THE POLITICS OF PROPORTIONALITY IN STATE CIVIL RULEMAKING

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ABSTRACT

In the wake of the 2015 amendments to the Federal Rules of Civil Procedure (FRCP)—particularly with the perceived constriction of discovery through the revised federal proportionality standard in Rule 26(b)(1)—a wave of critics quickly emerged. Some commentators highlighted how procedural reforms heightened barriers to accessing federal courts, sharply limited claim development through discovery, and impeded opportunities for trial. Others detailed well-founded concerns about federal rulemakers' potentially nefarious motivations, given their mostly conservative, Republican, pro-corporate defense backgrounds. Still others rightly worried that the federal proportionality standard (with its six factors), when applied by certain federal judges, would potentially stifle discovery, thereby disproportionately harming disempowered plaintiffs and inhibiting a fair and just resolution on the merits. A few scholars urged state courts to resist calls for uniformity and blind adoption of the federal proportionality standard.

Through the lens of a developing "Critical Procedure" framework, this Article provides an updated, more balanced assessment of these concerns and explores previously overlooked benefits of proportionality, with the goal of informing ongoing and future conversations among state rulemakers contemplating adoption of the 2015 federal proportionality standard. To ground these conversations, this Article offers the first systematic fifty-state survey examining the states' responses to the 2015 federal proportionality amendments. The Article also highlights recent trends and insights into rulemaking processes that reveal the complex shades of the politics of proportionality. The Article then argues that, although early critics

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of proportionality raised legitimate doubts about its efficacy, some of the initial predictions and critiques may have been overstated, and perhaps they were also simply effective in encouraging at least some federal judges to take a more cautious approach. In any event, the critiques also tended to obscure proportionality's potential benefits. This Article clarifies and highlights these affirmative benefits, positing that they should be front and center in state rulemakers' ongoing and future conversations. When properly understood and applied, proportionality principles can simultaneously balance power between asymmetrical parties, uplift the role of state court judges, and give a voice to vulnerable litigants. Indeed, the federal proportionality standard opens possibilities to *realize* and *equalize* access to justice to an even greater degree.

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INTRODUCTION

> Politics—with a small 'p'—sometimes matters.[1]

> [S]tate courts are becoming even more important vehicles for protecting substantive rights, so if we did not care about state procedure-making before, we must now.[2]

> [T]he true promise of proportionality rules can only be realized by a change in practice (and culture) . . . .[3]

With intensified scrutiny and stinging critiques of the Supreme Court's conservative supermajority—including deep concerns about the Court's perceived legitimacy as an institution and the role of the rule of law[4]—state courts as well as rulemakers, scholars, attorneys, and litigants should approach state civil procedural rulemaking that seeks to incorporate federal civil procedural rule amendments with healthy skepticism. After all, with increasingly limited access to federal courts to vindicate important substantive rights—including abortion, voting rights, employment discrimination, environmental protections, and more—due to heightened procedural rule changes (many by judicial fiat),[5] and with apparently

1. Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 789 (2017).
2. Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 7 (2018).
3. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 19, 21 (2015).
4. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 21 (2023).
5. Yamamoto, *supra* note 1, at 769, 771, 789.

partisan politics playing out in both "on the merits" and "shadow docket" rulings from the Supreme Court,[6] state courts have become (by default and at times the only remaining) forums to litigate contested matters.[7] What we have come to deeply appreciate and understand in recent years, as embodied in the epigraph quotations, is this: State courts matter. Access to justice matters. Politics (sometimes) matters. And proportionality in civil discovery matters, especially to vulnerable litigants and communities seeking justice in state courts.

Increased attention, then, has turned to state civil rulemaking. At the same time, electronic discovery has arrived, permeated legal practice, and become a steadfast feature in daily life for at least the past two decades.[8] As technology continues to rapidly evolve, the legal arena will continue to face an ongoing evolution, too.[9]

In 2015, the federal rulemaking bodies—with Supreme Court approval—amended the Federal Rules of Civil Procedure (FRCP)[10] to further guide and refine civil discovery practice, particularly for e-discovery. One of the most controversial amendments was the revised federal proportionality standard set forth in Rule 26(b)(1), which further limited the scope of discovery to that which is "proportional to the needs of the case."[11] The amendment focused on six factors to assess proportionality: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.[12]

In the wake of these amendments a wave of critics emerged.[13] Some commentators highlighted how certain procedural reforms heightened

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6. *See generally* VLADECK, *supra* note 4, at 19–20, 25.

7. *See generally* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 415 (2018).

8. Brandon M. Kimura & Eric K. Yamamoto, *Electronic Discovery: A Call for a New Rules Regime for the Hawai'i Courts*, 32 U. HAW. L. REV. 153, 154–55 (2009) (recognizing "[e]lectronic discovery has arrived").

9. *See* David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1002 (2021) ("'Legal tech' . . . is transforming litigation and law practice . . . .").

10. FED. R. CIV. P. ("Federal Rules of Civil Procedure," "FRCP," "Federal Rules," or "Rules").

11. FED. R. CIV. P. 26(b)(1). The "federal proportionality standard" refers to the 2015 proportionality amendment (with its six factors) in Rule 26(b)(1) (scope of discovery), not the prior "proportionality" limitations (with fewer factors) previously in FRCP 26(b)(2)(C)(iii) (limitations on discovery).

12. Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. R. 1949, 1955–56 (2018).

13. Professor Seth Endo estimated there were over a hundred law review articles that "either propose[d] or evaluate[d] rule changes or related doctrinal developments" in the three-year period following the 2015 FRCP amendments. *See* Seth Katsuya Endo, *Discovery Hydraulics*, 52 UC DAVIS L. REV. 1317, 1320 (2019); *see, e.g.*, Linda Sandstrom Simard, *Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules*, 71 VAND. L. REV. 1919, 1927–28 (2018); Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the*

barriers to accessing federal courts, sharply limiting claim development through discovery and impeding opportunities for trials.[14] Others detailed well-founded concerns about federal rulemakers' potentially nefarious motivations, with most rulemakers reflecting conservative, Republican, pro-corporate defense backgrounds.[15] Still others rightly worried that the federal proportionality standard, when applied by certain federal judges, would potentially stifle discovery, thereby disproportionately harming disempowered plaintiffs and inhibiting a fair and just resolution on the merits.[16] This is particularly concerning in cases with information asymmetries, where one party has greater access to relevant information.[17] A few scholars urged state courts to resist calls for uniformity and blind adoption of the 2015 federal proportionality standard.[18]

Through the lens of a developing "Critical Procedure" framework, this Article provides an updated, balanced assessment of these concerns and explores previously overlooked benefits of proportionality with the goal of informing ongoing and future conversations among state rulemakers contemplating adoption of the 2015 federal proportionality standard.[19] To ground these conversations, this Article offers the first systematic

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Federal Rules of Civil Procedure, 36 REV. LITIG. 117, 122 (2017); Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1095 (2016); Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 648 (2015). For an additional discussion on the academic critics, see *infra* Section II. In addition to criticism from the academy, members from the plaintiffs' bar and defense bar expressed strong reactions, "predict[ing] that the proportionality amendment would have profound consequences." *See* Klonoff, *supra* note 12, at 1959 (describing the general reactions and perspectives of different groups in response to the federal proportionality rule amendment).

14. *See generally* Yamamoto, *supra* note 1, at 780; Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1854–55 (2014); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 451 (2013); Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 503 (2012).

15. *See, e.g.*, Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. ONLINE 52, 53–55 (2018), https://scholarlycommons.law.northwestern.edu/nulr/vol113/iss2/5 (discussing the lack of diversity on the federal civil rulemaking committees); Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1567–76 (2015) (analyzing the professional backgrounds and legal experiences of federal rulemaking committees).

16. *See, e.g.*, Grimm, *supra* note 13, at 186–88 (remarking that disproportionate discovery increases greatly in cases with information asymmetries, such as those concerning employment discrimination, product liability, the Fair Labor Standards Act (FLSA), civil rights, and consumer fraud); Burbank, *supra* note 13, at 652 (noting that "judges must resist the temptation to privilege costs over benefits, and private over public interests"); John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 464–66 (2010) ("[T]he danger that monetary value of a case, alone, will control the proportionality analysis, impeding the discovery efforts of parties with limited resources and failing to acknowledge the non-pecuniary importance of public policy-related suits, such as those involving allegations of discrimination.").

17. *See, e.g.*, Grimm, *supra* note 13, at 186–88.

18. *See, e.g.*, Simard, *supra* note 13, at 1922 ("[S]tate courts should use caution in blindly following suit."); Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RSRV. L. REV. 501, 504 (2016) (discussing whether state civil rulemakers should track, or reject, federal rule amendments).

19. *See* Simard, *supra* note 13, at 1947–48 ("Jurisdictions will learn from each other and successes (as well as failures) will inform future developments.").

fifty-state survey[20] examining the states' responses to the 2015 federal proportionality amendments. The Article also highlights recent trends and insights into state rulemaking processes that reveal the complex shades of the *politics of proportionality*.[21]

In presenting a new dimension to these conversations, this Article agrees, in large part, with the important concerns of early critics. Pitfalls and dangers still exist—often to the detriment of vulnerable individuals and disempowered groups—if judges fail to apply the federal proportionality standard in a fair, just, and balanced way. But this Article suggests that some of the initial predictions and critiques may have been overstated, and perhaps they were also simply effective in encouraging at least some federal judges to take a more cautious approach.[22]

In any event, what we have learned since 2015 is this: The federal proportionality standard *itself* is not inherently harmful to vulnerable litigants. Rather, it has proven to be a legitimate, albeit discretionary, judicial tool when implemented in a fair, just, and even-handed manner. And it has become an even more crucial tool to carefully managing e-discovery disputes.

Because the application of the 2015 proportionality standard has not proven to be as harmful as initially predicted, some of its actual benefits have been obscured in sometimes discordant debates. This Article clarifies and highlights these affirmative benefits, positing that they should be front and center in ongoing and future conversations among state rulemakers. When properly understood and applied, proportionality principles can simultaneously balance power between asymmetrical parties, uplift the role of state court judges, and give voice to vulnerable litigants during the discovery process. Indeed, proportionality opens possibilities to *realize* and *equalize* access to justice to an even greater degree.

The Article therefore proceeds as follows. Part I provides background on the federal rulemaking process and the 2015 FRCP amendments, focusing on amended Rule 26(b)(1). Part II suggests that the Critical Procedure framework assists in unearthing the political and ideological preferences of rulemakers and how that affects the revision and application of rules. It presents an overview of political-economic critiques of federal rulemaking and proportionality. Part III sets forth the fifty-state survey

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20. This survey does not include the District of Columbia or U.S. Territories, including five major inhabited territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. This would be ripe for further research and exploration.

21. A scholarly focus on the political role of procedure is not new. *See* Dana Shocair Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 FORDHAM L. REV. 2203, 2203–04 (2017) (collecting sources reflecting that "procedure has been a blunt political instrument"); *accord* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818–22 (2010) (suggesting the political role of procedure can be divided into two categories).

22. In 2018, Professor Robert Klonoff initially assessed the application of the new federal proportionality amendment in the scope of discovery in the context of class actions. *See generally* Klonoff, *supra* note 12, at 1953–55. This Article, in many ways, builds upon this initial assessment and its insights.

results, assesses recent trends, and highlights key insights to shepherd future state civil rulemaking endeavors. It also presents a case study of the Hawai'i Supreme Court's rejection of proportionality. Part IV offers an updated approach to concerns surrounding proportionality and examines previously overlooked benefits of proportionality. Part V concludes that state rulemakers should strive to rise above the partisan politics of proportionality and assess what makes the most sense for their respective civil justice systems, tailoring amendments to fit their state's specific needs.

To begin, then, a brief overview of the federal rulemaking process and the 2015 FRCP amendments is helpful.

I. THE 2015 FRCP AMENDMENTS: PROPORTIONALITY IN DISCOVERY

A. Federal Rulemaking: A Touchstone for State Rulemaking

1. The Committee Process: Producing a Pattern for State Rules

Congress authorized the Supreme Court to promulgate the FRCP and any amendments, subject to Congress's right to reject, modify, or defer any of the rules.[23] As the Supreme Court Justices do not, in practice, initially draft any rule amendments, the Judicial Conference formalized a committee process to recommend rule amendments.[24] The Judicial Conference appoints a Standing Committee,[25] which may, in turn, appoint a Civil Rules Committee.[26] The Civil Rules Committee generally "considers proposals for amendments to the Rules, circulates drafts of proposed amendments to members of the bench and bar, holds public hearings and revises in light of the comments received, and then transmits the revised proposals" back to the Standing Committee.[27] The Standing Committee then reports to the Judicial Conference, which in turn recommends changes to the Supreme Court.[28] If the Supreme Court agrees with the proposed changes, then it officially promulgates the revised rules by May 1, to take effect on December 1 of the same year, unless Congress otherwise acts in the meantime.[29]

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23. *Overview for the Bench, Bar, and Public*, U.S. CTS. [hereinafter *Overview*], https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited June 19, 2023); *see also* 28 U.S.C. §§ 2071–2077 (detailing the authority and procedures for promulgating the Federal Rules).

24. *See* 28 U.S.C. §§ 2072–2074 (formalizing the committee process by statutory amendments). The Judicial Conference is a "supervisory and administrative arm of the federal courts." STEPHEN C. YEAZELL, JOANNA C. SCHWARTZ, & MAUREEN CARROLL, FEDERAL RULES OF CIVIL PROCEDURE, at xi (2022).

25. This committee is also sometimes referred to as the Committee on Practice and Procedure or the Committee on Rules, Procedure and Practice. *See* YEAZELL, SCHWARTZ, & CARROLL, *supra* note 24, at xi.

26. *Id.*; *see also* 28 U.S.C. § 2073(a)(2).

27. YEAZELL, SCHWARTZ, & CARROLL, *supra* note 24, at xi.

28. *Id.*

29. *See* 28 U.S.C. §§ 2072, 2074–2075.

Because the federal rulemaking process involves a meticulous and careful drafting and review process,[30] including the consideration of empirical studies, the rules promulgated often serve as a pattern, model, or blueprint for state courts to consider and adopt.[31] Many states previously adopted the Federal Rules outright, with one study reflecting that "about 35 of the 50 states had done so."[32] More recently, however, a study found that while no states currently adopt the Federal Rules outright, they "remain influential at the state level."[33] Thus, many state court procedural systems are similar or nearly identical to the Federal Rules.[34]

2. The Civil Rules Committee: Political-Economic Influences

The Standing Committee and Civil Rules Committee are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.[35] The Chief Justice of the Supreme Court appoints committee members.[36] Each committee has a reporter who is a prominent law professor in the relevant field.[37]

The Civil Rules Committee, specifically, "has been in place for eighty-two years" since 1934 with only a two-year hiatus from 1956 to 1958.[38] It is composed of fifteen people, including a chairperson, a reporter, and a member of the Department of Justice—most often an assistant attorney general—who sits ex officio.[39] Professors Stephen Burbank and Sean Farhang studied the Civil Rules Committee's composition, compiling information about every member that had served from 1960 to 2013 with a focus on members' professional affiliations and ideological backgrounds.[40] Their study revealed a shift over time towards corporate representation, defense practitioners, and Republican-appointed judges.[41] Further, the study discovered an overall lack of Committee members with diverse political-economic-ideological backgrounds or marginalized identities.[42] According to Professor Brooke Coleman's recent study on the Civil Rules Committee's composition between 1934 and 2018, which primarily focused on members' race and gender, "[o]f the 136 individuals who [had] served on the committee, 116 [were] white men, fifteen [were] white

30. *See Overview*, *supra* note 23 ("The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes.").
31. *See* Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 267 (2021) ("The administration of justice in the state courts . . . is usually read comparatively through the lens of federal procedure . . . .").
32. YEAZELL, SCHWARTZ, & CARROLL, *supra* note 24, at xiii.
33. *Id.*
34. *Id.*
35. *Id.* at xi.
36. Coleman, *supra* note 15, at 58–59.
37. *Id.*
38. *Id.* at 59.
39. *Id.* at 58.
40. *See* Burbank & Farhang, *supra* note 15, at 1562, 1567–76.
41. *See id.*
42. *See id.*

women, four [were] black men, and one [was] a Latino/Hispanic man."[43] Notably, "[n]o people of color served on the Committee during the [first] four decades of the Committee's existence."[44] And "[i]n the [last] five decades, people of color ha[d] served in severely disproportionate numbers compared to white individuals."[45] As of 2018, "[n]ot one woman of color ha[d] ever been appointed to the Committee."[46]

The historic composition of the Civil Rules Committee reflects certain political-economic influences that have in turn refocused more recent litigation reform conversations—including, for example, how the Civil Rules Committee may "give [some] reason to believe . . . that it should be understood, to a material degree, as a political institution carrying out a partisan project."[47] Indeed, while some argue that the rulemaking process is an apolitical, neutral, fact-based process such that the backgrounds of the rulemakers may make no difference to the outcome of the process, as Coleman aptly observed, "ideology, politics, and identity inform how the Civil Rules Committee members approach their work."[48] Thus, the Civil Rules Committee's diversification not only corrects the systematic exclusion of certain groups of individuals in the legal profession, but also encourages deeper thinking about complex problems and helps to address potential biases.[49] Burbank and Farhang agreed that "anyone considering additional reforms should look first at the appointment process."[50]

Yet, regardless of who participates in the Civil Rules Committee, there has been a historical trend of increased reliance on empirical studies to support procedural reforms.

