ABSTRACT

Pending changes in Federal Rule of Civil Procedure 26 have sparked substantial controversy. Many fear, and others hope, that these changes will lead to reduced access to discovery and a shift in the burden of paying for discovery toward (plaintiff-)requesters. Much debate over the discovery reforms has turned on empirical claims concerning how expensive discovery is under status quo rules, and thus whether a shift in cost allocation is warranted. But this debate may be beside the point.

In a world in which parties could bargain costlessly—in Coase World—wasteful discovery simply would never happen, regardless of the discovery cost allocation rule in place. This means that cost allocation rules would determine only the distribution of parties’ payments to each other. In other words, only normative distributional questions would be implicated by the choice of discovery cost allocation rules. This is a radically different picture of the role of discovery cost allocation rules from what one would gather from decades of scholarly or rulemaking discussions.

Of course these conclusions necessarily hold only in the idealized Coase World of zero bargaining costs, which may seem far-fetched. However, the presence of pre-discovery settlements of the overall claim—a ubiquitous aspect of both day-to-day litigation and the policy discussion over discovery rules—may serve as a close substitute for discovery-only settlements. If so, then the basic Coase World analysis would be a decent approximation, both empirically and normatively.

I explore both the limitations and the real world implications of applying Coasean analysis to discovery policy, and I conclude that we have much to learn from discovering Coase.

*I am grateful to some people whom I will name in the future.
TABLE OF CONTENTS

Introduction .......................................................................................................................... 1

I. CONTROVERSY OVER PENDING AMENDMENTS TO RULE 26 ...................................... 4

II. A COASEAN ANALYSIS OF DISCOVERY COSTS ......................................................... 11
   A. Overdiscovery Wastes by Definition: It Costs the Responder More
      Than the Requester Gains .......................................................................................... 14
   B. In Coase World, Parties Would Cut Deals to Avoid Wasteful
      Discovery .................................................................................................................. 15
   C. In Coase World, Legal Rules—Who Pays for Discovery—are
      Irrelevant to whether Discovery Occurs ...................................................................... 18
   A. But Legal Rules are Normatively Relevant in Coase World, because
      They Affect the Distribution of Gains and Losses from Litigation ......................... 19

III. LIMITATIONS OF THE COASEAN ANALYSIS .......................................................... 20
   A. Do We Ever See “Discovery Settlements”? ......................................................... 20
   B. Bargaining Problems ............................................................................................... 20
   C. Social Costs and Benefits of Discovery are Not All Accounted for in
      Coasean Bargains ..................................................................................................... 22

IV. COASEAN ANALYSIS IS USEFUL EVEN GIVEN ITS LIMITATIONS ........................... 24
   A. Overall Settlement of the Case Pre-Discovery is a Substitute, if an
      Imperfect One, for Discovery Settlements ................................................................ 24
   B. Coase World Provides a Useful Analytical Baseline ............................................ 26

V. IMPLICATIONS OF THE PROPORTIONALITY STANDARD FOR PRIVATE
   ENFORCEMENT ............................................................................................................. 29

Conclusion .......................................................................................................................... 34
INTRODUCTION

Discovery policy in federal civil actions has been a matter of ongoing controversy for decades. The most recent battle in the discovery wars concerns a now-pending package of amendments to the Federal Rules of Civil Procedure.\footnote{The pending amendments have been approved by the Supreme Court and are set to take effect on December 1, 2015, unless Congress proactively rejects them—a possibility that seems remote as of this writing.} In this Article I shall focus on two aspects of that package, both of which involve changes to Rule 26, which, \textit{inter alia}, sets forth the scope of discovery and the conditions under which adversarial discovery requests may be avoided via protective order.\footnote{The overall amendment package makes changes not only to Rule 26, but also to Rules 1, 4, 16, 30, 31, 33, 34, 37, 55, and 84, and the Appendix of Forms. See Order transmitting proposed amendments to the Federal Rules of Civil Procedure (April 29, 2015), available at \url{http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf}.}

The first change on which I shall focus involves what has become known as the proportionality standard, whose text has remained largely unchanged but which has been relocated within Rule 26(b) so that it appears in the heart of the scope definition rather than as a limitation. Further, there is an extensive Committee Note emphasizing the need for judicial vigilance with respect to proportionality, implicitly suggesting that judges have failed to live up to their obligations to restrict what the 1983 Committee Note referred to as “overdiscovery”. The second change involves new textual authority, in Rule 26(c)(1), for district courts to use “the allocation of expenses” as a component of an order protecting against “undue burden or expense”.

I shall take it as given that these changes to Rule 26 can be expected to lead to new limits on access to discovery, or increased cost shifting to discovery requesters, suggested by (i) the Advisory Committee’s emphasis in its Notes and memoranda, (ii) the supportive public comments from the business community, and (iii) the bitter opposition from lawyers and groups that typically represent plaintiffs in cases in which defendant-provided discovery is substantial, costly, and/or important. I shall not take a position on whether such changes are normatively warranted, nor on whether the empirical claims made by partisans on each side are accurate or convincing.

What I shall do is suggest that there are good reasons to think the effects of discovery policy changes have a good deal more to do with distributional considerations than with empirical issues related to actual expenditures on discovery. To understand why, it’s necessary to import some basic lessons about the relevance of legal rules in situations in which parties can bargain. In short, it’s necessary for proceduralists and practitioners to discover
Coase.

In an idealized world—what I refer to below as Coase World—with no impediments to bargaining, discovery will occur if and only if its requester believes its value exceeds the net cost the responder places on producing it. This means that the discovery cost allocation rule is irrelevant to whether discovery actually occurs. By construction, overdiscovery is wasteful, in the sense that it costs the responder more to provide the discovery than it is worth to the requester. In such situations, there always exist “discovery settlements”—cash-for-stipulation bargains that would make both parties better off. Given frictionless bargaining, which is the linchpin of Coase World’s ideal type, mutually desirable bargains always happen when they are possible. So in Coase World, wide application of proportionality and cost shifting would have no impact at all on the actual incidence of overdiscovery (that incidence would be zero no matter what).

What the cost allocation rule does determine in such a simplified world is the distribution of “payoffs” across requesters and responders. Shifting to rules that sometimes deny a requester’s right to discovery, or impose the costs of providing discovery on them, will make requesters worse off and responders better off. In Coase World, this is all that an argument about proportionality and cost shifting would be about. I discuss all these ideas in Part II of this paper.

Coase World is not the real world, of course. As I discuss in Part III, there are limitations on the immediate applicability of idealized Coasean analysis concerning discovery settlements. For example, bargaining isn’t

---

3 As I explain below, this net cost includes both direct costs of production and the responder’s expectation concerning the impact of the discovered information on the ultimate case outcome.

4 There is an enormous literature on the Coase Theorem, of course. And there are substantial law-and-economics literatures modeling discovery and modeling overall case settlement; for recent reviews, see, e.g., Bruce H. Kobayashi, The Law and Economics of Litigation, George Mason University Law and Economics Research Paper Series 15-20 (June 1, 2015, rev’d June 15, 2015); Abraham L. Wickelgren, Law and economics of settlement, in J. Arlen, ed., RESEARCH HANDBOOK ON THE ECONOMICS OF TORT LAW, Edward Elgar Publishers (2013); Andrew F. Daughety and Jennifer F. Reinganum, Revelation and suppression of private information in settlement-bargaining models, 81 U. Chicago L. Rev. 83 (2014); and Kathryn Spier, Litigation, HANDBOOK OF LAW AND ECONOMICS, A. Mitchell Polinsky & Steven Shavell, Editors (200X). There is also an insightful discussion of the role of the Coase Theorem as relates to the empirical relevance of debates over whether the American rule or the British rule is more efficient; see John J. Donohue, Opting for the British rule: Or, if Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 Harvard L. Rev. 1093 (1991). However, aside from my own contemporaneous companion paper to this Article, Jonah B. Gelbach, Can Simple Mechanism Design Results be Used to Implement the Proportionality Standard in Discovery? J. Inst'l & Theor. Econ. (forthcoming), I am aware of no economic analysis that has treated the possibility of discovery-only settlements.
really costless. And in the real world there are sometimes external costs and/or benefits to litigation. That is, people who are not parties to the litigation are sometimes affected by discovery. These people might have a hard time bargaining with parties, and vice-versa, so that Coasean bargains aren’t possible in such external-effects situations.\(^5\)

However, as I argue in Part IV, Coasean analysis is still very useful. First, overall case (or claim) settlement can function as a substitute for discovery-only settlements. This is a familiar idea: for example, supporters of the Rule 26 amendments often suggest that high discovery costs are used as leverage to jack up settlement values.

That observation is usually deployed to suggest something is wrong with our discovery system.\(^6\) But it yields at least one surprising insight when considered from the right vantage point. If the threat of high discovery costs leads to pressure to settle, then removing the threat will alleviate the pressure. Cases that aren’t settled are cases that get litigated. So in at least some cases, discovery rule changes that reduce pressure on defendants to settle pre-discovery will lead to longer, more costly litigation. In at least some cases, the relevant comparison isn’t between a pre-discovery settlement for a lot and one for a little, but rather between a pre-discovery settlement for a lot and a case that litigates with restricted discovery. Overall litigation costs borne by the judicial system and the parties certainly might be greater in the latter case. Thus, when the real world does not match up to Coase World, there is no guarantee that the discovery cost allocation rule changes coming down the pike will reduce litigation costs. They might well increase overall costs, on top of whatever distributional effects they have.

