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# Opting Out of Discovery

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# Opting Out of Discovery

Jay Tidmarsh\*

*This Article proposes a system in which both parties are provided an opportunity to opt out of discovery. A party who opts out is immunized from dispositive motions, including a motion to dismiss for failure to state a claim or a motion for summary judgment. If neither party opts out of discovery, the parties waive jury-trial rights, thus giving judges the ability to use stronger case-management powers to focus the issues and narrow discovery. If one party opts out of discovery but an opponent does not, the cost of discovery shifts to the opponent. This Article justifies this proposal in both historical and efficiency terms and concludes by considering objections to the proposal.*

INTRODUCTION.....	1802
I. DISCOVERY TODAY .....	1807
II. THE PROPOSAL .....	1815
A. <i>Back to the Future with Discovery</i> .....	1817
1. The Basic System .....	1817
a. <i>Plaintiff and Defendant Mutually</i> <i>Opt Out of Discovery</i> .....	1818
b. <i>Plaintiff Opts Out of Discovery,</i> <i>Defendant Opts In</i> .....	1822
c. <i>Plaintiff Opts In to Discovery,</i> <i>Defendant Opts Out</i> .....	1823
d. <i>Plaintiff and Defendant Mutually</i> <i>Choose to Engage in Discovery</i> .....	1824
2. Adding Complications: More Claims and Parties.....	1825
3. Strategic Considerations in an Opt-Out System .....	1826

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\* Judge James J. Clynes, Jr., Professor of Law, Notre Dame Law School. I thank Sam Bray, Kellen Funk, Howard Wasserman, and the participants in the *Vanderbilt Law Review* "Future of Discovery" Symposium and in a faculty colloquium at Florida International University College of Law for enlightening conversations and helpful suggestions. I also thank Ran Xu for research assistance.

	<i>B. Why an Opt-Out System Makes Sense</i> .....	1831
III.	THREE CRITIQUES .....	1837
	<i>A. The Right to Jury Trial</i> .....	1838
	<i>B. Access to Justice</i> .....	1841
	<i>C. Limiting Cost Shifting</i> .....	1843
	CONCLUSION .....	1844

## INTRODUCTION

As the recurring efforts to reform the discovery rules over the past thirty-five years attest,<sup>1</sup> discovery is controversial. The basic critiques—costliness and, relatedly, potential for abuse—are a by-product of discovery's effectiveness in unearthing a vast array of information of possible consequence to resolving lawsuits.<sup>2</sup> These critiques are leveled not just by domestic reformers. On the world stage, the capaciousness of discovery is viewed as a primary instance of the American legal exceptionalism that other countries seek to avoid at all costs.<sup>3</sup>

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1. For a description of the range of direct and indirect efforts to reform discovery since 1983, see *infra* notes 8, 11, 39–40, 64–77 and accompanying text.

2. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (“[T]he pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively.”); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989):

[D]iscovery [is] both a tool for uncovering facts essential to accurate adjudication and a weapon capable of imposing large and unjustifiable costs on one's adversary. Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party . . . . The prospect of these higher costs leads the other side to settle on favorable terms.

3. On the general topic of American legal exceptionalism, see Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005). On the specific foreign critique of U.S.-style discovery, see Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 306–07 (2002), which observes:

[T]he number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets us apart.

(footnote omitted). See also Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1017 (1998) (describing both “anti-foreign sentiment” and other reasons for foreign antipathy to U.S. discovery). One measure of the distaste for U.S. discovery is the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231, in which forty-two of the sixty-one signatory countries either refuse to execute letters requesting pretrial discovery or impose limits on the requests. See *Status Table, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, HCCH, <https://www.hcch.net/en/instruments/conventions/status->

To a considerable extent, discovery may be a victim of bad press. In a third or more of federal cases, no discovery occurs, and discovery costs in most other cases are not burdensome.<sup>4</sup> In the main, lawyers are satisfied with the process, believing that it reveals the right amount of information at a fair price.<sup>5</sup> Data from state courts also show that discovery costs constitute only a small fraction of the total recovery from litigation<sup>6</sup>—surely a reasonable expenditure for a process that enhances the accuracy of resolving disputes.

Although it seems to function well in most cases, discovery is problematic in a small percentage of cases—often those with the greatest informational content and therefore the greatest discovery demands.<sup>7</sup> Rather than attempting to isolate those cases and seek solutions unique to their circumstances, however, reform efforts over

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table/print/?cid=82 (last visited Sept. 15, 2018) [<https://perma.cc/X86B-58XW>] (listing signatory countries and providing links to countries' reservations).

4. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) (reporting that no discovery occurred in thirty-eight percent of cases in a sample and that “[d]iscovery is not a pervasive litigation cost problem for the majority of cases”); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 530–31 (1998) (finding, in a sample of cases likely to involve discovery, that only eighty-five percent of attorneys reported that discovery occurred and that the median cost of discovery was \$13,000 per client, about three percent of the stakes in the case).

5. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 27, 35 tbl.4, 37 tbl.5, 43 tbl.10 (Oct. 2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/EZ33-XYN5>] (reporting survey results in which a clear majority of both plaintiffs’ and defense lawyers believed that discovery revealed “just the right amount” of information, the median costs of discovery for plaintiffs’ lawyers was \$15,000 and for defense lawyers \$20,000, and the costs of discovery in relation to the stakes of the litigation were 1.6 percent for plaintiffs and 3.3 percent for defendants); Kakalik et al., *supra* note 4, at 636 (“Subjective information from our interviews with lawyers also suggests that the median or typical case is not ‘the problem.’”). *Contra* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT 3–5 (2008), [http://iaals.du.edu/sites/default/files/documents/publications/interim\\_report\\_final\\_for\\_web.pdf](http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf) [<https://perma.cc/UXE6-MBZE>] (describing survey results that “confirm[] that there are serious problems in many parts of the civil justice system, . . . especially the rules governing discovery”).

6. See Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1988 (2017) (describing a random sample of New York tort cases in which the median for all expenses, other than attorney’s fees, was three percent of recoveries and the average was five percent).

7. See Kakalik et al., *supra* note 4, at 636:

The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases, and the evidence indicates that discovery costs can be very high in some cases. . . . It is the minority of the cases with high discovery costs that generate the anecdotal “parade of horrors” that dominates much of the debate over discovery rules and discovery case management;

see also Willging et al., *supra* note 4, at 531 (reporting that five percent of lawyers reported that the costs of discovery amounted to thirty-two percent of the amount at stake).

the past thirty-five years have sought to make across-the-board changes to the pretrial system. Aside from amendments restricting the scope of discovery,<sup>8</sup> reforms include the mandatory disclosure of some information;<sup>9</sup> heftier case-management powers for judges;<sup>10</sup> change to the standard for motions to dismiss (so that cases will not proceed as easily to discovery);<sup>11</sup> and sanctions for filing frivolous pleadings, discovery requests, and discovery responses.<sup>12</sup>

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8. Amendments have reduced discovery's scope in numerous ways. First is the scope of discovery itself. Prior to 2000, parties were to obtain discovery relevant to "the subject matter" of the suit. See FED. R. CIV. P. 26(b)(1) (1999); see also FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment. From 2000 until 2015, this scope shrank to discovery relevant to "any party's claim or defense," with discovery "relevant to the subject matter" allowed only on a showing of "good cause." See FED. R. CIV. P. 26(b)(1) (2014); see also FED. R. CIV. P. 26(b)(1) advisory committee's note to 2000 amendment. In 2015, the scope of discovery contracted again, so that "subject matter" discovery is now eliminated and only discovery "relevant to any party's claim or defense" is permitted. See FED. R. CIV. P. 26(b)(1); see also FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment. Second, an amendment in 1983 created a proportionality limit on discovery. See FED. R. CIV. P. 26(b)(1) advisory committee's note to 1983 amendment; see also *infra* note 73 and accompanying text (tracing the development and changes to the proportionality provisions from its inception in 1983 until 2015). Third, a 2006 amendment established a special proportionality rule for electronically stored information; under this rule, a party need not presumptively provide such information when it is "not reasonably accessible because of undue burden or cost," although the requesting party can still obtain the information on a showing of "good cause." See FED. R. CIV. P. 26(b)(2)(B); see also FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

9. See FED. R. CIV. P. 26(a) (requiring initial disclosure of the identity of certain witnesses and documents, disclosure of the identity and opinions of testifying experts and their opinions later during the pretrial process, and disclosure of testifying witnesses and exhibits shortly before trial).

10. See FED. R. CIV. P. 16(b)–(c).

11. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–58 (2007) (imposing a plausibility pleading standard in part because "proceeding to antitrust discovery can be expensive"); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (clarifying the scope of the plausibility standard and noting that the main pleading rule, Rule 8, "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"); cf. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010) (arguing that *Twombly*'s pleading standard requires limited discovery opportunities that can help plaintiffs craft pleadings that are plausible). Whether the change to a plausibility standard has had the intended effect remains uncertain. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, at vii (2011), [http://www.uscourts.gov/sites/default/files/motioniqbal\\_1.pdf](http://www.uscourts.gov/sites/default/files/motioniqbal_1.pdf) [<https://perma.cc/MMD3-VCHE>] [hereinafter CECIL ET AL., MOTIONS TO DISMISS] (noting that although the rate of filing motions to dismiss rose after *Twombly* and *Iqbal*, the rate at which motions to dismiss were granted remained unchanged except in one narrow category of cases); JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND 1, 5 (2011), <https://www.fjc.gov/sites/default/files/2012/MotionIqbal2.pdf> [<https://perma.cc/2HJ2-P6V5>] (confirming these findings but noting that the "findings do not rule out the possibility that the pleading standards established in *Twombly* and *Iqbal* may have a greater effect in narrower categories of cases in which respondents must obtain the facts from movants in order to state a claim").

12. See FED. R. CIV. P. 11 (imposing sanctions for frivolous pleadings); FED. R. CIV. P. 26(g) (imposing sanctions for frivolous discovery or discovery responses). The 1993 amendments to Rule 11 partially retreated from the vigor of the 1983 amendment, which imposed greater sanctions for frivolous pleadings. Compare FED. R. CIV. P. 11(c) advisory committee's note to 1983 amendment (noting that a court must impose an appropriate sanction for a Rule 11 violation), with FED. R.

These reform efforts are unlikely to achieve their goal of reducing cost and ending abusive discovery practices. An ideal discovery system produces only the information essential to resolve a lawsuit by its best means (adjudication, settlement, or dismissal). Production of information extraneous to this resolution must be kept to a minimum, and production of information sought for abusive purposes must be curtailed entirely.<sup>13</sup> To a significant degree, the architecture of the existing discovery system reflects this ideal.<sup>14</sup> The difficulty lies in the application of the ideal, especially in an adversarial system.

To state the obvious, information is information: the purpose(s) for which it is sought and the uses to which it may be put vary with circumstances. In most cases it is too expensive—if even possible—to determine, request by request, whether the discovery sought is essential, extraneous, or abusive. This sorting problem has become considerably more difficult in light of the explosion of information generated through innovations like word processing and email.

The difficulties of sorting information piece by piece make default rules attractive. Indeed, the Federal Rules of Civil Procedure contain some default rules. For instance, the parties' mandatory obligation to disclose the identity of witnesses and documents that support the parties' claims or defenses<sup>15</sup> reveals more than is essential to the lawsuit's resolution, but a flat rule of disclosure avoids expensive inquiries that sort the essential from the extraneous. Commentators have offered other default rules to pare discovery to its essence. Many of these proposals rely on economic incentives: for instance, making the person seeking discovery pay for it<sup>16</sup> or requiring a plaintiff who fails to

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CIV. P. 11(c) advisory committee's note to 1993 amendment (noting that changes in Rule 11 made sanctions discretionary and created a safe-harbor provision).

13. Cf. Gerry L. Spence, *How to Make a Complex Case Come Alive for a Jury*, A.B.A. J., Apr. 1, 1986, at 62, 65 ("Give me the 20 documents in the case of 200,000 documents. The rest only obscure what there is to see. Give me the story—please, the story.").

14. The Federal Rules of Civil Procedure limit discovery only to material that is relevant and proportional to the needs of the case. See FED. R. CIV. P. 26(b)(1). The rules also impose sanctions for frivolous or abusive discovery practices. See FED. R. CIV. P. 26(g); FED. R. CIV. P. 37(a)–(b). Case-management practices such as early and firm discovery deadlines can also control discovery excesses. See FED. R. CIV. P. 16(b)(3)(A) (requiring federal judges to impose a deadline to "complete discovery" in most civil cases); FED. R. CIV. P. 16(c)(2) (listing case-management powers of federal judges, including many designed to streamline the discovery process).

15. FED. R. CIV. P. 26(a)(1)(A)(i)–(ii), (a)(2).

16. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 455 (1994) (arguing for a modified version of a requester-pays rule); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 778 (2011) (arguing that "[b]ecause the costs incidental to discovery production are, morally and economically, properly attributable to the requesting party," the requesting party should pay for its discovery); cf. Martin H. Redish, *Discovery Cost Allocation, Due Process, and the Constitution's Role in Civil Litigation*, 71 VAND. L.

survive a motion to dismiss to pay the defendant's costs of discovery.<sup>17</sup> So far, there is less appetite for even broader default rules: for instance, a rule eliminating all discovery (on the theory that discovery's global costs outweigh its benefits)<sup>18</sup> or a rule allowing discovery to proceed without regulation (on the theory that discovery's global benefits outweigh its costs).

This Article recommends a different default approach—one grounded in history and economics. The basic idea is this: If the parties forego discovery, they can proceed directly to trial without trial-stopping filters such as a motion to dismiss or a motion for summary judgment.<sup>19</sup> If both parties wish to conduct discovery, they forego the right to jury trial, instead submitting the case to the judge, who (freed of the unique requirements of the all-issues jury trial) can manage the discovery and resolution processes through a “discontinuous trial,”<sup>20</sup> which avoids excessive or abusive discovery. This approach contains a substantial nod in the direction of the historical division between law, which had trial but no discovery, and equity, which had discovery but no trial.<sup>21</sup> But it works in a manner that avoids the difficulties that infested traditional systems of law and equity.

