Discovery and the Social Benefits of Private Litigation

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INTRODUCTION

In the era just before the Federal Rules of Civil Procedure went into effect in 1938, federal civil litigation was a different animal.[1] Although Congress had created several private statutory causes of action before the 1930s,[2] the federal civil docket prior to enactment of the Rules consisted primarily of diversity jurisdiction common law cases, labor injunctions and receiverships, and miscellaneous cases brought by the United States, including Prohibition-era "liquor cases" as well as internal revenue and food and drug enforcement.[3] Occasional exceptions notwithstanding, pre–New Deal federal courts hearing private claims functioned primarily as forums for the resolution of discrete, traditional disputes between litigating parties rather than instruments of social change and social control.

This view began to change with the rise of the Progressive and Legal Realism movements around the turn of the twentieth century. Legal realists challenged the traditional perspective with, among other things, their insights regarding the largely false distinction between substantive and procedural law.[4] Progressives agitated for large-scale social change and envisioned the federal civil court system as a

1. *See generally* Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691, 1695–707 (2014) (summarizing changes to the federal civil docket after 1938 adoption of the Federal Rules of Civil Procedure).

2. *See, e.g.*, 15 U.S.C. § 15 (2012) (authorizing private treble damages suits for antitrust violations); 42 U.S.C. § 1983 (2012) (authorizing private federal suits for deprivation of constitutional or federal statutory rights).

3. *See* Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1670 n.188 (2017) ("The vast majority of the relevant private party v. private party federal civil docket of the day consisted of diversity-based common law case."); *see also* 1936 ATT'Y GEN. ANN. REP. 169–71 (organizing the disposition of criminal cases by offense); AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II: CIVIL CASES 1 (1934) (summarizing the civil docket of federal courts as consisting almost entirely of government cases, diversity jurisdiction cases, and federal questions); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508–11 (1986) (summarizing the jurisprudential background in which the framers of the Federal Rules of Civil Procedure drafted the Rules).

4. *See, e.g.*, Thurman W. Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 643 (1932) ("The difference between procedure and substantive law is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary.").

potentially valuable weapon in their arsenal. From the 1930s forward, the federal civil docket—including suits between private parties—increasingly reflected the ethos of both movements. Few today would challenge the claim that modern private federal litigation often serves a social welfare function both broader and deeper than simply offering eligible litigants an expeditious neutral forum for the resolution of private disputes.[5]

But the fact that some private federal litigation serves a broader social purpose does not necessarily mean that any particular quantum of private litigation activity—past, current, or future—is optimal for society. Before we can optimize the social value of private civil litigation, we must address at least three foundational challenges. First, we must both *define* and *quantify* the social goals in question. Second, we must be able to *measure* the *effects* of both the existing system and any changes to that system with respect to our properly defined and quantified social goals. Finally, we must be able to reconcile our preferences not only internally but also with reference to the myriad potentially competing values and claims on scarce resources associated with a real-world society.[6]

This Article explores whether we can answer each of these questions persuasively such that prescriptive recommendations based upon social benefit analysis should be given any particular weight. And at root, my analysis pertains with equal force to both "liberal" and "conservative" prescriptive analyses. In the abstract, at least, the landscape I describe should give both liberal and conservative would-be reformers pause, since the primary insight here is that the dynamics of civil litigation are complex and, well, *dynamic*, such that if static solutions are effective, they are often so only by accident. This is neither a "liberal" nor a "conservative" point.

However, recent commentary raises the issue in the context of a stated preference for liberalizing (or reliberalizing) discovery in private

5. The impulses animating the Legal Realists and the Progressives were undeniably similar, and some commentators and reformers were undoubtedly sympathetic to both movements. But they were not identical. To date, few if any scholars have explored the ways in which Legal Realists' emphasis on clear-eyed assessment of the law's functional effects and Progressives' commitment to a particular vision of social welfare might ultimately conflict with one another. While full exploration of this topic lies well beyond the scope of this Article, this potential tension is an important underlying theme in some of the discussion that follows.

6. One might attempt to circumvent this analysis by reference to a concept like "congressional intent," arguing that the purportedly liberal and progressive preferences of the Congress that passed the Rules Enabling Act and the Congress that later approved the initial Federal Rules of Civil Procedure together render the analysis moot. Under certain strains of democratic and republican theories, a clear *legislative* preference for a given outcome might operate as a complete bar to *judicial* interventions inconsistent with that preference. There are at least two problems with this argument. I explore each below. *See infra* Part III.

civil litigation on social benefit grounds.[7] Accordingly, this Article necessarily devotes substantial attention to these commentators' specific claims that the discovery component of the Federal Rules of Civil Procedure should be committed to a "public interest" view of civil litigation. In particular, I explore their recent argument that a public interest view of civil litigation is inconsistent with recent amendments to the Federal Rules of Civil Procedure's discovery provisions, including those amendments incorporating proportionality analysis into the definition of discoverable material under Rule 26.[8] Moreover, while much of my analysis applies equally to all components of the procedural regime, I will confine most of my examples to the discovery context in large part because commentators have argued specifically that we should revert to some version of "preretrenchment" civil discovery on social benefit grounds.[9]

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7. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) [hereinafter, BURBANK & FARHANG, RIGHTS AND RETRENCHMENT]; *see also* Stephen B. Burbank & Sean Farhang, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*, *in* POUND CIVIL JUST. INST., WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY? 15 (2016), http://poundinstitute.org/sites/default/files/docs/2016%20Forum/2016-forum-report-1.9.18.pdf [https://perma.cc/KS56-3V23] [hereinafter Burbank & Farhang, *Counterrevolution*] (lamenting the "impoverished view" of litigation and discovery from which the 2015 amendments to the Federal Rules proceeded because that view minimized or ignored the social benefits of both litigation and discovery).

8. *See* FED. R. CIV. P. 26(b); *see also* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 121–25. As I discuss below in greater detail, their decision to label recent procedural reforms as "retrenchment" is simultaneously rhetorically powerful and potentially myopic. While the most common modern dictionary definitions of "retrenchment" generally describe it as "a reduction of costs or spending in response to economic difficulty," its military origins give the term a particularly negative connotation in this context. Specifically, "retrenchment" is strongly associated with the creation of a fallback position to which one may retreat if one's initial position is in danger of being overrun by the enemy. The extended narrative crafted by Professors Stephen Burbank and Sean Farhang suggests that they chose the word advisedly with this connotation in mind. They devote multiple chapters to describing several decades of "conservative" rulemaking and procedural judicial decisions as part of a plan by the Reagan Administration and other conservatives to mitigate or undo the damage those conservatives thought Congress's progressive legislative agenda was doing. While their characterization may in fact be correct, use of the word "retrenchment" implies a far more static battlefield than exists in the real-world conflicts over procedure. It also implies a sort of "inevitable march of history" approach not just to individuals' rights but also to private federal civil vindication of those rights. While I certainly hope and believe that broad consensus is possible on the general contours of individual rights over time, I have no similar confidence that private federal civil litigation will inevitably vindicate those rights at appropriate levels and at acceptable cost. There are simply too many potentially perverse private incentives, and there is too much potential for changes in underlying social conditions and litigation dynamics for me to be comfortable taking such a position. What Burbank and Farhang label "retrenchment" may be just that, but it may also be a dynamic response to changing conditions resulting in roughly equivalent social outcomes. It is ultimately an empirical question, albeit one that is almost impossible to answer. *See infra* Part I.

9. *See* Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 15–17 (discussing the "neglected social benefits of discovery"). While the state-level rulemaking context for which

To be sure, federal civil litigation—both public and private—can and often should serve as a tool available to lawmakers pursuing legitimate regulatory ends. Moreover, because the U.S. system depends in large part upon adversarial conflict, private civil discovery can play an important role in helping that system achieve its social policy goals. As critics of recent restrictions in the scope of civil discovery have pointed out, civil discovery is often the primary means of exposing to public view certain forms of wrongdoing.[10] In their view, the social value of discovery offers an independent ground for retention of traditionally liberal discovery standards.[11]

In December 2015, a new set of amendments to the Federal Rules of Civil Procedure took effect.[12] While virtually all of the amendments received at least some scholarly attention both before and after their effective date, the majority of the commentary and concern seemed to center upon the "proportionality" amendments to Rule 26(b)(1). The proportionality amendments changed existing discovery rules in two important ways. First, they removed long-standing language that had authorized discovery of material "reasonably calculated to lead to the discovery of admissible evidence," replacing that phrase instead with the simple statement that material "need not be admissible in evidence to be discoverable."[13] More important, the new Rule 26(b)(1) explicitly established "proportionality" as a criterion for discoverability, defining discoverable material as "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[14]

Those advocating a rejection of the proportionality amendments and a return to more liberal discovery standards on "social value of litigation" grounds make three basic arguments in favor of their position. They begin by purporting to locate a "social value" purpose in

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Burbank and Farhang wrote this short piece required that they frame their arguments in terms of the undesirability of emulating federal practice at the state level, the overall tenor of the piece suggests they think federal "retrenchment" since the 1970s has been a very bad idea.

10. Discovery serves several vital social functions. It reveals not only what a specific case lacks but also what the substantive law might lack in order to enforce a social policy. *See id*. at 15 (recounting one commentator's view that unlawful conduct risks exposure by hundreds of thousands of lawyers); *id*. at 16 (noting that discovery serves a social insurance role in American society, deterring behavior that might otherwise be addressed by an administrative or regulatory body).

11. *See id*. at 15 ("[I]t is disconcerting to see how little attention the Advisory Committee gave to the social benefits of litigation and discovery.").

12. *See, e.g.*, *Summary of December 2015 Amendments to the Federal Rules of Civil Procedure*, ORRICK (Dec. 7, 2015), https://www.orrick.com/Insights/2015/12/Summary-of-December-2015-Amendments-to-the-Federal-Rules-of-Civil-Procedure [https://perma.cc/TD55-28V2] (summarizing the 2015 amendments).

13. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

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

the history of the Federal Rules of Civil Procedure and more generally in early twentieth-century law reform movements.[15] They bolster this argument with empirically supported normative claims that the rise of express private rights of action in federal statutes supports their position.[16] Finally, undergirding both of these arguments is their implicit contention that recent changes from the status quo ante in discovery rules have occasioned a *decrease* in net social welfare.[17] In other words, they implicitly argue that recent claimed retrenchment in civil discovery standards—most notably changes to Federal Rule of Civil Procedure 26(b)(1) establishing that only materials "proportional to the needs of the case" are discoverable—necessarily has made things worse.

But critics of this purported recent retrenchment in federal civil discovery have not quite connected all the dots. First, the implications of history—both of the Federal Rules of Civil Procedure and of the surrounding early to mid-twentieth-century reform ethos—are more ambiguous than they suggest. Similarly, their claims regarding the prescriptive import of recent empirical findings are also subject to debate.

Moreover, the fact that certain types of civil litigation can advance collective social goals does not necessarily imply that more such litigation is always better than less. As with so many things, the dose is the poison. Litigation is costly—*socially* costly—and we must account for those costs when assessing the social value of litigation. In the same vein, the fact that discovery can bring to light relevant,

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15. *See* Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 5 ("The 1938 Federal Rules were litigation-friendly. In this they reflected the jurisprudential and social commitments of the individuals who were responsible for drafting them."); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 739–40 (1998) [hereinafter Subrin, *Fishing Expeditions*] (recounting various movements' efforts to broaden procedure so that substantive law, justice, and equity did not suffer); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981) [hereinafter Subrin, *The New Era*] ("The federal rules ultimately were passed as New Deal legislation. Advocates . . . wanted procedure to be less technical and more flexible in order to meet newly recognized social needs."); Subrin*, The New Era, supra*, at 1648 (noting that the 2015 amendments "represent[ ] a substantial departure from assumptions that were central when the Federal Rules of Civil Procedure were enacted in 1938").

16. *See* Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 16 ("[R]esearch by political scientists has demonstrated that the substantial increase in federal litigation in the late 1960s and 1970s is closely correlated with purposeful decisions by Congress to provide incentives for private enforcement of federal statutes."); *see also* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 15–16.

17. *See* SEAN FARHANG, THE LITIGATION STATE 18 (2010) ("[P]rivate enforcement litigation . . . correspond[s] to the growing empowerment of private litigants, lawyers, and courts in the implementation of American policy."); Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 14–20 (discussing why recent amendments to the Federal Rules of Civil Procedure are "cause for concern").

socially valuable information that otherwise would have remained hidden does not mean that more discovery is always better than less, either in a given case or across categories of cases.

In reality, the social benefits of discovery are extraordinarily difficult to measure in ways that would allow rulemakers and courts to identify the optimal level of discovery. We compound these difficulties still further when we introduce the complications engendered by a world characterized by resource scarcity and potentially competing values. Nothing in life is free, and the "divide-and-conquer" approach adopted by proponents of "social value" theories of discovery obscure the real calculus by presenting the problem in a vacuum.[18] Finally, whatever the advantages of a system in which private litigation is used to accomplish broader social goals, there is what economists would call a significant "principal-agent" problem.[19] We have set up a system in which we ask and expect private plaintiffs to advance broader social ends through litigation, but those plaintiffs will necessarily act in their own perceived *self*-interest throughout the relevant proceedings. There is little reason to believe that any given private plaintiff's preferred approach to discovery will line up with society's interests, except by accident.[20]

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18. To be fair, "divide and conquer" is hardly unique to proponents of more liberal procedural regimes. *See, e.g.*, SEC v. Cohmad Sec. Corp., No. 09 Civ. 5680 (LLS), 2010 WL 363844 (S.D.N.Y. Aug. 31, 2010). In that case, Reagan-appointed District Judge Louis L. Stanton used the "divide-and-conquer" technique to dismiss a lawsuit brought against a Bernie Madoff–affiliated broker by victims of the Madoff fraud. Rather than viewing four separate factual allegations holistically to determine whether the defendant's alleged complicity was plausible, Judge Stanton instead analyzed each allegation independently. *Id.* at *3–6. Finding that none of the allegations created a plausible inference that the defendant knew of Madoff's fraud, the court then stated in conclusory fashion that even considered together, the allegations did not satisfy the requisite pleading standard. *Id.* at *6. Also, Burbank and Farhang offer a partial critique of transsubstantive procedure that one might charitably interpret as an attempt to consider procedural rules holistically. *See* Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 17–19 (writing that transsubstantive procedures generate greater transaction costs and disadvantage litigants with fewer resources). I agree with their general critique of transsubstantive procedure. *See* Stancil, *supra* note 3, at 1674 ("[U]nanticipated changes in the distribution of cost asymmetries in the civil litigation environment since 1938 severely undermined the strongest argument in favor of formally equal trans-substantive procedure."). But it is insufficient simply to characterize the current Federal Rules of Civil Procedure as "Federal Rules of Complex Litigation."

