either informal “requests” for information or subpoenas during investigations. Anecdotal examples show at least the range of SEC investigations. For instance, large banks have recently reported that broad SEC subpoenas forced them to produce anywhere from 750,000 documents in a case involving Wells Fargo, to as much as eight million documents in a case involving Goldman Sachs.³⁶⁷ Assembling these colossal productions take thousands of hours and hundreds of compliance workers and outside counsel review. Indeed, as Tesla and Kraft Heinz found recently, a single SEC subpoena can send a company’s stock tumbling.³⁶⁸ SEC investigations can also be notoriously protracted, with many continuing for more than four years.³⁶⁹ And these investigations are not outliers among agencies.³⁷⁰ With this broader context in view, the threat of private discovery in securities or antitrust cases seems much less intrusive. Judges should keep these comparative costs in mind.

C. The Implications of Regulatory Discovery

Conceptualizing discovery as a regulatory tool should restructure the way courts consider discovery questions. As mentioned

³⁶⁶ Of course, many have argued that neither discovery nor administrative subpoenas are appropriate; both should be shunned. *See e.g.*, PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 11 (1994); RICHARD A. EPSTEIN, *OVERDOSE: HOW EXCESSIVE GOVERNMENT REGULATION STIFLES PHARMACEUTICAL INNOVATION* 10-12 (2006).

³⁶⁷ Andrew N. Vollmer, *Need for Narrower Subpoenas in SEC Investigations*, *NEW YORK LAW JOURNAL* (Oct. 10, 2014).

³⁶⁸ Greg Farrell, *Tesla Receives Subpoena Over Musk’s Take-Private Tweet*, *BLOOMBERG* (Aug. 15, 2018, 11:20 AM EDT), <https://www.bloomberg.com/news/articles/2018-08-15/tesla-drops-on-report-of-sec-subpoena-over-musk-go-private-plan>; *SEC Opens Investigation into Kraft Heinz Accounting*, *FINANCIAL TIMES* (Feb. 21, 2019).

³⁶⁹ Vollmer, *supra* note xx.

³⁷⁰ [CITE].

above, regulatory discovery is systemic, depends on deterrence not accuracy, and most closely resembles administrative subpoenas. These differences make regulatory discovery powerful and rebut arguments presented by critics of the current discovery system. Specifically, we should focus on three consequences of regulatory discovery:

1. Private Enforcement as a Separate Category

Courts should analyze private enforcement cases, and the breadth of discovery therein, differently than other cases. Private enforcement is a fundamentally distinct process in the U.S. legal system. It represents the delegation of government enforcement power to private plaintiffs. As discussed at length above, its closest analogue, and relevant point of departure, must be the administrative subpoena. In that context, the relevant agency's enabling act must first authorize the relevant subpoena, and internal agency rules must then specify the scope and procedures that agency officials must follow. Administrative discovery is intimately tied with statutory authorization. This does not mean that discovery should be broader than it is—rather, it means only that our current broad discovery paradigm is justifiable in these cases.

Just as with administrative subpoenas, regulatory discovery must begin with an understanding of the purposes of the statute that authorizes private enforcement. Courts cannot just blindly rely on Rule 26's invocation that discovery extends only to matters that are "relevant to any party's claim or defense and proportional to the needs of the case."³⁷¹ Instead, they must engage in a simultaneous analysis of the underlying statute that grants plaintiffs a private right of action and must ask whether there is a nexus between the discovery at issue, Rule 26, and the broader purposes of the statute. Proportionality should not be dependent on the "needs of the case," but instead on the needs of the relevant private enforcement regime.

In regulatory cases, discovery should be informed by a spectrum of statutes that depend mostly on private enforcement, hybrid regimes that depend on both public and private action, and those that only agencies can enforce.³⁷² In the first group, statutory regimes depend mostly on private enforcement even though there are bureaucracies, too. Enforcement of the Fair Labor Standards Act, for example, falls mostly to employees and employment class actions, not

³⁷¹ FED. R. CIV. P. 26.