3. The Role of Empirical Data: Guiding and Distorting Rulemaking

In assessing potential procedural changes, the Civil Rules Committee often looks to empirical data.[51] Rulemakers and scholars have

43. Coleman, *supra* note 15, at 60.
44. *Id.* at 63.
45. *Id.* at 63–64.
46. *Id.* at 63.
47. *See also* Burbank & Farhang, *supra* note 15, at 1595–96. *See generally* Coleman, *supra* note 15, at 63.
48. Coleman, *supra* note 15, at 54.
49. *Id.* at 75.
50. Burbank & Farhang, *supra* note 15, at 1596.
51. Many scholars suggest that empirical data plays a central role in procedural reforms. *See, e.g.*, Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1172 (2005) ("There has been widespread scholarly criticism of . . . the paucity of sound empirical research to inform the flurry of discovery reforms . . . ."); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 778 (1998) ("As a general matter, the Federal Rules of Civil Procedure have been drafted without the benefit of detailed empirical input."); Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 263 (1999) (discussing that additional empirical research is needed before choosing a procedure to make uniform); Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 103 (1997) ("The history of the relationship between empirical research and the reform of civil procedure has been one of alternating enthusiasm and disappointment.").

"increasingly turned to data to drive their debates about procedural reform."[52] However, the role and use of such empirical data in the rulemaking process remains hotly debated.[53] Some scholars previously criticized the rulemakers for making procedural changes in "a vacuum, indifferent to the empirical realities of civil litigation."[54] In response, the rulemakers now largely justify reforms based on empirical data, as they did for the 2015 FRCP amendments.[55] Through an in-depth study, Professor Danya Shocair Reda argued that the Civil Rules Committee miscategorized and misinterpreted data to support the 2015 FRCP amendments.[56] Still others have criticized federal rulemakers for ignoring existing empirical data and drawing conclusions unsupported by the data they purport to be weighing.[57] Today the role of empirical data has become even more prominent, as procedural reforms continue to attract intense scrutiny and criticism, including that the process is political.[58] Indeed, the reliance on empirical data was a central focus in justifying the incorporation of the federal proportionality standard in amended Rule 26(b)(1).

B. "A Paradigm Shift": The 2015 FRCP Amendments

Many commentators have observed that the 2015 FRCP amendments were some of the most dramatic, significant, and notable changes in the last fifty years.[59] Supreme Court Chief Justice John G. Roberts, Jr. characterized the amendments as a "big deal," a "significant change," and a "major stride toward a better federal court system."[60] Following calls to

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52. Danya Shocair Reda, *Producing Procedural Inequality Through the Empirical Turn*, 94 U. COLO. L. REV. 899, 901 (2023).

53. It is beyond the scope of this Article to explore all aspects of these debates.

54. Reda, *supra* note 52, at 902; *see also* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1993) (noting a "difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda").

55. Reda, *supra* note 52, at 903.

56. *See generally id.* at 903–04.

57. *See, e.g.*, 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) (observing that some committee members dismissed stories shared at public hearings on the proposed 2015 FRCP amendments); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1098 (2012) (noting how the empirical review "plainly cut against the discovery-abuse narrative"); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 578–79 (2001) (suggesting that "there was not much of an empirical case for change favoring the narrowing of discovery scope"); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 406 (1992) ("But unless and until advisory groups conduct responsible empirical studies, hard data relating to the 'principal causes of cost and delay' will remain elusive.").

58. *See generally* Reda, *supra* note 52, at 906–07.

59. *See, e.g.*, Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 53 (2016) (worrying that the 2015 amendments may be the end of an era but advising that "it will be crucial to recognize the limited nature of the changes made by the 2015 amendments"); Richard Briles Moriarity, *And Now for Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into a New Age or Shifting Backward into a "Dark" Age?*, 39 AM. J. TRIAL ADVOC. 227, 227 (2015) (calling the 2015 amendments a "paradigm shift").

60. *See* Chief Justice John G. Roberts, Jr., *2015 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 1, 5, 9 (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

address serious concerns and complaints about the costs, delays, and burdens of civil litigation in federal courts,[61] the Standing Committee held the Civil Litigation Conference at Duke University (Duke Conference) in 2010 to begin discussions on procedural reforms.[62] The Duke Conference examined empirical studies—based on both quantitative and qualitative data[63]—and responded to the all-too-familiar "cost and delay" narrative[64] as well as concerns about discovery abuse, especially in the realm of e-discovery.[65] For example, an American Bar Association (ABA) survey found that "82% of the lawyers surveyed (including 61% of the plaintiffs' lawyers surveyed) agreed discovery is too expensive" with 51% believing discovery was commonly abused and 66% believing e-discovery, in particular, was abused.[66] As another example, a RAND Institute for Civil Justice study warned that in low-value cases, the costs of e-discovery could dominate the underlying stakes in dispute.[67] A further study by the Institute for the Advancement of the American Legal System estimated discovery costs of $3.5 million for a "midsize" case.[68]

As described by the Civil Rules Committee, the three themes at the Duke Conference were: "(1) early and active judicial case management, (2) the necessity for proportionality in discovery, and (3) a duty of cooperation in the discovery process by counsel."[69] On this basis, the Civil Rules Committee ultimately concluded that rule amendments were necessary and established a subcommittee to specifically address new problems

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61. *See* Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. ST. L. REV. 745, 783–84 (2017) (quoting Chief Justice Roberts, *supra* note 60, at 4); Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1813 (2018) (observing that, for the past thirty-five years, much of the focus "has been directed toward solving the cost problem in discovery").

62. The declared purpose was to "explore the current costs of civil litigation, particularly discovery and e-discovery, and to discuss possible solutions." Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 217 (2010) (quoting Memorandum from the Hon. John G. Koeltl to Participants in the 2010 Conference (Aug. 4, 2009)).

63. *See id.* at 217–18 (describing various submissions and survey results, including from the American Bar Association, American College of Trial Lawyers, and National Employment Lawyers Association).

64. *See infra* note 125 (collecting sources discussing efficiency and cost-and-delay narratives).

65. Some of these concerns are not new. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 911 (1987) ("Among the key targets are discovery abuse [and] expense and delay . . . ."). *But see* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1786 (2015) ("In spite of these [empirical] studies, the litigation system is perceived as being fraught with abuse.").

66. Carroll, *supra* note 16, at 456 (citing *ABA Section of Litigation Member Survey on Civil Practice: Detailed Report*, U.S. COURTS, at 2 (Dec. 11, 2009), https://www.uscourts.gov/file/3367/download). *See generally* Lawyers for Civil Justice et al., Statement Submitted for Presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States: Litigation Cost Survey of Major Companies (May 10–11, 2010).

67. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND INST. CIV. JUST. 19 (2012), https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf.

68. *Electronic Discovery: A View from the Front Lines*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 1, 4 (Jan. 1, 2008), https://iaals.du.edu/sites/default/files/documents/publications/ediscovery_view_front_lines2007.pdf.

69. *Minutes from Meeting of the Committee on Rules of Practice & Procedure*, U.S. CTS., 4 (June 3–4, 2013), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2013.

associated with vast amounts of electronically stored information (ESI).[70] The subcommittee presented a myriad of proposals reflecting efficiency as the primary goal in the litigation process.[71] In 2015, after further vetting by the Standing Committee, the Supreme Court approved various amendments to discovery rules.[72]

C. FRCP 26(b)(1): Elevating Proportionality to the Scope of Discovery

Although the Federal Rules have incorporated concepts of proportionality since 1983,[73] amended Rule 26(b)(1) elevated the proportionality standard, which was previously housed in Rule 26(b)(2)(C)(iii), to the general scope of discovery.[74] That is, the amendments "moved proportionality to the forefront of the discovery standard[,] [i]nstead of merely allowing the court to act as a backstop against disproportionate discovery."[75] Importantly, the amended rule incorporated a slightly modified proportionality test, eliminating the prior broad discovery language that "[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[76]

Amended Rule 26(b)(1) limits discovery's scope to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case" when considering the following six factors: (1) the importance of the issues at stake in the action; (2) the amount in controversy; (3) the parties' relative access to relevant information; (4) the parties' resources; (5) the importance of the discovery in resolving the issues; and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.[77] On its face, this federal proportionality standard seems neutral. It does not seem to favor defendants over plaintiffs, corporations over individuals, rich over poor, white parties over minorities, and so on—particularly with its acknowledgment and balancing-the-scales treatment of information asymmetry (where one party has greater access to relevant information). Indeed, nothing in this standard by itself seems inherently harmful to individual plaintiffs.

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70. *See* Chief Justice Roberts, *supra* note 60, at 4–5.

71. *See* Endo, *supra* note 13, at 1326–28 (presenting a taxonomy of such proposals); *cf.* Coleman, *supra* note 65, at 1825–26 (calling on scholars and practitioners to "encourage institutions like the Civil Rules Committee to articulate a common vision of efficiency").

72. Chief Justice Roberts, *supra* note 60, at 4–5.

73. *See* Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269, 281–82 (2020) (discussing the 1983 and 2015 FRCP amendments relating to proportionality); Brooke D. Coleman, *Discovering Innovation: Discovery Reform and Federal Civil Rulemaking*, 51 AKRON L. REV. 765, 773 (2017) (noting that the 1983 amendments "provided the first iteration of 'proportionality' language"); Laporte & Redgrave, *supra* note 3, at 29–39, 43 (presenting a brief history of proportionality in the Federal Rules from 1983 to 2015).

74. *See* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.").

75. Carroll, *supra* note 73, at 281 (noting that "disproportionate" previously referred to discovery as being "excessively costly and time-consuming").

76. FED. R. CIV. P. 26(b)(1) (2006).

77. FED. R. CIV. P. 26(b)(1) (2015).

But, of course, *who* would apply this proportionality test and *how* it would be applied prompted concerns. The 2015 Advisory Committee Notes clarified that the application of this standard is for both the judge and parties to effect.[78] This often hinges greatly on how litigated discovery disputes are resolved—including whether sanctions are appropriate if certain criteria is met. But the collective responsibility to consider the proportionality of all discovery, especially in resolving disputes, has become paramount. In the absence of applying proportionality principles, the consequences can be dire.

The Advisory Committee Notes also emphasized that the burden of proof would not change: "Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."[79] The rulemakers explained that they intended this change to "elevate awareness and get lawyers, litigants, and judges to pay more attention to the duties they have had for over three decades."[80]

In other words, the amendments did not materially change existing law; they simply elevated and emphasized proportionality's significance in federal cases.[81] Put another way, the Federal Rules historically advanced a model of broad discovery, and these amendments did little to change that. Many believed, then, that our civil justice system still "empowers any plaintiff, regardless of the amount in controversy or cause of action, to seek relevant documents that are proportional to the needs of the case."[82]

However, as discussed further below, other commentators were skeptical of such self-serving justifications and sought to unveil what was really going on behind these 2015 FRCP amendments. According to one scholar, "the response from the bar and the academic community has been strident and hyperbolic" with "panic on the plaintiffs' side and euphoria on the defense side."[83] Indeed, the proportionality amendment was among

78. *See* Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 9–10 (2017) (opining that amended Rule 26(b)(1) will encourage judges to engage in a more careful analysis as opposed to "revert[ing] to the mantra that requested documents should be produced because parties have a right to broad discovery"); *see also* Gelbach & Kobayashi, *supra* note 13, at 1095 (analyzing "issues that judges and litigants will face as they attempt to apply the proportionality standard in practice"); Burbank, *supra* note 13, at 654 ("If, however, proportionality is not to be window dressing or a clock for deregulation, similar challenges are unavoidable, and they will be presented in adjudication, not rulemaking, which is to say, again and again.").

79. FED. R. CIV. P. 26 advisory committee's notes to 2015 amendment.

80. Lee H. Rosenthal & Steven S. Gensler, *From Rule Text to Reality: Achieving Proportionality in Practice*, 99 JUDICATURE, Winter 2015, at 43.

81. *See, e.g.*, Vaigasi v. Solow Mgmt. Corp., No. 11. Civ. 5088 (RMB)(HBP), 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) ("[T]he 2015 Amendments constitute a reemphasis on the importance of proportionality in discovery but not a substantive change in the law.").

82. Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1429 (2022).

83. Klonoff, *supra* note 12, at 1951.

"the most controversial amendments."[84] According to one report, "[o]f the hundreds of written comments received specifically concerning the proportionality amendment, over two-thirds opposed the proposal."[85] Overall, then, "[b]oth supporters and opponents of the discovery amendments agreed that the changes would be sweeping, differing only on whether that result would be good or bad for the legal community and the public at large."[86]

II. A CRITICAL PROCEDURE APPROACH

Procedural critics fall along a wide jurisprudential spectrum. Some might be characterized as traditional proceduralists in assessing rule formation, interpretation, and application.[87] Others more explicitly employ critical theory insights into the legal process as an instrument of power influenced by politics, economics, and formal methods of analysis.[88] These latter critics tend to draw from new legal realism, critical legal studies, and critical race theory.[89] As part of these broader critical studies, Professor Eric Yamamoto has developed the Critical Procedure framework described in this Section. Procedural empiricists also lie along the critical spectrum. While these groupings, of course, overlap, they are all linked through rigorous critique of the formation, application, and larger consequences of the rules.

Yamamoto's developing Critical Procedure framework provides an analytical lens for interrogating recent federal and state civil procedural changes.[90] Critical Procedure offers a contextual lens and analytical tools for assessing certain under-explored developments in civil rulemaking.[91] As a departure from and a complement to a traditional formalist legal analysis that focuses on rules language, rulemakers' notes, and court opinions,[92] Critical Procedure suggests that "formalist notions of efficiency, neutrality and fairness have tended to obscure the cumulative effects and

84. Reda, *supra* note 21, at 2204, 2204 n.7 (citing to transcripts of the public hearings and proceedings of the Civil Rules Committee about the proportionality amendment).

85. *See id.* (citing *Preliminary Report on Comments on Proposed Changes to Federal Rules of Civil Procedure*, CTR. CONST. LITIG. 1, 6 (2014), http://www.cclfirm.com/files/Report_050914.pdf).

86. Klonoff, *supra* note 12, at 1952.

87. *See, e.g.*, Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 786 (2018); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 372–73 (2010); Clopton, *supra* note 7, at 469.

88. *See, e.g.*, Brooke D. Coleman, *#SoWhiteMale: Federal Procedural Rulemaking Committees*, 68 UCLA L. REV. DISC. 370, 430–31 (2020); Subrin & Main, *supra* note 14, at 1876; Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 525–26 (2014); Yamamoto, *supra* note 1, at 815–16.

89. *See, e.g.*, A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, at vii–ix (Brooke Coleman, Suzette Malveaux, Portia Pedro, & Elizabeth Porter eds., 2022).

90. *See* Yamamoto, *supra* note 1, at 781.

91. *See* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 170 (2011) ("Contextual legal analysis interrogates the rule-related choice made (measured against rejected choices), the values and interests served by that choice, and its short and long-term consequences.").

92. *See id.* at 160 ("Formalist analysis is often deployed to achieve a desired result, while appearing 'neutral' and as if the decision-makers were simply applying the 'rule of law.'").

attendant value judgments of procedural reforms."[93] That is, Critical Procedure—emerging from critical legal studies, critical race theory, and new legal realism[94]—probes, from the perspective of those of comparatively lesser power:

> what is really at stake, who benefits and who is harmed (in the short and long term), who wields the behind-the-scenes power, which social values are supported and which are subverted, how political [or economic] concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision[s].[95]

Although some have observed that "the phrase 'critical studies' has become freighted" in the 2020s, many share the view that "procedure is critical and constitutive."[96] Recent critical studies of civil procedure are grounded in acknowledged value judgments.[97] They are, in part, "premised on the ideas that courts ought to be accessible and accountable and that procedures should mitigate against biases predicated on class, race, gender, and other facets of identity."[98] They are a response to failures within courts to be more inclusive and to efforts that undermine procedural reforms "by closing off access *to* courts, diffusing disputes, and privatizing whatever processes for resolution remain."[99] Indeed, empirical data and commentary point toward a sharp constriction of court access for vulnerable communities, with supposedly efficiency-motivated procedural reforms leading the way. Critical Procedure analysis is essential. To be sure, broader critical studies, including Critical Procedure, "aim[] to interrupt that trajectory [that the 'haves' always play for the 'rules' and often come out 'ahead'] in an optimistic effort to generate participatory parity through new understandings of what 'equal justice under law' entails."[100]

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93. Yamamoto, *supra* note 1, at 781 (quoting Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 341, 345 (1990)); *see also* Sproat, *supra* note 91, at 154–55 (discussing legal formalism).

