

# WHAT DOES IT MEAN TO SAY THAT PROCEDURE IS POLITICAL?

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## INTRODUCTION

An appointment to the committee that reviews and amends the Federal Rules of Civil Procedure is unlikely to earn you any friends these days. The Advisory Committee on Rules of Civil Procedure (“the Advisory Committee” or “the Committee”) routinely finds itself at the center of controversy as it undertakes its mission to improve the rules that govern civil matters in our federal courts.<sup>1</sup>

Attorneys and parties who often appear in federal court criticize not only the product of the Advisory Committee’s work but also the integrity of its members. There is no shortage of commentary charging procedural reform with political maneuvering. Scholars have documented the sociological makeup and political affiliation of the Advisory Committee;<sup>2</sup> they have mapped industry lobbying on procedural matters<sup>3</sup> in both Congress and with the Committee itself. Many have argued that procedure has been a

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1. This is not to suggest that dissatisfaction and pressure on the rulemaking committees are new developments. For accounts of mounting pressure four decades ago, see generally Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 *BROOK. L. REV.* 841 (1993); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 *STAN. L. REV.* 673 (1975).

2. See generally Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 *N.C. L. REV.* 795 (1991); Jeffrey Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 *ALA. L. REV.* 529, 619–21 (2001).

3. See generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 *ARIZ. L. REV.* 717 (1998); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *STAN. L. REV.* 1393 (1994).

blunt political instrument,<sup>4</sup> with rulemakers, courts, and Congress all engaging in civil procedure reform to achieve political ends through seemingly apolitical means.<sup>5</sup>

Most recently, the discussion of procedure's politics has centered on discovery reform, especially upon the reform efforts that culminated in the 2015 amendments to the Federal Rules of Civil Procedure. One of the centerpieces of that reform process was the 2015 amendments' adoption of "proportionality" as a key standard to lower costs and increase discovery efficiency.<sup>6</sup> The proportionality amendment was among the most controversial amendments the Advisory Committee proposed.<sup>7</sup>

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4. Commentary suggests that politicization makes for bad rulemaking and that increasing the political tenor of the rulemaking process will exacerbate existing difficulties. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy and Procedural Efficacy*, 87 GEO. L.J. 887, 923–94 (1999) ("Because of . . . collective action problems . . . legislative rulemaking is likely to be plagued by inefficient logrolling. . . . [I]nefficient logrolling is less likely in a court-based rulemaking process which relies on a committee system."); Burbank, *supra* note 1, at 849–50 ("[T]he more we fashion the rulemaking process in Congress' image, the more Congress will be tempted to second-guess the product of that process or to preempt it."); Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 287; Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 263 (2009); Mullenix, *supra* note 2, at 801 ("[O]pening the rulemaking process at the earliest stages of rule promulgation will politicize [it] as never before, . . . creat[ing] vacuous, ineffective rules that are the result of political compromise . . . [or] fail[ing] to effectuate any rule reform . . .").

5. The attention to the political role of procedure is not new. Professor Burbank reminded us a decade ago that "procedure is power." Stephen B. Burbank, *Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008). Indeed, he has been analyzing procedure's relationship to power for much longer. See generally Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513 (1996) [hereinafter Burbank, *Procedure and Power*]. Professor Thomas Main has broken the claims about politics into two types. The first set of claims argues that procedural reform is political because it affects outcomes. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818–22 (2010). The second set argues that procedure is politicized because of personnel attempting to change outcomes in line with their ideological commitments. See *id.*

6. See FED. R. CIV. P. 26 advisory committee's note to 2015 amendment; see also Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1092 (2016).

7. See, e.g., Transcript of Proceedings, Judicial Conference Advisory Comm. on Civil Rules, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 7, 2014) [hereinafter February 2014 Hearing], <http://www.uscourts.gov/sites/default/files/civil-rules-public-hearing-transcript-dallas-tx.pdf> [https://perma.cc/4P3Y-4KRQ]; Transcript of Proceedings, Judicial Conference Advisory Comm. on Civil Rules, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Jan. 9, 2014) [hereinafter January 2014 Hearing], <http://www.uscourts.gov/sites/default/files/civil-rules-public-hearing-transcript-phoenix-az.pdf> [https://perma.cc/F4H7-YRKF]; Transcript of Proceedings, Judicial Conference Advisory Comm. on Civil Rules, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure (Nov. 7, 2013) [hereinafter November 2013 Hearing], <http://www.uscourts.gov/sites/default/files/civil-rules-public-hearing-transcript-washington-dc.pdf> [https://perma.cc/25M3-NZKL]. Of the hundreds of written comments received specifically concerning the proportionality amendment, over two-thirds opposed the proposal. CTR. FOR CONSTITUTIONAL LITIG., PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 6 (2014), [http://www.cclfirm.com/files/Report\\_050914.pdf](http://www.cclfirm.com/files/Report_050914.pdf) [https://perma.cc/K3AY-G7AX].

Perhaps because of the highly politicized context of discovery reform, the Advisory Committee has tended to engage in what it hopes will be objective or empirical criteria. The concept of proportionality took center stage as an objective criterion and as a means of furthering another objective aim: “efficiency.” Unfortunately for the Advisory Committee, this retreat into the appearance of objectivity did not silence the critics, likely because the concepts deployed in analyzing efficiency are neither objective nor coherent. A century ago, in a different doctrinal context, Robert Hale helped to expose the limits of judicial objectivity. This Article presents Professor Hale’s analytical critique as a helpful model for how to think about judicial branch rulemaking when political judgment is inescapable. In part, this Article is motivated by a desire to further the scholarly assessment of procedure’s political role, while turning away from the assessment of individual ideological commitments and material interests of constituent parties.<sup>8</sup>

Procedure is not the first field of law to face controversy along these lines. Law’s independence from politics, in both its descriptive and normative aspects, is a century-long legal challenge.<sup>9</sup> This Article aims to clarify what we mean when we characterize procedure as political, as well as to understand some of the harms generated by failing to confront and acknowledge the political. This is a preliminary step in approaching future formulations of procedural rules if they cannot be depoliticized.

## I. THE CURRENT APPROACH

The civil rulemaking process has long been the subject of controversy, one reflective of inherent tensions in its obligation to reform procedure without altering substantive rights. The legitimacy of the process relies on a premise that rulemaking and reform is a technical matter not requiring the exercise of political judgment. In hopes of presenting objective and neutral discovery reform, the Committee focused in its 2015 amendment to Rule 26 on the concept of “proportional” discovery.

### A. *The Rulemakers’ Predicament*

The civil rulemaking process has been the subject of controversy for at least the last thirty years. No matter what proposal the rulemakers develop, they face scrutiny, criticism, and at times, outright disdain. Some scholars have proposed that the procedural rulemaking process be returned to the legislature, while various other proposals have been made to cure the

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8. Scholars have done important work to explore the sociology of procedural rulemaking, as well as to map the strategies and methods of industries to further their material interests through procedure. Without diminishing the significance of those insights, this Article aims to shift the focus of the inquiry in hopes that new details of the field become clear.

9. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 9–31 (1992).

perceived failings of the Rules Enabling Act process.<sup>10</sup> In addition to attacks on the efficacy of the civil rulemaking process, scholars and practitioners have also raised questions as to the Advisory Committee's objectivity. Some suggest that the Advisory Committee is biased toward defendants,<sup>11</sup> others suggest that the bias is toward moneyed interests, still others argue the Committee is comprised of too many Republican-appointed judges, and some even suggest the problem is too many judges of any stripe.<sup>12</sup> From some, the criticism is of the very openness and transparency of the process, in that the openness has politicized the development of the substance.<sup>13</sup>

All this criticism points not just to the controversy and political investment in our procedural rules but also to the peculiar position in which the rulemakers, and particularly the Advisory Committee as the originator of proposed amendments, find themselves. The Advisory Committee is charged with a nearly impossible task. It is a body housed within the judicial branch that has been delegated legislative authority to promulgate transsubstantive rules governing all substantive legal areas that might be the subject of suit in the federal courts. Those rules must not expand or contract any substantive right. Yet the Advisory Committee process, as delineated by Congress, makes it look more analogous to an administrative body, ordinarily charged with implementing policy determinations. The Committee must conduct meetings open to the public and provide advance notice for those meetings, the meeting minutes must be made publicly available, a written report must be submitted detailing what the Committee considered in its deliberations, public hearings must be held, and a period is opened for public comment.<sup>14</sup>

Aside from the tension inherent in the Committee's process and structure, there is also the contradiction inherent in its procedural purview. The rulemakers must restrict themselves to procedural as opposed to substantive

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10. See, e.g., Burbank, *Procedure and Power*, *supra* note 5, at 513 (calling for attention to practitioner's participation and to empirical data); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 615 (2010) (calling for more congressional involvement in the civil rulemaking process); Coleman, *supra* note 4, at 292–96 (proposing a set of structural changes to committee rulemaking to recenter access in federal rulemaking); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1171 (1996) (proposing review of rulemaking activity by interbranch commission); Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1126 (2002) (advising the Standing and Advisory Committees to seek congressional permission to adopt experimental rules to test the possible impact of a proposed Rule or amendment). *But see* Bone, *supra* note 4, at 887 (defending the civil rulemaking process).

11. See, e.g., Stempel, *supra* note 2, at 623–34.

12. See, e.g., Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 248 (1998). *But see* Bone, *supra* note 4, at 926 (arguing for more judicial involvement in rulemaking).

13. See, e.g., Bone, *supra* note 4, at 909 (arguing that the rulemaking process requires deliberation, not public participation).

14. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IV, 102 Stat. 4642, 4648–52 (1988); *see also* Bone, *supra* note 4, at 903.

law. This difficulty, if not impossibility, of parsing such a line between substance and procedure has been addressed many times by other scholars.<sup>15</sup> These two features of civil rulemaking—a commitment to transsubstantivity on the one hand and strictly procedural effects on the other—point to a core challenge of the rulemakers’ work.<sup>16</sup>

The vision of the rules as procedural and not substantive and their formal application across cases, without regard to the substantive (or political) implications of those cases, is central to the existence of the Advisory Committee. The Committee is saddled with the burden of holding itself out as a body whose decisions are apolitical. Indeed, the Committee’s existence relies on the premise that it can engage in a largely expert and technical task best left to the judiciary rather than the political branches. To the extent that its decisions are understood to be political rather than “procedural,”<sup>17</sup> the legitimacy of its actions is called into question.

Yet, the political implications of Committee action are made clear by the uproar that its proposals engender and the criticism it has faced as to its substantive determinations, process, and structure.<sup>18</sup> Indeed, Committee members themselves have acknowledged that reality.<sup>19</sup>

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15. See, e.g., Burbank, *Procedure and Power*, *supra* note 5, at 513; Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975); Main, *supra* note 5, at 801; David Marcus, *Trans-Substantivity and the Process of American Law*, 2013 BYU L. REV. 1191, 1191 (defending transsubstantivity against its procedural critics as a “principle of doctrinal design” as a useful remedy for failings of institutions that generate procedure); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013).

16. Many have called the wisdom of this commitment into question, and the extent to which the present structure achieves transsubstantivity has been challenged, but, at least in theory, transsubstantive procedure persists. See Marcus, *supra* note 15, at 1201–07.

17. I put this term in quotation marks, as it here stands for nonpolitical. The very political impact of procedure has been long recognized, even in such adages as, “I’ll let you write the substance on a statute and you let me write the procedure, and I’ll screw you every time.” Jay Tidmarsh, *Procedure, Substance and Erie*, 64 VAND. L. REV. 875, 889 n.57 (2011) (quoting *Regulatory Reform Act: Hearing on H.R. 2327 Before the H. Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (testimony of Rep. John D. Dingell)).

18. See Danya Shocair Reda, *How the Anchoring Effect Might Have Saved the Civil Rule-Makers Time, Money, and Face*, 34 REV. LITIG. 751, 759–64 (2015).

19. In a subsequent discussion on pleading, a committee member asked: whether it is possible to determine whether any heightened rate of dismissals is a good thing or bad [and] agreed that it is important to gather data. “But in the end, it will be a policy decision.” It was agreed that this is a good caution to observe. It is distinctively difficult for the rules committees to make policy decisions in a way that is not political, or seen to be political.

*Draft Minutes: Civil Rules Advisory Committee March 18–19, 2010*, in 1 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JUNE 2010 AGENDA BOOK 147, 158 (2010), <http://www.uscourts.gov/file/15334/download> [<https://perma.cc/D7TR-2KK5>].

*B. The Quest for an Objective Discovery Standard*

It is thus not surprising that, in developing the 2015 amendments, the Advisory Committee was searching for a neutral and technical measure of how much discovery the Federal Rules of Civil Procedure should allow. The “proportionality standard” aimed to serve this function.

The 2015 amendments were animated by ongoing concerns over the cost and delay of discovery.<sup>20</sup> The Committee recognized that it had long been concerned with discovery cost and burden but that the problem had not been resolved. Specifically, the Committee pointed to the 1983 amendment to Rule 26, aimed primarily at minimizing discovery abuse.<sup>21</sup> But this change, the Advisory Committee explained, “cannot be said to have realized the hopes of its authors.”<sup>22</sup> The 1983 amendment created a limitation on otherwise permissible discovery if it was unduly burdensome and included cost-benefit language in the Rule to guide the inquiry.<sup>23</sup> Since the 1983 language had not succeeded in eliminating complaints about burdensome discovery, the Committee resolved to move the cost-benefit language, what it called the “proportionality” standard, up from the limitation clause of Rule 26(b)(2) into the definition of the “general scope of discovery” laid out in Rule 26(b)(1).<sup>24</sup>

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20. It is true that there has been persistent, vociferous accusations that the civil system generally, and discovery in particular, are “broken” and that cost and delay are both grievous and rising. For an analysis of the law of empirical foundation for these claims and a discussion of why they nonetheless persist, see generally Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012). This interpretation of the 1983 revisions has been challenged from several corners. See, e.g., Moore, *supra* note 6, at 1116 (“Proportionality has never defined the general scope of discovery, and the statement that the amendments will simply ‘restore’ proportionality to its former place is disingenuous.”); January 2014 Hearing, *supra* note 7, at 39 (statement of Arthur R. Miller) (suggesting the 2015 amendments posed a significant change to the original design of Rule 26(b)(2)(c), “when you put something in as sort of a discount or safety valve on relevance, that is quite different than pushing it as an adjunct, a correlative, a coequal with relevance”).

21. FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment.

22. Memorandum Regarding the Report of the Advisory Committee on Civil Rules from David G. Campbell, Chair, Advisory Comm. Fed. Rules of Civil Procedure, to Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 10 (May 8, 2013) [Report of the Advisory on Civil Rules], <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Reports/cv05-2013.pdf> [<https://perma.cc/AGR7-HTAF>].

23. FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment.

24. Federal Rule 26(b)(1) defines the scope of permissible discovery. See *id.* 26(b)(1). To the prior language setting out that parties may obtain discovery regarding “any non-privileged matter that is relevant to any party’s claim or defense,” the 2015 amendments added the following proportionality requirement:

and 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.

*Id.* These factors were taken, with slight modifications, from Rule 26(b)(2)(C)(3), a provision that earlier had specified circumstances in which limitations on allowable discovery were necessary. Cf. FED. R. CIV. P. 26(b)(2)(C).

This revision altered the definition of “discoverable information” itself. Prior to the 2015 amendment, information needed to be relevant and nonprivileged.<sup>25</sup> The amendment now requires information to be relevant, nonprivileged, and proportional to the reasonable needs of the case.<sup>26</sup> This final proportionality requirement would come to be defined by a six-factor analysis, bringing the total number of criteria required to assess discoverability to eight.

Initially, the Committee contemplated simply adding the term “proportional” to Rule 26(b)(1).<sup>27</sup> Some members worried, however, that the “[a]ddition of this term without definition . . . would be too open-ended to support uniform or even meaningful implementation.”<sup>28</sup> They considered the term “reasonably proportional” but were still not convinced that this addition would generate sufficient clarity.<sup>29</sup> To resolve this uncertainty the Committee turned to the cost-benefit factors laid out in Rule 26(b)(2)(C)(iii).

The Committee intended to provide some rigor to the proportionality concept by importing a five-factor standard.<sup>30</sup> But, despite their efforts, the standard remained unclear. When practitioners were provided a draft of the revision, they had a hard time agreeing on its most basic contours. All understood the Committee wanted discovery to be proportional, but proportional to *what* exactly? The concept remained open to multiple interpretations.

Consider this discussion at a “miniconference” the Committee hosted to get early practitioner feedback on possible amendments. An employment lawyer expressed his view that the proportionality standard would be a problem for a poorly resourced discrimination plaintiff because “[t]he defendant will always argue that the cost of discovery is more important than the relatively low stake in dollars.”<sup>31</sup> For example, if an employee’s claim is only worth \$50,000, allowing discovery that costs just as much would be disproportionate.

In response to the employment lawyer’s concerns, an attorney in a corporate counsel position reassured him that the comparison is not between discovery cost and the value of the claim.<sup>32</sup> Rather, “[t]he question is the value of the discovery in proving the claim. . . . Proportionality bears on the quality of the evidence in the

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25. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

26. *Id.*

27. Report of the Advisory Committee on Civil Rules, *supra* note 22, at 10.

28. *Id.*

29. *Id.*

30. This would eventually become the six-factor standard present in the finalized 2015 amendment.

31. *Duke Conference Subcommittee: Miniconference Notes, 8 October 2012*, in ADVISORY COMMITTEE ON CIVIL RULES NOVEMBER 2012 AGENDA BOOK 309, 328 (2012) [hereinafter *Duke Conference Subcommittee*], [http://www.uscourts.gov/sites/default/files/fr\\_import/CV2012-10.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV2012-10.pdf) [<https://perma.cc/JHV5-DV47>].

32. *Id.*

case.”<sup>33</sup> These represent two different readings of the content of proportionality. Specifically, it is important to understand what is being demanded of discovery. The employment lawyer interpreted the standard to require that the cost of discovery be proportional to the *total value* of the claim. The corporate counsel believed it must instead require that the cost of discovery be proportional to the *probative value* of the discovery. Both are plausible readings of the proportionality standard, and one can easily imagine that the proportionality determination might yield different outcomes depending on which factors are compared.<sup>34</sup>

The employment lawyer raised a second set of concerns that addressed a standard based on an assessment of the value of discovery in proving a claim. Employment discrimination cases, he explained, are rarely proved through a “smoking gun” document.<sup>35</sup> Thus, access to the defendant’s files was necessary if the plaintiff, even in a strong case, was to have any possibility of countering the defendant’s explanation for its adverse action. So how will the value of the case as a whole or of any particular request be assessed? After listening to participants’ observations, one Committee member intervened to ask: Is “proportional to the reasonable needs of the case’ . . . an attempt to quantify things that cannot be quantified? Is it simply not understandable?”<sup>36</sup>

After publication, in public comments and hearing testimony, plaintiffs’ attorneys raised concerns that incorporating proportionality into the scope of discovery would leave them fighting to get necessary discovery.<sup>37</sup> Plaintiffs’ attorneys argued that if information only falls within the scope of discovery when it is proportional, defendants will refuse to produce discovery on the grounds that it is disproportionate.<sup>38</sup> Moreover, judges will not be well placed to evaluate defendants’ proportionality claims. Even where the court ultimately orders the discovery, having to fight for that discovery will increase cost and delay. All this, plaintiffs’ counsel argued, was to say nothing of the newly generated uncertainty as to what discovery will be allowed.<sup>39</sup> Yet, the Committee’s amendment efforts remained committed to the utility of proportionality. Committee members continued to assert the objective character of proportionality in the face of

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33. *Id.*

34. That practitioners would have different interpretations of the standard is not surprising, as the committee members appear to have differed as well. One judge described how he ensures proportionality by starting with the parties’ estimates of the stakes involved in the case and creating a discovery plan from there, thus, we can assume, seeking to keep discovery proportional to the stakes of the case. *2010 Conference Subcommittee Meeting: 4 March 2011*, in ADVISORY COMMITTEE ON CIVIL RULES APRIL 2011 AGENDA BOOK 276, 278 (2011), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV2011-04.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV2011-04.pdf) [<http://perma.cc/8FM7-5PM3>].

35. *Duke Conference Subcommittee*, *supra* note 31, at 328.

36. *Id.* at 329.

37. *Id.*

38. *Id.*

39. *Id.*



attorneys' repeated examples to the contrary in the public comment process.<sup>40</sup>

The fissure between the Committee's conceptualization of appropriate discovery as objective and measurable and litigants' description of discovery as contextually dependent was a recurring theme of the public hearing testimony. Repeatedly, Committee members expressed confusion as to why their proposed revision to the scope of discovery would make any difference in whether a plaintiff could obtain the discovery needed for proving his claim. The Committee's reasoning here seemed to be that the rule change was only aimed at prohibiting "disproportionate" discovery, which it seems they understood to be synonymous with "unnecessary" discovery. As a result, any time an attorney expressed concern that he would not be able to obtain *necessary* discovery under the revised Rule, the Committee would respond by rejecting that possibility.<sup>41</sup>

Indeed, Committee members even expressed skepticism of an attorney whose caseload generally puts him in the position of discovery *producer*. This attorney shared his belief that the Rule will greatly strengthen his capacity to resist discovery, slow the process down, and impose costs on his adversary. He explained how, as an attorney representing defendants, he would interpret the proportionality requirement:

[T]here was a question about would I raise proportionality as a defendant in the cases. Absolutely, I would raise it, and here's how I would do it. I would not just object. I would unilaterally withhold relevant documents

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40. Patricia Moore describes Committee responses as thus: "[T]hroughout the three days of public hearings, Committee members repeatedly evinced disbelief that any federal judge would ever be anything but reasonable, and steadfastly refused to recognize that any shift in the rules would shift the parties' negotiating power." Moore, *supra* note 6, at 1143. The proportionality factors, similar to the presumptive limits proposals discussed in "How the Anchoring Effect Might Have Saved the Civil Rule-Makers Time, Money, and Face," also overestimate the capacities of the judge to "know" the objectively "right amount" of discovery based on relatively limited information. See Reda, *supra* note 18, at 751. With both proposals, committee members repeatedly asserted confidence in judges' ordering any "necessary" discovery. See, e.g., November 2013 Hearing, *supra* note 7, at 187 ("[I]t seems to me that a limit of five depositions is a disaster only if you can't get more when you need more, and to say that a presumptive limit is a disaster *necessarily implies that judges won't exceed it in cases where it should be exceeded.*" (emphasis added)).

41. The public hearing transcripts are littered with such responses. See, e.g., January 2014 Hearing, *supra* note 7, at 279 ("[I]t's not clear to me how then if the judge is faithfully following the rules and following proportionality, the result of putting it in the first sentence would change anything . . . ."); *id.* at 281–82 ("I don't see how there would be a different result to your circumstance . . . . Frankly, I think that's part of the problem with some of the . . . Queen-For-a-day issues that we've been hearing. . . . I don't see it being a different outcome."); *id.* at 23–25 ("[Y]ou said that under the proposal, judges would treat the amount in controversy as the primary factor. . . . [O]ne would think that judges would appreciate that there are cases where there are factors that have to be taken into account that in an individual case are more important than amount in controversy. . . . Why do you think judges will begin to interpret that differently?"); November 2013 Hearing, *supra* note 7, at 181 ("I don't understand why putting the factors into the scope of discovery would change the actual practice . . . ."); *id.* at 276 ("How would the Vioxx case have been any different under the proposed rules? . . . The judge controlled the case by using the standards in 26(b)(2)(C), which now under the proposal would be part of the first sentence in the scope of discovery. The judge would still have to do the same thing.").

based on my client's subjective evaluation of whether the documents are proportional to the kind of case we're in.<sup>42</sup>

A Committee member asked in response: "So the assumption in your conclusion is that a judge would allow you to get away with that?"<sup>43</sup> The attorney confirmed that he did believe he would get away with it, not under the then-current Rule but under the proposed Rule: "[Under this Rule,] I have a good faith belief that this is what is proportional to this, and that we don't need to get into expensive or far-reaching discovery. . . . It has given me control over what gets produced."<sup>44</sup>

The defense attorney provided details as to why it would be easy for him to assert that requests were not proportional by pointing out the inherent uncertainty in the valuations required by proportionality:

Now, that works great for me in patent cases, because patent cases, in my experience, are unique in that you have early on such diametrically opposed evaluations of the case.

It's not unusual for the plaintiff to think they have got a several million or tens of millions [of] dollars case, and my client is looking [and] saying . . . it looks like we only owe 20 or \$30,000.

I get to use that standard under this rule and say, okay, here's a product data sheet, that's all that you get.<sup>45</sup>

A clear articulation of this disjuncture comes on the issue of Rule 26(g) certification. Committee members appeared to feel strongly that the existing certification requirement for discovery requests is not unreasonable or unduly burdensome under Rule 26(g) and indicates that discovery requesters have always carried a burden of proportionality. This did not resonate for previous commenters. As one remark exemplary of the requester position put it: "[W]e make certifications based upon what our knowledge is. We don't know what the other side's burden is. They make certifications based upon what their knowledge is. They may have a very different idea about what is overly burdensome for them."<sup>46</sup> For plaintiffs' attorneys, it is one thing to certify that they are making appropriate, not unreasonable requests, but it is another for the Rule to demand that the request must be both relevant *and* proportional before a party is entitled to production. That this different demand would change the negotiating posture of the parties seems self-evident to discovery requesters.

Discovery is already subject to a problem of information asymmetry that affects parties' assessments of the proportionality of a request. This problem can be alleviated through the sharing of specific information concerning storage systems, search criteria, and the like. The above attorney's statement, however, contains a second recognition. Even complete transparency is not likely to lead to identical analyses, because the

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42. February 2014 Hearing, *supra* note 7, at 157.

43. *Id.* at 161.

44. *Id.*

45. *Id.* at 157–58.

46. January 2014 Hearing, *supra* note 7, at 291.

terms at issue such as “undue burden” or “proportional” are not knowable, objective facts in the world but rather judgments influenced by the goals and needs of a particular party or class of parties and a vision of the ideal purpose and functioning of the law.<sup>47</sup>

How can we understand the rulemakers’ commitment to the proportionality framework in the face of the extensive controversy it generated? To do so, we must recognize the centrality of “efficiency” to the ongoing reform of civil procedure. The “efficiency norm”<sup>48</sup> is referenced explicitly in the drive to make changes to the discovery rules that culminated in the 2015 amendments. The Committee Chair, Judge David Campbell, explained that these revisions were “designed to curtail the discovery process and make it more efficient [and] . . . [d]esigned to streamline the discovery process and reduce the expenses complained about at the Duke Conference.”<sup>49</sup>

The rulemakers spent little, if any, time considering what they meant by a “more efficient” discovery process, and Professor Brooke Coleman shows that most often the Committee means nothing more than “inexpensive.”<sup>50</sup> When conceived of as merely “least expensive,” the efficiency goal sounds like a simple effort to meet the mandate of Federal Rule of Civil Procedure 1 for “speedy and inexpensive” determination of every case.<sup>51</sup> Moreover, efficiency feels neutral and objective; surely no one is for *inefficient* procedure. Neutrality and objectivity are appealing traits for rulemakers who reside outside the political branches and who are prohibited from rule reforms with substantive repercussions.

Efficiency concerns have taken a particular form in the discovery context. First, efficiency advocates claim that there is simply “too much” discovery. Accordingly, the larger the volume of the discovery, the more money is spent on it (identifying it, reviewing it, producing it, and resisting

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47. In a thoroughgoing economic assessment of the proportionality standard, Jonah Gelbach and Bruce Kobayashi outline just how challenging a proportionality assessment will be and how many of the elements will require a normative judgment when implementing the proportionality elements. *See generally* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery* (Univ. Pa. Faculty Scholarship No. 1521, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2551520](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520) [<https://perma.cc/GEJ3-BXBP>]. Among the factors they cover are the agency costs that arise when the discovery responder has superior information about its own costs of production or superior information about the strategic value of the production to each party. *See id.* at 3. Even when objective factors are measurable, the ultimate determination of proportionality will require a normative assessment. *See id.* at 13.

48. I borrow this term from Professor Brooke Coleman. *See* Brooke Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015). She provides deft analysis of this commitment to the concept of efficiency and the lack of clarity as to what it means. *Id.* at 1786–95.