This proposal has additional features (including a limited requester-pays system) and limits that the Article develops over the course of the three subsequent Parts. Part I sets the table by describing the rise of the present discovery system and its criticisms. Part II lays out the proposal in more detail and justifies it. Part III responds to criticisms, adding final refinements in the process.

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REV. 1847 (2018) (expanding on prior arguments that a responder-pays regime for discovery cost allocation may violate equal protection and due process norms).

17. See Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117 (2018).

18. Cf. Richard E. Moot, *Consider Doing No Discovery*, LITIG., Fall 1988, at 36, 58 (“Discovery is a tool at the disposal of litigators. Like any tool, it is not always useful.”); George Shepherd, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465, 466 (2016) (“Broad discovery should be eliminated. It is a seventy-year experiment that has failed. The rest of the world recognizes this . . .”). But see David Rosenberg et al., *A Plan for Reforming Federal Pleading, Discovery, and Pretrial Merits Review*, 71 VAND. L. REV. 2059 (2018) (developing a system to replace discovery with stronger pleading and mandatory-disclosure rules).

19. Opting out of discovery does not preclude parties from gathering information by other means. See *infra* note 82 and accompanying text.

20. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 529 (2012) (“In jury-free Continental legal systems, based on the Roman-canon tradition, civil proceedings are discontinuous, taking place across as many hearings as the court, staffed exclusively with professional judges, thinks necessary. At these hearings the court hears testimony and the submissions of the parties’ lawyers.” (footnote omitted)).

21. This assertion is a bit of an oversimplification. See *infra* notes 22–25, 132–135 and accompanying text.



## I. DISCOVERY TODAY

Although discovery was unknown at common law, it has been a feature of suits in equity, first in England and then in the United States, for more than six hundred years.<sup>22</sup> Common law litigants could sometimes file a bill in equity to obtain discovery in aid of a common law action, but the practice was not common, and the allowable discovery was limited.<sup>23</sup> By the middle of the nineteenth century, discovery began to spread to common law actions in both England and some state courts in the United States.<sup>24</sup> Federal courts lagged behind; not until the Federal Rules of Civil Procedure came into effect in 1938 was discovery a feature of every federal case.<sup>25</sup>

In the years before adoption of the Federal Rules of Civil Procedure, however, discovery was never the central feature of civil litigation that it has now become.<sup>26</sup> A number of reasons account for discovery's more modest role. First, the mine-run of litigation fell within the jurisdiction of the common law courts. Second, discovery was not designed to gather the information relevant to a dispute as a prequel to adjudication; rather, discovery was a part of the adjudication process. Unlike the common law, which resolved factual disputes by means of live testimony before a jury, the chancellor resolved suits by means of documents and a written record.<sup>27</sup> Thus, discovery produced the record for decision. The chancellor determined the order in which issues were to be decided, the information necessary to decide those issues, and the

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22. See 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 432–44 (1836) (describing the jurisdiction of equity courts to compel discovery); Alan K. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257, 257 (1981) (noting that discovery was a part of chancery practice in the fourteenth century); Goldstein, *supra*, at 266 (“[D]iscovery in England, and America, was a creature of the courts of equity; the common law did not share it.”).

23. See Patricia I. McMahon, *Rediscovering the Equitable Origins of Discovery: The “Blending” of Law and Equity Prior to Fusion*, in EQUITY AND LAW: FUSION AND FISSION (John C.P. Goldberg et al. eds., forthcoming) (manuscript at 6–13) (on file with author) (describing the limits imposed on discovery in equity suits and in aid of common law actions).

24. See Common Law Procedure Act 1854, 17 & 18 Vict. c. 125, §§ 46–58 (Eng.) (authorizing common law courts to conduct discovery); Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 174–79 (2015) (describing the breadth of discovery in New York both before and after the adoption of the Field Code in 1848); Goldstein, *supra* note 22, at 266 (stating that Connecticut and New York permitted common law discovery by 1848 and that England permitted it in 1854); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869–72 (1933) (describing the extent of discovery in U.S. and Canadian jurisdictions prior to adoption of the Federal Rules of Civil Procedure).

25. See FED. R. CIV. P. 26–37 (1938), *reprinted in* 308 U.S. 645, 694–713.

26. See Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2203 (1989) (“In the run of significant lawsuits, federal discovery has helped shift the center of gravity from the trial to the pretrial stages.”).

27. See McMahon, *supra* note 23 (manuscript at 1) (noting that discovery was “paper-based”).

forms of discovery to obtain this information.<sup>28</sup> The scope and forms of discovery lay within the chancellor's sound discretion.<sup>29</sup> Freed of the demands of the common law trial, the chancellor could limit discovery to the information deemed essential to resolving the dispute.<sup>30</sup>

Third, and relatedly, discovery "allow[ed] one party to examine documents within the possession of the other with the goal of helping the [requesting party's] case."<sup>31</sup> Broad discovery of the "fishing expedition" variety—discovery intended to allow a requesting party to learn more about the facts of the dispute and the nature of the opponent's case in order to shape a party's own theories at trial—was forbidden.<sup>32</sup>

During the latter nineteenth and early twentieth centuries, however, discovery expanded as judges both in equity and at common law granted discovery into the facts relevant to the dispute.<sup>33</sup> The 1938 Federal Rules of Civil Procedure were strongly committed to this approach, giving parties a broad ability to access all forms of discovery in every case.<sup>34</sup> With depositions, witnesses could be examined regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>35</sup> With documents, a court could order production on a showing of "good cause" as long as the documents

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28. See Goldstein, *supra* note 22, at 259 ("The evolution of disclosure from its beginnings in chancery as a means to present evidence, to its modern discovery functions transpired over several centuries eventually producing discovery mechanisms significantly different from chancery procedure.").

29. See McMahon, *supra* note 23 (manuscript at 6–22) (describing the discretion inherent in equitable and common law discovery in England from 1850 until roughly 1880).

30. See Goldstein, *supra* note 22, at 259 (noting that discovery in equity was unlike modern discovery because "modern discovery is designed primarily to provide substantially in advance of trial[] information to the litigants with which they can structure and plot their cases, [while] chancery procedure was intended not so much to inform the parties as to inform the decisionmaker").

31. McMahon, *supra* note 23 (manuscript at 2); accord Sunderland, *supra* note 24, at 866 (stating that discovery in equity "was discovery of evidence which the pleader wished to obtain in support of his own case, not discovery regarding the case which his opponent might put up against him").

32. McMahon, *supra* note 23 (manuscript at 2).

33. See *id.* (manuscript at 23) ("Gradually, however, the court began to permit discovery to unearth the 'truth' about a dispute in the name of 'justice.'"); Sunderland, *supra* note 24, at 869 ("The ancient restrictions upon discovery have met with much criticism in modern times. . . . Efforts to modernize discovery have been directed along two lines, namely, enlarging its scope and improving its mechanics.").

34. See Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959) (noting that the discovery rules adopted in 1938 "had no counterpart at the time" and that although "there [was] to be found here and there a suggestion for some part of the proposed system, . . . nowhere [was there] the fusion of the whole to make a complete system such as" the 1938 rules).

35. See FED. R. CIV. P. 26(b) (1938), reprinted in 308 U.S. 645, 694.

were “not privileged” and “constitute[d] or contain[ed] evidence material to any matter involved in the action.”<sup>36</sup>

In 1970, with the removal of judicial approval for document production, discovery became entirely a party-controlled process.<sup>37</sup> Almost immediately, complaints about discovery cost and abuse began to percolate.<sup>38</sup> Those complaints have, in turn, generated important restrictions on discovery—a process that commenced in 1983 and remains ongoing<sup>39</sup>—as well as satellite changes in the Federal Rules of Civil Procedure or their interpretation that have the effect of tamping down discovery.<sup>40</sup>

These changes have done little to push discovery from its central spot in U.S. litigation. A constant refrain in the literature on the U.S. civil justice system is the “vanishing trial”:<sup>41</sup> in the last fiscal year, only 0.9 percent of federal civil cases reached trial.<sup>42</sup> Perhaps three percent of federal civil cases are dismissed in whole or part on a Rule 12 motion to dismiss.<sup>43</sup> The vast bulk of the remaining civil cases (or remaining claims, in the case of a partial dismissal) end on a Rule 56 motion for summary judgment or with a settlement.<sup>44</sup> Settlement or summary

36. See FED. R. CIV. P. 34 (1938), reprinted in 308 U.S. 645, 707–08.

37. See Richard Marcus, “Looking Backward” to 1938, 162 U. PA. L. REV. 1691, 1708 (2014) (describing the 1970 discovery amendments as “the high water point for discovery liberality”).

38. Perhaps the most famous marker of the rising dissatisfaction with discovery was the 1976 Pound Conference. For a description of the proceedings of the conference, see THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979). See also Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 685–88 (2017). But such concern with discovery was hardly new. For instance, Patricia McMahon has explored instances in which British courts in the nineteenth century sought to prevent vexatious or oppressive discovery. See McMahon, *supra* note 23 (manuscript at 21–22).

39. For a discussion of these changes, see *supra* notes 8–9 and accompanying text and *infra* notes 64–77 and accompanying text.

40. For a discussion of these changes, see *supra* notes 10–12 and accompanying text.

41. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). For a critical appraisal of the decline in trials, see Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013). See also *infra* notes 154–156 and accompanying text.

42. See *Judicial Business 2017 Table C-4—U.S. District Courts—Civil Cases Terminated*, by Nature of Suit and Action Taken, U.S. CTS. 1 (Sept. 30, 2017), [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c4\\_0930.2017.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2017.pdf) [<https://perma.cc/TW8M-YS6K>] [hereinafter *Judicial Business*].

43. Exact figures on the grant rates for motions to dismiss for failure to state a claim and for summary judgment are uncertain, but motions to dismiss for failure to state a claim immediately terminate claims in perhaps two to three percent of cases. See CECIL ET AL., MOTIONS TO DISMISS, *supra* note 11, at 8, 14 tbl.4 (reporting that Rule 12(b)(6) motions were filed in 6.2 percent of cases in a 2009–10 study, with 39.7 percent of these motions terminating some or all claims without permitting leave to amend).

44. Unfortunately, available data do not indicate how common summary judgment is in relation to settlement. The available evidence suggests that summary judgment is granted in ten

judgment typically occurs only after an extended period of discovery.<sup>45</sup> In cases involving discovery, discovery expenses account for nearly half of all litigation expenses,<sup>46</sup> and substantial fees and expenses are also incurred as lawyers use information gleaned from discovery to write briefs applying the law to the facts.<sup>47</sup>

One of the reasons that discovery occupies this critical position is the scope of discoverable material. As a *prima facie* matter, any evidence that is relevant is discoverable<sup>48</sup>—and “relevance” has a capacious meaning.<sup>49</sup> The limits of privilege, proportionality, and work

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percent or less of all federal civil cases, meaning that somewhere in the neighborhood of sixty to seventy percent of cases settle. See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882–86, 896 (2007) (noting that summary judgment successfully terminated 7.8 percent of cases in studied federal districts); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008, at 1, 25 (Kuo-Chang Huang ed., 2009) (finding that summary judgment disposed of between 5 and 10.9 percent in sample from two federal districts). On settlement, credible estimates suggest that around two-thirds of all cases settle, although some scholars suggest a higher figure, and the rate of settlement can hinge on exactly how the term “settlement” is defined. Compare Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 136 (2002) (estimating a settlement rate to be at least 66.7 percent in federal civil cases terminated in 2000), and Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 132 (2009) (finding an aggregate settlement rate of 66.9 percent of civil cases in two federal district courts), with STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 281 n.1 (2004) (citing studies showing that over ninety-six percent of civil cases were settled without trial).

45. Cf. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that summary judgment is available “after adequate time for discovery”).

46. See Willging et al., *supra* note 4, at 548 (reporting that for both plaintiff and defense lawyers, the mean percentage of discovery expenses in relation to all expenses was forty-seven percent, while the median was fifty percent).

47. See Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. 427, 473 (2015) (“The current generation of young attorneys is increasingly comfortable with defining themselves as ‘litigators’ rather than ‘trial lawyers’—with relative expertise in handling written briefing, discovery, and settlement, and relative non-expertise in oral argument, evidentiary objections, and trial techniques.”).

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

49. See FED. R. EVID. 401 (stating that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action”). The Federal Rules of Evidence generally guide the trial process, not the pretrial process, and the Federal Rules of Civil Procedure contain no comparable definition of relevance. Nonetheless, the Supreme Court has observed that the meaning of relevance in Federal Rule of Civil Procedure 26(b)(1) should be “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Some courts have read *Oppenheimer* to suggest that relevance is “a broader concept in the context of discovery compared to evidentiary relevancy.” *Price v. Hartford Life & Accident Ins. Co.*, 746 F. Supp. 2d 860, 866 (E.D. Mich. 2010).

product temper the breadth of discovery at the margins,<sup>50</sup> but lawyers can use the discovery process to cast nets that yield large quantities of information.

Broad discovery has important benefits. Principally, it ensures a rational and accurate process for adjudicating or settling claims. In a common law system without discovery, outcome-affecting information can be hidden from the opponent and the fact finder.<sup>51</sup> Without discovery, the outcome of a case may become overly dependent on the quality of the lawyers; the theatrics of examination and cross-examination loom larger when the facts that might prick the balloon of a particular line of testimony are unknown.<sup>52</sup> Moreover, to the extent that a meaningful “day in court” is a goal of our adjudicatory system,<sup>53</sup> discovery gathers the information that helps to ensure that parties can present their strongest factual cases.

Even discovery’s most pernicious side effect—cost—can also be spun as a positive feature. For instance, because many people with valid claims do not sue and therefore do not force defendants to internalize the full costs of their wrong, the threat of discovery costs incurred in the subset of lawsuits that would be filed can create a useful deterrent to defendants’ wrongdoing.<sup>54</sup> Moreover, a more expensive lawsuit establishes a wider range within which a case might settle and therefore increases the likelihood of settlement.<sup>55</sup> To the extent that

50. Federal Rule of Civil Procedure 26(b)(1) bars discovery of privileged material. *See also* FED. R. EVID. 1101(c) (applying the federal rules regarding privilege to pretrial proceedings). Rules 26(b)(1)–(2) contain the proportionality limit. Rules 26(b)(3)–(4) define the work-product protection available for ordinary and expert work product.