³⁷² Engstrom, *Agencies as Litigation Gatekeepers*, *supra* note xx, at 623 (discussing the evolution of "many of our most consequential regulatory regimes" into "hybrids of public and private enforcement [with] multiple enforcers"); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1976 (2014) (discussing the False Claims Act's qui tam regime as "a complex public-private hybrid"); Clopton, *Redundant Public-Private Enforcement*, *supra* note xx, at 295-99.

to the NLRB. So too Civil Rights Act Title VII claims, which are mostly private, even though the DOJ Civil Rights Division has some enforcement power. In these cases, broad discovery is fundamental. Without it, entire statutory regimes would go unenforced. As Judge Schiendlin once noted, “if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery.”³⁷³ Courts should therefore read into the statutes a broad right to discovery.

In the second group, hybrid regimes abound, including some of our most important statutes. For example, agencies share enforcement authority with private parties in contexts like antitrust (Sherman Act/FTC); environmental law (CWA/EPA); and securities (Securities and Exchange Act/SEC). In those cases, broad discovery is important though not nearly as necessary as in the first group.

Within this second group, Courts should err on the side of broad discovery but limit it where it seems clear that an agency could replace private enforcement. At first blush, this might be a difficult administrative task for courts. Questions of agency budgetary priorities and resources devoted to enforcement seem outside of judicial purview. Moreover, there are political reasons why agencies, and Congress, leave plenty of room for private enforcement.³⁷⁴ But one accessible way for courts to answer this question is to pay attention to agency or other public enforcers’ announcements, public reports, and amicus briefs. The SEC, for instance, often [files/writes amicus briefs/reports in important cases], outlining whether a potential procedural change might weaken private and public enforcement, and its broader effects.³⁷⁵ So too, the FTC and EPA often [file amicus briefs in procedure cases].³⁷⁶ Indeed, in *Twombly*, sixteen states wrote an amicus brief arguing that heightened pleading standards would not weaken enforcement because state attorneys general had the tools—including civil investigative demands—to replace private enforcement.³⁷⁷ Additionally, judges could take notice of Congressional action in certain areas. Below, I offer an example of this where Congress empowered the CFPB to assume enforcement tasks after 2010 that were originally performed by private parties.

³⁷³ *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

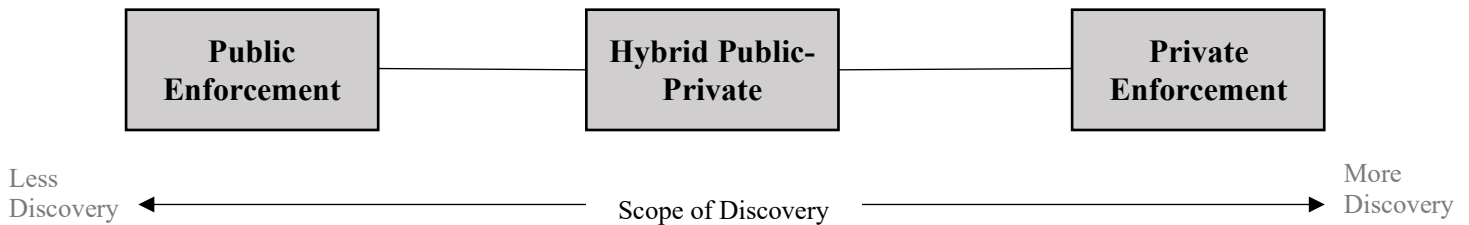
³⁷⁴ [Farhang (discussing EEOC).]

³⁷⁵ [SEC Amicus Briefs, including in *Cyan* or *Halliburton* or other statements quoted in amicus briefs in those cases].

³⁷⁶ [FTC Amicus Briefs. EPA Amicus briefs].

³⁷⁷ Brief of the Commonwealth of Virginia & 15 Other States as Amici Curiae in Support of the Petitioners, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2503552. I have previously written about this phenomenon of state briefs in federal procedure cases. Diego A. Zambrano, *The States’ Interest in Federal Procedure*, STAN. L. REV. (2018).

Finally, in the third group, where bureaucracies engage in the bulk of enforcement, as in occupational safety cases (OSHA) or EEOC actions, courts may comfortably limit the scope of discovery if an agency has occupied the field or heavily regulated the area. Again, the information relevant for this determination exists in agency announcements, public reports, and amicus briefs.