19. *See* Joseph E. Stiglitz, *Principal and Agent*, *in* THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 966–71 (John Eatwell, Murray Milgate & Peter Newman eds., 1987) (explaining that the principal-agent problem arises when one person's actions have an effect on another person, and an agent is expected to maximize his own utility).

20. *See* Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 483 (1994) ("Drawing on Steven Shavell's analysis of the divergence between social and private incentives to sue, I argue that there is no necessary correlation between discovery's value to the parties and its value to society."). For a discussion of the incentives of private attorneys contracted by the government, see also Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 520 (2016) ("[P]rivate attorneys may be more likely than salaried government employees to focus on maximizing financial penalties, or on winning cases at all costs . . . . The consequence is that

Accordingly, while I applaud these commentators for highlighting the importance of private lawsuit discovery as a tool for social change, they have not yet made a persuasive case that the broader social goals of private civil litigation independently justify any particular approach to the standards governing civil discovery.

In Part I of the Article, I explore the extent to which it is possible to identify the social goals of private litigation and to measure the impact of various approaches to civil litigation against those goals. While few would challenge the assertion that legislatures intend for private litigation to have positive effects upon society, it is difficult to identify legislatures' intended targets with specificity. It is equally difficult to quantify the actual net social effects of private litigation relative to those targets in isolation, and it is virtually impossible to determine optimal outcomes in a world characterized by competing priorities, limited resources, and potentially incompatible underlying values. As a result, commentators and reformers may tend inexorably to rely upon their own prior and potentially biased perceptions in lieu of complete and accurate empirical information. Those of a more conservative mindset[21] likely favor civil defendants, while liberal commentators probably will reflexively prefer rules that favor civil plaintiffs. Unless and until we find a reliable way to obtain meaningful data (or at least to correct for these likely biases), it is at best disingenuous to base calls for procedural reform upon arguments dependent upon highly subjective perceptions of the underlying state of the world.

In Part II of the Article, I briefly consider historical claims that the ethos of 1920s and 1930s federal law reform supports a liberal, Progressivism-influenced understanding of congressional intent in its passage of the Rules Enabling Act and its approval of the initial version of the Federal Rules of Civil Procedure. The actual historical evidence on this score seems to be mixed. Moreover, nothing in the historical record suggests that the architects of the Federal Rules[22] were "liberal discovery absolutists." Rather, to the extent some did embrace a liberal, "more discovery is better than less" ethos, theirs was necessarily a context-dependent preference.[23] That context has changed in significant

government litigation may be *changed*, not just cheaper, when private attorneys are involved." (emphasis added)).

21. This includes many federal district judges appointed by both Democratic and Republican presidents. *See generally* Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140 (2010) (exploring various demographic trends in federal courts and their consequences).

22. Or the Norris-LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70. *See infra* note 92–97 and accompanying text.

23. *Contra* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 67–70.

ways in the eight-plus decades since the Rules went into effect, and Rules architects' attitudes toward discovery might well have changed with it, were they still around to articulate those attitudes.[24]

Part III analyzes the prescriptive implications of recent empirical research suggesting that Congress enacts more statutes incorporating express private rights of action ("EPRAs") during times of divided government. The scholars conducting this research seem to suggest that their findings call for a more liberal approach to civil discovery. As I understand their argument, they first infer that the uptick in EPRAs during times of divided government evidences a legislative preference for more private litigation to help accomplish the legislation's social goals. They next apparently contend that recent tightening of the discovery rules somehow frustrates this preference. They thus seem implicitly to be suggesting one or both of two things. First, they may be arguing that legislatures fully understand the underlying social outcome implications of private civil litigation when they enact statutes incorporating EPRAs given the then-existing procedural framework. If that is true, any change to the underlying procedural rules might necessarily represent an undesirable change to the associated social outcome.[25] Second, these commentators may also be arguing that they themselves have the ability to baseline, identify, and quantify social results in the real world, and that they can determine whether changes to the discovery regime are consistent or inconsistent with the social aims of the legislature.[26] Unless at least one

24. Professor Stephen Subrin cites a 1928 article by Rules architect and Professor Charles Clark in support of the general proposition, arguing that Clark wanted the Federal Rules of Civil Procedure to be "less technical and more flexible in order to meet newly recognized social needs and to permit the expanded the role of the federal government." *See* Subrin, *The New Era*, *supra* note 15, at 1651. To be sure, Clark did write that "[o]ne of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants." *Id.*; Charles E. Clark, *Fact Research in Law Administration*, 2 CONN. B.J. 211, 211 (1928). Somewhat ironically, however, Subrin's citation is the opening sentence in a Clark article extolling the virtues of the then-novel concept that data-driven empirical research should drive procedural reforms. Even more ironically, one of Clark's primary findings in that article is that the Connecticut state courts were using pre-suit attachment of defendants' property "excessively." *See* Clark, *supra*, at 212–13, 227–30 (organizing the use of attachment by Connecticut state courts by table and stating that attachment seems "grossly excessive" in a large number of cases). It seems a bit odd to attribute a perpetual preference for liberal discovery to a Rules architect like Clark when the very source relied upon for the claim (1) argues forcefully that procedural reforms should be based when possible on empirical research, and (2) finds that certain courts are excessively proplaintiff in their use of attachment to encumber defendants' property before determining whether liability exists.

25. This argument is implicitly dependent upon an assumption of legislative purposivist omniscience—that Congress has and exercises the ability to foresee perfectly the private litigation consequences of every private right of action it creates.

26. For example, Sean Farhang and Stephen Burbank argue that tightening of the civil discovery rules will result in fewer successful suits for plaintiffs and will thus inevitably

of these potential assertions is correct, it is difficult to see how the careful and impressive empirical work they have performed necessarily carries with it any particular prescriptive implications.

Unfortunately, neither assertion is likely to be true. Indeed, there is little reason to believe that Congress can predict the ways in which a particular EPRA will interact with procedural rules to yield social results, and even if Congress possessed the requisite level of omniscience at the time of enactment, it does not follow that Congress would prefer single static responses to what are inherently dynamic problems. There is equally little reason to believe that, on the current state of the literature at least, commentators have any special insight into the identification of ideal social results, the measurement of those social results, or their consistency with legislative intent longitudinally over time.

In Part IV, I complete my analysis by exploring a dynamic curiously absent from progressive commentators' "social benefits of discovery" calculus: the social *costs* of discovery. Discovery is expensive; in many civil cases, discovery costs represent between thirty and fifty percent of the total pecuniary costs of litigation.[27] Moreover, those responding to discovery are not always in the wrong.[28] The social benefits associated with taking discovery from an innocent and unwilling litigant are speculative at best.[29]

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necessitate a corresponding increase in *public* enforcement to offset the decrease in *private* enforcement. *See* Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 17 ("[W]e live in a society where the same influences that prompt reliance on private enforcement of public law render it difficult to make up for capacity that is lost in that realm . . . . In the case of the long campaign for discovery retrenchment, success may lead to *no enforcement* . . . ."). This may be true. Or it may not. They are correct only insofar as their obvious belief that conservative discovery reform necessarily implies suboptimal social results from a decrease in private enforcement. That may be the case, but they have not carried their burden on the state of the current record.

27. This is a conservative estimate. *See, e.g.*, Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, COURT STATISTICS PROJECT: CASELOAD HIGHLIGHTS 20 (Jan. 2013), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx [https://perma.cc/6WJF-538T]. The median data Hannaford-Agor and Waters report indicate that a minimum of nineteen percent (premises liability) of lawyer or paralegal time and a maximum of twenty-five percent of lawyer and paralegal time (malpractice) is spent on discovery. *Id.* at 6. Importantly, these percentages are for the vanishingly small proportion of cases that actually go to trial. For cases that do not go to trial, median discovery-related lawyer and paralegal time rise to a minimum of thirty-two percent (premises liability) and a maximum of almost forty-six percent (automotive tort). And these figures reflect only the attorney and paralegal time; they do not include vendor fees or other costs.

28. This seems obvious, but apparently bears repeating.

29. There may be some social value associated with the deterrence implied by the *threat* of discovery as well; this value might be largely independent of the liability determination in any given case. However, as I discuss in Part IV, there are ways in which liberal discovery may also act to overdeter, leading to its own set of socially wasteful expenditures or socially inefficient activities. *See infra* Part IV.

To the extent that private litigants with potentially mismatched litigation incentives use discovery to impose costs upon parties without regard for the merits of their claims or defenses, these costs constitute a significant potential problem.[30] And the pecuniary costs of discovery in litigated cases are not the only relevant costs. There are other direct costs of discovery, and there are second-order costs as well.[31] In order to determine whether we have too much or too little discovery, we have to consider the costs, and we must consider *all* costs. We cannot focus only upon the social *benefits* of discovery. It may be that retrenchment in discovery is bad for society, but that is only true if the social benefits of a more liberal discovery regime outweigh the costs.

Part V concludes by offering some preliminary thoughts on the future of discovery as a tool for social change. Given the difficulties associated with measuring costs and benefits and the logical incoherence of existing arguments in favor of liberal discovery, it may not be possible to reach any firm conclusions about how to proceed. At the same time, however, it is critical that we continue, or in some cases begin, the difficult empirical and theoretical work necessary to get a handle on the problem. This work must avoid the pitfalls to which earlier efforts have fallen prey and must account explicitly for the weaknesses inherent in using private litigation for public benefit as well as the strengths.

I. IDENTIFYING THE SOCIAL GOALS OF LITIGATION AND MEASURING THE RESULTS

A. Legislators Use EPRAs to Help Accomplish Social Goals

EPRAs are one of several enforcement mechanisms Congress and other U.S. legislative bodies employ to accomplish the social outcomes targeted by legislation. Properly cabined, EPRAs can be a critical component of the enforcement mix, allowing legislators to reduce or even largely eliminate the resources devoted to public

30. The same potential problem exists to some extent in the context of public litigation and enforcement activity, but as a theoretical matter at least, there is less reason for systemic concern. Public litigants face a number of practical constraints (e.g., political, electoral, etc.) that should reduce the temptation to abuse the system in most cases.

31. FARHANG, *supra* note 17, at 71–72:

> Moreover, though increasing rates of litigation will cause some increase in the costs of maintaining the federal judiciary, these costs are not easily traceable by voters to legislators' support for a piece of regulatory legislation with a private enforcement regime. Thus, with private enforcement regimes Congress can hope to achieve its aims on the cheap, and to minimize blame for what implementation costs are borne by the government.

enforcement. Under the correct circumstances, private litigants pursuing statutory claims undoubtedly can advance the social reform goals inherent in the statutory enactments containing an EPRA.

It is thus hardly surprising that Congress has enacted numerous EPRAs since its first serious experiment with the device in the Civil Rights Act of 1871,[32] enacted shortly after ratification of the Civil War Amendments. The list of statutory federal EPRAs is long and includes but is not limited to express private rights of action to enforce antitrust policy,[33] securities fraud policy,[34] environmental policy,[35] and prohibitions against racial discrimination and other forms of discriminatory behavior.[36]

In each of these areas of law, Congress has also established some level of public enforcement. The Federal Trade Commission[37] and the Department of Justice ("DOJ") Antitrust Division[38] enforce the antitrust laws, and the DOJ Securities and Financial Fraud Unit[39] and the Securities Exchange Commission[40] enforce securities laws. Similarly, the Environmental Protection Agency has the authority to enforce environmental laws,[41] and the Equal Employment Opportunity Commission ("EEOC")[42] and the Civil Rights Division of the DOJ[43] can enforce laws prohibiting racial, religious, or gender discrimination, among other things.

But relatively few federal resources are devoted to public enforcement of some of these federal laws. Federal enforcement budgets are generally tight, and the budgets associated with EPRA-containing statutes are often even tighter.[44] For example, as experienced

32. *See* 42 U.S.C. § 1983 (2012) (creating a private right of action for violations of federal constitutional and statutory rights).

33. Clayton Act, Pub. L. No. 63-212, § 4, 38 Stat. 730, 731 (1914).

34. 17 C.F.R. § 240.10b-5 (2018).

35. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, §§ 112(a), 113(a), 94 Stat. 2767, 2792, 2795.

36. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 2, 78 Stat. 241, 243–46.

37. 15 U.S.C. § 45(a)(2) (2012).

38. Organization of the Department of Justice, 28 C.F.R. § 0.40 (2018).

39. *Securities and Financial Fraud Unit*, U.S. DEP'T JUST., https://www.justice.gov/criminal-fraud/securities-and-financial-fraud-unit (last visited Sept. 26, 2018) [https://perma.cc/TJ65-9L6N].

40. Securities Exchange Act of 1934, 15 U.S.C. § 78d (2012).

41. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251 (2012); Clean Air Act, 42 U.S.C. § 7402 (2012).

42. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 (2012); Rehabilitation Act of 1973, 29 U.S.C. § 701 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. § 12117 (2012); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

43. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101, 104, 71 Stat. 634, 634, 635.

44. I will leave for another time any discussion of the potential "chicken-and-egg" problem here. That said, I acknowledge that, to the extent public enforcement budgets are proportionally

employment discrimination lawyers know all too well, the EEOC's right-to-sue letter[45] is the rule rather than the exception. Notwithstanding the occasional complainant's mistaken conclusion that such letters reflect government endorsement of their claims, the right-to-sue letter is in reality an indication that the government will not pursue public enforcement in connection with a plaintiff's allegations of discrimination.

