Discovery Dark Matter

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Discovery disputes are prevalent in pretrial practice but are largely absent from law-school casebooks and the decisions of the Supreme Court. The lack of formal appellate decisions contributes to the view that discovery functions like civil litigation's Wild West, without meaningful law development or error correction. But, by looking at every reference to "discovery" in the Roberts Court's jurisprudence and hundreds of district courts' review of magistrate judges' discovery orders, this Article identifies how this story leaves out a few critical developments.

First, focusing on the lack of formal appellate decisions misses how discovery is actually extensively featured in the Roberts Court's decisions. For example, Twombly *and* Iqbal *changed the pleading standard in federal court because of concerns about the ostensible cost of discovery. And there are dozens of other examples in which fears about discovery are used to justify decisions about jurisdiction, interbranch conflicts, First Amendment challenges, the reach of certain statutes, and other issues. In this way, discovery acts like "dark matter," which is most easily identified by its effect on other areas of law.*

Second, the assumption that discovery is beset by a lack of error correction and law clarification because of the absence of formal appellate guidance fails to recognize the normative guidance provided by the Court's dark-matter discovery and the quasi-appellate review following from the rise of magistrate judges as the frontline managers of discovery. To the former, this Article canvases almost fifty trial-level courts' decisions that reference the discovery dicta in Twombly *and* Iqbal *to decide discovery disputes. To the latter, district judges routinely review magistrate judges' discovery decisions, and this Article highlights several examples in which they correct unjust applications of the law or clarify important doctrinal questions.*

In this way, one sees how the functions of appellate review have been channeled in ways consistent with institutional expertise instead of formal

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judicial hierarchy. The trial-level judges are given primary responsibility for the management of discovery disputes, including error correction and law clarification, by having district judges review the decisions of magistrate judges. At the other end of the spectrum, the Roberts Court has used its bully pulpit to make pronouncements about the normative tradeoffs implicated by common discovery disputes, which has some—but not necessarily a great deal of—traction. While this jury-rigged system largely seems to be working, it has not been explicitly identified, and several factors are poised to disrupt the existing equilibrium.

Introduction

Discovery disputes are endemic to pretrial practice. But if you scan law-school casebooks or the decisions of the Supreme Court, you won't find many appellate orders addressing discovery disputes.[1] The few exceptions

1. *See* Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 720–21 (2012) (canvassing civil-procedure casebooks for Supreme Court cases referenced in their sections on discovery); Joel Slawotsky, *Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered National Uniformity*, 104 DICK. L. REV. 471, 471 (2000) (describing a period of almost twenty-five years during which the Supreme Court did not significantly address discovery sanctions).

are cases like *Seattle Times Co. v. Rhinehart*,[2] which is intertwined with constitutional considerations, or *Hickman v. Taylor*,[3] which involves an important common-law doctrine and is an interesting outlier (the rare trial-level en banc decision!) in many ways.[4] The Supreme Court issued two opinions directly deciding discovery issues in 2022—the first since 2017.[5] But these are the exceptions illuminating, if not proving, the rule that discovery disputes rarely receive grants of certiorari. Even there, the discovery questions involved foreign relations and national security, two separate, high-profile issues.

The general absence of discovery decisions from legal education and the Supreme Court's docket is consistent with the common perception that the federal appellate courts take a hands-off approach to discovery in civil litigation, perhaps fueled by a view that discovery is not worth their time.[6] The lack of appellate oversight also may add to the impression that discovery functions like civil litigation's Wild West, without meaningful error correction or law development.[7] The absence of formal appellate discovery decisions, however, is not the full story.

Three existing lines of scholarship have responded to the concerns about the dearth of appellate discovery decisions. One line identifies how federal appellate courts have long recognized a few select issues in discovery as being worthy of their attention.[8] A second line notes that, for the majority of

2. 467 U.S. 20 (1984).

3. 329 U.S. 495 (1947).

4. *See* A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 698, 734 (5th ed. 2018) (referencing *Seattle Times* and *Hickman*).

5. *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2091 (2022) (holding that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under [28 U.S.C.] § 1782" (quoting 28 U.S.C. § 1782(a))); United States v. Zubaydah, 142 S. Ct. 959, 971 (2022) (holding that the state secrets privilege applied to a § 1782 discovery request seeking information related to the existence (or nonexistence) of a CIA facility in Poland).

6. *See* Wayte v. United States, 470 U.S. 598, 624–25 (1985) (Marshall, J., dissenting) ("The abuse-of-discretion standard acknowledges that appellate courts in general, and this Court in particular, should not expend their limited resources making determinations that can profitably be made only at the trial level.").

7. *See* Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH., no. 3, 2007, at 62, 62 (discussing the lack of "set-in-stone" standards for determining who bears the burden of discovery costs); Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 9 (2020) (discussing the Supreme Court's "functional, policy-oriented approach" to appellate review that allows appellate courts to conduct law clarification and error correction); Diego A. Zambrano, *Judicial Mistakes in Discovery*, 113 NW. U. L. REV. 197, 219–20 (2018) (arguing that compliance with discovery rules is greater for magistrate judges rather than district judges partially because magistrate judges gain greater discovery expertise through having their decisions checked by district judges on appeal).

8. *See, e.g.*, Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 786 (2006)

discovery questions left unaddressed, trial-level decisions may percolate and create a body of law, which fills the void left by the appellate courts.[9] A third line explores how civil litigants and their lawyers have a role in defining the law that effectively controls discovery.[10] While this scholarship individually and collectively provides a rich account of discovery, the literature still overwhelmingly accepts the premise that trial courts are left without much oversight when it comes to discovery issues.[11]

This Article challenges the consensus view that discovery happens in a "vertical vacuum."[12] First, in the Roberts era, pivotal references to discovery appear in a significant number of the Court's decisions.[13] Most notably, *Bell Atlantic Corp. v. Twombly*[14] and *Ashcroft v. Iqbal*[15] changed the pleading standard in federal court because of concerns about the ostensible cost of discovery.[16] In this manner, discovery acted like the "legal equivalent of dark matter, which can be observed . . . through its gravitational effect upon other

(discussing interlocutory appeals for questions of privilege that cannot wait for a final judgment ruling); Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 797 (2017) ("[D]iscovery issues typically are subordinate to the ultimate jurisdictional issue.").

9. *See, e.g.*, Elizabeth Y. McCuskey, Horizontal Procedure 4 (July 15, 2018) (unpublished manuscript) (on file with author) [hereinafter McCuskey, Horizontal Procedure] (defining "horizontal procedure" as precedent developed when appellate interpretations do not cover sufficient ground and district courts must rely on precedent from other district courts for interpretation); Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 550 (2016) [hereinafter McCuskey, *Submerged Precedent*] (noting that "the relative sparsity of appellate court opinions leaves plenty of decisional work for district courts to do without binding guidance" so "[d]istrict courts' prior opinions offer some efficiency horizontally"); Yablon & Landsman-Roos, *supra* note 1, at 722 (discussing how magistrate and district court judges have had to develop rules and practices around discovery disputes in the absence of academic or appellate court guidance).

10. *See, e.g.*, Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. (forthcoming 2023) (manuscript at 20–24) (on file with author) (discussing how gaps in the civil discovery process that are not governed by formal procedural rules or other laws are filled in by the "set of practices that develops in a legal community"); Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 174, 176 (2018) (suggesting that in limited circumstances civil "litigants are co-interpreters of rules").

11. *See, e.g.*, Yablon & Landsman-Roos, *supra* note 1, at 722 ("[B]ecause of the relative lack of academic or appellate court guidance . . . magistrate and district court judges have been forced to develop rules and practices on a largely ad hoc basis.").

12. *See, e.g.*, McCuskey, Horizontal Procedure, *supra* note 9, at 28 (coining term); Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1629 (2020) (applying term).

13. *See infra* subpart III(B).

14. 550 U.S. 544 (2007).

15. 556 U.S. 662 (2009).

16. *Twombly*, 550 U.S. at 558 ("Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)); *Iqbal*, 556 U.S. at 685 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment))).

bodies."[17] Put another way, at the Supreme Court-level, discovery is most easily seen by its influence on non-discovery jurisprudence. Second, the Court's discovery dicta then radiate back out as trial-level courts cite these non-discovery cases in their discovery orders. As such, we see how the Roberts Court uses its soft authority—through dicta and other commentary—to signal its views on discovery policy and guide the trial-level courts' application of the law, effectively, if informally, fulfilling its traditional appellate role.[18] Third, the rising use of magistrate judges has created another unheralded body of de facto appellate decisions on discovery disputes: district judges' oversight of magistrate judges instead of appellate judges' supervision of district judges.[19]

Akin to its "shadow docket," the Supreme Court has a stealth jurisprudence of discovery in which it flexes its informal authority. Since Chief Justice Roberts joined the Court, it has heard just six discovery merits appeals, all of which presented policy issues that went beyond the mechanics of discovery.[20] But concerns arising from bread-and-butter discovery have famously appeared in the Court's decisions on pleading standards.[21] This Article uncovers how fears about the ostensible burdens of discovery are also used to justify decisions about jurisdiction, interbranch conflicts, First Amendment challenges, the reach of certain statutes, and other issues.[22] Furthermore, Chief Justice Roberts has used his year-end reports to opine on the role of discovery in civil litigation, offering cautionary notes about its costs.[23] At minimum, these mentions signal the Justices' views on the

17. *See* Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. 845, 845–46 (2013) (applying this metaphor to the extra-jurisdictional effect of state laws).

18. *See infra* subpart IV(A).

19. *See infra* subpart IV(B).

20. *See infra* subpart III(A).

21. *See, e.g.*, *Iqbal*, 556 U.S. at 684–85 (noting that "a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process").

22. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) (noting discovery expense as part of the rationale for holding that officials and wardens were entitled to qualified immunity with regard to noncitizens' civil rights conspiracy claims). *See* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1090 (2012) (explaining that empirical evidence does not support the common idea that civil litigation is overly time-consuming and expensive); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1849–50 (2014) (identifying the types of cases that limitations on discovery are more likely to harm).

23. *See* JOHN G. ROBERTS, JR., 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2016), https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf [https://perma.cc/4JQS-Y9RT] [hereinafter ROBERTS, 2016 YEAR-END REPORT] ("This year, we will take a step further and ask district judges to participate in pilot programs to test several promising case management techniques aimed at reducing the costs of discovery."); JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2015), http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/L29S-69YL] [hereinafter ROBERTS,

normative and functional value of discovery. And those hints shape the analysis of the lower courts even if the Roberts Court's antipathy to liberal discovery has not been fully adopted.[24]

The soft authority of the Court is not the only way that the absence of appellate guidance is addressed, albeit without fanfare. Despite receiving limited scholarly attention, the frontline of discovery has changed.[25] Magistrate judges are now the first responders when it comes to managing discovery disputes in a significant number of districts.[26] Their orders shape the collective understanding of the procedural rules that they interpret in the context of fact-rich, active disputes.[27] And, critically, parties who lose on a discovery matter before a magistrate judge get a second bite at the apple—that is, they can seek to have the decision reviewed by a district court judge.[28] This second-level review provides some of the benefits of appellate review, and this Article highlights several instances in which this quasi-appellate structure seems to be working well.[29]

This Article makes both descriptive and conceptual contributions to the literature on civil discovery and the lack of formal appellate guidance in the federal courts. To the former, the Article details how review of on-the-ground discovery decisions functions at both ends of the judicial hierarchy and how the institutional actors understand their roles. In part, the Article creates a repository of cases in which the courts describe their visions of their own institutional competencies in addressing discovery issues. These firsthand accounts are then connected to the long-espoused scholarly theories of the

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2015 YEAR-END REPORT] (noting that the "[2015 amendments] may not look like a big deal at first glance, but they are"); *see also* Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES (Dec. 31, 2015), https://www.nytimes.com/2016/01/01/us/politics/chief-justices-report-praises-limits-on-claimants-access-to-information.html [https://perma.cc/C59J-Y23G] (noting that Chief Justice Roberts called limitations on discovery "a common sense concept"); Helena Agri-Enters., LLC v. Great Lakes Grain, LLC, 988 F.3d 260, 273–74 (6th Cir. 2021) (citing year-end report and NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 260 (2019)).

24. *See infra* subpart IV(A). *See* Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 6–7 (2016) (explaining that the significance of the 2015 amendments to the Federal Rules of Civil Procedure would rest with the district judges' implementation).

25. Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *The Shadow Judiciary*, 39 REV. LITIG. 303, 305 (2020) ("Despite their varied and important functions, magistrates' roles are under-theorized in law, and their activity is under-studied as an empirical matter.").

26. *See id.* at 322 (noting that "[t]hirty-six district courts have standing rules designating magistrate responsibility over administrative and pre-trial duties such as . . . discovery disputes," meaning that "[m]agistrate judge[s'] work clearly contributes to civil case management and moving a case through the litigation lifecycle").

27. *See* McCuskey, *Submerged Precedent*, *supra* note 9, at 548 (noting that creating precedent in a fact-heavy setting allows future parties to better understand how a rule may be applied in their own factual circumstances).

28. FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b)(1)(A).

29. *See infra* subpart IV(B).

functions of trial and appellate-level courts. It also collects examples in which the absence of appellate guidance has led to errors and has impeded the development of uniform law. Next, the Article surveys all of the references to discovery during the Roberts era, identifying discovery's covert role in the Court's jurisprudence. Additionally, it examines the extent to which the Court's use of its soft authority is affecting decision-making on discovery issues by providing trial-level judges with a window into the Court's view of the underlying principles and normative tradeoffs. It then looks at district judges' evaluations of challenges to magistrate judges' orders, highlighting examples where the district judges appear to be successfully correcting errors and clarifying the law.

As to its conceptual and prescriptive contributions, the Article explains how the descriptive findings illustrate how the functions of appellate review have been channeled in ways that are mostly consistent with institutional expertise instead of formal judicial hierarchy. The trial-level judges are given primary responsibility for the management of discovery disputes, including error correction and law clarification, by having district judges review the decisions of magistrate judges. At the other end of the spectrum, the Supreme Court uses its bully pulpit to make pronouncements about the normative tradeoffs implicated by common discovery disputes, which have, at least, some traction in the lower courts. While this jury-rigged system largely seems to be working, it has not been explicitly identified, and several developments are poised to disrupt the existing equilibrium.

Part I of the Article defines the issues. It explains the importance of discovery and describes the barriers to appeal. Part II describes the costs and benefits of this system design, noting how it is consistent with the assumed institutional expertise of the different courts and the courts' own accounts of their competencies. Part III identifies the Roberts Court's pronouncements on discovery across an array of sources, including formal decisions on discovery disputes, its dicta in non-discovery cases, and its bully pulpit. Part IV explores two different ways in which the judicial system is solving for the lack of formal appellate guidance on discovery. Drawing on the findings from Part III, it examines how lower courts integrate the Court's discovery dicta into their actual practices. It also explains the rise of magistrate judges and sets forth the benefits of having the second-level review of the district court judges. The Article concludes with the implications of the makeshift system of error correction and law development, including some predictions about how it might soon be unsettled.

I. Discovery Appeals—Framing the Issue

Notwithstanding its lack of appellate attention, discovery is a key aspect of civil litigation.[30] This Part begins by explaining the value of discovery to frame the importance of the absence of appellate guidance. It then describes the impediments to appeal.

A. Importance of Discovery

An absence of formal appellate guidance in the case law governing civil discovery only matters if discovery matters. And the absence of appellate decisions on discovery might itself suggest that discovery is relatively unimportant. Such a view, though, fails to recognize how discovery serves a number of key roles in civil litigation and the regulation of entities' primary conduct.[31]

The instrumental value of discovery in civil litigation flows from the design of our pleading system, which does not require parties to possess all information necessary to prosecute or defend a claim at the outset of the suit.[32] As the Supreme Court itself acknowledged, "This simplified notice pleading standard *relies* on liberal discovery rules."[33] The disappearance of civil trials makes discovery even more significant because dispositive motions and settlement negotiations turn on the uncovered information.[34]

The process for the parties' extraction and exchange of information helps define disputed facts and issues.[35] This, in turn, is classically understood to allow the parties to present or contest various claims and

30. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 67 (2019) (arguing that " [i]t was discovery, not trial—the deposition, not the cross-examination—that became the focal point of American civil litigation").

31. *See* Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2045 (2018) (articulating two purposes of discovery: providing individual claimants with information to assist them in court and producing information to regulators to better reduce future misconduct).

32. *See, e.g.*, Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1406 (2008) (arguing that parties "hotly contest discovery" because the success of their claims depends on their ability to gather proof during discovery of their claims).

33. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (emphasis added).

34. *See* Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1221–22 (2009) (stating that most of the action in an adjudicatory proceeding takes place in discovery rather than in trial); Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1512 (2016) (explaining that trial is declining in focus because the Federal Rules of Civil Procedure place greater importance on pretrial practice such as requiring initial disclosures and discovery plans).

35. *See* Freer, *supra* note 34, at 1512 (noting that the rules that require parties to meet and confer and then submit initial disclosures and a discovery plan define contested issues earlier in the litigation process).

defenses as part of both the formal adjudication before the court and in settlement negotiations.

At the extreme end of usefulness, discovery may have an outcome-dispositive impact if, for example, one party holds a critical piece of evidence.[36] Illustrating the potential impact of discovery decisions, in a high-profile case from 1994, the plaintiff sued the defendant for making false representations about its photovoltaic system.[37] Discovery led to email messages that confirmed the defendant's awareness of the problems with the photovoltaic system, essentially deciding the case.[38] The denial of access to discovery can also, in mirror-image fashion, have an outcome-dispositive influence. For example, if the claim requires expert testimony, a discovery sanction barring the use of an expert will de facto end the case.[39]

As one would expect, discovery does not have such extreme case-dispositive effects in every case—they might not even be the majority.[40] Even still, discovery may uncover information that can be used in settlement negotiations.[41] In the ideal world, the exchange of information through discovery may lead the parties to find new common ground if, for example, a party learns about the strengths of the opposing side's claims or defenses.[42] Discovery may also expand the bargaining zone by forcing the disclosure of

36. *See* United States v. Wallace & Tiernan Co., 336 U.S. 793, 794 n.1 (1949) (noting that dismissal without prejudice in an antitrust case followed from the lower "court's action in denying the Government's motions for production of documents essential to prove the Government's case"). *See also* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 637–39 (highlighting district courts' increased focus on pretrial practice and noting that pretrial discovery practice "is important, required, and often practically dispositive").

37. Siemens Solar Indus. v. Atl. Richfield Co., No. 93 Civ. 1126, 1994 WL 86368, at *1–2 (S.D.N.Y. Mar. 16, 1994).

38. *Id.* at *2. *See also* Carey Sirota Meyer & Kari L. Wraspir, *E-Discovery: Preparing Clients for (and Protecting Them Against) Discovery in the Electronic Information Age*, 26 WM. MITCHELL L. REV. 939, 956 (2000) (describing Siemens as having uncovered a "proverbial smoking gun").

39. *See* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1065 (2d Cir. 1979) (noting that it would be "tantamount to a dismissal" for a trial court to sanction a plaintiff for his grossly negligent failure to produce discovery by precluding all evidence to damages—a required element of the claim); Rae v. United States, No. CV-15-01551, 2016 WL 4943378, at *2, 6 (D. Ariz. Sept. 16, 2016) (granting summary judgment for the defendant after the plaintiff failed to disclose an expert on time and the trial court declined to allow in the expert's testimony). *See also* United States v. Procter & Gamble Co., 356 U.S. 677, 678–80 (1958) (noting that the government voluntarily dismissed a suit rather than produce grand-jury minutes).

40. *See* John F. Grady, *Reasonable Fees: A Suggested Value-Based Analysis for Judges*, 184 F.R.D. 131, 135–36 (1999) ("There are cases where discovery makes a real difference . . . . However, discovery does not often produce such dramatic results.").

41. *See* Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2187 (2014) (noting how pretrial discovery may be kept from the public when a case settles).

42. *Cf. In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., 628 F.3d 157, 163 (5th Cir. 2010) (regarding the loss of mutual discovery that would accompany substituting bellwether plaintiffs as prejudicial to the defendant).

information that creates a reputational harm or risks exposing trade secrets.[43] And a common concern about discovery is that it can be used to foist the costs of production on the opposing party and, thus, obtain a nuisance-value settlement for a meritless claim.[44]

The value of discovery in civil litigation goes beyond its instrumental value in defining claims and defenses.[45] It has long been understood that voice—that is, a party's opportunity to tell their story to a decision maker—is positively correlated with the party's sense of the fairness of the litigation procedures.[46] And "voice" is a key aspect of those procedures, even if it does not change the outcome.[47] With the disappearance of civil trials, motion practice and settlement negotiations are the decisive stages of litigation.[48]

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43. *See* Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 967–68 (2018) (describing reputational costs of litigation even when an organization wins); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 470 (1991) (outlining the risk of unjustifiable reputation damage from businesses being forced to disclose trade secrets in litigation).