Second, I shall argue that Coase World provides a useful analytical baseline for understanding the real world. That is, understanding how we would assess discovery cost allocation rules in Coase World gives us clues as to how we should assess them in the real world. To the extent that discovery use in the real world and in Coase World tend to be similar—say, because of pre-discovery overall settlements—we can use Coase World’s analytic simplicity as a proxy for policy choice in the real world.

A final issue I address in this paper concerns federal statutes providing for private enforcement. These statutes would be toothless in the absence of

\(^5\) It is well known that private and social values of discovery generally diverge under such conditions. See, e.g., Steven Shavell, The Fundamental Divergence between the Private and the Social Motive to Use the Legal System, 26 J. LEG. STUD. 575 (1997).

\(^6\) A classic example of such suggestion is Judge Frank H. Easterbrook’s Discovery As Abuse, 69 B.U. L. Rev. 635 (1989), which analyzes how settlement value can be increased by the threat of “impositional” discovery, which is discovery that is worth less to the requester than it costs the responder.
robust civil litigation quartered by private plaintiff’s attorneys. Cutting back on discovery—whether by limiting it or shifting costs—has the potential to undermine the enforcement of public law. Of course this possibility raises what might loosely be considered substantive concerns. In addition, there are potentially important questions related to the appropriateness of undermining private enforcement statutes via the Rules Enabling Act process, which is essentially administrative lawmaking practiced by judges. I sketch some considerations related to these observations in Part V, self-consciously raising questions rather than providing answers.

I turn now to a brief review of the controversy over the pending amendments to Rule 26.

I. CONTROVERSY OVER PENDING AMENDMENTS TO RULE 26

For several decades, controversy has alternately simmered and raged concerning the cost of civil discovery in the American federal courts. Within a few years of the 1970 amendments’ expansion of discovery, a movement began toward what Professors Steven Burbank and Sean Farhang have called retrenchment. In the 1970s, this movement and its objectives were well illustrated by the 1976 Pound Conference, which has been described as “the most important event in the counteroffensive against notice pleading and broad discovery.”

Opposition to liberal discovery was pronounced enough that three Justices dissented from the Supreme Court’s 1980 order amending the Rules on the ground that the 1980 amendments did not do enough:

Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules.

---


8 Powell, J., joined by Stewart, J. and Rehnquist, J., dissenting from Order of April 29, 1980, Amending Civil Rules, 446 U.S. 997-998 (1980) (stating that “the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue” and endorsing a statement by the ABA Section of Litigation that “the serious and widespread abuse of discovery” would “remain largely uncontrolled”). Cf. Advisory Committee Note to the 1980 Amendment to Rule 26 (stating that “[t]he Committee believes that abuse of discovery, while very serious in certain cases, is not so
In 1983, Federal Rule of Civil Procedure 26(b)(1) was amended to include a cost-benefit approach to determine whether discovery requests should be disallowed. The Advisory Committee Note explained that this text was meant to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices.9

Since then, the Federal Rules have been amended a number of times with an eye toward addressing concerns about the extent to which discovery is used. In fact, the current part of Rule 26 that concerns proportionality is, textually, nearly identical to the text that the proposed amendment will effect. The proposed rule's text, which will appear in Rule 26(b)(1), instructs judges to allow “discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case,” where proportionality is to be determined considering [1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' resources, [5] the importance of the discovery in resolving the issues, [6] and whether the burden or expense of the proposed discovery outweighs its likely benefit.10

As discussed in detail in a forthcoming paper I coauthored with Professor Bruce Kobayashi,11 some of these six criteria are objectively determinable; for example, in a damages action, the amount in controversy is often alleged in the complaint. Some criteria are objectively determinable

generally as to require such basic changes in the rules that govern discovery in all cases”). For a quick walk through certain details of the amendments to the discovery rules, see Wright & Miller, § 86, The Scope of Discovery, 20 Fed. Prac. & Proc. Deskbook § 86.9
Fed. R. Civ. P. 26, Committee Note to 1983 Amendment.10
in principle but could be difficult for the court to observe in practice; for example, in many situations it will be difficult to assess the “importance of the discovery in resolving the issues,” since doing so in a full but-for causal way would require running the case all the way to judgment both with and without the information sought in discovery.

Other criteria involve important normative dimensions. For example, the cost-benefit part of the text, concerning whether the burden of discovery outweighs its likely benefit, explicitly compares the responder’s burden to the requester’s benefit. There is no way to use such information in an overall consideration without assigning weights to the parties’ interests. Further, the criterion involving “the importance of the issues at stake in the action” signals that in determining the limits to discovery, judges are meant to take into account effects of discovered information outside the immediate context of the litigants who are before the court. There are many realms—e.g., antitrust, employment discrimination, constitutional civil rights litigation, and product liability—in which follow-on litigation (or even legislation) might be importantly affected by the production of information through discovery in a particular lawsuit.

If discovery responders regularly lodge proportionality objections, federal judges will be required to referee disputes over requests for discovery using an amorphous and subjective balancing approach based primarily on the text just described. Such a development raises two types of concerns. First, parties will spend a lot of time arguing over, and judges will have to spend a lot of time adjudicating, questions concerning discovery—Will it happen? Who will pay for what share if it does?—that are generally taken for granted under the status quo.

Second, whatever the merits of reducing discovery burdens on defendant-responders, there are countervailing concerns about plaintiff-requesters’ access to justice, as well as the value to the public of information discovered in private litigation. These concerns, together with the views of others that discovery is too expensive, help explain why the

---

12 The relevant part of the proposed amendment is the “the importance of the issues at stake in the action” text; see TAN 10, supra.


pending amendments were the subject of thousands of public comments.

The level of controversy is especially notable given the already noted fact that, for all the sturm und drang, the changes to the proportionality standard involve little textual change. Indeed, the Advisory Committee did not pursue calls for more sweeping changes. If the proportionality changes


15 The change to Rule 26(c)(1) to allow protective orders requiring cost-shifting as a condition of discovery, on the other hand, would clearly be important in its own terms if its use became frequent or credible. However, the Chair of the Advisory Committee has noted that “Rule 26(c)(1) already authorizes an order to protect against ‘undue burden or expense,’ and this includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding.” Hon. Judge David G. Campbell, Memorandum to Judge Jeffrey Sutton Re: Proposed Amendments to the Federal Rules of Civil Procedure, June 14, 2014, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf, at Rules Appendix B-10.

16 The Advisory Committee’s Discovery Subcommittee has discussed requester pays issues but has also not adopted a broad endorsement; see the agenda book for the November 7-8, 2013, meeting (available at http://www.uscourts.gov/file/15485/download) (“The idea behind considering some sort of explicit requester pays provision is that there may … be a significant number of instances in which discovery requests are made even though the likely importance of the information being sought is dwarfed by the cost of complying with the discovery request. Indeed, there are even assertions that some may deploy broad discovery requests precisely to impose costs on adversaries…. But it is not at all clear that ‘cost infliction’ happens with significant frequency, even though there probably are instances in which one might say it has occurred.”). For proposals to move to a requester pays system, see Rebecca A. Womeldorf, A REQUESTER-PAY DEFAULT: COMMON-SENSE DISCOVERY REFORM CAN REDUCE UNDESIRABLE LITIGATION INCENTIVES, 28 Legal Backgrounder (2013) (accessed on June 23, 2015 at http://www.wlf.org/publishing/publication_detail.asp?id=2380) (“One of the most effective ways to limit excessive, inefficient discovery would be to change the current default under the Federal Rules that a litigant may ask for very liberal discovery, and pay for none of it. Shifting some discovery costs from the ‘producer’ to the ‘requester’ would incorporate a largely self-executing check on expense, inefficiency, and unfairness in discovery. It’s simple, and it makes sense.”). See also “Cost Allocation,” posted on website of the Lawyers Committee for Civil Justice, accessed at http://www.lfcj.com/cost-allocation.html on June 23, 2015; Jon Kyl, “A Rare Chance to Lower Litigation Costs,” The Wall Street Journal, accessed on June 23, 2015 at http://www.wsj.com/articles/SB10001424052702304049704579321003417505882; and Martin H. Redish, Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure, 64 Fla. L. Rev. 845, 876 (2012) (“[I]t is necessary to turn to an alternative method of discovery control that has mysteriously been all but ignored since the very inception of the Federal Rules: the allocation of the costs of discovery not to the responding party (the overwhelmingly accepted practice), but rather to the requesting party.”).
have an impact, it will in large part operate through the jawboning in which the Advisory Committee has engaged, with the Standing Committee’s evident blessing.