94. Yamamoto, *supra* note 1, at 782; *see also* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3–5 (2d ed. 2012) (exploring critical theory analysis in race and law); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, BEYOND RATIONAL CHOICE: ALTERNATIVE PERSPECTIVES ON ECONOMICS 1–3 (2006) (deploying critical legal theory to address economic justice issues); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 827–28 (1997) (describing critical race praxis as the linkage "between progressive race theory and frontline political lawyering practice"); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 532–33 (1988) (describing critical legal theory with roots in legal realism).

95. Yamamoto, *supra* note 1, at 781 (quoting Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 285, 291–92 (2005)).

96. Judith Resnik, *Foreword* to A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, at xiv (Brooke Coleman, Suzette Malveaux, Portia Pedro, & Elizabeth Porter eds., 2022).

97. *See, e.g.*, *id.* (collecting various approaches and examples of critical legal perspectives on the study of civil procedure and practice of civil litigation).

98. *Id.* at xvi.

99. *Id.* at xiv.

100. *Id.*

With this backdrop, Critical Procedure serves as a "framework for realistically evaluating the impact of procedural changes" by "explicitly and systematically integrat[ing] 'changing social dynamics and consequences' into its assessments."[101] That Critical Procedure framework is "operationalized through insights into a given procedure's (or group of procedures') genesis, interpretation, application, alteration, and consequences."[102] A Critical Procedure inquiry also illuminates the sleight of hand dimension to efficiency-reform rhetoric and reveals the impact of recent discovery reforms on limiting claim development and access to adjudication on the merits of claims.[103]

According to Yamamoto, five Critical Procedure insights guide the inquiry into what's behind the curtain of procedural reform and how lawyers and judges might respond to better shape the justice (or injustice) system.[104] First, when viewed as "an instrument of power," procedure may empower or disempower social groups.[105] Second, Critical Procedure "dispels the myth of inherent procedural neutrality" to unveil "an often-politicized process of rule formation and alteration."[106] Third, litigation procedure, at times, substantively advantages, or disadvantages, some over others.[107] Fourth, Critical Procedure identifies "the importance of the litigation of cutting-edge claims to public values articulation and to a reshaping of mainstream public consciousness about what is right and just."[108] That is, public high-stakes litigation is not only about resolving disputes; rather, courts become "dynamic sites of cultural performances" where "narrow

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101. Yamamoto, *supra* note 1, at 782; *see also* Burbank & Farhang, *supra* note 15, at 1563 ("[A]ny attempt to understand procedural reform without attention to the legal and political philosophies [and interests] of its supporters and opponents, and without setting it in broader social [and political] context, is doomed.").

102. Yamamoto, *supra* note 1, at 782.

103. *Id.*

104. *Id.*

105. *Id.* This first insight illuminates ways that the litigation process empowers communities to coalesce and aggregate claims due to group commonalities, opening a path to use litigation as a "centerpiece for social justice organizing." *Id.* at 783–84. It assesses how litigation procedure may tend to "preserve the institutional status quo" depending on whether certain social groups can pursue group remedies or may be limited to individualized, narrow relief. *Id.*

106. *Id.* at 784–85. This second insight reveals significant substantive consequences and substantive value choices, exposing how "neutral" efficiency arguments may impact "substantive law by affecting court access and claim development in ways that benefit some over others." *Id.* It "expands procedural inquiry beyond ordinary costs and burdens into the realm of social and economic consequences for individuals, organizations, governments, communities, businesses and the judiciary itself." *Id.* at 785.

107. *Id.* More specifically, those with greater economic power tend to receive greater advantages, often by procedural design, over those "outsiders of lesser power, especially those challenging established political, social, or economic [status quo] arrangements." *Id.* This third insight, then, "opens to scrutiny the political and economic underpinnings of the fights over procedural reform." *Id.* at 786. It importantly "casts an eye on how procedural changes are affecting who wins and who loses in terms of both legal outcomes and broad social and economic consequences." *Id.*

108. *Id.* at 786. Crucial to this fourth insight is how the litigation process enables participants—especially through discovery—to discover previously private information and to develop claims and defenses that "challenge dominant understandings, or master narratives, undergirding unfair political or social arrangements." *Id.* at 787.

legal claims [are transformed] into larger public messages about social justice."[109]

The fifth insight is key to understanding the dissonance surrounding proportionality reforms and the current *politics of proportionality*. It is this: Context matters—and acknowledging that politics, economics, and ideology (sometimes) matter connects to the other four insights.[110] As Yamamoto explained, "[w]hen procedural shifts generate markedly non-neutral impacts, substantially advantaging some over others, the idea that *ideology matters* explicitly directs inquiry toward the politics of procedure."[111] This fifth insight, then, "examines political and economic influences, with an emphasis on underlying value preferences that determine practical consequences."[112]

As Yamamoto highlights in this fifth insight, procedure often reflects a clash of values undergirding the civil justice system, especially with respect to access to the courts and the discovery process:

> This is because procedure is neither value-free nor a technical science. Both in formulation and operation, procedural systems embody often contested value choices about the importance of resources (or lack thereof) in resolving disputes; [and] about whether similarly situated individuals should be allowed to band together to enter the courthouse and access the tools of factual discovery (particularly for discovery of private information located in defendants' files) . . . .[113]

Overall, the five Critical Procedure insights "direct inquiry into the proclivities of those behind procedural rulemaking," especially those legislators, rulemakers, and judges and their value preferences for certain social groups with either greater or lesser social and economic power.[114] This Critical Procedure framework helps to contextualize recent debates relating to the federal civil rulemaking process and the 2015 federal proportionality standard.

A. Political-Economic Critiques of Federal Rulemaking Generally

For at least the last two decades,[115] many critics have more urgently cited to mounting concerns over "pro-business political and defense

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109. *Id.* at 786, 788; *see also* Eric K. Yamamoto, Moses Haia, & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 17–28 (1994) (describing courts as sites of cultural performances in controversial cases that shape public perceptions).

110. *See* Yamamoto, *supra* note 1, at 782–89. *See also generally* Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 231 (2020) (exploring the influence of political ideologies on procedural decision making in federal circuit courts).

111. Yamamoto, *supra* note 1, at 788.

112. *Id.*

113. *Id.* at 789 (footnotes omitted).

114. *Id.*

115. Critiques go back to the original promulgation of the Rules in 1938, but this Section mainly focuses on developments from the last two decades.

interests" working to limit litigation and plaintiffs' access to federal courts.[116] These critics challenged underlying assumptions about litigation, such as: "Americans are excessively litigious," there are "skyrocketing court caseloads," and there are substantial costs, but few benefits, to litigation.[117] For example, Professor Arthur Miller questioned whether concerns at the center of urgent calls for procedural reform rules—including the "loudly trumpeted (but as yet unproven) 'litigation explosion' and its metaphorical twin, the 'liability crisis,'"[118] as well as outcries over the perceived costly and inefficient litigation process—were eroding litigants' fundamental rights to access federal courts and resolve their claims through jury trials.[119] Significantly, scholars emphasized the need to balance process values of fairness, participation, and dignity, on the one hand, with efficiency, on the other hand.[120]

Rooted in many ways in Critical Procedure, these scholarly critiques collectively reveal that the federal rule amendments do not reflect an "inherent neutrality" in their creation and alteration.[121] Critical Procedure exposes this "politicized process of rule formation."[122] Citing to empirical data and related criticisms,[123] many scholars have questioned the rulemakers' claimed necessity of "efficiency"[124] and reliance on a recurring "cost-and-delay" narrative as a basis for significant procedural rule reforms.[125] Those scholars cautioned that an "unfettered commitment to

116. *See supra* note 15 and accompanying text; *see also* Yamamoto, *supra* note 1, at 771–80 (describing the constriction of court access and claim development through two waves of procedural change); Miller, *supra* note 87, at 798 (reflecting on the procedural paradigm shift and the influence of "certain conservative and pro-business political and defense interests"); J. Maria Glover, *"Encroachments and Oppressions": The Corporatization of Procedure and the Decline of the Rule of Law*, 86 FORDHAM L. REV. 2113, 2113 (2018) (describing corporate advocacy for procedural rule reform and resulting impacts); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 597 (2010) (tracing the history of politics and civil procedure rulemaking).

117. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5–6 (1986).

118. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003).

119. *See generally id.*

120. *See, e.g.*, Yamamoto, *supra* note 94, at 383–93; Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 274 (1991).

121. *See supra* note 94 and accompanying text. *See also* Reda, *supra* note 21, at 2207 (contending that the dominant position of neutrality may exacerbate the polarization, bias, and inequality of procedural reform).

122. Yamamoto, *supra* note 1, at 785.

123. *See supra* Section I.A.3.

124. *See generally* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2073–74 (2002) (examining claims of litigation inefficiency through a variety of empirical studies). In 2015, Chief Justice Roberts urged a "change in our legal culture" with an emphasis on "the public's interest in speedy, fair, and efficient justice." Chief Justice Roberts, *supra* note 60, at 11.

125. *See infra* Section II.B. For instance, Reda has demonstrated that elite lawyers and judges have constructed and marshalled a "cost-and-delay" narrative under the guise of procedural efficiency. *See* Reda, *supra* note 57, at 1090 (noting the "resilience of the cost-and-delay narrative does not depend on its accuracy in reflecting the state of civil litigation"); *see also* Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 67 (2018) ("The persistence of the cost-and-delay narrative undoubtedly has contributed to decades of civil procedure transformation in the name of efficiency and its alter egos—economy and gatekeeping."); Alexander

'efficiency' in the pretrial disposition context . . . will erode other systemic values,"[126] such as fairness, participation, and dignity. Still others have exposed the apparent ideological biases of federal rulemakers in favor of those with greater social and economic power and resources as a significant undercurrent guiding the professedly neutral rulemaking process.[127]

More recently, with the fifth Critical Procedure insight as a backdrop, some scholars have focused on the rulemakers' own biases and the lack of diversity in federal rulemaking bodies.[128] For example, Burbank and Farhang have questioned how the ideologies and professional backgrounds, including litigation experience, of the federal rulemaking committee members affect procedural reforms.[129] Coleman has revealed how the committee members' identities, through both race and gender analyses, do not reflect a "neutral set of experts," observing that historically they have been overwhelmingly white (94%) and more specifically white men (81%).[130] Considering the rulemakers' own ideologies, experiences, and potential biases, Professor Patricia Hatamyar Moore warned that the 2015 FRCP amendments are "anti-plaintiff"[131] and reflect the "restrictive ethos" that Professor A. Benjamin Spencer previously described.[132] Many scholars continue to lament the constriction, largely by procedural rule design, on plaintiffs' abilities to develop and litigate claims before neutral arbiters, and they predict that "the future of discovery will likely hold further restrictions on the ability to obtain information."[133]

Taking a slightly broader view, as mentioned above, Reda has questioned federal rulemaking committee members' reliance on empirical data

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A. Reinert, *The Narrative of Costs, the Cost of Narrative*, 40 CARDOZO L. REV. 121, 122 (2018) (positing that "there is little empirical support for the proposition that our procedural system is too costly in most cases"); Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 858 (2015) ("The central theme in the past thirty years of American procedural reform—with its rise of case management and its emphasis on proportional discovery—has been the effort to keep litigation costs under control."); Coleman, *supra* note 65, at 1786 ("Rather than considering a range of costs and benefits, the U.S. Supreme Court, Congress, and rulemakers view a particular kind of litigation costs as the near-exclusive concern.").

126. Miller, *supra* note 118, at 1133.

127. *See, e.g.*, Thornburg, *supra* note 51, at 243–44 (suggesting that the Civil Rules Committee's composition may reflect defense interests); Stempel, *supra* note 57, at 530–32 (citing concerns about the defense-oriented background of Civil Rules Committee members).

128. *See, e.g.*, Coleman, *supra* note 88, at 396–400 (discussing the lack of diversity on federal rulemaking committees and the benefits of diversity); Burbank & Farhang, *supra* note 15, at 1567–77 (analyzing the professional backgrounds of federal rulemaking committees going back several decades); *cf.* Clopton, *supra* note 2, at 40–43 (distinguishing federal rulemaking committee compositions from more diverse state rulemaking bodies).

129. *See generally* Burbank & Farhang, *supra* note 15, at 1567–77.

130. Coleman, *supra* note 88, at 370, 381, 394–96.

131. *See* Moore, *supra* note 57, at 1112–13.

132. *See generally* Spencer, *supra* note 87, at 354, 366 (developing the concept of a "restrictive ethos," which is "characterized by a desire to discourage certain claims and to keep systemic litigation costs under control," as compared to the "liberal ethos," which refers to "those aspects of federal procedure that tend to promote access and merits-based or accurate resolutions of civil disputes").

133. *See* Moore, *supra* note 57, at 1154; *accord* Steinman, *supra* note 59, at 36–37; Subrin & Main, *supra* note 14, at 1850–51.

in the decision-making process.[134] Reda posits, in part as a response to the critiques that the rulemaking process is not neutral and reflects rulemakers' biases, that federal rulemakers seem to more firmly "cling to an assertion of neutrality" by turning to empirical data as a means of appearing more "objective."[135] Yet, as Reda recognizes, these actions, at times, make rulemakers seem even more "politically motivated, ideologically biased, and unfair."[136]

There are many nuanced facets to these broader critiques about the federal rulemaking process.[137] The next Section examines more specific critiques of the 2015 federal proportionality standard.

B. Critiques of Proportionality: Looking Beyond Efficiency

Leading up to the 2015 FRCP amendments, most scholars "vehemently opposed" the proportionality amendment, invoking strident language arguing that the likely impact of the new discovery rule would be "a dramatic and undesirable change."[138] Those scholars largely focused on limitations to claim development by curtailments to discovery, especially with respect to amended Rule 26(b)(1) regarding the scope of discovery.[139] Although on its face the federal proportionality language appeared to be an objective and determinable measure, many commentators "pointed to the slipperiness of the concept and its potential normative content."[140] Concerned with its "instability and subjectivity," some scholars worried that certain federal judges would apply an "amorphous analysis that appears to turn on the decision makers' normative judgment[s]."[141] Thus, a major concern has been *how* federal courts may apply the proportionality factors, if they are even applied *at all*. As one scholar explained, the amended rule encourages judges to restrict discovery—"even if [those restrictions] mean[] that some plaintiffs with valid claims will be unable to

134. *See* Reda, *supra* note 52, at 901.

135. *Id.* at 905, 911.

136. *Id.* at 905.

137. This is not a comprehensive survey of all scholarly critiques of the federal rulemaking process. There are many facets to these debates, including critiques of specific areas such as pleadings, class actions, discovery, summary judgment, and jury trials, to name a few.

138. *See* Klonoff, *supra* note 12, at 1959–62 (summarizing plaintiffs' perspectives, which were often aligned with those of the academy); *cf.* Karen A. Henry & Diana Palacios, *Proportionality: Finally, a Tool to Help Media Defendants Achieve Rule 1's Promise*, 32 COMMC'NS. LAW. 24, 25 (2016) (specifically referencing Rule 26's use by media defendants "to even the discovery-playing-field, and hopefully recapture some of the leverage the old rule's unreasonably broad standard reserved to individual plaintiffs"); Scott Y. Stuart, *The Power and Pitfalls of Amended FRCP 26*, AM. BANKR. INST. J., Sept. 2016, at 34, 39 (noting that "[f]or the first time, there is a road map regarding how best to negotiate the scope of discovery, largely because of the focus on proportionality"); Michael Thomas Murphy, *Occam's Phaser: Making Proportional Discovery (Finally) Work in Litigation by Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG., 89, 98–99 (2016) (observing that the amendments would "shift[] [proportionality requirements] from the reactive to the prospective").

139. *See, e.g.*, Yamamoto, *supra* note 1, at 780.

140. *See* Reda, *supra* note 21, at 2223.