44. *See* Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. REV. 821, 843 (2018) (noting that "litigants can use discovery requests to force settlement when a producing party's costs of complying with its discovery obligations are greater than the requested relief"); *cf.* Chrysler Corp. v. Miller, 450 So. 2d 330, 331 (Fla. Dist. Ct. App. 1984) (discussing the court's discomfort in cases where the value of the suit is eclipsed by the cost of discovery).

45. *See* Polaris Innovations Ltd. v. Kingston Tech. Co., Inc., No. SACV 16-00300, 2017 WL 2806897, at *5, 12 (C.D. Cal. Mar. 30, 2017) (declining to seal information related to a dispositive motion because "[l]awsuits enforce rights, but they also 'can hold people and organizations accountable, and they can open the flow of information to the public and equalize the playing field in a way that reaffirms our collective commitment to mutual respect.'" (quoting ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 30 (2017))); Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 616 (2018) (decrying the negative effects on narrative development created by proportionality requirements in discovery). *Cf.* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 882–83 (2010) ("To be sure, investigation through discovery can reveal useful information, but investigation is not in itself the purpose of adjudication. That purpose is to furnish remedies for substantive law violations.").

46. *See* John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 547 n.14 (1978) (arguing that including additional participants in the dispute-resolution process "tends to enhance the process control of either the disputants or the decisionmaker"); Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCH. 333, 333–34 (1987) (comparing Thibaut and Walker's concepts of decision control, "the control over actual decisions made," and process control, "the opportunity to state one's case to a third-party decision maker," and noting that "it is not clear why giving people heightened voice leads them to feel more fairly treated even when what they say has little or nothing to do with what the authorities decide"); Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, J. PERSONALITY & SOC. PSYCH. 108, 109 (1977) (defining voice and explaining that a decision maker's response to a party's voiced preference "may influence the recipient's perception of distributive justice").

47. E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCH. 952, 952 (1990).

48. Engstrom, *supra* note 30, at 67 ("It was *discovery*, not trial . . . that became the focal point of American civil litigation."); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation*

And it is during these times that litigants are consulted by their lawyers and are in some form of mediated dialogue with the court and opposing party, which should amplify the litigant's voice and sense of dignity.[49]

Just as discovery may provide parties with information to support their claims or defenses, the actual and potential court-forced disclosure of sensitive information may lead to regulatory action. Additionally, discovery may influence the primary behavior of regulated (or frequently sued) entities.[50]

In the American system, private litigants fulfill many of the functions served by state regulators in other countries.[51] For example, private litigants often play a primary role in enforcing federal civil rights statutes, ensuring socially important substantive rights without large state expenditures on bureaucracy.[52] And, as the designer of the Federal Rules of Civil Procedure observed, private litigants' use of liberal discovery rules in federal courts ultimately provides information to agencies and other state policymakers.[53]

Regulatory discovery, in turn, may guide the primary conduct of entities that are either directly subject to regulations or otherwise have a high litigation risk.[54] Once discovery of misconduct becomes public, an entity might choose to change its behavior to ensure compliance with the substantive law and avoid future liability.[55] Such tradeoffs are well-illustrated by a case in which the Coca-Cola Company was ordered to

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Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1076 (2003).

49. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 154–55 (2011) (discussing discovery as a tool that is "expressly designed to enable participation and voice," giving them "the opportunity for meaningful participation by allowing them access to information that will form the basis for their presentation to the court"); Lind et al., *supra* note 47, at 952 (suggesting that litigants' engagement in trial preparation created a sense of participation and voice); Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18, 21 (1996) (explaining the link between participation, dignity, and legitimacy of judicial decision-making).

50. Lahav, *supra* note 31, at 2045–47.

51. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997). *See also* STEPHEN C. YEAZELL, LAWSUITS IN A MARKET ECONOMY: THE EVOLUTION OF CIVIL LITIGATION 84 (2018) (describing private litigation as the "decentralized, private alternative to bureaucratic control").

52. *See* Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 649–51 (2015) (observing the "effectiveness of private enforcement" for substantive rights and describing the "social benefits" of discovery); Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997) (describing Congress's use of private enforcement for civil rights laws and stating that "[c]alibration of discovery is calibration of the level of enforcement of the social policy set by Congress").

53. Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 29, 35 (1994).

54. Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 119–20 (2020).

55. *Id.*

disclose the formula for Coke—a tremendously valuable trade secret.[56] Rather than produce the formula, even under robust confidentiality protocols, Coca-Cola settled the case.[57]

Beyond its effect on parties, discovery is a key piece of the system of civil procedure.[58] It is a lot of what trial judges do. Many years ago, the Federal Judicial Center conducted a study that found that district court judges spent about five percent of their case-related time on discovery matters.[59] Additionally, concerns about the expense of discovery and its impact on dockets drive other procedural decision-making by the courts.[60] Danya Shocair Reda coined the term "cost-and-delay narrative" to describe this long-standing view—a term that captures both the ostensible issues and their disconnect from empirical studies of litigation in the federal courts that do not show excessive costs or delays attributable to discovery in most cases.[61]

B. Procedural Barriers to Appeal

The notion that there is a dearth of appellate guidance when it comes to discovery in civil litigation is widespread both throughout the Judiciary and the academy.[62] The Supreme Court explicitly acknowledged that it has "generally denied review of pretrial discovery orders."[63] Of course, nobody

56. Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 300 (D. Del. 1985).

57. Miller, *supra* note 43, at 469–70.

58. *See* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 107 & n.238 (2010) ("The Federal Rules of Civil Procedure are designed to be interdependent. . . . Whenever possible we should harmonize the rules." (quoting Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004))); *id.* ("The Rules . . . must be considered in relation to one another." (quoting Canister Co. v. Leahy, 182 F.2d 510, 514 (3d Cir. 1950))); Subrin & Main, *supra* note 22, at 1849–51 (discussing the importance of discovery and concerns about its costs in the third era of civil procedure).

59. Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 799 (1998).

60. *See, e.g.*, Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1192 (10th Cir. 2009) (referencing costs of discovery and *Twombly* in explaining the standard for a motion to dismiss); HCRI TRS Acquirer, LLC v. Iwer, 708 F. Supp. 2d 687, 691 (N.D. Ohio 2010) (referencing costs of discovery in determining that the *Twiqbal* standard applies to affirmative defenses); Warne v. Hall, 373 P.3d 588, 594 (Colo. 2016) (adopting the *Twiqbal* standard in Colorado law for the same reasons).

61. Reda, *supra* note 22, at 1089–92. *See also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 363–64 (2013) (describing the uncertainty surrounding the cost-and-delay narrative).

62. *See, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981) (explaining the rationale behind generally denying review of pretrial discovery orders); Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901, 945 (2018) ("The rarity with which discovery rulings are the subject of appeal or published opinions makes the survey of discovery practices an imperfect enterprise.").

63. *Firestone*, 449 U.S. at 377.

claims that appellate courts *never* address discovery issues.[64] Several long-standing exceptions to the procedural hurdles to review are described below in subpart I(C). But the proportion of appellate decisions on civil discovery is significantly smaller than the number of trial-level orders.[65] This difference is particularly pronounced when contrasting the trial-level judges who spend, at minimum, five to ten percent of their time on discovery issues with the Roberts Court, which has heard six discovery cases in fifteen years.[66] And the absence of appellate guidance flows from several procedural barriers.[67]

The procedural barriers that limit discovery appeals have been well covered in the prior literature.[68] Most dauntingly, a trial-level court's discovery order is rarely a final order that may be immediately appealed under section 1291 of Title 28 of the U.S. Code.[69] No matter what the issue,

64. *See* Upjohn Co. v. United States, 449 U.S. 383, 386 (1981) (adjudicating an issue of attorney–client privilege and work-product doctrine occurring during discovery); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1273–74 (2007) (collecting cases in which appellate courts exercised discretionary, interlocutory review over orders compelling discovery, refusing to compel discovery, imposing protective orders, and refusing to impose protective orders).

65. McCuskey, Horizontal Procedure, *supra* note 9, at 27.

66. *Compare* McKenna et al., *supra* note 59, at 799 (summarizing Federal Judicial Center findings regarding district and magistrate judges), *with infra* subpart III(B). As a percentage of their work, the contrast is very sharp with the Supreme Court hearing a very conservatively estimated sixty-five cases per term. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225 (2012) (describing docket trends and noting that the Court had heard about eighty cases per term since 2005).

67. *See, e.g.*, Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304–05 (5th Cir. 1973) ("Because discovery matters are committed almost exclusively to the sound discretion of the trial Judge, appellate rulings delineating the bounds of discovery under the Rules are rare."); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 701 (2014) ("Many trial court procedural decisions are structurally insulated from appellate review . . . .").

68. *See, e.g.*, Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 430–31 (2013) (highlighting issues with the current system of interlocutory appeals). *See also* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1178 (1990) (discussing concerns associated with increases in interlocutory appeals); Steinman, *supra* note 64, at 1245 ("The district court has complete discretion over whether to certify such an order for an interlocutory appeal, and the appellate court has complete discretion over whether to allow an appeal from the certified order.").

69. *See* Church of Scientology of Cal. v. United States, 506 U.S. 9, 18 n.11 (1992) ("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review."); Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009) (noting that review of pretrial discovery orders is generally denied); 28 U.S.C. § 1291 ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."); Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 92 (2009) (noting that decisions such as discovery orders are "usually not final decisions and therefore are only rarely reviewed by courts of appeals"); Steinman, *supra* note 24, at 46 ("When a district court decides a discovery motion . . . principles of appellate jurisdiction usually insulate that ruling from immediate appellate review.").

while a party can seek review of an interlocutory order, the process is criticized for being too complex, underused by judges, and unpredictable.[70]

As to the complexity of interlocutory appeals generally, some of the mechanisms apply only in certain contexts, while others can be used in a broader array of cases. For example, as part of a common-law doctrine, the Supreme Court specifically allows interlocutory appeals of denials of summary judgment on the grounds of qualified immunity.[71] On the other hand, district courts may certify any otherwise unappealable interlocutory orders in civil cases.[72] Further illustrating the complexity of interlocutory appeals, the aforementioned pair of exceptions spring from different sources—the former is a product of a judge-made doctrine, while the latter is a congressionally enacted statute.[73]

Interlocutory appeals also are sparingly granted.[74] As the Fifth Circuit opined, "[i]nterlocutory appeals are generally disfavored, and statutes permitting them must be strictly construed."[75] Accordingly, courts have observed that they reserve interlocutory appeals for exceptional, big cases.[76]

The third commonly recognized problem with the system of interlocutory appeals is that the governing doctrine is unpredictable.[77] For example, as Bryan Lammon has extensively covered, the collateral-order doctrine is beset by vague terms and inconsistent application at both the trial and appellate levels.[78]

Courts gainsay these problems, suggesting that the ultimate right of an appeal from a final judgment ensures that any significant discovery issue can

70. Lammon, *supra* note 68, at 430–31.

71. *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985) ("[T]he denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.").

72. 28 U.S.C. § 1292(b).

73. *See Mitchell*, 472 U.S. at 526–27 (explaining the rationales for qualified immunity); 28 U.S.C. § 1292(b) (enumerating statutory grounds for interlocutory appeal).

74. *See* Lammon, *supra* note 68, at 430–31 (arguing that judges underuse interlocutory appeals); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 246 (2001) ("As stated above, the rate at which circuit courts grant review of orders certified under § 1292(b)—fifty percent in the 1960s and only thirty-five percent in the 1980s—is surprising[ly] low.").

75. Allen v. Okam Holdings, Inc., 116 F.3d 153, 154 (5th Cir. 1997) (per curiam).

76. *E.g.*, Long Island Lighting Co. v. Transamerica Delaval, Inc., 648 F. Supp. 988, 991 (S.D.N.Y. 1986). *See also* Solimine, *supra* note 68, at 1167 ("[S]ome federal courts have purported to limit the use of section 1292(b) to 'big cases,' and in fact, relatively few appeals are certified at the district court level or accepted by the circuit courts."); Steinman, *supra* note 64, at 1245 ("[T]he federal appellate courts have narrowly construed § 1292(b)'s requirements so that relatively few certified appeals are accepted.").

77. Lammon, *supra* note 68, at 431.

78. *Id.*

be remedied.[79] In *Mohawk*,[80] the Supreme Court explicitly noted that the theoretical availability of "[s]ection 1292(b) appeals, mandamus, and appeals from contempt citations facilitate immediate review of some of the more consequential attorney–client privilege rulings."[81]

Nevertheless, in addition to the categorical issues with interlocutory appeals, discovery orders rarely present controlling questions of law that warrant appellate review as required by § 1292(b).[82] Instead, it is well established that discovery orders tend to evaluate fact-specific questions over the applications of the discovery rules in the particular cases.[83] For example, in assessing a motion to compel the production of confidential documents, a court might evaluate the particular probative value of the documents and weigh it against the case-specific risks of disclosure.[84] On the other hand, few discovery orders turn purely on questions of law. Illustrating one such rare instance, the Fifth Circuit heard an appeal from a discovery order to address

79. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 112–13 (2009) (explaining that the rare discovery order detrimental to attorney–client privilege cannot support broad interlocutory appealability, especially in light of the backstop of post-judgment appellate review); Am. Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967) (explaining that the rarity of irreparable harm due to discovery orders, coupled with the availability of final judgment appeals, diminish arguments to expand interlocutory appeal power).

80. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009).

81. *Id.* at 112.

82. *See, e.g.*, Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 338–39 (5th Cir. 1972) (noting that "[i]t is indeed that rare case where the issue presented in the context of discovery . . . involves a controlling question of law and where an immediate appeal may materially advance the ultimate termination of the litigation"); Union Pac. R.R. Co. v. ConAgra Poultry Co., 189 F. App'x 576, 579 (8th Cir. 2006) ("Pretrial discovery orders are almost never immediately appealable."); White v. Nix, 43 F.3d 374, 377–78 (8th Cir. 1994) (noting that "the discretionary resolution of discovery issues precludes the requisite controlling question of law" requirement).

83. *See, e.g.*, California v. U.S. Dep't of Homeland Sec., No. 19-cv-04975, 2020 WL 1557424, at *14 (N.D. Cal. Apr. 1, 2020) (noting that "district courts have struggled to coalesce around a categorical rule and instead apply a fact-specific inquiry to reach outcomes that have rejected discovery for constitutional claims in some instances and permitted discovery in others"); Fannie Mae v. Hurst, 613 F. App'x 314, 318 (5th Cir. 2015) (characterizing an argument for interlocutory appeal as "a fact-specific dispute over the application of discovery rules to this case" and rejecting it for failing to "involv[e] a controlling question of law or . . . materially advance[] ultimate termination of the case"); Sai v. Dep't of Homeland Sec., 99 F. Supp. 3d 50, 59 (D.D.C. 2015) (declining to certify a "garden-variety discovery dispute for interlocutory appeal" because on a "case-specific" analysis, such interlocutory appeal "would not serve the purposes of Section 1292(b)"); Mack Energy Co. v. Red Stick Energy, LLC, No. CV 16-1696, 2019 WL 4411950, at *4 (W.D. La. Sept. 13, 2019) (applying same principles).

84. *See Sai*, 99 F. Supp. 3d at 58–59 (recognizing that "[t]he decision whether to permit discovery to proceed while a threshold, dispositive motion is pending is both case-specific and committed to the discretion of the district court"). *See also* Cazorla v. Koch Foods of Miss., LLC, No. 10CV135, 2015 WL 3970606, at *2 (S.D. Miss. June 30, 2015) (recognizing that "[c]ourt[s] must weigh the various forms of alleged prejudice against the probative value of the information").

whether Mississippi state law would extend the attorney–client privilege to circumstances involving the commission of a tort.[85]

Moreover, discovery orders usually are not characterized as final orders because they do not formally dispose of claims or defenses other than in the rare case of a dismissal as a sanction for discovery violations.[86] This approach is common even if the discovery orders might tilt the chances of success by excluding or permitting certain evidence.[87] For example, a magistrate judge prohibited a plaintiff from offering expert testimony on whether the plaintiff's losses were caused by flood or by wind where only the latter was covered by the insurance policy.[88] The district court held that the order was not dispositive even though the plaintiff could not prevail without her expert's testimony.[89] Nevertheless, not all courts view such orders as non-dispositive. In another illustrative case, a different district court held that a similar order excluding expert testimony "vitiate[d] plaintiff's case" and was "tantamount to an involuntary dismissal."[90]

The practical unavailability of immediate appeal leads to limited incentives to challenge perceived errors later.[91] A primary aspect of the limited incentives is how the aggrieved party might win or settle the case below, mooting the issue.[92] In a world in which ninety percent or more of

85. *Hyde Constr. Co.*, 455 F.2d at 338–39, 342. *See also* Herbert v. Lando, 441 U.S. 153, 158 n.3 (1979) (describing an interlocutory appeal concerning the application of the First Amendment in pretrial discovery).

86. *See* Villafana v. Auto-Owners Ins., No. 06-0684, 2007 WL 1810513, at *1–2 (S.D. Ala. June 22, 2007) (rejecting plaintiff's appeal because "the weight of authority holds that a magistrate judge's order that excludes a plaintiff's expert from testifying is not a dispositive ruling"); Phillips v. Raymond Corp., 213 F.R.D. 521, 525 (N.D. Ill. 2003) ("Perhaps most importantly, rulings on discovery or on evidence, whether made by a Magistrate Judge without later District Judge review, or even by the District Judge himself or herself, are *not* dispositive rulings in any sense.").

87. *See, e.g.*, *Villafana*, 2007 WL 1810513, at *1 (recognizing that "the weight of authority holds that a magistrate judge's order that excludes a plaintiff's expert from testifying is not a dispositive ruling").

88. *Id.*

89. *Id.* at *1–2.

90. Yang v. Brown Univ., 149 F.R.D. 440, 442–43 (D.R.I. 1993).

91. *See* Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1665, 1742–43 (Alan J. Auerbach & Martin Feldstein eds., 2002), http://www.law.harvard.edu/faculty/shavell/pdf/99_Economic_analysis_of_law.pdf [https://perma.cc/X8FU-X8J4] (noting that due to the cost of bringing an appeal, litigants may be deterred from appealing except if it is likely that the court made an error).

92. *See, e.g.*, Am. Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967) (determining that an order requiring production of discovery was not final and "therefore not appealable"); Rodrique v. Cnty. of Sacramento, 835 F. App'x 206, 207–08 (9th Cir. 2020) (dismissing discovery appeal as moot following settlement of underlying action); Handy v. Price, 996 F.2d 1064, 1068 (10th Cir. 1993) (finding that a dismissal of a claim on its merits mooted discovery issue). Note though that this limitation does not necessarily apply in state courts. *See, e.g.*, Diaz v. Wash. State Migrant Council, 265 P.3d 956, 960 (Wash. App. 2011) (deciding a discovery issue even though the parties reached a settlement after oral argument and requested a dismissal).

civil cases settle, the potential pool of discovery appeals is very limited.[93] And, even if the issue is not mooted and it finds its way before a reviewing court, discovery appeals are only rarely granted.[94]

The low expected value of an appeal follows from the deferential standard of review.[95] Appellate courts will only reverse a trial-court decision if the trial court abused its discretion in ordering or prohibiting discovery.[96] A trial court abuses its discretion when it makes a clearly erroneous finding of fact or mistake of law.[97] Additionally, appellate courts will not reverse a discovery ruling if it was a harmless error.[98] Capturing the prevailing approach of the appellate courts, the First Circuit noted, "Discovery decisions by the bankruptcy judge or district court are reviewed for abuse of discretion, and the discretion in this area is very broad, recognizing that an appeals court simply cannot manage the intricate process of discovery from a distance."[99]

Each of these barriers can reinforce the others. The low chances of reversal and the costs of appeal contribute to limited incentives for litigants to challenge discovery orders.[100] This, in turn, means that there are fewer appellate decisions that might encourage appeal.[101] Illustrating this dynamic, a district judge rejected a challenge to a magistrate judge's waiver decision because the Ninth Circuit had not yet addressed the issue and, thus, the order was not "contrary to law."[102]

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93. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (providing estimate of civil cases that settle).

94. *See* Solimine, *supra* note 68, at 1177 & n.72 (citing earlier study that showed only about twenty percent of all appealed cases are reversed).

95. *See In re* Platinum Partners Value Arbitrage Fund L.P., No. 18cv5176, 2018 WL 3207119, at *7 (S.D.N.Y. June 29, 2018) ("The reversal of discovery orders by the Court of Appeals is understandably rare, given the broad discretion granted lower courts in management of discovery.").

96. *See* United States v. Clarke, 573 U.S. 248, 255–56 (2014) ("[The abuse-of-discretion standard] reflects the district court's superior familiarity with, and understanding of, the dispute; and it comports with the way appellate courts review related matters of case management, discovery, and trial practice.").

97. Milanese v. Rust–Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001).

98. *See, e.g.*, Russell v. Harman Int'l Indus., Inc., 773 F.3d 253, 255 (D.C. Cir. 2014) (declining to reach the issue of whether discovery was improperly denied before summary judgment because it would not have changed the outcome). *See also* McCuskey, Horizontal Procedure, *supra* note 9, at 30 (noting that "harmless error review may dissuade an appellate court from actually reaching the issue").