In any case, the primary change is the migration of the relevant language from Rule 26(b)(2)(C)(iii)’s descriptions of Limitations on Frequency and Extent” of discovery into Rule 26(b)(1)’s “Scope in General” discussion. Some have argued that there is an important difference between (i) first defining discovery’s general scope and then defining limits, and (ii) defining discovery’s scope in a way that incorporates a limit. I do not see this distinction as particularly important; a simple Venn diagram shows that “the part of set A that doesn’t intersect set B” and “A except for B” are the same thing. But that is not to say that there aren’t good reasons why substantial controversy over the proposed amendment occurred. I suspect that the controversy stems from the sense that many have—on both sides—that the Advisory Committee’s reemphasis on proportionality might now gain the traction in the district courts that the concept seems to have lacked. Consider the following characterization of public comments on the proportionality text by the Chair of the Advisory Committee in a 2014 memorandum:

Many favored the proposal. They asserted that costs of discovery in civil litigation are too often out of proportion to the issues at stake in the litigation, resulting in cases not being filed or settlements made to avoid litigation costs regardless of the merits. They stated that disproportionate litigation costs bar many from access to federal courts…. They noted that the proportionality factors currently found in Rule 26(b)(2)(C)(iii) often are overlooked by courts and litigants.

---

17 Rule 26(b)(2)(C) states that “the court must limit the frequency or extent of discovery otherwise allowed … if it determines that: … (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

18 The text in proposed-amended Rule 26(b)(1), states that “[p]arties may obtain discovery regarding [otherwise appropriate] matter[s] that [are] … proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

Many others saw proportionality as a new limit that would favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy uniform application…. Some argued that the proposed change is a solution in search of a problem – that discovery in civil litigation already is proportional to the needs of cases.\textsuperscript{20}

As these comment summaries indicate, the debate over civil discovery policy has been fought largely on empirical ground. However, the empirical grounding of claims about controverted questions has not always been compelling. The debate has focused primarily on question of how much discovery costs, in general. For example, a number of participants in this debate have argued that discovery is really expensive,\textsuperscript{21} while others have stressed empirical evidence suggesting that for most cases, expenses related to actually conducted discovery are relatively slight.\textsuperscript{22}

Whatever the facts concerning the expense associated with present discovery policy, that expense is arguably a side point with respect to discovery policy choices. The amount of money spent on discovery is not obviously the most relevant question for discovery policy. If there’s lots of unlawful or otherwise litigable behavior, then it will be natural for a lot to be spent on discovery.\textsuperscript{23} I suggest that the following questions are at least as relevant, and likely moreso:

(i) Does discovery cost more than it is worth?
(ii) Will discovery that costs more than it is worth actually happen


\textsuperscript{22} To be sure, it would be well to design a civil justice system that induces people to behave in socially desirable ways with respect to both litigation behavior and primary behavior. Certainly, it might be possible to improve on a system in which lots of resources are consumed by discovery because there is lots of litigable behavior. Perhaps a different system would lead to less discovery because it somehow deterred litigable behavior in the first place. Further development of this point is beyond the scope of the present paper.
(iii) What are the normative implications of discovery reforms?

I start with the first of these questions. For discovery to cost more than it is worth requires that we have some way to determine what discovery is actually worth. As discussed in my paper with Professor Kobayashi, undertook such a valuation—which is at the core of the proportionality standard—is no mean feat. Measurement problems, analytical problems, and problems related to the normative subjectivity of applying the standard will crop up regularly in proportionality disputes. At a minimum, we can say that there are surely instances in which discovery is both quite expensive and worth requiring. In some instances the discovery will be very useful in determining the proper adjudication of an overall claim in litigation whose primary impact is on the litigating parties. In other cases the discovery will have important direct spillovers outside the litigation itself—as the proportionality standard itself and the Committee Note explaining it both recognize. And still others will create incentive effects related to both primary behavior and litigation behavior in future events. None of this is to suggest that every costly discovery request is worthwhile. The point is simply that worthiness and the level of cost are not the same thing.

Much of my analytical focus in this paper is on the second question: Will discovery that costs more than it is worth actually happen with substantial frequency? In what I refer to as “Coase World” below—a world in which cash-for-stipulation bargains can be easily struck—I shall show that wasteful discovery would never actually occur. In that world, it turns out, discovery policy reforms implicate only the third question just above: What are the normative implications of discovery reforms? In Coase World, reforms that shift the burden of paying for discovery onto requesters do affect who gains and who loses from litigation, and how much.

For reasons I shall discuss infra, Coase World and the real one are certainly different. Still, we shall see that there are valuable insights to be gained about discovery reform from an analysis of Coase World. And, as I

\[24\text{ See note 11, supra.}\]

\[25\text{ The Committee Note to the proposed Rule 26 amendment states that “It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized ‘the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.’”}\]

\[26\text{ See Part IV, generally.}\]
shall also discuss, settlement of overall claims might function as a kind of imperfect substitute for discovery settlements. Indeed, criticisms of current discovery cost allocation rules often are based partly on the settlement leverage that threatened discovery expense creates. But we shall see that changes in discovery cost allocation rules might have surprising effects—for example, by causing more litigation costs to be incurred, rather than less. The law of unintended consequences applies in procedural law as anywhere else.

In sum, the debate over discovery reform has focused to a large extent on the wrong questions. And the answers to the right questions can be surprising.

II. A COASEAN ANALYSIS OF DISCOVERY COSTS

I begin this Part with a brief review of the ideas that travel under the moniker of the Coase Theorem. These ideas are connected to the problem of negative externalities: actions by one person that harm others, with no market mechanism functioning to ensure that the first person internalizes the cost of the harm. It is easy to show that in such a situation there will be too much of the harmful activity—too much in the sense of Pareto inefficiency. This means that in principle, it will be possible to design policies that will lead to less of the harmful activity while leaving everyone at least as well off and making some people better off. Indeed, before Coase it was widely accepted by economists that only government interventions such as regulations or taxes could solve such a problem.

Coase’s first key insight was that government interventions are necessary to solve negative externalities only if there are important bargaining frictions. Suppose we live in what I shall call “Coase World”—a world in which anyone harmed by a negative externality can bargain costlessly with the person who generates the externality. The Coase Theorem says that in Coase World, resource allocation will be Pareto efficient even if potential negative externalities exist. The very nature of

\[27 \text{See Part IV.A.}
\]

\[28 \text{I note that I am not here talking about the increased litigation costs that will occur if parties wind up moving for many more protective orders (responders) or moving to compel (requesters). The possibility that the amendments will cause more such litigation activity is a real one, and has been ably noted before; see, e.g., comments by Arthur Miller and Sherilynn Ifill reported in Alison Frankel, \textit{Debate sharpens on proposed changes to federal rules on discovery} (Reuters, November 6, 2013) (accessed at http://www.lfcj.com/uploads/3/8/0/5/38050985/reuters_debate_sharpend_on_proposed_changes_to_federal_rules_on_discovery_11613.pdf on June 25, 2015). Instead, I am talking about the possibility that the amendments will lead some cases that would have settled pre-discovery to instead continue on through the litigation process.}\]
Pareto inefficiency is that those who are harmed would be willing to pay those who cause the harm to knock it off, and that these payments would be greater than the value to the harmers of continuing their harmful activity. Since bargaining costs are zero in Coase World, there is nothing to stop such bargains from occurring. So those harmed will pay the harmers to reduce harm as long as the harmers’ valuation of the right to cause harm exceeds the magnitude of the harm caused. The end result is Pareto efficient by construction. Thus in Coase World negative externalities will be solved by frictionless, freely operating markets.

Notice that this means no governmental limits on harmful activity are needed to achieve efficient resource allocation in Coase World. Another way to put it is that in Coase World, the Pareto efficient allocation of resources—the level of harmful activity—holds irrespective of the legal rules that govern harmful activity. As long as parties are allowed to make voluntary bargains, they will find their way to the efficient use of resources by contracting around any legal rule that would lead to any other resource use. This is a second, if derivative of the first, key insight related to the Coase Theorem.  

A third point is that the distribution of welfare can be importantly affected by the choice of legal rule—even though the activity in question won’t be. Suppose there are exactly two possible legal rules: strict liability and no liability. Under strict liability, those causing non-contracted harm must compensate the victims of the harm; under no liability, harmers never have to compensate victims for non-contracted harm. Suppose that the would-be victim of a negative externality values stopping the harm more than the would-be harmer values taking the activity that causes the harm. The Coase Theorem tells us that in Coase World the harm will not occur, regardless of whether the effective rule is strict liability or no liability. But notice that under strict liability, the would-be victim has the right not to be harmed, while under no liability she does not. Therefore, under strict liability the would-be victim needn’t pay anything to stop the harm, whereas under no liability she must pay the would-be harmer an amount sufficient to induce agreement not to harm. Thus one legal rule requires payments from the would-be victim and the other does not. The choice of legal rule may not affect whether the harm occurs, then, but it has clear distributional—and thus normative—implications.  

---

29 Of course, there is an implicit assumption here not just that bargains are costlessly struck, but also that contracts are costlessly enforced.

30 Notice that if the value of the harm-causing activity to the harmer were greater than the cost to the would-be victim, then in Coase World the activity will occur regardless of the legal rule in place. However, the choice of legal rule again has important distributional effects: under strict liability, the harmer must buy the right to cause the harm, whereas
We can sum up this discussion with the following observations. First, the Coase Theorem tells us that with costless bargaining—in Coase World—resource allocation will always be Pareto efficient, even when there are potential negative externalities. Second, this means that in Coase World, legal rules are neutral with respect to resource use. Third, the distribution of welfare is importantly affected by the choice of legal rules: which legal rule we choose will determine whether compensating payments must be made, and by whom. A fourth point follows from the first three: in Coase World, there is an important analytical separability between positive and normative questions related to legal rules.