51. *See* Sunderland, *supra* note 24, at 869 (“[I]nformation regarding the course which can or will be taken by one’s adversary is an almost universal necessity if the merits of the case are to be fully presented, if preparation is to be facilitated, and if the trial is not to be confused and encumbered with useless matters.”).

52. *Cf.* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 843 (1985) (“The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation.”).

53. *Compare* Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1877 (2009) (“The notion that the individual litigant possesses a foundational constitutional right to his day in court before his rights may be judicially altered has long served as a guide for the shaping of modern procedure.”), *with* Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 288 (1992) (“The assumption basic to the conventional account of the day in court ideal—that each person has an individual right to control her own lawsuit—is wrong on positive and normative grounds.”).

54. *Cf.* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.2 (8th ed. 2011) (describing how legal errors can increase the number of claims and the expense of the legal system).

55. *See id.* § 21.6 (discussing how procedural rules such as discovery can affect the decision to settle); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 57 (1982) (discussing how risk-neutral parties make decisions about filing or maintaining a lawsuit based on expected value,

settlement rather than adjudication of disputes is socially desirable—and the point is hotly contested<sup>56</sup>—discovery may enhance social utility.

For the most part, however, discovery's cost and intrusiveness are seen in a negative light. Without question, the process imposes costs across the board. The party responding to a request for discovery must engage in a time-consuming and expensive process to find responsive information and sift out the subset that privilege, proportionality, or work product protect from disclosure.<sup>57</sup> Next, the party requesting the discovery must spend time and money digesting the responsive information. The costs to both sides must be incurred even though the fraction of discovery that matters to the resolution of a case is likely to be small.<sup>58</sup>

The concern for discovery's negative effects is especially acute in cases of informational asymmetry: in other words, cases in which one side (often a large corporate defendant) holds significantly more discoverable information than the other side (often an injured plaintiff). If both sides possess roughly equal quantities of information, the costs of discovery wash out and do not significantly affect the equilibrium point for settlement.<sup>59</sup> Furthermore, in a situation of symmetrical

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"discounting possible outcomes by their probabilities" and the costs involved in litigation); cf. LEE & WILLING, *supra* note 5, at 33 fig.19 (reporting data that approximately half of attorneys believed that discovery had no effect on settlement, while approximately twenty-five percent believed that discovery costs increased or greatly increased the likelihood of settlement).

56. For the classic argument that settlement is not socially desirable in many cases, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984), which argues that cases often have implications for society as a whole, and thus their full adjudication may be necessary to achieve justice. For contrary positions more sympathetic to settlement, see Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 (1985), which argues, "Many advocates of [Alternative Dispute Resolution] . . . assume not that justice is something people get from the government but that it is something people give to one another"; and Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2692 (1995), which argues that Alternative Dispute Resolution can be more flexible in meeting the parties' goals and in achieving fairer, more ethical, and more democratic adjustments of competing interests. See also Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009) (engaging Professor Fiss's argument from a range of perspectives).

57. See, e.g., *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 289–90 (S.D.N.Y. 2003) (noting that the costs of restoring and searching electronically stored information was \$165,955, while the cost of reviewing and screening them added another \$107,695 to the production cost).

58. See LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 3 (2010), [http://www.uscourts.gov/sites/default/files/litigation\\_cost\\_survey\\_of\\_major\\_companies\\_0.pdf](http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf) [<https://perma.cc/N2GM-UV5W>] (noting that an average of "4,980,441 pages of documents were produced in discovery in major cases that went to trial—but only 4,772 exhibit pages actually were marked").

59. For instance, assume a case in which the plaintiff has a fifty-percent chance of winning \$100,000. In a world without litigation costs, and assuming that both parties are rational, risk-neutral actors who value the case similarly, the settlement value of the case is \$50,000. Now, if the litigation costs for each party (exclusive of discovery) amount to \$20,000, and the costs of

information, a kind of mutual-assured destruction keeps both parties on the discovery straight and narrow: one party's abuse of the discovery process would likely trigger the other party to respond in kind.<sup>60</sup> When information is asymmetrically held, however, the median point for settlement skews to the advantage of the party with less information.<sup>61</sup> And the party with more information has no easy means to keep the party with less information from imposing significant, nonreciprocal discovery expenses on it.

Tied closely to, but distinct from, the problem of asymmetry is the fear of discovery abuse. A party with allegations sufficient to clear the motion to dismiss hurdle obtains access to reams of an opponent's information, much of which is ordinarily kept out of public view.<sup>62</sup> Beyond privacy concerns are, once again, concerns about cost—in particular, costs of responding to discovery requests that a poorly financed responding party may be unable to bear. Using discovery as a weapon to browbeat an opponent into submission rather than for its stated purpose of obtaining information can be a large component of a “scorched earth” litigation strategy.<sup>63</sup>

As a result of these concerns, much of the energy in U.S. procedural reform for the past thirty-five years has been directed toward solving the cost problem in discovery. Some approaches have tackled cost issues by constraining the expansiveness of discovery. In

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discovery are symmetrical at \$10,000 apiece, the settlement range for the case is \$20,000 to \$80,000, with the midpoint still being \$50,000.

60. See John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 615–16 (1989) (using game theory and the concept of nuclear deterrence to analyze “the effect that asymmetries in the availability of resources and opportunities for discovery have on the potential for discovery abuse”).

61. For instance, assume the case described *supra* note 59, but with asymmetrical costs of discovery for the plaintiff of \$5,000 and for the defendant of \$35,000. If the litigation costs for each party (exclusive of discovery) are \$20,000, the settlement range for the case is \$25,000 to \$105,000, with the midpoint skewing upward from a no-discovery median of \$50,000 to a with-discovery median of \$65,000.

62. A party can throw a cloak over some trade secrets or other private information by means of a protective order. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004) [hereinafter MANUAL] (describing the pros and cons of umbrella protective orders). But there is no guarantee that this shield will remain in place throughout or after the litigation. See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987) (affirming trial court's order, entered at the behest of a public-interest organization, to unseal discovery materials previously designated as confidential under a protective order).

63. See *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014):

Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent. . . . But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms.

addition to limiting the scope of discovery,<sup>64</sup> the Federal Rules of Civil Procedure now presumptively cap certain forms of discovery,<sup>65</sup> require parties to certify that discovery is not being requested for an improper purpose,<sup>66</sup> presumptively ban the disclosure of inaccessible electronically stored information,<sup>67</sup> and demand that all discovery be proportional to the needs of the case.<sup>68</sup> The Federal Rules of Civil Procedure have also deployed indirect approaches to cut down on the amount of discovery: for instance, providing for more discovery planning,<sup>69</sup> trying to tamp down the filing of low-merit claims,<sup>70</sup> requiring the mandatory disclosure of certain discoverable information,<sup>71</sup> and, above all, increasing the case-management powers of judges.<sup>72</sup>

In theory, the most effective of these measures is proportionality, which first came into the Federal Rules of Civil Procedure in 1983 and has lived a peripatetic existence ever since.<sup>73</sup> The

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64. See *supra* note 8 and accompanying text.

65. See FED. R. CIV. P. 26(b)(2)(A) (permitting courts by local rule or order to limit requests for admission); FED. R. CIV. P. 30(a)(2)(A)(i), (d)(1) (presumptively limiting depositions to ten per side, with no deposition lasting more than one day of seven hours); FED. R. CIV. P. 33(a)(1) (limiting interrogatories to twenty-five per party).

66. FED. R. CIV. P. 26(g)(1)(B)(ii).

67. FED. R. CIV. P. 26(b)(2)(B). Such information can still be obtained if the requesting party demonstrates "good cause." *Id.*

68. FED. R. CIV. P. 26(b)(1), (b)(2), (g)(1)(B)(iii).

69. FED. R. CIV. P. 26(f).

70. This approach has two prongs: rulemaking and judicial interpretation. On the rulemaking front, Rule 11 imposes sanctions for frivolous factual and legal assertions made in pleadings, motions, and other nondiscovery filings; the goal of preventing frivolous assertions also has as an intended indirect effect the prevention of the costly discovery necessary to disprove those assertions. See *supra* note 12 and accompanying text (describing the evolution of Rule 11 since 1983). On the judicial front, the Supreme Court's interpretation of Rules 8(a)(2) and 12(b)(6) to require the dismissal of claims founded on implausible allegations was also crafted with an eye toward curtailing expensive discovery. See *supra* note 11 and accompanying text (describing the evolution of plausibility pleading).

71. FED. R. CIV. P. 26(a).

72. The court's case-management authority is located in Rule 16, which has been bulked up in a series of reforms, principally in 1983 and 1993. See FED. R. CIV. P. 16 advisory committee's note to 1983 amendment (describing the addition of a mandatory scheduling order and expanding the list of subjects for consideration at a case-management conference); FED. R. CIV. P. 16 advisory committee's note to 1993 amendment (describing the addition and clarification of subjects to be included in the scheduling order or considered at a case-management conference).

73. Proportionality began as a two-sentence add-on to Rule 26 in 1983. See FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment. It moved to Rule 26(b)(2) in 1993 before splitting itself between Rules 26(b)(1) and 26(b)(2) in a 2000 amendment. See *id.* In 2006, it expanded its reach with the e-discovery amendment of Rule 26(b)(2)(B). See FED. R. CIV. P. 26(b) advisory committee's note to 2006 amendment (noting that a court may compel discovery of not reasonably accessible electronically stored information if the costs and burdens "can be justified in the circumstances of the case"). In 2015, reforms that intended to emphasize the importance of proportionality shifted the bulk of the rule back up to Rule 26(b)(1), with a smaller remainder still existing in Rule 26(b)(2). See FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment.



concept of ensuring that discovery's costs match discovery's gains is eminently sensible. It is also eminently impractical. Judges possess almost none of the information needed to make informed decisions about the value of potential discovery to the accurate disposition of a case.<sup>74</sup> Moreover, parties often have private incentives to make (or force other parties to make) litigation expenditures that diverge from the socially desirable level of spending.<sup>75</sup> Limiting discovery to a socially proportional level is more aspirational than realistic, which explains the array of other direct and indirect reforms that the federal rules have assayed<sup>76</sup> and commentators have proposed.<sup>77</sup>

Although controlling the negative effects of discovery has proven difficult, it is worth remembering that these side effects are not a major problem in every case—and indeed not even in most cases.<sup>78</sup> Crafting solutions to deal with a cost-and-abuse problem in a minority of cases risks throwing out the baby with the bathwater.

Against this backdrop fits my own proposal: allow the parties to elect in to (or out of) the discovery system. The proposal uses a combination of incentives that tailor the “discovery/no-discovery” duality of equity and the common law to modern circumstances in a way that harnesses the potential of a number of other reforms, such as mandatory disclosure and case management.

## II. THE PROPOSAL

The gist of my proposal is to empower litigants to opt out of the discovery system in return for certain benefits and to impose certain consequences if they do not. Under the proposal, parties can mutually opt out of discovery; in lieu of discovery, parties mandatorily disclose the witnesses and documents they intend to use at trial. Opting out of discovery carries certain benefits. The parties proceed directly to trial; as a rule, no motions to dismiss or motions for summary judgment bar the way.<sup>79</sup> If the case is jury triable under existing law, the parties retain the right to a jury. On the other hand, the parties can mutually agree to participate in discovery. In doing so, the parties sacrifice the

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74. For a more detailed explanation of the difficulty of implementing a proportionality test for discovery, see Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 874–76 (2015).

75. See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577–78 (1997) (arguing that because many litigants consider only the benefits they garner and the costs they incur, they consider neither the benefits of the lawsuit that they do not capture nor the costs that their behavior imposes on others).

76. See *supra* notes 64–66, 69–72 and accompanying text.

77. See *supra* notes 16–18 and accompanying text.

78. See *supra* notes 4–6 and accompanying text.

79. I discuss limits on this statement *infra* note 83 and accompanying text.

right to jury trial. No longer constrained by the requirements of jury trial, the judge can employ various case-management strategies to carve up the case in a fashion that limits the scope of discovery and can determine the case on a motion to dismiss, on a motion for summary judgment, or at a bench trial. Finally, when the parties disagree about the need for discovery (say, a plaintiff wants discovery and a defendant does not), then the party who wishes to engage in discovery may not file motions to dismiss or for summary judgment against the party who waives discovery and must also pay the reasonable costs of the discovery in which the party engages (including the costs of the waiving party). The party opting out of discovery is entitled to receive mandatory disclosure from the opponent. Jury-trial rights are unaffected.

Section II.A fully describes the proposal, which is summarized in Figure 1. Section II.B justifies the proposal.

FIGURE 1: EFFECTS OF PARTIES' DISCOVERY DECISIONS

		<i>Plaintiff</i>	
		No discovery requested	Discovery requested
<i>Defendant</i>	No discovery requested	<ol style="list-style-type: none"> <li>1. No motions to dismiss or for summary judgment by either party</li> <li>2. Mandatory disclosure of witnesses and documents that may be used at trial</li> <li>3. Limited discovery permitted by mutual agreement of the parties</li> <li>4. Jury trial if so triable</li> </ol>	<ol style="list-style-type: none"> <li>1. No motions to dismiss or for summary judgment filed against the defendant</li> <li>2. Mandatory disclosure by plaintiff of witnesses and documents that may be used at trial</li> <li>3. Mandatory disclosure by defendant; plaintiff bears the reasonable costs of discovery against defendant</li> <li>4. Jury trial if so triable</li> </ol>
	Discovery requested	<ol style="list-style-type: none"> <li>1. No motions to dismiss or for summary judgment filed against the plaintiff</li> <li>2. Mandatory disclosure by defendant of witnesses and documents that may be used at trial</li> <li>3. Defendant bears the reasonable costs of discovery against plaintiff</li> <li>4. Jury trial if so triable</li> </ol>	<ol style="list-style-type: none"> <li>1. Motions to dismiss or for summary judgment available to both parties</li> <li>2. Full discovery with each party bearing its costs to the extent permitted under the present Federal Rules of Civil Procedure</li> <li>3. Jury trial waived</li> </ol>

*A. Back to the Future with Discovery*

The fundamental point of this proposal is to give both parties an opportunity to opt out of discovery. At present, every party in every lawsuit enjoys a right to engage in the full range of discovery. The rules provide no incentives for parties to refrain from doing so. Although a party may choose not to engage in discovery when economic self-interest so dictates and when discovery provides no tactical litigation advantage, these are rare circumstances. When an opponent employs discovery—often with the goal of accumulating the information to file a dispositive motion or to obtain a better negotiating position—it takes a mighty will not to return fire or, if not, to engage in a preemptive strike.