99. Brandt v. Wand Partners, 242 F.3d 6, 18 (1st Cir. 2001).

100. Gardner, *supra* note 12, at 1629–30.

101. *Id.*

102. Batts v. Cnty. of Santa Clara, No. C 08-00286, 2009 WL 3732003, at *1–2 (N.D. Cal. Nov. 5, 2009). *See also* Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 134 n.124 (2013) (identifying potential reviewability issues with the approach in *Batts*).

C. *Exceptions & Mitigating Approaches to the Absence of Discovery Appeals*

An important caveat about the story of the vertical vacuum is that it has always been less applicable to discovery issues that have their roots in the common law such as the scope of the attorney–client privilege.[103] And there is a fairly developed literature that explores how to get around the barriers to appellate review through procedural mechanisms such as mandamus, policy proposals encouraging greater use of certification, and gaming strategies such as refusing to comply with a discovery order to then challenge an ensuing contempt order.[104]

Trial-level courts and lawyers also might have cobbled together some partial solutions to the lack of appellate guidance on discovery. Lower courts look to their peer courts for guidance on discovery because that is all they have.[105] And this horizontal precedent works because it frequently develops in a manner that is consonant with—and perhaps informally supported by—the prevailing litigation culture in a district.[106]

II. Costs & Benefits of the Lack of Formal Appellate Guidance

This Part describes how the discovery–appeals gap is a conscious design choice of the system. It then explains how the lack of appellate review may limit the possibility of error correction and hinder the development of a vibrant jurisprudence. Throughout, the Part ties the scholarly accounts of the institutional competence of trial- and appellate-level courts to the visions articulated by the courts themselves in their orders.

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103. *See, e.g.*, Robertson, *supra* note 8, at 734–35, 773 (describing issues surrounding disclosure of information covered by attorney–client privilege and subsequent attempts at appeal, while also noting that appellate courts have allowed interlocutory review of cases involving questions of attorney–client privilege).

104. Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 SW. L.J. 1045, 1082 (1990); Robertson, *supra* note 8, at 735; Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1824 (2018); Thomas J. André, Jr., *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041, 1062–63 (1980).

105. *See* McCuskey, Horizontal Procedure, *supra* note 9, at 31–32 (providing an example of an opinion by a magistrate judge on discovery stays pending dispositive motions that has been cited over seventy-five times by district courts in the Ninth Circuit).

106. *See* Beerdsen, *supra* note 10, at 28–29 (describing rule changes undertaken to align the law with existing practice); *id.* at 38–40 (discussing interactions of discovery culture and judicial rulings); Effron, *supra* note 10, at 176 (describing the discovery rules' requirement that the litigants first interpret the scope of discovery as an implicit delegation of interpretive authority).

A. Explaining the Purposeful Design

The vertical vacuum is not an unintended consequence of our system. Instead, the absence of appellate decisions on discovery is a deliberate choice of system design. The scholarly literature and the words of judges themselves within discovery orders have primarily identified two rationales for the obstacles that lead to the absence of appellate guidance: judicial efficiency and protecting the discretion of the trial-level judge.[107] Together, these two rationales can best be understood as maximizing the institutional expertise of judges at different levels.

Roadblocks to appealing discovery decisions contribute to judicial efficiency by protecting the time of the appellate courts.[108] The Supreme Court has cautioned courts to "think carefully before expending 'scarce judicial resources' to resolve . . . questions . . . that will 'have no effect on the outcome of the case.'"[109] As described above, discovery appeals are unlikely to succeed, making appellate review "an essentially academic exercise" for which courts of appeal are "understandably unenthusiastic."[110]

Additionally, the appellate courts' reluctance to hear live discovery disputes ensures that they are not overly burdened with "appeals of housekeeping matters in the district courts."[111] The Supreme Court explicitly articulated this rationale, explaining that appellate courts "should not expend their limited resources making determinations that can profitably be made only at the trial level."[112] Instead, the appellate courts are understood as being best positioned to use their scarce time on questions of law requiring consideration of legal concepts and the exercise of judgment about the values underlying the legal principles.[113]

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107. *See, e.g.*, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106–07 (2009) (stating that the Court has disallowed "piecemeal, prejudgment appeals" because they harm judicial efficiency and "encroach[] upon the prerogatives of district court judges"); Solimine, *supra* note 68, at 1178 (recognizing the "institutional costs of increasing the burdens on circuit courts, decreasing respect for district judges, and delaying the resolution of trial court proceedings" from interlocutory appeal).

108. *See* Wayte v. United States, 470 U.S. 598, 624–25 (1985) (Marshall, J., dissenting) (contending that trial judges should have "great deference" in discovery matters, and that appellate courts should rarely "expend their limited resources" deciding such matters).

109. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quoting Pearson v. Callahan, 555 U.S. 223, 236–37 (2009)). *See also* Anderson v. Bessemer City, 470 U.S. 564, 574–75 (1985) ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

110. *Pearson*, 555 U.S. at 237. *See also* Am. Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967) (noting the "burden on the reviewing court's docket" from discovery appeals and "the slim chance for reversal of all but the most unusual discovery orders").

111. *Am. Express Warehousing*, 390 F.2d at 280.

112. *Wayte*, 470 U.S. at 624–25 (Marshall, J., dissenting).

113. *See* United States v. McConney, 728 F.2d 1195, 1202–03 (9th Cir. 1984) (articulating this conception of judicial review). Even high-level questions of statutory interpretation might fruitfully

The notion that discovery issues are beneath the notice of appellate courts might also turn on the view—shared, fairly or not, by judges at virtually all levels—that many of the disputes arise from the lawyers' obstreperousness.[114] Illustrating this belief, a federal judge from Florida noted that, in her three decades of litigation experience, the great majority of discovery disputes arose from variations on a lack of professionalism and courtesy.[115] Even accounts that disclaim the general pervasiveness of meritless discovery disputes borne of lawyers' pique tend to acknowledge that fights over discovery can "become contagious" and sometimes resemble schoolyard fights.[116]

The absence of appellate case law also logically reduces the potential of nuisance appeals and the drag they may place on either the expeditious resolution of specific cases by prolonging the litigation or on cases in the aggregate by taking up the time of the reviewing courts.[117] These concerns

be assigned to trial-level judges with more experience with "the mainsprings of human conduct." *See* Comm'r of Internal Revenue v. Duberstein, 363 U.S. 278, 289 (1960) (noting "the non-technical nature of the statutory standard" addressing whether a transfer is a "gift" under the Internal Revenue Code).

114. *See* SV Gopalratnam v. Hewlett-Packard Co., No. 13-cv-618, 2015 WL 5772864, at *7–8 (E.D. Wis. Sept. 30, 2015) (recognizing that "[t]he parties' behavior explains the belief among lawyers that judges hate discovery disputes" but finding "that generalization too broad" based on the court's experience that "it isn't that judges hate discovery disputes. It is that judges dislike unnecessary discovery disputes that involve unprofessional (some might say puerile) behavior by the lawyers or the parties"); Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) ("Therefore, it is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of 'the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.'" (quoting Tommy Prud'homme, *The Need for Responsibility Within the Adversary System*, 26 GONZ. L. REV. 443, 460 (1990/91))).

115. *In re* Camferdam, No. 18-30160, 2019 WL 3316133, at *2 (Bankr. N.D. Fla. May 15, 2019). *See also* Sterling BV, Inc. v. Cadillac Prods. Packaging Co., No. 18-CV-209, 2020 WL 9814121, at *6 (N.D. Ga. Dec. 30, 2020) ("Because it is this Court's experience that many discovery disputes occur due to diatribe and innuendo contained in e-mail communications (which appears to have occurred in this case) . . . ."); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1303–05 (1978) (describing how the adversarial instincts of litigators in a discovery system premised on non-adversarial assumptions "impair significantly, if not frustrate completely, the attainment of the discovery system's primary objectives"); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032–34 (1975) (providing a "judicial perspective" on how the discovery system fails to accomplish its truth-seeking objective because of maneuvering by litigators); Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 264–65 (1979) (bemoaning how "[u]njustified demands for and refusals to provide discovery prolong litigation and drive up its costs").

116. Craig B. Shaffer, *Motions to Compel from A Judicial Perspective*, COLO. LAW., Nov. 2005, at 97, 97; James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 LA. L. REV. 467, 487–88 (2002) (quoting the author's own remarks at a judicial conference).

117. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) ("Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts

are also shared by the Legislature, which echoed them in the Senate report on § 1292(b).[118] Moreover, as the Supreme Court noted, litigants have already "concentrate[d] their energies and resources on persuading the trial judge that their account . . . is the correct one."[119]

The Supreme Court explained that the impediments to immediately appealing discovery decisions prevent the encroachment "upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation."[120] One benefit of this funneling is related to judicial efficiency—the absence of formal appellate oversight provides enhanced flexibility of the trial court to tailor its decisions to the facts before it.

Richard Heppner has discussed how appealability "implicates the policy debate between the values of systemic efficiency and individual fairness."[121] By restricting the practical appealability of discovery orders, the appellate courts are weighing the "individual fairness" arm of the scale, which is consistent with the consensus that discovery issues usually present case-specific questions.[122] To concretely illustrate this, a study of stipulated protective orders found that trial courts routinely entered orders that did not comply with the governing appellate case law.[123] At the same time, this practice appeared to be an effective case-management technique because it reduced disputes and did not create any harm given the lack of court

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by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial."). *See also* Solimine, *supra* note 68, at 1178 ("Even traditional advocates of interlocutory appellate review, however, recognize associated institutional costs of increasing the burdens on circuit courts, decreasing respect for district judges, and delaying the resolution of trial court proceedings."); Michael Zinna, *Techniques for Expediting and Streamlining Litigation*, *in* 7 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 74:25 (5th ed. 2021) (explaining that judges dislike handling discovery disputes "because they consume so much time and do so little to advance the case").

118. OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1379 n.17 (11th Cir. 2008). The legislative history of § 1292(b) states:

> The right of appeal given by the amendatory statute is limited both by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics, and by the resting of final discretion in the matter in the court of appeals, which will not permit its docket to be crowded with piecemeal or minor litigation.

Id. (quoting S. REP. NO. 85-2434 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 5255, 5259).

119. Anderson v. Bessemer City, 470 U.S. 564, 575 (1975).

120. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U. S. 368, 374 (1981)).

121. Richard L. Heppner Jr., *Conceptualizing Appealability: Resisting the Supreme Court's Categorical Imperative*, 55 TULSA L. REV. 395, 400 (2020).

122. *See* California v. U.S. Dep't of Homeland Sec., No. 19-cv-04975, 2020 WL 1557424, at *14 (N.D. Cal. Apr. 1, 2020) (discussing how appellate courts take a flexible, "case-by-case" approach to discovery that focuses on the particular facts of the claims at hand).

123. Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1288 (2020).

filings.[124] More generally, many trial-level judges have adopted chamber rules that set forth informal procedures for expeditiously addressing discovery disputes.[125]

Another benefit of the rarity of appellate oversight is the enhancement of the trial-level judge's authority. Charles Black's daughter recounted a story of turning to her father after her mother said "no" to a request for a third piece of cake.[126] Before she could begin her plea, he shook his head and said, "Baby, I am not a court of appeals."[127] Whether the child of famous legal minds or not, this experience might have broad resonance.[128] And it applies to judges too. As the Supreme Court observed, "[T]he district judge can better exercise [his or her] responsibility [to oversee the prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings."[129]

This concern about buttressing the authority of the trial-level judges might apply with special force to matters before magistrate judges whose discovery rulings may be appealed to district judges as a matter of course. In a *qui tam* case, one district judge noted that the parties constantly challenged the magistrate judge's discovery orders simply "to provide their client with a second bite at the juridical apple" and not because they thought the decisions were wrong.[130]

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124. *See id.* (implying that because courts entered flawed stipulated protective orders, discovery disputes were reduced and no harm was created due to fewer court filings).

125. *See, e.g.*, Monster Energy Co. v. Vital Pharm., Inc., No. 18-cv-01882, 2020 WL 4107861, at *3 (C.D. Cal. May 5, 2020) (describing adoption of such procedures, such as resolution via telephonic procedure); Walsh/Granite JV v. HDR Eng'g, Inc., No. CV 17-558, 2018 WL 10228380, at *3 n.3 (W.D. Pa. Apr. 30, 2018) ("In this Court's experience, such a practice substantially reduces otherwise avoidable discovery disputes because it fosters cooperation between the parties and counsel."). *See also* Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 151 (2017) ("[O]ne of the most effective tools that judges use to reduce discovery costs and achieve proportionality is the adoption of informal discovery resolution methods that eliminate the need for formal briefing of disputes."); Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 752 (1994) (providing that "[n]umerous" local rules require a conference, which "helped to resolve discovery disputes through informal means").

126. Robin Black, Tribute, *Dad*, 111 YALE L.J. 1923, 1923 (2002).

127. *Id.*

128. *Cf.* Katharine Whittemore & Jeff Wagenheim, *Solving the 'Dad Says Yes, Mom Says No' Issue*, BOS. GLOBE (July 31, 2016, 10:00 PM), https://www.bostonglobe.com/lifestyle/2016/07/31/how-solve-dad-says-yes-mom-says-issue/b3p2IwaPcgEW4IGCkRCafL/story.html [https://perma.cc/LTX9-3AX6] (illustrating that one parent agreeing or disagreeing with another parent's previous decision is like appellate courts second-guessing district courts' prejudgment rulings).

129. Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 436 (1985).

130. United States *ex rel.* Purcell v. MWI Corp., 238 F.R.D. 321, 328 (D.D.C. 2006). *See also* Don Zupanec, *Don't Go Overboard in Challenging Magistrate Judge Discovery Orders*, 22 FED. LIT. 15 (Jan. 2007) ("The court's unhappiness is typical of the reaction when magistrate judges' discovery orders are subject to wholesale challenge.").

The primacy of trial-level judges also may reflect the institutional competency of district and magistrate judges. It is likely that trial-level judges have greater expertise in managing discovery disputes than do their appellate-level counterparts, especially as contrasted with members of the Supreme Court.[131] In dissent, Justice Stevens once criticized the Court for reviewing de novo factual findings because the Justices in the majority "did not hear the witness testify; they have insufficient time to study the transcript with the care that is appropriate to credibility determinations; and, indeed, collectively they have only minimal experience in the factfinding profession."[132] And this remains the case today—only Chief Justice Roberts, Justice Sotomayor, and Justice Gorsuch have about ten or more years of civil litigation experience, and it was decades ago for all of them.[133]

On the other side, trial-level judges will likely have expertise in handling discovery disputes.[134] In part, these judges have greater experience handling the sorts of fact-specific calls that arise in the context of discovery disputes.[135] Also, trial-level judges address many more discovery disputes

131. *See* Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. 1949, 1953, 1977 (2018) (noting that "virtually all" opinions discussing the new federal discovery rules are by trial-level judges, who conduct "nuanced, fact-specific analyses" of discovery requests); Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 817 (2010) (noting the same predominance of trial-level judges developing discovery law in the context of e-discovery).

132. Florida v. Rodriguez, 469 U.S. 1, 12 (1984) (Stevens, J., dissenting).

133. *About the Court: Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/NBG4-RGHU].

134. *See* DL v. District of Columbia, 274 F.R.D. 320, 324 (D.D.C. 2011) (noting that the trial-level judge's "specialization [with discovery issues] yields expertise"). *See also* Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL'Y, L., & ETHICS 587, 650 (2005) ("Federal district judges and magistrate judges handle discovery disputes in complex litigation on a regular basis. They are expert at it.").

135. *See* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1523–24 (2012) (noting that appellate courts generally apply deferential review standards even when technological advances "can put appellate judges in shoes that very much resemble those of jurors and trial judges" because of a belief in the latter's expertise with factfinding). Moreover, single trial-level judges can be more agile in addressing discovery disputes. *See* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3943 (3d ed. 2012) ("The arguments in favor of district court action rest on the factfinding capacities of a trial court and the ability of a single trial judge to act faster than a panel of three appellate judges."). As the Second Circuit commented, "The difficulties in a court of appeals' informing itself . . . are imaginary. There is nothing to prevent the hearing of evidence by three judges, . . . cumbersome though it be." Nat'l Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1144 (2d Cir. 1974). *See also* Debmallo Shayon Ghosh, Note, *"Inquiries That We Are Ill-Equipped to Judge": Factfinding in Appellate Court Review of Agency Rulemaking*, 90 N.Y.U. L. REV. 1269, 1292 (2015) (arguing that

and thus are more familiar with the substance of the law and the practical ramifications of its application to specific cases.[136] While still on the U.S. Court of Appeals for the Tenth Circuit, Justice Gorsuch identified this comparative advantage of trial-level judges, writing:

> Discovery disputes are, for better or worse, the daily bread of magistrate and district judges in the age of the disappearing trial. Our district court colleagues live and breathe these problems; they have a strong situation sense about what is and isn't acceptable conduct; by contrast, we encounter these issues rarely and then only from a distance.[137]

And, in their written orders, district judges frequently reference their experience and expertise when deciding discovery issues. For example, there has been a trend towards informal dispute-resolution methods, such as permitting telephonic conferences, instead of formal motion hearings over discovery disputes based on the judges' positive experiences with the techniques.[138]

For better or worse, judges even rely on their experience and assumed expertise when making case-specific rulings. In some cases, the judges properly compare or contrast a specific litigant's behavior with the norms in that jurisdiction. For example, a district judge relied, in part, on "the Court's own experience with similar discovery disputes" in finding that the requested hours in a fee application related to a discovery dispute were excessive.[139] Similarly, in another fee dispute related to discovery abuses, a district court noted that "the degree of misfeasance and lack of candor exhibited by the City and its counsel in the course of this discovery dispute were simply unprecedented" and thus justified a sizeable free award.[140] In other cases, judges rely on their experience to make generalizations about the merits of certain types of discovery requests that seem, at minimum, facially troubling. For example, in a civil rights case brought by a prisoner in New York, the

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judicial review of agency rulemaking should be returned to district courts because appellate courts have been forced to adopt a factfinding role that has burdened courts, produced inaccuracies, and weakened judicial review).

136. Lee v. Max Int'l, LLC, 638 F.3d 1318, 1320 (10th Cir. 2011).

137. *Id.*

138. *See, e.g.*, Monster Energy Co. v. Vital Pharm., Inc., No. 18-cv-01882, 2020 WL 4107861, at *3 (C.D. Cal. May 5, 2020) (stating the magistrate judge's belief "that the telephonic approach is the better approach"); Walsh/Granite JV v. HDR Eng'g, Inc., No. CV 17-558, 2018 WL 10228380, at *1 (W.D. Pa. Apr. 30, 2018) (discussing discovery issues in a telephonic conference).

139. Marquis v. Sadeghian, No. 19-cv-626, 2021 WL 4148755, at *10 (E.D. Tex. Sept. 13, 2021).

140. Flagg v. City of Detroit, No. 05-74253, 2011 WL 6131073, at *5 (E.D. Mich. Dec. 9, 2011).

district judge relied on his general experience with similar cases to frame the likely probative value and burdens of the requested discovery.[141]

Notwithstanding that prior troubling example, the assumed substantive expertise of trial-level judges should again apply even more strongly when considering magistrate judges specifically. As discussed in further detail below, magistrate judges are the frontline discovery managers in the federal courts.[142] And both scholars and the courts themselves have recognized the magistrate judges' expertise in the area of discovery.

Diego Zambrano's study of magistrate and district judges confirms the link between expertise and familiarity with discovery issues.[143] He found that magistrate judges made the fewest errors in applying new discovery standards following the 2015 amendments to Rule 26(b) of the Federal Rules of Civil Procedure.[144]

Courts also recognize magistrate judges' command of the law of discovery. For example, one district judge commented, "By reason of their vast experience in handling such matters, magistrate judges are as competent as the district judges (if not more competent) to preside over discovery disputes."[145] In addition to their handling of discovery matters, magistrate judges often have developed a talent for facilitating settlement negotiations from their experience acting as mediators—a skill set that can help informally resolve discovery disputes.[146] District judges have even recognized the expertise of specific magistrate judges who have blazed the trails on discovery issues.[147]

In addition to having more experience with discovery cases generally, trial-level judges likely know more about the specifics of the case in which a particular discovery dispute arises. For example, in addressing a dispute over fees, the district judge noted that it found no evidence of duplicate billing

141. Johnson v. Miller, No. 20-CV-622, 2021 WL 4803647, at *3 (N.D.N.Y. Sept. 2, 2021).

142. *See infra* subpart IV(B).

143. *See* Zambrano, *supra* note 7, at 220 (describing study results that suggest magistrate judges' expertise leads to increased judicial compliance). Buttressing these findings, an older survey of administrative law judges found that prior experience was correlated with an ability to discern false testimony. *See* Gregory L. Ogden, *The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 9–10 (2000) (finding the majority of administrative law judges believe that experience helps discern false testimony).

144. Zambrano, *supra* note 7, at 201, 220.

145. United States *ex rel.* Purcell v. MWI Corp., 238 F.R.D. 321, 328 (D.D.C. 2006).

146. *See, e.g.*, Michael E. Upchurch, *United States Magistrate Judges: Southern District of Alabama*, 80 ALA. LAW. 183, 184–85 (2019) ("Judge Bivins has found that her settlement skills are also useful in resolving discovery disputes, where she prefers to give the lawyers the chance to control the outcome by compromise.").