141. *Id.*

get the information they need to win cases."[142] This, and similar critiques, seemed to be in stark contrast to prior value judgments that "discovery should be expansive (even at the expense of some delay) . . . ."[143]

Part of this lies in the rule's construction as a multifactor test. Although the federal proportionality standard lists a number of factors for consideration, often the inquiry turns on the narrow conception of efficiency or the "amount in controversy,"[144] in part, because it is a "multifactor test without a clear hierarchy or order of operations."[145] When viewed through a Critical Procedure lens, this emphasis on efficiency—or rather, the costs of litigation for the defendant weighed against the benefits of allowing liberal discovery—shrouds the disproportionate impacts of sharply constricted discovery on disempowered groups, such as racial minorities and women.[146] That is, to these critics, "the law governing the scope of discovery is used as a shield to protect the interests of structurally powerful actors like large corporations against litigation efforts by members of historically disempowered groups."[147] As such, some scholars cautioned that amended Rule 26(b)(1) may not reflect the concerns of minority communities, who may be left further disempowered in the civil discovery process.[148] Echoing this concern, Sherrilyn Ifill, National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund President and Director-Counsel, testified that "for civil rights claimants, this is not modest. It is a potential death knell for a whole variety of claims."[149]

Indeed, as the revised federal proportionality standard, in concept, appeared likely to increase efficiencies and advance uniformity in a wide-array of cases, when analyzed through this Critical Procedure lens, scholars cautioned that this narrower conception of discovery, in practice, would likely erect barriers for vulnerable litigants to access the courts and

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142. *See* Coleman, *supra* note 15, at 71 (noting that this amendment "reflects a normative judgment that discovery must be highly monitored and restricted in order to avoid unnecessary 'costs and delay'").

143. *Id.*

144. *See* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 132 (2020).

145. *See* Reda, *supra* note 21, at 2223.

146. *See, e.g.*, Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1009–10 (2016) (noting that the proportionality amendment "made it substantially more difficult for individual claimants in employment discrimination, consumer protection, and similar cases to get the discovery they would need to carry their burdens of proof"); Malveaux, *supra* note 88, at 517–18 (discussing scholars' warnings about "the potential danger the proposed [2015] rules pose for cases involving employment discrimination and civil rights").

147. Seth Katsuya Endo, *Privilege and Voice in Discovery*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 278, 282 (Brooke Coleman, Suzette Malveaux, Portia Pedro, & Elizabeth Porter eds., 2022).

148. *See, e.g.*, *id.*; *see also* Moore, *supra* note 57, at 1112–13; Steinman, *supra* note 59, at 36–37; Subrin & Main, *supra* note 14, at 1850–51.

149. *See* Klonoff, *supra* note 12, at 1969 (quoting *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Subcomm. on Bankr. & the Cts. of the S. Comm. On the Judiciary*, 113th Cong. 21–23 (2014) [hereinafter *Changing the Rules*] (statement of Sherrilyn Ifill, President and Director-Counsel, NCAAP Legal Defense Fund).

achieve justice.[150] For example, Miller argued that the proposed amendments were "the latest impediment to citizen access to meaningful civil justice in our federal courts."[151] Commentators raised concerns that large corporate or institutional defendants would grasp this opportunity and deploy the proportionality rule as a shield to block discovery of private documents that lay only within their possession and control.[152] This concern was especially alarming for cases where certain information asymmetries are ever-present, such as discrimination cases by individual plaintiffs against large institutional defendants.[153] In those cases, scholars predicted that the more stringent discovery requirements of relevant and proportional might "harm minorities by permitting [federal] judges to define relevance through the lens of their individual institutions and implicit biases."[154]

Overall, most of the concerns surrounding the proportionality amendments "centered on the extent to which the amount in controversy should drive the analysis"[155]—or how decisionmakers determine efficiency.[156] As Professor Maureen Carroll observed, "[e]ven before the 2015 amendments went into effect, some had complained that courts were placing too much weight on the amount in controversy, relative to the other listed considerations, when making proportionality determinations."[157]

In the first few years after the 2015 FRCP amendments, scholars continued to assess and evaluate the rule changes, paying special attention to the potential for the proportionality standard to harm vulnerable litigants such as women, minorities, veterans, and other disadvantaged and disempowered groups.[158] Indeed, around 2018, Professor Robert Klonoff assessed the initial impact of the new federal proportionality requirement in

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150. *See, e.g.*, Endo, *supra* note 147, at 278–80; Amii N. Castle, *Rule 26(B)(1) Proportionality Amendment: Three Outcomes Will Be Contrary to the Advisory Committee's Stated Intent, Including Who Bears the Burden of Proving Proportionality*, 38 N.C. CENT. L. REV. 32, 39–40 (2015) (expressing that the amended rules will in practice result in (1) requesting parties bearing the burden of proving proportionality, (2) parties opposing discovery lodging objections on the basis of proportionality, and (3) litigation costs increasing as discovery about discovery becomes necessary). This has long been a concern of critics of the Federal Rules. *See, e.g.*, Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1916 (1989).

151. *See Changing the Rules*, *supra* note 149, at 42. Miller further argued that the rulemaking process should not be used "to obstruct citizen access to our justice system or to impair the enforcement of important public policies by constructing a procedural wall of stop signs around our court houses." *Id.* at 48.

152. *See, e.g.*, Endo, *supra* note 147, at 280.

153. *See, e.g.*, Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 762–64 (2016); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519–20 (2010).

154. *See* Endo, *supra* note 147, at 280; *see also* Moore, *supra* note 57, at 1112.

155. *See* Carroll, *supra* note 73, at 282.

156. *See* Endo, *supra* note 13, at 1326–28; *cf.* Coleman, *supra* note 65, at 1825–26.

157. *See* Carroll, *supra* note 73, at 282 (citing Laporte & Redgrave, *supra* note 3, at 60–61; Carroll, *supra* note 16, at 464).

158. *See* sources cited *supra* note 16 and accompanying text.

the context of class action suits.[159] His review of approximately 135 class action cases under the proportionality amendment revealed several conclusions:

- Courts have made clear that the proportionality amendment does not materially change the governing principles;
- Courts have generally conducted nuanced, fact-specific analyses designed to yield discovery that is important and meaningful;
- Courts frequently invoke common pre-amendment techniques of meet and confer and sampling to resolve discovery disputes;
- Courts are especially liberal in allowing discovery relevant to class certification; and
- As with many pre-amendment cases, the outcomes in many cases denying discovery can be explained by ineffective lawyering.[160]

In other words, courts were "generally doing an excellent job in mediating discovery disputes in class actions," and their rulings belied the critics' predictions that "the consequences of the proportionality amendment would be dramatic."[161] Overall, Klonoff's study concluded that "courts have strived to be fair to both sides."[162]

After 2018, however, scholars largely pivoted their focus to other procedural matters and further assessments of the initial critiques went largely unstudied and unaddressed in scholarship. Notwithstanding this shift in focus, a few scholars have discussed proportionality in discovery in more recent works, albeit often tangentially in the context of broader topics or themes.[163] The actual impacts of the 2015 federal proportionality standard, analyzed through empirical assessments, have thus largely remained under the radar of civil procedure scholarship in recent years.

As a result, it is difficult for state rulemakers to know or evaluate what has happened since the 2015 FRCP amendments.[164] They are left to consider the following: Should their state rules adopt, reject, or modify the federal proportionality standard? As detailed below, certain commentators strongly feel that state rulemakers should reject the standard due in large part to the early critics' doubts and fears.

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159. *See generally* Klonoff, *supra* note 12.
160. *Id.* at 1955.
161. *Id.*
162. *Id.*
163. *See, e.g.*, Seth Katsuya Endo, *Discovery Dark Matter*, 101 TEX. L. REV. 1021, 1051–52 (2023) [hereinafter Endo, *Discovery Dark Matter*]; Endo, *supra* note 147, at 280; Endo, *supra* note 13, at 1354–55; Engstrom & Gelbach, *supra* note 9, at 1051–52; Carroll, *supra* note 73, at 281.
164. Even if there had been recent empirical studies, though, as Klonoff recognized in his own studies focused on class action suits under the new proportionality amendment, such studies are likely "anecdotal and not empirical." *See* Klonoff, *supra* note 12, at 1954. This Article agrees with Klonoff's recognition that "the new discovery rules may impact discovery in ways that cannot be ascertained merely by reading the published court decisions." *See id.* Nonetheless, like Klonoff's work, this Article adds another important piece to the ongoing "complicated puzzle." *See id.*

C. The Fourth Era of Civil Procedure: Resisting the "Siren Song"

Federal and state court litigation dockets differ in the types and volume of cases processed, resources of the parties and the courts, and ethos or culture of litigation.[165] As Professor Thomas Main acutely observed, "because 'procedure is power' we should expect the different variables between state and federal courts (and between and among state courts) to yield different outcomes."[166] A significant difference, for example, is that district judges in the federal system are appointed for life, while judges in the state system are sometimes elected.[167] Relatedly, another distinction is that magistrate judges often manage discovery on the federal side.[168] The types of cases litigated also differ because the majority of state court dockets focus on low-value, high-volume suits involving landlord-tenant, debt collection, and family disputes.[169] Another dramatic difference is the number of unrepresented parties in these types of state court cases as compared with federal suits.[170] State court dockets also reflect marked differences in the types of plaintiffs that seek to litigate matters, such as well-resourced plaintiffs filing cases against sharply disadvantaged defendants.[171] Indeed, with these marked distinctions in the types of clients and cases, the type of attorneys who litigate before state courts and those who litigate before federal courts also differs.[172] And these attorneys' familiarity with the relevant discovery rules and practices may profoundly impact particular cases. The list of differences between state and federal dockets goes on.

Nonetheless, despite any predicted differences, the Federal Rules provide a solid foundation for state civil discovery concerns, reflecting the gathering and consideration of relevant research, the evaluation of alternatives, the vetting of proposals, and the publication of detailed reports.[173] Therefore, it is not surprising that many state courts historically have

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165. *See* Thomas Main, *Civil Rulemaking in Nevada: Contemplating a New Advisory Committee*, 14 NEV. L.J. 852, 857 (2014).

166. *See id.* For further insights into how "procedure is power," see Subrin & Main, *supra* note 14, at 1856; Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008); Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996).

167. *See* Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 841–42 (2012).

168. *See* Peter G. McCabe, *A Guide to the Federal Magistrate Judges System*, FED. BAR ASS'N (Oct. 2016), https://www.fedbar.org/minnesota-chapter/wp-content/uploads/sites/54/2021/12/A-Guide-to-the-Federal-Magistrate-Judges-System.pdf (observing that Magistrate Judges often "resolve discovery disputes").

169. *See* Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1716–17 (2022); Zambrano, *supra* note 82, at 1425.

170. *See* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg, & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 511 (2022); Colleen F. Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 WIS. L. REV. 215, 219–23 (2018); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743–45 (2015).

171. *See* Wilf-Townsend, *supra* note 169, at 1716–17; Steinberg, *supra* note 170, at 743–45.

172. *See, e.g.*, Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 1039 (2023) (discussing the community of lawyers that may practice in a particular specialty field or jurisdiction and how they may interact).

173. Main, *supra* note 165, at 857.

incorporated the Federal Rules amendments into their rules of civil procedure while others have taken a more cautious approach.

Within at least the last decade or so, and building on prior scholarship focused on state civil litigation,[174] a few scholars have implored the need for—and several others have responded to the call for—more research and studies on state civil rulemaking.[175] As the federal system faces critiques that the rules are too focused on the interests of large institutional actors or corporate defendants, litigants and their counsel are turning to state courts to litigate and vindicate important substantive rights.[176] Those scholars aptly observed that, although only about 2% of cases are filed in federal courts and 98% are filed in state courts, there is a disproportionate emphasis on—and thus bias toward—the FRCP.[177] Burbank and Main strongly urged state civil rulemakers to "resist the siren song" of uniformity and advocated against blindly adopting recent FRCP amendments.[178] Similarly, Professor Linda Sandstrom Simard called on state civil rulemakers to "[r]ecogniz[e] the power of procedure unshackled by the demands of uniformity," and to tailor proportionality rules to the demands of each state's own caseload.[179] In response to these scholarly

174. Discussions and symposia focused specifically on state civil procedure are not recent phenomena. *See, e.g.*, *WSU Symposium on State Civil Procedure: Transcript Highlights of Panelist Discussions*, 35 W. STATE U. L. REV. 255, 256 (2007); Koppel, *supra* note 51, at 1169; John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356 (2003) (part of the Nevada Law Journal's *Symposium: Perspectives on Dispute Resolution in the Twenty-First Century*); Carl Tobias, *The Past and Future of the Federal Rules in State Courts*, 3 NEV. L.J. 400, 400 (2003) (same); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1367 (1986).

175. *See, e.g.*, Beerdsen, *supra* note 172, at 1039; Zambrano, *supra* note 82, at 1461–62; Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2189 (2019) [hereinafter Zambrano, *Federal Expansion*]; Linda S. Mullenix, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 BYU L. REV. 1551, 1554–56 (2020); Clopton, *supra* note 2, at 7; Clopton, *supra* note 7, at 417; Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1805 (2018) [hereinafter Zambrano, *States' Interest*]; Subrin & Main, *supra* note 18; Main, *supra* note 165, at 857; Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 647 (2002) ("While many states continue to follow the model of the Federal Rules, others are experimenting with innovations that follow quite different paths. These developments may be the harbinger of a future procedural regime, changing the traditional roles of both attorneys and judges . . . .").

176. *See* Clopton, *supra* note 2, at 3–4.

177. *See* Spaulding, *supra* note 31, at 264–65 (noting that although "federal cases comprise *less than two percent* of all civil cases in the United States . . . [many scholars] remain[] fixed on federal litigation and the Federal Rules of Civil Procedure"); Clopton, *supra* note 2, at 4 (noting that "state courts handle more than sixty times the number of civil cases as federal courts"); Zambrano, *Federal Expansion*, *supra* note 175, at 2103, 2110 (highlighting the importance of state courts in shaping state and federal law by recognizing, "For most Americans, Lady Justice lives in the halls of state courts"); John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, NY TIMES (Nov. 26, 2011), http://perma.cc/BT5T-5R2R (quoting former Colorado Supreme Court Justice Rebecca Love Kourlis)).

178. Subrin & Main, *supra* note 18, at 502 (discussing whether the state civil rulemakers should track or reject federal rule amendments); *accord* Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 317 (2001); Oakley, *supra* note 174, at 356.

179. Simard, *supra* note 13, at 1921.

exhortations, it seems that the trend to adopt FRCP amendments outright "has slowed, if not reversed."[180]

Still others emphasize the similarities and distinctions between federal and state civil rule reform processes in terms of the rulemakers' backgrounds, ideologies, and experiences.[181] They also focus on considerations of the federal and state rulemaking processes, such as the timing and participation in public hearings; institutional structures of standing committees or ad hoc committees; and the rulemaking role of state legislatures or the highest appellate state courts.[182] For example, Professor Zachary Clopton conducted one of the first systematic, empirical studies on who makes state civil procedure.[183] Through a fifty-state survey and detailed research of relevant sources, many of which were not publicly accessible, Clopton argued that "state courts matter" and "represent an important bulwark against the effects of federal procedural retrenchment on substantive rights."[184] As part of this study, Clopton concluded that state rulemaking should work on becoming "more accessible," whereas federal rulemaking should strive to be "more diverse."[185]

As another example, in a study of judicial federalism, Professor Diego Zambrano argued that "federal expansion may be contributing to the decay of state courts and has reinforced a plaintiff-defendant divergence between the two systems."[186] In other words, "while federal courts have embraced prodefendant procedural rules in the class action, arbitration, and pleading contexts—circumscribing access to court in the process—state courts have remained relatively proplaintiff and have ensured broader access to court."[187]

A couple of scholars have started to consider the role of discovery in state civil litigation, especially in high-volume, low-discovery cases, which comprise the bulk of state court cases.[188] Zambrano, for instance, explored how state discovery differs in important ways from the federal system, with a focus on landlord-tenant, debt collection and family disputes, or rather those "lawyerless" cases.[189] Focusing on states that have not adopted the FRCP and those that have experimented with discovery rules, Zambrano observed that the states that maintain their own procedural rules generally offer three distinct differences in their rules: "an

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180. *See* Clopton, *supra* note 7, at 424 n.108; Zambrano, *supra* note 82, at 1430 (observing that "many states' procedural rules are increasingly diverging from the FRCP, refusing to embrace a federal trend of procedural retrenchment").

181. *See, e.g.*, Zambrano, *States' Interest*, *supra* note 175, at 1805; Subrin & Main, *supra* note 18, at 504.

182. *See supra* notes 84 & 85 and accompanying text.

183. *See generally* Clopton, *supra* note 2, at 5–7.

184. *Id.* at 3–4.

185. *Id.*

186. Zambrano, *Federal Expansion*, *supra* note 175, at 2104.

187. *Id.* at 2103–04.

188. *See, e.g.*, Beerdsen, *supra* note 172, at 983–85; Zambrano, *supra* note 82, at 1430.

