

**ASSESSING THE FEDERAL RULES’  
PROPORTIONALITY AMENDMENT:  
WHY PROPORTIONALITY IS PHILOSOPHICALLY  
PROPER, YET PRACTICALLY PROBLEMATIC**

**David M. Katz<sup>†</sup>**

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INTRODUCTION

Pre-trial discovery is a hallmark of the modern American civil justice system.<sup>1</sup> In 1938, the Federal Rules of Civil Procedure (the

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<sup>†</sup> J.D. Candidate, Syracuse University College of Law, Class of 2017; B.A. College Scholar, *summa cum laude*, distinction in all subjects, Cornell University College of Arts and Sciences. Mr. Katz would like to thank Professor Milner, both for teaching his first-year Federal Civil Procedure class and for her continuous support, advice, and insight throughout the drafting process. Mr. Katz would also like to thank his family, friends, and professors who made this note possible by shaping his interests and supporting him through the trials of academic writing.

1. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their*

“Rules”) radically changed civil litigation by allowing parties to obtain information from other parties through a variety of means, including written and oral depositions, requests for documents, and physical inspections, prior to trial.<sup>2</sup> In the years since 1938, however, discovery “has expanded from a useful tool to a combination lawyer’s industry and litigator’s religion.”<sup>3</sup> While discovery has become an integral part of the American civil justice system, with clearly defined and ingrained devices, its proper scope has been a source of constant debate.<sup>4</sup>

In 2015, the Rules were amended, shifting the scope of discovery away from its traditional relevance inquiry and toward a proportionality inquiry.<sup>5</sup> The proportionality inquiry attempts to curtail discovery’s scope, but the proportionality inquiry itself is ambiguous and its success as a limiting principle will depend on judicial construction. This Note concludes that the *Twombly/Iqbal* standard, which governs motions to dismiss for failure to state a claim, should inform the proportionality inquiry in discovery because the standard focuses on the factual basis of the complaint and allows for flexibility in discovery regarding legal theories stemming from those factual allegations.

Part I discusses the history of discovery practice in the Anglo-American common law tradition prior to the 1938 Rules. At common law, there was no discovery.<sup>6</sup> Common law courts could not compel parties to disclose information to either prove or disprove a claim or defense. Over time, equity courts developed limited discovery mechanisms, but they were cumbersome, and were designed to help the courts, in their roles as adjudicators, not the parties as litigants. In the nineteenth century, New York’s Field Code—subsequently adopted in other states—revolutionized state practice in 1848 by giving common law courts equitable powers and new, though limited, discovery devices. In contrast, the federal system continued to operate without meaningful discovery

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*Impact*, 137 U. PA. L. REV. 2197, 2203 (1989) (“No change in litigation practice resulting from the Rules has had as great an impact as the liberalization of pretrial discovery.”).

2. FED. R. CIV. P. 30, 31, 34, 35.

3. Rosenberg, *supra* note 1, at 2203.

4. See, e.g., Richard Marcus, “*Looking Backward*” to 1938, 162 U. PA. L. REV. 1691, 1707 (2014) (“In the 1960s . . . conflict over scope [of discovery] had become a principal source of controversy.”); Walter E. Oberer, *Trial by Ambush or Avalanche? The Discovery Debacle*, 1987 MO. J. DISP. RESOL. 1, 7 (1987) (“In other words, the discovery reforms of 1938 *et seq.* have changed dramatically, in ways utterly unforeseen, the entire system of American justice.”).

5. Compare FED. R. CIV. P. 26(b)(1), 28 U.S.C. app. at 174 (2012) (amended 2015), with FED. R. CIV. P. 26(b)(1).

6. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694–95 (1998).

until 1938. As a result, federal litigation remained defined by “trial by surprise,” where easily obtainable evidence compelled verdicts at trials that could have been avoided simply because parties did not have to provide any information to an adversary.

Part II then discusses discovery’s inception in the 1938 Rules. First, Part II uses the classic first year contracts case, *Alaska Packers’ Ass’n v. Domenico*, to provide a picture of “trial by surprise” in the federal courts prior to the Rules. *Alaska Packers’* provides a glimpse into how cases were shaped by the absence of discovery, and more specifically how theories of a case could completely lose due to a lack of information.

Part II then briefly discusses the original goals of the discovery process. Discovery was designed to avoid “trial by surprise” by providing the parties with information that would help them make more rational decisions about whether to try a case or settle it. Additionally, discovery was designed to foster efficient litigation by entrusting the process primarily to lawyers. Finally, Part II briefly discusses the scope of discovery under the Rules under the relevance standard, from 1938 to 2015.

Part II then concludes by reviewing the proportionality amendment, enacted in 2015. While Part II discusses how the proportionality amendment comports with the original theory underlying the Rules, it ultimately concludes by arguing that the proportionality amendments are likely to lead to more uncertainty regarding discovery. By fostering uncertainty in discovery practice, Part II argues that the practical impact of the proportionality amendment will be more delay in litigation due to motion practice. Additionally, the proportionality inquiry will put stress on judicial resources due to litigators’ incentives to test the proportionality of individual discovery requests. Part II argues that proportionality exacerbates an existing problem with prior discovery practice: proportionality will require the requesting party to have a notion of what it is looking for prior to finding it, which will impermissibly cause issue-narrowing instead of issue development, which will cause information asymmetry.

In conclusion, this Note argues that transplanting the *Twombly/Iqbal* standard from the motion to dismiss for failure to state a claim context will help inform the proportionality amendments and will reduce motion practice as certainty will be established through (1) a body of case law that has already been developed, (2) a symbiosis between the Rules governing motions to dismiss and the ability to obtain discovery, and (3) *Twombly/Iqbal*’s focus on the factual gravamen of the litigation, which also informs the discovery inquiry, best fits the discovery context.