147. *See, e.g.*, Barnes v. District of Columbia, 289 F.R.D. 1, 17 (D.D.C. 2012) ("Recognizing Judge Facciola's wisdom and expertise resolving discovery disputes, this Court is confident following his lead.").

"given its own experience with this complicated discovery dispute."[148] In the same vein, another district judge rejected a party's attempt to designate a broad swathe of transcripts as confidential based on the judge's "unfortunate experience of reading transcripts of many depositions in this case."[149] One final example highlights how district judges can wisely apply their discovery expertise at both the category and case levels. A district judge had developed informal processes for addressing discovery disputes that helped expedite the resolution of most issues.[150] But, when faced with litigants who struggled with that system, the district judge required formal briefing.[151]

Again, as the frontline managers of discovery, magistrate judges will have this same understanding of the case context in which discovery disputes arise. For example, in a set of antitrust cases, the magistrate judge issued at least eighteen orders resolving twenty-five or more discovery disputes over a multiyear period.[152] Further illustrating these dynamics, in another case, a magistrate judge relied on her experiences with the parties' discovery disputes to determine that the plaintiff acted diligently as required by Federal Rule of Civil Procedure 16(b)(4).[153]

B. Identifying the Drawbacks

The absence of formal appellate guidance on discovery issues is a deliberate design choice—and one that carries real costs. Commentators have identified that robust error correction and the development of uniform law

148. Adams v. City of Montgomery, No. 10cv924, 2013 WL 6065763, at *3 (M.D. Ala. Nov. 18, 2013).

149. Shenwick v. Twitter, Inc., No. 16-cv-05314, 2019 WL 1552293, at *1 (N.D. Cal. Apr. 9, 2019).

150. *In re* EasySaver Rewards Litig., No. 09-CV-2094, 2011 WL 3859442, at *1 & n.1 (S.D. Cal. Sept. 1, 2011).

151. *Id.*

152. Coal. for App Fairness v. Apple Inc., No. 21-mc-00098, 2021 WL 3418805, at *2 (D.D.C. Aug. 5, 2021) (noting the importance of this experience in granting motion to transfer). *See also* Hirsch v. USHEALTH Advisors, LLC, No. 18-cv-00245, 2020 WL 1271374, at *1 & n.1 (N.D. Tex. Mar. 12, 2020) (illustrating the district judge's deference to discovery decisions by a magistrate judge because of the magistrate judge's familiarity with the issues after resolving multiple previous discovery disputes in the case).

153. Est. of Roemer v. Shoaga, No. 14-cv-01655, 2017 WL 1190558, at *2 (D. Colo. Mar. 31, 2017).

are inhibited by the absence of appellate review.[154] Moreover, servicing these two aims adds to the fairness and legitimacy of the legal process.[155]

The benefit of error correction should be relatively self-apparent—courts of appeal provide litigants with an opportunity to show that the lower court erred so that the final legal judgment correctly applies the law to the facts.[156] This is their basic function.[157]

The magnitude of the underlying problem in this specific context—that is, the extent to which trial-level judges err in their discovery orders—is difficult to estimate. The procedural barriers to appeal mean that we should not expect to see many instances in which orders are reversed, and the fact-bound nature of many discovery issues explains why the rare appeal is unlikely to generate an easily found published opinion.[158] Even if an intrepid researcher were to search docket entries directly, many courts use informal processes to resolve discovery disputes, and thus, the record is likely to underreport issues.[159]

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154. *See* Solimine, *supra* note 68, at 1175 ("Appeals, by providing at least one more layer of decision-making, serve a number of values: they further the goal of rendering correct factual and legal decisions, and they permit law to be developed in a way applicable to all geographically dispersed federal courts."); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 503 (1998) (concluding that the existence of the appeals process protects against certain errors by trial judges because parties have the opportunity to appeal to a judge with different incentives than the trial judge); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381–82 (1995) (arguing that appeals initiated by litigants, rather than enhanced trial process or appeals initiated by the reviewing court, are an efficient method of error correction because litigants have information about whether a decision was erroneous).

155. *See* Solimine, *supra* note 68, at 1175 (arguing that appellate review promotes fairness by protecting individual litigants from being bound by one judge's reasoning). *See also* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 96–97 (1975) (stating that appellate review is necessary to preserve the appearance of justice and legitimize the decisions of lower courts and the legal system as a whole); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 550 (1969) (describing how appellate review provides greater objectivity by bringing in additional decisionmakers who are not as involved or invested in the litigation as the trial judge).

156. *See, e.g.*, Shiflett v. Virginia, 447 F.2d 50, 60 (4th Cir. 1971) (en banc) (Winter, J., dissenting) ("[A]t least one appeal is a necessary and desirable step in the search for truth."). *But see* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 55 (2010) (describing some circumstances when errors do not require reversal by appellate courts).

157. *See* Carrington, *supra* note 155, at 550 ("The basic purpose of review is to minimize the resulting loss.").

158. *See* Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 342 n.18 (2010) (discussing how discovery rulings are rarely appealable orders).

159. *See* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1437 (1994) (identifying this difficulty in an earlier study involving attorney interviews with case-specific questions); Christina L. Boyd, Pauline T. Kim & Margo Schlanger, *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466, 472

Still, the tendency to assume that trial-level discovery orders might frequently contain mistakes intuitively follows from the structural design of the system.[160] Discovery orders rarely involve issues that will have a broad legal effect, reducing the incentives for judges to devote significant time and attention to them.[161] Additionally, the risk of reversal is very low given the deferential standard of review and the lack of appeals, which also reduces the incentives for judges to ensure that their discovery orders are without error.[162] It also is plausible that both litigants and judges view resolving discovery disputes expeditiously as more important than getting them technically right.[163]

In addition to the incentive structure that suggests we can expect to frequently find mistakes in discovery orders (even with the barriers to appeal), descriptively, there *are* many examples in which trial-level courts have made mistakes in discovery orders to the potential significant detriment of a party.[164] For example, in an employment discrimination case, a judge mistakenly permitted discovery into the plaintiff's immigration status despite its lack of immediate relevance, the potential chilling effects on the bringing of such civil rights suits, and its inconsistency with the governing case law.[165]

A lack of appellate review can hinder the development of rigorous and uniform law.[166] District courts are generally charged to simply handle the

(2020) ("Relying on published sources . . . yields even fewer of the motions—just over 10 percent of the dispositive motions, 3 percent of all motions, and 1 percent of discovery motions.").

160. *See* Stempel, *supra* note 158, at 335 n.18 (discussing the difficulty of obtaining appellate review of discovery decisions (citing ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE §§ 31.04, 32.02 (5th ed. 2009))).

161. *See* Elliott Ash & W. Bentley MacLeod, *Intrinsic Motivation in Public Service: Theory and Evidence from State Supreme Courts*, 58 J.L. & ECON. 863, 865 (2015) (explaining how "judges prefer working on important cases that can influence the law in the future"); McKenna et al., *supra* note 59, 804–05 (explaining a study showing "higher levels of judicial control resulted in closer conformity to rule provisions specifying time limits for responses to requests and reduced the time between requests").

162. *See* Stempel, *supra* note 158, at 342 n.18 ("[I]n a manner akin to the old adage about doctors being able to 'bury their mistakes,' erroneous trial judge discovery rulings seldom become the subject of appeal because a discovery ruling is normally not a final, appealable order and normally does not become the object of successful interlocutory review."); Drahozal, *supra* note 154, at 477 ("[I]f a judge's decision is likely to be reversed on appeal and remanded for further proceedings, thereby decreasing the judge's leisure time, the judge's incentive to make that decision may be substantially reduced.").

163. *See* Endo, *supra* note 123, at 1278–80 (illustrating that discovery protective orders are filed early in the legal process but at alarmingly high rates of inaccuracy).

164. *See, e.g.*, E.E.O.C. v. Rest. Co., 448 F. Supp. 2d 1085, 1087–88 (D. Minn. 2006) (describing the harms that would result by granting a motion to compel discovery of a party's immigration status). Subpart IV(B), *infra*, provides additional examples.

165. *Rest. Co.*, 448 F. Supp. 2d at 1087–88.

166. *See Ex parte* Yerger, 75 U.S. 85, 102–03 (1868) ("[I]t is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must . . . seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction . . . .").

cases before them without necessarily considering the broader impacts of their decisions.[167] The district courts cannot be faulted for this because they often face significant docket pressures and may not be exposed to a variety of representative fact patterns.[168] But the end result can be muddled case law that fails to provide guidance to litigants.[169]

Collected below for the first time, there are a handful of both current and older instances in which the absence of appellate review led to inconsistent tests for discovery issues, sometimes even within the same district.[170] In considering the scope of the problem, given the paucity of reported discovery orders and appeals, intra-district and intra-circuit divergence might be endemic, leading to heightened uncertainty for litigants.

In 2019, a district court in Nevada noted an intra-circuit split over whether discovery should be stayed while a dispositive pre-answer motion is pending.[171] As early as 1995, some district courts within the Ninth Circuit applied a multi-factor test to determine if discovery should be stayed in such circumstances.[172] But other courts only stay discovery if there is an immediate and clear possibility that the motion will be granted.[173]

In 2015, a district court in Ohio highlighted the lack of intra-circuit consistency as to when plaintiffs were entitled to discovery into the defendants' potential bias in ERISA cases.[174] Some courts permitted such

167. *See* Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 666 (2013) ("[W]e can only say that, like most discovery disputes, it should be determined on a case-by-case basis . . . ."); Endo, *supra* note 44, at 868 ("First, courts frequently have to decide the cases before them without engaging in a more philosophical inquiry about first principles.").

168. Endo, *supra* note 44, at 868; Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

169. These issues do not just arise in discovery. For example, Andrew Bradt has described the problems stemming from the lack of appellate guidance and oversight of district courts' decisions as to whether federal jurisdiction exists over a case presenting a state-law claim that includes a federal question. Andrew D. Bradt, Grable *on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1156 (2011) ("Perhaps more importantly, because most of these unexplained *Grable* decisions are made as part of unreviewable remand orders, no 'common law' has developed to guide litigants or to prevent district courts from ducking important federal questions.").

170. *See infra* notes 171–185 and accompanying text.

171. Steinmetz v. Experian Info. Sols., Inc., No. 19-cv-00067, 2019 WL 3082720, at *1 (D. Nev. July 15, 2019).

172. Skellerup Indus. Ltd. v. City of L.A., 163 F.R.D. 598, 601 (C.D. Cal. 1995).

173. *E.g.*, GTE Wireless, Inc. v. Qualcomm, Inc., 192 F.R.D. 284, 286 (S.D. Cal. 2000).

174. Corey v. Sedgwick Claims Mgmt. Servs., No. 15 CV 1736, 2015 WL 9206490, at *2 (N.D. Ohio Dec. 17, 2015).

discovery based on the plaintiff's allegation of a conflict of interest alone while others required more.[175]

Jonathan Remy Nash and Joanna Shepherd identified a third intra-district split—this one on the meaning of the 2006 amendment to Rule 26(b)(2).[176] The amended language provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[177] Some courts took the view that the amendment prohibited any discovery of electronically stored information that was not reasonably accessible because of undue burden or cost, evaluating this question under the preexisting seven-factor *Zubulake*[178] test.[179] Within Kansas, another faction of federal courts used the factors in the Advisory Committee notes to determine whether to permit the discovery or shift costs.[180] A second group of federal courts within Kansas considered both sets of factors.[181]

A fourth intra-circuit split involved the discovery of federal income tax returns within the Eleventh Circuit.[182] Some courts applied a heightened approach based on a public policy against their disclosure while others used the standard relevancy test.[183]

Additionally, district courts within the Seventh Circuit differed on whether the inadvertent disclosure of privileged information waived

175. *Compare, e.g.*, Clark v. Am. Elec. Power Sys. Long Term Disability Plan, 871 F. Supp. 2d 655, 660–61 (W.D. Ky. 2012) (stating that "the mere existence of an inherent conflict of interest . . . allows Plaintiff some limited discovery"), *with* Donovan v. Hartford Life & Accident Ins. Co., No. 10 CV 2627, 2011 WL 1344252, at *2 (N.D. Ohio Apr. 8, 2011) (reasoning that in ERISA cases, "a plaintiff is not automatically entitled to discovery on the conflict of interest factor").

176. *See* Jonathan Remy Nash & Joanna Shepherd, *Aligning Incentives and Cost Allocation in Discovery*, 71 VAND. L. REV. 2015, 2021–22 (2018) (noting the multiple ways in which the 2006 amendments to Rule 26 have fractured courts' tests for reapportioning discovery costs for electronically stored information).

177. FED. R. CIV. P. 26(b)(2)(B). *See also* FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendment (describing the purpose of the 2006 amendment to Rule 26(b)).

178. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

179. *See, e.g.*, Juster Acquisition Co. v. N. Hudson Sewerage Auth., No. 12-3427, 2013 WL 541972, at *4 (D.N.J. Feb. 11, 2013) (applying the *Zubulake* test).

180. *E.g.*, Hudson v. AIH Receivable Mgmt. Servs., No. 10-2287, 2011 WL 1402224, at *1 (D. Kan. Apr. 13, 2011).

181. Semsroth v. City of Wichita, 239 F.R.D. 630, 636–37 (D. Kan. 2006).

182. Steffen v. Akerman, Senterfitt & Eidson, P.A., No. 04-cv-1693, 2005 WL 8160100, at *3 (M.D. Fla. July 21, 2005).

183. *Compare* Dunkin' Donuts, Inc. v. Mary's Donuts, Inc., No. 01-0392-CIV, 2001 WL 34079319, at *2 (S.D. Fla. Nov. 1, 2001) (requiring a "higher burden" before permitting production of tax-related information because of "a public policy against their disclosure"), *with* Shearson Lehman Hutton, Inc. v. Lambros, 135 F.R.D. 195, 198 (M.D. Fla. 1990) (applying the standard relevancy test).

privilege.[184] Within the Northern District of Illinois itself, there were three separate approaches, ranging from finding waiver from nearly any disclosure to holding that unintentional waiver never waives the privilege.[185]

Whether disclosure of attorney work product in connection with a government investigation waives the privilege in later civil discovery also was the subject of an intra-district split in the Second Circuit for many years.[186] Some courts within the circuit found that disclosure to the government did not waive the privilege because the disclosure to a regulator did not increase the adversary's opportunities to obtain the material while others found that voluntary production constituted waiver of the privilege.[187]

Looking forward, it is possible that inconsistent case law might develop around other discovery issues—a risk that is especially high after a core aspect of discovery doctrine was recently unsettled. Specifically, a 2015 amendment to Rule 26(b)(1) added a proportionality requirement to the definition of the scope of discovery.[188] This definition includes several difficult-to-measure objectives.[189] This standard has been criticized as too vague and as requiring information—such as how individual judges'

184. *See* Sanner v. Bd. of Trade of Chi., 181 F.R.D. 374, 379 (N.D. Ill. 1998) ("The Seventh Circuit has not definitively held whether inadvertent disclosure of privileged information waives privilege.").

185. *See, e.g.*, Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 117 (N.D. Ill. 1996) (following an "objective approach" that would result in waiver of privilege for nearly any disclosure); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954 (N.D. Ill. 1982) (applying the rule that "mere inadvertent production does not waive the privilege"). The third approach used a case-by-case balancing test. *See, e.g.*, Lien v. Wilson & McIlvaine, No. 87 C 6397, 1988 WL 58613, at *1 (N.D. Ill. June 2, 1988) (weighing several factors to determine whether inadvertent disclosure waived the privilege).

186. *See In re* Steinhardt Partners, L.P., 9 F.3d 230, 233, 235 (2d Cir. 1993) (resolving a split that had lasted at least a decade).

187. *Compare* Enron Corp. v. Borget, No. 88 CIV. 2828, 1990 WL 144879, at *2 (S.D.N.Y. Sept. 22, 1990) ("[T]he disclosure of work product materials to third parties does not constitute a waiver of privilege unless the disclosure increases the adversary's opportunity to obtain the materials."), *with* Tchrs. Ins. & Annuity Ass'n v. Shamrock Broad. Co., 521 F. Supp. 638, 644–45 (S.D.N.Y. 1981) (holding that voluntary disclosure "should be deemed a complete waiver of the attorney-client privilege" unless the party "specifically reserve[s]" the right to assert the privilege in subsequent proceedings).

188. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment; Endo, *supra* note 44, at 845. In the words of Judge Shira Scheindlin, the scope of discovery "is critical." Shira A. Scheindlin, *Judicial Fact-Finding and the Trial Court Judge*, 69 U. MIA. L. REV. 367, 368 (2015).

189. FED. R. CIV. P. 26(b)(1). Rule 26(b)(1) reads:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Id.

practices might vary—that neither the parties nor the judges might have.[190] These same issues might make it difficult for trial-level judges to create a uniform scheme.

The lack of uniform law might be self-perpetuating based on the incentives for the litigants too. The absence of active oversight permits district courts to be less-than-faithful stewards of appellate-level jurisprudence.[191] And then, when faced with varying district court practices and limited appellate oversight, parties might choose to settle and thus reduce the likelihood that an appellate court addresses the issue.[192]

These practical disadvantages, stemming from the lack of appellate decisions on discovery, carry meaningful normative costs.[193] Accuracy is a fundamental component of fairness.[194] And this principle should be served by having a multi-judge panel assess a decision made by a sole, frontline jurist, especially if the panel catches errors or develops more rigorous frameworks to evaluate discovery disputes.[195] Moreover, appellate review should reassure litigants of the fairness and legitimacy of the process by both articulating the rationales underlying the decisions and ensuring that the allocation of rights and duties does not turn simply on the caprice of an individual judge.[196]

III. Discovery in the Roberts Court's Jurisprudence

This Part explores the Roberts Court's pronouncements on discovery, canvassing both formal and informal statements. It first examines the only six cases in which the Court heard appeals to actual discovery decisions—a sextet whose analysis and holdings, counterintuitively, have more

190. *See* Bernadette Bollas Genetin, *"Just A Bit Outside!": Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts*, 34 REV. LITIG. 655, 693 (2015) (noting that a proportionality standard does not afford lower federal courts the required information to make a comprehensive decision, leading judges to potentially rely on biases and heuristics).

191. *Cf.* Endo, *supra* note 123, at 1279 (determining that proposed protective orders could be denied by the court for the very same reason that they had been repeatedly granted by other courts).

192. Debra Lyn Bassett, *Reasonableness in E-Discovery*, 32 CAMPBELL L. REV. 435, 438 (2010).

193. *See* Solimine, *supra* note 68, at 1175 (noting that appellate review traditionally plays a key role in reviewing the decisions of an otherwise unaccountable trial judge, developing caselaw guidance, and providing factually and legally correct oversight).

194. *See id.* (noting that "appeals provide a *fairer* way of reaching decisions"). *See also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192 (2004) ("[T]he Accuracy Principle[] specifies the achievement of legally correct outcomes as the criterion for measuring procedural fairness . . . .").

195. *See* Carrington, *supra* note 155, at 550 (emphasizing that the extraordinary power of trial judges justifies making their decisions subject to appellate review to provide greater objectivity, address a wider base of values, and help to ensure more fairness for "men of ordinary sensitivity").

196. *See* Redish, *supra* note 155, at 96–97 (showing that appellate review legitimizes the court system in the litigant's eyes by protecting them from the perception they are "victims of arbitrary individuals").

significance in non-discovery cases. With that underbrush cleared, the Article turns to its namesake concern: the effect that background concerns about the timing and expense of discovery have on the Court's non-discovery jurisprudence. The Part concludes by describing another high-profile set of Chief Justice Roberts's discovery dicta: his 2016 and 2015 Year-End Reports.

A. Discovery Merits Cases

Appeals of discovery decisions rarely make their way to the Supreme Court.[197] In the Roberts era, only six discovery merits appeals have reached the Court.[198] In each of these cases, the Court's analysis went beyond the mechanics of discovery, reaching other significant legal questions. Given the high bar for granting a writ of certiorari, which includes the proviso that review should be limited to "important federal question[s]," the complexity of the cases should not be surprising.[199] But the breadth of the holdings and other clues—e.g., the reasons for granting certiorari, the authorities relied on, and the use by subsequent lower courts—suggest that this sextet of cases mostly are not even true *discovery* discovery cases.

In 2022, the Court issued its two most recent discovery merits decisions, which both address questions about 28 U.S.C. § 1782.[200] In *ZF Auto*,[201] a sales contract called for any disputes to be submitted to a specific private dispute-resolution organization in Germany.[202] The Hong Kong-based buyer sought information from the Michigan-based seller under § 1782, which authorizes federal district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal."[203] The seller moved to quash the subpoenas, arguing that the term "foreign or international tribunal" did not cover a private arbitral body. The Court agreed with the seller based on dictionary definitions of the terms, the statute's nod to government procedures in other sections, and the statute's focus on comity.

