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## Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?

Stephen B. Burbank\*

In a paper on the “Law and Economics of Proportionality in Discovery,” Jonah Gelbach and Bruce Kobayashi do a superb job “elaborat[ing], from an analytical perspective, the economic considerations that arise from the [proportionality] standard as written.”<sup>1</sup> The paper is as refreshing as it is analytically acute. Claims concerning the private and social costs of discovery have dominated the discovery retrenchment campaign narrative that gained traction following the 1976 Pound Conference.<sup>2</sup> These claims pay little, if any, attention to discovery’s private and social benefits.<sup>3</sup> Indeed, not even the methodologically sound empirical

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\* David Berger Professor for the Administration of Justice, University of Pennsylvania Law School. This brief comment is based on remarks made at a panel on the future of discovery sponsored by the Section of Litigation of the Association of American Law Schools on January 3, 2015. I appreciate the helpful suggestions of Tess Wilkinson-Ryan.

1. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law & Economics of Proportionality in Discovery* 19 (Univ. of Penn. Inst. for Law & Econ., Research Paper No. 15-1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2551520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520).

2. See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1588–89, 1598 (2014) [hereinafter Burbank & Farhang, *Litigation Reform*]; Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1864–66 (2014). The potential catalyzing effect of the 1976 Pound Conference suggests the usefulness of periodic conferences to bolster support for retrenchment, as does the 2010 Duke Conference. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1593–94 (2015) [hereinafter Burbank & Farhang, *Federal Court Rulemaking*] (discussing the 2010 Conference on Civil Litigation organized by the Advisory Committee, which has been repeatedly invoked as cover for some of the recent discovery amendments).

3. See, e.g., Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994); see also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1102–16, 1122–23 (2012) (“The very questions implicated by the cost-and-delay narrative—that is, whether civil justice is worth the burdens that it entails—are not questions susceptible to empirical verification. This limitation helps to explain the persuasiveness of the cost-and-delay narrative in the face of empirical data that seems to contradict it.”). For experimental evidence that “one can get the public to focus on those issues one thinks are important by never mentioning other issues,” see Baruch Fischhoff, Paul Slovic & Sarah Lichtenstein,

studies that have consistently undermined the costs story rigorously engage the question of benefits.<sup>4</sup> Such a skewed view likely enabled the chair of the Judicial Conference's Standing Committee, without apparent irony, repeatedly to invoke discovery amendments that were proposed in 2013<sup>5</sup> as an important contribution to the goal of access to court.<sup>6</sup>

Observing that "one effect of the partial externalization of litigation costs is to generate litigation activity whose aggregate social costs exceed its aggregate social benefits," the authors quickly add that "this tendency to overuse the legal system may be offset by differences between the private and social *benefits* of litigation."<sup>7</sup> The authors refer to statutes in which Congress provides "features such as damage multipliers and fee-shifting, which encourage litigation of statutorily created causes of action," suggesting that they

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*Fault Trees: Sensitivity of Estimated Failure Probabilities to Problem Representation*, 4 J. EXPERIMENTAL PSYCHOL. 330, 343 (1978). For the possibility that this phenomenon resulted from the exploitation of "availability cascades" by "availability entrepreneurs," see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 687 (1999) (discussing availability entrepreneurs' focus on large punitive damages awards in order to win support for tort reform).

Of course, some interested observers have pointed out, without attempting to quantify, the benefits that could be lost in discovery retrenchment. *E.g.*, Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 819–20 (1981); Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51 (1997); Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1 (1997).

4. See Reda, *supra* note 3, at 1102, 1122–23.

5. For a summary of the Proposed Rules as approved for publication and comment in 2013, see REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2013.pdf>. For the Proposed Rules that were submitted to and approved by the Judicial Conference in 2014, see REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULE OF PRACTICE AND PROCEDURE (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>.

6. See *Inadequate Court Resources Hurt Access to Justice, Say Nation's Top Jurists*, A.B.A., [http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/inadequate\\_courtres.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/inadequate_courtres.html) (last visited Mar. 2, 2015).