I thus readily acknowledge at the outset that private enforcement can and should play an important role in the effectuation of the social policies undergirding statutes containing EPRAs. This in turn implies that discovery in private statutory litigation can play an important role in furthering social policy by bringing potentially illegal conduct to light. Moreover, because potential defendants often will naturally seek to hide or obscure their illegal actions, one can make the case that discovery is a particularly important component of the procedural toolkit available to the private parties upon whom Congress is relying for at least some of the enforcement activity necessary to accomplish congressional ends. But none of this means that any particular approach to discovery—liberal or conservative—represents the *optimal* approach. Nor does it suggest that changes to the status quo have any particular normative valence.

B. Measurement Is Hard

Congress does not enact statutes in a vacuum. Rather, Congress acts against a backdrop of constrained resources and potentially competing values. As a result, it is virtually always a mistake to claim that Congress intends any extreme or absolute result in connection with its legislation, no matter how strong or high-minded the rhetoric surrounding enactment of a statute.

Commentators have filled countless volumes debating the difficulties associated with ascertaining the legislative intent behind statutes and proposing their own solutions to the problem.[46] Textualists

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lower in connection with statutes containing an EPRA, it is at least plausible that Congress feels it can reduce such budgets because private litigation will pick up the slack. But as I discuss below, that general belief tells us very little about the optimality of any given level of private or public enforcement.

45. *See, e.g.*, Notice of Right to Sue: Procedure and Authority, 29 C.F.R. § 1601.28 (2018) (authorizing discrimination claimants to request notice of right to sue from Equal Employment Opportunity Commission).

46. *See, e.g.*, LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES (2006); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737 (1984); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Lawrence B. Solum, *Legal Theory Lexicon 078:*

contend with purposivists at every turn, and their debates are among the most contentious in the legal academy. But traditional statutory interpretation debates focus almost exclusively upon statutory semantics and generally ask whether a given pattern of behavior falls within the semantic purview of a statute.[47] While this can be a maddening exercise, traditional statutory interpretation is a relative walk in the park compared to attempts to divine congressional intent regarding appropriate enforcement levels or social results. On the margins, it may be difficult to figure out whether Congress intended to prohibit a given behavior in a particular statute, but it is generally far *more* difficult to ascertain the specific net social results Congress intended to achieve when it enacted a law. This is because even Congress's aspirational social goals will eventually come into conflict with other important values or with the realities of a resource-constrained world.

Finally, it can be more difficult still to determine to what extent Congress's aspirations comport with empirical reality. How, precisely, does one ascertain how much racial discrimination, anticompetitive business activity, or securities fraud is taking place?

1. The Resource-Constraint Problem

This much we do know: when Congress enacted the Sherman Act, it did not intend to end all anticompetitive business behavior.[48] Similarly, when Congress passed the Civil Rights Act of 1964, it did not intend to eliminate all racial discrimination in employment. However attractive it might be to conclude otherwise, it is simply nonsensical to attribute any particular aspirations to Congress—even clearly noble aspirations—without accounting for the resources Congress devotes to the enforcement of its legislative enactments.

Racial discrimination in employment became illegal after the passage of Title VII in 1964,[49] and it is certainly possible that some who discriminated before its effective date stopped doing so after it became law simply because it had become law.[50] But to a very real degree, the

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Theories of Statutory Interpretation and Construction, LEGAL THEORY LEXICON (May 21, 2017), http://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html [https://perma.cc/8HH8-KSE6].

47. *See* Manning, *supra* note 46, at 71 ("[Federal courts] must ascertain and enforce Congress's commands as accurately as possible.").

48. At least not in the sense of putting sufficient congressional money in the same location as the congressional mouth.

49. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. 7, 78 Stat. 241, 253–66.

50. On religious grounds, for example. *See, e.g.*, 1 *Peter* 2:13–14 (New Standard American Bible) ("Submit yourselves for the Lord's sake to every human institution, whether to a king as

functional "Title VII law" is not simply its nominal prohibitions of various forms of discrimination. Rather, the functional law is a combination of the statute's proscriptions and the resources devoted to enforcing those proscriptions.[51] Had Congress truly wished to eliminate all racial discrimination in employment, it would have devoted massive additional resources to combating that discrimination. The fact that it did not do so—and has never done so—is a strong suggestion of more modest "legislative intent," at least insofar as intended enforcement levels or intended social results are concerned.

Resource allocation decisions are a function of resource scarcity, at least to some degree. In a world of constrained resources, the legislature faces hard choices. Any dollar Congress devotes to Title VII enforcement is a dollar it cannot direct toward antitrust enforcement, environmental protection, or other socially valuable causes. Thus, as a nominal matter at least, the "social outcome" version of "legislative intent" is inherently dependent upon the resources devoted to enforcement of statutory provisions. And those resources will always be limited.

But if resource constraint were the only challenge to identifying "social outcome legislative intent," one might respond that *private* enforcement allows Congress to have its cake and eat it too.[52] After all, in the proverbial vacuum, infinite private enforcement can accomplish absolute or extreme congressional goals without requiring direct public expenditures. For example, in the absence of private enforcement, functional Title VII policy is limited to the finite level of public enforcement activity funded by Congress. But if one assumes infinite private Title VII enforcement, Congress might be said to intend an absolute result—elimination of all discrimination in employment.[53]

There are at least two significant weaknesses in such an argument, however. The first, addressed below, is that it fails to engage with the "competing-values problem." That is, infinite private enforcement would necessarily engender conflict with other values of importance to Congress.

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the one in authority, or to governors as sent by him for the punishment of evildoers and the praise of those who do right."). Islam embodies a similar obligation. *See* Muhammad ibn Adam, *Obeying the Law of the Land in the West*, DARULIFTAA, http://www.daruliftaa.com/node/5852 (last visited Aug. 26, 2018) [https://perma.cc/3DK6-MEBS] (quoting the Prophet Muhammad as saying, "It is necessary upon a Muslim to listen to and obey the ruler, as long as one is not ordered to carry out a sin.").

51. *See* Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69 (2010).

52. FARHANG, *supra* note 17.

53. Leaving aside both jurisdictional issues and detection problems.

The second problem is that even ostensible *private* enforcement necessarily involves very public first-order and second-order costs. For example, infinite levels of private enforcement will necessarily involve consumption of court resources. Moreover, even though private enforcement is less costly *to the government* than public enforcement, the costs associated with private enforcement still ultimately fall upon society as a whole.[54] The social costs of private litigation may not appear as a line item on a government budget, but they nonetheless still exist in the form of suboptimal allocations of social resources. Dollars spent defending *or prosecuting* a private suit are dollars that cannot be spent on more productive activities. Those expenditures may still provide a *net* benefit to society as a whole, of course, but they are still social costs. I further elaborate this concern in Part IV.

2. The Competing-Values Problem

"Social outcome legislative intent" is also in part a function of the interaction of competing societal values. Even laudable goals like the reduction or elimination of racial or other forms of discrimination give way at some point to other supervening principles. Imagine a world in which the government addresses employment discrimination by installing a federal "discrimination monitor" in every business subject to the prohibitions embodied in Title VII. This monitor would be a federal employee and would be responsible for monitoring all personnel matters to ensure that employers are making personnel decisions without any improper discriminatory animus. It is possible—perhaps even likely—that a "discrimination monitor" regime would further reduce illegal workplace discrimination.[55]

But at what cost? Assume away for the moment the overwhelming dollar costs associated with hiring a monitor for each of the millions of private businesses in the United States.[56] It seems likely

54. I leave for another time yet another disturbing possibility: at some point, certain statutory goals might actually be directly frustrated by excessive private enforcement. While not all legislative subject matter raises this concern, it is certainly possible in some contexts that overenforcement would lead directly to more rather than less statutorily prohibited conduct.

55. Admittedly, we do something similar in specific cases, but only *after* a finding of liability, and then usually only in "structural reform" environments like school desegregation, prison conditions reform, etc. More recently, Senator (and former law professor) Elizabeth Warren has proposed something similar in her Accountable Capitalism Act, S. 3348, 115th Cong. (2018). This proposed legislation would create the "Office of United States Corporations" within the Department of Commerce, applicable to all U.S. corporations with more than $1 billion in annual revenue. *Id.* § 3. The regime Senator Warren apparently envisions might more accurately be described as "Big Brother Comes to Big Business."

56. *See Number of Private Sector Firms, By Size*, HENRY J. KAISER FAM. FOUND., http://www.kff.org/other/state-indicator/number-of-firms-by-size/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Aug. 26,

that most commentators would also balk at the imposition of such a regime because it would be too disruptive to the free enterprise system and would impinge upon private citizens' liberty interests excessively. If near-perfect enforcement can only be realized by creating a virtual police state, it is likely inaccurate to assume that Congress intended near-perfect enforcement as the standard.[57]

Private enforcement will not solve this problem either. As in the resource-constraint context, private enforcement mitigates at least some of the "competing-values" problem by reducing direct government involvement in private affairs. But private litigation is not truly private—it is effective only because the power of the state stands behind parties ostensibly litigating their cases independently. Private enforcement thus inherently raises the prospect of government interference in private matters. Worse, the dynamics of U.S. litigation are such that private litigants can unleash the machinery of the state upon their foes without any guarantees that they are acting in anything other than naked self-interest.

Moreover, private litigation raises its own independent competing-values concerns. As discussed below, private litigation both creates benefits for and imposes costs on society. If we were to allow private litigants to run amok, there is a very real chance that their self-interested actions would come at too high a price to society as a whole. The elimination of the evils condemned in statutory regimes is important. But so too are things like economic productivity. It is certainly *possible* that a particularly liberal private litigation environment will yield net benefits for society, but it is by no means certain.

C. Measurement in the Messy Middle—What Level of Enforcement Does the Legislature Intend?

Because legislatures cannot possibly intend perfect enforcement of their statutory enactments, those proposing adherence to a particular

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2018) [https://perma.cc/V4SM-FBNM] (reporting that, as of 2016, there were almost 1.8 million firms in the United States with fifty employees or more). Title VII applies to employers with fifteen or more employees. 42 U.S.C. § 2000e(b) (2012). There are thus almost certainly more than 2 million U.S. employers falling within the jurisdictional reach of Title VII. If we also assume federal salary and benefits costs of $100,000 per monitor (a conservative assumption), we are assuming away $200 billion in annual costs associated with a discrimination monitor regime. This is about one percent of U.S. gross domestic product—a fairly substantial sum.

57. To be clear, the competing-values problem exists regardless of whether one agrees with the specific example I have chosen. The broader point is that law enforcement does not take place in a vacuum. Rather, it takes place against a backdrop of limited resources and competing values. One who believes that increased enforcement is worth the harm to other values in one context may not share that belief in a different context.

enforcement approach bear the burden of demonstrating that their preferences are consistent with whatever intermediate level of enforcement the legislature can be said to prefer. This is a daunting task.

Determining just how much enforcement Congress wants is difficult for myriad reasons, especially when compared to the (relatively) simple task of determining which conduct Congress intended for a given statute to cover. In the traditional statutory interpretation context, both textualist and purposivist approaches often provide relatively straightforward answers. A stereotypical textualist does not concern herself overmuch with getting into the mind(s) of the enacting legislature—her commitment to the purportedly supervening value of forcing Congress to speak its mind clearly allows her to dodge most of the trickier analogical problems she might otherwise confront.[58]

To be sure, the stereotypical purposivist often faces a somewhat more difficult task. She must engage with objective evidence of subjective preferences, teasing from the legislative history and other materials an underlying legislative purpose behind the statute. She must then determine whether that purpose is consistent with the interpretation under consideration.[59] Still, even purposivists can take comfort in the fact that their work relates only to statutory coverage in the abstract. Moreover, while most purposivists likely embrace one form of legal dynamism—specifically, the idea that statutory *coverage* should change to reflect changed circumstances—that sort of dynamism typically is largely unconcerned with the *quantum* of changing social conditions.[60]

By contrast, anyone attempting to identify legislatively intended social *outcomes* faces a far steeper climb. First and perhaps foremost, those of a textualist bent can really only dodge this question on textualist grounds by rejecting private rights of action outright. A textualist who rejects the EPRA as a valid enforcement tool can at least argue with some intellectual coherence that public enforcement levels are appropriate by definition. Without private enforcement, the textualist might argue, actual legislative appropriations and executive branch spending on enforcement presumptively represent the compromise of enforcement intentions between the legislative and

58. *See* JELLUM & HRICIK, *supra* note 46, at 96.

59. *See id.* at 100.

60. There is admittedly at least some relationship between the quantum of changing social conditions and purposivist interpretation. If the purposivists interpreting a statute perceive an ongoing or imminent social crisis, they are probably more likely to extract coverage and thus enforcement authority from the most convenient statute at hand. Still, in such a case, the basic exercise is to determine *coverage*, not enforcement levels.

executive branches. But once we accept the viability of the EPRA, this argument is no longer available. With EPRAs, some component of overall enforcement activity will necessarily be independent of government enforcement expenditures. Thus, a textualist who accepts that the EPRA is a potentially valid enforcement tool cannot use the textualist toolkit to identify appropriate enforcement levels, even if she can use that toolkit to delineate statutory coverage.

Purposivists fare little better when playing the "identify the legislatively intended social outcome" game, if for somewhat different reasons. First, whatever the value of legislative history for determining whether Congress intended that a given law cover specific conduct, it is of little to no use in identifying how much enforcement Congress expected or the precise social result Congress intended to produce. Legislative history has a number of well-understood weaknesses when used for its traditional purpose.[61] Those weaknesses are magnified tenfold when trying to divine the precise contours of the "enforcement-compromise" inherent in every statute.

Far more important, purposivist analysis becomes much more difficult when one incorporates enforcement-level dynamism into the equation. While purposivism allows its proponents to make reasonable arguments for analogical extension of statutory coverage to new situations,[62] it lacks the tools necessary to adapt current enforcement levels to current enforcement needs in real time. If we do not know congressional intent with respect to net social results (we do not), and we cannot accurately assess current enforcement levels (we cannot), it becomes something of a fools' errand to ask whether some form of real-time legislative purpose requires a tweak in one direction or the other.