This spectrum, along with the regulatory discovery theory, allows us to reconsider the question of discovery costs. As explored above, high discovery costs are rare and may exist in less than 5% of all cases.³⁷⁸ Within this smaller subset of cases, the FJC has noted that “that patent, trademark, securities, and antitrust cases stood out for their high discovery expenses.”³⁷⁹ Two of these regimes—securities and antitrust—explicitly depend on delegated private enforcement. In the antitrust context, private enforcement accounts for 90% of all antitrust filings.³⁸⁰ In the securities realm, the SEC routinely declares that private enforcement is “essential” and empirical studies find that “private enforcement seems to dwarf public enforcement.”³⁸¹ These contexts are somewhere between the hybrid public-private or private enforcement groups. Therefore, courts should err on the side on broader discovery because it serves regulatory goals.

But there are areas where courts and system designers should restrict discovery or at least increasingly supervise it. Prior to the Dodd-Frank Act, federal consumer financial protection law was either weakly enforced by the Federal Trade Commission (under the Federal Trade Commission Act) or private claims under the Fair Debt Collections Practices Act and similar statutes.³⁸² The FTCA provided no private right of action. Given the weakness of the FTC, broad discovery was justified for FDCPA and state law claims. Dodd-Frank,

³⁷⁸ See *infra* notes xx.

³⁷⁹ SHAPARD, STIENSTRA, & MILETICH, *supra* note xx.

³⁸⁰ See *supra* note xx.

³⁸¹ S. Rep. No. 104-98, at 8; John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1543 (2006); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 511-13 (1991).

³⁸² Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 37 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58 (2006)).

however, completely changed this. By creating the Consumer Financial Protection Board, and providing that agency with the power to issue broad civil investigative demands, the statute reordered the entire area award from the hybrid bucket towards public enforcement. The CFPB was given broad investigatory powers to obtain documents, tangible items, and depositions—prior to any formal investigation—and independent funding to support its mandate.³⁸³ This powerful agency, in a sense, occupied the field and displaced the relevance of private claims (both state and federal). Given a regulatory discovery framework, it would be sensible for courts to limit discovery in this context, especially because the FTCA and Dodd-Frank still do not authorize private rights of action.³⁸⁴

2. Judicial Administrability

The proposals in this section can lean on existing analytical frameworks that are judicially administrable. To summarize:

- In private enforcement cases, courts should err on the side of broad discovery by interpreting “proportionality” in relation not only to the needs of the specific case, but to the needs of the relevant statutory regime and industry.
- The breadth of discovery should be related to whether the statutory regime depends (1) largely (2) somewhat or (3) scarcely, on private enforcement. The more a regime depends on private enforcement, the broader discovery should be, and *vice-versa*.
- To the extent that Congress or agencies indicate that public enforcement can replace private enforcement, courts should err on the side of narrow discovery.
- In calculating the question of discovery costs, parties and courts should compare the costs of private discovery to the costs of compliance with an analogous administrative subpoena.

At first blush, this framework is complex and perhaps unwieldy—it asks courts to determine whether discovery has regulatory consequences, how it interacts with the statutory claim, and to analyze the potential benefit of having the relevant information in the public eye. This may seem like an inappropriate analysis at the discovery stage. Moreover, if courts grant public, hybrid, and private actions different levels of discovery, this might yield a nightmare of mixed and matched procedures. Complex cases potentially feature two or even three of the claim types. This casts doubt on the feasibility of the proposal.

³⁸³ Linyak & Tierney, *supra* note xx, at 771.

³⁸⁴ Burbank, Farhang & Kritzer, Private Enforcement, *supra* note xx, at 704.

But the key conceptual move that underlies the entire proposal is that courts should consider the regulatory public benefits of discovery. Fortunately, courts *already conduct analogous analyses in several discovery contexts*, weakening potential concerns with judicial administrability. To begin, when courts consider protective orders under Rule 26(c), they balance several factors, often including both “whether confidentiality is being sought over information important to public health and safety” and “whether the case involves issues important to the public.”³⁸⁵ Because of this analysis, courts have developed an arsenal of methods to analyze how discovery interacts with the public interest. For example, in the face of motions for protective orders, courts have recently allowed the public release of material covering Bill Cosby’s history of sexual assault,³⁸⁶ and police video documenting the use of excessive force.³⁸⁷ In both cases, courts had to grapple with the public interest in the information produced, focusing on the statutory provisions at issue, media interest, and public-facing nature of the cases.