In the rest of this Part, I shall conduct an analytical thought experiment. In this experiment, I treat parties to litigation as inhabitants of Coase World with respect to discovery. This means I shall imagine that parties are able to make costless bargains over whether discovery will be conducted. The mechanism for deals avoiding discovery under the responder pays rule is what I shall call “discovery settlements”—agreements by the parties to stipulate to a would-be requester’s foregoing of discovery, in return for a payment from the would-be responder.

In considering the effects of renewed emphasis on the proportionality standard in particular, and the pending amendments in general, it is worth distinguishing two different types of ideal-type representations of these amendments. The more moderate representation, and the one on which I shall focus, treats the amendments to Rule 26(b) and (c) as tantamount to a shift to a requester pays rule. Under requester pays, requesters have a right to discovery but have to pay the direct costs of producing it.\(^{31}\)

The more extreme rule, which I shall discuss only in passing, views the proportionality standard as imposing what I shall call the “responder can refuse” rule. Under this rule, the responder can refuse discovery requests, so they will happen only if either (i) the responder believes producing the requested material is in the responder’s own interest,\(^{32}\) or (ii) the requester agrees to pay the responder enough to convince the responder to do so. The key difference between the requester pays and responder can refuse rules is that under the latter, the price the requester must pay will reflect the responder’s (ex ante) assessment of the damage the discovered material would do to its case.

\(^{31}\) I shall ignore the problem of determining the actual cost of producing discovery, though in the real world this problem is likely to be important, and litigated, in at least some cases.

\(^{32}\) See Bruce Hay *Civil Discovery: Its Effects and Optimal Scope*, 23 J. Leg. Stud. 481 (1994) and Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 RAND J. Econ. 183 (1989), for discussions of conditions under which voluntary production will occur, even of information that tends to demonstrate liability.
The results of the basic analysis conform to the Coase Theorem analysis above. Whether discovery occurs will turn not on who pays for it, but rather who values it most. If the requester values discovery most, discovery will occur; otherwise not. But the rule that determines who must pay for discovery is important, because it affects the distribution of payoffs from litigation. Thus discovery cost allocation rules are very important, but for different reasons from those often cited in policy discussions.

A. Overdiscovery Wastes by Definition: It Costs the Responder More Than the Requester Gains

Here I introduce what I shall refer to below as Example 1. Suppose that P sues D. The parties agree that if P wins the suit, D will owe damages of $100,000. Without any adversarial discovery, P thinks she will win with probability \( \frac{3}{4} \), and D thinks P will win with probability \( \frac{1}{4} \). Assume that non-discovery aspects of litigation costs each party $20,000. Thus, P’s expected gain from litigating without discovery is $55,000.\(^{33} \) D’s expected loss from litigating without discovery is $45,000.\(^{34} \) Since the defendant expects to lose less from litigation than the plaintiff expects to gain—that is, since there is not positive surplus from settlement—the parties will not settle, and the case will be litigated.\(^{35} \)

\(^{33} \) That is, three-fourths of $100,000, which is $75,000, minus $20,000—for a final result of $55,000.

\(^{34} \) That is, one-fourth of $100,000, which is $25,000, plus $20,000—for a final result of $45,000.

\(^{35} \) Here I assume a model of settlement that is sometimes called “divergent expectations”, or “mutual optimism”. In this model, the parties are able to settle whenever there is positive surplus to be had from doing so, and they litigate otherwise. Such models are methodologically controversial in the theoretical law and economics literature, for two reasons. First, they entail the implicit assumption that the parties know each other’s valuations. This is problematic since, if settlement terms are pegged to parties’ beliefs about the value of the case, parties will often have incentives to either overstate (P) or understate (D) their assessments of case value. Second, if parties understand the first point, then they might regard their valuation estimates as private information that is strategically valuable. Consequently, a fully rational party would update her beliefs about her adversary’s valuation when she observes the adversary’s settlement offer. For example, if D offers P a settlement on terms more generous than P initially expected, a fully rational P should update her assessment of D’s value of the case, which might lead P to counter-offer rather than simply accepting. However, explicit models that take this idea seriously tend to be sensitive to modelling assumptions about the settlement bargaining process; e.g., these models sometimes assume that only one party can make an offer, which the other party can only accept or reject (rather than countering). See, e.g., the discussion in Kathryn Spier, Litigation, § 2.2.2., HANDBOOK OF LAW AND ECONOMICS, A. Mitchell Polinsky & Steven Shavell, Editors (200X). Because of the simplicity of the divergent expectations, I shall use it here unabashedly.
Now suppose that discovery is available. For simplicity, I shall assume throughout that only the defendant has discoverable information, so that the plaintiff is always the requester and the defendant is always the responder. Suppose it will cost D $30,000 to collect and provide that information, and suppose the parties agree that P’s chances of winning will rise by 20 percentage points if discovery is conducted.\(^3\) Thus, the parties agree that P’s expected value of litigating will rise by $20,000\(^3\) if P is able to use the discoverable information in litigation. Assuming away any external benefits of litigation,\(^3\) discovery of the information in question fails the proportionality standard when it is understood as requiring that discovery be cost-justified, in Judge Frank H. Easterbrook’s terms:\(^3\) it costs an additional $30,000 in direct discovery expense to provide the plaintiff with an additional benefit of $20,000. In Easterbrook’s terms, such discovery is not “cost-justified”; others use the term “overdiscovery”.\(^4\)

\[\text{B. In Coase World, Parties Would Cut Deals to Avoid Wasteful Discovery}\]

Here is the Coasean insight: If the parties can bargain costlessly, the wasteful discovery will not happen. We have seen that P expects to gain $20,000 from the discovery, whereas D expects to lose $50,000.\(^4\) There is substantial surplus available from a discovery settlement, i.e., an agreement in which D pays P to stipulate to forego discovery. And notice that such surplus would exist even if the parties had substantially different self-

\(^3\) Thus, P thinks her chances of winning rise to 95% when she has the information, while D thinks P’s chances rise to 45% with the information. What is important here is that the parties have these beliefs, and (as above) each understands that the other has the belief. There is nothing critical about the assumption that the parties agree on the 20-point increase in P’s chance of winning; the same qualitative results will hold with differences in these beliefs provided that D doesn’t think P’s increased win probability is too much less than P’s belief about that same probability.

\(^3\) That is, 20% of $100,000.

\(^3\) This issue is dic in Part III.C, infra, as well as in Gelbach and Kobayashi, Law and Economics of Proportionality, note 11, supra, and Shavell, Fundamental Divergence, note 5, supra.

\(^3\) See Frank H. Easterbrook, Discovery As Abuse, 69 B.U. L. Rev. 635, 637-38 (1989) (defining “normal discovery request[s]” as those “in which the demander's costs of pursuing the request (as it sees things) are less than the increase in the value of the anticipated judgment that the demander expects the new information to produce” and subsequently referring to such requests as “cost-justified from the perspective of the seeker”) (also defining “impositional,” “excessive,” and “abusive,” discovery requests as those that (i) are not cost-justified but (ii) are justified “from the demander's perspective” only by their “contribution to an anticipated settlement”).

\(^4\) See Committee Note ___.

\(^4\) That is, an expected $20,000 in discovery-induced gain in litigation’s results, plus $30,000 in direct costs of producing the discovery—for a final sum of $50,000.
serving beliefs about the value of discovery to P. For example, suppose D genuinely believes the discovery at issue here is completely worthless to P’s case. Even so, D’s direct cost of discovery production—$30,000—exceeds P’s subjective value of the discovery, which is $20,000. Even in this situation, then, gains from trade are there to be had.

Suppose the standard Coasean condition holds: parties are able to bargain costlessly. Then it is possible for a deal to make both parties better off. For example, suppose P agrees to drop its discovery demand, in return for which D pays P $35,000. By comparison to the no-deal world, P and D are each better off by $15,000. 42 Of course, any payment from D to P between $20,000 and $50,000 has this salutary property, so there is a range of bargains that leave both parties better off.

There is an illuminating way to understand this analysis in terms of opportunity cost. In an influential paper, Cooter and Rubinfeld argued that the responder-pays rule is likely to cause overdiscovery for a simple reason having to do with marginal economic analysis. 43 The requester doesn’t pay to provide discovery, so its marginal cost of demanding additional discovery may be as low as zero. 44 An economically rational requester might demand an amount of discovery so great that its marginal benefit is just equal to zero. But the marginal cost to the responder is certainly not zero. Therefore, under the responder-pays rule, requesters have incentives to demand too much discovery—an amount so great that the benefit of the last bit of discovery is zero, whereas the marginal cost of providing that bit of discovery is positive. Incidentally, this position is hardly confined to academics. For example, in its public comment on the proposed amendments, specifically with respect to Rule 26(c)(1), the U.S. Chamber Institute for Legal Reform stated that “The root cause of our broken discovery system is the rule that generally the producing party bears the costs of producing.” 45

This is a simple externality story, one which should be familiar to

---

42 P will get $35,000 rather than discovery she values at only $20,000, leaving her with a gain she values at $15,000. D will pay $35,000, rather than spending $30,000 to provide P with information that will increase D’s expected litigation loss by an additional $20,000; paying $35,000 to avoid a total loss of $50,000 constitutes an improvement of $15,000 for D.