Notwithstanding consistent drum beating by the myopic and self-interested,[63] we should generally expect (or at least hope) that the magnitude of underlying social problems addressed by legislation will decrease over time. And even if the magnitude of social ills does not reliably *decrease* in the decades following a statutory enactment, it does reliably *change* over time.

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61. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 369–90 (2012) (tracing the use of legislative history throughout U.S. history and detailing its worthlessness as an aid in statutory construction).

62. JELLUM & HRICIK, *supra* note 46, at 100.

63. As I am using the terms, "myopic" refers to those for whom the nominal statutory goal fills the entire field of vision. "Self-interested" encompasses those whose continued political relevance and accumulation or retention of political power depends upon perpetuation of the social dynamics the legislation was intended to address. The myopic participant is incapable of placing legislative enforcement into broader perspective (for one or more of several different reasons). The self-interested participant must refuse to do so because acknowledging improvement would diminish her political standing.

Thus, the purposivist's reflexive resort to the intentions of the enacting legislature is not in good faith unless she incorporates not only the enacting legislature's difficult-to-identify enforcement intentions, but also the specific social environment to which Congress intended time-of-enactment enforcement to respond. It may well be the case that the 88th Congress intended a relatively high level of enforcement (both public and private) when it enacted the Civil Rights Act of 1964.[64] But the 88th Congress's desired level of enforcement at the time of enactment came in response to that same Congress's perceptions of pervasive racial discrimination and other social ills to which the legislation was addressed.

This ultimately leads to a somewhat ironic conclusion: if we take congressional intent seriously as a benchmark, we may have to abandon congressional intent arguments in connection with debates about appropriate enforcement levels. Whatever we may be able to discern regarding legislative intent in the context of traditional statutory interpretation, it turns out to be far more difficult to identify Congress's desired *outcomes* in a world of competing values and resource constraint. And it is virtually impossible to do so when underlying social conditions change over time.[65]

D. What About "Optimal" Levels of Enforcement Instead?

Proponents of changing discovery rules to better accomplish the purported social goals of legislation may have another arrow in their quiver: even if we cannot justify a particular change by reference to the enacting legislature's intended enforcement level or net social result, we may still be able to justify it by reference to some extrinsically derived notion of "optimality." A commentator taking this approach might attempt to justify some change to enforcement levels—perhaps by changing some component of prevailing discovery rules or another component of the procedural regime—by claiming that this change would be "better" relative to the baseline enforcement level occasioned by the status quo.

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64. Even this would be extremely difficult to measure accurately, except by reference to adjustments made over time in subsequent legislation.

65. For those who might balk at the dynamic enforcement argument in the context of a law like Title VII, consider instead statutes prohibiting polygamy. It may well be worthwhile to keep such laws on the books, given the ways in which polygamous arrangements can constitute abuse in certain circumstances. But it also seems likely that contemporary legislative attitudes toward enforcement of such laws have shifted somewhat over time. It is simply nonsensical to attempt to tie current enforcement levels to the intent of the enacting legislature when that legislature was responding to a radically different environment. But as I discuss below, this is what some proponents of liberalizing discovery on "social value of litigation" grounds are ultimately doing.

But to be successful, such arguments must present a meaningful baseline against which we can measure the relevant changes. Unfortunately, such baselines are in damnably short supply. Consider the primary context of this Article—arguments that discovery "retrenchment" associated with the December 2015 amendments to the Federal Rules of Civil Procedure and earlier reforms is bad because it reduces the social benefits of private litigation.[66] This might well be true. Then again, it might not. The answer depends on two things. First, how does one define "optimal" outcomes in the context of the social benefits of private litigation? Second, where was the status quo ante relative to both that elusive definition of "optimality" and the changes occasioned by the alleged retrenchment?

I readily concede that proponents of a return to more liberal discovery rules are correct[67] if either one of two propositions is true. We should return to more liberal discovery rules if (1) the status quo before the December 2015 amendments was optimal or (2) the status quo before those amendments was suboptimally *hostile* to the general class of private litigation expected to yield social benefits. However, a return to more liberal discovery rules is the wrong move if the pre–December 2015 status quo was suboptimally *friendly* to that same category of cases. In that case, a return to more liberal discovery rules would make things worse, not better.

Unfortunately, there is no easy way to assess optimality, even in the abstract. It becomes even more difficult when we attempt to identify an "optimal" outcome in light of the complexities inherent in any real-world system characterized by tradeoffs among competing values and competition for scarce public and private resources.

Consider briefly the idea of optimality in the abstract. Just as it is inappropriate to presume that Congress ever intends to achieve perfect enforcement of its statutes (or alternatively, to achieve complete social compliance with the principles those statutes represent), it is ridiculous to speak of "optimal enforcement" in the abstract. Viewed in a vacuum, optimal enforcement of a given law may simply refer to unattainable, unintended (and thus unhelpful) *perfect* enforcement. But we cannot view optimality in a vacuum. Resources used to accomplish Legislative Goal A are unavailable to accomplish Legislative Goal B. Enforcement efforts in one arena—whether public or private—will

66. BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7.

67. Correct, at least, with respect to the proper *direction* of any subsequent changes to the discovery rules. Whether any specific proposed change (e.g., a return to the pre–December 2015 rules regarding proportionality) is appropriate is yet another extraordinarily difficult empirical question.

inevitably have spillover effects in others, and some of those spillovers will be socially costly.

Things do not get much easier when we attempt to define optimal social outcomes in the real world. The tradeoffs inherent in any real-world attempt to improve society make it insurmountably difficult to locate optimality in the first place, and they make it equally challenging to defend one's definition against attacks from others with differing normative priorities.

E. Measuring Results *Is Equally Impossible*

Even if we could somehow identify the legislatively intended enforcement level and social result or the socially "optimal" level of enforcement, there is another likely insurmountable problem: measuring actual social results against these hypothetical baselines. Notwithstanding heartfelt *beliefs* of commentators and stakeholders at different points along the ideological spectrum, reliable *evidence* of the relevant social context is remarkably difficult to come by. When it comes to many of the sorts of violations for which Congress has created a civil private right of action, we simply do not know how much illegal conduct is occurring.

Compare the dynamics of one of the earliest EPRAs—Section 1983 actions against those violating constitutional or federal statutory rights "under color of state law"—with those surrounding antitrust, securities fraud, or racial discrimination claims. In the Section 1983 context, it is at least theoretically possible to measure the level of violations over time.[68] A person who has suffered deprivation of her constitutional rights typically knows that she has suffered a legally cognizable harm and may be able to do something about it.[69]

By contrast, potential victims of securities fraud, antitrust violations, and even illegal racial discrimination are far less likely to have direct personal knowledge that they have suffered legally cognizable injuries. Those engaging in such conduct are far more likely to keep their illegal behavior secret and to obscure their wrongdoing in ways that make detection less likely. While the secretive nature of such

68. Of course, "theoretically possible" does not mean easy. Even though the Section 1983 violation is considerably more transparent than other federal statutory causes of action, measuring violation levels will still require far more than simply counting the number of lawsuits. There are a number of significant problems with using litigation rates as proxies for rates of underlying illegal conduct.

69. To the extent individuals do not know their rights and thus do not know they have suffered legally cognizable harms under 42 U.S.C. § 1983 (2012), this actually reinforces my point.

conduct may provide some justification for relaxed pleading standards[70] or in favor of more liberal discovery, it also compounds the baseline problem. In order to justify a return to *Conley v. Gibson* notice pleading or to pre–December 2015 discovery standards under the view that the *Twombly/Iqbal* plausibility pleading or the December 2015 amendments made things worse, we would need to know at least three things. First, we would need to know the optimal social outcomes across *all* statutory regimes implicated (and across any other areas of legitimate public interest affected by enforcement). Second, we would need to know underlying violation rates at all relevant times. Third, we would need to be able to assess the effects of the proposed changes more or less accurately.

We would also need to figure out some way to measure and weigh different effects in different areas of law. While "divide and conquer" is often an attractive military or political strategy, it has little place in the world of transsubstantive procedure. Assuming we could somehow overcome the incredible challenges associated with merely *measuring* the impact of procedural reforms in meaningful ways, we would thus still face an uphill climb. Specifically, unless we were very, very lucky,[71] we would have to determine how to proceed when a particular procedural reform had net positive social effects as to some classes of cases and net negative social effects as to others. I have written elsewhere regarding my skepticism of transsubstantive procedure in the modern litigation environment.[72] But if we remain committed to applying the same procedural rules to different kinds of cases, we must develop a workable theory of social utility that accounts for differential effects as courts apply transsubstantive rules changes to claim types involving radically different underlying economic incentives.[73] Without such a theory, it is difficult if not impossible to

70. *See* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 95 (2009) (identifying and discussing the information asymmetry dynamic).

71. Or unless we allowed ourselves to be persuaded by our own categorical priors. This seems like a bad idea. *See infra* Section I.F. It seems unlikely that anyone who believes categorically that all federal civil plaintiffs or all federal civil defendants are getting an unfair shake by virtue of current procedural rules has much of value to contribute to the conversation.

72. *See* Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1636 (2017) ("This trans-substantive procedural regime, and the formal equality it necessarily creates and lionizes, however, often produces outcomes that cannot be regarded as 'just' under any serious theory of procedural justice.").

73. Though it is beyond the scope of this Article, it is certainly possible to describe the 2015 amendments (and in particular, the proportionality amendments) as an attempt by procedural rulemakers to conduct a partial end run around transsubstantive procedure. By moving the proportionality criteria into the definition of discoverable material, rulemakers invited courts (both implicitly and explicitly) to engage in case-specific and claim-type-specific analyses with respect to the issue of discoverability. *See* FED. R. CIV. P. 26(b)(1) (authorizing, among other things, consideration of "the importance of the issues at stake in the action" and "the amount in

determine the "right" answer when a proposed discovery reform would produce net social benefits in the context of, say, racial discrimination claims, but would yield net social *costs* in the context of securities fraud class actions.

In summary, whatever small ability we may have to discern legislative intent with respect to statutory coverage, it is impossible to identify the precise level of enforcement Congress intends at the time of enactment. Moreover, because conditions change over time, even a perfect understanding of congressional enforcement intentions at the time of enactment[74] is of little or no value years or decades after the fact. It is similarly difficult to identify an "optimal" level of enforcement for any statute. And even if we could do so, it is incredibly difficult to measure real world conditions by reference to that optimum. As if that is not enough, unless one embraces a remarkably simplistic view of the world (e.g., "defendants good, plaintiffs bad," or vice versa), the largely transsubstantive nature of federal civil procedure throws another wrench into the works: a single proposed reform may have very different effects, both with respect to magnitude and direction, in different substantive areas of the law. Given all of this, it is dangerous to claim that a return to the purportedly more liberal discovery standard of November 30, 2015 will necessarily result in improved social welfare, just as it would be dangerous to make the equal but opposite contention.

F. Commentators Substitute Their Own Priors in the Absence of Reliable Information

This suggests one final problem with identifying the social goals of legislation and measuring the results: commentators and long-term stakeholders will almost inevitably fall back on *something* when they cannot obtain the data they need to make reasonable empirical assessments. Unfortunately, those commentators and stakeholders—no matter their location along the relevant ideological spectra—are quite likely to fall victim to cognitive biases, thus allowing their own priors—that is, prior beliefs—to fill in the gaps when reliable information is unavailable.

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controversy" in determining whether discovery is "proportional to the needs of the case"). Taken together, these criteria alone suggest a departure from transsubstantive procedure. The ability to consider the "importance of the issues at stake" implies that courts can think about different categories of cases differently, while the ability to consider the amount in controversy suggests that courts may consider case-specific factors.

74. Something proponents of liberalizing discovery on social value grounds implicitly embrace when they cite empirical research demonstrating an increase in the use of EPRAs in times of divided government in support of their arguments.

Cognitive psychologists have identified myriad cognitive biases that interfere with individuals' ability to consider problems rationally. Psychologists have also demonstrated that our susceptibility to cognitive biases increases when reliable information is in short supply.[75] Many of these biases are thus likely in play in the "discovery reform" scenario, where reliable information is so hard to come by. Among other things, commentators and stakeholders are likely to embrace their priors at least in part because one or more of the following (sometimes-interrelated) biases nudge them in that direction:

- bandwagon effect (the tendency to believe something because many other people believe the same)[76]
- confirmation bias (the tendency to search for or interpret information in a way that confirms one's preconceptions)[77]
- anchoring bias (the tendency to rely too heavily—or "anchor"—on a past reference or on one trait or piece of information while making decisions)[78]
- déformation professionnelle (the tendency to see and understand the world according to the conventions of one's own profession, forgetting any broader point of view)[79]
- ingroup bias (the tendency to favor one's own group)[80]

75. *See* Martie G. Haselton & David M. Buss, *Error Management Theory: A New Perspective on Biases in Cross-Sex Mind Reading*, 78 J. PERSONALITY & SOCIAL PSYCHOL. 81 (2000) (reporting that psychological mechanisms are designed to be predictably biased when the costs of false-positive and false-negative errors were asymmetrical over evolutionary history); Martie G. Haselton & Daniel Nettle, *The Paranoid Optimist: An Integrative Evolutionary Model of Cognitive Biases*, 10 PERSONALITY & SOCIAL PSYCHOL. R. 47 (2006) (discussing the error management theory). Error management theory predicts that cognitive bias prevalence depends upon the evolutionary advantages conferred by such biases under conditions of uncertainty. Broadly speaking, the theory suggests that persistent cognitive biases appear when such biases consistently result in better evolutionary fitness. Put differently, error management theory hypothesizes that humans and human institutions will adopt biases that produce the least costly errors over time.

76. 3 ECONOMICS: THE DEFINITIVE ENCYCLOPEDIA FROM THEORY TO PRACTICE 31 (David A. Dieterle ed., 2017).

77. Hannah L. Cook, *Flagging the Middle Ground of the Right to Be Forgotten: Combatting Old News with Search Engine Flags*, 20 VAND. J. ENT. & TECH. L. 1, 30–31 (2017).

78. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

79. Hilary Davis, *Dèformation Professionnelle*, IN THE LIBRARY WITH THE LEAD PIPE (Mar. 17, 2010), http://www.inthelibrarywiththeleadpipe.org/2010/deformation-professionnelle/ [https://perma.cc/Z7A7-ZLEA].

80. Melanie B. Leslie, *The Wisdom of Crowds: Groupthink and Nonprofit Governance*, 62 FLA. L. REV. 1179, 1192 (2010).

- saliency bias (the tendency to use noticeable—that is, salient—traits to make judgments about a person or situation)[81]
- base rate fallacy (the tendency of the mind to ignore general probabilities—that is, base rate information—and instead focus on specific information pertaining only to a certain case when presented with both)[82]
- conservatism bias (the tendency to revise one's belief insufficiently when presented with new evidence)[83]
- negativity bias (the tendency for things of a more positive nature to have less of an impact on a person's behavior than something equally emotional but of a more negative nature)[84]

At some level, this is just formalized common sense. In the absence of reliable information regarding the actual state of the world, most of us would likely acknowledge a temptation to assess a situation by reference to our own prior experiences (anchoring bias), or to formulate opinions that tend to be consistent with our own ingroup's preferences (ingroup bias). Legal commentators are also particularly susceptible to both saliency bias and déformation professionnelle. For example, there are myriad articles that purport to study changes to the civil litigation environment simply by examining pre- and postchange samples of filed cases.[85] But while filed cases are salient to legal researchers, they do not often allow comprehensive and reliable analyses of legal phenomena. Changes in the legal environment likely will also affect the number and quality of cases filed in the first place (selection bias), and will often affect primary behavior giving rise to legal claims. The "filed case" phenomenon is likely exacerbated by déformation professionelle as well—lawyers and legal scholars have

81. Harry S. Gerla, *The Reasonableness Standard in the Law of Negligence: An Abstract Values Receive Their Due?*, 15 U. DAYTON L. REV. 199, 211 (1990) ("A saliency bias is tendency of 'colorful, or other distinctive stimuli [to] disproportionately engage attention and accordingly affect judgments.' " (quoting Shelley Taylor, *The Availability Bias in Social Perception and Interaction*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192 (1982)) (alteration in original)).

82. *Base Rate Fallacy*, INVESTOPEDIA, https://www.investopedia.com/terms/b/base-rate-fallacy.asp (last visited Sept. 29, 2018) [https://perma.cc/62UN-34V7].

83. Adam Hayes, *How Cognitive Bias Affects Your Business*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/022015/how-cognitive-bias-affects-your-business.asp (last visited Sept. 29, 2018) [https://perma.cc/N8ZM-B3ZG].

84. Cook, *supra* note 77, at 32.

85. For an overview of the empirical literature on the subject, see Jonah Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2288–95. Professor Gelbach's own study focused on the role party selection can have in undermining these comparisons. *See id.* at 2275–77.

spent their entire careers considering the filed case as the most relevant (and sometimes *only*) unit of analysis; it is difficult to break that pattern.

These same biases likely drive civil litigation stakeholders to focus primarily upon the cases and scenarios that are most important to them, or at least to those situations that have most frustrated them over time. A longtime corporate defense lawyer will tend first to think about the types of cases she has handled, and will anchor or find most salient the interactions relevant to a corporate defense lawyer's docket. A plaintiff-side civil rights attorney will do the same; it is just that these two individuals will likely have very different priors in mind when they consider a change to the civil litigation environment.

The tendency to focus on what one already knows is even more problematic in light of the negativity bias. Because we have a tendency to recall and emphasize negative experiences relative to positive experiences of similar magnitude, we will often focus excessively upon salient past experience that imposed significant costs upon us. The corporate defense lawyer may thus tend to forget cases that she settled for her clients quickly and quietly because liability was obvious and significant. While conduct creating clear legal liability may well be negative for her clients, it is often less costly *to the lawyer*. Investigation of such claims is often less involved, and she will experience fewer of the frustrations of protracted litigation in such cases as well.

By contrast, that same lawyer will tend to remember and focus upon matters that imposed significant personal costs upon her. She will gravitate mentally toward the cases she regarded as "frivolous" and those that involved what she believed to be "excessive" pretrial cost and acrimony. For the corporate defense lawyer, these are the negative experiences that bring the negativity bias into play.

Lawyers and commentators on the other side of the bar are subject to precisely the same biases, but in the opposite direction. The crusading civil rights attorney will be disinclined to remember the would-be clients she turned away because she concluded that their respective claims had no merit. She will similarly tend to forget or deemphasize the cases in which her client's meritorious claims produced a quick and satisfying resolution. Instead, she will think most often of the cases that frustrated her. She will remember, for example, situations in which her intuitions and experience suggested that actionable discrimination had occurred, but in which the defendant stonewalled and prevented her from obtaining the discovery necessary to prove her claims.

These biases are a significant problem for anyone interested in crafting public policy. But they are particularly pernicious in the

context of debates about civil procedure in a transsubstantive world. The proceduralist must confront the *systemic*, cross-doctrinal implications of procedural changes because the U.S. system generally imposes procedural changes upon all types of claims. The tendency to focus excessively on the kinds of cases that are salient to the individual commentator along with the tendency to recall more strongly the cases with negative consequences for that commentator together create a serious risk of error.[86]

A full exploration of the ways in which cognitive biases affect commentators' beliefs and preferences under conditions of uncertainty is beyond the scope of this Article. But it seems highly likely that those biases drive us toward a set of empirically unreliable priors. Couple that with the fact that we are operating in an environment characterized by *extreme* uncertainty as to legislative intent, optimal outcome, and even the real-world effects of rules changes, and it seems probable that we will inevitably be walking on thin ice whenever we attempt to offer certain forms of prescriptive advice.[87]

II. HOW MUCH CAN WE LEARN FROM HISTORY?

A. "Social Value of Discovery" Proponents' Historical Claims

At this writing, Professors Stephen Burbank and Sean Farhang are probably the most visible advocates for a return to pre–December 2015 discovery rules on "social benefits of discovery" grounds.[88] While some of their arguments arise out of their extraordinary empirical

86. To some extent, this is probably why liberal and conservative proceduralists are so often "ships passing in the night." Potentially more troubling, it may also suggest a larger problem with the composition of the rulemaking committees and the other members of the judiciary involved in rulemaking. It seems possible—even probable—that nominal political labels like "Democratic appointee" and "Republican appointee" actually mask the relevant biases. To a very large extent, committee rulemakers and federal judges are experientially similar. While the party of the appointing president (or the perceived ideology of the Chief Justice) may serve as reliable proxies for their appointees' views on highly salient, hot-button topics like sexual or reproductive rights, purported ideological diversity may not be an adequate substitute for the sort of experiential diversity that will probably yield more equitable transsubstantive results. At some level, a big-firm lawyer is just a big-firm lawyer, regardless of how she acts in the voting booth on the first Tuesday in November.

87. This does not mean that commentators should not offer prescriptive advice, of course. It does suggest, however, that (1) commentators should approach prescriptive recommendations with modesty and (2) that certain *forms* of prescriptive argument are inherently suspect.

88. Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 15–17 (arguing that the 2015 discovery amendments to the Federal Rules of Civil Procedure "do not reflect the social benefits of discovery, and of litigation overall, in the enforcement of important rights"); *see also* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7.

research,[89] they have also articulated a historical argument in support of their claims. Specifically, they argue that the "primary architect of the federal rules on discovery, Professor Edson Sunderland, was both a Legal Realist and, more important for these purposes, a Progressive."[90]

Burbank and Farhang place special emphasis upon Sunderland's stated preference for "legibility"—what modern-day commentators would call "transparency." They quote a 1925 statement from Sunderland in support of their position:

> The spirit of the times calls for disclosure, not concealment, in every field—in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that courts need no longer permit litigating parties to raid one another from ambush.[91]

I thus take it that in Burbank and Farhang's view, Edson Sunderland's key role in the drafting of the discovery portions of the Federal Rules of Civil Procedure and Sunderland's aggressive articulation of the power and importance of transparency together indicate that the framers of the Federal Rules were committed to a particularly liberal (and thus usually proplaintiff) view of discovery.

A recent article by Professor Luke Norris echoes these themes.[92] Among other things, Norris claims that there is a strong but heretofore underappreciated relationship between the Norris[93]-LaGuardia Act of 1932 ("NLGA"), the Rules Enabling Act of 1934, and the initial Federal Rules of Civil Procedure Congress approved in 1936 and put into effect in 1938.[94] In Norris's narrative, the traditional story—that conservative members of the American Bar Association ("ABA") deserve primary credit for the Rules Enabling Act and the resultant Federal Rules of Civil Procedure—ignores a critical fact. Specifically, while the ABA was the primary drafter of the Rules Enabling Act, Congress did not pass the statute until Roosevelt's Progressive New Deal administrators—most notably, Attorney General Homer Cummings—involved themselves in lobbying efforts.[95]

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89. *See infra* Part III. The quality of their research is outstanding; their empirical findings, however, do not necessarily support their prescriptive preferences.

90. Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 16; *see also* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 69.

91. Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 116 (1925). It is worth noting that the comparative aspects of Professor Edson Sunderland's 1925 assessment of English procedure were informed by 1925 U.S. procedure. Enactment of the Federal Rules of Civil Procedure was still over a decade away when Sunderland wrote.

92. *See* Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017).

93. No relation, I presume.

94. *See* Norris, *supra* note 92, at 467–69.

95. *Id.* at 510–11.

As Norris interprets the historical record, the 1932 passage of the NLGA is also a huge part of the story. The NLGA provided procedural protections and express hearing rights for labor interests, and Congress enacted it in response to the perception that federal judges were abusing their equitable powers by issuing promanagement injunctions that had the practical effect of reducing or eliminating workers' rights.[96] Norris finds in both the NLGA and the Federal Rules movement a commitment among the key players to promoting what economist John Kenneth Galbraith labeled "countervailing power."[97] In other words, he finds that the NLGA, the Rules Enabling Act, and the Federal Rules of Civil Procedure are all intended to give workers and consumers—ordinary human beings—some measure of collective power to enable them to stand up to and bargain successfully with large corporate interests.

Norris locates some additional support for his position in Yale Law School Dean and future Third Circuit Judge Charles Clark's writings. Clark is widely acknowledged as the chief architect of the Federal Rules of Civil Procedure, so one might expect his views to carry some extra weight. Norris acknowledges, as he must, that the generally progressively minded Clark focused primarily on ensuring simplicity in the Rules he was crafting. But relying primarily upon work by Professor Stephen Subrin, Norris indicates that Clark also "linked federal rules to 'meet[ing] newly recognized social needs' " and claims that Clark looked at procedural rules as "instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants."[98]

Although the bulk of Norris's article is addressed to his broad-sweep arguments about the overall ethos surrounding enactment of the Rules Enabling Act and the drafting of the original Federal Rules of Civil Procedure, he explicitly decries recent procedural rule changes that "mak[e] it harder for less-resourced plaintiffs to access discovery and trial" as inconsistent with that ethos.[99] Thus, like Burbank and Farhang, Norris sees inconsistencies between what he suggests is the original intent behind the Federal Rules project and the supposed retrenchments of recent decades.

Interestingly, both the Burbank and Farhang work and Norris's article seem implicitly to ask readers to go at least two steps further than simply assessing the truth or falsity of their historical claims.

96. *Id.* at 506–08.

97. *Id.* at 544–46.

98. *Id.* at 513 (quoting Subrin, *The New Era*, *supra* note 15, at 1651).

99. *Id.* at 463.

These commentators do not merely attempt to persuade readers that those leading the charge in the 1930s Federal Rules movement had progressive sympathies attuned to mitigating concentrated industrial influence and maximizing the power of individual consumers and workers.[100] Rather, they go on to suggest that Edson Sunderland, Homer Cummings, Charles Clark, and other key players in the Federal Rules movement would continue to prefer whatever passes for "progressive" today.[101] That is, they strongly imply that these figures would share their own contemporary concerns about perceived retrenchment in civil discovery. Second, they seem to suggest that we should continue to care about how people like Sunderland, Cummings, and Clark would react to today's controversies.[102]

While both historical accounts are largely plausible, the historicity of the Burbank and Farhang and Norris claims is not as clear-cut as they suggest. Moreover, there is at least some reason to believe that the early Rules proponents on whom these modern commentators build their historical case would not agree with the full scope of the modern critique. And given the analytical difficulties I identified in Part I, there is no strong reason to assume that their 1930s preferences translate to the modern context. Taken together, I see relatively little reason to place much weight on this sort of historical analysis.

B. Problems in the Historical Account

To be sure, both the Burbank and Farhang work and Norris's historical research offer important perspectives worthy of serious consideration. To some degree at least, both offer useful correctives for the traditional historical narratives that have grown up around the enactment of the Rules Enabling Act and the drafting of the original Federal Rules of Civil Procedure.

At the same time, however, there are significant weaknesses in the Burbank and Farhang and Norris revisionist accounts. As I discuss below, Burbank and Farhang's reliance upon Edson Sunderland's comments on English procedure fail to account for significant

100. While I do not necessarily agree with the full scope of their historical claims, their truth or falsity is in many ways subordinate to the question of whether 1930s proponents of liberal discovery would necessarily share these modern commentators' preferences today. And both assessing the historicity of their claims and their answering of the intertemporal transitivity questions they raise are less important than figuring out whether we should care about the perspectives of 1930s rulemakers in the first place.

101. BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 69–70; Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 17; Norris, *supra* note 92, at 469, 510–11.

102. *See* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 69–70.

differences between the comparative account Sunderland himself was rendering and the comparisons Burbank and Farhang would apparently like the reader to make.[103]

Moreover, Burbank and Farhang largely ignore or treat as irrelevant one entire side of the historical equation. They engage only with the desires of the Rules pioneers, neglecting to mention the underlying social dynamics that prompted those preferences.[104]

Both the Burbank and Farhang account and Norris's work suffer from another critical historical flaw—neither engages significantly with the fact that federal civil litigation itself has changed substantially since the Rules went into effect in 1938. And Norris's article presents one additional but significant historical weakness: his reliance upon Stephen Subrin's account of Charles Clark is largely misplaced.