Similarly, in considering discovery fee-shifting motions—requests by respondents to shift the costs of production on to the requesting party—courts ask whether the litigation is “of public importance.”³⁸⁸ This analysis explicitly blurs the line between public and private enforcement. For example, courts in this context have found that cases dealing with the Exxon Valdez oil spill and the Lockerbie bombing did not warrant cost-shifting of discovery costs because of the “nature of the cases and the strong public interest in the outcome.”³⁸⁹

In yet a third analogous context, courts conduct a similar analysis of the public interest when they consider motions or stipulations to hold documents produced to the court under seal.³⁹⁰ Finally, and perhaps most relevantly, as discussed above, courts implicitly consider the impact of administrative subpoenas on regulated industries.³⁹¹

The regulatory discovery framework is only an extension of these four existing approaches. References to public welfare already incorporate some of the regulatory goals of private discovery. If

³⁸⁵ See *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

³⁸⁶ *Constand v. Cosby*, 229 F.R.D. 472, 480 (E.D. Pa. 2005), amended in part (June 24, 2005).

³⁸⁷ *Harmon v. City of Santa Clara*, 323 F.R.D. 617 (N.D. Cal. 2018)

³⁸⁸ *DeGeer v. Gillis*, 755 F. Supp. 2d 909 (N.D. Ill. 2010).

³⁸⁹ *In re Law Firms of McCourts & McGrigor Donald*, No. M. 19-96 (JSM), 2001 WL 345233, at *3 (S.D.N.Y. Apr. 9, 2001); *In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992).

³⁹⁰ *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999).

³⁹¹ *See infra* at xx.

anything, discovery as regulation would narrow the question to considerations of deterrence, the effects on the regulated industry, and the spillover effects on the law and relevant government agencies. Courts can quite comfortably engage in this analysis of social or regulatory benefits during discovery disputes. It is possible for courts both to consider and weigh the spillover regulatory effects of discovery and litigation while at the same time acknowledging that “[t]he collateral effects of litigation should not be allowed to supplant th[e] primary purpose.”³⁹² They already do. Again, it bears emphasis that this regulatory framework only applies in a minority of cases that implicate private enforcement regimes. There is little, if any, reason to believe that such an application would be unrealistic or unduly burdensome.

3. Regulation and Transsubstantivity

The existence of a category of cases that might benefit from broader regulatory discovery is not necessarily incompatible with our idea of trans-substantivity.³⁹³ The traditional understanding of the trans-substantive principle is that the rules of procedure should apply equally regardless of the substantive claim.³⁹⁴ The trans-substantive ideal draws directly from the Rules Enabling Act of 1934, and its prohibition of rules that “enlarge” or “abridge” substantive rights.³⁹⁵ One of the principle’s core purposes is simplicity.³⁹⁶ Judges should be able to adjudicate substantive claims without dealing with different procedures in every case. David Marcus has argued that trans-substantivity could also be defended as a principle of institutional allocation of power between courts and Congress.³⁹⁷ The judiciary could “legitimately generate trans-substantive rules, that is, rules not designed to achieve any particular goals of substantive policy.”³⁹⁸ Substantive-specific rules, by contrast, necessitate a political entity with democratic legitimacy, like Congress. Trans-substantivity, therefore, operates at its zenith when it polices these institutional boundaries.

That courts should recognize discovery’s regulatory purpose is consonant with the trans-substantive ideals of simplicity and institutional allocation. As to simplicity, discovery is the bread-and-butter of litigation. Magistrate judges, and many district court judges,

³⁹² JACK WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 65 (1995).

³⁹³ Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–46 (1994).

³⁹⁴ David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010).

³⁹⁵ REA 1934.

³⁹⁶ REA 1934.

³⁹⁷ Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note xx at xx.