Given that an opponent can engage in discovery even if a party does not, the opt-out system must build in certain carrots and sticks. Those in my proposal are grounded in both historical practice and economic principles. The proposal creates one carrot to induce parties to opt out of discovery: freedom from two dispositive motions (the motion to dismiss for failure to state a claim and the motion for summary judgment), thus funneling a case on the track to trial (including trial by jury when appropriate). The proposal also creates three potential sticks for parties who decline to opt out of discovery: exposure to dispositive pretrial motions, waiver of the jury-trial right (if both parties decline to opt out of discovery), and a requester-pays regime (if a party stays in the discovery system but the opponent opts out).

In working through these carrots and sticks, I begin with a simple two-party, one-claim case. I then expand the idea to encompass more complex party and claim structures. I conclude with some thoughts on the tactics involved in the decision to opt out of discovery (or not).

### 1. The Basic System

A plaintiff who files suit must make an election at the time of filing: to seek (or not seek) discovery from the defendant and nonparties. If the plaintiff opts out of discovery, the plaintiff's complaint is immune from dismissal on motion, except in limited circumstances.<sup>80</sup> The defendant must answer the complaint and make a similar election: opt out of discovery or retain discovery rights. On the other hand, if the plaintiff does not opt out of discovery, the plaintiff is not immune from dismissal on a motion to dismiss. If the lawsuit moves beyond the

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80. See *infra* note 83 and accompanying text.

motion to dismiss stage (either because the defendant makes no motion or the plaintiff survives the motion), then the defendant must answer the complaint and also make an election to stay in or opt out of the discovery system.<sup>81</sup>

Thus, four possible scenarios arise: (1) the plaintiff and the defendant both opt out of discovery; (2) the plaintiff opts out of discovery, but the defendant stays in the system; (3) the plaintiff stays in the discovery system, but the defendant opts out; and (4) the plaintiff and the defendant both choose to conduct discovery.

The following Sections explore the procedural consequences of each scenario. First, however, an important caveat: opting out of discovery does not preclude parties from gathering information. They may interview witnesses, file Freedom of Information Act requests,<sup>82</sup> and seek evidence from cooperating persons. By opting out of discovery, a party loses only one right: the ability to use the Federal Rules of Civil Procedure to compel the disgorgement of information in others' possession in advance of trial.

#### *a. Plaintiff and Defendant Mutually Opt Out of Discovery*

Begin with the situation in which both parties opt out of discovery. In opting out, both parties immunize themselves to dispositive pretrial motions that go to the merits of their claims and defenses. The parties remain subject to certain dispositive motions that are unrelated to the merits—in particular, the motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, lack of venue, defects in process or service of process, or failure to join a required party.<sup>83</sup>

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81. In the system I describe, the parties make their elections seriatim, beginning with the plaintiff. The system would also work if both parties made their election simultaneously after the pleadings close, perhaps at the Rule 26(f) discovery-planning conference.

82. See 5 U.S.C. § 552 (2012).

83. See FED. R. CIV. P. 12(b)(1)–(5), (7). Consistent with, but not required by, this approach would be a limited motion testing the merits—a motion claiming that the requested relief is legally or factually impossible. A *legally impossible* claim or defense is one clearly barred under existing law; for instance, the facts may show a clear lack of duty, or claim preclusion may bar suit. A motion to dismiss a legally impossible claim is equivalent to a common law demurrer, with the exception that if the motion is denied, the case proceeds to a trial on the merits. See, e.g., CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 78, at 501 (2d ed. 1947) (“[T]he general demurrer raised defects of substance, the failure to state a cause of action.”); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 28 (3d ed. 1923) (outlining how a demurrer works within the system of common law pleading). A *factually impossible* claim or defense is one of the “little green men” variety. See *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009) (Souter, J., dissenting) (arguing that a complaint should be dismissed due to faulty factual allegations only when the allegations “are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel”).

Without discovery and with limited motion practice, the case should be ready for trial quickly. But one lesson from the common law is the dysfunction of trial by ambush; because neither the parties nor third persons could be forced to reveal information in advance of trial, trial became a game of wits in which victory often went to the side that best managed the surprise and theater of trial.<sup>84</sup> To avoid that dynamic, parties who mutually forego discovery must have some access to the issues and evidence that they will face. Four mechanisms should be sufficient to avoid undue surprise while streamlining the pretrial process.

First, the parties must jointly prepare a trial plan that identifies and mandatorily discloses several critical matters for trial, including stipulated factual and legal issues; disputed factual and legal issues; documents that a party intends to use at trial and objections that the opposing party raises to those documents; a list of the witnesses that each party may call at trial and a short summary of their testimony; and, in the case of expert witnesses, an expert report. In cases involving damages, a calculation of damages—including all supporting evidence, such as medical records when a person's physical or mental health is in controversy as well as any insurance agreements—also falls within a mandatory-disclosure requirement. Except for summaries of a lay witness's testimony, most of these disclosures are already mandated either in the Federal Rules of Civil Procedure or in judges' final pretrial orders.<sup>85</sup> Summaries or narratives

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Providing a motion to dismiss based on impossibility is debatable. On the one hand, little is gained from the trial of impossible claims or defenses. On the other hand, providing such a motion creates a danger that the bar will be lowered over time, wiping out the principal carrot that induces parties to opt out. Even without an impossibility motion, a court can address impossible claims on a motion for judgment as a matter of law during trial. See FED. R. CIV. P. 50(a)(1) (enabling a judge to enter judgment during a jury trial when the evidence is insufficient to find in favor of the party opposing the motion). Indeed, Charles Clark, who was the principal architect of the federal rules' pleading regime, reportedly would have "preferred to dispense with the motion to dismiss altogether." Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 857 n.47 (2012). He believed "that a plaintiff with a compelling story should be able to bring it before a judge and ask for justice." Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 84 (2008).

84. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose. . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 946–47 (1961) (describing the common law regime in which "[e]ach party found preparation for trial something of a gamble which required him to anticipate his adversary's strategy largely by guesswork").

85. See FED. R. CIV. P. 16(e) (permitting a court to hold "a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence"); FED. R. CIV. P. 26(a) (mandating the disclosure of documents, witnesses, expert reports, and other information);

of lay testimony are also not novel; they are a well-known case-management technique in complex cases.<sup>86</sup>

Second, the parties must be allowed to subpoena for trial documents in the possession of their opponents or third parties. This subpoena authority comes with limits. The requesting party must pay the reasonable cost of production.<sup>87</sup> The request must identify specific documents that the requesting party intends to use to prove an element of the party's case.<sup>88</sup> Production need not occur until shortly before the parties' trial plan is due. These requirements should tamp down production of the "fishing expedition" variety.

Third, parties can agree to conduct discovery.<sup>89</sup> This discovery would be limited to the terms of the agreement. The bargaining would allow the parties to negotiate to extract concessions or other matters of value from the discovery process, thus creating a minimarket in discovery rights.<sup>90</sup>

Fourth, discovery to preserve evidence that would be lost by the time of trial should be permitted.<sup>91</sup>

Saverson v. Levitt, 162 F.R.D. 407 (D.D.C. 1995) (ordering use of narrative direct testimony and citing cases); Fed. Judicial Ctr., *Form 36: Final Pretrial Order*, CIV. LITIG. MGMT. MANUAL (2d ed. 2010), [https://www.fjc.gov/sites/default/files/2012/CivLit2D\\_Form36.pdf](https://www.fjc.gov/sites/default/files/2012/CivLit2D_Form36.pdf) [<https://perma.cc/77QJ-A5ZR>] (sample final pretrial order); Fed. Judicial Ctr., *Form 39: Final Pretrial Order*, CIV. LITIG. MGMT. MANUAL (2d ed. 2010), [https://www.fjc.gov/sites/default/files/2012/CivLit2D\\_Form39.pdf](https://www.fjc.gov/sites/default/files/2012/CivLit2D_Form39.pdf) [<https://perma.cc/CUH9-WM5A>] (another sample pretrial order). Under the federal rules, parties are also required to disclose certain other information, including a computation of damages with supporting documentation and any applicable insurance agreements. See FED. R. CIV. P. 26(a)(1)(A)(iii)–(iv).

86. See MANUAL, *supra* note 62, §§ 12.331, 12.51 (recommending the use of summaries of deposition testimony as well as narrative statements of witnesses in nonjury cases); see also Oostendorp v. Khanna, 937 F.2d 1177, 1178–80 (7th Cir. 1991) (affirming an order requiring five-page summaries of deposition testimony); United States v. Am. Tel. & Tel. Co., 83 F.R.D. 323, 339–41 (D.D.C. 1979) (discussing the use of narrative summaries for direct examinations).

87. Shifting the cost of production to the requesting party is necessary to force the requesting party to internalize the costs of discovery and thus to prevent excessive use of nonparty discovery. The court may also need to control nonparty discovery to prevent a party who claims to opt out of discovery from effectively doing an end run around the opt-out decision and tactically declining to join a potential codefendant to obtain nonparty discovery from the second putative defendant. This tactical choice is not necessarily problematic, because the opt-out system thus simplifies a two-defendant suit into a one-defendant suit. Should the plaintiff sue the nonparty in later litigation, however, the plaintiff should be deemed to have opted in to discovery due to the discovery conducted in the prior suit.

88. In this sense, discovery would return somewhat to its early roots. See *supra* note 31 and accompanying text.

89. Cf. FED. R. CIV. P. 29(b) (permitting the parties to modify the procedures "governing or limiting discovery").

90. Cf. Ronen Avraham et al., *Procedural Flexibility in Three Dimensions* 25–31 (Univ. of Chi. Coase-Sandor Inst. for Law & Econ., Research Paper No. 843, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3140585](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140585) [<https://perma.cc/3CDK-G49G>] (describing the benefits of creating secondary markets to trade procedural rights).

91. Cf. FED. R. CIV. P. 27 (permitting prefilings depositions to perpetuate testimony).

At trial, the parties retain whatever jury-trial rights they otherwise possess.<sup>92</sup> The prospect of proceeding directly to trial raises one concern. At present, some cases involving little to no discovery do not generally proceed to trial. For instance, Social Security appeals<sup>93</sup> and habeas corpus petitions<sup>94</sup> are typically disposed of on motion. Likewise, cases involving an uncontested debt on a student loan, a mortgage, or a commercial note often require no trial.<sup>95</sup> Thus, categorical exceptions that keep a party from using the discovery opt-out as a tactical tool to obtain a trial that is not generally available may be advisable.

When both parties opt out of discovery, the process, in many ways, mimics the modern arbitration system, in which parties, by prior agreement, typically forego most discovery rights.<sup>96</sup> In one sense, an opt-out process is broader than arbitration because the parties can consent to pretermite discovery even in cases in which parties had no predispute agreement to arbitrate. In other ways, the opt-out system effects a more limited change in legal rights than arbitration because the parties retain their jury-trial rights. But providing an arbitration-

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92. In federal court, the Seventh Amendment is the principal determinant of the scope of parties' jury-trial rights in civil cases. See U.S. CONST. amend. VII (providing in part that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"). Congress may also authorize jury trial for a statutory right of action. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2302.2, at 54 (3d ed. 2008). Parties may, however, waive their right to jury trial by failing to demand it. See FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed.").

93. See Robert J. Axelrod, Comment, *The Politics of Nonacquiescence: The Legacy of Stieberger v. Sullivan*, 60 BROOK. L. REV. 765, 794 n.151 (1994) (noting the "summary disposition of many Social Security appeals in district courts").

94. See Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 123 (2012) (stating that "the circumstances in which habeas discovery or an evidentiary hearing is available seem perilously narrow").

95. Actions on a debt were the type of cases for which summary judgment was originally created in England. See Bills of Exchange and Promissory Notes Act 1855, 18 & 19 Vict., c. 67 (Eng.).

96. In arbitration, discovery is unavailable or limited unless the parties otherwise agree. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (upholding an agreement to arbitrate ADEA disputes even though discovery in the arbitration proceeding was limited); Joseph L. Daly & Suzanne M. Scheller, *Strengthening Arbitration by Facing Its Challenges*, 28 QUINNIPIAC L. REV. 67, 96 (2009) ("Parties may expand or limit pre-arbitration discovery by agreement."); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1930 n.320 (2015) (noting that 7.6 percent of arbitration agreements authorize discovery). The court can enforce the parties' agreement to conduct discovery but has little to no power to order discovery beyond the parties' agreement. Cf. *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 125 F.R.D. 398, 400 (S.D.N.Y. 1989) (indicating that courts will permit discovery when a movant demonstrates "extraordinary circumstances" and that discovery will "aid" arbitration (internal quotation marks omitted) (quoting *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 244 (E.D.N.Y. 1973))).

like option is an important step if the litigation system is to remain competitive and relevant in the modern market of dispute resolution.<sup>97</sup>

*b. Plaintiff Opts Out of Discovery, Defendant Opts In*

The second scenario involves a plaintiff who opts out of discovery but a defendant who decides not to do so. The defendant's decision to stay in the discovery system may be reflexive, opposing anything that the plaintiff supports. Or, as can be true in some Goliath-versus-David lawsuits, the plaintiff may have most of the discoverable information in its possession. In either instance, the defendant will opt for discovery.