49. *Draft Minutes: June 11–12, 2012*, in ADVISORY COMMITTEE ON CIVIL RULES NOVEMBER 2012 AGENDA BOOK, *supra* note 31, at 69, 105. One may reasonably question whether this is an accurate account of what occurred at Duke. Presentations at the Conference itself indicated consensus on the topic of improving cooperation among attorneys, setting firm trial dates, and greater judicial involvement.

50. Coleman, *supra* note 48, at 1779–85.

51. *Id.*

its production). Second, the availability of voluminous discovery in the system is understood to have a distorting effect on case outcomes, whether or not a lot of discovery is taken.<sup>52</sup> Third, expenditures on discovery are considered an inefficient allocation of business resources and, as such, are understood to serve as a drag on the nation's economy.

It appeared to the Advisory Committee that a more efficient discovery system would better ferret out nonproportional discovery. Stated another way, because all discovery must be proportional, the scope of discovery should only encompass relevant, nonprivileged information that is proportional. Once again, this feels neutral and objective, for who would argue for *disproportionate* discovery? Thus efficiency, given life through the Rule's language of proportionality, took center stage in the 2015 amendments.<sup>53</sup>

Absent from the discussions was a recognition that the question of "efficient discovery" is subject to multiple meanings. For instance, we might determine that an efficient discovery regime is one that produces all information relevant to the legal claims in a case as quickly as possible. If our focus is on both speed and information sharing, we might calibrate the discovery process to penalize stonewalling and limit party discretion as to timeline and compliance with deadlines. We might prioritize court resources and deem a discovery regime efficient where it produces relevant information with the least imposition on court time and attention. Alternatively, we might understand efficient discovery to be one that provides information to the party who is lacking information about the case in a manner that limits that party's costs. In other words, we might prioritize reducing the costs of asserting a claim.

Our understanding of efficient discovery might take yet a fourth form and focus on the cost to a party of *producing* discovery. Under this meaning, we would revise discovery rules to lower production costs. This might lead us to limit the amount of discovery that is produced or shift costs from the producer to the requester. This appears to be the meaning of "efficient discovery" with which the Committee was working, though it obviously does not make this explicit, since it does not recognize that the term is open to multiple interpretations.

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52. This is believed to be true even when the amount of discovery taken in a given case does not prove to be large, because the threat of discovery expense will nonetheless alter the settlement outcome.

53. Professor Coleman demonstrates how rulemakers have made use of the efficiency concept while ignoring its conventional meaning in economic analysis. She does so while leaving to the side what she flags as extensive critiques of even this, more sophisticated, efficiency concept. Those critiques of efficiency make clear that, not unlike the concept of value, efficiency is a concept lacking a single, stable meaning, the content of which is frequently determined by the priors of the analyst deploying it. *See generally* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

## II. PROFESSOR HALE AND THE SEARCH FOR OBJECTIVITY IN JUDICIAL REASONING

Judicial interest in finding objective criteria upon which to base legal determinations is not new. Others have previously attempted to anchor controversial policy determinations in neutral concepts. In the early twentieth century, Robert Hale examined how the U.S. Supreme Court's search for objective value in rate regulation functioned to conceal the political judgments involved.

### A. *Professor Hale's Context*

The Advisory Committee is not the first judicial body to attempt to anchor controversial policy determinations in neutral and objective concepts. In the early twentieth century, economist and legal scholar Robert Hale was drawn into debates about rate regulation that centered on judges' supposedly objective and neutral determination of value in judicial opinions. Although the field is substantively remote from our focus here, the rules governing discovery and the reasoning that rulemakers use to assess their validity and the analysis developed by Professor Hale and his peers can nonetheless assist us in seeing the debate about discovery anew.

Today, rate regulation of public utilities appears as an arcane doctrinal interest, but at the turn of the twentieth century, it sat on a major political fault line and was a core concern of economists and legal scholars. The issue arose as a result of a series of laws passed in the late nineteenth century regulating rates of railroads and grain elevators. In quick succession, states all over the nation established railroad commissions regulating rates, thus instituting a patchwork of local regulation of a national railway system. The legality of rate regulation carried meaningful import both politically and intellectually. Not only were the industries regulated among the most powerful economic actors in the nation, but the issue presented—the appropriate role of government in controlling businesses—also carried broad political implications.<sup>54</sup>

Needless to say, this regulation generated a vociferous response from the business interests arguing for a laissez-faire economic and legal system. In response, a set of progressive scholars developed theories that challenged the legal framework supporting economic laissez-faire policies. Professor Hale's professional work made significant contributions to a broad progressive attack on the intellectual foundations for laissez-faire policy.

Two distinct aspects of Professor Hale's analysis are of interest for our purposes. First, his scholarship reconceptualizing "coercion" is beneficial and helps to reemphasize the bargaining context that procedural rules serve to structure. Although bargaining through litigation is a fairly visible

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54. Barbara Fried describes the then-common view of the stakes as: "[T]he fight over public utilities regulation was a fight over the soul of property." BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 163 (2001).

phenomenon,<sup>55</sup> rulemaking deliberations evince a very limited recognition of the ways in which the rules structure bargaining. Professor Hale's work is of particular interest to our inquiry because of the attention and novel insight he provides into the legal conditioning of the bargain in areas classically considered to be in the realm of private ordering and beyond legal conditioning.

Second, Professor Hale's engagement with a significant problem of his day, the constitutionality of setting rates for utilities, is instructive because it identifies and critiques a particular type of legal reasoning at work in the deliberations of procedural rulemakers today. The value of Professor Hale's rate regulation analysis is not due to strong similarities between the rate regulation context and the reform of discovery rules; rather, its utility lies in allowing us to recognize the long pedigree of a form of legal analysis that clings to an appearance of neutrality and objectivity, the functions it tends to serve, and the types of critique to which it may remain susceptible. In the rate-making cases, Professor Hale was referencing actors who were implicated in, or authors of, a particular historical development who were also seeking to erase their participation and deny the coercive power that courts would invariably exercise.

### B. Understanding Coercion

Professor Hale's work characterizing coercion as expansive and inescapable<sup>56</sup> will sound strange to modern sensibilities, as indeed it did to many of his contemporaries. His expansive reading of coercion, that it is everywhere and part of every exchange, is integral to his argument. Indeed, he relies precisely on the realization of the truly capacious reach of coercion to suggest that its presence or absence *cannot* be the basis for legal doctrine.