## I. HISTORY OF DISCOVERY: SETTING THE STAGE FOR THE 1938 RULES

Although the Rules are often credited with introducing discovery to federal law, limited discovery existed prior to the Rules' enactment.<sup>7</sup> More properly, the Rules created the first federal discovery *system*—a set of rules designed with one clear goal—to provide information to the parties for use during litigation.<sup>8</sup> This section briefly traces the roots of discovery practice in the Anglo-American tradition.<sup>9</sup>

### A. *Discovery at Common Law and Equity: Until 1848*

From the fourteenth century until the eighteenth century, there was no discovery at common law.<sup>10</sup> Even if common law courts attempted to require discovery, the legal community, including judges, felt that the common law courts lacked the authority to coerce compliance with discovery demands.<sup>11</sup> However, common law litigants could turn to the courts of equity to obtain limited discovery in some cases.<sup>12</sup>

Courts of equity, which operated alongside courts of law, began to develop limited forms of discovery relatively early.<sup>13</sup> Unlike courts of law, courts of equity drew their authority from the King's prerogative, and thus had the ability to coerce compliance with discovery demands because their orders carried the King's legal authority to make commands.<sup>14</sup> In the fourteenth century, courts of equity adopted a mechanism similar to written interrogatories in order to obtain facts pertinent to the claim.<sup>15</sup> Over time, courts of equity developed a form of examination before trial, or deposition.<sup>16</sup> The major difference between modern depositions and early depositions was that the early depositions

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7. *Id.* at 698–701.

8. Alan K. Goldstein, *A Short History of Discovery*, 10 *ANGLO-AM. L. REV.* 257, 266–67 (1981).

9. See Robert Wyness Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 *ILL. L. REV.* 261 (1937), for a discussion of the evolution of discovery in continental legal systems, written contemporaneously with the Rules.

10. Goldstein, *supra* note 8, at 257–58, 260. However, there was a mechanism for reading documents into the record, and contesting them, at trial. *Id.* at 257–58 (describing *profert and oyer*).

11. *Id.* at 258.

12. *Id.*

13. *Id.*

14. Goldstein, *supra* note 8, at 259.

15. *Id.* at 258–60 (arguing that early procedure more closely resembled requests for admission, and over time the procedure became closer to interrogatories).

16. *Id.* at 266–67.

were kept secret until trial.<sup>17</sup> Only petitioners-in-equity<sup>18</sup> could use these proto-discovery devices, which meant that respondents-in-equity had to file a cross-bill against the petitioner-in-equity if the respondent-in-equity sought reciprocal discovery.<sup>19</sup>

If a party in a common law action sought discovery in equity, the process was not as simple as it is today.<sup>20</sup> First, the petitioner-in-equity had to file a pleading in a court of equity, which had to contain the interrogatories requested.<sup>21</sup> Then, the respondent-in-equity had to answer formally. At this time, the court could compel certain admissions that were relevant to the cause of action.<sup>22</sup> Then, if the petitioner-in-equity could show a compelling reason for taking a deposition, usually that the party was dying and the testimony needed to be perpetuated, a deposition would be taken.<sup>23</sup> After the whole process was completed, the case returned to a court of law.<sup>24</sup> This process was sometimes known as the “bill of discovery” procedure.<sup>25</sup> With this laborious process in mind, nineteenth century reformers went to work in an attempt to streamline procedural hurdles and focus cases on legal, not procedural, considerations.

### *B. Early American Antecedents to Federal Discovery: 1848 to 1938*

The Rules did not introduce the first system of discovery to the United States.<sup>26</sup> In the nineteenth century, the states experimented with various levels and devices of discovery in their courts.<sup>27</sup> New York’s 1848 Code of Civil Procedure, often known as the Field Code, was influential in the movement toward instituting discovery at the state level.<sup>28</sup> Under the Field Code, the division between law and equity was

17. *Id.* at 262.

18. The terms “petitioner-in-equity” and “respondent-in-equity” are used for clarity since the defendant in a suit at law could seek discovery in a court of equity.

19. Goldstein, *supra* note 8, at 261.

20. Subrin, *supra* note 6, at 698 (“[The] equitable bill for discovery in support of a law case[] [was] a cumbersome and infrequently used device . . .”).

21. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 88 (2d ed. 1979); Goldstein, *supra* note 8, at 261–62.

22. Goldstein, *supra* note 8, at 260.

23. See Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 24, 31 (1988).

24. See *id.* at 23–24.

25. Subrin, *supra* note 6, at 700.

26. Millar, *supra* note 9, at 262 n.2.

27. Subrin, *supra* note 6, at 701–02.

28. Goldstein, *supra* note 8, at 266–67; Subrin, *supra* note 6, at 695–96.

collapsed: courts of equity and courts of law were combined, and one judge could now decide law and do equity between the parties.<sup>29</sup> As a result, a judge deciding a common law cause of action could order discovery.<sup>30</sup> The Field Code went further, liberalizing discovery practice by expanding the procedures available to trigger discovery devices and allowing more examinations before trial.<sup>31</sup> The Field Code was widely adopted: over half the states adopted the Field Code, either word-for-word or with local variations.<sup>32</sup>

While the Field Code represented the first sustained attempt to introduce a system of discovery to American law, it largely failed its aspirational goal: liberalized discovery practice.<sup>33</sup> The Field Code's judicial construction shows how statutory language can only set the scene for the law in action: judges did their best to avoid broad discovery by strictly construing the Field Code's discovery provisions.<sup>34</sup> Lawyers who were responding to discovery, knowing that judges were hostile to discovery issues, forced court intervention even where the request was probably proper under a plain reading of the Field Code.<sup>35</sup> Over time, the Field Code's attempt to liberalize discovery served more as a historical landmark than as a concrete step in discovery's history.

### *C. Federal Law Prior to the Rules*

Prior to 1938, lawyers seeking discovery in federal courts were not without any options; however, they were without any meaningful options.<sup>36</sup> Federal courts of law allowed parties to pursue bills of discovery, but that procedure was cumbersome and time-consuming at best.<sup>37</sup> Two other statutes allowed for depositions at law, but only in limited, exceptional circumstances. First, a deposition could be taken to perpetuate testimony: if, for example, a deponent was dying, more than one hundred miles from the courthouse, abroad, or at sea, then a deposition was authorized.<sup>38</sup> Second, an opposing party could be

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29. See Goldstein, *supra* note 8, at 267.

30. See *id.* at 266–67; Subrin, *supra* note 6, at 700–01, 704–06, 723.

31. Subrin, *supra* note 6, at 704.

32. See Michael Weber, *Introduction to 1 NEW YORK FIELD CODES SERIES*, at viii–ix (The Lawbook Exchange 1998) (1850).

33. Subrin, *supra* note 6, at 704–05.

34. *Id.* at 704–05.