C. Sunderland's (Complete) Context

It is important to understand Sunderland's statements in context. Sunderland wrote his article after spending six months in England to observe the English court system in action.[105] During his stay, Sunderland became enamored by the English system he described as an "immense success" that operated "quickly, quietly, and efficiently."[106] Although Sunderland did sing the praises of "disclosure, not concealment,"[107] he did so in the context of an English system in which the *court* and not the parties set the boundaries of permissible discovery:

> Practically every case, commenced in the ordinary way, is sent at once to a master on a summons for directions, who makes an order mapping out the course which it is to follow, and the main purpose of this order is to specify and direct the discovery which must be made forthwith. . . . The summons for directions, by which the vast scheme of discovery is largely administered, is thus a tremendously efficient instrument.[108]

Sunderland's paean to the glories of English civil procedure also contains other hints that his preference for "disclosure" would not necessarily translate into a commitment to unfettered discovery today. For example, he also complimented the English system for its efficiency,

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103. *See infra* Section II.C.

104. Norris devotes at least some space to the argument that countervailing power is again becoming increasingly necessary in light of what he describes as a modern trend toward industrial concentration. Norris, *supra* note 92, at 470.

105. *See* Sunderland, *supra* note 91, at 110 (explaining that the suggestions he provided in the article are the result of his "extended opportunity for observation" during the six months he spent in England).

106. *Id.*

107. *Id.* at 116.

108. *Id.* at 114–15.

especially in the context of summary judgments on debt actions.[109] In his discussion of English summary judgment, Sunderland decried the use of the "affidavit of merits" in the United States, noting that English judges "want solid assurances, and sham defenses [to summary judgment motions] are ruthlessly rejected."[110]

Sunderland was writing in 1925, nine years before the passage of the Rules Enabling Act and eleven years before Congress approved the first Federal Rules of Civil Procedure. U.S. federal practice at the time had very little discovery of any sort.[111] Moreover, the English discovery procedures he described were quite different from the U.S. conception of the practice eventually embodied in the Federal Rules. Under the English system he described, discovery largely occurred by way of specific "disclosures" ordered *by the court*. Nowhere did the English approach contemplate the sort of self-policing adversarial discovery procedures Sunderland himself eventually embraced in the new Federal Rules.

Of course, one might interpret Sunderland's ultimate embrace of the U.S. adversarial approach to discovery as independent evidence of his liberal proclivities. After all, he extolled the virtues of a far more restrictive approach to discovery after a six-month visit to England, then decided to propound an even more liberal discovery framework in the United States. This is potentially true, to be sure. But there are still reasons to be cautious of Sunderland's 1925 statement and of his eventual turn to still more liberal discovery provisions in the Federal Rules.

First and probably foremost, whatever Sunderland's preferences, they were inherently contingent upon the civil litigation environment of the day. As I and others have written elsewhere, the federal civil litigation docket changed enormously in the first several decades after the Federal Rules went into effect.[112] And the information environment—highly relevant to discovery issues—began to change in

109. *See id.* at 111–12 (noting that summary judgments on debt actions in England "are disposed of very rapidly, five or ten minutes being usually enough").

110. *Id.* at 112. To be fair, Sunderland's praise of summary judgment is implicitly limited to the debt collection context. I do not claim that he would have been in favor of modern U.S. summary judgment procedure. Nonetheless, his enthusiasm for summary disposition is hard to square with the modern liberal position in the United States.

111. *See generally* Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737–38 (1939) (summarizing pre-Rules practice in "party presentation" jurisdictions).

112. *See* Stancil, *supra* note 3, at 1661 (noting the changes that have occurred in civil litigation since the Federal Rules of Civil Procedure were created); *see also* Marcus, *supra* note 1, at 1695–707 (explaining the changes that have occurred in the federal civil litigation docket since 1938); Resnik, *supra* note 3, at 525–26 (stating that "the docket of the federal courts has changed in several significant ways" since the enactment of the Federal Rules).

equally momentous ways with the advent of the digital computer. To at least some degree, Sunderland's excitement about transparency and his enthusiasm for the English disclosure system are products of an era in which broad discovery likely would not overwhelm litigants, nor give those litigants an effective bludgeon to use against their adversaries.[113]

Second, subsequent English practice is particularly damning. By 1998, British courts had largely abandoned the so-called "*Peruvian Guano* rule" under which disclosure was required of all documents potentially related to a claim or defense, regardless of their admissibility.[114] Instead, the British Civil Procedure Rules pushed most cases into what it described as "standard disclosures," under which a party had the narrower obligation to disclose (1) documents on which he relies; (2) documents which adversely affect his own case; (3) documents which adversely affect another party's case; and (4) documents which support another party's case.[115] While the British system has since moved away from mandating standard disclosures in favor of a more flexible approach, most cases still use standard disclosures.[116]

Perhaps even more telling, in 2013, the United Kingdom expressly adopted a proportionality standard of its own in the context of discovery/disclosures.[117] The standard is strikingly similar to the U.S. standard now embodied in Federal Rule of Civil Procedure 26(b)(1).

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113. I will not fully recapitulate my arguments here, but will note that they also apply to Norris's contentions with equal force. *See* Norris, *supra* note 92, at 539 (arguing that recent changes to the Federal Rules have made it more difficult for plaintiffs with fewer resources to access discovery). The economic incentives inherent in modern litigation are radically different from the incentives in 1938. Far more important, the *diversity* of incentives across case types has increased substantially as well. These changes are a product of both a slew of new and radically different federal causes of action and of the changes to the information environment wrought by the arrival of the digital age. As a result, it is dangerous to make *any* "original intent" argument in the context of procedural rulemaking. To a certain extent, my critique here mirrors constitutional critiques that effectively shifted the prevailing view on originalism from "original intent" to "original public meaning." For a general discussion of this evolution in the constitutional context, see Lawrence B. Solum, *Legal Theory Lexicon 019: Originalism*, LEGAL THEORY BLOG (Jan. 18, 2004), https://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html [https://perma.cc/G98W-BXZU] (detailing the evolution from "original intent" to "original public meaning" in the academic literature).

114. Cie Financière et Commerciale du Pacifique v. Peruvian Guano Co. (1882), 11 QBD 55, 63 (C.A.). The old *Peruvian Guano* rule bore more than a passing resemblance to the version of Federal Rule of Civil Procedure 26(b)(1) in effect for several generations after enactment of the Rules. *See* FED. R. CIV. P. 26(b)(1) (explaining the scope of discovery under the Federal Rules of Civil Procedure).

115. CPR 31.6 (UK).

116. *See Disclosure*, HERBERT SMITH FREEHILLS: LITIG. NOTES (Jan. 16, 2017), http://hsfnotes.com/litigation/jackson-reforms/disclosure/ [https://perma.cc/EJ99-LGQA].

117. *See* CPR 44.3(5) (UK) (adopting a proportionality standard to the Civil Procedure Rules); *see also* Dorchester Grp. Ltd. v. Kier Constr. Ltd. [2015] EWHC (TCC) 3051[26]–[28] (Eng.) (applying proportionality tests to the disclosure in the case).

Specifically, British and Welsh litigants can only be forced to bear costs that bear a reasonable relationship to:

- the sums in issue in the proceedings
- the value of any nonmonetary relief in issue
- the complexity of the litigation
- any additional work generated by the conduct of the paying party
- any wider factors involved in the proceedings, such as reputation or public importance[118]

Viewed in the light most favorable to Burbank and Farhang, Edson Sunderland's 1925 article on English procedure and his ultimate embrace of even more liberal discovery standards in the first Federal Rules of Civil Procedure do suggest that Sunderland thought liberal discovery was part of the cure for what ailed the civil justice system in 1925.[119] But they do not necessarily mean that he would continue to place himself at the liberal end of today's spectrum along with Burbank and Farhang, Norris, and others. The English themselves abandoned their traditional approach in favor of categorically limited discovery and proportionality, and they did so largely *before* the U.S. system made its most recent shifts in that direction. The changes to both the civil litigation docket over time and to the information environment facing modern litigants together imply that the conditions justifying the 1938 approach to discovery may no longer hold.

D. Norris's Reliance Upon Clark Is Largely Misplaced

Norris claims that Charles Clark, the primary architect of the Federal Rules, viewed federal rules as important in "meeting newly recognized social needs" and that he "looked at the rules as 'instruments

118. CPR 44.3(5) (UK); *see also* CPR 1.1 (UK) ("These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.").

119. Burbank and Farhang supplement their position by noting that two relatively recent reporters for the Advisory Committee on Civil Rules, Jack Friedenthal and Paul Carrington, have sounded a similar call. Carrington describes civil discovery as "the American alternative to the administrative state," for example. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997). They also cite to (conservative) Judge Patrick Higginbotham who, as chair of the civil rules advisory committee, said, "Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress." Patrick Higginbotham, *Foreword: Evaluation of the Civil Justice Reform Act* , 49 ALA. L. REV. 1, 5 (1997). As I demonstrate in Part I, the idea that there is a single "social policy set by Congress" is ludicrous. At best, Congress has enacted a complicated, sometimes contradictory patchwork of *different* social policies, each of which is virtually impossible to quantify in terms of enforcement levels. While procedural rules governing litigation undoubtedly have effects on the congressional policies embodied in statutes and their respective enforcement regimes, *transsubstantive* procedure is particularly ill-suited for the role of "social policy rheostat," notwithstanding Judge Higginbotham's suggestion.

of social control.' "[120] In support of this contention, Norris cites to a 1981 Stephen Subrin article and to a 1997 article by Professor Laurens Walker.[121] Subrin in turn cites to a 1928 article Charles Clark published in the *Connecticut Bar Journal* as support for his contention that Clark in part conceived of the Federal Rules as part of a project to effectuate social change. Subrin quotes the first sentence of Clark's article as his sole historical justification for that argument:

> One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants.[122]

Viewed in a vacuum, this pre–Federal Rules statement might indeed be read to support Subrin's (and by extension, Walker's and Norris's) contention that Clark would view the Federal Rules as an instrument of social change.

But commentators' reliance upon this particular Clark quote is curious in several ways. First and foremost, it is clear from the context of the entire Clark article that Clark was not really talking about procedural rules in the way Subrin's article suggests. Given Clark's strong association with procedural law and procedural reform, it is perhaps understandable that commentators would read the first sentence of a Clark article and assume what followed would be a strong pragmatic defense of procedural rulemaking. But the then–Yale Law professor (Clark would be named Dean of Yale Law School the following year) was actually writing about a surprisingly modern and only tangentially procedural topic: the potential value of empirical legal research.

Clark's article is actually an explanation and defense of what he described as "almost a virgin field to the social scientist":[123] empirical analysis of the sort we would today call "docket research." And at least one of the "legal rules" he describes as "instruments of social control" is a *substantive* legal rule.[124] To the extent Clark engages with procedural

120. Norris, *supra* note 92, at 513 (quoting Subrin, *The New Era*, *supra* note 15, at 1651).

121. *Id.* at 513 n.261. Although Norris cites Professor Laurens Walker as additional support, Walker's discussion of the issue is entirely dependent upon the same Subrin discussion and citation. *See* Subrin, *The New Era*, *supra* note 15, at 1651 ("Advocates, like Clark, wanted procedure to be less technical and more flexible in order to meet newly recognized social needs and to permit the expanded role of the federal government."); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1279 (1997) (using Subrin's language to describe Clark's views).

122. Subrin, *The New Era*, *supra* note 15, at 1651.

123. Clark, *supra* note 24, at 212.

124. *Id.* at 211, 227–28 (analyzing the use of attachments as a mechanism in suits over real property).

rules at all, his engagement comes in the form of questioning the value of certain procedural devices in light of observed results. His is hardly an endorsement of procedural rulemaking as an "instrument of social control."

He reports, for example, that it appears to be relatively easy to obtain a divorce in 1920s Connecticut, despite widespread belief that Connecticut law made it difficult for spouses to untie the knot.[125] The "legal rule" in question here is clearly substantive. Clark also reports on the relatively low rate of jury trials in automobile accident cases,[126] the frequency with which courts attach defendants' property before trial,[127] and the use of demurrers as a delaying tactic.[128] While each of these has a somewhat stronger connection with procedural law than divorce case statistics, nowhere does Clark argue or even intimate that procedural rules should be drafted to effectuate broader social preferences.

It gets worse for those who have more recently cited Clark's opening sentence in support of the contention that he would be on board with their set of modern preferences. First, Clark's entire article is an argument in favor of careful empirical research to support and inform reform efforts. It thus stands in mute condemnation of prescriptive programs predicated upon little more than intuition. The Charles Clark reflected in this article would laud Farhang and Burbank for their careful, insightful, and thought-provoking empirical work; he might be a little less pleased with prescriptive recommendations that are somewhat less causally tethered to their findings.

Moreover, the Clark article tentatively identifies at least three concerns potentially at odds with the modern liberal procedural mindset. First, noting the large percentage of automobile accident cases

125. *See id.* at 213–15 (explaining that divorces were only denied in twenty-eight out of 1554 cases). As one might expect in something that was "almost a virgin field to a social scientist," Clark's actual data are likely unreliable as evidence of the ease or difficulty of obtaining a divorce. *See id.* at 212–16 (discussing how the data were collected for this study). Clark neglected to account for the selection bias problem and thus failed to consider the possibility that the uncontested divorce actions he studied represented a group of particularly strong cases for dissolution of the marriage relationship. *See id.* at 213–16 (outlining the frequency of successful divorces in the study but failing to acknowledge that couples with weaker divorce cases might not bring such actions). But the fact that his research was likely flawed in no way changes the fact that his brief introductory discussion of legal rules as "instruments of social change" was directed toward substantive legal rules like those establishing the conditions under which a divorce is appropriately granted. *See id.* at 212 ("One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants.").

126. *Id.* at 213, 224–27.

127. *Id.* at 227–30.