The author attended this American Bar Association Showcase Program. Although other panelists discussed the effect of resource constraints and the high costs of legal representation on access to court, Judge Sutton, the Chair of the Standing Committee, repeatedly touted the Advisory Committee's discovery proposals.

7. Gelbach & Kobayashi, *supra* note 1, at 6.

“spring[] from a view that certain favored types of litigation bring substantial social benefits that are external to the litigants themselves.”<sup>8</sup>

The recent work by Sean Farhang that the authors cite for this proposition<sup>9</sup> makes clear that the standard Chamber of Commerce anti-litigation narrative, of which the discovery abuse story is an important chapter, is radically incomplete, if not simply wrong.<sup>10</sup> Farhang’s work shows a tight correlation between the large increase in federal civil litigation that started in the late 1960s and the incidence of statutory fee-shifting or multiple damages provisions.<sup>11</sup> It also demonstrates, both quantitatively and qualitatively, that congressional decisions to include such provisions were animated by concern, in periods of divided government, that exclusive reliance on public enforcement would put the new substantive rights that Congress created across the entire federal regulatory landscape at risk of subversion by an ideologically distant Executive.<sup>12</sup>

The original Federal Rules on discovery reflected the social, political, and jurisprudential views of those who fashioned them. Their primary architect was Edson Sunderland, a member of the Advisory Committee, not the Committee’s Reporter, Charles Clark. Sunderland was a Progressive before he was a legal realist, and he embraced the Progressives’ campaign for “legibility,” a central tenet of which was that effective regulation requires adequate information about the subject of regulation.<sup>13</sup> Thus, it is no surprise that the 1938 discovery rules favored private enforcement even when that phenomenon was much more sparingly encouraged as a tool of federal regulatory policy.<sup>14</sup> It is also no surprise that, when the Advisory Committee turned back to the

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8. Gelbach & Kobayashi, *supra* note 1, at 6.

9. *See id.* at 6 n.11 (citing SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); Burbank & Farhang, *Litigation Reform*, *supra* note 2).

10. *See* FARHANG, *supra* note 9, at 13–14, 69; Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1586.

11. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1548 (Figure 1).

12. *See* FARHANG, *supra* note 9, *passim*; Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1547–50.

13. *See* Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1583–85.

14. *See* FARHANG, *supra* note 9, at 66 (Figure 3.1).

discovery rules in the late 1960s, their efforts made the rules even more favorable to private enforcement.<sup>15</sup> Evidence of the effectiveness of private enforcement was mounting, and with it, awareness of how central broad discovery is to that effectiveness.<sup>16</sup>

The Supreme Court is fond of reminding us that Congress legislates against the background of the Federal Rules,<sup>17</sup> which, in a world of both the goose and the gander, means not only that Congress is deemed to be aware of the procedural rules with which its statutes will interact (and must clearly manifest an intent to displace them), but that it may rely on those rules in devising regulatory policy. To be sure, those responsible for rulemaking under the Enabling Act<sup>18</sup> are not forever saddled with their predecessors' policy choices.<sup>19</sup> In considering different policy choices about discovery, however, the rule makers must recognize that the social benefits "external to litigants themselves"<sup>20</sup> are not mere abstractions or the stuff of formal models. They are the intended fruits of conscious legislative policy. If discovery retrenchment results in substantially less enforcement of federal statutes, who will take up the slack, and how will the alternative

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15. See Burbank & Farhang, *Federal Court Rulemaking*, *supra* note 2, at 1566.

16. See Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1588–89 (discussing 1971 memorandum written by Lewis Powell for the Chamber of Commerce and Justice Powell's 1980 dissent from "tinkering changes" to the discovery rules); Carrington, *supra* note 3; Higginbotham, *supra* note 3.

17. See, e.g., *Califano v. Yamasaki*, 442 U.S. 672, 700 (1979) ("We do not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure.").

18. 28 U.S.C. §§ 2072–75 (2012).