35. *Id.* at 704.

36. *Id.* at 693 n.16–17, 694–95.

37. Goldstein, *supra* note 8, at 259–61; Wolfson, *supra* note 23, at 31.

38. Subrin, *supra* note 6, at 698 (discussing former 28 U.S.C. § 639 (1934) (amended 1937)).

deposed, but only if justice required the deposition.<sup>39</sup> Finally, bills of particulars were allowed, which allowed for a written elaboration of pleadings under oath.<sup>40</sup>

Additional, limited discovery was permitted under the 1912 Rules of Equity for suits in equity.<sup>41</sup> Absent specific statutory authorization, depositions were allowed in equitable courts after an application was made to the court if the party showed good cause for taking the deposition.<sup>42</sup> Some federal courts of equity liberalized the deposition rule by accepting agreements between parties to allow a deposition to constitute good cause.<sup>43</sup> Additionally, three limited discovery devices were authorized: (1) written interrogatories were allowed if the interrogatories would lead to “material” facts and documents; (2) demands to produce documents were allowed, on motion, but only pertaining to the movant’s case, not the adversary’s case; and (3) requests for admissions were allowed on notice, but requests for admissions were limited to written documents.<sup>44</sup>

#### *D. Avoiding Trial by Surprise: Examining the Inequity of Trial by Surprise*

Prior to the Rules’ discovery system, trials were largely creatures of uncertainty: absent any mechanism to determine an opponent’s evidence, parties showed up on the day of trial hoping to, at best, anticipate what their opponents might say. Trial by surprise took many forms, but the famous first-year contracts case of *Alaska Packers’ Ass’n v. Domenico* provides an interesting example of trial by surprise in action.<sup>45</sup> Thanks to recent scholarship, records show how the plaintiffs’ attorney failed to elicit testimony that would have supported the plaintiffs’ claim that the defendant-employer intentionally supplied them with nets that were substandard.<sup>46</sup> The plaintiffs’ attorney seemingly failed his clients, at least to modern eyes, because he failed to pursue a simple and essential line of questioning: the defendant’s motivation for providing substandard

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39. *Id.* (discussing former 28 U.S.C. § 644 (1934) (amended 1937)).

40. *Id.* at 698; *see also* Wolfson, *supra* note 23, at 22.

41. Wolfson, *supra* note 23, at 28.

42. *See* Subrin, *supra* note 6, at 699 (citing FED. EQ. R. 47, 226 U.S. 13–14 (1912)).

43. *Id.*

44. *Id.* at 700 (citing FED. EQ. R. 58, 226 U.S. 17–18 (1912)).

45. *Alaska Packers’ Ass’n v. Domenico*, 112 F. 554 (N.D. Cal. 1901), *rev’d*, 117 F. 99 (9th Cir. 1902).

46. Debora L. Threedy, *A Fish Story: Alaska Packers’ Association v. Domenico*, 2000 UTAH L. REV. 185, 210–13 (2000).

nets. Unfortunately, without recourse to discovery devices, the plaintiffs' attorney was left to guess as to his opponent's motivations, and thus was left without even the simplest records from which he could have constructed the alternate trial narrative that was later uncovered.

*Alaska Packers'* is generally taught as a seminal consideration case: coercion cannot be consideration to modify a contract.<sup>47</sup> The plaintiffs, fishermen, sued the defendant, their employer, for money due under a contract that they negotiated during a strike in the middle of the packing season.<sup>48</sup> The defendant claimed that the amended contract was invalid because, among other things, the parties entered into the amended contract under the duress of the strike, which threatened a whole year's profits.<sup>49</sup> In turn, the plaintiffs argued that their strike was not profiteering, but rather was designed to return their contractual payment to its intended level because the nets they were given could not catch the normal amount of fish.<sup>50</sup> Both the district court and the court of appeals found the plaintiffs' argument unavailing and nonsensical, citing the defendant's self interest in producing more cans of fish in order to make greater profits.<sup>51</sup>

Recent scholarship has provided compelling evidence for the plaintiffs' theory by reviewing records that show a largely undeveloped theory at trial.<sup>52</sup> Under the employment contract, fishermen were paid a base salary plus a commission for each fish caught, which constituted the bulk of the employees' compensation.<sup>53</sup> Due to the cannery's remoteness, supplies for canning had to be ordered months prior to the season, which

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47. See, e.g., IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* 160–61 (2005).

48. *Alaska Packers' Ass'n*, 112 F. at 555–56.

49. See *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 101 (9th Cir. 1902) (“[I]t was impossible for the appellant to get other men to take the places of the [plaintiffs], the place being remote, the season short and just opening.”).

50. *Id.* (“[T]he [plaintiffs] undertook to show that the fishing nets provided by the [defendant] were defective, and that it was on that account that they demanded increased wages.”).

51. “The defendant’s interest required that [the plaintiffs] should be provided with every facility necessary to their success as fishermen,” because the plaintiffs’ ability to catch fish was tied to “the profits defendant would be able to realize that season from its packing plant. . . . In view of this self-evident fact, it is highly improbable that the defendant gave libelants rotten and unserviceable nets with which to fish.” *Id.* (quoting *Alaska Packers' Ass'n*, 112 F. at 556).

52. Threedy, *supra* note 46, at 210–12. Threedy ultimately ascribes the error to the plaintiffs’ lawyer’s unfamiliarity with the salmon packing industry. *Id.* at 213. While that may be true, discovery could also have helped the lawyer acquaint himself with the industry, or at least made the lawyer aware of a possible line of inquiry to pursue.

53. *Id.* at 208–09.

forced the cannery to estimate the strength of the salmon season in advance.<sup>54</sup> Without adequate storage facilities, if the number of fish caught exceeded the amount of canning supplies, then the fish spoiled and were useless to the cannery; however, the cannery would still have to pay the fishermen for the fish, making the overage doubly costly.<sup>55</sup>

In 1900, the year of the dispute, the cannery appears to have underestimated the strength of the salmon season, and, despite the strike, still managed to use all its canning supplies.<sup>56</sup> Seen in this light, providing substandard nets was a clever way for the defendant to avoid having to pay the fishermen for its mistake: not ordering enough cans. By making the fishermen inefficient, through the substandard nets, the cannery could control the supply of fish and keep its labor costs in line with its demand for salmon.