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197. *See* Slawotsky, *supra* note 1, at 471 (noting the infrequency of Supreme Court review of discovery disputes).

198. ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022); United States v. Zubaydah, 142 S. Ct. 959, 971 (2022); Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1184 (2017); United States v. Jicarilla Apache Nation, 564 U.S. 162, 168–69 (2011); Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 104–05 (2009); Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 139–40 (2014).

199. SUP. CT. R. 10. *See also* Hubbard v. United States, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) ("A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction, and our Rule 10 embodies the standards by which we decide to grant review.").

200. *ZF Auto.*, 142 S. Ct. at 2084; *Zubaydah*, 142 S. Ct. at 963.

201. ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (2022).

202. *Id.* at 2084.

203. 28 U.S.C. § 1782(a).

In *Zubaydah*,[204] a foreign national attempted to use § 1782 to obtain information about contractors for the Central Intelligence Agency (CIA) for use in a Polish criminal investigation as to whether the contractors had tortured the foreign national.[205] The United States intervened and sought to prevent the discovery, asserting state secrets privilege.[206] The Court held that the state secrets privilege applied to bar the discovery where the confirmation or denial of Poland as a CIA interrogation location could harm national security and the requesting party suggested that his need for the information was not great.[207]

While both *ZF Auto* and *Zubaydah* directly address discovery issues, there is, at minimum, some suggestion that the trial courts' day-to-day case management was not what drove the grants of certiorari. First, by its nature, § 1782 is designed to aid parties in foreign litigation, not those suing in domestic courts. Also, in *ZF Auto*, the Court granted certiorari to resolve a circuit split. As Amanda Frost has noted, the Roberts Court appears to honor uniformity, even on minor issues, as a key criterion for granting certiorari.[208] Additionally, only months removed from their issuance, the effects of *ZF Auto* and *Zubaydah* are hard to definitively know. For example, it is possible that the understanding of "tribunal" in *ZF Auto* will migrate to other statutes, and the state secrets privilege can arise in many evidentiary contexts. To the former, as of June 2022, only one case has cited *ZF Auto*, straightforwardly applying it to a § 1782 dispute over whether a foreign private arbitral body was encompassed by the term.[209] To the latter, two cases have cited *Zubaydah*, but neither involved discovery.[210]

Goodyear Tire & Rubber Co. v. Haeger,[211] another of the few Roberts Court cases that directly addressed a discovery issue, arose from a product-liability suit brought against a tire company after the plaintiffs' motorhome flipped over.[212] Over several years of litigation, the tire company engaged in bad-faith discovery conduct, including the withholding of a vital safety report

204. United States v. Zubaydah, 142 S. Ct. 959 (2022).

205. *Id.* at 963.

206. *Id.*

207. *Id.* at 970–71.

208. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569, 1634 & n.203 (2008) (discussing the Court's emphasis on uniformity in case selection).

209. *In re* EWE Gasspeicher GmbH, No. 20-1830, 2022 WL 2233915, at *1 (3d Cir. June 22, 2022) (per curiam).

210. *See* Fed. Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1056 (2022) (citing *Zubaydah* in a challenge to evidentiary provisions of the Foreign Intelligence Surveillance Act of 1978); United States v. Schulte, No. 17-CR-548, 2022 WL 1639282, at *7 (S.D.N.Y. May 24, 2022) (citing *Zubaydah* in addressing a challenge to an evidentiary ruling in a national security case).

211. 137 S. Ct. 1178 (2017).

212. *Id.* at 1184.

related to the allegedly defective tires.[213] The district court sanctioned the tire company under its inherent authority, ordering the tire company to pay $2.7 million to compensate the plaintiffs for all the attorneys' fees and costs incurred from the first dishonest discovery response.[214] On appeal, the Court addressed whether the district court's inherent authority permitted it to sanction the tire company for all of the plaintiffs' expenses, whether or not they could be causally tied to the tire company's misconduct.[215] As should be expected, the Court did not disturb the district court's factual determinations or indulge in its own hypothesizing about the underlying facts.[216] Instead, the holding focused on the appropriate legal standard as to the "but-for" causation required to support an award of fees under a federal trial court's inherent powers.[217] The Court held that that the lower courts had erred because a sanctioning court "must determine which fees were incurred because of, and solely because of, the misconduct at issue."[218]

While the case grew out of a discovery dispute, several factors suggest that the Court's main priority was not about helping lower courts manage discovery. First, just as in *ZF Auto*, the Court noted that it granted certiorari to resolve a circuit split.[219] Further confirming the focus of the Court's concern, discovery did not play any role in the circuit cases creating the split.[220] Second, of the handful of cases discussed in the Court's analysis, again, only one involved discovery.[221] Third, the Court's holding has broad applicability beyond the discovery context and speaks more fundamentally to the power of the federal trial courts.[222] Fourth, consistent with this reading,

213. *Id.* at 1185.

214. *Id.*

215. *Id.* at 1184–85.

216. *Id.* at 1189–90.

217. *Id.* at 1188–89.

218. *Id.* at 1189.

219. *Id.* at 1185–86. *See also* Frost, *supra* note 208, at 1639 & n.203 (arguing that circuit splits are a predominate factor in the Supreme Court's decision to grant certiorari).

220. *Compare* Plaintiffs' Baycol Steering Comm. v. Bayer Corp., 419 F.3d 794, 808 (8th Cir. 2005) (concluding that the "only issue" in the case was the appropriateness of a sanction amount), *and* Bradley v. Am. Household, Inc., 378 F.3d 373, 378 (4th Cir. 2004) (assessing whether the amount of the sanctions was improperly punitive rather than compensatory), *with* United States v. Dowell, 257 F.3d 694, 696, 699 (7th Cir. 2001) (arising out of sanction for contempt of court when attorney did not appear in court for client's criminal trial after withdrawal motion was denied).

221. *Compare* Chambers v. NASCO, Inc., 501 U.S. 32, 38 (1991) (determining whether an award of sanctions for litigation misconduct, including discovery misconduct, was justified under the court's inherent power), *with* Fox v. Vice, 563 U.S. 826, 841 (2011) (determining how to apportion fees for frivolous claims when a suit includes both frivolous and non-frivolous claims), *and* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 838 (1994) (concluding that the contempt sanctions imposed were criminal, requiring a jury trial).

222. *See, e.g.*, Serv. Emps. Int'l Union Loc. 32BJ v. Preeminent Protective Servs. Inc., 997 F.3d 1217, 1219 (D.C. Cir. 2021) (applying holding to sanction stemming from party's failure to arbitrate).

subsequent courts do not appear to have relied on *Goodyear* as a discovery-*qua*-discovery case. *Goodyear* has been cited in 644 cases.[223] Only 130 of these citations pair the reference to *Goodyear* with a mention of "discovery" in the same paragraph.[224] Most starkly, only eight citing cases are listed under the discovery-focused headnote to the case.[225]

The next Roberts Court discovery case, *Republic of Argentina v. NML Capital, Ltd.*,[226] involved a significant political question of international relations.[227] In the case, the plaintiff sued the Republic of Argentina after it defaulted on its external debt.[228] After prevailing in eleven actions to collect on its debt of $2.5 billion, the plaintiff sought discovery on Argentina's property in the hopes of enforcing its judgments.[229] The district court permitted discovery directed to Argentina's banks with locations in New York over the country's sovereign immunity objections.[230] The Court affirmed, focusing its attention on whether the Foreign Sovereign Immunities Act impliedly prohibited discovery in aid of execution of a judgment against a foreign sovereign's assets.[231] The Court noted that the Act did not explicitly displace the federal discovery rules in this context and thus held that the district court had discretion to order discovery from third-party banks about the sovereign debtor's assets located outside the United States.[232]

Discovery is a more central legal concern in the *Republic of Argentina* decision than it is in *Goodyear*. Of the 219 subsequent cases citing *Republic of Argentina*, about 67% are listed under the discovery-focused headnotes, which is much more than any of the other cases in this sextet but still not an overwhelming amount.[233] Even so, the Court's analysis in *Republic of Argentina* primarily addressed separation-of-powers concerns rather than

223. Westlaw search as of November 5, 2022.

224. *Id.*

225. *Id.*

226. 573 U.S. 134 (2014).

227. *See id.* at 136 ("We must decide whether the Foreign Sovereign Immunities Act of 1976 . . . limits the scope of discovery available to a judgment creditor in a federal postjudgment execution proceeding against a foreign sovereign." (citation omitted)). *See also* Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L., no. 1, 2016, at 157, 167–71 (describing the contentious history of U.S. discovery in foreign contexts).

228. 573 U.S. at 136.

229. *Id.* at 136–37.

230. *Id.* at 137–38.

231. *Id.* at 141–46.

232. *Id.* at 143, 146.

233. Westlaw search as of November 5, 2022.

closely parsing the underlying discovery rules (as took place in the lower courts).[234]

The final two Roberts Court decisions on discovery dealt with the attorney–client privilege, which receives more appellate attention given its intersection with evidence and its roots in the common law.[235] The first of these cases, *United States v. Jicarilla Apache Nation*,[236] shares some similarities with *ZF Automotive* and *Republic of Argentina* in that all three involved the federal government's relationship with other sovereigns. In *Jicarilla Apache Nation*, the tribe sued the federal government for mismanaging property held in trust on its behalf.[237] After years of engaging in alternative dispute resolution processes, the tribe moved to compel the government to produce more than one hundred documents withheld under the attorney–client privilege and attorney–work–product doctrine.[238] The lower court partially granted the tribe's motion to compel, finding that a long-standing fiduciary exception to the attorney–client privilege applied.[239] The Supreme Court reversed the lower court, holding that, even if it were to recognize the exception, the exception did not extend to the federal government in its capacity as trustee of tribal funds.[240]

The nature of the trust relationship between the federal government and the tribe is the predominant theme in the *Jicarilla Apache Nation* analysis.[241] Only one of the five cases discussed most fully by the Court in *Jicarilla Apache Nation* deals with the fiduciary exception to the attorney–client privilege, while the others primarily concerned the duties owed to tribes by

234. *See* 573 U.S. at 138–39 (noting that "[w]e need not take up those issues today" and referencing the lower court's discussion of Rule 69 and Rule 26(b)(1)). Also, note that neither of the two unrelated—that is, not arising out of the same dispute—cases extensively examined by the Court dealt with discovery. *Id.* at 140–41. *See* Republic of Austria v. Altmann, 541 U.S. 677, 700–01 (2004) (ruling narrowly on sovereign immunity under the Foreign Sovereign Immunities Act); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 482 (1983) (evaluating the constitutionality of the Foreign Sovereign Immunities Act).

235. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that the attorney–client privilege "is the oldest of the privileges for confidential communications known to the common law").

236. 564 U.S. 162 (2011).

237. *Id.* at 166.

238. *Id.* at 166–67.

239. *Id.* at 167–68.

240. *Id.* at 187.

241. *See id.* at 170 (asserting that in order to determine whether the exception applies, the Court must examine the bounds of the "nature of the trust relationship between the United States and the Indian tribes"). *See also* Michalyn Steele, *Indigenous Resilience*, 62 ARIZ. L. REV. 305, 322 (2020) (arguing that trust doctrines, such as those asserted by the tribe in *Jicarilla Apache Nation*, would require the federal government have "special obligations to the tribes"); Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 117 (2013) (summarizing that the *Jicarilla* Court restricted the federal government's obligation to the tribes to those defined by statute, not common law).

the federal government.[242] In keeping with this theme, *Jicarilla Apache Nation* has been most cited for its holding about the relationship between the federal government and tribes.[243]

In *Mohawk Industries, Inc. v. Carpenter*, the Roberts Court addressed whether an order compelling disclosure of material withheld on the basis of attorney–client privilege qualified for immediate appeal under the collateral-order doctrine.[244] Here, like in *Republic of Argentina*, the discovery issue was intertwined with a broader question of statutory interpretation and implicated separation-of-powers concerns.[245] In *Mohawk*, Carpenter sued Mohawk for violating 42 U.S.C. § 1985(2) and various state laws, alleging that after he informed the company that it was using undocumented immigrants (an allegation in a pending class action, unbeknownst to Carpenter), the company fired him.[246] Carpenter sought information related to his pre-termination meeting with Mohawk's counsel.[247] Mohawk refused to produce it, asserting that it was protected from disclosure by attorney–client privilege.[248] The district court granted Carpenter's motion to compel but then stayed its ruling to allow Mohawk to explore an immediate appeal under the collateral-order doctrine.[249] The Court held that orders rejecting assertions of attorney–client privilege did not qualify for immediate review because post-judgment appeals "generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege."[250]

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242. *Compare* Riggs Nat'l Bank of Wash., D.C. v. Zimmer, 355 A.2d 709, 713–14 (Del. Ch. 1976) (addressing the exception), *with* United States v. Navajo Nation, 556 U.S. 287, 290 (2009) (asserting that to invoke jurisdiction under the Indian Tucker Act, the tribe must establish a fiduciary duty exists); United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 (2003) (recognizing that the federal government has statutory duties as a trustee); United States v. Mitchell, 463 U.S. 206, 226 (1983) (recognizing the federal government's fiduciary obligations concerning Indian lands and resources); *and* Heckman v. United States, 224 U.S. 413, 434 (1912) (stating that the relevant inquiry is "what is the duty of the Government").

243. Only 139 of the 291 cases citing *Jicarilla Apache Nation* are listed under the discovery-focused headnotes per a Westlaw search on February 7, 2022. *See also* Steele, *supra* note 241, at 322 & n.13 (citing *Jicarilla Apache Nation* while discussing the federal government's responsibility to tribes); Sisk, *supra* note 241, at 117 (citing *Jicarilla Apache Nation*'s holding that the government's relationship with tribes is limited to those imposed by statute rather than common law).

244. 558 U.S. 100, 103 (2009).

245. *Id.* at 106–07, 113 n.4. *See also* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 337–38 (2012) (discussing the limitations in *Mohawk* on collateral-order doctrine); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 27 n.124 (2011) (citing *Mohawk* to support the assertion that the Supreme Court prefers the rulemaking process over developing rules through individual cases).

246. 558 U.S. at 103.

247. *Id.* at 104.

248. *Id.*

249. *Id.* at 104–05.

250. *Id.* at 109.

Of the six cases discussed within this subpart, *Mohawk* is probably the ruling that will be the most applicable to day-to-day discovery practice. Even so, just as in *Goodyear*, the Supreme Court explicitly acknowledged that it granted review to resolve a circuit split.[251] Moreover, much of the Court's analysis focused on the relationship between the Judiciary and Congress in setting the statutory subject matter of the courts, not the boundaries of the attorney–client privilege itself.[252] Only two of the seven cases discussed by the *Mohawk* Court arose out of the discovery context, and only one of those cases involved a motion to compel.[253] The others focused on interlocutory appeals.[254] And, just like *Goodyear* and *Jicarilla Apache Nation*, relatively few cases are listed as citing *Mohawk* under its sole discovery-focused headnote.[255]

B. The Gravitational Pull of Discovery

The Roberts Court's discovery cases are at most only partially discovery cases—a particularly surprising turn given the significant role that the cost-and-delay narrative of discovery has played in the Court's other jurisprudence. While courts and scholars have commented extensively on its effect on *Twombly* and *Iqbal*, the full extent of discovery's gravitational pull has not been explored.[256] This Part extends and updates the existing scholarship, collecting all the substantive references to discovery in Supreme Court decisions issued between Chief Justice Roberts's investiture and the end of the October 2020 term.

References to the cost-and-delay narrative are near ubiquitous in the decisions of the Roberts Court from this period, well beyond the normal intertwinement of the Civil Rules.[257] These references appear across a panoply of substantive and procedural issues, such as pleading, executive

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251. *Id.* at 105.

252. *Id.* at 113–14.

253. These seven cases are those that Westlaw identified the *Mohawk* Court as having "examined" or "discussed," the two most in-depth levels of treatment. *See* Cunningham v. Hamilton Cnty., 527 U.S. 198, 200 (1999) (addressing discovery sanctions); Boughton v. Cotter Corp., 10 F.3d 746, 748 (10th Cir. 1993) (addressing motion to compel).

254. Will v. Hallock, 546 U.S. 345, 347 (2006); Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 37–38 (1995); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 876 (1994); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 369 (1981); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949).

255. Only 97 of the 808 cases citing *Mohawk* are listed under the discovery-focused headnote per a Westlaw search on November 5, 2022.

256. *Cf.* Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 81, 94–97 (2018) (surveying federal judges and litigants and describing findings that suggest that cost, speed, and privacy concerns are more salient).

257. *See* Malveaux, *supra* note 58, at 107 & n.238 (describing the Federal Rules of Civil Procedure as "opearat[ing] as a system" with "litigation generally develop[ing] in a logical sequence, subject to interdependent and interrelated rules").

privilege, First Amendment challenges, stays, and the reach of certain statutes.[258]

The *Twombly* and *Iqbal* decisions are the prime examples of discovery's outsized influence with the Roberts Court. They also were the rare cases in which the cost-and-delay narrative's profile was especially high and garnered a great deal of attention.[259]

In *Twombly*, the Court held that consumers' allegations of parallel pricing as violative of the Sherman Act were insufficient to state a claim.[260] Writing for the majority, Justice Souter cautioned courts against "forget[ting] that proceeding to antitrust discovery can be expensive" and cited several cases and other authorities for the proposition that litigation can be bogged down by costs or that it could lead to meritless claims being settled to avoid the nuisance expense.[261] Justice Souter also explicitly rejected the argument that trial-level judges could use discovery-management tools to manage the expense well enough to prevent abuse.[262] On the other hand, Justice Stevens dissented, at least partially because of his confidence in the trial-level judges' "case-management arsenal," including multiple discovery tools.[263]

In *Iqbal*, the Court held that the district court's order denying officials' motion to dismiss on grounds of qualified immunity was immediately appealable and that the detainee's complaint failed to plead sufficient facts to state a claim for unlawful discrimination.[264] Both holdings turned in part on the cost-and-delay narrative. Writing for the majority, Justice Kennedy noted that one of the main benefits of qualified immunity was avoiding the

258. *See* Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1686 (2013) ("Over the past thirty years, the Supreme Court has fortified gateways in fear that discovery and trial impose undue cost and delay and lead to unjust results.").

259. *See, e.g.*, Steinman, *supra* note 24, at 14–15 (describing *Twombly* and *Iqbal* as the "[s]hot(s) [h]eard [r]ound the [w]orld"); Schwartz, *supra* note 258, at 1687 (explaining *Twombly*'s reasoning and the limited discussion of discovery in federal cases); Malveaux, *supra* note 58, at 107 ("There is no doubt that one of the Supreme Court's primary rationales for retiring *Conley*'s permissive pleading standard was the Court's desire to reduce time-consuming, costly, and burdensome discovery."); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2285–87 (2012) ("The underlying issue animating not only the Supreme Court's decisions in *Twombly* and *Iqbal*, but also the controversy surrounding them, is discovery access."); Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009) (noting that his article "views *Twombly* not so much as a pleading decision but rather as a court access decision, one that addresses a general problem of institutional design"); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 62, 64, 69 (2010) (emphasizing the Court's concern with the costs of discovery animating its reasoning in *Twombly*); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2025–28 (2010) (describing the cost of discovery as a key consideration of the *Twombly* Court).

260. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564–70 (2007).

261. *Id.* at 558–59.

262. *Id.* at 559, 560 n.6.

263. *Id.* at 593 n.13 (Stevens, J., dissenting).

264. Ashcroft v. Iqbal, 556 U.S. 662, 672, 687 (2009).

burdens of litigation, especially potentially costly discovery, and thus, a rejection of qualified immunity was a final decision subject to immediate appeal.[265] In evaluating the sufficiency of the complaint, Justice Kennedy acknowledged that "Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era" but cautioned that it "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[266] And, just like Justice Souter in *Twombly*, Justice Kennedy rejected the argument that the trial-level courts could use their case-management tools to mitigate against abusive discovery costs.[267] In dissent (but now joined by Justice Souter, who had penned the *Twombly* majority decision), Justice Breyer expressed his conviction in the trial courts' ability to manage discovery.[268] Highlighting the importance of this interplay, years later, Justice Scalia explicitly confirmed that discovery was the driving factor behind *Iqbal*.[269]

The cost-and-delay narrative also appears in the Roberts Court's jurisdiction and venue cases.[270] For example, in *Daimler AG v. Bauman*,[271] Justice Ginsburg's majority decision held that a foreign defendant sued by foreign plaintiffs based on events occurring outside of the United States could not be constitutionally subjected to California's jurisdiction solely on the basis that it did significant business in the state.[272] Justice Sotomayor concurred in the judgment but criticized the majority's approach because of the likelihood that it would create greater unpredictability and "radically expand[] the scope of jurisdictional discovery."[273] While they differed on the

265. *Id.* at 672.

266. *Id.* at 678–79.

267. *Id.* at 684–86.

268. *Id.* at 699–700 (Breyer, J., dissenting).