Professor Hale identifies the market as a system of mutual coercion, where the ability to extract a price for one's goods or services depends on the legal right to withhold those goods or services from others. There is no bargaining that is "free" as compared to that which is "coerced." Through this argument, he seeks to remove "free bargaining" as a criterion by which to judge whether further government coercion is desirable. The key insight is twofold. First, whatever the source of the power, every exchange involves coercion; we normally do not see the coercion, however, because it

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55. See generally Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

56. See ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 3-11, 35-37, 189-96, 366-82 (1952) [hereinafter HALE, *FREEDOM THROUGH LAW*]; Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606-07 (1943) [hereinafter Hale, *Economic Liberty*]; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923) [hereinafter Hale, *Coercion and Distribution*] ("[A] careful scrutiny will . . . demonstrate that the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions on individual freedom. . . . Some sort of coercive restriction of individuals . . . is absolutely unavoidable, and cannot be made to conform to any Spencerian formula."). See generally Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

is exercised by what we term a “private” actor.<sup>57</sup> Second, Professor Hale tackles the source of the power to coerce, demonstrating that the government’s role in private coercion cannot be elided.<sup>58</sup> Legal rules intervene in bargaining relationships that are themselves constructed by law.<sup>59</sup> The only way to get the full measure of them is to turn to the conditions in which the bargain is being struck.<sup>60</sup>

It is through the concept of coercion that Professor Hale argues that legal rules are not neutral. Since nearly all incomes are generated through (private) coercion, there is no posture the law can inhabit that does not involve coercion. The law allows, amplifies, counterbalances, or flips existing coercion so that in every instance the law is choosing among forms of coercion.<sup>61</sup> We only see this by understanding social relations as bargaining and legal framework as intervening (sometimes by doing nothing) in those bargaining relations.<sup>62</sup>

Bargaining’s significance for procedure operates on two levels. The primary level involves bargaining over the terms of the litigation itself: what motions will be filed, what discovery allowed, what settlement talks engaged, and how quickly or slowly to proceed. This bargaining is structured in obvious ways by the procedural rules themselves (although even this level of bargaining is not sufficiently attended to in rulemaking deliberations). On the secondary level, parties bargain over the controversy or relationship that gives rise to the suit. That is, parties’ bargaining positions in the litigation itself is structured by their relative bargaining position external to the litigation. To take two very obvious examples, a party’s relative holdout power in settlement will depend in substantial part on its relative economic power; this holdout power will play a significant role in all manners of procedural bargaining and in the ultimate settlement

57. Hale, *Coercion and Distribution*, *supra* note 56, at 472–79.

58. *Id.* at 477–78; *see also* HALE, FREEDOM THROUGH LAW, *supra* note 56, at 11 (“These economic inequalities are embodied in legal rights which the government enforces.”).

59. Hale, *Economic Liberty*, *supra* note 56 at, 624–26.

60. *See, e.g.*, HALE, FREEDOM THROUGH LAW, *supra* note 56, at 4–5 (“Whether any given extension of state control in the economic sphere involves an enlargement or a diminution of individual liberty can be determined only after a careful weighing of alternatives.”); Hale, *Coercion and Distribution*, *supra* note 56, at 479–81.

61. HALE, FREEDOM THROUGH LAW, *supra* note 56, at 11; Hale, *Coercion and Distribution*, *supra* note 56, at 479–81.

62. HALE, FREEDOM THROUGH LAW, *supra* note 56, at 6–11. While conventional economic analysis of litigation centers on the bargaining context and recognizes discovery as an instrument that significantly shapes or “distorts” outcomes, the literature tends to operate from the premise that there are accurate outcomes with which, if properly calibrated, discovery will not interfere. *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401–03 (2004); Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 409, 413–14 (1984); Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 445–46 (1988); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1715–16 (2012) (focusing on the centrality of settlement under the Federal Rules today, and calling for reform on that basis and attentive to that phenomenon); Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, in REFORMING THE CIVIL JUSTICE SYSTEM 13 (Larry Kramer ed., 1996) (describing the economic model in detail); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 69–72 (1997).

made. Likewise, a party's control over, and access to, relevant information will be critical to its litigation bargaining position.

If we accept Professor Hale's argument, neither factor of relative economic power or relative information control is a naturally occurring phenomenon; both are the results of privately exercised coercion. Moreover, that privately exercised coercion is structured by law and could be structured a different way if law so desired.<sup>63</sup> It seems apparent that procedure should recognize the primary level of bargaining and engage directly in understanding how the Rules affect relative bargaining position with respect to that primary level and, normatively, what effect it *ought* to have. It is less apparent, but no less relevant, to wonder what attention, if any, procedure should pay to the secondary level.<sup>64</sup> That level plainly influences the effect that procedural rules will have.

The rate regulation debate implicated the constitutional legitimacy of legislative regulation of the market and raised questions as to the nature of

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63. In his classic article, "Against Settlement," Professor Owen M. Fiss posits that it is the judge presiding over his court that can serve as a safeguard and equalizer ensuring that relative bargaining power be taken into account. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076, 1085–90 (1984). Fiss's account sketches a landscape in which plaintiffs particularly suffer from resource inequalities leading to injuries left undercompensated or worse. *Id.* Professors Samuel Issacharoff and Robert Klonoff have described how mistaken Fiss's empirical account has turned out to be about the relative bargaining position between plaintiffs and defendants, with substantially increased plaintiff bargaining power in the decades after Fiss's article. Issacharoff explains this as a combination of legal (relaxing the restrictions on attorney solicitation) and technological developments (allowing increased organization among the plaintiffs' bar). Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1179–83 (2009) (highlighting that litigation inequalities are produced, in part, by background legal rules and the complexity of factors that condition litigation inequality).

64. This is not *unprecedented* in the procedural system. Rule 23 could be understood as a procedural intervention designed to make functional particular, formal procedural rights. And the effective vindication doctrine in the arbitration context, depending on how narrowly or broadly it is construed, also might set the margins of the otherwise dominant principle that procedure must ignore functional inequality. For strong articulations of narrow construction in the majority opinion and broad construction in Justice Kagan's dissent, see *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Compare, for example, the language of Justice Antonin Scalia's majority opinion:

As we have described, the exception finds its origin in the desire to prevent "prospective waiver of a party's right to pursue statutory remedies[.]" That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.

*Id.* at 2310–11 (emphasis omitted) (citations omitted), with Justice Kagan's dissent:

Our decisions have developed a mechanism—called the effective-vindication rule—to prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights. That doctrine bars applying such a clause when (but only when) it operates to confer immunity from potentially meritorious federal claims.

*Id.* at 2313 (Kagan, J., dissenting).



property itself. In the rate-making cases, courts were asked to review the reasonableness of government-set rates in railroads and public utilities. Railroads, with public utilities following in their wake, challenged regulatory rates on grounds that the rate limitations were unreasonable, representing an unconstitutional deprivation of property under the Fifth and Fourteenth Amendments.

The legal controversy focused on two legal doctrines. First was the doctrine of “horizontal constraints”<sup>65</sup> that limited government regulation of prices to only those businesses supposedly “affected with a public interest.”<sup>66</sup> This was plainly understood to include public utilities, but scholars were concerned with what else beyond public utilities might be included as within the public interest scope.<sup>67</sup> The second doctrine concerned “vertical constraints.”<sup>68</sup> That is, to the extent a business was affected with a public interest, the government was allowed to set prices only to the point it guaranteed at least a “fair return” on the “fair value.”<sup>69</sup> This second doctrine was a major focus of Professor Hale’s work and has greatest relevance for our purposes.

In *Smyth v. Ames*,<sup>70</sup> the Court held that a rate could be unconstitutional if it was set “so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law.”<sup>71</sup> Thus the Court determined that the Constitution required that rates be set high enough to allow a “fair return” on the “fair value of the property being used by [the company] for the convenience of the public.”<sup>72</sup>

For nearly fifty years following *Smyth*, courts subjected rate regulation of public utilities and railroads to the fair value rule. That is, in examining the constitutionality of a rate-setting regulation, a court would aim to divine the

65. See Robert L. Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401, 424–25 (1934).

66. *Id.* at 416. “Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.” *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (declining a due process challenge to a statute regulating grain elevator storage rates on the basis that they are private property “affected with a public interest”).