Since discovery was non-existent, the plaintiffs' lawyer likely had no understanding of the cannery's ordering practices, or its actual orders for the season.<sup>57</sup> While he probably understood the compensation arrangement, without more information it would be nearly impossible to understand the defendant's scheme. Additionally, without documentary evidence, the plaintiffs' lawyer would be stuck examining the defendant's employees, hoping to elicit the testimony he wanted regarding the canning supplies. And, importantly, without documentary evidence, prior deposition testimony, or interrogatory answers, the plaintiffs' lawyer would probably have been foreclosed from even examining a witness on the subject, which otherwise seems irrelevant to a contractual modification dispute.

*E. Discovery's Goals: Avoiding Trial by Surprise While Supporting Efficient, Pre-Trial Resolutions*

The initial Advisory Committee on Rules of Civil Procedure (the "Advisory Committee") was undoubtedly aware of the emerging trend amongst the states to liberalize discovery.<sup>58</sup> Indeed, one scholar has argued that an expert in discovery was picked because the committee's chair felt he lacked the expertise required to create a new system of

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54. *Id.* at 211.

55. *See id.* at 209–11 ("If the salmon harvest was too bountiful, the cannery workers would not be able to keep up and fish would rot before they could be canned.").

56. *See* Threedy, *supra* note 46, at 209–11 ("In 1900, Pyramid Harbor was outfitted . . . to can 55,000 cases. In fact, that year it canned 55,601.").

57. *See id.* at 211 n.188 ("This suggests that in 1900, Pyramid Harbor was operating pretty much at capacity for the season.").

58. FED. R. CIV. P. 26(b) advisory committee's note to 1937 rules.

discovery.<sup>59</sup> When the Advisory Committee convened in 1935, discovery was considered an essential part of the Rules' new procedural system.<sup>60</sup> However, just as discovery was quickly determined to be necessary, very early in the drafting process issues regarding discovery abuses (i.e., overdiscovery) were discussed.<sup>61</sup> Thus, the fear of discovery abuse has been intertwined with the need for discovery since before discovery was implemented.

Discovery, as a part of the Rules, was designed to aid the "just, speedy, and inexpensive determination of every action and proceeding."<sup>62</sup> The prevailing view was that parties who had more information about their case, and their opponent's case, would be able to appraise their chances of success.<sup>63</sup> As a result, parties could make just decisions to settle cases amongst themselves.<sup>64</sup> By encouraging settlements through critical assessment of information disclosed, more cases would be resolved faster and more economically.<sup>65</sup> Further, by entrusting lawyers with the day-to-day administration of the discovery process, discovery was designed to be a relatively speedy process that would free up judicial resources, at least as opposed to prior procedures that required motions or even a collateral suit in equity.<sup>66</sup>

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59. Subrin, *supra* note 6, at 713. For reasons unexplored by that scholar, he argues that another discovery scholar was effectively barred from the committee. *Id.* at 713 n.141.

60. Marcus, *supra* note 4, at 1707 ("Discovery was central to the original Federal Rules' reform package.").

61. Subrin, *supra* note 6, at 717 ("[C]are must be taken to prevent such procedure from being used as a basis for annoyance and blackmail . . . possibly it is desirable to have such proceedings conducted by a master or magistrate having power . . . to prevent abuse." (quoting SUMMARY OF PROCEEDINGS OF THE FIRST MEETING OF THE ADVISORY COMMITTEE ON RULES, HELD IN THE FEDERAL BUILDING AT CHICAGO, THURSDAY, JUNE 20, 1935, at 11, *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, Fiche CI-103-34 (Cong. Info. Serv.))). Interestingly, there was no serious discussion of the opposite form of discovery abuse (i.e., underdiscovery), where a disclosing party uses objections to block discovery, even though it would have been known to the Advisory Committee. *See id.* at 704 (discussing attorneys' use of spurious objections and arguments to block discovery under the Field Code).

62. FED. R. CIV. P. 1. The 1938 Rules innovated the use of broad discovery to "end trial by ambush and surprise," and to "promote settlements" because "with both sides obliged to turn over all their important cards, secrets would disappear and realistic negotiations would occur." Rosenberg, *supra* note 1, at 2198.

63. John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513-14 (2000).

64. Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 30 (1994) [hereinafter *Fudge Points and Thin Ice*].

65. Rosenberg, *supra* note 1, at 2197-98.

66. Goldstein, *supra* note 8, at 262, 266-67.

From 1938 until December 2015, discovery analysis generally centered on relevance,<sup>67</sup> limited only by whether a privilege applied.<sup>68</sup> Under the relevance system, information was discoverable if (1) the information was non-privileged and (2) the information was relevant to the suit.<sup>69</sup> Relevance was a broad standard, borrowed from the law of evidence.<sup>70</sup> Unfortunately, relevance's conceptual breadth helped to foster concerns about discovery's expense. Since 1938, and especially in the 1970s,<sup>71</sup> advocates, judges, and academics have been unable to reach a consensus on how to balance discovery's fundamental conflict: how much discovery is needed to level the information playing field while avoiding expensive, protracted pre-trial discovery.<sup>72</sup> Avoiding information asymmetry has always been balanced against the expense of discovery, which is now the focal point of most litigation.<sup>73</sup>

Proportionality is not completely new to the federal discovery system. Relatively early, and certainly before proportionality was ever engrafted into the Rules' text, "the concept of proportionality existed in

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67. With the exception of demands for documents, which initially required an order and a showing of good cause until 1970. Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 L. & CONTEMP. PROBS. 197, 198, 205 (2001).

68. FED. R. CIV. P. 26(b)(1), 28 U.S.C. app. at 174 (2012) (amended 2015) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ."). Relevance, for discovery purposes, is broader than admissibility. *Id.* ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

69. *Id.*

70. Relevance is discussed in the broader evidentiary sense. Thus, as the Advisory Committee on the Federal Rules of Evidence noted in its proposal for the Federal Rules of Evidence, "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." FED. R. EVID. 401 advisory committee's note to 1975 rules. Thus, if evidence tends to make a scenario "more . . . probable than it would be without the evidence," then the evidence is relevant. *Id.* (omission in original). As the Advisory Committee on the Federal Rules of Evidence noted, "Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, 'A brick is not a wall.'" *Id.*

71. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 25 (2015).