44 This statement must be modified in situations in which sifting through discovered material is very costly.

When an economic actor can externalize the costs of an activity on others, it is predictable that there will be too much of that activity. Here, the discovery process is the activity, and the end result of the externality quite naturally seems to be too much discovery. Enter Coase.

It is a simple implication of Coasean analysis that externalization is a marker for a missing market. Consider the famous problem of the noisy condominium neighbors. Suppose A and B have neighboring condominiums, and A makes a lot of noise, which bothers B. It’s natural to assume that such a problem can be solved only via condominium rules and regulations. But it’s also wrong to assume that. Why can’t A and B just work it out together? Perhaps B pays A to be quiet. Or maybe they agree that A can be loud every other night. Or maybe every night, in return for which A will feed B’s cat when B is travelling. The particulars aren’t important; what matters is that when A’s actions make her neighbor B more miserable than they make A happy, the neighbors at least in principle might be able to work things out on their own. Regulations are needed to solve such inefficiencies, Coase argued, only when something prevents the people involved from negotiating a mutually beneficial solution to their problems.

Thus, regulation is needed to avoid wasteful situations only when something stops the people involved in these situations from bargaining effectively. When bargaining is costless, we need no regulation to avoid wasteful deployment of resources. Consider the most extreme form of bargaining costs: a situation in which the parties are completely unable to reach mutually beneficial deals. If one thinks discovery settlements are entirely impossible, then one necessarily thinks that the market for mutually beneficial agreements to limit discovery is entirely missing. As it happens, Cooter and Rubinfeld assumed precisely that this market is entirely missing: “Assume that the plaintiff and defendant cannot cooperate together and reach a mutual agreement to constrain discovery.”

But what if the market for discovery settlements weren’t missing? What if we imagine that it functions perfectly—that parties can bargain costlessly? Then demanding discovery causes the requester to forego whatever discovery settlement she could have obtained from the responder. And we already know that the responder would be willing to pay the requester more than the requester herself thinks the discovery is worth. This analysis shows that in a world with frictionless bargaining, the requester does, in fact, bear the marginal costs of discovery over and above its value to the requester: the opportunity cost of demanding discovery is the 

46 For further discussion, see Gelbach and Kobayashi, Law and Economics of Proportionality, note 11, supra, or Shavell, Fundamental Divergence.

47 Cooter and Rubinfeld, note 43, supra, at 452.
discovery settlement the requester foregoes. Thus when we relax Cooter and Rubinfeld’s assumption that the discovery settlement market is entirely missing, we destroy their cost-externalization case for characterizing the responder pays rule as inefficient.

One apparent implication of this reasoning is that with frictionless bargaining over discovery settlements, the discovery cost allocation rule should not affect whether discovery actually occurs. And that is exactly right.

C. In Coase World, Legal Rules—Who Pays for Discovery—are Irrelevant to whether Discovery Occurs

Suppose we change the discovery rule from responder pays to requester pays. Recall that in our example above, D expects to lose $50,000 if she provides the discovery.\(^{48}\) Recall as well that P expects to gain only $20,000 from the improvement in her case that she expects discovery will bring. So the Coase Theorem tells us that there will be no discovery under the requester pays rule—just as under the status quo responder pays rule.

Now consider two further examples. Example 2 is the same as Example 1, except that discovery costs much less to provide—only $5,000. Our requester P still values discovery at $20,000, so P will be willing to pay $5,000 to receive discovery. It might seem that discovery will happen in this situation, since P values discovery more greatly than its cost of production. But since D values \(\text{not}^{49}\) providing discovery even more greatly than P does, discovery won’t happen in Example 2, with either discovery cost allocation rule. D’s total cost of discovery is now $25,000, while P’s expected gain is still only $20,000. Even though P will be willing to pay the direct costs of providing discovery, D is willing to pay P enough to ensure that discovery does not occur.\(^{50}\)

Example 3 is the same as Example 2, except that now D thinks the discovery will be worthless to P. Then with the responder pays rule, D will be willing to pay no more than $5,000 to avoid providing discovery, while P will accept no amount less than $20,000. So a discovery settlement will not be possible under the responder pays rule, and the discovery will occur. What if we shift to the requester pays rule? By assumption, the discovery is worth $20,000 to P, and it costs D only $5,000 to provide. So P will be

---

\(^{48}\) That is, $30,000 in direct costs and $20,000 in additional expected losses to P.

\(^{49}\) That is, $5,000 in direct costs plus $20,000 in additional expected gains by P at trial, for a total of $25,000.

\(^{50}\) Under the more extreme requester pays rule, discovery also will not occur: P—the requester—is willing to pay no more than $20,000 for discovery, while D—the responder—is not willing to produce discovery for less than $25,000.
willing to pay for the discovery, and it will occur. These examples show us that regardless of who must pay for discovery, it will occur when it is worth more to P than it costs, and it will not occur when it is worth less to P than it costs.

This is the classic Coase Theorem result: with frictionless bargaining, resources will be used in a particular way only when using them that way maximizes the subjective well-being of the people who together have the right to allocate those resources. Changing the legal rules in effect does not affect this conclusion, and so the Coase Theorem shows us that legal rules have no impact on resource use. In the present example, the resources in question are whatever time, money, and physical goods would be necessary to provide discovery. The legal rule in the present context is the discovery cost allocation rule: responder pays, requester pays, or anything else. In sum, the Coase Theorem tells us that with frictionless bargaining over discovery settlements, the legal rule—who pays for discovery—would be irrelevant to whether discovery will occur.

A. But Legal Rules are Normatively Relevant in Coase World, because They Affect the Distribution of Gains and Losses from Litigation

Let us not conclude that legal rules concerning discovery rights would be entirely irrelevant, even in Coase World. As in any Coasean analysis, in ours there are major distributional effects of changing the legal rule. If the requester owns the discovery right, then she must be paid to relinquish it in those situations in which it is worth more to the responder. By contrast, if the requester must pay for discovery, then when Coasean bargains don’t occur, the requester will receive nothing—not discovery, and not any compensation for foregoing a right the requester now does not have. Thus, even in the idealized Coase World, where discovery’s occurrence is independent of legal rules, discovery cost allocation rules can have important effects. A shift away from the responder pays rule will make requesters worse off, to the benefit of responders.

To the extent that requesters tend to be plaintiffs in cases likely to have proportionality disputes, this redistribution will benefit those who are defendants at the expense of plaintiffs. Thus even in a perfectly Coasean world, one in which discovery would never occur if it were expected ex ante be wasteful, the same groups that have fought for a more cost-conscious approach would rationally line up against the same groups that have fought against it. This simple observation likely does more than any arguments over publicly available empirical evidence to explain the way battle lines over discovery amendments have been drawn.
III. LIMITATIONS OF THE COASEAN ANALYSIS

In this Part I discuss a number of limitations to the Coasean analysis conducted in the previous Part. There are several such limitations worth flagging. First, do discovery settlements of the type necessary for a fully Coasean analysis to apply—agreements in which responders pay requesters cash to stipulate to forego discovery rights—actually occur? Second, there are surely real bargaining frictions that would help explain an absence of such cash-for-stipulation agreements. Third, benefits and costs of discovery that accrue to non-parties will be ignored in Coase World.

A. Do We Ever See “Discovery Settlements”?

An obvious objection to the real-world relevance of Coase World concerns whether discovery settlements really occur. Conceived broadly enough, they surely do. Some attorneys routinely waive initial disclosures required by Rule 26(a) via joint stipulation. Docket reports for civil actions litigated in federal trial courts indicate that there is no shortage of stipulations concerning discovery generally. Further, pursuant to Rule 26(f), parties are required to attempt to develop a discovery plan relatively early in a litigation. While they need not agree on a joint plan, they are required by Rule to make good faith efforts. The occurrence of joint stipulations and discovery plans suggests the likelihood that there is meaningful bargaining over the scope of discovery.

Still, such evidence need not exhaust the set of what I have termed discovery settlements. I am unaware of any literature discussing cash-for-stipulation deals, and it is certainly possible that such deals do not abound. Of course, one possibility is that they do occur, but the parties tend to keep them quiet. An alternative hypothesis is that cash-for-stipulation bargains don’t generally occur, due to aspects of the underlying situation involved. I turn now to such aspects.

B. Bargaining Problems

Certain features of real-world litigation might limit the potential for discovery settlements. First, there may be important asymmetric information. For example, suppose D knows more than P does about whether D really is responsible for an injury suffered by P.\textsuperscript{51} Then D also

\textsuperscript{51} A sufficiently realist orientation would render this question circular—D is responsible only when D is found liable; the question of whether D really is liable is partly stuck in contested jurisprudential ideas that are largely orthogonal to my inquiry. Accordingly I shall simply assume there is an objectively correct answer to the question of
has better information than P about the value to D of settling the case. Consequently, the parties won’t have common knowledge about each other’s beliefs. In such a situation, P can only infer information about D’s knowledge from D’s litigation behavior. (Did D make a generous-looking settlement offer? If so, maybe D knows something P doesn’t. And so on.) That makes it more difficult to stomach the assumption that the parties will always bargain to efficient, surplus-realizing agreements. They might not even both realize such an agreement is possible.