189. *See generally* Zambrano, *supra* note 82, at 1442–48.

emphasis on substance-specific rules, expansive disclosure requirements partnered with limited depositions and interrogatories, and increasing court management of discovery."[190] Zambrano encouraged rulemakers and scholars to think more expansively about the options relating to discovery in state courts, including considering some middle ground instead of an all-or-nothing mindset.[191]

From a different perspective, Professor Edith Beerdsen proffered that, although there are rules that govern discovery, "Discovery Culture" outside of the courtroom largely shapes everyday discovery practice.[192] Beerdsen argued that ensuring adequate procedural protections requires recognizing the central role of Discovery Culture—which may be particularly applicable at the state level—and that additional procedural measures may be necessary to make cultural norms of the discovery process visible and evaluable.[193]

At bottom, many scholars agree that "the rule of law depends upon ready access to court, where litigants have a fair chance to bring their claims before a neutral arbiter."[194] Litigants with relatively lesser power may not prevail on a host of substantive rights without access to a convenient forum and liberal discovery.[195] As Professor Michael Vitiello succinctly put it, "liberal discovery supports greater access to justice by leveling the playing field [and] . . . prevents 'gotcha justice' by forcing parties to reveal their evidence in advance of trial."[196]

Importantly, scholars are not the only group interested in these types of state civil justice reforms. Around the same time that the federal rulemaking bodies were considering proposed amendments, a national movement aimed at making federal and state civil justice systems more efficient, effective, and accessible gained momentum.[197] As one scholar described it, the "American civil justice system has often and justifiably been criticized as inefficient, overly expensive, unnecessarily protracted, and inaccessible to ordinary citizens seeking judicial redress."[198] As part of this national movement, state courts—led by the chief justices of the state supreme courts and the National Center for State Courts—scrutinized the civil litigation process, studied possibilities, and started to develop and

190. *Id.* at 1430.
191. *See generally id.*
192. *See generally* Beerdsen, *supra* note 172, at 983–84, 1012–13.
193. *See id.* at 1057–58.
194. MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE, at xv (Carolina Academic Press 2017).
195. *See id.* at xvi.
196. *Id.* at 108–09.
197. *See, e.g.*, *Resolution 8: In Support of the Call to Action and Recommendations of the Civil Justice Improvements Committee to Improve Civil Justice in State Courts*, CONF. OF CHIEF JUSTS. NAT'L CTR. STATE CTS. (adopted July 27, 2016), https://ccj.ncsc.org/__data/assets/pdf_file/0017/23480/07272016-support-call-action-recommendations-cji.pdf.
198. *See* Laurie Kratky Doré, *If You Build It, Will They Come? Designing Iowa's New Expedited Civil Action Rule and Related Civil Justice Reforms*, 63 DRAKE L. REV. 401, 403 (2015).

propose "innovative procedures to reduce the delay and expense of litigation, while protecting and fostering the civil jury trial."[199]

A few scholarly pieces and bar journal articles document state civil justice reforms for particular states. But no comprehensive scholarly or empirical work compiles the states' efforts more broadly. This Article does not undertake that encompassing task. Instead, it focuses on one aspect of the reforms: proportionality in state civil discovery.

III. AN EMPIRICAL REVIEW OF STATE PROPORTIONALITY AMENDMENTS

Part III presents the first systematic study of whether state civil rules incorporate the amended 2015 federal proportionality standard.[200] The results, described below and documented in the Appendix, are of both scholarly interest and helpful to state civil rulemakers, including state courts.

For state rulemakers, this survey provides a solid foundation for ongoing and future conversations about proportionality in discovery. It is helpful in two primary ways.

First, as Table 1 illustrates below, the survey provides a numerical assessment of how many states have: (1) adopted, either verbatim or with slight wording changes, the federal proportionality standard; (2) rejected the federal proportionality standard; or (3) maintained the status quo, pre-2015 FRCP amendments ("catch-all" category).[201]

Second, the survey provides nuanced context behind these decisions, including, when available, methods of adoption, rationales, and commentary by rulemakers and practitioners. This context helps to inform state rulemakers' analyses of policy rationales and understandings of the broader implications of rule changes. It also provides a solid foundation for state rulemakers to understand how some states mitigated early critics' worries and adjusted their overall rules regimes accordingly. And, importantly, these insights might help rulemakers navigate potential tensions and power dynamics between different state rulemaking bodies.

Rulemakers can use both types of information, readily available in both the discussion below and the Appendix, to sort through various approaches and identify the best approach for their state courts.

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199. *See id.* at 409.

200. A careful assessment of the District of Columbia and the U.S. Territories is beyond the scope of this project.

201. As to the third category, some states included a proportionality standard in their civil procedural rules, although it was not necessarily included or elevated to the scope of discovery; other states lacked a proportionality standard altogether before the 2015 FRCP amendments; and at least one state considered the adoption of the federal proportionality standard but opted to take a "wait and see" approach. Rather than parsing out the varied nuances of these states into multiple categories in the taxonomy, this third category includes states that have neither explicitly adopted nor rejected the federal proportionality standard (i.e., maintained or preserved the status quo), and therefore serves as a "catch-all." The states in this catch all category may be the most likely to benefit from the analysis and proposals set forth in this Article.

A. 50-State Survey of Proportionality Discovery Rules

The project considered current state rules on the scope and limitations of discovery, and whether the current state rules referenced proportionality, including the 2015 federal proportionality standard with its six considerations. With this starting point, the survey considered any implicit or explicit decisions to either adopt or reject the federal proportionality standard, including the timing (and any available explanations) of these decisions.[202]

A note on methodology: most of the critical information—states' procedural standards found in rules, statutes, or court decisions—is publicly available. From a comprehensive review of these sources, I drew unique conclusions about the state rulemaking processes relating to proportionality, with additional insights from other publicly available resources such as judiciary reports, bar journal articles, law review articles, and other scholarly and practitioner commentary. To do this, I systematically reviewed all states' procedural developments since the 2015 FRCP amendments and categorized developments into three types: (1) states that adopted the federal proportionality standard in the scope of discovery (including verbatim or slight modifications to wording, with or without other substantive changes); (2) states that rejected the federal proportionality standard in favor of maintaining the status quo (through explicit or implicit decision-making processes); and (3) a "catch-all" category of states that maintained the status quo, pre-2015 FRCP amendments (either by deferring any decision-making through a "wait and see" approach or without indicating whether such a decision is intentional or by default).[203] Because much of state civil procedure rulemaking is neither transparent nor accessible,[204] where information was unavailable (perhaps because it was not written or could only be obtained through anecdotal or background oral interviews with key decisionmakers), it may be described as "not available." This serves a dual purpose of both (1) underscoring the need for increased transparency and accessibility as well as renewing calls for these

202. Importantly, this study does not expressly account for the specific state court dockets, state by state, which may at times feature heavier caseloads, a majority of "lawyerless" high-volume, lower-stakes, low-discovery cases focused on debt collection, landlord-tenant, or family law disputes, elected judges, or other distinctive features that differ sharply from federal court dockets. However, as discussed herein, this Part contemplates and underscores that state rulemakers should tailor any rule amendments to fit the state's needs, which may include accounting for these distinctions.

203. *See* Clopton, *supra* note 7, at 424 n.108; Zambrano, *supra* note 82, at 1429–30. Clopton's *Making State Civil Procedure* path-breaking study serves as a useful starting point for the categorization of these procedural developments of the federal proportionality standard. *See* Clopton, *supra* note 2, 44–45. In many respects, this Article's taxonomy updates his important work from 2018, but it also differs in a few marked ways. For example, whereas Clopton categorized Massachusetts as a "rejection" of the federal proportionality standard, I distinguish Massachusetts' approach from the express rejection examples (e.g., Hawai'i) and view its "wait and see" approach as a means of maintaining the status quo such that it falls into the third catch-all category. Because the Massachusetts Rules Committee did not formally recommend or allow for a formal deliberation by the rulemakers, I conclude that there was no express or implicit rejection of it during the rulemaking process.

204. *See* Clopton, *supra* note 2, at 44–45.

in the formal state civil rulemaking process;[205] and (2) maintaining the integrity of the data by avoiding heavy reliance on informal, qualitative, anecdotal evidence.[206]

The case study of the Hawai'i Supreme Court's recent express rejection of the federal proportionality standard draws from both written reports and court orders, which are publicly available, and background oral interviews with Hawai'i Supreme Court Justices, State Judiciary personnel, and members of the Civil Justice Task Force.

Before 2015, Utah and Illinois assessed and made changes relating to proportionality, but tailored the language to fit each state's specific needs.[207] As of June 2023, fourteen states have adopted the federal proportionality standard.[208] A few state legislatures did so by enacting laws,[209] while a number of state courts amended the rules themselves (following the rulemaking process).[210] At least one state supreme court, by judicial fiat, reached a ruling consistent with the interpretation and application of amended FRCP 26(b)(1)'s proportionality factors, even without a similar standard in its rules.[211] About thirty states have largely maintained the status quo in their discovery rules,[212] and four states have rejected the federal proportionality standard.[213]

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205. *See id.*

206. For complete results of this systematic review, see *infra* App.

207. *See infra* Section III.A.1.

208. *See infra* note 221 and accompanying text.

209. *See, e.g.*, MO. SUP. CT. R. 56.01(b) (amended by Senate Bill 224, which was signed by Missouri's governor and became effective on August 28, 2019); WIS. STAT. ANN. § 804.01(2)(a) (West 2018) (amended by Act 235 in 2017, effective 2018). Notably, these two examples from Missouri and Wisconsin are not "code states," or states where the "rules of procedure—and any rule amendments—are primarily promulgated through the usual legislative process." *See* Clopton, *supra* note 2, at 9–10. "Code states," according to Clopton's study, include California, Connecticut, Georgia, Illinois, Kansas, Louisiana, New York, North Carolina, and Oklahoma. *See id.* at 10.

210. *See, e.g.*, ARIZ. R. CIV. P. 26(b)(1), 26.2 (adopting FRCP 26(b)(1) and a three-tiered track system for discovery); OHIO CIV. R. 26(B) (adopting the federal proportionality amendments as of July 1, 2020); MICH. CT. R. 2.302(B)(1) (incorporating the proportionality standard in relation to ESI discovery).

211. *See, e.g.*, *In re* State Farm Lloyds, 520 S.W.3d 595, 613–15 (Tex. 2017) (applying the FRCP 26(b)(1) proportionality factors to rule on issues involving ESI, even though they had not been incorporated into the state rules).

212. *See infra* Section III.A.3.

213. *See infra* Section III.A.4.

ADOPTED	PRE-2015 STATUS QUO[214]		REJECTED[215]
Alabama	Alaska	New Hampshire	California
Arizona	Arkansas	New Jersey	Georgia
Colorado	Connecticut	New Mexico	Hawai'i
Delaware	Florida	New York	West Virginia
Kansas	Idaho	North Carolina	
Michigan	Indiana	North Dakota	
Minnesota	Iowa	Oregon	
Missouri	Kentucky	Pennsylvania	
Nevada	Louisiana	Rhode Island	
Ohio	Maine	South Carolina	
Oklahoma	Maryland	South Dakota	
Vermont	Massachusetts	Tennessee	
Wisconsin	Mississippi	Texas	
Wyoming	Montana	Virginia	
	Nebraska	Washington	

TABLE 1: *Adoption of the Federal Proportionality Standard by State.*[216]

1. Trailblazer States that Adopted Proportionality Before 2015

Before 2015, Utah and Illinois assessed and addressed proportionality considerations, tailoring their proportionality rules to fit each state's respective needs. Utah's civil rulemakers retooled the then-proposed federal proportionality standard, articulating its own unique "standards of proportionality."[217] Utah also adopted a discovery tier system based on the amount of damages in controversy.[218] In contrast, Illinois expressly incorporated in its state civil discovery rules a provision titled "[P]roportionality" in a separate section titled "Prevention of Abuse."[219] This amendment, while incorporating proportionality principles, tracks more closely with limitations on discovery in FRCP 26(b)(2)(C)(iii), rather than the then-proposed FRCP 26(b)(1). Neither Utah nor Illinois have updated their discovery rules since these amendments.

214. Indiana commercial courts, New York commercial courts, and North Carolina business courts also incorporated the federal proportionality standard, with New York commercial courts limiting its application to ESI only.

215. The Supreme Court of Georgia and Supreme Court of California, through court rulings, implicitly rejected the 2015 federal proportionality standard in favor of the pre 2015 status quo. *See* Section III.A.4.

216. Utah and Illinois are not included in these counts because these trailblazer states amended their rules to incorporate proportionality principles before the 2015 FRCP amendments. *See* Section III.A.1.

217. *See* UTAH R. CIV. P. 26(b)(1). For more information on Utah's rulemaking process, see Simard, *supra* note 13, at 1942–44; NAT'L CTR. FOR STATE CTS., UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS 1–5 (Apr. 2015).

218. *See* UTAH R. CIV. P. 26(c)(5) (detailing three discovery tiers based on the amount of damages at issue).

219. *See* ILL. R. SUP. CT. R. 201(c)(3) (detailing proportionality considerations).

2. The First Wave of Adoptions: 2015 to 2020

As of June 2023,[220] fourteen states have adopted the 2015 federal proportionality standard, including Alabama, Arizona, Colorado, Delaware, Kansas, Michigan, Minnesota, Missouri, Nevada, Ohio, Oklahoma, Vermont, Wisconsin, and Wyoming.[221] Indiana commercial courts, New York commercial division courts, and North Carolina business courts also incorporated the federal proportionality standard, with New York commercial division courts limiting its application to ESI disputes only.[222]

Some of these states incorporated the federal proportionality standard verbatim.[223] Other states included amendments that are nearly identical in substance, but with differing language.[224] A few states did not adopt the federal proportionality standard in the same fashion, insofar as they may have kept prior liberal discovery standards or added restrictive standards, such that as a whole these states' rules do not exactly mirror the Federal Rules.[225] These fourteen states amended the rules through a variety of means, including through legislative actions and rulemaking processes (which typically ends with a state supreme court order confirming the rule amendments).[226] And these states achieved these changes over time—beginning immediately following the 2015 FRCP amendments' promulgation and continuing through 2020. Some states provided explanations

220. This Section updates Clopton's prior research, which observed that "as of April 2018, seven states ha[d] adopted the new 'proportionality' language" with five using judicial rule amendments and two using statutes to do so. *See* Clopton, *Making State Civil Procedure*, *supra* note 2, at 17 (citing to rules from Arizona, Colorado, Kansas, Minnesota, Oklahoma, Vermont, and Wyoming).

221. *See* ALA. R. CIV. P. 26; ARIZ. R. CIV. P. 26(b)(1); COLO. R. CIV. P. 26(b)(1); DEL. CH. CT. R. 26(b)(1); KAN. STAT. ANN. § 60-226 (West 2023); MICH. CT. R. 2.302(B)(1); MINN. R. CIV. P. 26.02(b); MO. SUP. CT. R. 56.01(b); NEV. R. CIV. P. 26(b); OHIO R. CIV. P. 26(B); OKLA. STAT. ANN. tit. 12, § 3226(B) (West 2023); VT. R. CIV. P. 26(b); WIS. STAT. ANN. § 804.01(2) (West 2023); WYO. R. CIV. P. 26(b). Notably, Arizona incorporated proportionality principles in other rules amendments in 2018, such as Rule 16(a)(3) and Rule 37(h). *See* Brett Donaldson & John Wittwer, *The 2018 Amendments to the Arizona Rules of Civil Procedure: What Do They Mean to the Practicing Trial Lawyer?*, COMMON DEFENSE, 8, 12 (2018), https://www.cavanaghlaw.com/wp-content/uploads/2018/05/Donaldson-Wittwer-ARCP-2018-Amendments.pdf.

222. *See* IND. COM. CT. R. 6(A); N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70.11–c(d) (2023); N.C. BUS. CT. R. 10.3(a); D.C. SUPER. CT. R. CIV. P. 26(b)(1). Courts of general jurisdiction in these states have otherwise not adopted the federal proportionality standard in their rules.

223. Kansas, Minnesota, Nevada, Ohio, Vermont, Wisconsin, and Wyoming have incorporated the proportionality standard verbatim. *See* KAN. STAT. ANN. § 60–226(b)(1) (West 2023); MINN. R. CIV. P. 26.02(b); NEV. R. CIV. P. 26(b)(1); OHIO R. CIV. P. 26(B)(1); VT. R. CIV. P. 26(b)(1); WIS. STAT. § 804.01(2)(a) (West 2023); WYO. R. CIV. P. 26(b)(1).

224. If there were any word changes, many are minor and make no meaningful difference. States whose proportionality standards have slight word changes include Alabama, Colorado, Delaware, Michigan, Missouri, and Oklahoma. *See* ALA. R. CIV. P. 26(b)(1); COLO. R. CIV. P. 26(b)(1); DEL. SUPER. CT. R. CIV. P. 26(b)(1); MICH. CT. R. 2.302(B)(1); MO. SUP. CT. R. 56.01(b)(1); OKLA. STAT. ANN. tit. 12, § 3226(B)(1)(a) (West 2023).