72. Discovery is "the most debated . . . aspect of litigation today" and the legal community "espouse[s] widely differing views about the real or supposed existence, extent and nature of discovery problems." Beckerman, *supra* note 63, at 505–06; *see also* Marcus, *supra* note 4, at 1695–96 ("But as we continue to deal with efforts to constrain over-discovery, it is useful to remember that the concerns have been with us almost as long as the Rules.").

73. Rosenberg, *supra* note 1, at 2203–05. "[F]ederal discovery has helped shift the center of gravity from the trial to the pretrial stages," and, as a result, "practitioners who once were referred to as trial lawyers are now more comfortable being called litigators." *Id.* at 2203.

[federal discovery] practice.”<sup>74</sup> Proportionality entered the discovery system as a result of discovery’s equitable roots: “For functional and utilitarian reasons,” courts have informally responded to the use of discovery to “make the discovery process as slow and laborious as possible” by silently using proportionality to resolve “discovery disputes” within the relevancy framework.<sup>75</sup> For at least thirty years, proportionality lurked in the shadows as an equitable, not legal, consideration underlying the federal discovery system.

Then, in 1983, proportionality gained a foothold in the federal discovery system.<sup>76</sup> In 1983, responding to fears of discovery abuses, Rule 26(c)’s prohibition on limiting the use of discovery devices was removed.<sup>77</sup> At the same time, proportionality entered the Rule as a list of factors to be considered when determining how much the discovery devices could be used under the relevancy analysis.<sup>78</sup>

One decade later, the still-unnamed proportionality inquiry for limiting relevant discovery gained two new factors: discovery’s importance in resolving a dispute and discovery’s burden compared to its benefit.<sup>79</sup> The 1993 Advisory Committee Note clearly stated the amendments’ mandate, which was to force courts to patrol unwieldy discovery practice.<sup>80</sup> Finally, in 2015, after five years of haggling, Rule 26 was amended so that proportionality was no longer a set of factors designed to inform and restrict the relevancy analysis.<sup>81</sup> Now proportionality has become the scope of federal discovery.<sup>82</sup>

## II. DISCOVERABILITY UNDER THE CURRENT RULES: PROPORTIONALITY’S UNCERTAINTY CURBS “ABUSE” IN REQUESTS, BUT WILL LEAD TO “ABUSE” BY MOTION PRACTICE

In 2015, Rule 26 of the Rules was amended to create a second step in discovery analysis: proportionality.<sup>83</sup> Under the current Rule, once the

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74. Laporte & Redgrave, *supra* note 71, at 24–25.

75. *Id.* at 25.

76. *Id.* at 27.

77. *Id.* at 26–27.

78. *Id.* at 27 (stating that three factors added in 1983 drove at the heart proportionality inquiry: evidence being obtainable from other sources, prior opportunities at discovery, and burden based upon parties’ positions as well as the case’s nature).

79. Laporte & Redgrave, *supra* note 71, at 29.

80. *Id.* at 29.

81. *Id.* at 30, 32, 34, 43.

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

83. *Id.* (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense *and* proportional to the needs of the case.”) (emphasis added);

relevancy test is met, the party seeking discovery (the “requesting party”) must also show that the discovery is “proportional to the needs of the case” against the responding party (the “disclosing party”).<sup>84</sup> Factors bearing on proportionality include “the importance of the issues at stake . . . , the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>85</sup>

The proportionality amendments return to the original Rules’ intent, at least philosophically. On the one hand, the proportionality amendment attempts to rebalance discovery practice to avoid “trial by surprise,” the primary evil designed to be abolished by the federal discovery system. On the other hand, however, the proportionality amendment also suffers from the same flawed assumptions and shortcomings that the original Rules did: (1) that discovery will be collaborative; (2) that discovery, run in the first instance by lawyers, will lead to cheaper, faster resolutions; and (3) that parties know what they need to discover, to some level, based on defining their theory of their case.<sup>86</sup> Under the proportionality system, information is discoverable if (1) the information is non-privileged, (2) the information is relevant, and (3) the request is proportional to the suit.<sup>87</sup>

#### *A. Proportionality as Restoring Original Principles: Restoring Original Intent to Federal Discovery*

The proportionality amendment attempts to return to discovery’s initial, implicit limiting principle. While the original Rules originally contemplated self-regulation and limitation by lawyers, the new Rules are designed to provide judicial limitations.<sup>88</sup> Underlying both the original

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Laporte & Redgrave, *supra* note 71, at 30.

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

85. *Id.*

86. See *supra* notes 62–66 and accompanying text (discussing discovery’s original goals).

87. See generally FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”).

88. FED. R. CIV. P. 26(b) advisory committee’s note to 2015 amendment. The heightened judicial role is a recognition of two changes in discovery practice: first, the increased emphasis on discovery as the focal point of litigation; and, second, the more adversarial, “pitbull” litigator ethos that emerged from the 1980s. Compare *Fudge Points and Thin Ice*, *supra* note 64, at 33–34 (noting that the 1938 Rules’ choice to entrust lawyers with the discovery process was odd given the Advisory Committee’s distrust of lawyers regarding the litigation process), with DUKE LAW SCH. CTR. FOR JUDICIAL STUDIES, GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY 9 (2015)

intent, and the intent of the amendment, is an idea that discovery can, and must, be liberal but limited in order to be most effective.<sup>89</sup> However, the key difference between the original Rules and the new amendment is who will provide the limits: self-regulation, with its attendant assumption that lawyers can work together to resolve discovery disputes without judicial intervention, has been effectively discarded.<sup>90</sup> Thus, judges will be intimately involved in the new discovery process: intervention early and often is designed to avoid discovery abuses.<sup>91</sup> Even though the mechanism of regulation has changed, proportionality focuses on returning discovery to its goal, providing enough information to aid reasonable, expedient dispute resolution.<sup>92</sup>

The 2015 amendments attempt to re-strike the balance that the original Rules attempted to strike: remedying “trial by surprise,” while also “avoid[ing] unnecessary delay or abuse.”<sup>93</sup> Two of the six proportionality factors are aimed at balancing discovery’s main goal:

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[hereinafter GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 AMENDMENTS] (“The parties should engage in early, ongoing, and meaningful discovery planning. . . . The judge should make it clear from the outset that he or she will be available to promptly address the disputes.”).