128. *Id.* at 230–33.

resolved before trial, he states, "Almost 85 per cent of these cases would, therefore, seem to be cases where the parties use the court machinery to spar for position in order to effect a compromise."[129] While he does not explicitly endorse such behavior, neither does he condemn it. It is thus difficult to determine whether Clark would share the modern liberal perspective that there are too few trials.[130]

Second, after examining the relatively low number of contract and foreclosure cases going to trial, he asks "whether for the somewhat limited requirements of this class of cases the court processes are the most effective and least expensive possible."[131] He recommends instead that the state consider enacting the Uniform Mortgage Act, which eliminates the need for foreclosure by the court "unless required by one of the parties."[132] This again stands in potential tension with the current liberal ethos, under which court involvement is almost an article of faith.[133]

Finally, Clark expresses genuine concern at the apparent abuse of attachment as a pre-suit remedy in Connecticut courts. Connecticut law at the time allowed plaintiffs to attach defendants' property at the institution of suit "practically as a matter of course."[134] Noting that the value of these attachments seemed "grossly excessive" in relation to the amounts plaintiffs actually recovered, Clark then coyly states, "Outside of the matters here stated no judgment upon the Connecticut law of attachment is here attempted."[135] In modern economic terms, one thus might read Clark as being concerned with pretrial cost dynamics that skew results away from merits-driven determinations. In much of the existing liberal academic literature, such concerns rarely make even a cameo appearance.

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129. *Id.* at 213.

130. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140–41 (2007) (examining how the use of summary judgment motions has resulted in the decline of civil trials in federal courts).

131. Clark, *supra* note 24, at 213.

132. *Id.* at 213–14.

133. For example, consider the academic furor over the Supreme Court's recent arbitration decisions. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619–32 (2018) (judging that the Federal Arbitration Act's saving clause did not render the arbitration clause at issue unenforceable); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342–67 (2011) (refusing to certify a class of Wal-Mart employees seeking to sue); AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempts a California ruling regarding the unconscionability of certain arbitration agreements). I take no position on the merits of those decisions or the various critiques they have spawned. Rather, I simply note that these commentators might have found themselves uncomfortable with Charles Clark's focus on efficiency. *See* Clark, *supra* note 24, at 213–14 (considering whether court processes are the most effective and least expensive way to resolve foreclosure disputes).

134. Clark, *supra* note 24, at 227.

135. *Id.* at 230.

In sum, the article that three separate scholars have used to support their characterization of Clark as committed to using procedural rules to further social goals offers at best only weak support for that claim. Instead, the Clark article in question supports what we today might call an "evidence-based" approach to procedural reform. Although Burbank and Farhang cite reams of evidence in their work, the necessary causal connection between their empirical research and their prescriptive claims is relatively weak. And that same Clark article actually expresses at least three largely prodefendant concerns—concerns generally incompatible with the perspectives expressed by the modern commentators in question.

E. The Ultimate Value of Historical Arguments

To be sure, it is certainly possible that Federal Rules–era heavyweights like Homer Cummings, Edson Sunderland, and Charles Clark were committed to a liberal understanding of the Federal Rules and their intended purpose. And it is at least possible that these important figures and other key players would still self-identify on the left side of the political spectrum in today's environment, such that their opinions today would be in line with those of Burbank and Farhang, Norris, Subrin, and others. But the historical case for a perpetually liberal interpretation of the Federal Rules (and in particular, of the discovery rules) is not as strong as its proponents might claim. And changes in litigation since the enactment of the Federal Rules further reduce the likelihood that those early Rules pioneers would have the same perspective today if they encountered modern federal civil litigation "in the wild." Moreover, even if they would embrace the liberal position today, post-1938 changes independently suggest that reflexive adoption of "the ~~customer~~ plaintiff is always right" might not be the best course of action.

III. ON THE STRENGTHS AND WEAKNESSES OF EMPIRICAL DATA

Implicit in the contention that the social benefits of discovery justify a return to the more liberal pre–December 2015 discovery rules is the notion that congressional creation of an EPRA denotes a special congressional intent to encourage private enforcement. According to this line of argument, it follows therefore that retrenchment of discovery rules largely in favor of defendants must necessarily conflict with congressional intent regarding private enforcement.

In 2010, Professor Sean Farhang published *The Litigation State: Public Regulation and Private Lawsuits in the U.S.*[136] Farhang's overarching thesis is novel and his analysis powerful. In short, Farhang's book persuasively identifies the United States as a "litigation state" in which private litigation plays a critical regulatory role unmatched in any other society. In Farhang's view, the U.S. litigation state fills at least some of the role occupied in other developed nations by the "administrative state."[137] *The Litigation State* is rich and dense reading, packed with a number of sophisticated and well-designed empirical studies. It is well worth a close read.

I cannot even begin to scratch the surface of Farhang's far-ranging research in this Article, but one of the book's specific empirical findings bears directly on the question of whether the social value of discovery merits a return to more liberal discovery rules. Specifically, Farhang studies whether legislative-executive conflict (that is, the presence of divided government between the legislative and executive branches) affects Congress's enactment of EPRAs. As Farhang describes his findings, the data "shows that divided government increases Congress's enactment of private enforcement regimes."[138] He observes that the variable he studies "is statistically significant and positive, with a large substantive effect," and further notes that "these findings are robust across multiple operationalizations of interbranch conflict, whether one uses a simple divided government dummy, opposition seat share, or a party-neutral measure of the ideological distance between Congress and the president."[139] In other words, Farhang is fairly confident that the use of EPRAs goes up when the president and Congress come from different political parties.

I have no reason to doubt the reliability of Farhang's empirical findings. But I do have significant concerns about the ways in which Farhang and Burbank are deploying those findings in support of their normative claims regarding their "social value of discovery" hypothesis. In *Rulemaking and The Counterrevolution Against Federal Litigation: Discovery*, Burbank and Farhang cite Farhang's independent research on the "divided government effect" as follows:

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136. FARHANG, *supra* note 17.

137. *Id.* at 225 ("From a comparative cross-national point of view, 'weak' American administrative state capacity on the one hand, and extensive private litigation in American policy implementation on the other, are linked outcomes of the same institutional causes and problems."); *id.* at 32 (noting a "continuum between pure legal process and pure administrative process," which forms a "theoretical framework . . . based upon the stylized choice *between* bureaucratic implementation and private enforcement regimes").

138. *Id.* at 76.

139. *Id.* at 80, 82.

> More recently, research by political scientists [Farhang himself] has demonstrated that the substantial increase in federal litigation in the late 1960s and 1970s is closely correlated with purposeful decisions by Congress to provide incentives for private enforcement of federal statutes, and that in doing so instead of relying exclusively on administrative (or other public) enforcement, Congress was often seeking to insulate the majority's preferences from subversion by agencies under the control of an ideologically distant executive. This and other work makes clear that Americans rely on decentralized litigation—for a variety of cultural, institutional, financial, and political reasons—to do what in many other advanced democracies is done by social insurance or a central bureaucracy.[140]

Viewed in the context of their entire article, Burbank and Farhang seem to extract something rather remarkable from the congressional tendency to deploy EPRAs more frequently in times of divided government: an indication that recent conservative procedural amendments and case law necessarily frustrate congressional intent.[141]

To be sure, Burbank and Farhang *may* be right. If we could somehow overcome the challenges discussed in Part I and magically divine the congressionally intended level of private enforcement at the time of enactment for various EPRAs, we might find that today's enforcement levels fall short of that long-past congressional expectation. There is a certain economic elegance to an argument based upon assumptions that the legislature possesses perfect and complete information regarding the impact of an EPRA in light of the discovery rules prevailing at the time of enactment. If such assumptions were reliable, and if changing social conditions had no effect on congressional enforcement desires in perpetuity, then *any* deviation from the time-of-enactment status quo ante would violate legislative intent, essentially by definition. But Congress does not possess that type of information. Moreover, as I have already demonstrated, the underlying social circumstances motivating remedial legislation are themselves dynamic.[142] If nothing else, Congress's relatively regular "tweaks" to EPRA enforcement regimes suggest that Congress either has the capacity to err in its calibration of the private enforcement regime or that Congress can respond to changes in underlying social conditions by altering the private enforcement apparatus accordingly.

Consider the Civil Rights Attorney's Fees Award Act of 1976 ("CRAFAA"). Codified at 42 U.S.C. § 1988, this legislation for the first

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140. Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 16.

141. *See id.* at 2 ("[S]ince the early 1970s the Supreme Court—increasingly conservative and influenced by ideology—has been more effective than . . . Congress . . . ."); *id.* at 14 ("Against this historical and institutional background, we believe that the 2015 discovery amendments, in particular the amendment adding proportionality to the basic scope of discovery, are cause for concern—and should not be emulated . . . .").

142. *See supra* notes 1–2 and accompanying text (summarizing how the courts were initially used for traditional, discrete disputes but have now transformed into mechanisms for social change).

time allowed prevailing civil rights plaintiffs to recover their attorney's fees in connection with a successful suit.[143] One could interpret statutory intent for this law in at least three ways. First, the statute might have represented a congressional conclusion that the social ills addressed by substantive civil rights legislation were getting worse, not better. Under this view, sweetening the pot by offering prevailing plaintiffs their reasonable attorney's fees would prompt additional private litigation to help stem the increasing tide of civil rights violations to which Congress was responding.

Alternatively, and perhaps more plausibly, the CRAFAA might have represented congressional recognition that it had made a mistake in one or more of its initial civil rights private enforcement regimes. For example, faced with around eleven years of data since the passage of the Civil Rights Act of 1964, Congress in 1976 might have concluded that there was not yet enough private enforcement, independent of any changes to underlying social conditions. The inclusion of an attorney's fees remedy could thus be viewed as an attempt to bring enforcement to the initially intended level.

Finally, the CRAFAA might instead have represented a response to congressional perceptions of bad behavior on the part of civil rights defendants in litigation. By incorporating an attorney's fees remedy, the law might discourage litigation misconduct going forward.

On the conservative side of the aisle, one might tell precisely the same stories with respect to the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[144] which among other things tightened the pleading standard and restricted discovery in certain types of securities litigation. By requiring that false statement allegations be pled "with particularity," by requiring that private securities fraud complaints create a "strong inference" of scienter, and by staying discovery "during the pendency of any motion to dismiss,"[145] Congress essentially corrected course on what it regarded as excessive levels of private securities law enforcement. Attempts to peg current enforcement levels to time-of-enactment expectations seem deeply misguided. Regardless, legislatures are hardly private civil litigation specialists, and assumptions holding them to such an impossible standard are not reliable. Moreover, such assumptions are inherently and unavoidably

143. The Supreme Court has said that plaintiffs are prevailing parties when they triumph on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *See* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)).

144. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of Title 15 of the U.S. Code).

145. *Id.* § 101(b)(1)–(2), 109 Stat. at 747.

inconsistent with our overarching commitment to mostly transsubstantive procedure. If rules of practice and procedure have substantive effects (they do), and if changes to those rules are supposed to apply across all claim types (they mostly are), then arguments based upon prevailing "time-of-enactment" litigation dynamics are inherently inconsistent with the procedural rulemaking as currently practiced.

There is another fundamental problem with arguments predicated on the notion that procedural-change-driven deviations from a given enforcement baseline are somehow definitionally inconsistent with congressional desires—and the CRAFAA and PSLRA examples above provide a preview of that problem. As both the CRAFAA and the PSLRA demonstrate, Congress knows how to incorporate customized discovery procedures into its statutory regimes, and it knows how to insulate those statutory regimes from changes occasioned by committee rulemakers' amendments to the generally applicable procedural rules.[146]

The fact that legislatures continue to create EPRAs *without* bespoke discovery procedures suggests that the vagaries of the committee rulemaking process may in fact be part of the legislative deal. The interest groups that write most major legislation could certainly include language fixing the level of discovery at some desirable level. The fact that they do not do so strongly suggests that, whatever the abstract preferences of some legislators, legislative compromises incorporating EPRAs should not necessarily be seen as endorsements of any particular approach to civil discovery. And they most certainly should not be seen as endorsements of the civil discovery regime operative at the time of enactment. Although increased use of EPRAs during times of divided government is intriguing, it cannot by itself support claims in favor of more liberal discovery.

It is important to note again that my critique of the "social value of discovery" attack on recent discovery amendments is *not* an endorsement of any particular position with regard to the current state of the world. At most, I am inclined to believe that, just as a matter of simple probability, the current federal EPRA landscape is best thought of as a sort of Goldilocks environment. That is, some federal statutory regimes are probably experiencing overenforcement, others are characterized by underenforcement, and still others are, if only by accident, more or less "just right."

146. *See* 15 U.S.C. § 77z-1(a)(3)(B)(iv) (2012) (specifying specific procedures for plaintiffs in certain discovery matters); Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b) (2012) (providing that the prevailing party in a civil rights lawsuit may collect attorney's fees).

Even such tentative and preliminary thoughts require a disclaimer, however. I am not certain that I have enough data to claim that my beliefs are anything more than speculative intuitions informed by my own background and experiences. I am myself thus subject to a variety of cognitive biases that may be in play in my own thinking. At the same time, other commentators likely face the same risks with respect to their own assessments and should probably therefore offer the same sort of disclaimer. This does not happen very often in our line of work.

Regardless, the arguments I advance in this Article are only "conservative" to the extent that I am responding to an overwhelmingly ideologically liberal majority among my proceduralist friends and colleagues. I am perfectly willing to admit that those friends and colleagues may be right in the end. I only ask that they demonstrate the sort of epistemic humility called for by the complexity of the situation and the paucity of reliable data.

IV. WHAT ABOUT COSTS?

There is one final, fatal flaw in the arguments advanced to date in support of a "social value of discovery" approach. They completely fail to consider the social *costs* of discovery in their analyses. To date, I have been unable to locate a single article explicitly or implicitly supporting liberal discovery on "social value of private litigation" grounds that also accounts for the costs of liberal discovery. This is curious in the extreme, given the constant "costs, costs, costs" drumbeat from conservative stakeholders since the 1970s on.