225. Some states, such as Missouri and Oklahoma, incorporated the federal proportionality language but did not delete the prior scope of discovery standard language ("reasonably calculated to lead to the discovery of admissible evidence"). *See* MO. SUP. CT. R. 56.01(b)(1); OKLA. STAT. ANN. tit. 12, § 3226(B)(1)(a) (West 2023). For a further discussion on Missouri's rules amendments, including tensions between two rulemaking bodies, the Missouri State Judiciary and the Missouri State Legislature, see Maddie McMillian, Note, *Who Makes the Rules Around Here? The Missouri Legislature Redefines Discovery*, 85 MO. L. REV. 585, 592–600 (2020).

226. For additional information on state procedure-making authority, including a discussion on code states, see Clopton, *supra* note 2, at 9–11.

through editors' or committee notes; many, however, remained silent in the written record as to any rationales.

Some of the written explanations provide helpful insights into the circumstances surrounding the rule changes. For example, at least one state, Colorado, viewed adopting the federal proportionality standard within the scope of discovery as a means of advancing access to justice for vulnerable litigants.[227] At least one other state, Alabama,[228] emphasized the federal proportionality standard's utility in certain types of cases such as those featuring "information asymmetr[ies]"[229] or ESI.[230] For Wisconsin, the method of adoption by the state legislature—circumventing the normal rulemaking process with support from certain business interest groups—illustrated tensions between the two rulemaking bodies: the state legislature and the state judiciary.[231] And through a cautious and slow approach with assessments by four different rulemaking bodies, rulemakers in Ohio took about five years to incorporate the federal proportionality standard into its rules.[232] This slower, yet comprehensive, approach was apparently driven by a strong sense of distrust and skepticism of effective, appropriate party self-management of discovery in certain types of cases.[233]

Although none of these rule amendments (or commentaries thereto) say it explicitly in writing, there is a palpable sense that lurking behind some of these changes are some of the discordant dimensions of the politics of proportionality. On the one hand, reflecting the unease of many early critics, Wisconsin's 2018 amendments apparently illustrate some of the more explicit partisan politics of proportionality through a pro-corporate defense interest push, advanced by the Republican-dominated

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227. *See* COLO. R. CIV. P. 26(b)(1). "[A] member of the Colorado Supreme Court Standing Committee on Civil Rules" observed that these rule changes sought to "persuade parties and counsel" to "recognize that justice delayed is justice denied; and to acknowledge that unchecked expense is more frequently used as an unjust sword than a shield against injustice." Richard P. Holme, *New Pretrial Rules for Civil Cases—Part II: What Is Changed*, COLO. LAW., July 2015, at 111, 116.

228. *See* ALA. R. CIV. P. 26(b)(1).

229. *See* ALA. R. CIV. P. 26(b)(1) committee's comments to 2018 amendments (acknowledging that "the burden of responding to discovery lies heavier on the party who has more information, and properly so" in information asymmetry cases).

230. *Id.* ("The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.").

231. In a rare move, with apparent support from corporate interest groups, the Wisconsin Legislature voted to incorporate the 2015 federal proportionality standard into Act 235 in 2018. *See* WIS. STAT. ANN. § 804.01(2)(a) (West 2023); Ryan M. Billings, Robert L. Gegios, & Melinda A. Bialzik, *Sweeping Changes to Rules of Civil Procedure*, WIS. LAW., June 2018, at 12–14. Act 235 was prepared and passed without the usual input from the Wisconsin Supreme Court and the Judicial Council, thereby circumventing the normal state civil rulemaking process. *Id.* at 13.

232. For a detailed account of the slow and cautious rulemaking process involving the Ohio Civil Justice Task Force, the Ohio Supreme Court Commission on Rules of Practice & Procedure, the Ohio Supreme Court, and the Ohio Senate Judiciary Committee, see Richard A. Frye & John D. Holschuh, Jr., *2020 Ohio Civil Rules Amendments*, OHIO BAR (July 29, 2020), https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2020-ohio-civil-rules-amendments/.

233. According to the Staff Note, the proportionality requirement "contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." OHIO R. CIV. P. 26(B)(1) staff note to 2020 amendment.

Wisconsin legislature,[234] to incorporate proportionality into its civil procedure regime by circumventing both the elected Wisconsin Supreme Court justices and the Judicial Council.[235] On the other hand, at least to some observers, Colorado's rule amendments incorporating the 2015 federal proportionality standard reflected efforts to promote access to justice, which may be viewed as unpopular among those same pro-corporate conservative defense litigants.[236] Indeed, at least one commentator opined that the "cultural change [reflected in the amendments] is not expected to be immediately popular with some trial lawyers, or clients with unlimited litigation budgets, but the change may help lawyers to . . . learn they must focus their cases and use thoughtful cross-examination in place of discovery paper blizzards."[237] And apparently, at least for Alabama and Ohio, some states strongly considered ESI's emergence in state civil lawsuits and the complexity of cases where self-management of discovery was unlikely.[238]

3. States That Maintained the Status Quo: Catch-All Category

At least thirty states have not made any significant changes to their discovery rules. Most of these states—through their rulemaking bodies or otherwise—have not indicated whether they are considering incorporating the 2015 federal proportionality standard. It seems that they simply have not taken up the issue or are ignoring these considerations for the present. A few states have considered updating their rules to mirror the 2015 FRCP amendments but ultimately elected not to do so.[239] As described below,

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234. For the 2017-2018 legislative session, Republicans controlled Wisconsin's state Senate and House, and the Governor was also Republican. *Party Control of Wisconsin State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Wisconsin_state_government#:~:text=The%20Republican%20Party%20controls%20both,neither%20party%20holds%20trifecta%20control (last visited Jan. 20, 2024).

235. Billings, Gegios, & Bialzik, *supra* note 231, at 13. "While Wisconsin Supreme Court elections are nonpartisan," elected justices tend to maintain their ideological backgrounds, which generally align either with Republicans or Democrats. *See Wisconsin Supreme Court Elections, 2017*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_2017 (last visited Jan. 20, 2024). In 2017, the Wisconsin Supreme Court reflected a 5-2 balance "in favor of Republican-affiliated justices." *Id.* In 2018, the conservative hold shifted to 4-3. *Wisconsin Supreme Court Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_2018 (last visited Jan. 20, 2024). In 2023, the conservative hold yielded to a liberal majority of 4-3 "for the first time in [fifteen] years." *See* Shawn Johnson, *For the First Time in 15 Years, Liberals Win Control of the Wisconsin Supreme Court*, NPR (Apr. 4, 2023, 9:57 PM), https://www.npr.org/2023/04/04/1167815077/wisconsin-supreme-court-election-results-abortion-voting-protasiewicz-kelly.

236. *See* Holme, *supra* note 227, at 116.

237. *Id.*

238. *See* ALA. R. CIV. P. 26(b)(1) (committee's comments to 2018 amendments); 2 CASSANDRA BURKE ROBERTSON & DENNIS G. TEREZ, BALDWIN'S OHIO PRACTICE: CIVIL PRACTICE § 26:1 (2023–2024 ed.).

239. *See* MASS. R. CIV. P. 26 reporter's notes to 2016 amendment; Nathalie K. Salomon, *Massachusetts Takes a "Wait and See" Approach to Rule 26 Discovery Rule Changes: Unlike Federal Rules, the Recent Amendment to Rule 26 of the Massachusetts Rules of Civil Procedure Addresses Protective Orders Only*, BOS. BAR J., Fall 2016, at 23–25; N.J. CTS., 2022 REPORT OF THE SUPREME COURT CIVIL PRACTICE COMMITTEE 216 (2022), https://www.njcourts.gov/sites/default/files/sccr/reports/cpcreport22.pdf; *Minutes from Meeting of the Civil Procedure Rules Committee*, FLA. BAR 10 (2022), https://www-media.floridabar.org/uploads/2020/03/CivPRC-Minutes-10-20-22.pdf.

Massachusetts took a "wait and see" approach. Because the written record is sparse, at times, it is difficult to assess the rationale or processes behind these decisions. And for at least one state, rather than incorporate proportionality in the rules themselves, the state appellate court did so through a court ruling.

Most of these states' rules reflect the pre-2015 FRCP amendment proportionality language that was embedded in the limitations on discovery section, as opposed to the scope of discovery. That language states that the court may limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[240] As of June 2023, the twenty states that maintained this language in their rules included: Alaska, Florida, Idaho, Indiana (except commercial courts), Iowa, Maryland, Massachusetts, Mississippi, Montana, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, North Dakota, South Dakota, Tennessee, Texas, Virginia, and Washington.[241]

Other states that maintained the status quo in their rules do not include any type of proportionality language—either reflecting the revised six-factor 2015 standard in FRCP 26(b)(1) or the proportionality considerations enumerated in former FRCP 26(b)(2)(C)(iii). As of June 2023, ten states, including Arkansas, Connecticut, Kentucky, Louisiana, Maine, Nebraska, New Hampshire, New York, Oregon, and Pennsylvania, limited discovery based on relevance and privilege, with some of these states' rules reflecting the prior scope of discovery standard that the "information sought . . . appears reasonably calculated to lead to the discovery of admissible evidence."[242]

Because state rulemaking processes often are not transparent or accessible, there are few examples or written records reflecting whether the

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240. Fed. R. Civ. P. 26(b)(2)(C)(iii) (2014).

241. *See* ALASKA R. CIV. P. 26(b)(2)(A)(iii); FLA. R. CIV. P. 1.280(d)(2)(ii); IDAHO R. CIV. P. 26(b)(1)(C)(iii); IND. R. TRIAL P. 26(B)(1)(iii); IOWA R. CIV. P. 1.503(8)(c); MD. R. 2-402(b)(1)(C); MASS. R. CIV. P. 26(f)(4)(C) (only limiting ESI); MISS. R. CIV. P. 26(d)(2); MONT. R. CIV. P. 26(b)(2)(C)(iii); N.J. CT. R. 4:10-2(g)(3); N.M. DIST. CT. R. CIV. P. 1-026(B)(2)(c); N.C. GEN. STAT. § 1A-1(26(b)(1a)(iii)) (2018) (does not apply to Business Court); R.I. SUPER. CT. R. 26(b)(1)(C); S.C. R. CIV. P. 26(a)(iii); S.D. R. CIV. P. § 15-6-26(b)(1)(iii); N.D. R. CIV. P. 26(b)(1)(B)(i); TENN. R. CIV. P. 26.02(1)(iii); TEX. R. CIV. P. 192.4(b); VA. SUP. CT. R. 4:1(b)(1)(iii); WASH. SUPER. CT. CIV. R. 26(b)(1)(C).

242. *See* ARK. R. CIV. P. 26(b)(1); CONN. R. SUPER. CT. CIV. § 13-2; KY. R. CIV. P. 26.02(1); LA. CODE CIV. P. 1422; ME. R. CIV. P. 26(b)(1); NEB. SUP. CT. R. § 6-326(b)(1); N.H. SUP. CT. R. 21(b); N.Y. C.P.L.R. 3101 (MCKINNEY 2024); OR. R. CIV. P. 36(B)(1); PA. R. CIV. P. 4003.1(b). For some of these states, such as Oregon, the civil rules regimes depart significantly from the Federal Rules. For a further discussion on Oregon's rules of civil procedure, see generally *Survey of the Oregon Bench & Bar on the Oregon Rules of Civil Procedure*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 1, 1 (2010), https://iaals.du.edu/sites/default/files/documents/publications/survey_oregon_bench_bar2010.pdf; Jennifer Nicholls, Comment, *A Proportional Response: Amending the Oregon Rules of Civil Procedure to Minimize Abusive Discovery Practices*, 89 OR. L. REV. 1445, 1459–73 (2011).

above states had robust conversations leading to intentional decisions not to make any changes to their rules, or whether they simply have not addressed the issue. Massachusetts' rulemakers, however, have explicitly detailed their process, which included certain political "compromise[s]" and explained their "wait and see" approach with respect to the 2015 federal proportionality standard.[243] In response to public comments reflecting both the "dismay of some practitioners" at delays in amending the discovery rules, views that changes were not needed, and concerns that there may be "drawbacks" or "unintended consequences" of incorporating the federal amendments so soon after the 2015 FRCP amendments, the committee favored a "wait and see" approach, which was unique in 2016.[244] Notably, the committee, rather than the Supreme Judicial Court, deferred recommending these changes, thereby keeping open the possibility of revisiting these proportionality issues after federal courts had "sufficient experience" under the 2015 FRCP amendments.[245]

At least one state appellate court has stepped in and, through judicial fiat, implicitly adopted federal proportionality factors in a dispute involving ESI.[246] In *In re State Farm Lloyds*,[247] when ruling on a petition for a writ of mandamus, the Supreme Court of Texas recognized that the "proportionality inquiry requires case-by-case balancing" in light of (1) the likely benefit of the requested discovery; (2) the needs of the case; (3) the amount in controversy; (4) the parties' resources; (5) the importance of the issues at stake in the litigation; (6) the importance of the proposed discovery in resolving the litigation;" and (7) any other articulable factor bearing on proportionality.[248] The court explained that its "application of proportionality principles in this context aligns electronic-discovery practice under the Texas Rules of Civil Procedure with electronic-discovery practice under the Federal Rules of Civil Procedure."[249] That is, although apparently limited to electronic discovery disputes in Texas, the court clarified that the Texas Rules of Civil Procedure are "in line with their federal counterparts" and "elucidate[d] the guiding principles informing the exercise of discretion over electronic-discovery disputes, emphasizing that proportionality is the polestar."[250]

Although fourteen states have adopted the 2015 federal proportionality standard, a plurality of states may still consider whether incorporating that standard makes sense for their state courts.

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243. MASS. R. CIV. P. 26 (reporter's notes to 2016 amendment). For additional explanations and discussions on Massachusetts' rulemaking process, see Salomon, *supra* note 239.

244. Salomon, *supra* note 239, at 24; MASS. R. CIV. P. 26 (reporter's notes to 2016 amendment).

245. MASS. R. CIV. P. 26 (reporter's notes to 2016 amendment) (noting that a "'wait and see' approach" would allow for further review and consideration as to whether proportionality should be adopted); *see also supra* note 203.

246. *See In re* State Farm Lloyds, 520 S.W.3d 595, 615 (Tex. 2017).

247. 520 S.W.3d 595 (Tex. 2017).

248. *Id.* at 607–11 (footnotes omitted).

249. *Id.* at 612.

250. *Id.* at 613, 615.

4. States That Rejected Proportionality

A handful of states rejected including the federal proportionality standard in their rules, opting instead to maintain broader, liberal discovery standards like those described above.[251] Hawai'i (as detailed in the case study below) and West Virginia have done this expressly as part of their state rulemaking processes.[252] By contrast, Georgia and California have done so implicitly through state supreme court rulings on discovery issues.[253]

The West Virginia Supreme Court, after receiving public comments reflecting division on the issue,[254] opted to reject incorporating the 2015 federal proportionality standard in its scope of discovery rule.[255] Instead, it expanded the "existing opportunity for a proportionality analysis" by a state court under Rule 26(b)(1)(C), which guides limitations on discovery.[256]

Meanwhile, in *General Motors, LLC v. Buchanan*,[257] the Georgia Supreme Court expressly rejected the apex doctrine, which limits the ability of parties to depose high-ranking corporate officials.[258] In doing so, it emphasized the broad nature of discovery under Georgia state law.[259] With the following acknowledgment, the court seemed to implicitly reject the federal proportionality standard in FRCP 26(b)(1), distinguishing the Georgia equivalent and reasoning that it wanted to promote broad, liberal discovery constrained only by relevance and privilege, but not proportionality:

> And although we acknowledge as a general principle that we look to federal case law interpreting the Federal Rules of Civil Procedure as persuasive authority, where the language of a Georgia statute deviates

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251. *See* discussion *supra* Section III.A.3.

252. *See* discussion *infra* Section III.B. and notes 254–56 and accompanying text.

253. *See infra* notes 257–65 and accompanying text.

254. *See* Matt Harvey, *West Virginia Supreme Court Mulls Revamp of Rules of Civil Procedure*, W. VA. NEWS (Apr. 10, 2023), https://www.wvnews.com/statejournal/law/west-virginia-supreme-court-mulls-revamp-of-rules-of-civil-procedure/article_6afe5470-cef5-11ed-9cf1-33198ca4482d.html (summarizing some of the various divisive opinions on the proposed rule amendments).