89. Wolfson, *supra* note 23, at 34–35. Compare *id.* at 34 (“The new rules represented the first time the problem of pretrial fact gathering was addressed in a thorough, liberalized and unified manner providing a truly integrated system of pretrial investigation.”), with John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411, 414–15 (2015) (arguing that proportionality is not a drastic change and still allows for liberal discovery, but requires a more case-specific, practical assessment of the scope of discovery).

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

91. See GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 AMENDMENTS, *supra* note 88, at 9 (“The judge should make it clear from the outset that he or she will be available to promptly address the disputes.”).

92. Laporte & Redgrave, *supra* note 71, at 30–31. “There thus exists a striking disconnect between the goal of proportionality embedded in the Federal Rules and the imbalanced reality of modern discovery.” *Id.* at 44. Specifically, “[w]hile not entirely a failure of the rules, this disconnect is attributable in part to the failure to address proportional discovery, a concept that is easy to articulate in general terms, yet can be difficult to implement in practice.” *Id.* Making matters worse, “[t]he current Federal Rules (and associated Advisory Committee Notes) do not give specific direction to litigants and courts on how to properly consider the factors listed.” *Id.*

93. Atl. Research Corp., 217 Ct. Cl. 663, 665 (1978). In *Atlantic Research*, the Court of Claims aptly summarized the issues that began to face courts in the late 1970s and early 1980s: “We are not oblivious to the delay which the discovery process causes in the resolution of disputes nor to the fact that the discovery rules can be and are abused.” *Id.* at 664. As a result, the Court of Claims recognized “the need for some curbing and policing of the discovery process by the courts to prevent the discovery delays and abuses from becoming a preliminary trial by delay.” *Id.* The *Atlantic Research* court concluded by encouraging “innovative attempts by the trial judges of this court to limit and police the discovery process.” *Id.* at 665.

stopping information asymmetry. Courts must now explicitly consider “the parties’ relative access to relevant information” and “the importance of the discovery in resolving the issues” in the suit.<sup>94</sup> Under the proportionality standard, information asymmetry still motivates allowing for discovery practice, albeit only as a factor. Still open for debate is whether “relative access to relevant information” will include informal discovery or other investigative techniques, including Freedom of Information Act requests. In order to preserve the discovery system’s intent, these factors should be the first amongst equals when weighing discovery disputes.<sup>95</sup>

The remaining factors are designed to avoid the burdens that worried the initial Advisory Committee. Thus, courts must now consider “the importance of the issues at stake . . . , the amount in controversy, . . . [and] the parties’ resources,” and must perform a cost-benefit analysis regarding the discovery request.<sup>96</sup> Taken together, these considerations attempt to nudge attorneys toward informal dispute resolution by vesting the courts with greater discretion to tailor discovery: courts are now freed to consider the *extent* of discovery beyond an all-or-nothing relevance inquiry.<sup>97</sup>

Proportionality has attempted to re-strike the balance between discovery’s fact-finding philosophy and the more general goal of modern civil procedure, to cheaply and quickly resolve cases.<sup>98</sup> However, as discussed below, proportionality runs a high risk of failing in practice, just as the original Rules did.<sup>99</sup> Unfortunately, the realities of modern litigation eschew flexibility in discovery practice: discretion placed in courts provides attorneys with compelling incentives to test whether, and

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

95. *See, e.g.*, *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) (“[Discovery,] together with pretrial procedures make a trial less a game of blind man’s buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947))).

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

97. *See, e.g.*, *Bennett Levin & Assocs. v. Falick/Klein P’ship*, No. 81-5223, 1984 U.S. Dist. LEXIS 22223, at \*11 (E.D. Pa. Nov. 7, 1984) (“Although the modern discovery rules were intended to prevent trial by surprise . . . , the purpose of such discovery is to narrow the issues at trial, with a concomitant saving in both the resources of time and money for the court, counsel, and the parties.”). In addition, under the relevance standard, parties often were forced to respond in kind to overbroad demands that were allowed by courts, who felt constrained by the plain meaning of the Rules. *See Oberer, supra* note 4, at 2, 6, 7 (“Once the other side comes after you with a strategy of paper warfare, there is no retreat but counter-paper.”).

98. FED. R. CIV. P. 1, 26(b)(1).

99. *See infra* notes 100–16 and accompanying text.

to what extent, items are proportionally discoverable. Moreover, the case-by-case analysis required under a proportionality system means that case law will rarely give definitive guidance, and courts will rarely be able to police abuses through sanctions because the abuse will, at best, only be definitively legally determined after the fact.

*B. Proportionality's Practical Implication: The Final Quixotic Quest to Curb Discovery*

While proportionality establishes a meaningful principle for limiting discovery in theory, its fact-specific nature, along with the attendant invitation for increased judicial intervention, will lead to practical problems. Additionally, proportionality suffers from a fundamental paradox: one must understand what is proportional early in the litigation process in order to avoid motion practice; yet, as theories of the case change, so, too, may the case's proportionality determination. In short, the practicalities of litigation will lead litigators to more frequently contest issues because proportionality eschews bright-line rules and carries an inherent level of uncertainty.

Proportionality's main practical deficiency is that it trades a limiting principle for a meaningful level of certainty. While broad relevance, founded in evidentiary concepts, was subject only to minimal constraints, it was also more readily discernible. In contrast, proportionality is highly uncertain: "The parties may begin discovery without a full appreciation of the factors that bear on proportionality."<sup>100</sup> Under the proportionality inquiry, both parties have a different form of information asymmetry regarding the discovery process itself. While the requesting party "may have little information about the burden or expense of responding," the disclosing party "may have little information about the importance of the discovery in resolving the issues as understood by the requesting party."<sup>101</sup>

Nevertheless, the parties are expected to create a binding discovery plan, which will be ratified by the court, before the discovery process begins or the case starts to take shape, based upon the opening rounds of discovery.<sup>102</sup> In other words, the initial proportionality discussions leave

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100. FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment; Laporte & Redgrave, *supra* note 71, at 45 ("[A]ttorneys over-request, over-object, and advise clients to over-preserve because of uncertainty as to how proportionality will or will not play out in any given case. And to date, there has been little downside to such behavior.").

101. FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment.

102. See FED. R. CIV. P. 16(b)(1)(A) (requiring pre-trial conference, where scheduling order will be entered based on Rule 26(f) conference report); FED. R. CIV. P. 26(f) (requiring

each party holding the cards that the other party needs to make its hand, but gives no incentive for either party to show their cards to each other. Proportionality thus creates a new “blind man’s bluff” regarding the scope of discovery.<sup>103</sup>

Similarly, the proportionality amendment presupposes that judges will be involved in discovery practice early and often. As the Advisory Committee noted, “Many . . . uncertainties should be addressed and reduced in the parties’ Rule 26(f) conference” which, if irreconcilable, should be brought to the court’s attention “in scheduling and pretrial conferences.”<sup>104</sup> After the initial conferences, “if the parties continue to disagree, the discovery dispute could be brought before the court” in motion practice.<sup>105</sup> The courts are thus left in a precarious position: knowing even less than the parties do about the information that the parties hold and need, the court must ratify a plan and provisionally settle upon the scope of discovery.<sup>106</sup>

In practice, this flexibility encourages attorneys to employ a whole track of discovery motion practice: first, to establish a preliminary determination regarding proportionality’s effect on discovery’s scope; second, to reaffirm which major documentary requests are proportional to the claim; and then finally determining whether portions of those requests are, in fact, disproportionate after objections to specific requests.

The proportionality requirements also encourage disclosing parties to use the uncertainty of proportionality by employing form objections that leave requesting parties the uncertain and costly option of motion practice.<sup>107</sup> Problematically, while the Advisory Committee acknowledged the uncertainty involved in a proportionality inquiry, the Advisory Committee failed to provide a new or independent enforcement mechanism regarding spurious allegations of disproportionate requests. Instead, the Advisory Committee merely noted that “[t]he parties and the court have a collective responsibility to consider the proportionality of all

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conference to determine discovery plan).

103. Discovery, “together with pretrial procedures” is designed to “make a trial” and, by extension, litigation, “less a game of blind man’s buff [sic].” *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

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

105. *Id.*

106. See GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 AMENDMENTS, *supra* note 88, at 6, 8, 10, 12–13.

107. FED. R. CIV. P. 26(b) advisory committee’s note to 2015 amendment (“[T]he change [is not] intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”).

discovery and consider it in resolving discovery disputes.”<sup>108</sup> At best, sanctions might be assessed after motion practice, which is an inequity that the Rules attempted to correct due to disclosing parties’ use of the tactic in early discovery systems.<sup>109</sup> The disclosing party, though, is incentivized to summarily reject the request as disproportionate and risk the unlikely imposition of sanctions after motion practice.<sup>110</sup>

Even though the proportionality amendment’s uncertainty favors parties resisting disclosure, disclosing parties also received greater procedural protection by recognition of cost-shifting protective orders in discovery practice, as “Rule 26(c)(1)(B) [was] amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery.”<sup>111</sup> Recognizing cost shifting as a valid discovery tactic will likely have a chilling effect on voluminous, yet necessary, discovery demands. At the very least, it incentivizes motion practice by allowing the larger discovery requests to be challenged based on the cost to produce those requests. While the Advisory Committee noted that the new provision “does not imply that cost-shifting should become a

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108. *Id.*

109. Subrin, *supra* note 6, at 704–05, 744 (discussing how attorneys used objections liberally because discovery was effectively denied even by the threat of time-consuming, expensive motion practice).

110. *See* Lee v. Max Int’l, LLC, 638 F.3d 1318, 1320 (10th Cir. 2011) (“Discovery disputes are, for better or worse, the daily bread of magistrate and district judges in the age of the disappearing trial. Our district court colleagues live and breathe these problems; they have a strong situation sense about what is and isn’t acceptable conduct.” (citing Regan-Touhy v. Walgreen Co., 526 F.3d 641, 647 (10th Cir. 2008))); Adolph Coors Co. v. Movement Against Racism & The Klan, 777 F.2d 1538, 1543 (11th Cir. 1985) (“We find bad faith noncompliance and no reasonable expectation that lesser sanctions [than default judgment] under Rule 37 would have had the necessary effect.”). However, the Eleventh Circuit should not be confused as endorsing liberal or drastic sanctions. The case was exceptional, and until its last sanction, the case unfolded normally: with disclosing parties eager to run the risk of sanctions to avoid disclosure.

The judge below exhibited great sensitivity to appellants’ concerns: he ordered discovery only minimally adequate to meet the legitimate needs of the appellees; he iterated the duty of all parties to abide by court directives; and he gave appellants repeated opportunities to avoid default. Appellants’ response was a flat pretermission of the trial court’s orders.

*Adolph Coors Co.*, 777 F.2d at 1543. As the Supreme Court has noted, even if sanctions are imposed, they are frequently reduced or overturned outright on appeal. Nat’l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 642 (1976) (“There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order.”).

111. FED. R. CIV. P. 26(b) advisory committee’s note to 2015 amendment (“Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.”).

common practice,” it failed to recognize that the inclusion provides a good-faith reason to pursue discovery motion practice in nearly every large discovery dispute.<sup>112</sup> The Advisory Committee failed to realize, however, that ratifying cost-shifting authority only incentivizes attempts to shift the costs of major discovery requests onto the requesting party.

Most problematic, however, is a fundamental, practical misapprehension that the proportionality system presupposes. The Advisory Committee correctly noted that “[a] party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination.”<sup>113</sup> The proportionality system misunderstands the fundamental nature of discovery’s goals by requiring knowledge of the fruits of a discovery request prior to actually receiving the discovery request: “A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.”<sup>114</sup> Discovery is not merely about helping to establish *a* predetermined case or defense, but rather about helping to establishing *the* strongest case or defense. Thus, many times, discovery informs the theory of a case and sharpens issues, not only by limiting the number of issues, but also by discarding issues that become non-issues and substituting in new issues that have arisen.

By placing the burden of advance knowledge on the requesting party, the proportionality system forces the courts into the wrong role in deciding discovery disputes. Under the new system, “[t]he court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.”<sup>115</sup> Thus, the proportionality inquiry is infected by the belief that a case will become static and crystallized over time, which replicates the same static view of litigation that the original Rules suffered from.<sup>116</sup>

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112. *Id.* (“Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”). Rule 26(f)(2) also requires a conference between the attorneys of record, prior to the first pre-trial conference, where “the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case” are discussed, and the parties develop a proposed discovery plan. FED. R. CIV. P. 26(f)(2).