Picture this scenario:

P has sued D. P thinks that if it had to litigate with only the material it already has in hand, the case is worth $300,000. P has also just made an adversarial discovery request for production related to the contents of D’s files. P believes D is well informed about these files, and P isn’t entirely sure what they will reveal, though P initially believed that access to the contents of the files would increase the value of the case by $500,000. Before complying with the request, D contacts P and offers P $700,000 if P will agree to forego it.

What should P do? On one hand, it appears that P is getting a great deal—$700,000 cash for something P valued at only $500,000. On the other hand, P might reasonably suspect that D made her surprisingly generous offer only because there is some especially damning information in the requested files. P might reasonably raise her estimate of the value of the requested material, and refuse to accept D’s offer. But D might have made the offer only because her cost of producing discovery is especially great—greater than P anticipates. So if P raises her estimate to an amount greater than D’s willingness to pay to avoid the discovery, though, then the parties will not be able to forge a discovery settlement. Thus asymmetric information about the value of discovery, or the cost of providing it, could cause discovery settlements not to occur.

A second type of bargaining friction would arise if there are multiple parties involved in the litigation. For example, suppose there are two plaintiffs—P1 and P2—suing a single defendant, D, with both P1 and P2 having the right to the discovery in question. Even if D and P1 would be able to forge a discovery settlement, P1 and P2 might have trouble agreeing on a split of the discovery settlement proceeds. This kind of problem would only get worse as the number of plaintiffs increased. A similar problem could occur if there are multiple defendants, with each being affected by the other’s discovery.
C. Social Costs and Benefits of Discovery are Not All Accounted for in Coasean Bargains

The previous two sections have suggested reasons to doubt that Coasean discovery settlements do or can be expected to occur when they are mutually beneficial. But there is another problem with the idealized analysis in Part II: mutually beneficial bargains struck by parties to a litigation might not always be socially desirable. The idealized Coase World analysis does not take into account normatively relevant effects of discovery settlements would have outside the scope of the litigation in question. 52

Further, much legal policy is built on the assumption that primary behavior is affected by the legal consequences of that behavior. By reducing the effective cost of being sued, Coasean discovery bargains could lead to insufficient deterrence of unlawful behavior or failure to take adequate care. Such an argument must be built on the assumption that the expected costs of litigation fail to properly reflect the social costs and risks of primary behavior. 53

And discovery might have yet broader social costs or benefits. On the cost side, discovery preservation rules might cause firms that expect to be sued with some frequency to keep records in ways that would not be optimal in the absence of discovery rules. As an example of discovery’s potential general social benefits, consider the role of document discovery in Minnesota’s tobacco litigation. In that case, Minnesota aggressively pursued discovery of documents that the defendants had not produced in decades of previous litigation, and

[t]he ensuing discovery battles—which resulted in the production of approximately thirty-five million pages of internal industry documents—lasted several years and continued well into trial, when the United States Supreme Court refused the industry’s request to stay an order requiring the production of tens of thousands of documents which the industry had withheld on claims of privilege. 54

52 For discussions of this point, see, e.g., Gelbach and Kobayashi, note 10, supra; Shavell, note 5, supra; or Bruce H. Kobayashi, The Law and Economics of Litigation (June 1, 2015, rev’d June 15, 2015), George Mason Law & Economics Research Paper No. 15-20.

53 For arguments to that effect, see Shavell, note 5, supra, and Cooter and Rubinfeld, note 43, supra.

The case settled a month thereafter, just before it was to go to the jury.\textsuperscript{55} The documents in question included reports from the 1950s with titles such as “Lung Cancer - Smoking Studies,” “Animal-Lung Tumor Study,” “Arsenic and/or Arsenic Compounds – Carcinogenesis Studies,” “Tobacco-Arsenic Studies,” and “Lip Cancer - Smoking Studies.”\textsuperscript{56} At the time, public understanding of smoking’s hazards was limited,\textsuperscript{57} and of course the tobacco industry insisted that smoking was not hazardous for many years after the 1964 Surgeon General’s report.\textsuperscript{58} Other documents that were produced in the case “provide details concerning RJR's efforts to conceal unfavorable scientific research,”\textsuperscript{59} as well as “evidence of the extensive control of research into nicotine by lawyers for Philip Morris.”\textsuperscript{60}

It is not difficult to believe that the ultimate release of these documents played a major role in stripping away the legal armor and political clout of the tobacco industry, which have plausibly been major factors in the reduction of tobacco use in the United States.\textsuperscript{61} It is at least possible that these events would not have occurred without discovery in the Minnesota lawsuit.

\begin{flushright}
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id., at 559.
\textsuperscript{60} Id., at 560.
\textsuperscript{61} The Minnesota tobacco litigation settlement was entered into the civil docket on May 8, 1998. Details of the settlement, and a link to the settlement itself, may be found at http://publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/minnesota-litigation-and-settlement (accessed on June 24, 2015). While marketing restrictions the defendants agreed to in the settlement applied to Minnesota only, the tobacco companies agreed, in November 1998, to a Master Settlement Agreement, whose effect was the prohibition of youth-directed marketing in any state; a copy of the Master Settlement Agreement is available at http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf. While correlation does not by itself establish causation, it is useful to note a CDC report showing that current youth smoking rates fell from a peak of 36.4% in 1997 (no measure is reported for 1998) to 28.5% just four years later—a drop of more than a quarter in just four years. See figure titled “Current cigarette smoking among U.S. high school students — lowest in 22 years”, accessed at http://www.cdc.gov/tobacco/data_statistics/tables/trends/infographics/pdfs/high-school-low.pdf on June 24, 2015.
\end{flushright}
IV. COASEAN ANALYSIS IS USEFUL EVEN GIVEN ITS LIMITATIONS

As we have just seen, Part II’s idealized Coase World analysis is not a perfect reflection of the real world of litigation. One common economist’s response to this kind of observation is to suggest that we should favor policy rules that lead to a more Coasean reality. For example, one might propose changes in the Federal Rules, or even just case management choices by judges, that facilitate discovery settlement bargaining.\(^{62}\) Our analysis of Coase World is clearly more relevant, the more policy interventions there are that make the world more Coasean.

As important as that point is, in this Part I shall focus on two alternative arguments for taking the Coase World analysis seriously in considering policy toward discovery. First, in the real world we do have an imperfect substitute for discovery settlements: overall settlement of the civil action, or at least of all claims that are the subject matter of disputable discovery requests. Second, the Coase World analysis provides a clear analytical baseline, one that is helpful for thinking through the normative merits of different policies even in a non-Coasean world.

A. Overall Settlement of the Case Pre-Discovery is a Substitute, if an Imperfect One, for Discovery Settlements

In this section I adopt what might be called the anti-Coase World assumption—that discovery settlements are simply impossible. Thus, if a case reaches the discovery stage and the status quo responder pays rule is in effect, discovery will occur if the requester values it at all. On the other hand, if a case reaches the discovery stage and the requester pays rule applies, then discovery will not occur. My focus in this section will be on the implications of discovery rules for overall settlement of the case in the stage of litigation that occurs before discovery would.

Consider again Example 1. P’s expected gain from litigating without discovery would be $55,000, while D’s expected cost would be $45,000. As we saw in Part II.B, in the absence of discovery D’s expected cost from litigation is less than P’s expected gain, so there would be no surplus from settlement; therefore the case will litigate. Now recall that P believes that if the discovery did happen, P’s expected gain from litigating would rise by $20,000. Thus if the overall case did not settle, P’s overall gain from

---

\(^{62}\) Such policies would seem to be in the spirit of the general federal policy of encouraging settlement; see *Marek v. Chesny*; Federal Rule of Evidence 4___ (inadmissibility of settlement offers); and the Advisory Committee Note to Rule 68. CITES. For a wide ranging discussion of settlement and its role in federal procedural policy, see J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U.L.Rev. 1713 (2012).
litigation would be $75,000 considered from the moment just before discovery. Recall that D also believes the discovered information would increase D’s expected costs of litigating by $20,000. In addition, D must pay $30,000 in direct discovery costs. So D’s expected cost from litigating rises from $45,000 to $95,000 as a result of discovery conducted under the responder pays rule. Since D’s expected costs of litigating now exceed P’s expected gains, both parties would do better by settling than by litigating.63

As this example shows, discovery costs can induce the parties to settle a case they would otherwise litigate. Thus, even when discovery settlements aren’t possible, wasteful overdiscovery can sometimes be avoided due to the parties’ ability to agree on overall settlements. This means that the real world and Coase World may be separated by less space than first appears.64 Further, it means that we have an important counterintuitive result: the proportionality standard might well cause an increase in overall litigation expenditures. That is because the threat of greater discovery costs can be associated with lower actual litigation expenditures, whether on discovery or other forms of litigation activity.