Because the defendant can wield a tactical weapon (discovery) that the plaintiff cannot, certain protections are in order. First, the defendant cannot file dispositive pretrial motions on the merits against the plaintiff.<sup>98</sup> As with the prior scenario, the reason is simple: without the power to discover evidence that the defendant possesses, a plaintiff has less ability to fend off such motions and should not be expected to do so.<sup>99</sup> This reasoning does not extend to the defendant, whose election to use discovery empowers the plaintiff to test the defendant's defenses through a motion for judgment on the pleadings, a motion to strike, or a motion for summary judgment.<sup>100</sup> Second, the defendant must bear the full cost of any discovery that it seeks, including the reasonable costs to the plaintiff of responding to the discovery request. Again, the reason is simple: if the plaintiff has elected not to participate in discovery, the plaintiff should not be expected to bear its costs. Third, the plaintiff must mandatorily disclose basic case information before trial.<sup>101</sup>

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97. See Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 576–81 (2006) (suggesting a need to blend the procedural forms of litigation and arbitration); cf. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597–600 (2005) (describing the decline of “Due Process Procedure” and the rise of “Contract Procedure”).

98. Other dispositive motions would still be available. See *supra* note 83 and accompanying text.

99. Cf. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that summary judgment should be permitted against a plaintiff who bears the burden of proof on an issue only “after adequate time for discovery”).

100. A Rule 12(f) motion to strike is available to eliminate any inadequate defense alleged in the defendant's answer. See 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1381, at 407 (3d ed. 2004) (“[A]n insufficient defense may be stricken on motion of the plaintiff.”). The Rule 12(c) motion for judgment on the pleadings is the plaintiff's equivalent to the defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim and may be employed by the plaintiff when the complaint, answer, and referenced exhibits demonstrate that the defendant cannot plausibly win the case. See *id.* § 1367.

101. See *supra* notes 85–86 and accompanying text.



As a final protection, the court might extend to a plaintiff that has opted out of discovery one opportunity to step back in to the discovery system if it becomes apparent that a defendant is pursuing a strategy that the plaintiff can parry only with discovery. If the plaintiff exercises this option, the case continues under the procedures for cases in which both parties choose to employ discovery, discussed shortly.<sup>102</sup>

In this second scenario, the trial rights of the parties are unaffected; by opting out of discovery, the plaintiff can be deemed to have demanded a jury trial if one is otherwise available. The other limitations previously discussed—for instance, permitting the plaintiff to subpoena documents if the plaintiff bears the costs of production—still apply to the plaintiff.<sup>103</sup> In addition, the court possesses the full range of controls on discovery in the Federal Rules of Civil Procedure—including proportionality and various case-management techniques—to limit the defendant's discovery. Mindful of the plaintiff's decision not to conduct discovery, the court may choose to exercise these controls with some vigor.

*c. Plaintiff Opts In to Discovery, Defendant Opts Out*

The third situation is the converse of the second: here the plaintiff elects to conduct discovery, but the defendant does not. The plaintiff's election carries certain consequences. The plaintiff's complaint is now subject to dispositive motions on the merits (especially motions to dismiss and for summary judgment). On the other hand, the plaintiff cannot employ any motions to obtain judgment on the merits of the defendant's defenses. The defendant must now disclose documents intended to be used at trial, provide summaries of testimony and expert reports for witnesses likely to be called at trial, and identify stipulated and contested issues in a final pretrial order.<sup>104</sup> The plaintiff must pay for any discovery that it conducts, including the reasonable costs of the defendant's production. As with the prior two scenarios, the jury-trial rights of the parties are unaffected by the defendant's election to opt out of discovery.

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102. *See infra* Section II.A.1.d.

103. *See supra* notes 87–88 and accompanying text. Likewise, the plaintiff must participate in creating a trial order identifying stipulated and contested issues. *See supra* note 86 and accompanying text. As a participant in the discovery process, the defendant must also comply with the mandatory-disclosure obligations of Rule 26(a).

104. *See supra* notes 85–86 and accompanying text. By participating in discovery, the plaintiff is subject to the mandatory-disclosure obligations of Rule 26(a).

*d. Plaintiff and Defendant Mutually Choose to Engage in Discovery*

In the final scenario, both the plaintiff and the defendant elect to not opt out of the discovery system. In doing so, both parties expose themselves to the usual dispositive pretrial motions that go to the merits of the case (motions to dismiss, to strike, for judgment on the pleadings, and for summary judgment). Disclosure and discovery would proceed under the existing rules. The existing rules also govern allocation of the costs of discovery: with some exceptions, these rules require the requesting party to bear the costs of the request and the responding party to bear the costs of responding.<sup>105</sup>

Electing to proceed under the current system, however, includes one critical change: the parties waive any jury-trial rights they possess. This waiver is a vital component in making the opt-out system work. When a jury must try a case, the combination of the Reexamination Clause of the Seventh Amendment<sup>106</sup> and the practical difficulty of either bringing back the same jury or constituting a new jury for subsequent trials typically requires a court to conduct a continuous, all-issues trial. An all-issues trial demands that all discovery be conducted before trial. On the other hand, without a jury, a court can be more creative in blending pretrial and trial phases. Under this discontinuous-trial approach, a court can limit discovery to and try a single issue, then move on to other issues with subsequent discovery and trials if necessary. For instance, in a mass tort case with a significant issue regarding whether a chemical can cause the harm alleged, a court can divide up the case to handle only the causal issue first. If the court finds

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105. Under Rule 26, a court can shift the cost of production to the requesting party in some circumstances. See FED. R. CIV. P. 26(b)(2)(B) (permitting a court to "specify conditions for the discovery" of electronically stored information); FED. R. CIV. P. 26(b)(4)(E)(i) (requiring a court to order a requesting party to pay a responding party's expert "a reasonable fee for time spent in responding to discovery"); FED. R. CIV. P. 26(c)(1)(B) (permitting a court to issue an order "specifying terms, including . . . allocation of expenses," in order to protect a responding party from undue burden or expense). In general, however, each party bears its own costs in disclosure and discovery.

106. The Reexamination Clause provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII, cl. 2. Under this Clause, a trial cannot be divided up in such a way that a second trial would require a second jury to redetermine facts decided by a prior jury from a prior trial. See *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498-501 (1931) (permitting a retrial limited to damages issues when only the jury instructions regarding damages were erroneous and the damages issues did not require determination of facts also relevant to liability). Practically, the Clause hinders or prohibits a court from dividing a case into a series of smaller trials that decide one issue at a time.

a lack of causation, discovery and trial of other fact-intensive issues, such as negligence or damages, are avoided.<sup>107</sup>

A discontinuous-trial approach is common in civil law systems.<sup>108</sup> It was also the approach to determine disputes in equity.<sup>109</sup> Adapting this method to the modern U.S. system gives the judge the maximal use of case-management powers—unconstrained by the demands of jury trial—to limit discovery only to matters essential to deciding the dispute.

## 2. Adding Complications: More Claims and Parties

Many disputes involve multiple plaintiffs and defendants, as well as counterclaims, crossclaims, and third-party claims.<sup>110</sup> Each new plaintiff or defendant must enjoy the same rights of election discussed in the prior Section. The same ability to make a new election arises with respect to counterclaims, crossclaims, and third-party claims.<sup>111</sup> For the

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107. For a well-known example of splitting a case into three parts and trying only the issue of general causation in the first trial, see *In re Bendectin Litig.*, 857 F.2d 290, 293–94, 306–17 (6th Cir. 1988), which affirmed the decision to trifurcate the case, resulting in a defense verdict and disposing of the claims of more than eight hundred plaintiffs after a twenty-two-day trial. Because the plaintiffs did not waive their Seventh Amendment rights, the *Bendectin* case was tried to a jury. See *id.* at 306 (stating that the record supported a finding that the plaintiffs timely preserved their Seventh Amendment objection).

108. For the classic description of the approach used in the German system, see Langbein, *supra* note 52, at 826–30. In recent years, some civil law countries have moved in the direction of a single-trial system for simpler cases as a means to reduce cost. See Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 674 (2006). Nothing would prevent a judge in a case in which both parties elected to take discovery from adopting the continuous-trial method of the adversarial system if that approach was warranted.

109. 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, 1208 (2005):

Once all testimony and documentary evidence was gathered, the parties presented it at a hearing, after which the judge would either enter a final decree, resolving the dispute, or an interlocutory decree, ordering further proceedings. Further proceedings might be necessary to resolve disputed questions of fact and were often referred to a master . . .

(footnote omitted).

110. The Federal Rules of Civil Procedure provide for these additional claims and parties. See FED. R. CIV. P. 13 (assertion of counterclaims and crossclaims); FED. R. CIV. P. 14 (assertion of third-party claims); FED. R. CIV. P. 19 (joining required parties); FED. R. CIV. P. 20 (joining additional plaintiffs and defendants). In addition, a single plaintiff can assert as many claims as the plaintiff has, and a single defendant can assert as many defenses as the defendant has. See FED. R. CIV. P. 8(d); FED. R. CIV. P. 18(a).

111. As a rule, a court should not permit a new election when a party who has previously made an election amends a complaint or answer; otherwise, a party could use the liberal amendment policy of Rule 15 to obtain a tactical advantage. See FED. R. CIV. P. 15(a) (describing generous terms under which parties are able to amend pleadings). Under exceptional circumstances in which a party's amendment fundamentally alters the litigation, however, a new election may be warranted. The opposing party should also enjoy a liberal right to change its original election if the amendment is granted; otherwise, a party can lock in an opponent's election and then alter the litigation through amendment.

most part, this result is dictated by fundamental fairness; some parties should not (and, with respect to Seventh Amendment rights, cannot) determine the legal rights of other parties.<sup>112</sup>

This approach could result in a mixed case: some parties obtaining discovery on some claims and other parties not obtaining discovery on other claims. To take a simple example of two plaintiffs involved in a car accident with one defendant, Plaintiff *A* and the defendant may opt out of discovery in Plaintiff *A*'s case, but Plaintiff *B* and the defendant may choose to engage in discovery for Plaintiff *B*'s case. If the defendant's conduct toward both plaintiffs is identical, few, if any, savings in discovery costs would result. Plaintiffs could also game the system, with some opting out of discovery and others choosing discovery as a means of getting a few cases to trial quickly, thus gaining insight into the defendant's trial strategies and accumulating trial evidence at low cost.

One adjustment to avoid this tactical ploy is to deny issue-preclusive effect to the early judgments.<sup>113</sup> The tactical use of the opt-out process also raises larger issues about the ways in which the system could be used as a weapon to gain advantages, as well as questions about how frequently parties might opt out of discovery. The following Section takes up these issues.

### 3. Strategic Considerations in an Opt-Out System

One important question is whether this system will have any effect on present behavior—in other words, whether any party has an incentive to opt out of discovery. The answer is yes. Begin with the plaintiff, who may choose to opt out in numerous circumstances. As a skeptic will point out, an evident reason for the plaintiff to opt out is to avoid dismissal of a case so weak on the merits that it would fail on

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112. That rationale does not cover counterclaims, which involve new claims asserted by the existing defendant against the existing plaintiff. But the character of a counterclaim may be sufficiently different that the parties should in fairness have an opportunity to elect the best procedure to determine the counterclaim rather than be bound by the elections made on the original claim. Moreover, with respect to permissive counterclaims, see FED. R. CIV. P. 13(b), the inability of the defendant to make a new election might lead the defendant not to assert the counterclaim but to sue in a separate suit in which a new election could be made. The efficiency involved in joining permissive counterclaims would thus be lost.

113. The authority to do so exists. The type of issue preclusion typically involved is nonmutual offensive issue preclusion, in which one plaintiff can avoid the need to prove facts that were litigated, determined, and essential to a prior judgment. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–33 (1979) (recognizing the use of nonmutual offensive issue preclusion in federal court). But the use of such nonmutual issue preclusion is subject to certain exceptions, including the situation in which a plaintiff could have joined a prior case but refused to do so. See *id.* at 329–30.

pretrial motion. In this instance, a plaintiff might wish to take his or her chances with a jury. In other words, the skeptic will argue, the system encourages the filing of exactly the wrong sort of claims.

Few meritless claims, however, are likely to be filed. One reason is that other protections against meritless litigation, such as Rule 11,<sup>114</sup> remain in place to sanction frivolous pleadings and can be expanded to create sanctions for the trial of frivolous claims. Another reason derives from real-options analysis, which suggests that adjudicatory systems with multiple stages of litigation can induce plaintiffs to make incremental investments in litigation that are more inefficient than single-stage systems in which the plaintiff knows at the time of filing that he or she will incur all of the litigation expenses.<sup>115</sup> On this theory, knowledge that a case will proceed directly to trial will discourage the filing of frivolous and other negative-value suits. Third, juries are not proplaintiff,<sup>116</sup> and in any event, the judge retains the power under Rule 50(a) or Rule 52(c) to enter judgment as a matter of law against a plaintiff whose trial proof is inadequate.<sup>117</sup>

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114. See FED. R. CIV. P. 11(c) (permitting a judge to sanction a party for the filing of pleadings, written motions, or other papers that have no adequate basis in fact or law).

115. For a classic description of how multistage adjudication (in which the merits of a case are subjected to multiple barriers, such as a motion to dismiss and a motion for summary judgment before trial) can influence a plaintiff to make inefficient investments in litigation, see Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1293–98 (2006). For further discussion of this point, see *infra* note 151 and accompanying text.

116. Studies suggest that juries and judges agree in about eighty percent of cases, with judges being perhaps slightly more disposed to plaintiffs than juries are in cases of disagreement. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1134 (1992) (analyzing data showing that “plaintiffs enjoy greater success before judges than before juries in three major tort categories—product liability (personal injury), medical malpractice, and motor vehicle” and further noting that plaintiffs enjoy higher win rates before juries than before judges in Federal Employers’ Liability Act and marine law cases); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964) (noting that judges and juries agreed in seventy-nine percent of personal-injury cases, with neither judges nor juries being more proplaintiff when they disagreed); see also Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 48 tbl.13 (1994) (finding that judge-jury agreement drops in complex civil cases to sixty-three percent, but juries are slightly more prodefendant than judges in both civil and criminal cases in which disagreement exists); cf. Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 502 (2005) (“Additional research on the effect of jury deliberation generally is clearly warranted as is additional research specifically comparing judges with juries making group decisions.”).