67. Justice David Brewer, dissenting in a case analyzing the “public interest” issue explained the danger:

There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man’s property is beyond the touch of another’s welfare.

. . . .  
. . . If [the government] may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property?

*Budd v. New York*, 143 U.S. 517, 549, 551 (1892).

68. Hale, *supra* note 65, at 424–25.

69. *Smyth v. Ames*, 169 U.S. 466, 546–47 (1898).

70. 169 U.S. 466 (1898).

71. *Id.* at 526.

72. *Id.* at 546.

fair value of a business, ensuring a fair return on the fair value.<sup>73</sup> The Court in *Smyth* envisioned that fair value could be determined through scientific calculation and set out a multifactor standard that included the original cost of constructing the property, the amount expended in permanent improvements to the property, the par value and market value of a company's stocks and bonds, and the present cost of replacement of the property.<sup>74</sup> The Justices thus launched themselves and the nation's rate commissioners on a curious and wasteful search for the objective "value" of the property for which rates would be set. Whatever the number of commissioners and courts arrived at for fair value, the *Smyth* standard also suggested that there was an objective, "fair" rate of return on that value.<sup>75</sup>

Professor Hale and other legal realists ("Realists") questioned the Supreme Court's search for a factual and scientific measure of public utility value. The value quest, Realists argued, was a way of avoiding directly addressing controversies about the nature and purpose of property.<sup>76</sup> The rate-making decisions were "regularly shrouded in an aura of science,"<sup>77</sup> what Gerard Henderson called "the illusion of juristic necessity."<sup>78</sup> Professor Henderson's description of the Supreme Court's rate-making jurisprudence is evocative of common tendencies in our civil procedural discourse:

[T]he court has been trying to ascertain not a rule of policy, but a discoverable fact. . . . [It has been operating with the] conception that there is a fact which can be discovered . . . and which, once it is found, will provide a mathematical solution of all rate-making problems . . . .<sup>79</sup>

The retreat to "science" reflected judicial discomfort in the discretion that the cases afforded them. Judges were forced to engage in policymaking that perhaps appeared best suited to legislative decision making.<sup>80</sup> Professor Hale's and other Realists' work demonstrated that the Supreme Court's analysis of "value" was circular. That is, the rules that courts would adopt as to rate setting would *determine* the future value of the property. Thus, the judicial analysis sought to hide policymaking and choices about resource distribution through what appeared to be an objective analysis.

Since the market value of income-producing property was equal to the anticipated stream of future earnings the property generates, the fair value

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73. *Id.*

74. *Id.* at 547. One commentator describes the result thus: "[T]ogether they produced only a hodgepodge of irreconcilable standards." FRIED, *supra* note 54, at 179.

75. *West v. Chesapeake & Potomac Telephone Co.*, 295 U.S. 662, 671 (1935) ("[W]here by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value.").

76. HORWITZ, *supra* note 9, at 162.

77. *Id.*

78. Gerard Henderson, *Railway Valuation and the Courts* (pt. 1), 33 HARV. L. REV. 902, 912 (1920).

79. *Id.* at 910, 912.

80. Of course, one solution to this quandary would have been to acknowledge the gaping legal discretion and to defer to legislative will accordingly.

would depend upon the rate that regulators set. Thus, to define a constitutional rate as one that allowed a fair return on fair value was to engage in an inevitably circular analysis. Perhaps to avoid this problem, the Court fleshed out the contours of “value” with the above-described multifactor standard. Professor Hale charged that the Court’s explanation had little to no relationship to the question at hand: “what the value of the entire business ought to be.”<sup>81</sup> The word “valuation” was used in different and contradictory ways depending on the purpose of the valuation. Indeed, its meaning “depended on the purpose for which the valuation was done.”<sup>82</sup>

Everything about the process by which “fair value” was determined—the rhetoric of the courts and counsel; *Smyth*’s list of factors to be considered . . . the ritual obeisance commissioners paid to that list in rate determinations—conspired to create the illusion that commissions were on an evidentiary search for a “fact.”<sup>83</sup>

The reasoning functioned to mask the Court’s normative assessment of the rate set behind a purportedly objective measure. Professor Hale explained: “[T]he determination of what is a ‘fair value’ is a determination of *how much* confiscation is proper (in the opinion of the court).”<sup>84</sup>

Professor Hale took aim at the Supreme Court’s adoption of an eminent domain theory of rate regulation,<sup>85</sup> which reflected the dominant view that understood public utilities and their regulation as a problem of state regulation of *private* ownership. Formulated as such, rate regulation was a confiscatory legislative act.<sup>86</sup> In contrast, Professor Hale showed that the public utilities’ right to exclude others from using the public utility, in itself, generated its value. As such, it was a legal construct that generated the opportunity to charge a rent for use. It was, in Professor Hale’s terms, a private delegation of public power. The logical import of this conclusion is simply that, because unequal bargaining power is a matter generated and enforced by the state’s governing legal regimes (in this case, property), it is a matter of legislative choice how precisely to set that imbalance.

Professor Hale leaves open what choice the legislature or the courts can make in setting the bargain. What is demanded is not a particular outcome but an abandonment of the pretense that there is some natural, preexisting equilibrium that the law can choose to upset or leave alone. The law is never passive; it is always constructing parties’ holdout power. Professor Hale’s analysis suggests that all property is a form of monopoly power sanctioned and enabled by the state and that “there is not a single income-yielding property right, inside or outside the utility field, which can be

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81. Letter from Robert Hale to John B. Winslow, Chief Judge, Wis. Supreme Court (Sept. 14, 1918), in FRIED, *supra* note 54, at 180.

82. *Id.*

83. *Id.*

84. *Id.* at 177.

85. Under an eminent domain theory, legislative regulation of rates charged by public utilities was analyzed as a governmental taking of property requiring fair compensation of the confiscated value.

86. HORWITZ, *supra* note 9, at 161.

enjoyed on equal terms by *everyone*. To speak of equal rights of property is ridiculous.”<sup>87</sup> Property picks winners and losers; it determines the strong and the weak.

### III. A HALEAN APPROACH TO DISCOVERY REFORM

In our procedural work, we can begin by adopting the realist hostility “to the substitution of scientific for political discourse,”<sup>88</sup> seeking instead to ferret out any false claims of objectivity. Discovery rules are and *will be* policy determinations as to resource distribution.<sup>89</sup> Across the spectrum of discovery rulemaking (both in the Federal Judicial Conference and in doctrinal developments), we should seek the frank acknowledgment of this problem and articulation of the policy determinations that are being made.

Procedural rulemaking is caught in a contradiction. By definition, it is intended only to concern itself with the technical rules of procedure that will govern disputes in the civil system. It constructs, and considers modifying, the legal ground rules, what Professor Hale identified as the background rules, that structure dispute bargaining. It is facially prohibited from expanding or contracting the substantive rules. Yet procedure has been mired in highly polarized conflict for decades, and the political import of these conflicts has been documented explicitly.<sup>90</sup> What Professor Hale can help us recognize is that the highly visible political conflict generated by procedural rules is a feature of procedure rather than a flaw. Perhaps the cure for it is to contend with it much more directly than procedural rulemakers—whether administrative, legislative, or judicial—have been willing to do thus far.