This is another, possibly surprising, way of framing a well-trod idea: that the specter of high litigation burdens, especially those involving discovery, might cause a defendant to settle a case it would not otherwise be willing to settle. This idea has permeated contemporary procedural decisions from the Supreme Court, with the most obvious reference being Bell Atlantic Corp. v. Twombly, e.g., its citation of a report “that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed,”65 and its close-by lament that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching” summary judgment.66 It is worth noting that the same

63 Any settlement amount between $75,000 and $95,000 would leave them both better off.

64 This result isn’t absolute, to be sure: it is not hard to construct examples in which P and D will not be able to agree on an overall settlement when discovery would be wasteful. For example, suppose the difference in the responder’s cost of providing discovery and the requester’s expected value of it is X dollars. And suppose that in the absence of discovery, P’s expected gain from litigation would be Y dollars greater than the loss that D expects. If Y is positive, then the case would litigate in the absence of discovery, since there is not positive surplus. When X exceeds Y, this result is reversed, because discovery-related surplus is sufficient to induce a settlement when P can demand discovery at D’s expense. But when Y exceeds X, discovery-related surplus is insufficient to overcome the difference in parties’ expectations.


Memorandum cited in *Twombly* for the 90% figure also states that “in almost 40% of federal cases, discovery is not used at all, and in an additional substantial percentage of cases, only about three hours of discovery occurs,” so that “the discovery rules are relevant to only a limited portion of cases in which discovery is actively employed by the parties.” Thus one might turn around *Twombly*’s suggestion that the ability to “take up the time of a number of other people” might “represent[] an in terrorem increment of the settlement value” of a case: the absence of such a right might lead to an increment of the litigation expense associated with a case.

Further, it is worth noting that even if the threat of high discovery costs causes an in terrorem increment to settlement value, that value attaches to the settlement only if it happens before discovery (a threat doesn’t work after the trigger has been pulled, after all). It follows that when the in terrorem story is on point, wasteful discovery doesn’t actually happen.

Finally, I note that as with any legal rule, discovery cost allocation rules have effects both on cases actually at bar and the composition of cases that will be at bar. Certainly in the post-*TwIqbal* period this problem is supposed to be diminished. But if there are still many such suits—too many, to be precise—then the case for limiting discovery would be accordingly buttressed. The number of nuisance suits discovery rules induce is thus a potentially important question, but one that is outside the scope of the present paper.

### B. Coase World Provides a Useful Analytical Baseline

As we have discussed, resource use is unaffected by legal rules in Coase World, because in Coase World, resources will always be used in whatever way maximizes willingness to pay. For many—in my view, all too many—scholars writing in the law-and-economics literature, policy discussions end when we get to a policy that maximizes willingness to pay, because such a

---

67 Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).


69 To be clear, changes in legal rules that cause a plaintiff not to file at all will lead to a reduction in overall litigation expenditures. But as the examples above show, rule changes will cause increased litigation expense if they reduce the incidence of early settlement in cases that will be litigated under either legal rule under consideration.

70 Eliminating all such suits cannot generally be optimal if our ability to determine which suits are which type, on an ex ante basis, is limited. The price of desirable deterrence of unlawful behavior through the civil justice system is overdeterrence of some lawful behavior.
policy typically is tantamount to wealth maximization. If A is willing to pay more than B for some resource, then, the argument goes, efficiency dictates that A should get the resource. Someone forced to defend this view invariably will turn to an argument of the Kaldor-Hicks variety: since it would be possible to have A compensate B and still have some value left over from the resource, but not vice-versa, it must be better to assign the resource to A. Needless to say, this approach to policy has been controversial.

An underappreciated advantage of Coase Theorem arguments is that they make such controversies unnecessary, or at least much less necessary. That is because of an important analytical separability lurking beneath the surface of the Coase Theorem. If every legal rule induces the same use of resources, and this use is wealth-maximizing, then every legal maximizes wealth in the Kaldor-Hicksian sense. In Coase World, then, the basis for choosing between legal rules is entirely distributional, and thus entirely normative. The Coase Theorem thus paints an idealized image in which positive questions related to resource use are perfectly separated from normative questions related to distribution. Rather than constituting the end of our normative discussion, the observation that Coase World’s resources will always be allocated in a way that maximizes willingness to pay should be the beginning. Since all rules get us to the same discovery result in Coase World, the basis for choosing a particular discovery cost allocation rule in Coase World must be entirely normative.

This observation is helpful for understanding the basis for policy choices in the real world, too. Our policy choices in the real world and Coase World can reasonably differ only to the extent that discovery rules lead us to real world outcomes that differ from Coase World outcomes. Suppose that in the real world we see very little wasteful overdiscovery. That would leave three basic possibilities. First, perhaps, for whatever reason, there just aren’t many situations in which requesters might ask for discovery they expect to have low value. Second, perhaps there are lots of these situations, but the real world of litigation bargaining operates pretty close to Coase World. Third, maybe some other feature of the real world leads to results quite similar to those that would obtain in Coase World. In all three of these events, our optimal policy choices in the real world and


72 Of course, the hypothesized compensation often—typically—won’t occur, which is what makes the Kaldor-Hicks approach so controversial.

73 This could happen if pre-discovery settlements of overall actions or claims preempt the occurrence of wasteful discovery, as discussed in the previous section of this Part.
Coase World likely would be the same.

On the other hand, suppose there really is lots of wasteful overdiscovery in the real world. In that case, our optimal choice of discovery cost allocation rule might depend on just how much such waste actually occurs. If a lot of resources are actually taken up doing low-value discovery, and if we view discovery that is wasteful when only parties’ valuations are considered as socially costly (as many observers likely do), then optimal real world and Coase World policies might differ. But notice what empirical support is necessary for this result. One needs to show more than just that discovery is costly. One needs to show that, on average, discovery is wasteful. In other words, its value—however this is to be measured—must be less than its cost: the proportionality standard states that discovery must be “proportional to the needs of the case,” considering not only the various factors discussed above, but also whether, in light of them, “the burden or expense of the proposed discovery outweighs its likely benefit.”

As I have detailed in related co-authored work, it is very difficult to see how such empirical assessments can be made in the real world. Such assessments require a clear valuation not only of the direct costs of providing discovery—that part, anyway, might well be straightforward—but also (i) a valuation of the but-for impact of the discovery on the outcome of the case and (ii) a valuation of the social costs or benefits of the discovery involved. Such valuations pose a major challenge, inasmuch as counterfactual assessments about the litigation world with and without the discovery are implicated. Finally, the cost-benefit bottom line in this standard unavoidably requires normative judgments, to trade off the various other components.

As far as I am aware, there is no compelling empirical evidence supporting the proposition that overdiscovery, thus properly understood, is a substantial problem. Certainly the Advisory Committee did not discuss any during the Rules Enabling Act process that led up to the proposed amendment to Rule 26.

If there is limited evidence that overdiscovery is a serious problem, then we can reasonably argue that optimal real world discovery policy should look a lot like optimal Coase World policy. And since the choice in Coase World is fundamentally normative, so is the choice in the real world. Arguments about how much is spent on discovery—whether the answer is a lot or a little—seem likely to be beside the point. The relevant arguments are about whether, as a matter of public policy, we want to burden those who are typically defendants, which is necessary to benefit those who are typically plaintiffs.

---

74 See Gelbach & Kobayashi, note 11, supra.
75 This summary suggests an interesting juxtaposition with the well-known claim by
V. IMPLICATIONS OF THE PROPORTIONALITY STANDARD FOR PRIVATE ENFORCEMENT

In this Part I shall briefly flag some issues about how the use of the federal rulemaking process to create and emphasize the proportionality standard fits with other policy choices related to private enforcement that Congress has established via federal statute. Private enforcement is of special interest because of the nature, scope, and political considerations that have motivated the collection of statutes that provide for private enforcement.

Many such statutes together undergird federal civil rights protections. And Professor Sean Farhang has argued persuasively that private enforcement is often used to cement Congressional regulatory policies in place when the policy commitments of courts (CHECK) and the executive branch are less than steadfast. Thus, the whole point of effecting Congressional policies via private enforcement is to ensure a lasting framework that can be undone only by subsequent Congressional action, subject to presidential agreement or veto override.

Professor Steven Burbank and Professor Farhang have collected evidence suggesting that the Supreme Court has, over a period of years, engaged in a pattern of “retrenchment”, chipping away at the efficacy of private enforcement. In related work, Burbank and Farhang have also explored the rulemaking process. This latter evidence suggests that


retrenchment successes achieved via Federal Rule interpretations at the Supreme Court have not been matched by the results of retrenchment efforts channeled through the rulemaking process. For example, Burbank and Farhang write that, despite Chief Justice Burger’s substantial efforts to “turn[] the tide of Federal Rules that favored private enforcement,” his “bold ambitions for retrenchment … were largely frustrated.”

But the revival of emphasis on the proportionality standard might constitute a story with a different ending. Discovery is the lifeblood of many private enforcement cases. In a disparate treatment employment discrimination case, a plaintiff’s ability to prove discriminatory intent might well turn on the contents of her employer’s files. In a § 1983 case challenging municipal police policy, Monell v. Department of Soc. Svcs. requires plaintiffs to demonstrate an official policy or custom. And criticism of Bell Atl. Corp. v. Twombly and Ashcroft v. Iqbal has turned in part on the suggestion that they create a need-discovery-to-get-discovery Catch 22 in employment discrimination and constitutional civil rights cases.