117. Rule 50(a) permits a judge in a jury-tried case to enter judgment as a matter of law when no reasonable jury could find for the party opposing the motion; the standard is identical to the pretrial summary judgment standard of Rule 56(a). See FED. R. CIV. P. 50(a); FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); see also FED. R. CIV. P. 52(c) (permitting a judge in a bench trial to enter judgment on partial findings during the trial when the judge “finds against the party on that issue”).

Finally, a standard story line in the critique of U.S. discovery is that plaintiffs with frivolous claims use the expense of the discovery process to extort money from defendants.<sup>118</sup> Assuming the critique's accuracy, it seems unlikely that plaintiffs with such frivolous claims will waive the one weapon that they possess to extract a settlement.

In short, even if an opt-out system induces occasional meritless litigation, it is far from clear that disposing of such lawsuits with no discovery and immediate trial is less efficient than disposing of a lawsuit after extensive discovery and a motion for summary judgment.

Plaintiffs may wish to forego discovery in numerous other instances. For example, the plaintiff may need little information to conduct a trial. In simple torts, commercial disputes, and cases like asbestos litigation—in which prior lawsuits have already uncovered almost all relevant information—the plaintiff may regard the opportunity to sidestep dispositive pretrial motions and the promise of a speedy trial as sufficient compensation for the loss of the ability to pester the defendant with discovery that would add, at best, marginal value to the case and would slow down its resolution. In addition, plaintiffs will almost certainly opt out of discovery in cases of strong informational asymmetry in which the plaintiff possesses most of the relevant information.<sup>119</sup> Finally, in some cases, the defendant may be likely to engage in scorched-earth discovery tactics intended to force the plaintiff to drop the case or settle for a pittance;<sup>120</sup> the plaintiff can avoid these tactics by opting out of discovery.

The issue then shifts to the defendant's incentive to opt out. In many instances, a defendant is likely to choose discovery. A defendant may reflexively elect to engage in discovery just because the plaintiff opted out. Likewise, defense lawyers may wish to string a case along for as long as possible, either to avoid the risk of loss, to keep money in the client's pockets as long as possible, or, less honorably, to squeeze as many fees out of the case as possible. In none of these instances would the defense lawyer opt out of discovery, even if the defendant had little to gain from the discovery process itself. Finally, in a case of strong

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118. See *supra* note 2 and accompanying text.

119. This decision is especially likely if the plaintiff enjoys a second opportunity to opt in to discovery in the event that the defendant elects to engage in discovery and the defendant's litigation strategy requires the plaintiff to engage in discovery. See *supra* note 102 and accompanying text.

120. The classic example of the use of scorched-earth tactics to suppress plaintiffs' claims is the tobacco litigation. For a short history of this litigation, see Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 867 (1992), which describes how the tobacco defendants were "able to wear down the tobacco litigants through a seemingly inexhaustible expenditure of resources."

informational asymmetry favoring the plaintiff, the defendant will almost certainly elect to conduct discovery.

Despite these incentives, the best interests of some defendants dictate that they will opt out. In some cases, a defendant may be as eager as a plaintiff who opted out of discovery to resolve a dispute expeditiously; the litigation may hang like the sword of Damocles over the defendant's future conduct or its balance sheet. Similarly, in simple cases such as car accidents or well-trod, repetitive litigation, a cost-conscious defense counsel may realize that substantial cost savings can result from opting out of discovery—especially because the defendant must pay the reasonable cost of all discovery that the defendant conducts.<sup>121</sup> The marginal benefits of information obtained in discovery may be less than the marginal costs of obtaining the information.

Even if the defendant elects to engage in discovery, however, the cost shifting that occurs should keep the amount of discovery at a level that the defendant regards as cost justified. Even though a decision to opt out of discovery by both parties creates the greatest savings, significant savings can also result from the unilateral decision of the plaintiff to exit the discovery system.

The plaintiff will not always have an incentive to opt out of discovery. For instance, in David-versus-Goliath scenarios, in which the defendant controls access to most of the information necessary for the plaintiff to prove the claim, the plaintiff is likely to elect to engage in discovery. The same may be true in a case of two Goliaths (and no informational asymmetry): the plaintiff may believe that the defendant or nonparties possess significant information relevant to the claim and may want to capture that information to strengthen the case. Likewise, given lawyers' familiarity with discovery, inertia may also lead some plaintiffs' counsel to stick with the known. Finally, the plaintiff may elect to engage in discovery precisely to impose costs and extract a settlement in a claim of limited merit.

When the plaintiff elects to participate in discovery, the defendant's calculation becomes interesting. In a David-versus-Goliath scenario, the defendant has a big incentive to opt out of discovery. That decision will not save the defendant much in terms of requesting discovery (by definition, the plaintiff has little information worth

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121. In order to gain the benefit of delay without paying the cost of discovery, some defendants may strategically opt in to discovery when the plaintiffs opt out and subsequently conduct little to no discovery. In these instances, the judge should employ his or her case-management authority to keep the case moving along.

discovering<sup>122</sup>), but opting out shifts the cost of the plaintiff's requested discovery to the plaintiff, which should temper the amount of discovery by the plaintiff. Opting out of discovery also seems a good strategy for a defendant in a case of suspected impositonal discovery: now the plaintiff, who bears the cost of discovery, loses any credible threat to impose discovery costs as a means of extracting a blackmail settlement.<sup>123</sup> Finally, the defendant may opt out of discovery to immunize its defenses to motions to dismiss or for summary judgment, thus gaining settlement leverage.<sup>124</sup>

In other cases, the defendant, like the plaintiff, may make the calculation that discovery is necessary. The defendant may also be worried about unilaterally giving up a right to discovery that the plaintiff enjoys. The familiarity with the present discovery system may lead other lawyers to choose the present discovery route. Finally, avoiding jury trial, which occurs when both sides elect to engage in discovery, may appeal to some defendants as a reason not to opt out.<sup>125</sup> In all of these cases, both parties will participate in disclosure and discovery under the present rules.

If plaintiffs and defendants in most cases involving significant discovery elect to stay in the present system, a skeptic might argue that the cost savings from an opt-out system are minimal. But this critique misses two central points. First, most cases involve no risk of excessive discovery costs.<sup>126</sup> By creating incentives for defendants to opt out of discovery in cases involving asymmetric information—which are the cases usually singled out as the cause of excessive discovery costs<sup>127</sup>—the opt-out system is tailored to limit excessive discovery costs in exactly the cases in which constraints are most necessary.

Second, by mutually electing to stay in the present disclosure-and-discovery system, the parties waive their jury-trial rights. As a

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122. To the extent that the plaintiff has any information worth discovering, the plaintiff's mandatory disclosures should unearth most of this information. See *supra* notes 85–86 and accompanying text (discussing mandatory disclosures).

123. See Cooter & Rubinfeld, *supra* note 16, at 453 (“[A] cost-shifting rule completely eliminates impositonal abuse.”).

124. Cf. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990) (arguing that summary judgment can drive down the value of settlements for plaintiffs).

125. Admittedly, the defendant in this situation faces a difficult choice. By opting out, the defendant shifts the costs of the plaintiff's discovery to the plaintiff, a result that many defendants would regard as a positive feature. But opting out also subjects the defendant to a jury trial if the case is so triable, a result that many defendants would regard as a negative feature. How these two factors balance out in the context of a particular case will have a large influence on the defendant's election.

126. See *supra* notes 4–6 and accompanying text.

127. See *supra* notes 7, 61 and accompanying text.



result, a judge is released from the fetters of the Reexamination Clause. The judge can employ a discontinuous-trial approach that forces the parties to train discovery on discrete issues.<sup>128</sup> Handling factual issues in this seriatim fashion can generate cost savings, especially if the court can target and resolve a dispositive issue early in the litigation.<sup>129</sup> Admittedly, not every case is susceptible to cost savings under the discontinuous-trial approach.<sup>130</sup> When combined with the savings from cases in which one or both parties opt out of discovery, however, the use of a discontinuous trial can reduce the overall costs of the present disclosure-and-discovery system.

Undoubtedly, the calculus to opt in to or out of discovery will involve case-unique factors other than those that I have described. It is also true that when put into the hands of adversaries, any rule can be used to achieve tactical gains that frustrate the purpose of the rule. An opt-out system for discovery is no different. But the combination of cost shifting when only one party elects to conduct discovery and the loss of jury-trial rights when both parties elect to conduct discovery help to ensure that parties wishing to game the system pay a substantial price for doing so.

### *B. Why an Opt-Out System Makes Sense*

In describing how the opt-out system works and evaluating some of its tactical implications, I have laid out basic arguments for this approach. Here I step back and make two larger, thematic arguments in support of the opt-out system. The first argument derives from history, the second from economics.

Historically, discovery was a process used only in equity.<sup>131</sup> It was a major part of the means by which the chancellor sitting in equity received the information on which to base a decision. In contrast, at common law, the fact finder (the jury) received the information necessary to decide a case at the trial. Granted, the evidentiary

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128. See *supra* notes 106–107 and accompanying text.

129. For instance, the *Manual for Complex Litigation* recommends the use of sequenced or bifurcated discovery as a means of breaking a large case into bite-sized segments that might foster an earlier, less costly resolution. See MANUAL, *supra* note 62, § 11.422 (describing the availability and advantages of various discovery controls available to judges).

130. Cf. *Kos Pharm., Inc. v. Barr Labs., Inc.*, 218 F.R.D. 387, 390–91 (S.D.N.Y. 2003) (refusing to bifurcate issues because dividing a case into multiple proceedings “necessarily implicates additional discovery; more pretrial disputes and motion practice; empaneling another jury or imposing more on the jurors who decide the earlier phase of the litigation; deposing or recalling some of the same witnesses; and potentially engendering new rounds of trial and post-trial motions and appeals”).

131. See *supra* note 22 and accompanying text.

strictures of the common law limited the information available to juries and thus made discovery largely unnecessary;<sup>132</sup> but the trial was the place for revealing the evidence, while the pretrial process merely framed the triable issue.<sup>133</sup> Over time, a hybrid process softened the edges of the division between a common law system without discovery and an equity system with discovery. In some instances, parties in an action at law could file a bill in equity to obtain discovery for use in the common law action.<sup>134</sup> And by the 1850s, the English courts of common law and some U.S. courts enjoyed the power to order discovery directly.<sup>135</sup>

In equity and in the early days of common law discovery in England, however, the chancellor or judge could, and typically did, limit discovery both as to methods and as to scope.<sup>136</sup> Discovery was not an information free-for-all to lay bare all of the facts in a dispute but a limited process to aid a party in disgorging necessary proof within the opposing party's control.<sup>137</sup> Toward that end, discovery was designed to work under the close control of a judicial officer.

A system with both discovery and trial, like the modern U.S. system, has a belt-and-suspenders quality to it. It pastes a process (discovery) designed to obtain evidence for a discretionary, nonjury system of adjudication onto the rigid jury system of the common law.<sup>138</sup> The opt-out proposal hearkens back to a world in which discovery was principally a part of an equitable adjudicatory process. Parties that opt out of discovery retain their right to trial, including jury trial if a case

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132. For instance, common law courts did not permit the testimony of the parties or of spouses, and they barred parol evidence on contracts. See 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* §§ 326–430 (3d ed. 1846) (discussing the competency of witnesses); cf. Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1070–72 (1992) (describing two hypotheses to explain common law restrictions on admissible evidence: a jury-control principle and a best-evidence principle).

133. On the nature of common law pleading and its effort to reduce a case to a single legal or factual issue, see J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 67–69 (2d ed. 1979).

134. See *supra* note 23 and accompanying text.

135. See *supra* note 24 and accompanying text.

136. See *supra* notes 27–32 and accompanying text.

137. See Goldstein, *supra* note 22, at 259 (noting that the function of discovery was to create a written record “upon which the chancellor could render a verdict”).

138. See Kessler, *supra* note 109, at 1184 (“[S]ome of the worst abuses of modern litigation—and in particular, our discovery practice—can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework after 1938.”); McMahon, *supra* note 23 (manuscript at 23) (“Although discovery was borne of equity, many of the hallmarks of common law procedure now overwhelm the process in modern civil litigation. Rigidity has replaced judicial discretion; oral examination has come to dominate, supplanting the use of written interrogatories.”). On the rigidity of the common law system, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 177–78 (5th ed. 1956).

is so triable, just as at common law. Parties who mutually choose to employ discovery step into an equity-like system in which the case-management discretion of the trial judge can control the excesses of the discovery process. The intermediate cases, in which only one party opts for discovery, are akin to those common law cases in which one party filed a bill in equity to obtain necessary discovery.<sup>139</sup>

It is important not to stretch this historical analogy too far or to view our legal heritage through rose-colored glasses. Maintaining the dual system of law and equity had significant problems and costs; the merger of law and equity was long overdue.<sup>140</sup> One difficulty was the jagged, ever-shifting line between the jurisdictions of the two systems.<sup>141</sup> Another was the maintenance of distinct procedural systems to resolve disputes (or even different issues within a single dispute).<sup>142</sup>

Unlike the historical practices of law and equity, the opt-out proposal does not hinge on any predetermined boundary between cases meriting discovery and those not deserving discovery. Nor is it accompanied by the rigors of common law procedure that made the system harsh and unjust in many cases. Discovery is available to every party in every case; it lies within each litigant's power to choose whether to use it or not. Granted, that choice has downwind procedural consequences that influence the choice—in particular, the form of trial, the availability of certain motions, and the responsibility for payment of discovery. In a way not true of the historical division between law and equity, however, these procedural consequences relate directly to the benefits and costs of discovery itself.

Although the opt-out proposal taps into the historical sensibilities of law and equity, its principal justification is modern: the

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139. See *supra* note 23 and accompanying text.

140. In England, the systems merged in 1875. See Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (Eng.). In the United States, New York's Field Code accomplished the merger in 1848. See GEOFFREY C. HAZARD, JR., ET AL., *CIVIL PROCEDURE* § 1.7 (6th ed. 2011). The federal courts merged the systems in 1938. See FED. R. CIV. P. 2 (1938), reprinted in 308 U.S. 645, 663 ("There shall be one form of action to be known as 'civil action.'").