255. *Request for Public Comment on Proposed Amendments to the West Virginia Rules of Civil Procedure, No. 21-Rules-12*, W. VA. JUDICIARY 86 (June 15, 2022) [hereinafter *Request for Public Comment*], https://www.courtswv.gov/sites/default/pubfilesmnt/202307/RCP%20Public%20Comment%20Order.pdf. On January 31, 2024, the West Virginia Supreme Court of Appeals approved amendments to the West Virginia Rules of Civil Procedure, which will be effective as of January 1, 2025. *Recent Rules Orders*, West Virginia Judiciary, 1, 67–68 (effective Jan. 1, 2025), https://www.courtswv.gov/sites/default/pubfilesmnt/2024-01/Rules%20of%20Civil%20Procedure%20-%20Amendments%20Effective%20January%201%202025_0.pdf. These amendments reflect the court's rejection to incorporate the 2015 federal proportionality standard in Rule 26 of the West Virginia Rules of Civil Procedure. *See id.*

256. *Request for Public Comment*, *supra* note 255, at 78–79, 86.

257. 874 S.E.2d 52 (Ga. 2022).

258. *Id.* at 60–63.

259. *Id.* at 59.

> from the federal rules, the persuasive value of the authority interpreting and applying the federal rules is diminished.[260]

The Supreme Court of California similarly rejected limits on discovery set forth in the FRCP, retaining language unique to California state courts relating to limitations on discovery and emphasizing broad, liberal discovery.[261] In *Williams v. Superior Court*,[262] the court reaffirmed that the right to discovery should "be construed liberally so that parties may ascertain the strength of their case and at trial the truth may be determined."[263] Although *Williams* involved the Labor Code Private Attorneys General Act of 2004 and concerned interrogatories, such that the specific holding may be interpreted as narrowly limited to those circumstances, the court's liberal approach to discovery is nevertheless notable.[264] The court confirmed that trial courts should approach discovery disputes liberally and broadly, stating that:

> A trial court must be mindful of the Legislature's preference for discovery over trial by surprise, must construe the facts before it liberally in favor of discovery, may not use its discretion to extend the limits on discovery beyond those authorized by the Legislature, and should prefer partial to outright denials of discovery.[265]

For these handful of states, at least for now, there does not seem to be any indication that state civil rulemaking bodies will revisit whether to incorporate the 2015 federal proportionality standard. This includes the Hawai'i State Judiciary.

B. A Case Study: The Hawai'i State Judiciary

In 2020, the Hawai'i Judiciary promulgated amended rules, which largely adopted the 2015 FRCP amendments and became effective on January 1, 2022.[266] According to the Hawai'i Bar Journal, "[t]hese amendments are designed to reduce costs and delay in civil litigation and to streamline the litigation process in Hawaii circuit courts."[267] These

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260. *See id.* at 63–64 (citations omitted); *see also* W. Warren Hedgepeth, Comment, *You Can't Simply Say "No!" Almighty CEO: Georgia's View on the Apex Doctrine and Discovery Abuse*, 74 MERCER L. REV. 377, 386–97 (2022) (discussing other aspects of the case).

261. *See* CAL. CIV. PROC. CODE §§ 2017.010–.020 (Deering 2023); Williams v. Superior Court, 398 P.3d 69, 74 (Cal. 2017) (reversing a 2015 trial court decision denying broad, early-stage discovery that seemed "to promote the philosophy of proportionality drafted into the proposed amendments to the Federal Rules of Civil Procedure" (quoting Janell M. Adams, *California Court of Appeals Affirms Trial Court's Staging of Discovery to Promote Efficiency and Economy*, BOWMAN & BROOKE (June 26, 2015), https://www.bowmanandbrooke.com/insights/ca-court-of-appeals-affirms-staging-of-discovery)).

262. 398 P.3d 69 (Cal. 2017).

263. *Id.* at 74.

264. *See id.*

265. *Id.* at 75.

266. *See* HAW. STATE JUDICIARY, ORDER AMENDING THE HAWAI'I RULES OF CIVIL PROCEDURE 5–13 (2020), https://www.courts.state.hi.us/wp-content/uploads/2020/10/2020_hrcp16_16.1_26_29am_ada.pdf.

267. *Summary of New Court Rules Designed to Improve Civil Litigation in Hawaii Circuit Courts*, HAW. BAR J., January 2022, at 26 [hereinafter *Summary of New Court Rules*].

amendments were not minor word changes; they ushered in a major substantive overhaul of the Hawai'i civil rules regime.

1. The 2019 Task Force on Civil Justice Improvements

On June 18, 2018, Hawai'i Supreme Court Chief Justice Mark E. Recktenwald established and convened the Task Force on Civil Justice Improvements (Task Force).[268] The Task Force's purpose was to "develop recommendations, including rule amendments, on ways to reduce the costs of and delays in civil litigation, and to streamline the litigation process, in Hawaii's circuit courts."[269]

According to the Task Force's Final Report, the Task Force was "comprised of eight current and retired judges and nineteen lawyers," including one law professor and "three former presidents of the Hawai'i State Bar Association."[270] In contrast to federal rulemaking committees, the Task Force was diverse in terms of race and gender as well as professional background, including geography. The attorney members represented plaintiffs, defendants, individuals, businesses, and government entities.[271] They were from law firms of all sizes, nonprofits, public interest firms, and government agencies.[272] Collectively, they had resided and practiced in each of the circuits (i.e., were from different islands).[273] The judges similarly resided and presided over courts in each of the circuits.[274] The law professor on the Task Force had litigated in Hawai'i courts and long taught and wrote about civil procedure.[275] There were eleven women and sixteen men—many reflecting Asian American or Pacific Islander backgrounds.[276]

Before making any recommendations, the Task Force analyzed national reform studies, including those expressing serious concerns that "[u]nconstrained and disproportionate discovery" practices were creating "excessive costs and delays" and thus "deny[ing] access to justice."[277] To obtain additional input, the Task Force also surveyed over four hundred

268. HAW. STATE JUDICIARY, FINAL REPORT OF THE TASK FORCE ON CIVIL JUSTICE IMPROVEMENTS 1 (2019) [hereinafter FINAL REPORT], https://www.courts.state.hi.us/wp-content/uploads/2019/08/Final-Report-of-the-Task-Force-on-Civil-Justice-Improvements.pdf.

269. *Id.* at 3.

270. *Id.* at 3–4.

271. *Id.* at 3, app. (listing names of Task Force members).

272. *Id.* at 3–4.

273. *Id.* at 3.

274. *Id.*

275. *Id.* at 58; *see Eric K. Yamamoto*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., https://hoku.law.hawaii.edu/personnel/yamamoto/eric (last visited Mar. 4, 2024).

276. This is based on the Author's personal knowledge, in addition to other forms of basic background research on the participants (such as examining profiles on their law firm websites). The participants did not take any formal survey in which they were asked to self-report their racial, socio-economic, or other personal background.

277. FINAL REPORT, *supra* note 268, at 1.

members of the Hawai'i State Bar Association and participated in panel discussions at the October 2018 Civil Law Forum.[278]

Approximately 55% of the survey respondents had twenty years or more of civil litigation experience, and approximately 75% had ten years or more.[279] Additionally, the respondents were evenly split between those who predominantly or more frequently represented plaintiffs and those who predominantly represented defendants.[280] About 57% of respondents believed that "litigation costs are almost never or only occasionally proportional to the value of the case in circuit court."[281] About 60% of respondents agreed or strongly agreed that "cases in circuit court are resolved based on considerations unrelated to the merits of the parties' claims or defenses."[282]

Interestingly, although the respondents' backgrounds as plaintiff or defense counsel were almost evenly split, "74 percent of respondents agree[d] or strongly agree[d] that Hawai'i should incorporate considerations of proportionality in defining the scope of discovery."[283] About "76 percent or more of respondents agree[d] or strongly agree[d] that Hawai'i should adopt rules . . . similar to the federal provisions."[284]

After reviewing the survey results and after subsequent consultation, debate, and deliberation, the Task Force's recommendations primarily sought to reduce costs and delays and to streamline the resolution of discovery disputes by "(1) right-sizing discovery . . . to fit the needs of a case; (2) providing more certainty in the litigation process; and (3) simplifying discovery."[285] The recommendations aimed to "make the civil justice system more accessible, affordable, efficient, and just."[286] Recognizing that the existing rules were generally one-size-fits-all and trans-substantive (nonsubject-matter-specific), which often led to inefficiencies and disproportionate discovery, the Task Force proposed to "right-siz[e] discovery, procedures, and case management" so that the rules aligned with the needs of the case.[287]

Supported by the survey results and other national reports noting that proportionality "should be the most important principle applied to all discovery,"[288] the Task Force proposed amending Hawai'i Rule of Civil

278. *Id.* at 4, app. 6 at 1/107. Lawyers were asked to self-report on the survey.
279. *Id.* at 16.
280. *Id.*
281. *Id.* at 17.
282. *Id.*
283. *Id.* at 17–18.
284. *Id.* at 40.
285. *Id.* at 21.
286. *Id.* at 55.
287. *Id.* at 21.
288. *Id.* at 24 (quoting *Reforming Our Civil Justice System: A Report on Progress & Promise*, AM. COLL. OF TRIAL LAWS. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 1, 17 (2015), https://www.actl.com/docs/default-source/judiciary-committee/leading-suggestions-for-improvements/2-actl-iaals---reforming-our-civil-justice-system---a-report-on-progess-and-promise-(2015).pdf).

Procedure (HRCP) 26(b)(1) to track the language of amended FRCP 26(b)(1) requiring that discovery be proportional to the needs of the case in light of the six factors.[289] The Task Force's justification for this proposal noted that "expressly incorporating proportionality into the scope of discovery is vital to developing the proper mind-set in litigants, lawyers, and judges," as "[i]t will definitively establish that proportionality is integral to discovery and must always be considered."[290]

The Task Force aptly observed that incorporating the FRCP's language had several advantages: "the federal rules are already familiar to many Hawai'i practitioners; they are supported by research and have been used in practice; and they provide a body of federal precedents that, while not binding on a Hawai'i court, offer guidance on how the rules have been interpreted and applied."[291] Apart from the survey results, the Task Force did not consider any other empirical studies on discovery issues in Hawai'i courts.[292] Instead, the Task Force relied on national studies citing "unchecked discovery as a major cause of excessive costs" as the basis for its proposal.[293]

Significantly, the Task Force also proposed adopting other 2015 amended Federal Rules to encourage early and active judicial involvement in case management and to simplify and improve discovery planning and management.[294] These proposals largely embraced proportionality principles.[295] Importantly, the Task Force did not recommend blindly adopting these 2015 FRCP amendments.[296] Instead, the Task Force sought to specifically tailor proposed rule amendments to local needs and issues.[297]

A notable example of this was the Task Force's proposal to implement a two-tiered system of assigning cases based on their characteristics to different pathways.[298] This tiered system recognized the heavier caseload of Hawai'i circuit court judges, the types of cases involving limited discovery or that might be resolved by default or summary judgment, and other rules or procedures that would better suit certain exempted cases.[299] The Task Force acknowledged that such "exemptions create a margin of safety to address caseload concerns and to help insure that [the] proposals can be successfully implemented."[300]

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289. *Id.* at 24–25.
290. *Id.* at 25–26.
291. *Id.* at 6.
292. *See generally id.* at 40.
293. *Id.* at 24.
294. *Id.* at 7–9.
295. *See id.* at 5, 6.
296. *See id.* at 9.
297. *See id.*
298. *Id.* at 27–31 (describing the two-tiered system and comparing it to other jurisdictions, like Utah, which the Task Force viewed as "too restrictive"). "Separating cases into tiers with different discovery limitations reinforces proportionality . . . ." *Id.* at 27.
299. *See id.* at 27–32.
300. *Id.* at 50.

Overall, the Task Force noted that, in addition to "reducing costs and delay and streamlining the litigation process in Hawaii's circuit courts," the recommendations sought to make the civil justice system "more accessible, affordable, efficient, and just."[301] Thus, the Task Force significantly emphasized accessibility to the courts as a primary concern by listing it first.

2. The Hawai'i Supreme Court Expressly Rejected Proportionality

Although the Task Force recommended incorporating the federal proportionality standard into the scope of discovery, in the style of amended FRCP 26(b)(1), the Hawai'i Supreme Court expressly rejected it.[302] Yet the other HRCP rule amendments relating to judicial case management and a tier-system—all of which embraced the concept of proportionality—were adopted.[303]

Language relating to proportionality in discovery, however, is not entirely missing. Concepts of proportionality remain embedded in the limitations to discovery rule in HRCP 26(b)(2)(iii).[304] Hawai'i courts have authority to impose these limitations on the parties if raised as a motion to limit discovery or *sua sponte*, as follows:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that:
>
> . . . .
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[305]

This language, embracing proportionality, reflects similar language in former FRCP 26(b)(2)(C)(iii)—a rule rarely employed in civil discovery practice.

So what's behind the curtain of these procedural reforms? What's *really* going on behind the Hawai'i Supreme Court's decision to expressly

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301. *Id.* at 55.

302. "On November 4 and 5, 2021, Virtual Civil Town Hall Meetings" were convened to allow for further input and discussion on the proposed amendments. *See Summary of New Court Rules*, *supra* note 267, at 27.

303. Specifically, as related to discovery, Rules 16, 26, and 29 of the Hawai'i Rules of Civil Procedure (HRCP) were amended, and a new Rule 16.1, relating to "[e]xpedited or non-expedited track assignment based on case characteristics" and "discovery limitations," was adopted. *Id.* at 26. Certain proceedings are exempt from initial disclosure requirements under HRCP 26(a)(1), including cases involving "foreclosure," "agency appeals," "consumer debt collection," "quiet title," and "asbestos" and "cases included in and not exempted from the Court Annexed Arbitration Program." *See* HAW. R. CIV. P. 26(a)(1)(B).

304. *See* HAW. R. CIV. P. 26(b)(2)(iii).

305. *See* HAW. R. CIV. P. 26(b)(2).

reject the Task Force's recommendation to adopt the federal proportionality standard in the scope of discovery rule?

Because "procedure is power," the answers to these questions matter. The written record is sparse and does not reflect the justices' reasoning. But original on-the-ground research—viewed through the lens of Critical Procedure—reveals the justices' deep concerns about the non-neutral consequences of the new rule, favoring "haves" over the "have nots," and uplifting large business or institutional defendants over vulnerable individuals or communities.[306] Their concerns reflect a realistic grappling with the underlying politics of the Hawai'i state civil rulemaking process. They also reveal fealty to the deeply rooted values of the Hawai'i civil justice system, including those of the well-respected trailblazer, former Hawai'i Supreme Court Chief Justice William S. Richardson.[307]

At least two justices strongly opposed adopting the federal proportionality language from amended FRCP 26(b)(1) for several reasons.[308] First, and of paramount concern, these justices did not want to incorporate the "pro-corporate, conservative, [defense] interests" of the federal rulemakers into the local Hawai'i rules because the more recent politics undergirding the federal rulemaking process "did not reflect the local Hawai'i politics."[309] The context of the federal rulemaking process, and the politics and ideologies behind it, mattered to these justices. The result: a clash of procedural justice values between the federal rulemakers and Hawai'i justices.

At the time of the express rejection of the revised federal proportionality standard, there were five Hawai'i Supreme Court justices: Chief Justice Mark E. Recktenwald, Associate Justice Paula A. Nakayama, Associate Justice Sabrina S. McKenna, Associate Justice Richard W. Pollack, and Associate Justice Michael D. Wilson.[310] Regardless of their ideologies

306. *See* Yamamoto, *supra* note 1, at 780, 782, 788.

307. *See* discussion *infra* Section III.B.3.

308. Associate Justice McKenna and Associate Justice Richard W. Pollack (retired) voiced the fiercest opposition. Interview with Justice Sabrina S. McKenna, Assoc. Just., Haw. Sup. Ct., in Honolulu, Haw. (Sept. 16, 2022) [hereinafter Justice McKenna Interview] (on file with author). The Author was a law clerk for Associate Justice Pollack during the 2015-2016 Term.