Discovery thus plays a critical role in the vindication of statutorily created rights that Congress has entrusted to private enforcement regimes. So it is not difficult to make a case that cutting back on discovery might effectively abridge the substantive rights created by federal statute. It doesn’t take a savant to known that when a proceduralist uses words like “abridge” and “substantive” in proximity, a Rules Enabling Act discussion is coming down the pike. And this is no exception. The statutory framework for federal rulemaking was created by the 1934 Rules Enabling Act ("REA"). In addition to giving the Supreme Court “the power to prescribe general rules of practice and procedure … for cases” in the lower federal courts, the REA also limits what can be legitimately done via rulemaking. In particular, it requires that such general rules of practice and procedure must not “abridge, enlarge or modify any substantive right.” In practice, the Supreme Court has neutered this constraint, starting with 1941’s

Litigation Reform”.

---

80 Burbank and Farhang, Rulemaking and Litigation Reform, supra note 79, at ___.
85 Those aren’t the only types of cases where this problem might arise. For a case involving a more typical tort claim, see Menard v. CSX Transp., Inc., 698 F.3d 40 (1st Cir. 2012) (recognizing the need for at least limited discovery to meet Twombly and Iqbal’s plausibility pleading standard).
Sibbach v. Wilson & Co.\textsuperscript{88} The neuterment reached full flower in 1965’s Hanna v. Plumer,\textsuperscript{89} which minted the circular proposition that Federal Rules must not violate either the Rules Enabling Act or the Constitution, since some smart and influential people would have had to have made a mistake for that to be the case.\textsuperscript{90}

In the part of his opinion in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company\textsuperscript{91} that spoke only for a plurality, Justice Scalia wrote that, regardless of “whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes),”\textsuperscript{92} the proper test for a Rule’s validity is the one proffered in Sibbach: that the Rule “really regulates procedure.”\textsuperscript{93} As a practical matter, then, the idea that a duly made Federal Rule will be found to violate the REA is a dead letter. In light of the doctrinal facts, then, there is little practical value in raising the question of the proportionality standard’s status under the REA. Further, as a matter of realism, it is difficult to imagine that the same Court lineup that approved the pending amendments to discovery rules would ever find a deployment of them to violate the Enabling Act.

Nevertheless, there are serious issues to consider concerning the new emphasis on the proportionality standard that the present round of rulemaking has endorsed. As Professor Burbank has pointed out, “The Supreme Court is fond of reminding us that Congress legislates against the background of the Federal Rules.”\textsuperscript{94} This is especially a propos with respect to causes of action that involve private enforcement. As Professor Burbank suggests, this means not only that

\begin{footnotesize}
\begin{enumerate}
\item Sibbach v. Wilson & Co., 312 U.S. 1 (1941).
\item Hanna v. Plumer, 380 U.S. ___ (1965).
\item Hanna v. Plumer, 380 U.S. at 471 (explaining that the Supreme Court can lawfully refuse “to apply [a] Federal Rule … only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions,” and not endorsing the likelihood of these events’ transpiration). This idea found a willing reaffirmer on statutory\textsuperscript{stare decisis} grounds, if only a functional plurality, in Justice Scalia’s Shady Grove opinion; Shady Grove, 559 U.S. 393, 409 (quoting Sibbach, 312 U.S. at 13).
\item Stephen B. Burbank, Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind? 34 Rev. of Litigation ___ (2015) (citing the Supreme Court’s statement in Califano v. Yamasaki, 442 U. S. 672, 700 (1979) that the Federal Rules operate unless there is a “clear expression of congressional intent to exempt actions brought under that statute from the[ir] operation”).
\end{enumerate}
\end{footnotesize}
Congress is deemed to be aware of the procedural rules with which its statutes will interact (and must clearly manifest a intent to displace them), but [also] that it may rely on those rules in devising regulatory policy.\textsuperscript{95}

As noted above, there are many statutes provide for private enforcement of public law. Civil rights as against government, employment discrimination in private industry, governmental compliance with environmental law, and plenty more all rely on private enforcement via litigation to some degree. Because discovery is a critical part of litigation, it is also a critical part of the private enforcement regime. Courts that are sensitive to Congressional prerogatives in statutory interpretation generally might thus be inclined to shy away from limiting discovery in statutory private enforcement cases.\textsuperscript{96}

At a bare minimum, one basis for such a position has to do with democratic legitimacy and the status that courts—and thus rulemaking—should accord Congressional policies in favor of private enforcement. The Enabling Act aside, the fact remains that cutbacks in discovery rules might have the effect of “abridging,” and certainly of “modifying,” those “substantive rights” that are created through statutory law.\textsuperscript{97} Indeed, one of the most important insights in Professor Sean Farhang’s fascinating recent book, \textit{The Litigation State},\textsuperscript{98} is that federal regulatory policy is, in many ways, Congressionally enacted litigation policy.

This discussion suggests an interesting question familiar to legislation scholars: when Congress legislates at time 1 with particular FRCP in place, does or should that legislation constrain the outcome of federal court rulemaking at time 2? Congress does have the statutory ability, under the REA, to block amendments to the rules. But the Congressional agenda can

---


\textsuperscript{96} A countervailing impulse might crop up based on the transsubstantive nature of the Federal Rules; see Fed. R. of Civ. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts...”). An announced judicial policy of applying the proportionality standard differently in private enforcement cases would seem to run afoul of the principle of transsubstantivity. But this isn’t an inevitable result, functionally speaking, because a judge might reasonably regard the very fact of statutory law enabling private enforcement as adding weight to the “importance of the issues at stake in the action” proportionality factor.

\textsuperscript{97} And notice that not only \textit{federal} statutory law is concerned here. There are interesting questions to be considered concerning statutory state-law claims that makes its way into federal court, whether through diversity or supplemental jurisdiction. Obviously state statutes can create substantive rights; inasmuch as their enforcement is foreseeable carried out in federal courts, changes in federal court discovery policy conceivably implicate not just separation-of-powers concerns, but federalism ones, too.

\textsuperscript{98} Sean Farhang, \textit{THE LITIGATION STATE} (2010).
be crowded (more recently, it can seem nearly void, with nothing getting done anyway). And of course, the coalition that enacted private enforcement legislation at time 1 might, for all practical purposes, have evaporated by time 2. That characterization is a pretty good approximation of the situation circa 2015, with respect to the expansions of private enforcement that got started in the 1960s.\(^99\)

A second question is whether our assessment of the legitimacy of implicit policymaking-through-rulemaking hinges on whether amendments implement rules or standards. Proposed-amended Rule 26(b)(1)’s proportionality discussion may occur in a Rule, but it obviously creates a standard. And the proposed amendment to Rule 26(c) leaves a lot of discretion to individual judges concerning cost shifting. These Rules will be deployed, when they are, by judges applying one or another type of balancing—the essence of common law, totality-of-the-circumstances adjudication.\(^100\)

So, what should we think if an individual judge uses the proposed amendment to Rule 26(c) as a basis to shift discovery costs to the plaintiff-requester in a suit with one-way fee shifting? On the one hand, the proposed-amended Rule surely provides general authority for district courts to shift costs. On the other hand, the exercise of this authority would contravene the plain text of fee-shifting statutes. Again leaving aside REA considerations, there is still the question of whether a single judge—unelected, as the exclamation so often goes—should be able to suspend the application of democratically enacted fee-shifting statutes.\(^101\)

Perhaps judicial action in these situations would be no different from the exercise of federal judicial power in, say, run-of-the-mill administrative law cases. In such events, of course, public statutory law is interpreted by the judicial branch, and judges often have substantial discretion to operate.\(^102\) Still, the appropriateness of district court discretion over discovery in the


\(^100\) Perhaps this fact should help reduce concern over transsubstantivity, as I suggested in note 96, supra.

\(^101\) One might be tempted to cite to the REA’s supersession clause. 28 U.S.C. 2072(b) (“All laws in conflict with [the Federal Rules] shall be of no further force or effect after such rules have taken effect”). But that argument surely would prove too much, as no one would seriously argue that the proposed amendment to Rule 26(c) could render fee-shifting statutes of no further force effect; only a judicial finding of good cause warrants Rule 26(c)(1) protective orders of any kind.

\(^102\) A devotee of the proposition that *Chevron* deference and related doctrines importantly constrain the judiciary would note that such constraints are likely to operate most tightly at the district court level. This is not the place to take up the question of whether, and how much, such doctrines actually constrain.
presence of statutory private enforcement provisions seems to warrant consideration beyond the scope of the present article.

CONCLUSION

Debate over the discovery reforms has focused largely on empirical claims that may be beside the point. As I argue in this Article, in a world in which parties could bargain costlessly, wasteful discovery simply would never happen, regardless of the discovery cost allocation rule in place. This means that cost allocation rules would determine only the distribution of parties’ payments to each other. This is a radically different picture of the role of discovery cost allocation rules from what one would gather from scholarly or rulemaking discussions.

To be sure, these conclusions necessarily hold only in the idealized Coase World of zero bargaining costs. They rely on the possibility of bargains in which a responder pays cash to a requestor to stipulate to foregoing discovery—even as the parties continue to litigate the underlying claims at issue. That may seem far-fetched. However, the presence of pre-discovery settlements of the overall claim—a ubiquitous aspect of the policy discussion over discovery rules—may serve as a close substitute for discovery-only settlements. If so, then the basic Coase World analysis would be a decent approximation, both empirically and normatively.

Discovering Coase yields a number of important insights into the interface between discovery behavior, settlement, and discovery rules. We would do well to take these insights seriously.