141. See Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 48–50 (1980) (describing the difficulty of defining the limits of law and equity in the late eighteenth century). In England, expansions and contractions of jurisdiction affected not only the line between law and equity but also the lines among the three common law courts, each of which also employed somewhat varying procedures. See 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 194–264 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956).

142. See Devlin, *supra* note 141, at 45–64 (describing the interaction of, and differing procedures in, common law and equity); *id.* at 45 ("[T]he differences in the procedures of on the one hand the Court of Chancery and on the other the three courts of common law were so profound that the two procedures might have been the products (as to some extent they were) of different civilisations.").

control of litigation costs. Litigation costs are largely a function of two variables: the direct expenses of litigation (including the cost of conducting discovery) and error costs.<sup>143</sup> From an economic viewpoint, a generally desirable goal is minimizing the sum of these costs.<sup>144</sup>

Applying this insight to discovery is not a simple matter. Abolishing discovery reduces the expense of litigation but likely increases errors (because cases are decided on the basis of less information). It might also increase the number of lawsuits (because each suit is less expensive to bring). Conversely, retaining discovery makes each lawsuit more expensive to maintain but likely cuts down on errors and suppresses the number of cases filed. Without a clear sense of the macrocosts of discovery and the macrocosts of litigation errors, it is impossible to know whether a discovery or no-discovery system is more efficient. Of course, intermediate approaches, which may be more beneficial than either extreme, also exist. The opt-out system is such an approach, and it has strong advantages. It tailors the amount of discovery to the needs of the case, abetting only the discovery whose marginal cost is less than the marginal gain from enhanced accuracy. This approach is, in essence, the proportionality doctrine of Rule 26(b)(1).<sup>145</sup> As we have seen, however, judges possess little knowledge about the parties' legal theories, the nature of the discoverable information in the parties' possession, or the ways in which that information might affect the outcome of the case; as a result, they are poorly equipped to make the cost-benefit calculations that the proportionality doctrine demands.<sup>146</sup>

The opt-out system establishes a default rule that maps onto the cost-benefit calculus by putting the decision about conducting discovery in the hands of the parties. The parties are better equipped to determine the costs and benefits of discovery than the judge.<sup>147</sup> A party that

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143. See POSNER, *supra* note 54, § 21.1 (describing the economic goals of procedure).

144. There are three different costs to minimize: the cost of harm, the cost of preventing harm, and transaction costs such as the cost of litigation. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26-31 (1970). Although this broad objective does not necessarily require that litigation costs be kept to their minimum (for instance, the fear of incurring large litigation costs may induce actors to spend more on preventing harm, thus reducing the overall cost of accidents), it can be difficult to determine the best way to minimize all three components. Hence, keeping litigation costs to a minimum is usually regarded as an important and independent goal. See *id.*

145. See *supra* notes 68, 73-77 and accompanying text.

146. See *supra* note 74 and accompanying text.

147. See Redish & McNamara, *supra* note 16, at 804 ("In the context of discovery costs, the requesting party is, for the most part, unambiguously the cheapest cost avoider."); cf. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (arguing that a government institution can avoid making a cost-benefit analysis by instead

eschews discovery garners certain benefits, such as an immunity from dispositive pretrial motions on the merits and speedier trial, but at the cost of a potential loss in the accuracy of the judgment. A party who seeks discovery faces the flip-side costs and benefits as well as the potential cost of a lost jury trial if the opponent also opts in to discovery. Presumably each party knows his or her case far better than does the judge or the drafters of the Federal Rules of Civil Procedure, and each party knows better whether the expected marginal gains to the lawsuit's value exceed the cost of the discovery.

Of course, this opt-out system imposes new costs that are not presently part of the system, such as the loss of jury trial and dispositive merits-based motions in some cases. In cases in which one or both parties forego discovery, trials themselves might be somewhat lengthier and costlier. The reasons are simple: the parties will not have pinned down the witnesses' testimony at depositions, and the parties may not have access to information that would have enhanced the accuracy of the judgment.

These costs are offset to some (and perhaps a complete) degree by two factors. First, a bench trial in cases in which the parties mutually elect to conduct discovery may enhance the accuracy of the judgment.<sup>148</sup> Second, the absence of discovery will generate savings—not only eliminating the expense of discovery but also curtailing the costs associated with discovery motions and with rulings on unsuccessful dispositive motions.

The proposal also promises to curtail the costs of impositional discovery by giving the party who believes that it might be the target of such discovery (typically a defendant) the means to avoid it. The defendant can opt out of discovery, thus shifting the reasonable costs of any requested discovery to the plaintiff. Shifting the cost of discovery to the requesting plaintiff should stop impositional discovery in its tracks.<sup>149</sup> Granted, this protection comes at a price—the defendant's inability to take any discovery that might help to demonstrate that the

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determining which party to an accident “*is in the best position to make the cost-benefit analysis*” and that “[t]he question for the court reduces to a search for the cheapest cost avoider”).

148. Whether judges are more accurate factfinders than juries is a debatable point. As I have discussed, a high degree of judge-jury agreement exists. See *supra* note 116 and accompanying text. But studies have shown that juries have enormous difficulty comprehending jury instructions; judges generally have an excellent grasp of the legal principles that underlie a case. See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 454–58 (2006). And judges, unlike juries, must give reasons for their decisions. See FED. R. CIV. P. 52(a)(1) (requiring judges to issue findings of fact and conclusions of law). Judges also have certain tools—such as deliberating at length, recalling witnesses, and requesting additional evidence—that are unavailable to juries. Marder, *supra*, at 463.

149. See *supra* note 123 and accompanying text.

plaintiff's claims are meritless—but many cases of claimed impositional discovery involve asymmetrical information, in which the plaintiff has little discoverable information on the case's merits. Moreover, because the plaintiff has elected to conduct discovery, the defendant can still employ motions to dismiss or for summary judgment; a defendant need not conduct discovery to obtain summary judgment.<sup>150</sup> By opting out of discovery, the defendant also signals its belief about the merits of the claim, so the judge may exercise the court's case-management powers to ensure that litigation costs remain low. The real savings, however, derive from the absence of meritless cases that exploit the costliness of discovery to extort nuisance-value settlements. In an opt-out system, plaintiffs will no longer file these cases (or else nonsuit them once the defendant opts out of discovery).

Another efficiency gain is suggested by real-options analysis. This analysis suggests that plaintiffs will sometimes file economically unjustified litigation because they incur litigation expenses over time and can stop spending at any time by dropping the case.<sup>151</sup> When parties opt out of discovery, however, the case comes closer to a single-stage adjudication; merits-based dispositive motions are no longer available. In single-stage adjudication, plaintiffs can anticipate that they will incur the full amount of litigation expenses, so they will sue only when the gains from litigation exceed the costs. As a result, plaintiffs will file fewer economically unjustified lawsuits.

One potential drag on the efficiency of an opt-out system lies in its effect on settlement. High costs of litigation are an important inducement to settle because they create a range within which

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150. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

151. See *supra* note 115 and accompanying text. To explain, assume that the plaintiff seeks to recover on a claim with an expected value of \$100,000 but must spend \$150,000 in litigation expenses. It seems that no rational plaintiff would choose to bring suit. In some cases, however, the plaintiff will do so as long as the plaintiff can abandon the suit without incurring all \$150,000 in expenses. Assume that the plaintiff's claim, if successful, is worth \$400,000 (but \$0 if unsuccessful). The plaintiff's outlay for investigating and filing the complaint and then responding to a motion to dismiss the case is \$75,000, and the likelihood of surviving beyond the pleading stage is fifty percent. If the case survives this first stage, the plaintiff must now invest an additional \$75,000, with the two outcomes (\$400,000 and \$0) being equally likely. Overall, the plaintiff has a twenty-five-percent chance of winning the case, so the claim has an expected value of \$100,000. Overall, the costs of prosecuting this claim are \$150,000. In deciding whether to commence the case, however, the plaintiff does not commit all \$150,000 at once. Instead, at the first stage, the plaintiff spends \$75,000 in pursuit of a claim with an expected value of \$100,000—a sensible economic proposition. If the plaintiff survives the first stage, he or she now has a fifty-percent chance to win \$400,000, so an expenditure of another \$75,000 is also rational.

settlement can occur.<sup>152</sup> In addition, discovery exposes the strengths and weaknesses of the parties' cases, helping them to make a more accurate assessment of the lawsuit's expected value.<sup>153</sup> When either party opts out, and especially when both parties opt out, of discovery, the costs of litigation for the party opting out fall. Moreover, without discovery into its opponent's case, a party may become unduly optimistic about the strength of its own case. These effects might narrow, or even eliminate, the range for settlement.

This concern relies on a disputable assumption: that settlement of litigation is an intrinsic good.<sup>154</sup> Others have decried the low rate of trial.<sup>155</sup> One consequence of the opt-out system might be a greater number of trials. These trials might be somewhat messier affairs, with perhaps less accurate results, due to the lack of pretrial discovery. But two points are worth keeping in mind. First, the parties elect out of discovery, and no party is likely to do so unless the party perceives that opting out is economically worthwhile. Second, any losses from more trials must be offset against the benefits of the opt-out system: reduced or eliminated discovery costs, more efficient handling of litigation due to bench trial, and the benefits of trial itself.<sup>156</sup>

### III. THREE CRITIQUES

I have responded to a number of criticisms about the opt-out proposal as I have developed its elements and justifications. But the opt-out concept also raises three systemic concerns that merit deeper consideration.

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152. See *supra* note 55 and accompanying text. Assuming that both parties are risk neutral and agree on the expected value of the lawsuit, the plaintiff should be willing to settle for anything more than the expected value less the plaintiff's costs of litigation, while the defendant should be willing to settle for anything less than the expected value plus the defendant's costs of litigation.

153. POSNER, *supra* note 54, § 21.4.

154. See *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998) (recognizing a "strong judicial policy in favor of settlements"); *supra* note 56 and accompanying text.

155. See Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 414 (2011) ("The aspirations of our founders for trials in open court and jury trials are not obsolete, and neither is the duty of the judiciary, within constitutional limits, to respect clearly articulated statutory norms and clearly articulated legislative policy."); Galanter, *supra* note 41, at 531 ("As adjudication is diffused and privatized, what courts do is changing as they become the site of a great deal of administrative processing of cases, along with the residue of trials in high-stakes and intractable cases."). But see Langbein, *supra* note 20, at 572 (arguing that the discovery-based system is proving so superior to jury trial that trial is properly becoming "obsolete").

156. For a description of some of the benefits of trial, see Burbank & Subrin, *supra* note 155, at 401-03.

*A. The Right to Jury Trial*

One objection to an opt-out system is the sacrifice of parties' jury-trial rights. To be clear, this loss occurs only when both parties opt for discovery; if either party or both parties opt out of discovery, both sides retain whatever jury-trial rights they otherwise enjoyed. But strong proponents of jury trial might object that conditioning access to jury trial on the abandonment of discovery, which is a powerful engine to determine the merits of a dispute, is unconstitutional and unwise.

To begin, the proposal presents no constitutional difficulty. In federal court and virtually all state courts, parties enjoy a constitutional right to jury trial.<sup>157</sup> Like most constitutional rights, however, parties can waive the right to a civil jury.<sup>158</sup> Moreover, given its use of the word "preserved," the Seventh Amendment has always been interpreted with an eye to the line between law and equity as it existed in 1791.<sup>159</sup> In 1791, discovery was available only in equity; actions at common law—in other words, cases tried to juries—did not permit discovery.<sup>160</sup> Hence, conditioning a mutual right to obtain discovery on the absence of a jury presents no *prima facie* difficulty.

Perhaps, though, this argument is too facile. Some cases—those in which only one party opts for discovery—will continue to employ a jury trial, while others—those in which both parties opt for discovery—will not. A purely historical approach would permit no discovery in any jury-tried cases, while the opt-out proposal permits discovery in some jury-tried cases.

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157. In federal court, the Seventh Amendment "preserve[s]" the right to jury trial in "Suits at common law" that exceed twenty dollars in value. *See supra* note 106 (quoting the Seventh Amendment). The Amendment is one of the few guarantees in the Bill of Rights that have never been incorporated through the Fourteenth Amendment and made applicable to the states. *See González-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015) ("The Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases."). Forty-eight states (Louisiana and Wyoming being the exceptions) have comparable jury-trial guarantees in their constitutions. *See Robert Wilson, Free Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test*, 18 GEO. MASON U. C.R.L.J. 389, 401 & n.116 (2008) (collecting state constitutional provisions).

158. *See* FED. R. CIV. P. 38(d) (providing that the failure to file a jury-trial demand waives the party's right to jury trial). *See generally* *Schneekloth v. Bustamonte*, 412 U.S. 218, 237 (1973) (upholding a criminal defendant's "knowing and intelligent waiver" of a right that "the Constitution guarantees to a criminal defendant in order to preserve a fair trial"); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 673 F.3d 192, 205 (3d Cir. 2012) ("The Supreme Court has long recognized that a party may waive constitutional rights if there is 'clear' and 'compelling' evidence of waiver and that waiver is voluntary, knowing, and intelligent.").

159. The Seventh Amendment was ratified in 1791. *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 875 (2013) ("Even skeptics of the jury concede that the Seventh Amendment text demands some special attention to history.").

160. *See supra* notes 22–25, 132–136 and accompanying text.



This consequence results from respecting each party's right to demand a jury. The opt-out system maximizes litigant choice rather than relying on past markers that divided law from equity. A party willing to forego a jury can access the discovery system. If an opponent makes the opposite calculation, preferring jury trial to discovery, that choice must be respected. Extending discovery to some jury-tried cases expands the scope of jury trial in relation to historical practice; expanding rights beyond the constitutional minimum should pose no difficulty. Moreover, a party willing to forego discovery to obtain a jury trial gains immunity from dispositive merits-based motions. In a world in which motions to dismiss and for summary judgment dispose of perhaps ten times as many cases as trials,<sup>161</sup> and in which jury trials constitute well less than one percent of all dispositions in federal court,<sup>162</sup> the opt-out approach is in fact more protective of jury trial than the present system.