³⁹⁸ Marcus, *The Past, Present, and Future of Trans-Substantivity*, *supra* note xx at xx.

are consummate discovery experts.³⁹⁹ Applying the principles discussed above on judicial administrability, judges should be able to easily recognize regulatory discovery. Moreover, as to institutional allocation, regulatory discovery draws legitimacy precisely from Congressional authorization of private enforcement. It therefore does not imply that the judiciary should overstep its institutional role into the political realm. Nor does it require substance-specific rules because it does not demand that federal judges treat specific substantive categories of cases differently (securities or otherwise). It only asks judges to recognize the distinctiveness of a Congressionally authorized trans-substantive category of cases—those reliant on private enforcement.

Even in cases where judges should draw on different underlying theories of discovery depending on the substantive claim, the trans-substantive ideal survives because it is compatible with judicial discretion. A tailored approach to discovery only allows judges to exercise their considerable and well-recognized power to adapt procedures to the needs of each specific case.⁴⁰⁰ The discovery provisions of the FRCP are mostly phrased, and operate, like standards, not definitive rules. Indeed, the “Federal Rule drafters made a conscious choice to grant broad discretion, based on the assumption that trial judges had the experience and expertise to appropriately tailor procedures to the circumstances of individual cases.”⁴⁰¹ That is why scholars have recognized for decades that district and magistrate judges adapt the discovery rules to specific cases, altering the number of interrogatories, extent and depth of document discovery, depositions, and even attorneys’ fees.⁴⁰² Recognition that regulatory discovery requires tailored treatment would draw on an appropriate exercise of this existing judicial discretion.⁴⁰³ So, allowing judges to expand the number of interrogatories in an antitrust class action, rather than a typical breach of contract case, is well-within existing power and does not conflict with trans-substantivity.

To the extent that regulatory discovery may sometimes conflict with trans-substantivity, scholars have variously argued that such conflicts are as inevitable as they are appropriate. Robert Bone, for

³⁹⁹ Diego A. Zambrano, *Judicial Mistakes in Discovery*, 112 NW. U. L. REV. 217, 239-40 (2018) (making this point and observing that, in 2015, magistrate judges “dealt with over 100,000 nondispositive motions, 55,600 pretrial conferences, and over 10,000 motion hearings”).

⁴⁰⁰ Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767, 785-787 (2017).

⁴⁰¹ Robert. G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. Rev. 1155, 1160, 1169 (2006).

⁴⁰² Bone, *Securing the Normative Foundations*, supra note xx at 1160, 1169; Bookman & Noll, supra note xx at 785.

⁴⁰³ Subrin, *Fudge Points*, supra note xx at 785, argues that we should allow a more flexible form of trans-substantivity in the discovery context.

instance, has forcefully argued that “different cases with different substantive interests might call for different procedural rules if the substantive interests at stake have different value or if the cost of the procedure varies with different case types.”⁴⁰⁴ Bone specifically noted in the context of trans-substantivity and the fairness theory of discovery: “[C]onsider the scope of pre-trial discovery. . . . [O]btaining more information is not valuable in itself; it is valuable because information revelation improves the adversarial process and increases the likelihood of an accurate result.”⁴⁰⁵ In the context of regulatory discovery, more information is valuable in the realm of private enforcement and would redound to the benefit of many regulatory areas—including civil rights and employment law—where trans-substantivity may otherwise generate a negative impact.⁴⁰⁶ All of this affirms, yet again, the legitimacy of regulatory discovery.

4. The Propriety of Producer Pays

In a regulatory discovery paradigm, a producer-pays rule is quite sensible. As an initial matter, businesses that enter a heavily regulated industry are on notice about potential costs stemming from routine government enforcement. They therefore expect and price-in the cost of administrative subpoenas as a regular cost of business and can pass the cost on to consumers. Moreover, in a regulated market, someone must bear the costs of regulation. If administrative subpoenas operated under a requestor-pays rule, then the government would be deterred from fully pursuing administrative enforcement or would pass on the costs to all taxpayers. It is much fairer for the regulated entities themselves, and their consumers, to internalize the costs of their operations, rather than externalize them on to taxpayers. After all, regulated entities reap benefits from the predictability and rule of law values that agencies bring to regulated industries. Agencies ensure that competitors are not violating the law, through antitrust conspiracies or unfair business competition. Paying for discovery costs is part and parcel of paying for the benefits of this regulation. And these payments are also substitutes for engaging in private enforcement against competitors. Finally, entities can always challenge overbroad or unduly burdensome administrative subpoenas.