A. The Traditional Costs of Discovery

Discovery is expensive, especially in complex cases.[147] In order to justify more discovery relative to the current baseline, one would need to be able to both quantify the social benefits of that discovery *and* weigh those benefits against the costs. As Part I demonstrates, calculating the social benefits of discovery is at best extraordinarily difficult. It is somewhat less difficult to calculate certain categories of the social *costs* of discovery. For example, it is relatively well established that litigating parties' direct discovery expenditures represent deadweight losses to society.[148]

147. *See supra* note 27 and accompanying text.

148. If not necessarily to the lawyers or discovery vendors representing those parties. *See generally* ROBERT BONE, THE ECONOMICS OF CIVIL PROCEDURE (2003).

Whatever the ultimate personal or social benefits of discovery, time and resources spent by a litigating plaintiff or defendant collecting, reviewing, and producing information or responding to discovery requests are time and resources that cannot be spent engaging in the productive activities in which the responding party typically engages. These costs are often substantial, both in absolute terms and as a percentage of overall litigation costs.

B. Less Traditional Categories of Cost

In addition to direct social costs, discovery will often impose less obvious indirect costs on litigants as well. Among other things, the threat of litigation involving a given quantum *x* of likely discovery costs may well overdeter potential litigants relative to some (admittedly difficult to identify) optimal baseline. Assume that there exists an optimal level of productive activity for a given entity. Overly liberal discovery rules may prompt the entity to engage in too much self-monitoring to reduce the risk of legal liability. Or it may prompt that entity to engage in less productive and less efficient forms of internal communication (e.g., oral discussions in lieu of written communications), to reduce the likelihood that innocuous documents will later be misconstrued in a litigation setting.

Similarly, if somewhat more speculatively, it is at least possible that at some point greater transparency or more liberal discovery comes only at the cost of reduction in productive activity overall. Some seem to envision a quasi-utopian regulatory state in which the activities of virtually everyone would be subject to a sort of fragmented Panopticon[149] consisting in part of formal regulatory oversight and in part of monitoring conducted by way of discovery in private suits. They further argue (again without any reference to the cost side of the equation or optimal social outcomes) that decreases in access to discovery will necessitate more direct state involvement to ensure adequate public knowledge of parties' activities.[150]

Whether they are right or wrong, they are ignoring yet another potential cost of the liberal discovery regime they prefer. It is not just the *form* of internal communications that may be affected by changes to the discovery regime. The *fact* of communications may also be

149. The Panopticon is an institution designed by Jeremy Bentham which allows a single watchman to observe every person in the building without those people being able to determine whom the observer is watching. *See* Jacques-Alain Miller, *Jeremy Bentham's Panoptic Device*, 41 OCTOBER 3, 3 (1987) (Richard Miller trans.) (describing Bentham's Panopticon).

150. *See* Burbank & Farhang, *Counterrevolution*, *supra* note 7, at 16 (quoting Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997)).

affected. An employee engaged in conduct (innocuous or illegal) may choose not to communicate with anyone at all regarding her behavior if the discovery regime is extremely liberal. Thus, preferences for a liberal discovery regime may in fact be subject an "ex post reasoning" critique on this ground as well. That is, while liberal discovery may be great in that subset of cases in which relevant inculpatory documents (a) exist and (b) would not have been discoverable under a more conservative regime, the argument must account for the fact that the rule will affect both the form and fact of communication ex ante. It is at least plausible that a regime calibrated to induce *document creation* will have better net effects than one calibrated to induce obfuscation, even if somewhat fewer of those documents are likely to be discoverable under a more restrictive discovery standard.

There is one additional slippery slope cost problem with a regulatory Panopticon: economic actors will make many investment decisions based upon their understanding of their own ability to realize gains from those investments. At a liberal discovery policy extreme, I can envision parties deciding not to engage in certain forms of potentially productive activity at all because of pure transparency risk. If discovery is so liberal that I cannot reasonably expect to obtain the economic benefit of my activity, why engage in that activity in the first place?[151]

Even more conjecturally, might there be an additional set of costs in the form of cultural penalties associated with particularly liberal discovery practices? Orwell's Big Brother is a persistent and powerful image for a reason, and certain liberal discovery rules may foster grievance culture. They can also damage or even destroy generally well-functioning institutions that generate substantial net social benefits *by way of their productive activities*. This is what I would call the "unilateral action" version of the utopian fallacy. Proponents of certain intrusive regulatory proposals (e.g., liberal discovery) have a tendency to think that their proposals are unilateral moves that will not have spillover effects elsewhere, and they tend to see only the evil about which they care most. While there are undoubtedly some evils that justify action regardless of net consequences, it is far from clear that the blunt instrument of discovery (or, more accurately, the purported social benefits of discovery) fall exclusively or even mostly into that category. It may well be that, in some circumstances at least,

151. I acknowledge that it would take a far more liberal discovery regime than even most liberal commentators propose to prompt most economic actors to stop engaging in productive activity altogether on this sort of quasi-intellectual property ground. But one can envision plausible liberal discovery regimes in which this sort of effect is observed on the margins.

the *social* benefits occasioned by productive economic activity would fall excessively as a result of a too-liberal discovery regime.

* * *

Once again, the point of this exercise is not to demonstrate that the social costs of liberal discovery outweigh the social benefits of liberal discovery, either as a whole or in connection with individual cases or claim types. It may well be that a return to liberal discovery would generate net social benefits either on a systemic basis or at least in specific limited circumstances. Relatedly, the indirect social costs of discovery that I identify will not necessarily be present in every situation to the same extent. In fact, the more speculative forms of indirect cost I have identified may turn out to be relatively rare in the real world.

That said, the problem with most existing procedural literature is its total failure to engage the issue of costs. As I discuss below, there are few intellectually coherent ways to justify such a failure, and commentators are understandably reluctant to make the necessary arguments.

C. Conclusions on Costs

At the end of the day, those promoting liberal discovery because private litigation has potential social benefits also have to consider potential social costs. It is really that simple. Moreover, the fact that private litigation inherently involves agency costs relative to the social goals of litigation makes it all the more important to incorporate social costs into the calculus. Private litigation theory imagines private parties and their attorneys pursuing their own individual economic interests in EPRA litigation. The hope is thus that their self-interested actions will promote the common good by vindicating the social preferences embodied in the underlying statutory regime. While this is certainly possible, it is by no means guaranteed. Public enforcers have at least some incentive to internalize the social costs of their enforcement activities.[152] By contrast, in our current "producer-pays" discovery environment, many of the social costs of litigation that run through defendants are largely an externality to private plaintiffs, unless their own exposure to countervailing adversarial litigation cost

152. *See* Elysa M. Dishman, *Class Action Squared: Multistate Actions and Agency Dilemmas* 6 (J. Reuben Clark Law Sch., Brigham Young Univ. Research Paper No. 18-21, 2018). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252149## [https://perma.cc/LH4N-8N9J] (discussing the incentives of state attorneys general to aggregate claims on behalf of citizens).

imposition effectively forces them to internalize those social costs.[153] It is therefore critical that discovery theorists incorporate the social costs of discovery into their analyses in situations where pretrial cost disparity favors plaintiffs substantially.[154]

V. CONSIDERING THE FUTURE

The primary problem with analyses of the foregoing sort is that they tend to make both prediction and prescriptive recommendations extraordinarily difficult. After all, the first four Parts of this Article offer detailed arguments *against* making aggressive predictions and strong normative claims. At the same time, however, I do have several tentative thoughts regarding the future of this scholarly conversation, and a few even more tentative thoughts about the future of discovery in light of its potential social value.

A. The Future of the Scholarly Conversation

First, it is important to remember that U.S. federal civil litigation does serve a social purpose and that Congress's relatively frequent use of EPRAs is a clear indication that the questions Burbank and Farhang raise are important. The fact that I reject their apparent conclusion that the current empirical record calls for a particular outcome does not lessen the importance of their work in highlighting the issue. Federal civil discovery *does* serve social purposes, and it is vital that commentators consider those purposes when evaluating existing or proposed discovery rules.

Second, as Farhang noted in oral remarks presented in conjunction with a public discussion of the Burbank and Farhang *Counterrevolution* paper, careful empirical research—even research attempting to engage meaningfully with the concerns I have raised—while important, is of potentially limited value in answering some of the most important questions surrounding questions about the "right" quantum of discovery.[155] Farhang correctly notes that "private litigation, enforcing statutes, involves core questions about how

153. *See* Stancil, *supra* note 70, at 128 ("The plaintiff's external costs of suit are largely dependent upon the reputational consequences the plaintiff and her attorney will suffer they file a frivolous claim.").

154. *See id.* at 148 (examining how the consideration of social costs can inform pleading parameters and limit the cost of litigation).

155. *See* Sean Farhang, Professor of Law, Berkeley Law, Response by Professor Farhang, Remarks Before the Pound Civil Justice Institute's Annual Forum for State Appellate Court Judges (July 23, 2016), *in* WHO WILL WRITE YOUR RULES?, *supra* note 7, at 43 (expressing doubts that a strictly scientific approach to this issue is sufficient).

aggressive and assertive and interventionist the American regulatory state is going to be."[156] This Article is largely a critique of attempts to stretch ambiguous historical or empirical evidence to promote strong normative claims such evidence does not support. That does not mean that expressly normative conversations are inappropriate. In fact, the difficulties I have identified as inherent in interpreting the historical record and obtaining reliable empirical evidence suggest that we cannot wait for those sorts of answers. Thus, it is incumbent upon commentators and other stakeholders to "embrace the normative."

My plea, however, is that we elevate the normative conversation in two key ways. First, all sides need to engage fully with the relevant counterarguments. For conservative commentators, for example, this may mean taking time to consider carefully the implications of information asymmetry as an impediment to potentially valid claims. For liberal commentators, this may require engagement with the social *costs* associated with discovery rather than focusing entirely on the social *benefits*. As a corollary, if commentators choose to reject this sort of engagement, they should do so openly and honestly. Procedural law derives much of its power from perceptions of its neutrality, regardless of whether such perceptions have ever been accurate in the abstract. It is tempting in the extreme for stakeholders to trade on those perceptions by casting ultimately contestable normative preferences in the neutral language of procedural reform. But these mischaracterizations do enormous damage to the procedural enterprise as a whole. The fact that one's heartfelt normative preferences might not be politically palatable should be irrelevant.[157] Going forward, commentators should either engage counterarguments directly or explain honestly why they feel as though such counterarguments are irrelevant.

B. The Future of Discovery in Light of "Social Benefit of Private Litigation" Claims

It is far harder to offer meaningful thoughts on the ways a "social benefits" theory should inform the direction of discovery in the future.

156. *Id.*

157. For example, a hypothetical law and economics–influenced conservative commentator may believe that the net social costs of some category of litigation overwhelm any potential benefits and may prefer to significantly curtail or even entirely eliminate litigation activity in that area as a result. Conversely, a hypothetical liberal commentator may prefer a genuinely redistributive approach to litigation and may not care about costs incurred by wealthy corporate defendants as a result of litigation. For either commentator, the political costs of explaining their full position honestly would be high. Temptation would therefore be strong to suggest a seemingly neutral procedural solution that they believe or know would have the desired effect.

On one hand, I am tempted to suggest that the inherent uncertainties attendant to the questions raised by such a theory imply that we cannot and should not give "social benefit" considerations any particular primacy of place in crafting the discovery rules of the future. At the same time, however, private enforcement is definitely a part of Congress's social calculus, and discovery does play an important role in private enforcement.

As a result, we should not ignore social benefit concerns entirely going forward, but we should not give them too much weight either.[158] For all their theoretical importance, social benefit concerns are enticingly amorphous when compared with traditional modes of analysis that focus on intralitigation, interparty dynamics. In certain circumstances, reliance upon social benefit concerns to justify liberal discovery reforms might amount to little more than smuggling in contestable and empirically suspect normative preferences through the back door. At the very least, we should be reflexively skeptical of reform efforts predicated on social benefit grounds.

My final thought is both caution and comfort: we must always remember that we live in a dynamic, ever-changing world. In the context of this Article, that dynamism is evident in at least four separate but interrelated areas. First, social mores change over time. Things that offended social sensibilities yesterday may not do so tomorrow. Second, underlying social *conditions* change, and we hope that at least some of those changes are a direct product of legislative attempts to address social problems. Third, litigation dynamics as a whole change. The creation of new causes of action and (to a lesser extent) the diminishing importance of some older types of claims means that the appropriate procedural approach is always changing as well. Fourth, technologies change in ways that affect litigation dynamics significantly. The explosion of electronically stored information that came with the arrival of the digital age disrupted litigation dynamics in one way. The increasing viability of algorithmic search and technology-aided review are currently disrupting the same dynamics in the opposite direction.

Because the world is always changing, our approach to discovery and to its proper role in advancing broader social preferences must change with it. It seems unlikely that the direction of our approach to

158. Whatever it may say about my perspective on the civil litigation enterprise, I am here reminded of C.S. Lewis's famous quote about devils: "There are two equal and opposite errors into which our race can fall about the devils. One is to disbelieve in their existence. The other is to believe, and to feel an excessive and unhealthy interest in them." C.S. LEWIS, THE SCREWTAPE LETTERS ix (HarperCollins 2001).

discovery over time should resemble a one-way ratchet in which the approach is ever more restrictive.[159] Or ever more liberal.

159. Burbank and Farhang argue that recent procedural rulemaking reforms have been uniformly conservative in nature. *See* BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 7, at 170 ("[P]rocedure has become an important part of conservative justices' agenda in the area of litigation."). While I am not sure I agree with the way in which they have coded recent discovery amendments as "conservative," a full discussion of that aspect of their work is beyond the scope of this Article. Moreover, I share some of their misgivings regarding the makeup of the various committees that together comprise the rulemaking process. *See* Stancil, *supra* note 51, at 71–76 (explaining that there is little congressional oversight over the rulemaking committee). That said, the fact that recent reforms have had largely or entirely conservative valence does not necessarily mean that they were wrong. Nor does it mean the biases with which Burbank and Farhang and I are all concerned are necessarily present in the current rulemaking apparatus. It will be interesting to watch the committee rulemakers work over the next generation or so, as technology-assisted review works its way through the litigation landscape. It is at least possible that many of the discovery cost concerns animating modern conservative reform efforts will decrease or even vanish as courts and litigants embrace ever-improving aided-review technology.