What are the lessons we can draw from a close look at this prior example of apparently empirical legal reasoning? Several elements of the reasoning articulated in rate-making cases are operating in discovery rulemaking today.

First, in both contexts, legal actors are engaged in a search for objectivity. Professor Hale focused with keen interest on the Supreme Court’s commitment in the rate-making cases and cast the legal question as one of empirical inquiry: calculate the value of the property in question and calculate the fair rate of return on it. In discovery deliberations, there has been a similar interest in casting questions of discovery as empirical problems susceptible to objective determinations. The 2015 amendments were sparked by the inquiry: Does discovery cost “too much”? Cost, it was hoped, was an objectively measurable variable, and its outcome would

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87. Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 212 (1922).

88. HORWITZ, *supra* note 9, at 162.

89. We might say the Committee’s struggle to engage in neutral rulemaking determined by empirical data or some other objective determination (or at least to engage in a discourse of objectivity) reflects procedure’s peculiar lag or failure to fully incorporate the Realist legal consciousness dominant in U.S. law from the New Deal era onward.

90. See generally Burbank, *Procedure and Power*, *supra* note 5; Galanter, *supra* note 3; Moore, *supra* note 6; Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998).

reveal what constraints should be placed on discovery. Ultimately, the concept of “proportionality” was deemed the solution.<sup>91</sup>

Second, in neither context do we have an inquiry susceptible to scientific assessment. We are not dealing with “fact” but with policy or normative judgment. In the rate regulation context, courts and rate-making commissions sought to determine the objective “value” of the property at stake. In discovery today, the objective talismans are proportionality specifically and efficiency more broadly.

Similar to the concept of “value,” to which the *Smyth* Court assigned a multifactor definition without a clear mode of application, so too, the proportionality rule ends up in a multifactor test without a clear hierarchy or order of operations. In devising the amendment to Rule 26(b)(1), rulemakers grabbed hold of the proportionality concept, conceived of as an objective and determinable measure. Yet commentary from the bar pointed to the slipperiness of the concept and its potential normative content. In both contexts, the articulation of a legal rule turns to a seemingly objective concept of value or proportionality that is rife with instability and subjectivity. To prevent such instability, judicial actors attempted to provide definitional outlines (the multifactor standards), but the concept is hopelessly muddled, encompassing several definitions that are not reconcilable with one another.<sup>92</sup> As a result, the seeming certainty and neutrality that the rule seeks results instead in an amorphous analysis that appears to turn on the decision makers’ normative judgment. This undifferentiated multifactor analysis can serve to justify any decision.

Third, Professor Hale’s analysis of coercion was a critique of the view that government economic regulation had a distorting effect. In his totalizing view, government passivity was just as constitutive of private bargaining as affirmative intervention. Though the context of procedural rules is very different, existing discovery rules still face the claim that they have a distorting effect on litigation outcomes (or more specifically, on the vast majority of litigation outcomes reached through bargaining). But this claim is subject to the same refutation. Any set of procedural rules will decide winners and losers in the bargaining structured by litigation. There is no “natural” litigation bargain.

Fourth, rulemakers are wary of wading into questions of policy or politics. This is at least part of the reason that they return time and again to seemingly objective concerns such as efficiency, proportionality, and cost. Simultaneously, the political problem is also managed by punting the real choices to the judges in the courtrooms. Take again the proportionality standard: not only does it lack clarity and coherence, but it solidifies the political questions right into the standard. What else can it mean for the

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91. Reda, *supra* note 20, at 1085.

92. Gelbach and Kobayashi provide a nonnormative analysis of the proportionality standard, identifying objective factors, analyzing the extent that such objective factors are measurable, and clarifying where normative factors remain. In doing so, they point out the uncertainty residing at multiple nodes of the proportionality framework. See Gelbach & Kobayashi, *supra* note 47, at 1–3.

individual judge to weigh the “importance of the litigation at stake” against the expected “costs” of the discovery, as a precondition for determining whether anyone is entitled to the discovery? The standard itself invites individual judges to make the political judgments that rulemakers have repeatedly declined to make.<sup>93</sup> Just as Professor Hale explained that “the determination of what is a ‘fair value’ is a determination of *how much* confiscation is proper (in the opinion of the court),”<sup>94</sup> so too is the determination of proportionality simply delegating to the court the exercise of its judgment as to whether the discovery requested is a normative good.

Fifth, if we follow closely Professor Hale’s insight about the ways in which law shapes all of our bargains—through background rules that *create* the inequality or leverage that parties exploit to reach agreements—we may be led to wonder about the extent to which procedure grapples with inequality today or in the future. The background rules, procedure among them, *create* the inequality with which litigants arrive in court, and on which their relative bargaining power as to a civil settlement depends. To what extent should procedure take this reality into account?<sup>95</sup>

The Rules, which govern dispute bargaining in the federal system, interact with complex additional background rules addressed by Professor Hale and his Realist counterparts. When the parties appear before the court, they arrive with bargaining already delimited by substantive legal background rules that will affect their ability to instrumentalize the procedural background rules to their desired effect. The first difficult question this poses is a classic Realist one. The procedural system, particularly as a transsubstantive one, seeks to expand formally equal rights, but of course parties do not arrive at the court that way.

Even apart from inequalities created by substantive law governing the particular dispute, our legal frameworks create and enable party asymmetry in numerous ways. For instance, there are laws that enable one party to have a monopoly of the information that ultimately becomes relevant to a dispute. For example, we allow big businesses to keep data related to their employees secret. This is an express result of our legal regime. Indeed, the fact that enterprises become as large as they do is another express result of the legal order. Since law structures all of this asymmetry, does procedure have an obligation to identify and acknowledge it and determine whether its rules should amplify or counterbalance that asymmetry?

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93. While this might resemble the perfectly typical delegation of a common law system (granting discretion to judges to flesh out the details of a legal standard over time), the delegation in the discovery context is bound to remain ad hoc and inconsistent, as these decisions are unlikely to be appealed with any regularity.

94. FRIED, *supra* note 54, at 177.

95. We might say that the new proportionality standard is doing this already in a partial and unsystematic way by identifying information asymmetry as one of the factors relevant to the evaluation. In doing so, it recognizes the inequality of the parties who come before the court. Another place in which we do so already may be in the pro se context (although there is, of course, substantial criticism of the treatment of pro se litigants within the system). This may be an increasingly important question, as pro se litigants make up a significant percentage of the docket.

Legal rules are “rules of the game of economic struggle.”<sup>96</sup> Whereas Professor Hale explained that this was true for the rules of property, contract, and tort law, it is perhaps time to recognize that the Rules of Civil Procedure play a similar role. In this capacity “they differentially and asymmetrically empower groups bargaining over the fruits of cooperation in production.”<sup>97</sup>

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96. See Duncan Kennedy, *The Stakes of Law*, 15 J. LEGAL STUD. 327, 327 (1991).

97. *Id.* Relevant to any discussion here, to focus for a time on the distributional effects of legal rules is not to suggest that this is law’s exclusive role:

The focus of this article doesn’t mean that I think the only important thing about law is its distributive effect. Legal rules function to distribute, but they also “resolve disputes” in ways that people find more or less fair . . . . Legal discourse is the language for stating the legal rules that function distributively, but it has many other uses and effects (this is where ideas like legitimation, rationalization, apology and utopia come in).

*Id.* at 327–28.