5. Transparency and Protective Orders

⁴⁰⁴ Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. Rev. 1155, 1160, 1162 (2006). See e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 936 (2009).

⁴⁰⁵ Bone, *Securing the Normative Foundations*, supra note xx at xx.

⁴⁰⁶ Suzette Marveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights*, 92 Wash. U. L. Rev. 455, 458 (2014) (arguing that trans-substantivity is flawed because it has a disparate impact on employment and civil rights litigation).

All of these benefits come with a caveat: regulated entities have grown adept at preparing confidentiality provisions or obtaining protective orders that blunt discovery's public impact. Under Rule 26(c) "any person from whom discovery is sought may move for a protective order."⁴⁰⁷ A court has discretion, on a showing of good cause, to issue a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."⁴⁰⁸ Protective orders are usually individualized and discrete, with each document evaluated separately.⁴⁰⁹ In complex litigation, however, they are "a different beast."⁴¹⁰ Under "umbrella" protective orders, parties agree to a blanket order at the outset of discovery.⁴¹¹ Typically, an umbrella order "permits a party to designate parts of its produced discovery as confidential upon a good faith belief that there is good cause for the designated discovery to be included in the protective order."⁴¹² Many parties also negotiate procedures for the deletion of produced documents at the close of the matter.⁴¹³

Protective orders obviously present a threat to the regulatory benefits of private discovery. Scholars have suggested that these orders have recently become much more common or expansive.⁴¹⁴ But even if true, the extent of its effect is unclear. On the one hand, limiting third-party access to discovery would blunt the positive spillovers of regulatory discovery, including the possibility of general deterrence. Disney's competitors, the sovereign debt market, and cities observing the *Faragher* case, would not have been able to restructure their behavior in response to those cases. On the other hand, protective orders retain the internal benefits of regulatory discovery, including specific deterrence, and perhaps expand them. The more a target company is assured that its internal information will not be public the more willing it may be to engage in a thorough internal investigation. So protective orders may present a clear danger to the external benefits of discovery—general deterrence—but may enhance the "introspective" regulatory benefits of discovery—specific deterrence.

Given its potential impact on industries and primary behavior, courts addressing motions for protective orders should consider not

⁴⁰⁷ FRCP 26.

⁴⁰⁸ FED. R. CIV. P. 26(c)(1).

⁴⁰⁹ William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565, 565-66 (2008).

⁴¹⁰ *Id.* at 566.

⁴¹¹ See Federal Practice and Procedure (Wright & Miller), §2035 (Procedure for Obtaining Protective Orders). See also generally Childs, *supra* note xx.

⁴¹² REAGAN, *supra* note xx, at 5 (citing *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986)).

⁴¹³ Robert D. Keeling & Ray Mangum, *The Burden of Privacy in Discovery*, 20 SEDONA CONF. J. 415, 438 n.76 (2019).

⁴¹⁴ Seth Endo, Confidentiality, *supra* note xx.

only the public interest in having access to certain information—which is currently part of the test—but, more importantly, all of the regulatory benefits discussed above: deterrence, corporate reform, and routinization of corporate information gathering. Lower courts dealing with protective orders focus mostly on Rule 26(c)’s “good cause” requirement. This is a flexible standard that allows courts to take into account up to eight factors (including the effects of potential disclosure, and the private and public interests at stake). Courts could comfortably fit into this analysis discovery’s positive spillover effects. Discovery as regulation demands a more exacting test for blanket protective orders because they present a significant impediment to regulatory goals.