A different angle of constitutional attack involves the doctrine of unconstitutional conditions. When the government (here, a court) conditions receipt of a government benefit (here, discovery) on the sacrifice of a constitutional right (here, the civil jury), a concern arises.<sup>163</sup> But the prohibition against such conditions is not absolute.<sup>164</sup> To run afoul of the unconstitutional conditions doctrine, the government's action must amount to coercion.<sup>165</sup> There is nothing

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161. Motions to dismiss for failure to state a claim terminate claims in two to three percent of cases. *See supra* note 43. Motions for summary judgment are successful in another five to ten percent. *See supra* note 44.

162. Jury trials resolved only 0.63 percent of all civil cases (1,812 jury trials out of 289,595 terminated cases) in the 2017 fiscal year ending in September. *See Judicial Business, supra* note 42, at 1 (stating that 0.9 percent of federal civil cases reached trial during the fiscal year ending on September 30, 2017, with jury trials constituting sixty-eight percent of civil trials (1,812 of 2,663 total civil trials) and bench trials (851 of 2,663 total civil trials) accounting for the remaining thirty-two percent).

163. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("We have said in a variety of contexts that the government may not deny a benefit to a person because he exercises a constitutional right." (internal quotation marks omitted) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983))); *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593–94 (1926) ("[T]he power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.").

164. *See South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (holding that in the context of the Spending Clause, Congress can condition the receipt of federal aid on the abandonment of a constitutional right as long as the aid promotes the general welfare, is intended to serve "general public purposes," is related to the federal interest in the funded program, and is consistent with other constitutional commands).

165. *See Koontz*, 570 U.S. at 606 ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."); *id.* at 607 ("As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."); *see also* Kathleen M. Sullivan, *Unconstitutional*

coercive about limiting jury trial in return for mutual access to discovery. The mandatory-disclosure provisions in the opt-out system guarantee that each side will have basic information about the case in advance of trial even without discovery; moreover, parties can mutually negotiate for limited discovery even in opt-out cases.<sup>166</sup> Controlling excessive discovery costs requires case-management tactics that are, to some extent, inconsistent with the structure of jury trial.<sup>167</sup> Given that jury-tried cases at common law received even less in discovery than the opt-out system provides, it is difficult to argue that the opt-out system fails to “preserve[ ]” the Seventh Amendment’s right to a civil jury.<sup>168</sup>

Beyond the Constitution, however, lies the jury’s value as a democratic institution.<sup>169</sup> For the reasons that I have just described, however, the opt-out proposal may well result in more jury trials, due to the abolition of dispositive motions against parties who opt out and to the effects of lower costs and less information on settlement patterns.<sup>170</sup>

In advance of making the system operational, I do not believe that it is possible to assess the effects of an opt-out approach on the number of jury trials. Such a reduction in jury trials is certainly possible, although an increase seems more likely. Even if the number of jury trials declined (and the number of bench trials increased), some would applaud the movement toward a system of adjudication more in line with the methods used elsewhere in the world—especially in an age when the United States’ procedural exceptionalism may need to soften

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*Conditions*, 102 HARV. L. REV. 1413, 1506 (1989) (arguing that government can condition benefits on the waiver of constitutional rights if there is no “government overreaching,” no lack of “evenhandedness,” and no creation of an “inappropriate hierarchy among rightholders”).

166. See *supra* note 96 and accompanying text.

167. See *supra* notes 106–109 and accompanying text; cf. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (“In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice.”).

168. Cf. *Jenkins*, 447 U.S. at 236 (“[T]he Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.” (internal quotation marks omitted) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973))).

169. For such an argument, see Burbank & Subrin, *supra* note 155, at 401–03. See also SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 5–6 (2016) (arguing for a restoration of the jury to the central role envisioned for it by the Founders). But see Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1353–74 (2012) (arguing that the benefits of the civil jury as a political institution are overstated).

170. See *supra* notes 152–156 and accompanying text.

to accommodate the demands of transnational business and litigation.<sup>171</sup>

*B. Access to Justice*

The opt-out plan's cost-shifting component, under which a responding party can shift the reasonable cost of discovery to the requesting party by opting out of discovery, raises concerns in the David-versus-Goliath context. From the viewpoint of Goliath (usually a defendant-corporation that possesses nearly all of the discoverable information), discovery imposes costs that force settlement of meritless claims. As I have described, the opt-out system gives Goliath the ability to avoid those impositional costs.<sup>172</sup>

From the viewpoint of David, however, the system makes far more difficult the revelation of information necessary to prove corporate wrongdoing on a vast scale. Many little guys do not possess the money to fund the type of broad discovery that is often required to hold large-scale wrongdoers accountable. Most lawyers also do not possess the financial wherewithal to fund such discovery or to carry its costs on their books for years in the hope that discovery will eventually reveal enough information to bring the defendant to the bargaining table. Moreover, as the literature on class action lawyers has long noted, asking lawyers to front discovery expenses creates agency costs, as the lawyer's enormous stake in the controversy (the recovery of the outlays on discovery) may lead the lawyer to make litigation decisions in the best financial interests of the lawyer rather than the client.<sup>173</sup> Third-party financing can step into the breach, but such funding mechanisms are controversial and siphon money away from injured plaintiffs and into the pockets of the third-party investors.<sup>174</sup> A requester-pays system might suppress consumer and other David-versus-Goliath litigation, reducing access to justice for the little guys.

The viewpoints of both sides have validity. We do not want discovery used to extort unjustified settlements; we also do not want

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171. See generally OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 55–58 (2005) (describing jury trial as the first element of American procedural exceptionalism).

172. See *supra* notes 123, 149–150 and accompanying text.

173. For a classic analysis of the agency costs that class actions impose, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12–27 (1991).

174. For a largely positive appraisal of third-party funding, see Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1338 (2012). For a more cautious analysis of the system, see Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TULANE L. REV. 405, 470–72 (2017).

wrongdoers to hide behind their superior access to information. These concerns play out over a small range of cases—principally those involving asymmetrical information in which David opts for discovery and Goliath opts out. The concern for a loss in access to justice for some must be counterbalanced against the savings from a decline in impositional litigation and from the overall efficiency of the opt-out system.

But throwing the concern for individual access to justice onto a cost-benefit scale cannot be the entire answer.<sup>175</sup> A partial solution could be to allow a court to award a prevailing plaintiff at trial the costs of discovery; thus, defendants would bear the costs of responding to discovery in cases in which they were proven to be in the wrong.<sup>176</sup> Reallocation of discovery costs away from the requesting party and to the responding party could also be one subject in settlement negotiations; presumably, a plaintiff who obtained discovery that revealed a substantial risk of liability could use that information to recoup its discovery costs from the defendant. A court's power to award only reasonable expenses in responding to discovery may also give some wiggle room; perhaps a judge can defer the plaintiff's reimbursement of the defendant's expenses in responding to discovery until the end of the case or deny the defendant reimbursement for a modest amount of initial discovery that a plaintiff needs to obtain to determine if the case has merit.<sup>177</sup>

These solutions are imperfect. Third-party financing, taxing discovery expenditures as costs, and denial of reimbursement for a modest amount of exploratory discovery should, in combination, limit concerns for access to justice. Although economic considerations should not overbear our policy of open courts, the savings from the elimination of impositional discovery and other unnecessary discovery are also not

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175. For a discussion in a related context, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 170 (2011):

If . . . the ordinary civil litigant is priced out or among the millions of pro se complainants, then courts become the domain of the criminal defendant; of the well-to-do litigants who opt in rather than buying private dispute resolution services; of the few constitutional claimants able . . . to attract issue-oriented lawyers; and of the government . . . . That reduced spectrum of users becomes a problem for the democratic legitimacy of courts . . . .

176. See 28 U.S.C. § 1920 (2012) (permitting a court to tax certain costs as a part of the judgment).

177. Cf. Cooter & Rubinfeld, *supra* note 16, at 455–56 (proposing a two-stage cost-shifting rule in which the responding party bears the cost of discovery up to a threshold level “deemed appropriate for this class of cases, beyond which the reasonable costs of complying with further discovery requests would shift to the plaintiff”).

irrelevant in determining the proper balance between fostering corporate accountability and preventing litigation abuse.

There is general agreement that discovery is a problem only in a limited number of cases—and cases involving large amounts of information asymmetrically distributed are the candidates that typically are singled out as the problem children.<sup>178</sup> The opt-out proposal is crafted to give both parties some choice in identifying and responding to these problem cases. Retaining the status quo in the name of access to justice is another option, but as the myriad changes in the discovery rules and the rise of case management and proportionality analysis show, the status quo is increasingly untenable. The opt-out system provides a simple set of default rules to target excessive discovery without throwing out a system that, in the main, appears to function well.

### *C. Limiting Cost Shifting*

The opt-out system's cost-shifting approach can also be critiqued from a different perspective. Some commentators have called for cost shifting of discovery in all cases as a means to prevent discovery abuse.<sup>179</sup> The cost shifting in the opt-out proposal is limited to cases in which one party opts out of discovery; cases in which both parties agree to conduct discovery operate under existing rules, in which cost shifting, although possible, is rare.<sup>180</sup> Why the costs of discovery do not shift in all cases is a fair question.

One reason is that the discovery system seems to work reasonably well in many cases. The opt-out system singles out for separate cost-shifting treatment those cases in which the present discovery system seems likely to work least well—the cases of asymmetrical information. Cost shifting in these cases will impose some burden on the court, particularly in calculating how much cost shifting is reasonable.<sup>181</sup> There is little reason to expand the scope of that burden by making cost shifting mandatory in all cases.

Moreover, the opt-out system works through a series of carrots and sticks. One of the critical carrots intended to induce opting out is the cost-shifting rule that accompanies the decision to opt out. If cost

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178. See *supra* notes 4–5, 7, 123 and accompanying text.

179. For a sample, see sources cited *supra* note 16.

180. See FED. R. CIV. P. 26(c)(1)(B) (permitting a court to enter an order “specifying terms, including . . . the allocation of expenses, for the disclosure or discovery”).

181. See Cooter & Rubinfeld, *supra* note 16, at 454 (noting that under a cost-shifting rule for discovery, the responding party “might hire a more expensive lawyer or waste time gathering documents” as a way to impose costs on the requesting party).

shifting occurred in all cases, the incentive for either side to opt out of discovery would be lessened. In Goliath-versus-David cases, automatic cost shifting will typically lead the Goliath plaintiff to opt out of discovery; likewise, in David-versus-Goliath cases, automatic cost shifting will typically lead the Goliath defendant to opt out of discovery. Admittedly, even with automatic cost shifting, some incentives for Goliath to opt out remain: immunity from dispositive pretrial motions and retention of jury-trial rights can be powerful motivators in some situations. But in most cases, cost shifting is the critical carrot. That possibility is especially salient in the asymmetrical-information cases of greatest concern. If cost shifting applied across the board, Goliath defendants in asymmetrical-information cases would have much less reason to opt out; as defendants, they gain little from an immunity to dispositive motions, and they are unlikely to prefer jury trial. The same is true of Goliath plaintiffs. As a result, the savings that are realized due to the Goliath party's decision to opt out of discovery are lost.

The final reason that the opt-out system does not include across-the-board cost shifting, however, is the concern for access to justice that the prior Section discussed. Cost shifting in all cases is likely to discourage filings from impecunious plaintiffs, whose claims are no less important than those of moneyed parties. The opt-out system is less discouraging to plaintiffs, for defendants have some reason (such as avoidance of jury trial) to choose to conduct discovery and thus bear their own discovery costs. Obviously, when filing suit, the plaintiff does not know whether the defendant will elect to engage in discovery or opt out, so the plaintiff runs some risk that the defendant will opt out of discovery, thus shifting the cost of the plaintiff's discovery back to the plaintiff. But the chance of cost shifting that the opt-out system creates is less discouraging to impecunious plaintiffs than the certainty of cost shifting that arises under an automatic cost-shifting rule.

### CONCLUSION

Discovery seeks to ensure that case-relevant information is disclosed so that legal claims are adjudicated accurately. Economic reality, in particular the costliness of discovery, necessarily constrains this goal. In recent years, discovery reform has sought to recalibrate the balance between accuracy and efficiency, with an increasing emphasis on keeping costs down. The basic reformist intuition is proportionality: make sure that requested discovery is worth the price.

In the real world, judges lack the information to make correct assessments about the proportionality of discovery requests. The best that we can hope for is to establish default rules that approximate

efficient results across large swaths of discovery. Given that overly expensive discovery seems to be a problem confined to a small sector of the litigation world, it is important to design solutions that, to the largest extent possible, target problem litigation without ruining a discovery system that performs fairly well in the mine-run of cases.

That intuition underlies the opt-out approach. It begins with the belief that in our adversarial culture, the lawyers know much more than the judge about their cases, the evidence that they possess, and the evidence that they need. The system then empowers them to make elections to participate in or withdraw from discovery.

Given the inertia of the present system, some incentives are necessary to make the lawyers seriously contemplate opting out of the discovery system. These incentives—immunity from dispositive pretrial motions, retention of jury-trial rights, and cost shifting should the opponent wish to conduct discovery—are tailored to address the reasons that discovery exists and the problems that discovery poses.

In a world in which the right to discovery is universal, an opt-out system is a bold reform. As the last Part suggested, a serious risk of the proposal is the potentially negative impact on parties' access to justice. Other unintended consequences, like manipulation of the system to take strategic advantage of the incentives, are also likely. For these reasons, the best way to implement an opt-out system may be a pilot project, in which the possible side effects of an opt-out system can be monitored and the system adjusted.<sup>182</sup> In making an opt-out system operational, rulemakers and judges must bear in mind the first principles that were the impulse for the opt-out proposal: ensure that discovery is conducted only when necessary and only when cost-effective.

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182. See generally Jeffrey S. Sutton & Derek A. Webb, *Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects*, JUDICATURE, Autumn 2017, at 12–21 (touting the benefits of pilot projects on discovery reform).

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