19. For evidence that the changes to the Enabling Act process in the 1980s resulted in part from the desire of certain interest groups and legislators to protect pro-access, pro-private-enforcement Federal Rules from consequential amendment, see Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1595–97; cf. McNollgast & Daniel R. Rodriguez, *Administrative Law Agonistes*, 108 COLUM. L. REV. SIDEBAR 15, 15–16 (2008) ("[A] serious normative dispute remains about whether and to what extent [an] enacting coalition should be preferred over the current coalition in Congress. In the end, it is one thing to say that Congress tries to stack the deck in favor of certain interests and policies; it is another thing to say that we ought to let Congress get away with it.").

20. See *supra* text accompanying note 8.

enforcement be paid for?<sup>21</sup> Put otherwise, the social benefits of discovery in policy areas where Congress has sought to stimulate private enforcement include avoiding the large expenditures, higher taxes, and bureaucratic state-building that are essential to adequate public enforcement.<sup>22</sup> This assumes, of course, that those who favor discovery retrenchment share the regulatory goals of the Congresses that deployed private enforcement regimes.<sup>23</sup>

Business does not like legibility, and it does not like regulation.<sup>24</sup> However, it is difficult to quash a subpoena from a federal agency. If proportionality is not to become a deregulatory tool in cases in which federal regulatory policy is implicated,<sup>25</sup>

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21. “Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.” Higginbotham, *supra* note 3, at 5. “Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.” Carrington, *supra* note 3, at 54.

22. See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–63 (2013) (discussing potential advantages of private enforcement, including the fact that it “shift[s] the costs of regulation off of governmental budgets and onto the private sector”).

As compared to constructing and financing bureaucratic regulatory enforcement machinery and endowing it with coercive powers, for example, to investigate, prosecute, adjudicate, and issue cease-and-desist orders, an enforcement regime that is founded instead on allowing aggrieved persons to prosecute their own complaints in court may be likely to attract broader support. If there are pivotal lawmakers prepared to obstruct enactment of regulatory policy that entails bureaucratic state-building, utilizing private enforcement regimes may facilitate overcoming such obstructions.

*Id.* at 666.

23. See *supra* note 19 and accompanying text.

24. See Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 254 (1999) (“The tie between discovery and enforcement is no coincidence, and assuredly not a surprise to those groups seeking change. Business groups seek to limit discovery precisely *because* those limits will make it more difficult for plaintiffs to prevail in products liability suits. Having failed to pass substantive tort reform legislation, these groups seek procedural advantage; if the law cannot be changed, maybe it can be made unenforceable.” (footnotes omitted)).

25. See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 606–10 (2010) (arguing that “the motives of many of those seeking reform of discovery practice were primarily

judges must resist the temptation to privilege costs over benefits, and private over public interests. The temptation is great because one naturally tends to focus on the interests of those who are present to the detriment of the interests of those who are absent,<sup>26</sup> and on variables that appear quantifiable over those that do not.<sup>27</sup> It may also be great at a time when the Supreme Court's decisions "interpreting" the Federal Rules are more inflected with ideology than their decisions about matters much more obviously central to private enforcement,<sup>28</sup> when the chance of securing a pro-enforcement decision from the Court has declined precipitously to match the voting record on those issues of conservative Justices,<sup>29</sup> and when the chance of securing a pro-enforcement proposal from the Advisory Committee in 2011 was precisely zero.<sup>30</sup> These circumstances cast in relief the numerous parts of proportionality analysis that, as Professors Gelbach and

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substantive rather than procedural: they sought economic advancement, perhaps especially their own, if at the cost of decreasing civil justice").

26. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 137–45 (2011) (discussing the availability heuristic); Fischhoff, et al., *supra* note 3, at 333, 343 (describing experimental support for the availability hypothesis, "that what is out of sight is also out of mind"); *supra* note 3 ("availability cascades").

27. See Gelbach & Kobayashi, *supra* note 1, at 16–17 (discussing difficulties of "quantifying benefits implicated by intrinsically nonquantifiable factors"); Reda, *supra* note 3, at 1122–23. For experimental research testing the "evaluability hypothesis," which "shows that when two options involving a trade-off between a hard-to-evaluate attribute and an easy-to-evaluate attribute are evaluated, preference between these options may change depending on whether these options are presented jointly or separately" and that "the direction of this change can be predicted, and can even be manipulated," see Christopher K. Hsee, *The Evaluability Hypothesis: An Explanation for Preference Reversals Between Joint and Separate Evaluation of Alternatives*, 67 J. ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 247, 256 (1996).