D. The German (Dis)advantage in Civil Procedure?

As a final more speculative note, perhaps private enforcement partly explains why broad and adversarial regulatory discovery may be necessary in the United States but not in any other country. John Langbein claimed in a seminal article that German procedure had an “advantage” over American procedure because of its judicially imposed discovery constraints.⁴¹⁵ Langbein argued that German judges’ close supervision of fact-gathering maintained a relatively narrow and focused legal process—a boon for both parties and the system. To be sure, Langbein qualified “that the main concern of this article is not the sprawling Big Case, but the traditional bipolar lawsuit in contract, tort, or entitlement.”⁴¹⁶ That qualification likely removes the possibility that Langbein meant to cover regulatory discovery. But the Article has influenced similar, and sometimes broader, critiques of American discovery, with Steve Subrin going as far as asking if Americans were “nuts” for embracing broad discovery.⁴¹⁷

A regulatory view of discovery, however, highlights why it is complicated, and perhaps impossible, to compare the American and German discovery processes. European countries, Japan, and Australia, along with most other countries, rely overwhelmingly on *ex ante* regulation or administrative enforcement to apply the law. The costs of their regulatory systems are explicit in the costs of market entry—administrative review, drawn out licensing requirements, etc.—and in the costs of a much larger bureaucracy.⁴¹⁸ That allows the *ex post* litigation system to be either non-existent or relatively lean. But in an American style system, where *ex ante* regulation is lean and private enforcement is paramount, discovery may bear the costs of regulation. This means that the relevant comparison should not be between the

⁴¹⁵ Langbein, The German Advantage in Civil Procedure.

⁴¹⁶ Langbein, The German Advantage in Civil Procedure, *supra* note xx at 825.

⁴¹⁷ Although, again, its possible that Subrin was excluding complex litigation cases. See Subrin, *supra* note x at xx.

⁴¹⁸ Kagan, Adversarial Legalism.

costs of American and German discovery. But rather, whether the entire American package—including *ex ante* and *ex post* regulation and the discovery system—imposes more costs than the entire German regulatory package, both *ex ante* and *ex post*. Such a comparison makes the question much more complicated and perhaps unanswerable.

I do not mean to settle this question here but merely to speculate that conceptualizing discovery as regulation may push us to rethink this comparison. To be sure, proponents of the German approach might argue that an *ex ante* regulatory system is superior to an *ex post* system with broad discovery. This question has been the subject of decades-long scholarly debates and it remains unclear whether the first-best system is a civil law approach with narrow discovery or the American approach. But taking private enforcement *as a given*—a choice that Congress made long ago—then broad discovery seems necessary. Determining which system is more efficient would take a comprehensive study, but *a priori* there may not be any civil law advantage in civil procedure if the *ex ante* system is much more burdensome. For example, the recent European data law (GDPR) aimed at large tech firms imposed high *ex ante* compliance costs of billions of dollars.⁴¹⁹ In the U.S. there is no similar regulation, but plaintiffs have increasingly sued Google and other tech companies for violating privacy-related statutes.⁴²⁰ Moreover, U.S. discovery likely contributes to a lower trial rate and higher settlement rate, of around between 50-80% of cases, than in European countries like France, where only 8-13% of cases are resolved in settlement.⁴²¹ While “there are several possible explanations for this variance . . . the existence of robust (and expensive) discovery in the United States must rank high” among the possible explanations for fewer trials here.⁴²²

Conclusion

This Article attempted to move discovery debates forward by reframing the foundations of private enforcement discovery through a regulatory theory. A focus on regulatory discovery reconceptualizes the underlying purposes of discovery and complements its traditional foundations in fairness, equality, and settlement. Private discovery resembles, and in many ways is, nothing more than administrative subpoena power delegated to private enforcement agents. This power is fundamental in a country that depends on private litigants to enforce some of our most important statutes. Critics of the system must

⁴¹⁹ Jeremy Kahn, Stephanie Bodoni, & Stefan Nicola, *It'll Cost Billions for Companies to Comply With Europe's New Data Law*, BLOOMBERG BUSINESSWEEK (Mar. 22, 2018), available at <https://www.bloomberg.com/news/articles/2018-03-22/it-ll-cost-billions-for-companies-to-comply-with-europe-s-new-data-law>.

⁴²⁰ See e.g., Frank v. Gaos, 139 S. Ct. 1041 (2019).

⁴²¹ Daniel Klerman, Data [on file with author].

⁴²² See Yeazell, Vanishing Trial, *supra* note xx, at 951.

wrestle with this analogy. If this theory is accurate, courts must also embrace a comparative approach to discovery costs.