269. Fabio Arcila, Jr., *Discoverymania: Plausibility Pleading as Misprescription*, 80 BROOK. L. REV. 1487, 1487 & n.2 (2015) (citing Ira Nathenson, Comments on AALS Panel on 75th Anniversary of the FRCP, INFOGLUT.TUMBLR (Jan. 5, 2013, 3:13 PM), http://infoglut.tumblr.com/post/40037283307/comments-on-aals-panel-on-75th-anniversary-of-the [https://perma.cc/5THX-LWG3] ("Justice Scalia: what's driving [Iqbal] is discovery, 'especially in an age of electronic discovery.' #aals")).

270. *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1786–87 (2017) (Sotomayor, J., dissenting) (suggesting "plaintiffs' interest . . . is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, *share discovery*, and maximize recoveries on claims that may be too small to bring on their own." (emphasis added) (quotation omitted)); Daimler AG v. Bauman, 571 U.S. 117, 139 n.20 (2014) (suggesting that to incorporate reasonableness factors in cases of general jurisdiction would not promote efficiency on an issue that should be resolved quickly at the outset of a case); Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 435–36 (2007) (discussing the interests of judicial economy in quickly resolving jurisdictional disputes).

271. 571 U.S. 117 (2014).

272. *See id.* at 138–39 (holding that it was error "to conclude that Daimler . . . was at home in California" despite its significant business in the state because the "doing business" formulation is "unacceptably grasping").

273. *Id.* at 155 (Sotomayor, J., concurring in the judgment).

approach's effects, Justice Ginsburg seemed to agree that expanding jurisdictional discovery would be problematic.[274] Additionally, in *Sinochem*,[275] a unanimous Court held that the dismissal of a case under the forum non conveniens doctrine was appropriate, in part, because "[d]iscovery concerning personal jurisdiction would have burdened [the defendant] with expense and delay."[276]

Securities fraud and antitrust are two other areas in which discovery costs influence the Roberts Court's jurisprudence.[277] For example, in limiting the reach of § 10(b) of the Securities Exchange Act, Justice Kennedy pointed out that a broader reading would run the risk of expansive discovery that could enable plaintiffs to extort settlements.[278]

In keeping with its fears that discovery costs could impede the executive function, the cost-and-delay narrative appears in a handful of cases that implicate that interest.[279] Writing for the majority, Justice Kennedy identified discovery expenses as part of the rationale for holding that officials and wardens were entitled to qualified immunity with regard to noncitizens' civil

274. *See id.* at 139 n.20 (majority opinion) (questioning whether Justice Sotomayor's approach would actually decrease the scope of jurisdictional discovery and resolve jurisdictional disputes efficiently).

275. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007).

276. *Id.* at 435.

277. *See* FTC v. Actavis, Inc., 570 U.S. 136, 169–70 (2013) (Roberts, C.J., dissenting) (noting in the context of a patent antitrust case that this sort of litigation is "particularly complex, and particularly costly"); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (finding differences in the disclosure procedures of foreign jurisdictions relevant to determine the scope and reach of American securities regulation); Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 163–64 (2008) (expressing skepticism about increasing the costs of discovery in securities-fraud cases for foreign firms trading in U.S. markets); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320–21 (2007) (noting Congress's intent in passing the Private Securities Litigation Reform Act (PSLRA) to "curb perceived abuses," such as costly discovery requests, of securities-fraud lawsuits); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81–82 (2006) (explaining congressional intent behind the PSLRA as preventing "vexatious discovery requests"); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347–48 (2005) (recognizing congressional intent behind securities-fraud statutes was to prevent plaintiffs from using discovery to incur costs in pursuit of weak claims).

278. *Stoneridge*, 552 U.S. at 163.

279. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1856 (2017) (noting that "[c]laims against federal officials often create substantial . . . time and administrative costs" from discovery and trial); Dep't of Commerce v. New York, 139 S. Ct. 2551, 2574–75 (2019) (reasoning that extra-record discovery is rare but a showing of extensive pretext on behalf of the Department of Commerce was sufficient to justify creating an "extensive" agency record); Trump v. Vance, 140 S. Ct. 2412, 2430 (2020) (recognizing the need to allow grand juries access to information while allowing sitting presidents the ability to raise constitutional challenges to quash subpoenas); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026 (2020) (describing President Trump's arguments that the House of Representative's subpoena lacked a valid legislative purpose and was actually intended to improperly harass him); Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (noting the importance of determining whether discovery would intrude on the President's foreign affairs powers).

rights conspiracy claims.[280] Justice Breyer dissented, again, based on the availability of discovery-management tools.[281]

The Roberts Court has expressed its concern about the costs of discovery in several First Amendment cases too.[282] In one case, the Court suggested that having to divert resources to respond to discovery requests might constitute an injury sufficient to confer Article III standing in a challenge to an Ohio law criminalizing false statements made during a political campaign.[283] In another, the Court determined that an objective standard was appropriate for an as-applied challenge to a campaign finance statute and that it should entail "minimal if any discovery" to prevent "chilling speech through the threat of burdensome litigation."[284]

The Court also has referenced the cost-and-delay narrative in its review of decisions to stay litigation.[285] In remanding youth-brought climate-change litigation, the Court directed the district court to assess the burdens of discovery as part of its analysis.[286]

Concerns about discovery costs arise in a potpourri of additional cases, including a few significant non-discovery civil procedure decisions.[287] For

280. *Abbasi*, 137 S. Ct. at 1851, 1856.

281. *Id.* at 1883–84 (Breyer, J., dissenting).

282. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 165–66 (2014) (recognizing that "the target of a false statement complaint may be forced to divert significant time and resources to . . . respond to discovery requests"); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (plurality opinion) (acknowledging that discovery must balance efficient dispute resolution "without chilling speech through the threat of burdensome litigation").

283. *Driehaus*, 573 U.S. at 165–66.

284. *Wis. Right to Life*, 551 U.S. at 469.

285. *See, e.g.*, United States v. U.S. Dist. Ct. for Dist. of Or., 139 S. Ct. 1, 1 (2018) (denying an application for stay while noting the "striking" breadth of a respondent's claims and advising the district court to assess the "burdens of discovery" and the "desirability of a prompt ruling" on pending motions). *See also In re* United States, 138 S. Ct. 371, 375 (2017) (Breyer, J., dissenting) (rejecting arguments that discovery is imposing an undue burden because the district court had yet to enter any orders outlining the scope and timeline of discovery).

286. *U.S. Dist. Court for Dist. of Or.*, 139 S. Ct. at 1.

287. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (reasoning that allowing parties to demand class-wide arbitration proceedings would alter the nature of arbitration, in part by increasing costs); RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2106–07 & n.9 (2016) (noting concerns—including expansive discovery—that would follow from making RICO's private right of action apply extraterritorially); Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2549–50 (2015) (Alito, J., dissenting) (noting risks of discovery abuse costs driving settlement to counter the majority's holding that disparate-impact claims are cognizable under the FHA); Commil USA, LLC v. Cisco Sys., Inc., 575 U.S. 632, 645 (2015) (holding that a defendant's belief regarding patent validity is not a defense to a claim of induced infringement, in part, because the "need to respond to the defense will increase discovery costs and multiply the issues the jury must resolve"); United States v. Tohono O'Odham Nation, 563 U.S. 307, 315 (2011) ("Developing a factual record is responsible for much of the cost of litigation. Discovery is a conspicuous example, and the preparation and examination of witnesses at trial is another."); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 612 (2010)

example, in *Epic*,[288] the Court identified the difficulty of requiring arbitrators to alter procedures to address class-wide discovery as part of the rationale for holding that the Federal Arbitration Act's saving clause did not provide a basis for refusing to enforce arbitration agreements waiving collective-action procedures for certain claims.[289] In *Sturgell*,[290] the Court defended its categorical approach to determining whether a litigant had been virtually represented in an earlier case because of concerns about the cost of discovery that would be necessary if they had used a more fact-specific multifactor balancing test instead.[291]

As already seen in the dissents noted above, several members of the Roberts Court occasionally speak approvingly of discovery and trial-level judges' ability to use discovery-management tools effectively.[292] For example, in dissenting from the Court's holding that a federal no-fault compensation program preempted any private litigation, Justice Sotomayor noted that "court actions are essential because they provide injured persons with significant procedural tools—including, most importantly, civil discovery—that are not available in administrative proceedings under the compensation program."[293] And, in holding that assignees had Article III standing to bring claims arising from payphone operators' injuries under the Communications Act, Justice Breyer stated that the trial-level courts' discovery-management tools would prevent unnecessary costs or delays.[294]

The Roberts Court's references to discovery do not always involve the cost-and-delay narrative. Discovery also shows up—usually as a point of comparison—when the Court discusses questions of specialized procedure or other law.[295] Several other cases incidentally refer to discovery, usually as

(Kennedy, J., dissenting) (noting that "when the costs of discovery and litigation are used to force settlement even absent fault or injury," the Court errs); South Carolina v. North Carolina, 558 U.S. 256, 287–88 (2010) (Roberts, C.J., concurring in part and dissenting in part) (noting that allowing nonstate intervenors would increase costs, including discovery); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 898 (2009) (Roberts, C.J., dissenting) ("Are the parties entitled to discovery with respect to the judge's recusal decision?"); Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting a multifactor balancing test because of concerns about "wide-ranging, time-consuming, and expensive discovery").

288. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

289. *Id.* at 1622–23.

290. Taylor v. Sturgell, 553 U.S. 880 (2008).

291. *Id.* at 901.

292. In passing, note that these three Justices might have special solicitude for trial-level judges given Justice Stevens's general litigation experience, Justice Sotomayor's time on the Southern District of New York, and Justice Breyer's relationship with Judge Charles Breyer of the Northern District of California.

293. Bruesewitz v. Wyeth LLC, 562 U.S. 223, 273 (2011) (Sotomayor, J., dissenting).

294. Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 291–92 (2008).

295. *See* Banister v. Davis, 140 S. Ct. 1698, 1715 (2020) (Alito, J., dissenting) (noting that discovery rules are not a matter of right in habeas proceedings); Biestek v. Berryhill, 139 S. Ct.

part of the procedural history. For example, some cases involve claims that were dismissed as a discovery sanction.[296]

C. Chief Justice Roberts' Use of the Bully Pulpit

References to the "Roberts Court" appear throughout this Article. But this is a difficult notion to pin down. Justice Frankfurter characterized each Justice as their "own sovereign," highlighting how any particular Chief Justice's influence over the Court might vary based on a host of factors.[297] Even still, the Chief Justice has both formal and informal powers, which may

1148, 1154–55 (2019) (comparing the expert-disclosure rule in SSA disputes versus standard civil litigation); Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 878 (2019) (holding that discovery is not part of compensable costs under the Copyright Act); Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 769 (2019) (articulating the interpretative methodology for parsing the International Organizations Immunity Act); Lucia v. SEC, 138 S. Ct. 2044, 2047–48 (2018) (including discovery powers as part of the analysis to determine whether ALJs, to whom the SEC could delegate the task of presiding over enforcement proceedings, were "Officers of the United States" within the meaning of the Appointments Clause); B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 144 (2015) (contrasting the availability of discovery in standard civil litigation and Trademark Trial and Appeal board proceedings); Yates v. United States, 574 U.S. 528, 539 & n.3 (2015) (plurality opinion) (importing the definition of "tangible objects" from Rule 25(b) to § 1519 of the Sarbanes-Oxley Act); Gelboim v. Bank of Am. Corp., 574 U.S. 405, 410 (2015) (noting the discovery-related aims of § 1407—to "eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts"—in holding that the order dismissing antitrust claims for lack of antitrust injury was a final, appealable decision for bondholder plaintiffs (quoting MANUAL FOR COMPLEX LITIGATION § 20.131 (4th ed. 2004))); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 277 (2014) (noting that Congress addressed concerns about discovery abuse with the PSLRA); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 74 (2010) (rejecting the argument that deposition limits for an arbitration agreement—along with fee-sharing provision—made it unconscionable); McBurney v. Young, 569 U.S. 221, 231, 237 (2013) (noting that Virginia's rules of civil procedure provide for both discovery and subpoenas *duces tecum* in upholding Virginia's citizens-only FOIA provision); Gen. Dynamics Corp. v. United States, 563 U.S. 478, 484 (2011) (examining discovery rules that implicate the state secrets privilege); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341–42 (2011) (considering arbitration agreements that do not provide for judicially monitored discovery); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009) (discussing the amount of discovery in age-discrimination claims to determine if they should be arbitrable).

296. *See* CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 426 (2016) (discussing the district court's dismissal of claims as discovery sanctions); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 671 (2015) (arising from efforts to collect discovery sanctions); Kloeckner v. Solis, 568 U.S. 41, 48–49 (2012) (determining whether an employee must appeal to the Federal Circuit when the Merit Systems Protection Board dismisses the case on procedural grounds as a sanction for bad-faith conduct in discovery).

297. FELIX FRANKFURTER, *Chief Justices I Have Known*, *in* FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 471, 491 (Philip B. Kurland ed., 1970). *See* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1665–66 (2006) (recognizing as factors the "particular composition of the bench and the personality and inclinations of the individual Chief Justice").

promote a jurisprudential philosophy that broadly defines an era.[298] And one of the most important powers is the bully pulpit that accompanies the leadership role.[299]

A particularly salient example involves Chief Justice Warren Burger, who used the soft power of his position to campaign against excessive, costly litigation, perhaps marking the modern beginning of the cost-and-delay narrative.[300] Chief Justice Burger—like Chief Justice Roberts—also used his official power to appoint members of the Advisory Committee on the Civil Rules, leading to formal rules changes.[301] But scholars have identified Chief Justice Burger's use of his informal powers, such as organizing the Pound Conference, as playing a leading role in the greater sea change.[302]

Chief Justice Roberts may have helped bring about the much-criticized 2015 amendments to Rule 26(b) of the Federal Rules of Civil Procedure through his appointments to the Advisory Committee.[303] Responding to the cost-and-delay narrative, the amendments integrated a proportionality requirement directly into the definition of the scope of discovery, which potentially augured a more restrictive regime that would be focused on economic efficiency.[304] But, as Adam Steinman has observed, the

298. *See* Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 20–21 & n.75 (2008) (discussing examples from the Burger Court); Cross & Lindquist, *supra* note 297, at 1667, 1673–74 (explaining leadership role and influence of titular head of court).

299. Thomas O. Main, *Arbitration, What Is It Good For?*, 18 NEV. L.J. 457, 473 & n.91 (2018). *See also* Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, L. & CONTEMP. PROBS., Spring/Summer 2001, at 197, 248 (discussing the Chief Justice's ability to appoint members to Committees); Cross & Lindquist, *supra* note 297, at 1667 (providing empirical evidence on the Chief Justice's influence).

300. Stempel, *supra* note 299, at 197, 206–07; Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1588 (2014).

301. *See* Stempel, *supra* note 299, at 247–48 (discussing the Chief Justice's ability to appoint members to committees); Burbank & Farhang, *supra* note 301, at 1587–88 (describing the composition of the Advisory Committee during the Burger Court); 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, 1087 (2015) (arguing the ideological composition of the Advisory and Standing Committees during the Roberts Court is likely to align with the Federalist Society).

302. *See* Stempel, *supra* note 299, at 207, 250 (noting that the Pound Conference began Chief Justice Burger's quest to restrict broad discovery and perceived excessive litigation); Burbank & Farhang, *supra* note 301, at 1588 (characterizing the Pound Conference as "the most important event in the counteroffensive against notice pleading and broad discovery").

303. *See* Moore, *supra* note 301, at 1087, 1112–14 (describing the corporate-defense-friendly ideological leanings of Chief Justice Roberts's Advisory Committee appointees and the near unanimous disapproval by the plaintiffs' bar of changes to Rule 26(b)).

304. *See id.* at 1112–16 (describing the Advisory Committee's concern with over-discovery as the justification for making proportionality part of the scope of discovery); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1788 (2015) (tracking the shift in the way rulemakers understood efficiency, from initially administrative concerns to the recent economic and monetary

proportionality requirement did not formally change much about the actual law.[305] Instead, the suggestion that the amendments formalized concerns about excess discovery depends on the non-binding statements of Chief Justice Roberts (and others).[306]

Chief Justice Roberts has inveighed against the costs of litigation since his time as a young lawyer in the Reagan Administration.[307] And his 2015 and 2016 Year-End Reports on the Federal Judiciary took special aim at the costs of discovery.[308] The 2015 Year-End Report focused on the amendments that went into effect that year.[309] Chief Justice Roberts characterized the changes as addressing the "the most serious impediments to just, speedy, and efficient resolution of civil disputes" in contrast with amendments that only made "modest," "technical," and "even persnickety" changes.[310] In aid of this description, Chief Justice Roberts noted the findings of a 2010 symposium on civil litigation held at Duke University, forgoing any mention of how the panel had adopted the cost-and-delay narrative without examining its (lack of) empirical basis or other criticisms.[311] He then asserted that the amendment to Rule 26(b)(1) should "increase[] reliance" on the use of proportionality as a limiting factor to discovery.[312] In the 2016 Year-End Report, Chief Justice

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focus); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1009 (2016) (highlighting that the "amendments were passed over vehement dissent from the plaintiffs' bar").

305. Steinman, *supra* note 24, at 28, 31–32.

306. *Id.* at 50 & n.250.

307. *See* Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 41 (2018) (noting that, when working for the Reagan Administration, Chief Justice Roberts campaigned against fee-shifting statutes); Steinman, *supra* note 24, at 7 (describing Chief Justice Roberts's efforts to restrict judicial access and his comments on the 2015 rule changes that directly contradict the Advisory Committee).

308. ROBERTS, 2015 YEAR-END REPORT, *supra* note 23, at 5–7; ROBERTS, 2016 YEAR-END REPORT, *supra* note 23, 6–7; *See also* Howard M. Wasserman, *Civil Procedure in the Chief Justice's Year-End Report on the Federal Judiciary*, 51 STETSON L. REV. 317, 318, 328–31 (2022) (noting the 2015 report's reception and critiquing its discussion of the discovery changes).

309. ROBERTS, 2015 YEAR-END REPORT, *supra* note 23, at 4.

310. *Id.*

311. *Compare id.* ("The symposium . . . confirmed that . . . civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts."), *with* Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 758 (2016) (pointing out that "the Duke Conference did not call for rule change" and "there was no demand at the Conference for a change to the rule language; there is no clear case for present reform"). *See also* Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, FED. CTS. L. REV., Fall 2015, at 19, 34–39 (detailing polarized public comments on the proposed rule and the lack of effect on the final version); Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1220 (2020) (noting criticism because of the ideological affiliation of the Committee members); Mullenix, *supra* note 159, at 1396 (highlighting that existing empirical studies challenge the belief that there is pervasive discovery abuse).

312. ROBERTS, 2015 YEAR-END REPORT, *supra* note 23, at 6.

Roberts reemphasized the reforms and noted the launching of several pilot programs designed to reduce discovery costs further.[313]

IV. Correcting for the Lack of Formal Appellate Guidance

This Article has already pushed back on the common belief that discovery rarely appears in the Supreme Court's jurisprudence. But that does not necessarily mean that the discovery dicta serve the same functions as formal appellate guidance. This Part describes how the Roberts Court's discovery dicta influence trial-level discovery decisions by providing high-level instructions about the normative balancing they must undertake. It also turns to the error correction and law clarification that accompanies the relatively new form of second-level review by the district judges of magistrate judges' discovery orders.

A. Radiating Power of Dark Matter Discovery

Discovery functions as dark matter in the Roberts Court's jurisprudence, but its gravitational effect does not end there. The Court's pronouncements, regardless as to whether they have formal legal effect, carry great weight.[314] Generally, trial-level courts defer to higher courts' expressed preferences.[315] This might be due to the difficulty in definitively distinguishing dicta from holdings.[316] It also might follow from the hierarchical nature of the Judiciary.[317]

As discussed in Part II, one rationale for the judicial hierarchy is that appellate courts—and especially the Supreme Court—are assumed to have the expertise to address the big questions, such as how to balance competing normative values like accuracy, efficiency, and fairness.[318] The Court can allow issues to percolate below so that it can evaluate a broad range of perspectives.[319] The Court also has the time to carefully parse the law and

313. ROBERTS, 2016 YEAR-END REPORT, *supra* note 23, at 6–7.

314. *See, e.g.*, Cerro Metal Prods. v. Marshall, 620 F.2d 964, 978–79 (3d Cir. 1980) (following dictum from the Court as "a matter of sound judicial policy").

315. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 237 (2010) (providing an example of courts treating dicta as the case's holding).

316. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS & REFORM 252–53 (1985); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1411 (1995); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994).

317. Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 614–15 (2021).

318. *See* United States v. McConney, 728 F.2d 1195, 1202–03 (9th Cir. 1984) (recognizing that when "the concerns of judicial administration favor the appellate court," a de novo standard of review should apply).

319. Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998).

think about the potential ramifications of the tradeoffs.[320] And, with discovery in particular, the Court has a role in developing and approving the Federal Rules of Civil Procedure, positioning them almost like an agency in administrative rulemaking.[321] One problem, though, is that most discovery disputes (even if they were more easily appealed) may not cleanly present the normative issues undergirding the jurisprudence because the orders are so tightly bound with the specific facts of the case.[322]

In contrast, both *Twombly* and *Iqbal* involved a real back-and-forth amongst the Justices about the risk of discovery abuse and the ability of the trial-level judges to manage it.[323] Moreover, the cases can be understood as applying the *Mathews v. Eldridge*[324] balancing test to discovery.[325] In procedural due process challenges (and, functionally, in most discovery challenges), courts apply the *Mathews* test, weighing the private interest that will be affected by the official action, the risk of erroneous deprivation of the interest through the existing procedures, and the probable value of additional or alternative procedure.[326] By implicitly requiring balancing the risk of an erroneous dismissal against the cost of discovery, *Twombly* and *Iqbal* became

320. *See id.* (noting that circuit splits can create different legal regimes, which enables the Court to assess ramifications of varying legal viewpoints before granting certiorari).

321. *See* Edgar A. Jones, Jr., *The Accretion of Federal Power in Labor Arbitration—The Example of Arbitral Discovery*, 116 U. PA. L. REV. 830, 855 (1968) ("Discovery must be carefully administered in accordance with the safeguards implicit in the Federal Rules and emphasized by the Court in *Hickman v. Taylor*.").

322. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) ("Particularly in a complex case such as this, a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference."). *See also* Bone, *supra* note 259, at 876 ("The Supreme Court is in a poor position to make these choices in individual cases."); Schwartz, *supra* note 258, at 1690–92 (explaining why "the Supreme Court's decisions in *Twombly* and *Iqbal* appear ill suited to address concerns about excessive cost and delay during discovery").

323. *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 554, 560 n.6 (2007) (arguing that despite the "dissent's optimism," the "hope of effective judicial supervision is slim" in our current system), *and* Ashcroft v. Iqbal, 556 U.S. 662, 684–86 (2009) (rejecting an "invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery"), *with Twombly*, 550 U.S. at 595 n.13 (Stevens, J., dissenting) (arguing that the majority's concerns about costly discovery are not reasons to "throw the baby out with the bathwater" and that the majority "underestimates a district court's case-management arsenal"), *and Iqbal*, 556 U.S. at 700 (Breyer, J., dissenting) (arguing that nothing in the "Court's opinion provides convincing grounds for finding these alternative case-management tools inadequate").

324. Mathews v. Eldridge, 424 U.S. 319 (1976).

325. *See* Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 46 (2010) ("Understanding *Twombly* as *Mathews* applied to discovery allows courts to draw on the well-developed framework and case law supporting the three-factor *Mathews* test. Applying the three *Mathews* factors to discovery deprivations is, moreover, well within the institutional competence of the federal judiciary.").

326. *Id.* at 46; *Mathews*, 424 U.S. at 335.

excellent vehicles for the Court to deliver normative pronouncements that are determining the general law of discovery.[327]

At the same time, trial-level courts retain a great deal of discretion in figuring out how the normative pronouncements apply, which shapes the development of the law—again, a feature (not a bug) of our system.[328] And discovery is an area in which both litigants and courts might be willing to trade expeditious resolution over steadfast adherence to process and the black-letter law.[329] Accordingly, an important descriptive question is to what extent are trial-level courts picking up what the Supreme Court is putting down.

As this Article identifies for the first time, even the Supreme Court's discovery dicta and Chief Justice Roberts's Year-End Reports affect the application of discovery at the trial level, informally fulfilling part of the appellate function of guiding the development of the law. In examining citations to *Twombly*, *Iqbal*, and the two Year-End Reports, one sees trial-level courts citing those sources in their analysis of discovery issues. While it is possible that the Supreme Court's other discovery dicta guides the trial-level courts, the analysis below focuses on *Twombly*, *Iqbal*, and the two Year-End Reports because they are the most well-known calls-to-arms regarding discovery.

Searches for cases referencing either *Twombly* or *Iqbal* and terms related to their dicta on the time and expense of discovery led to 149 trial-level orders. Forty-two of these decisions were on point, referencing *Twombly* or *Iqbal* in the court's discovery analysis.[330] The cases came from

327. *See* Blair-Stanek, *supra* note 325, at 45 (addressing the balancing of the risk of erroneous dismissal with the individual costs and inconveniences of discovery in *Twombly*); Genetin, *supra* note 190, at 672 (noting that proportionality requires a set of "guiding principles" that might be beyond the institutional competence of trial-level judges); Effron, *supra* note 259, at 2026 (weighing the balance of cost concerns with the strength of plaintiffs' claims).

328. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 926 (2016) ("The upshot is that ambiguous Supreme Court precedent can and often should be viewed as effecting a kind of delegation to lower courts, affording them legitimate space for interpretive flexibility."); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2061–62 (2016) (explaining different conceptions of relationships of appellate and trial-level courts and how they account for each other's reactions).

329. *See* Edward D. Cavanagh, *Rulemaking, Litigation Culture and Reform in Federal Courts*, 35 AM J. TRIAL ADVOC. 49, 84 (2011) (discussing experiences in the Eastern District of New York, the judge observed that, "[p]arties were more concerned about resolving discovery disputes so the case could move forward than with retaining the right to file formal and perhaps lengthy, motion papers"). *Cf.* Endo, *supra* note 123, at 1279 (discussing the efficiency of confidential discovery and discovery sharing). *But see* Michalski, *supra* note 256, at 94 ("The previous Sections showed a broad consensus among the surveyed groups for *not* valuing highly privacy, speed, cost, and simplicity.").

330. Feibush v. Johnson, 280 F. Supp. 3d 663, 665–66 (E.D. Pa. 2017); A.A. *ex rel.* Archuletta v. Martinez, No. 12-cv-00732, 2012 WL 5974170, at *1–2 (D. Colo. Oct. 9, 2012); Eggert *ex rel.*

just nineteen of the ninety-four districts, which suggested that some trial-level decisions were being adopted by colleagues within their respective districts or circuits.[331]

As to substance, only seven of the decisions resolved disputes about the scope of discovery with a discussion of relevancy limitations.[332] For example,

Eggert v. Chaffee Cnty., No. 10-cv-01320, 2010 WL 3359613, at *1, 3 (D. Colo. Aug. 25, 2010); Chavez v. Cnty. of Larimer, No. 11-cv-00988, 2011 WL 4373945, at *2 n.2 (D. Colo. Sept. 16, 2011); Marks v. Lynch, No. 16-cv-02106, 2017 WL 491190, at *1–2 (D. Colo. Feb. 6, 2017); Willnerd v. Sybase, Inc., No. 09-cv-500, 2010 WL 4736295, at *3 (D. Idaho Nov. 16, 2010); Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., No. 15-3183, 2016 WL 6534394, at *2 (D. Minn. Nov. 2, 2016); Sai v. Dep't of Homeland Sec., 99 F. Supp. 3d 50, 57–58 (D.D.C. 2015); Loumiet v. United States, 225 F. Supp. 3d 79, 82–84 (D.D.C. 2016); Loumiet v. United States, 315 F. Supp. 3d 349, 351, 353–54 (D.D.C. 2018); Simon v. Taylor, No. CIV 12-0096, 2014 WL 6633917, at *22 (D.N.M. Nov. 18, 2014), *aff'd*, 794 F. App'x 703 (10th Cir. 2019); Encinias v. Sanders, 570 F. Supp. 3d 1078, 1094–95 (D.N.M. 2021); McFadden v. Bittinger, No. 15-cv-02507, 2016 WL 6823323, at *2 (D.S.C. Nov. 18, 2016); *In re* Generic Pharms. Pricing Antitrust Litig., 315 F. Supp. 3d 848, 854 (E.D. Pa. 2018); Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc., No. 19-cv-00180, 2020 WL 8254263, at *2–3 (E.D. Tenn. Aug. 12, 2020); S.D. v. St. Johns Cnty. Sch. Dist., No. 09-cv-250, 2009 WL 4349878, at *1–2 (M.D. Fla. Nov. 24, 2009); DSM Desotech Inc. v. 3D Sys. Corp., No. 08 CV 1531, 2008 WL 4812440, at *2–3 (N.D. Ill. Oct. 28, 2008); Fassett v. Sears Holdings Corp., 319 F.R.D. 143, 156–57 (M.D. Pa. 2017); Mendia v. Garcia, No. 10-cv-03910, 2016 WL 3249485, at *2–3 (N.D. Cal. June 14, 2016); *In re* German Auto. Mfrs. Antitrust Litig., 335 F.R.D. 407, 409–10 (N.D. Cal. 2020); Sirazi v. Panda Express, Inc., No. 08 C 2345, 2009 WL 4232693, at *5 (N.D. Ill. Nov. 24, 2009); Liggins v. Reicks, No. 19-cv-50303, 2021 WL 2853359, at *1, 3 (N.D. Ill. July 8, 2021); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *1–2 (N.D. Ill. Nov. 17, 2010); Coss v. Playtex Prods., LLC, No. 08 C 50222, 2009 WL 1455358, at *2–4 (N.D. Ill. May 21, 2009); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 721–22 (N.D. Ill. 2014); Uppal v. Rosalind Franklin Univ. of Med. & Sci., 124 F. Supp. 3d 811, 814–15 (N.D. Ill. 2015); Nexstar Broad., Inc. v. Granite Broad. Corp., No. 11-cv-249, 2011 WL 4345432, at *2–3 (N.D. Ind. Sept. 15, 2011); Harris v. City of Balch Springs, 33 F. Supp. 3d 730, 731–32 (N.D. Tex. 2014); M.G. v. Metro. Interpreters & Translators, Inc., No. 12cv460, 2013 WL 690833, at *2 (S.D. Cal. Feb. 26, 2013); Pharmacychecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy, No. 19-CV-7577, 2021 WL 2477070, at *2 (S.D.N.Y. June 17, 2021); Congelados del Cibao v. 3 Kids Corp., No. 19-cv-7596, 2021 WL 3774141, at *2 (S.D.N.Y. Aug. 24, 2021); Ford v. Caddo Par. Dist. Att'y's Off., No. 15-0544, 2016 WL 2343903, at *2 (W.D. La. May 3, 2016); Seeds of Peace Collective v. City of Pittsburgh, No. 09-1275, 2010 WL 2990734, at *1–3 (W.D. Pa. July 28, 2010); Rhoten v. Stroman, No. 16-CV-00648, 2020 WL 3545661, at *2–3 (W.D. Tex. June 30, 2020); Saenz v. City of El Paso, No. 14-CV-244, 2015 WL 4590309, at *1–3 (W.D. Tex. Jan. 26, 2015); Terwilliger v. Stroman, No. 16-CV-00599, 2020 WL 3490222, at *2–3 (W.D. Tex. June 26, 2020); Weaver v. Stroman, No. 16-CV-01195, 2020 WL 3545655, at *2–3 (W.D. Tex. June 30, 2020); Walker v. Stroman, No. 1:17-CV-00235, 2020 WL 3545656, at *2–3 (W.D. Tex. June 30, 2020); Eaton v. Stroman, No. 1:16-CV-00871, 2020 WL 3545736, at *2–3 (W.D. Tex. June 30, 2020); *In re* Netflix Antitrust Litig., 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007); Sommerfield v. City of Chi., 613 F. Supp. 2d 1004, 1016–17 (N.D. Ill. 2009), *objections overruled*, No. 06 C 3132, 2010 WL 780390 (N.D. Ill. Mar. 3, 2010).

331. *See, e.g.*, *Liggins*, 2021 WL 2853359, at *1 (citing *Tamburo*, 2010 WL 4867346, at *1–2, as intra-district authority to support limitations on the scope of discovery); *Nexstar Broad.*, 2011 WL 4345432, at *3 (citing *Coss*, 2009 WL 1455358, at *3).

332. *Miller UK*, 17 F. Supp. 3d at 721–22; *Sirazi*, 2009 WL 4232693, at *5; *Simon*, 2014 WL 6633917, at *22; *Willnerd*, 2010 WL 4736295, at *3; *Fassett*, 319 F.R.D. at 156–57; *In re Generic Pharms.*, 315 F. Supp. 3d at 854; *Sommerfield*, 613 F. Supp. 2d at 1016–17.

in *Sirazi v. Panda Express, Inc.*,[333] Judge Cole of the Northern District of Illinois denied a motion to compel two non-party law firms to produce any communications with one of the litigants based on the involved burden and with a nod to *Twombly*.[334] Similarly, Judge Browning of the District of New Mexico referenced both *Twombly* and *Iqbal* in disallowing burdensome non-party discovery.[335]

The remaining thirty-four decisions all involve discovery stays. Litigants often argue that *Twombly* and *Iqbal* require staying discovery once a dispositive motion has been filed.[336] And courts analyze those arguments, focusing on how *Twombly* and *Iqbal* formally decided motions to dismiss and did not have any directly on-point language that would require an automatic stay.[337] And, with this flexibility, several of the courts then granted the stays.[338] A handful of courts recognized that *Twombly* and *Iqbal* only offered dicta as to stays but still found them weighty. For example, one decision noted that the statements from the cases "indicate very clearly that the Supreme Court believes discovery should be stayed in the case as a whole even when only one defendant is asserting qualified immunity."[339]

Given the exceptional nature of the discovery merits cases that get to the Supreme Court, it is even possible that the dicta might have more impact on how trial-level judges manage day-to-day discovery disputes than the holdings in the actual discovery cases. Certainly, it is interesting—if not easily explainable—that the Roberts Court has not generally discussed the big normative tradeoffs of discovery or invoked the cost-and-delay narrative

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333. No. 08 C 2345, 2009 WL 4232693 (N.D. Ill. Nov. 24, 2009).

334. *See id.* at *5 (stating that failure to evaluate the relevancy of the discovery request "would result in needless costs to the litigants and to the due administration of justice . . . to say nothing of the burdens, not insubstantial, that would be imposed on two law firms with no connection to this case").

335. *See Simon*, 2014 WL 6633917, at *22 (refusing to grant discovery requests involving dismissed parties with an "unlimited geographical scope").

336. *See, e.g.*, *Tamburo*, 2010 WL 4867346, at *2 ("*Twombly* and *Iqbal* do not dictate that a motion to stay should be granted every time a motion to dismiss is placed before the Court."); S.D. v. St. Johns Cnty. Sch. Dist., No. 09-cv-250, 2009 WL 4349878, at *1 (M.D. Fla. Nov. 24, 2009) ("The Supreme Court, in *Iqbal*, did not decide whether discovery *must* be stayed pending the resolution of a motion to dismiss . . . .").

337. *See, e.g.*, *Tamburo*, 2010 WL 4867346, at *2 (concluding that *Twombly* and *Iqbal* do not support the contention that a motion to stay should be automatically granted when a dispositive motion is before the court); *S.D.*, 2009 WL 4349878, at *1 (recognizing the primary issue resolved in *Iqbal* related to pleading requirements and not whether discovery must be stayed pending a motion to dismiss).

338. *Tamburo*, 2010 WL 4867346, at *4; *S.D.*, 2009 WL 4349878, at *4; Mendia v. Garcia, No. 10-cv-03910, 2016 WL 3249485, at *5 (N.D. Cal. June 14, 2016); DSM Desotech Inc. v. 3D Sys. Corp., No. 08 CV 1531, 2008 WL 4812440, at *1 (N.D. Ill. Oct. 28, 2008).

339. A.A. *ex rel.* Archuletta v. Martinez, No. 12-cv-00732, 2012 WL 5974170, at *2 (D. Colo. Oct. 9, 2012). *See also* Eggert *ex rel.* Eggert v. Chaffee Cnty., No. 10-cv-01320, 2010 WL 3359613, at *3 (D. Colo. Aug. 25, 2010) (citing *Iqbal* for the proposition that all discovery should be stayed in a multi-defendant case pending a ruling on an immunity defense offered by some defendants).

in its actual discovery merits cases. Consider that, of the sextet of cases discussed in subpart III(A), only half of the cases restricted discovery—and all three involved special cases. In *ZF Auto* and *Zubaydah*, the Court addressed discovery to aid foreign proceedings under § 1782.[340] In *Jicarilla Apache Nation*, the Court's holding only applies to the federal–tribal relationship.[341] Least predictably, in *Goodyear*, the Court limited the power of the trial courts to sanction parties for discovery abuses and thus implicitly adds to the likelihood of such malfeasance, potentially leading to either more or less discovery.[342] And then, in *Republic of Argentina*, the Court's interpretation of the Foreign Sovereign Immunities Act of 1976 permitted liberal discovery.[343] In *Mohawk*, the Court's ruling made it harder to withhold documents on the basis of attorney–client privilege by reducing the availability of immediate appeals to orders directing the disclosure of such material.[344]

Discovery dicta is not the only outlet for the Court to flex its soft authority and provide guidance to the trial-level courts on how to weigh procedural values like accuracy, efficiency, and fairness. In the 2015 and 2016 Year-End Reports, Chief Justice Roberts engaged in explicit advocacy, exhorting courts to apply the amended Rule 26(b)(1)'s definition of scope to limit discovery expenses beyond what the text of the adopted rule would seem to warrant.[345] Trial-level courts' use of proportionality in their

340. *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2091 (2022) (holding that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under [28 U.S.C.] § 1782"); United States v. Zubaydah, 142 S. Ct. 959, 971 (2022) (holding that the state secrets privilege applied to a § 1782 discovery request seeking information related to the existence (or nonexistence) of a CIA facility in Poland).

341. United States v. Jicarilla Apache Nation, 564 U.S. 162, 165 (2011). *See also* Rebecca Wexler, *Privacy as Privilege: The Stored Communications Act and Internet Evidence*, 134 HARV. L. REV. 2721, 2762–63 & nn.252–53 (2021) (collecting federal district court cases reflecting "[t]he Ninth, Tenth, and Eleventh Circuits[' holding] that federal statutes must contain express privilege language before the courts construe the statutes as blocking judicial process").

342. Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1184 (2017). *See also* Jeffrey W. Stempel, *Asymmetry and Adequacy in Discovery Incentives: The Discouraging Implications of* Haeger v. Goodyear, 51 AKRON L. REV. 639, 657 (2017) (implying that Goodyear was "getting away with it" as a result of the *Goodyear* opinion).

343. *See* Republic of Arg. v. NML Capital, Ltd., 573 U.S. 134, 134 (2014) (holding that the Foreign Sovereign Immunities Act does not explicitly limit discovery); Leading Case, *Foreign Sovereign Immunities Act of 1976—Postjudgment Discovery*—Republic of Argentina v. NML Capital, Ltd., 128 HARV. L. REV. 381, 381 (2014) (stating the holding that the Foreign Sovereign Immunities Act does not restrict the discovery of a foreign state's extraterritorial assets).

344. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 112 (2009); Yablon & Landsman-Ross, *supra* note 1, at 721 n.6.

345. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 943 (2020) (criticizing the Rules Committee for not fulfilling its mandate); Steinman, *supra* note 24, at 50 (explaining that the 2015 Year-End Report's discussion of Rule 26(b)(1) was "advocacy, not law" and that "[g]iven current institutional realities . . . they are what remain in the arsenal of those who seek to make judicial enforcement less available and less effective").

discovery grew dramatically following the 2015 amendments.[346] The uptick, however, does not demonstrate a necessary causal relationship between the increased use and the Year-End Reports.

Still, a search for federal cases citing the Year-End Reports in the same paragraph as the term "discovery" and a set of terms associated with the cost-and-delay narrative espoused by Chief Justice Roberts produced 142 results across twenty-five districts and one court of appeals since the issuance of the first report.[347] As a group, these discovery orders share a few characteristics of the discovery decisions citing *Twombly* or *Iqbal* discussed above.

Again, some trial-level courts deeply engage with the 2015 Year-End Report and the broader history of the role of proportionality within the Federal Rules of Civil Procedure.[348] And, in those districts, one sees other judges citing to their colleagues' analysis.[349]

On the other hand, many of the references to the Year-End Reports appear to be part of stock language used by the specific judge or the district to describe a legal standard. For example, either the exact or a very slight variation of the language from *In re Takata Airbag Products Liability Litigation*[350] referencing the report is used by many judges in the Southern District of Florida, perhaps explaining why 44 of the 127 results are from that

346. *See* Coleman, *supra* note 345, at 940 (noting that the Rules Committee amended Rule 26(b)(2) to add proportionality to the scope of discovery); Steven Baicker-McKee, *Mountain or Molehill?*, 55 DUQ. L. REV. 307, 316 (2017) (finding an "increased application of proportionality" following the 2015 amendments).

347. Results of the following Westlaw search on November 5, 2022: adv: ((2015 2016) /s "Year-End Report") /p discovery /p (cost delay expense proportionality) in All Federal.

348. *See, e.g.*, Roberts v. Clark Cnty. Sch. Dist., 312 F.R.D. 594, 603–04 (D. Nev. 2016) (discussing in detail Chief Justice Roberts's 2015 Year-End Report and his comments on the 2015 amendments); Generation Brands, LLC v. Decor Selections, LLC, No. 19 C 6185, 2020 WL 6118558, at *4 (N.D. Ill. Oct. 16, 2020) (emphasizing the importance of proportionality, mentioning its appearance in the 2015 Year-End Report, and discussing the concept's historical role prior to the 2015 amendments).