28. See Burbank & Farhang, *Litigation Reform*, *supra* note 2, at 1571–80, 1606–12 ("The effect of ideology in Federal Rules cases went from about half the effect in other private enforcement cases in the 1970–1994 period, to about the same in the 1995–2013 period. Indeed, . . . after 2000 ideology had a materially larger effect in the Federal Rules cases.").

29. See *id.* at 1574, 1609.

30. See Burbank & Farhang, *Federal Court Rulemaking*, *supra* note 2, at 1579 ("After increasing in the early 1960s, the predicted probability that a proposed amendment would favor plaintiffs declined from 88 percent in 1963 to zero by the end of the series.").

Kobayashi point out, inescapably tap into the normative views of judges.<sup>31</sup>

I have considered recommending that rulemaking under the Enabling Act be brought within the larger world of delegated federal legislation<sup>32</sup> by subjecting some proposals to a requirement of formal cost-benefit analysis. I have not done so because such analysis of federal regulations under the pertinent legislative and executive requirements has proved to be difficult and inconsistent,<sup>33</sup> because the rulemakers lack the information and qualifications to conduct it,<sup>34</sup> and because, even if they did not, such a requirement would be

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31. See Gelbach & Kobayashi, *supra* note 1, at 16–18 (“[T]he proportionality standard . . . provides judges with explicit equitable discretion to consider normative issues . . . that implicate justice, speed, and expense.”).

32. On federal court rulemaking under the Enabling Act as an exercise of delegated legislative power (as opposed to “inherent power”), see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1679–89 (2004).

33. See, e.g., Robert W. Hahn & Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?* (AEI-Brookings Joint Center for Regulatory Studies, Working Paper 04-01, 2006), available at [https://www.law.upenn.edu/academics/institutes/regulation/papers/hahn\\_paper.pdf](https://www.law.upenn.edu/academics/institutes/regulation/papers/hahn_paper.pdf).

The authors of this empirical study of cost-benefit analyses of federal regulations found that “[t]he RIAs [Regulatory Impact Analyses] did not present estimates of benefits as consistently as costs . . . . While 100 percent of the RIAs monetized at least some costs, only half that number monetized at least some benefits. The number of RIAs that quantified at least some benefits was significantly higher—exceeding 80 percent for all three administrations. This suggests that some benefits are not easily monetized and/or that the agency is reluctant to monetize some benefits.” *Id.* at 11. In a footnote, the authors observe: “Benefits are considered to be quantified if they are expressed in some countable unit, such as dollars, lives saved or tons of pollution reduced. They are considered monetized if those units are assigned monetary values. Note that monetization implies quantification, but not vice versa.” *Id.* at 11 n.36. For the legal requirements governing cost-benefit analyses of federal regulations, see *id.* at 4 (“To encourage the development of more effective and efficient regulations, Presidents Reagan, Bush, and Clinton have directed agencies to perform economic analyses of major regulations that show whether a regulation’s benefits are likely to exceed its costs and whether alternatives to that regulation are more effective or less costly.”).

34. Of course, the rulemakers’ disabilities in this respect pale in comparison to those of the Supreme Court when amending Federal Rules in the guise of interpreting them in order to resolve a case. See Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116 (2009) (“The Court acting as such under Article III was even less well-positioned to estimate the procedural costs and benefits of a general rule of plausible

the source of substantial delay in a process that is already lengthy. If, however, proportionality is not to be window dressing or a cloak for deregulation, similar challenges are unavoidable, and they will be presented in adjudication, not rulemaking, which is to say, again and again. Even more than in rulemaking, there is danger that case-by-case cost-benefit calculations will give short shrift to those elements of the analysis that, because they are out of sight, are also out of mind, or are difficult to quantify—in particular, social benefits.

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pleading, let alone the non-procedural costs and benefits of such a rule, substance-specific or general.”).