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

114. *Id.*

115. *Id.*

116. This fundamental misapprehension is not new. “A third issue which the reformers fudged” in the original 1938 Rules, was that the framers “tended to treat facts relevant to trial as knowable in an absolute sense, static, and inherently limited.” *Fudge Points and Thin Ice*, *supra* note 64, at 34.

## CONCLUSION

The proportionality amendment has merit as an attempt to balance discovery's use with its abuse. Moreover, proportionality bears a conceptual resemblance to the original goals of discovery as a system. As a system of curbing the amount of discovery, it provides for a fit between the right to discovery and the cost of producing the information. However, proportionality places a significant burden on both the parties and the courts, who will have to continually revisit the proportionality of requests based on the case and its evolution, or simply make colorable form objections and resort to repeated motion practice.

Proportionality is borne of the practicalities of litigation in the modern era, but those same practicalities undercut its efficacy. Proponents argue that proportionality will be able to strike a practical balance between the abuses caused by excessive discovery and the need for pre-trial fact-finding. In practice, however, proportionality will likely exacerbate the very problems that proportionality sought to correct. Motion practice, spurred by uncertainties regarding what is proportional, will protract litigation and further bog down already overloaded dockets.

Within discovery motion practice, it is likely that requesting parties will be required to articulate their needs in terms of a partially developed theory of the case, which locks a party into one theory of the case. The dependence on one theory of the case will ultimately lead to less fact-finding in discovery, and runs the risk of denying discovery that could uncover an alternate theory that best encapsulates the case's issues. As a result, proportionality will lead to issue-narrowing as opposed to issue-development: instead of allowing for fluidity until the best theory of the case can be tested, proportionality promotes locking into one theory and latching onto it in discovery.

Due to proportionality's uncertainty and its potential for extended motion practice, proportionality's ability to improve the discovery system will largely depend on the judges that administer the system. Judicial construction of the proportionality standard will prove to be the greatest determinant of its success. Judges will have to focus on the practicalities of litigation in forming their opinions, and will have to work informally to avoid extensive motion practice. Far from enjoying a supervisory role, judges will find themselves at the center of discovery practice. Over time, as a body of case law develops around the proportionality standard, the primary issue will become how much flexibility the courts will retain—using an unadulterated proportionality standard can give the judges great discretion—and how much certainty the courts will need to give to parties to litigation and future courts.

While the proportionality amendment vests courts with an unprecedented amount of discretion regarding discovery decisions, that very discretion will likely make the system very unpredictable during its early years. As a result, the proportionality amendment may cause more issues than it fixes. Judicial construction should, over time, focus on creating rules that provide certainty within the broader flexibility provided by proportionality. If that body of law is developed, then proportionality will fulfill its promise and curb discovery abuses while providing for litigation that is more efficient without harming the parties' ability to develop their case.

The proportionality inquiry should be guided by the early posture that discovery arises in, and the *Twombly/Iqbal* standard should inform discovery decisions, especially where a Rule 12(b)(6) motion has been filed and denied, or the time to file a pre-answer motion to dismiss has passed.<sup>117</sup> Courts, in constructing rules under the proportionality inquiry, should be cognizant of the substantive law theories underlying the action, which should provide the primary guide for the proportionality inquiry.<sup>118</sup> Focusing on the substantive law underlying the action will allow courts to be receptive to the proof that parties will need at trial. In considering the substantive law underlying the claims, courts should be receptive to both the need to uncover proof and the need to determine that proof cannot be uncovered.

Additionally, courts should then look beyond the legal theories presented, and should consider the pleading's factual underpinnings and possible future theories of the case based on those factual allegations.<sup>119</sup> Focusing on the gravamen of the complaint will give courts an appreciation of the possible theories that a party may be seeking to

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117. FED. R. CIV. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

118. Compared to the pleading context, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); see also *Iqbal*, 556 U.S. at 678–79 ("Rule 8 marks a notable and generous departure from the . . . [] code-pleading regime . . . , but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. . . . [Thus,] [d]etermining whether a complaint states a plausible claim for relief will[] . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007))). In the discovery context, courts should also focus on the factual underpinnings of the pleading to determine the requesting party's entitlement to discovery.

119. Cf. *Iqbal*, 556 U.S. at 679 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

develop or rule out.<sup>120</sup> When considering discovery requests, courts should treat factual allegations as true, lest they unduly restrict theories from developing in discovery.<sup>121</sup>

Finally, courts should be loathe to myopically focus on the amount in controversy, and should emphasize that the amount in controversy is a limited factor that bears on potentially over-burdensome discovery.<sup>122</sup> Where the amount-in-controversy requirement for diversity jurisdiction is established, for example, the amount in controversy should be presumptively the least weighty factor in the proportionality analysis.<sup>123</sup> Federal courts should not quickly limit discovery based solely on the amount in controversy, and, instead, should strive to require resubmission of discovery requests where they feel that the discovery is burdensome given the amount in controversy. Alternatively, courts should exercise their discretion to allow requesting parties to share in the costs of a burdensome discovery request in a case where the amount in controversy is relatively small, instead of determining that the discovery request is impermissible.

In conclusion, courts should focus on harmonizing the proportionality standard for discovery with the plausibility standard for pleading. By using the *Twombly/Iqbal* framework to inform the proportionality inquiry, and by only focusing on the amount-in-controversy factor in unusual cases, courts will be able to provide easier rules for proportionality disputes. Furthermore, since the *Twombly/Iqbal* standard has been developed through case law and is familiar to litigators, its deployment in this context would provide a ready-made framework that the legal profession is familiar with. Additionally, discovery motion practice will be quelled by the ability to make reasoned and informed decisions based on a well-developed body of case law already enunciated in the *Twombly/Iqbal* context.

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120. *Cf. id.* (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

121. *Cf. id.* at 678 (“[F]or the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true . . . .” (quoting *Twombly*, 550 U.S. at 555, 570)).

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

123. *See* 28 U.S.C. § 1332(a) (2012) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.”).