349. *See, e.g.*, Friedman v. Baca, No. 17-cv-00433, 2019 WL 11499068, at *3–4 (D. Nev. Sept. 10, 2019) (block-quoting *Roberts*, 312 F.R.D. at 602–04).

350. *In re* Takata Airbag Prod. Liab. Litig., No. 14-24009-CV, 2016 WL 1460143, at *2 (S.D. Fla. Mar. 1, 2016) ("The recently amended Rule 26(b)(1) of the Federal Rules of Civil Procedure 'crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.'" (citing ROBERTS, 2015 YEAR-END REPORT, *supra* note 23, at 6)).

district.[351] The language has even spread to other districts in the state.[352] Judge Cole frequently quotes one of his earlier cases referencing the 2015 Year-End Report.[353]

Both Judge Cole and Judge Browning cited either *Twombly* or *Iqbal* and the Year-End Reports in discovery decisions, which might reflect a particular alertness to the Supreme Court's informal signaling.[354] This attentiveness, however, does not mean that the judges unthinkingly adopt the Roberts Court's apparent antipathy to robust, liberal discovery. For example, Judge Cole has both granted and denied discovery on proportionality grounds after carefully attending to the specifics of the cases, including the non-pecuniary aspects that should factor into any proportionality analysis.[355] And Judge Browning more than once explicitly voiced his "concerns with the new amendments being pro-business and giving corporations new tools to limit plaintiffs' discovery."[356]

The findings discussed above demonstrate that the Roberts Court's discovery dicta are having some effect on trial-level courts' application. And this might provide some comfort—whether or not one agrees with the Roberts Court's normative balancing—that the trial-level judges are not

351. *E.g.*, Guantanamera Cigars Co. v. SMCI Holding, Inc., No. 21-cv-21714, 2021 WL 6752508, at *1 (S.D. Fla. Sept. 23, 2021) (Goodman, J.); N. Am. Transp. Servs., LLC v. Ryder Truck Rental, Inc., No. 21-mc-21911, 2021 WL 3290627, at *2 (S.D. Fla. Aug. 2, 2021) (O'Sullivan, J.); Laremore v. Holiday CVS, LLC, No. 20-61650-CIV, 2021 WL 2184882, at *2 (S.D. Fla. May 28, 2021) (Strauss, J.); Davis v. Nationwide Ins. Co. of Am., No. 19-cv-80606, 2020 WL 7480819, at *3 (S.D. Fla. Dec. 18, 2020) (Matthewman, J.); Bishop v. Baldwin, No. 20-cv-61254, 2020 WL 7320932, at *7 (S.D. Fla. Dec. 10, 2020) (Valle, J.); Indep. Bank of W. Mich. v. Devecht, No. 13-21753-MC, 2020 WL 2616208, at *1 (S.D. Fla. May 22, 2020) (Torres, J.).

352. *E.g.*, *In re* Brinker Data Incident Litig., 337 F.R.D. 424, 425 (M.D. Fla. 2020).

353. *See, e.g.*, LKQ Corp. v. Gen. Motors Co., No. 20 C 2753, 2021 WL 4127326, at *3 (N.D. Ill. Sept. 9, 2021) (quoting BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc., 326 F.R.D. 171, 175 (N.D. Ill. 2018)). And, here too, judges in other districts within the circuit have adopted the language. *E.g.*, Todd v. Ocwen Loan Servicing, Inc., No. 19-cv-00085, 2020 WL 1328640, at *4 (S.D. Ind. Jan. 30, 2020).

354. Sirazi v. Panda Express, Inc., No. 08 C 2345, 2009 WL 4232693, at *5 (N.D. Ill. Nov. 24, 2009) (Cole, J.) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)); *BankDirect*, 326 F.R.D. at 175 (Cole, J.) (referring to the 2015 Year-End Report); Simon v. Taylor, No. CIV 12-0096, 2014 WL 6633917, at *22 (D.N.M. Nov. 18, 2014) (Browning, J.) (citing *Twombly*, 550 U.S. at 564 and Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009)); Landry v. Swire Oilfield Servs., L.L.C., 323 F.R.D. 360, 381 (D.N.M. 2018) (Browning, J.) (citing ROBERTS, 2015 YEAR-END REPORT, *supra* note 23, at 7).

355. *Compare* Velez v. City of Chi., No. 18 C 8144, 2021 WL 1978364, at *4 (N.D. Ill. May 18, 2021) ("There is no question that this case—which is about the unlawful incarceration of a young man and the loss of sixteen years of freedom—and all that entails—is about unimaginable and ineffably important issues."), *with* Metcalf v. Ross, No. 19 C 4623, 2021 WL 1577799, at *2 (N.D. Ill. Apr. 22, 2021) ("The right that plaintiff is seeking to enforce—to be free from discrimination on the basis of race, religion, and psychological impairments—is significant. But that does not mean discovery is limitless—to be limited only by the imagination and energy of the plaintiff.").

356. *Landry*, 323 F.R.D. at 380 n.17; Benavidez v. Sandia Nat'l Lab'ys, 319 F.R.D. 696, 718 n.10 (D.N.M. 2017).

actually left to themselves to sort out the law but, instead, receive high-level (albeit, informal) appellate guidance.[357]

While there are not an overwhelming number of illustrative trial-level decisions, it is quite likely that many other examples remain hidden. First, discovery orders often cannot be found on electronic databases because they are entered orally, as minute-orders on the docket, or are otherwise unpublished.[358] Second, trial-level courts might be influenced by the discovery dicta and other pronouncements without citing the Roberts Court as the source. For example, one Tenth Circuit case references a lower court applying *Twombly* in a discovery decision, but the underlying case was not on Westlaw.[359] Additionally, trial-level courts might cite intermediate appellate decisions or other trial-level decisions that reference the Supreme Court's discovery dicta.[360] A case from the Third Circuit discussed *Iqbal*'s meaning for granting discovery stays.[361] Some trial-level decisions cite both *Mann*[362] and *Iqbal* in their analyses while others only cite *Mann*.[363] Likewise, there is one appellate court referencing the Year-End Reports in a discussion of the value of proportionality.[364] Of the four cases citing this Sixth Circuit case for the proposition that the 2015 amendments require an enhanced concern about proportionality, two cases do not reference the Year-End Reports themselves.[365]

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357. *Cf.* Genetin, *supra* note 190, at 672 (identifying issues); Yablon & Landsman-Roos, *supra* note 1, at 722 (same); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1222, 1228 (discussing issues with the implementation of judge-made law).

358. *See* Mullenix, *supra* note 159, at 1437 (describing a case study in which "filed papers could not adequately track discovery events, since formal papers often underreported or misrepresented discovery activity"); Boyd et al., *supra* note 159, at 477 ("Relying on published sources (*F. Supp.* and *F.R.D.*) yields even fewer of the motions—just over 10 percent of the dispositive motions, 3 percent of all motions, and 1 percent of discovery motions.").

359. *See* Marin v. King, 720 F. App'x 923, 929 (10th Cir. 2018) (explaining that the magistrate judge in the instant case had stayed discovery pursuant to the analysis in *Iqbal*).

360. *Cf.* Guantanamera Cigars Co. v. SMCI Holding, Inc., No. 21-CV-21714, 2021 WL 6752508, at *1 (S.D. Fla. Sept. 23, 2021) (noting that *In re* Takata Airbag Prod. Liab. Litig., No. 14-24009-CV, 2016 WL 1460143, at *2 (S.D. Fla. Mar. 1, 2016), quotes the 2015 Year-End Report).

361. Mann v. Brenner, 375 F. App'x 232, 239–40 (3d Cir. 2010).

362. Mann v. Brenner, 375 F. App'x 232 (3d Cir. 2010).

363. *Compare, e.g.*, Flores v. Pa. Dep't of Corr., No. CV-12-1149, 2013 WL 2250214, at *1 (M.D. Pa. May 22, 2013) (citing both *Mann* and *Iqbal*), *with* Lane v. Wolf, No. 17-CV-00495, 2018 WL 1296573, at *6 (M.D. Pa. Mar. 13, 2018) (citing *Mann* for same proposition).

364. Helena Agri-Enters., LLC v. Great Lakes Grain, LLC, 988 F.3d 260, 273–74 (6th Cir. 2021).

365. *Compare* Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 556 F. Supp. 3d 657, 666 (W.D. Ky. Aug. 25, 2021) (citing *Helena* for enhanced concern about proportionality but not the year-end reports directly), *and* Tchun v. 3M Co., No. 20-cv-12816, 2021 WL 5864016, at *1 (E.D. Mich. Oct. 18, 2021) (same), *with* Weidman v. Ford Motor Co., No. 18-12719, 2021 WL 2349400, at *3 (E.D. Mich. June 9, 2021) (citing both *Helena* and Year-End

B. Second-Level Review by District Courts

The main focus of this Article is the presence and effect of discovery in the Roberts Court's jurisprudence. But, in thinking about how the system as a whole is responding to the absence of formal, traditional appellate review, the rise of magistrate judges must be acknowledged. The federal courts' use of magistrate judges has grown rapidly over the past quarter-century.[366] Between 1990 and 2014, civil referrals rose from 114,968 to 371,672.[367] Another study found that from 2013 to 2018, magistrate judges "took over 6.8 million actions in 2.6 million cases pending in district courts, or almost three actions per every open case."[368]

Magistrate judges might even handle a majority of the pretrial discovery issues.[369] One study showed that magistrate judges are involved in about two-thirds of cases and about 75% of their rulings were on discovery motions.[370] Another recent survey of district court judges showed about 80% regularly refer discovery matters to magistrate judges.[371]

This Article takes a targeted look at the interactions of magistrate judges and district court judges as they address discovery disputes. In reviewing almost one thousand district court decisions addressing appeals of magistrate judges' orders or objections to reports and recommendations,[372] a theme emerged: the additional level of review appears to lead to some, if not all, of the traditional benefits that are associated with review by the courts of appeal.

Report), *and* Pannek v. U.S. Bank Nat'l Ass'n, No. 19-CV-852, 2021 WL 5533749, at *2 (S.D. Ohio July 20, 2021) (same).

366. *See* Douglas A. Lee & Thomas E. Davis, "*Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 934–35 (2016) ("The data from 1990 to 2014 suggests that the expansion of utilization during that period was a combination of both broadened and intensified utilization.").

367. *Id.* at 935.

368. Alexander et al., *supra* note 25, at 305.

369. *See id.* at 322 ("Thirty-six district courts have standing rules designating magistrate responsibility over administrative and preliminary pre-trial duties such as scheduling, discovery disputes and pre-trial conferences."). *See* Klonoff, *supra* note 131, at 1953 (noting that within three years of the 2015 amendments to Rule 26, there were several thousand cases discussing them and "[v]irtually all of these opinions are by district judges and magistrate judges"); Willoughby, Jr., et al., *supra* note 131, at 817 (noting the same with e-discovery sanctions); *Lee*, 638 F.3d at 1320 ("Discovery disputes are, for better or worse, the daily bread of magistrate and district judges in the age of the disappearing trial.").

370. Christina L. Boyd, *The Comparative Outputs of Magistrate Judges*, 16 NEV. L.J. 949, 957, 959–60 (2016).

371. Grimm, *supra* note 125, at 135.

372. As to the methodological decision to focus on district court decisions addressing appeals of magistrate judges' orders or objections to reports and recommendations, it was partly chosen for practical reasons given the number of orders and partly for theoretical ones based on the notion that objections are a signal of complexity, the importance of dispute, and the probability that the district judges took a closer look. *See* Alexander et al., *supra* note 25, at 341–42 (finding that district courts tend to adopt magistrate judges' recommendations more often in complex cases).

Specifically, the availability of second-level review lends itself to both error correction and law clarification.

In contrast to the difficulties of appealing a discovery decision to the circuit courts, litigants are guaranteed a limited review of a magistrate judge's discovery decision. Both section 636(b)(1)(A) of Title 28 of the United States Code and Rule 72(a) of the Federal Rules of Civil Procedure permit litigants to object to a magistrate judge's pretrial discovery order.[373] Under those authorities, the district judge may reverse a magistrate judge's order that "is clearly erroneous or is contrary to law."[374] The standard of review incorporates the two traditional functions of appellate review,[375] placing them in the hands of the district judges.

At one end of its operation, there are very case-specific issues that turn on small, technical considerations and require correction without implicating any broader policy or legal concern. For example, a district judge reviewed a page of claimed work product and determined that its relevant information could be found in other produced material, and thus, the magistrate judge erred in finding that the requesting party had met its burden to overcome the work-product privilege.[376]

District judges may also use their review of magistrate judges' orders to refine and clarify the law. For example, a district judge reversed a magistrate judge's order that compelled two former corporate officers to turn over company documents, noting that the original order did not correctly read Rule 34 and the cases interpreting the Rule's use of the term "control."[377] Highlighting the significance of this correction, this case ultimately was heard by the Eleventh Circuit—a rare exception to the usual absence of appellate guidance.[378]

The second-level review of the district judges can also define the law itself. Illustrating this, when a party objected to a magistrate judge's order denying its motion for spoliation sanctions, a district court provided an in-depth discussion of Rule 37(e) sanctions following the 2015 amendments to

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373. FED. R. CIV. P. 72(a)(2). *See* 28 U.S.C. § 636(b)(1)(A) (stating that with a few notable exceptions, "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court").

374. FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b)(1)(A).

375. *See* Steinman, *supra* note 7, at 9 (describing how the Supreme Court embraced "a functional, policy-oriented approach to choosing the standard of appellate review"); Zambrano, *supra* note 7, 219–20 (explaining that magistrate judges' specialization on discovery issues gives them greater levels of expertise on discovery orders than district court judges).

376. Muller v. Bonefish Grill, LLC, No. 20-1059, 2021 WL 2822374, at *2 (E.D. La. July 7, 2021).

377. Siegmund v. Xuelian, No. 12-62539-CIV, 2016 WL 1359595, at *2 (S.D. Fla. Apr. 5, 2016), *aff'd sub nom.* Siegmund v. Xuelian Bian, 746 F. App'x 889 (11th Cir. 2018).

378. *Siegmund*, 746 F. App'x at 891–92 (holding that the district court did not abuse its discretion by denying Siegmund's motion to compel and motion for reconsideration of the court's refusal to compel production).

the Rule.[379] In the past three years, this decision has already been cited twenty times by district court opinions within the circuit and eleven times by district courts outside of the circuit.[380] The emerging jurisprudence of technology-assisted review similarly grew out of a case in which the exchanges of the magistrate judge and district judge set forth a template that has been widely adopted.[381]

The structural relationship between magistrate judges and district judges might also lead to greater uniformity within a district and provide a check against the individual caprice of a judge who, just by happenstance, is assigned to a case with a discovery dispute. An empirical study found that magistrate judges moderate their decisions to aim for the average of the judges in their district.[382] Additionally, magistrate judges likely develop an expertise about discovery and the preferences of the various district judges to whom they report, which may be implicitly communicated through their orders and recommendations.[383] And, even though a magistrate judge's order is appealed to yet another single-member judging body, the second-level review should still provide some reassurance to litigants that they are being treated fairly. Illustrating this, a district court reversed a magistrate judge's order granting a defendant's motion for a protective order where the plaintiff was not given an opportunity to respond—a legal error that sounds in procedural due process.[384]

Review by a district court judge is distinct from that of an appellate judge, so the analogy is not perfect. One significant difference is that the district court's review does not provide an opportunity for direct conversations amongst decision makers who might have different viewpoints but the same level of authority.[385]

379. Ungar v. City of New York, 329 F.R.D. 8, 10, 12–13 (E.D.N.Y. 2018).

380. Westlaw search as of October 16, 2022.

381. *See* Seth Katsuya Endo, The Uneven Impact of AI Discovery 9–10 (unpublished manuscript) (on file with author) (describing coalescing case law stemming from *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012)).

382. Christina L. Boyd & Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 JUST. SYS. J. 249, 250 (2013).

383. *See id.* at 250, 264 (theorizing that magistrate judges account for the ideological preferences of district court judges when making recommendations); Zambrano, *supra* note 7, at 219–20 (explaining that magistrate judges may have greater discovery expertise than district court judges).

384. England v. Cont'l Cas. Co, No. 3:10cv98, 2010 U.S. Dist. LEXIS 129567, at *2 (N.D. Fla. Dec. 7, 2010).

385. *See* Helen Hershkoff, *Some Questions About #MeToo and Judicial Decision Making*, 43 HARBINGER 128, 137–38 (2019) (describing how district court judges act alone and thus the "sharing of ideas" is different in district courts compared to multi-member courts); Gardner, *supra* note 12, at 1632–33 (noting that district courts operate in such a way that authority from fellow district court judges is "persuasive authority" that need not be followed, yet is helpful for judges to consider).

There also is a different set of relationships between magistrate judges and district court judges than between the latter and appellate judges.[386] Magistrate judges are selected by the district court judges and are subject to their authority without the protections of an Article III judgeship such as lifetime appointments.[387]

There also are different social relationships because magistrate judges sit in close proximity to the district court judges who oversee them and get to know them personally.[388] And, while a district court judge may reverse a magistrate judge's discovery ruling, there is no formal precedential effect, so the law-development aspects are presumably less strong than when there is formal review from the circuit courts or the Supreme Court.[389]

Conclusion

By looking at every reference to "discovery" in the Roberts Court's jurisprudence and hundreds of district courts' review of magistrate judges' discovery orders, this Article sees that two interrelated truisms of discovery are not entirely correct. First, the view that discovery does not significantly feature in appellate-court opinions fails to account for how concerns about the costs of discovery exert a meaningful influence on the outcomes of non-discovery cases. This finding should concern all critics of the rights-retrenchment movement of the federal courts as the Roberts Court seeds the cost-and-delay narrative within its jurisprudence to limit access to justice.[390] Second, the assumption that discovery is beset by a lack of error correction and law clarification because of the absence of formal appellate guidance fails to recognize the normative guidance provided by the Supreme Court's

386. *See* Zambrano, *supra* note 7, at 219 (recognizing the different incentives facing magistrate versus district judges).

387. *See* 28 U.S.C. § 631(a); United States v. Raddatz, 447 U.S. 667, 685 (1980) (Blackmun, J., concurring) (noting that the "the magistrate himself is subject to the Art[icle] III judge's control").

388. Andrew Chesley, Note, *The Scope of United States Magistrate Judge Authority After* Stern v. Marshall, 116 COLUM. L. REV. 757, 801 (2016).

389. *See* JAMES W.M. MOORE, 18 MOORE'S FEDERAL PRACTICE ¶ 134.02[1][d] (Daniel R. Coquillette, Gregory P. Joseph, Sol Schreiber, Georgene M. Vairo & Chilton Davis Varner, eds., 2016) (stating that a decision of a federal district court judge is not binding precedent); Steinman, *supra* note 7, at 8–9 (describing how the appellate court may correct any errors of law independently but will only set aside a district court's findings of fact if clearly erroneous).

390. *See* Schwartz, *supra* note 258, at 1686–87 (arguing that the Supreme Court's approach emphasizing cost and delay in discovery has actually increased costs, led to unjust outcomes, and unfairly harmed plaintiffs); Burbank & Farhang, *supra* note 307 at 55 (describing the Roberts Court's holdings in *Twombly* and *Iqbal* as partially an effort to correct "the perceived inability of federal judges . . . to exercise needed control of discovery"); Mullenix, *supra* note 159, at 1396 (arguing that discovery abuse lacks empirical basis and that discovery reform will harm future litigants).

dicta and the quasi-appellate review happening within the two trial-level layers.

In addition to refining our collective understanding of discovery in the federal system, the importance of identifying this jury-rigged system of error correction and law development is heightened when one considers the factors that might unsettle the existing equilibrium. First, the continuing growth of electronically stored information might disrupt judging norms and place even more pressure on the magistrate judges.[391] Second, the availability of unpublished discovery orders provides both parties and judges with much more information and possibly incentives to guide the development of discovery law.[392] Third, the growth of multi-district litigation already might be encouraging litigants to expend the resources necessary to put discovery issues before appellate courts.[393] Depending on how each of these three factors develops, we might expect to see either an increase or decrease in discovery appeals. And, either way, both courts and litigants should be aware of how that future will be scaffolded onto our existing world of makeshift appellate guidance on the law of discovery.

391. *See* Grimm, *supra* note 125, at 167–69 (arguing that ESI discovery is increasingly prevalent and costly, that new technology can help reduce costs of ESI discovery, but that those cost savings are unlikely until more courts adopt new technologies to manage ESI discovery); Lee, *supra* note 366, 934–35 (describing the increased use of magistrate judges to handle civil pretrial matters).

392. *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 948–49 (2009) (describing publication bias's application to discovery orders); McCuskey, *Submerged Precedent*, *supra* note 9, at 562 (noting unpublished discovery orders are increasingly easy to find through PACER and other electronic databases that permit searching the federal dockets); Garrett & Mitchell, *supra* note 62, at 945 (noting that appellate-court review of discovery orders is rare but still exists in the criminal-law context) .

393. *See* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1645 (2011) ("Propelled in large measure by the rise of the mass tort, the MDL system aggregates separately filed federal actions that involve 'one or more common questions of fact.'" (quoting 28 U.S.C. § 1407(a))).