309. *Id.*

310. HAW. STATE JUDICIARY, ORDER AMENDING THE HAWAI'I RULES OF CIVIL PROCEDURE 1, 14 (2020), https://www.courts.state.hi.us/wp-content/uploads/2020/10/2020_hrcp16_16.1_26_29am_ada.pdf. Since these decisions on proportionality, based on the mandatory retirement requirement, three justices have retired. *See Hawaii Supreme Court Justices*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/supreme/justices/justices (last visited Mar. 4, 2024). In November 2020, Todd W. Eddins was confirmed as an Associate Justice of the Hawai'i Supreme Court, filling the vacancy left by Associate Justice Pollack. Blaze Lovell, *Senate Confirms Todd Eddins to Hawaii Supreme Court*, HONOLULU CIV. BEAT (Nov. 19, 2020), https://www.civilbeat.org/2020/11/senate-confirms-todd-eddins-to-hawaii-supreme-court/. In November 2023, Hawai'i Intermediate Court of Appeals Chief Judge Lisa M. Ginoza and Vladimir P. Devens were confirmed as Associate Justices of the Hawai'i Supreme Court to fill the vacancies left by Associate Justices Paula A. Nakayama and Michael D. Wilson. Chad Blair, *Senate Confirms Ginoza, Devens to Hawaii Supreme Court*, HONOLULU CIV. BEAT (Nov. 21, 2023), https://www.civilbeat.org/beat/senate-confirms-ginoza-devens-to-hawaii-supreme-court/; Chad Blair,

or backgrounds, during their tenure together, their collective decisions demonstrated overwhelming support for access to state courts and claim development through discovery.[311] This stands in stark contrast to the federal rulemakers' backgrounds and perceived values and interests, including the current supermajority conservative Supreme Court.[312]

Second, these Hawai'i justices did not want to implicitly incorporate federal case law applying amended FRCP 26(b)(1). From their perspective, some federal judges were not applying the proportionality factors correctly across the board.[313] For example, some courts engaged in proportionality analyses in which privacy was considered, even though it is not one of the six factors.[314] These concerns about the misapplication or inconsistent application of the federal proportionality standard in federal courts echoed some early critics' concerns.[315]

Third, from these justices' view, the HRCP already contained proportionality language.[316] Elevating the language from HRCP 26(b)(2)(iii) to HRCP 26(b)(1) was seen as "redundant," or "potentially confusing," and prompted concerns that it might "send the wrong message to attorneys, courts and litigants."[317] In their view, it was unnecessary to include in the scope of discovery because proportionality has always been a central part

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Another Vacancy Posted for Hawaii Supreme Court, HONOLULU CIV. BEAT (Oct. 29, 2022), https://www.civilbeat.org/beat/another-vacancy-posted-for-hawaii-supreme-court/. These three recently appointed associate justices join Chief Justice Recktenwald and Associate Justice McKenna to comprise the current Hawai'i Supreme Court. *Hawaii Supreme Court Justices*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/supreme/justices/justices (last visited Mar. 4, 2024).

311. According to the National Center for Access to Justice, as of June 2023, Hawai'i was ranked sixth in the nation in the Justice Index, which "is a snapshot of the degree to which each US state has adopted best policies for ensuring access to justice justice [sic] for all people" and considers "four key areas -- attorney access, self-help access, language access and disability access." *Justice Index*, NAT'L CTR. FOR ACCESS TO JUST., https://ncaj.org/state-rankings/justice-index (last visited June 22, 2023).

312. *See* discussion *supra* Section II.A.

313. Hawai'i state courts rely upon federal court decisions interpreting Hawai'i rules modeled after the corresponding federal rules. *See, e.g.*, Moyle v. Y & Y Hyup Shin, Corp., 191 P.3d 1062, 1080 n.14 (Haw. 2008) (quoting Harada v. Burns, 445 P.2d 376, 380 (Haw. 1968)). After the 2015 FRCP amendments, some federal judges continued to cite to the prior scope of discovery standard, instead of the proportionality standard. *See, e.g.*, Bonner v. Triple S Mgmt. Corp., 68 F.4th 677, 684–85 (1st Cir. 2023) (quoting FRCP 26(b)(1) but then quoting the prior discovery standard that "information need only appear to be 'reasonably calculated to lead to the discovery of admissible evidence" (quoting Remexcel Managerial Consultants, Inc. v. Arlequin, 583 F.3d 45, 52 (1st Cir. 2009))). Others applied some, but not all, of the proportionality factors. And some weighed other considerations, like privacy, as part of a proportionality analysis.

314. *See* James C. Francis IV, *Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)*, 59 SAN DIEGO L. REV. 397, 414–20 (2022) (collecting cases illustrating this phenomenon).

315. *See, e.g.*, Bernadette Bollas Genetin, *"Just a Bit Outside!": Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts*, 34 REV. LITIG. 655, 689–94 (2015) (discussing various limitations on district courts applying the federal proportionality standard, which may result in "disuniformity of discovery procedure across the federal system"). Nonetheless, as discussed below, recent case law has signaled that prior fears of incorporating inconsistent federal case law into state court jurisprudence may not be as valid as it was when the justices initially took up these considerations.

316. Justice McKenna Interview, *supra* note 308.

317. *Id.*

of the rules and a guiding principle, even if it is set forth as a limitation on discovery for the court to operationalize upon motion by the parties.[318]

Fourth, these justices' perceptive sense was that "[t]here are really not as big discovery disputes in Hawai'i state courts," as there are in certain complex federal civil lawsuits (e.g., antitrust), such that proportionality would not necessarily be needed in state cases—despite the explosion of ESI.[319] Their overall impression was that e-discovery disputes were "not a big deal" in Hawai'i courts.[320] This impression was due in part to their perception that Hawai'i attorneys generally tend to "talk to each other" and "work it out."[321] Put another way, the local Discovery Culture impacted how discovery disputes are handled and litigated.[322] To them, the parties and their counsel already effectively self-managed and self-regulated discovery obligations in state cases without court intervention. Additionally, in their view, because of the strong collegial, cooperative litigation culture among Hawai'i practitioners and a relatively insulated state bar, few discovery disputes (such as motions to compel) even make it to court.[323]

Fifth, these Hawai'i justices seemed to take to heart some of the recent scholarship against blindly adopting the Federal Rules[324] and in favor of maintaining more liberal pleading standards, discovery rules, and summary judgment standards so that more cases might advance to trial on their merits.[325] In *Bank of America, N.A. v. Reyes-Toledo*,[326] a masterful opinion by Associate Justice McKenna in 2018, the Hawai'i Supreme Court expressly rejected the federal plausibility pleading standard from *Bell Atlantic Corp. v. Twombly*[327] and *Ashcroft v. Iqbal*[328] in favor of the more liberal notice pleading standard from *Conley v. Gibson*.[329] Observing that the *Twombly* and *Iqbal* plausibility pleading standard is "restrictive" and "contrary to our well-established historical tradition of liberal notice pleading[, thereby] undermin[ing] citizen access to the courts and to justice," the court rejected that approach.[330] By favoring the *Conley* notice

318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *See* Beerdsen, *supra* note 172, at 1003–04.
323. Justice McKenna Interview, *supra* note 308.
324. *See* discussion *supra* Section III.C.
325. *See* Justice McKenna Interview, *supra* note 308.
326. 428 P.3d 761 (Haw. 2018).
327. 550 U.S. 544, 555, 570 (2007) (stating that a pleading must contain "enough facts to state a claim to relief that is plausible on its face" and must not contain mere "labels and conclusions [or] a formulaic recitation of the elements of a cause of action").
328. 556 U.S. 662, 684 (2009) (holding that the *Twombly* pleading standard was applicable to "all civil actions and proceedings in the United States district courts" (quoting FED. R. CIV. P. 1)).
329. 355 U.S. 41, 44–46 (1957); *Reyes-Toledo*, 428 P.3d at 772–73.
330. *Reyes-Toledo*, 428 P.3d at 773–74 (citing to scholarship reiterating the same); *see* Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH. L. REV. 587, 593–94 (2011); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 75, 77 (2010);

pleading standard, the court sought to ensure open access to state courts and an opportunity for full claim development through discovery for the "common litigant."[331] This case is a prime example of the Hawai'i justices directly responding to scholars' warnings about closing off court access, especially for disadvantaged, injured individuals asserting claims against large defendants possessing most of the evidence on liability, such as in product liability or civil rights cases.[332]

In a similar vein, by rejecting the federal proportionality standard, the Hawai'i Supreme Court advocated for more liberal discovery standards.[333] Likewise, the Hawai'i summary judgment standard, encompassed in *Ralston v. Yim*,[334] reflects a more lenient, plaintiff-friendly test where at least some Hawai'i trial court judges have interpreted and applied it to mean that they are prohibited from ruling on any summary judgment motions until after the close of discovery, including expert discovery.[335]

What shines through and can be gleaned from these rationales, insights, and behind-the-scenes politics harkens back to the Critical Procedure framework—a sifting through of competing value judgments that reveals an allegiance to certain embraced values undergirding the Hawai'i civil justice system. None of the Hawai'i justices expressly enunciated these values. But it is apparent they share and seek to carefully balance the same closely held judicial values that are essential to an accessible civil justice system. That is, Hawai'i jurists largely weigh fairness, participation, and dignity, on the one hand, against efficiency, on the other hand.

3. A Historical and Critical View of the Hawai'i Judiciary's Values

The balancing of these values can be traced back to one of the most distinguished jurists and political figures in Hawai'i legal history, Chief Justice Richardson.[336] Serving as Chief Justice of the Hawai'i Supreme Court from 1966 to 1982,[337] Chief Justice Richardson influenced state civil rulemaking at a national level through his roles as the Chairman of the

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Ramzi Kassem, *Implausible Realities:* Iqbal's *Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN STATE L. REV. 1443, 1449–50 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460, 479–81 (2008).

331. *See Reyes-Toledo*, 428 P.3d at 773–74 (emphasizing Justice Stevens's dissenting opinion in *Twombly*, noting that FRCP 8(a)(2) set forth a pleading standard "that was easy for the common litigant to understand" (quoting *Twombly*, 550 U.S. at 574 (Stevens, J., dissenting))).

332. *See id.* (noting that the plausibility "approach [is] wholly out of line with the original liberal vision of the rules and would ultimately saddle plaintiffs in disfavored actions like antitrust and civil rights claims with burdens they will have difficulty meeting" (quoting Spencer, *supra* note 330, at 487–88)).

333. *See* Justice McKenna Interview, *supra* note 308.

334. 292 P.3d 1276 (Haw. 2013).

335. *See id.* at 1278–79. This observation is based on both the Author's practical experience litigating civil matters before the First Circuit Court, State of Hawai'i, and on informal conversations with other Hawai'i attorneys.

336. *See* William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAW. L. REV. 1, n.* (1979).

337. *About William S. Richardson*, UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF L., https://law.hawaii.edu/about-us/about-william-s-richardson/#:~:text=Richardson-,William%20S.,Lieutenant%20Governor%20under%20John%20A (last visited June 22, 2023).

Conference of Chief Justices from 1971 to 1973 and as an incorporating director and president of the board of directors of the National Center for State Courts.[338] In Hawai'i, his influence extended beyond the courts and before his judicial appointment, including his roles as President of the Hawai'i State Bar Association in 1961, Lieutenant Governor of Hawai'i, and Chief Clerk of the Territorial Senate for the 1955 and 1957 sessions.[339] The namesake of Hawai'i's only law school—the University of Hawai'i at Mānoa William S. Richardson School of Law—Chief Justice Richardson's influence continues to extend to the vast majority of judges, attorneys, and politicians practicing and residing in Hawai'i.[340]

According to Chief Justice Richardson, certain procedural values may at times conflict, and thus the significance of judicial independence becomes paramount.[341] In describing the "judiciary's traditional role of resolving disputes and dispensing justice evenhandedly, efficiently, and speedily," especially in an increasingly complex society, he observed that "those who value justice must protect and balance numerous corollary principles":

> Among them are maintaining the high quality of the judicial process, improving the efficiency of the judicial system, maintaining public confidence in and respect for the courts, providing citizens greater yet equal access to the courts, and preserving the independence of the judiciary.[342]

Chief Justice Richardson further aptly noted, as an example, that "greater access to the courts could result in clogged dockets and decreased efficiency; methods used to improve the efficiency of the courts could threaten the quality of the adjudicative process."[343]

Critical Procedure illuminates the meaning and import of Chief Justice Richardson's words. From a Critical Procedure perspective, Chief Justice Richardson elucidated understandings of "equal justice under law" by generating participatory parity among litigants, encouraging inclusivity, and advancing a timely resolution on the merits of legal claims. To him, open court access and claim development were key to a justice system.[344] And keeping partisan politics in check and away from any undue influence on the judiciary was just as essential.[345]

Over the last few decades, only through this kind of open court access and claim development, including through discovery, were

338. *See* Richardson, *supra* note 336.
339. *Id.*
340. *About William S. Richardson*, *supra* note 337. *See generally* Gregory L. Lui-Kwan, *William S. Richardson School of Law--Realizing the Dream and Keeping It Alive: Part I*, HAW. BAR J., July 2023, at 4, 9–10, 26 (2023).
341. Richardson, *supra* note 336, at 3.
342. *Id.*
343. *Id.*
344. *See id.*
345. *See id.* at 4.

disenfranchised Native Hawaiians enabled to establish path-forging traditional and customary rights;[346] Hawai'i environmental groups empowered to claim stream waters as part of the Public Trust;[347] and same-sex couples encouraged to establish a constitutional right to marry.[348]

In more recent years, this type of state civil justice system—with its liberal pleading standards, broad discovery rules, and nonrestrictive summary judgment standard—made it possible for thousands of Native Hawaiian families and their descendants to sue and reach a settlement with the State of Hawai'i for its failure to properly manage the land trust governing Hawaiian Homelands[349]; for taro farmers to pursue and develop legal claims against the state and a corporate entity for diverting and mismanaging water resources on Maui[350]; and for local county governments to sue and seek discovery in suits against big oil companies for their role in contributing to sea level rise and other effects of climate change.[351]

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346. *See, e.g.*, Kalipi v. Hawaiian Tr. Co., 656 P.2d 745, 751–52 (Haw. 1982); Pele Def. Fund v. Paty, 837 P.2d 1247, 1268–70 (Haw. 1992), *cert. denied* 507 U.S. 918 (1993); Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 903 P.2d 1246, 1255, 1273 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996); Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 7 P.3d 1068, 1090 (Haw. 2000). For a further discussion on these issues, see NATIVE HAWAIIAN LAW: A TREATISE 790–801 (Melody Kapilialoha MacKenzie, Susan K. Serrano, D. Kapua'ala Sproat, Ashley Kaiao Obrey, & Avis Kuuipoleialoha Poai eds., 2015); DAVID M. FORMAN & SUSAN K. SERRANO, HO'OHANA AKU, A HO'ŌLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAI'I 19–20 (2012).

347. *See, e.g.*, *In re* Water Use Permit Applications, 9 P.3d 409, 448–49 (Haw. 2000); *In re* Wai'ola o Moloka'i, Inc., 83 P.3d 664, 693–94 (Haw. 2004); *In re* Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Moloka'i), Inc., 174 P.3d 320, 330 (Haw. 2007); *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 152 (Haw. 2012); Kauai Springs, Inc. v. Plan. Comm'n, 324 P.3d 951, 990–91 (Haw. 2014); *see also* D. KAPUA'ALA SPROAT, OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAI'I 7–10 (2009) (providing additional information on water use and management in Hawai'i); Todd W. Eddins, *Gifts from the Past for the Future: A Tribute to Justice Richard Pollack*, 43 U. HAW. L. REV. 636, 653 (2021) (describing Justice Pollack's legacy as "public trust defender" to safeguard "the natural resource jewels essential to sustain Hawai'i's special way of life"); Isaac H. Moriwake, *The Lady of Justice of Hawai'i: The Trail-Blazing and Record-Setting Judicial Career of Justice Paula A. Nakayama*, 45 U. HAW. L. REV. 272, 273, 281–84 (2023) (discussing Justice Nakayama's significant impact and legacy on Hawai'i water law during "[h]er thirty years on the Hawai'i Supreme Court").

348. *See* Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993); Zoe Dym, *Hawai'i Fueled the Decision to Legalize Same-Sex Marriage 30 Years Ago This Week*, HAW. PUB. RADIO (Feb. 14, 2023, 9:13 AM), https://www.hawaiipublicradio.org/local-news/2023-02-14/hawaii-fueled-the-debate-to-legalize-same-sex-marriage-30-years-ago; Chris Geidner, *The Court Cases That Changed L.G.B.T.Q. Rights*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/legal-history-lgbtq-rights-timeline.html.

349. *See* Kalima v. State, 468 P.3d 143, 166 (Haw. 2020); Anita Hofschneider, *Court: Hawaiians Deserve Compensation for State's Poor Oversight of Homelands*, HONOLULU CIV. BEAT (July 2, 2020), https://www.civilbeat.org/2020/07/court-hawaiians-deserve-compensation-for-states-poor-oversight-of-homelands/.

350. *See* Carmichael v. Bd. of Land & Nat. Res., 506 P.3d 211, 216–17, 236 (Haw. 2022); Melissa Tanji, *State Supreme Court Rules in Favor of Taro Farmers*, MAUI NEWS (Mar. 8, 2022), https://www.mauinews.com/news/local-news/2022/03/state-supreme-court-rules-in-favor-of-taro-farmers/.

351. *See* City & Cnty. of Honolulu v. Sunoco LP, 537 P.3d 1173, 1180–82, 1207–08 (Haw. 2023); Patrick Parenteau & John Dernbach, *Honolulu's Lawsuit Against Big Oil Over Sea Level Rise Just Got a Boost from the Supreme Court*, HONOLULU CIV. BEAT (May 26, 2023), https://www.civilbeat.org/2023/05/honolulus-lawsuit-against-big-oil-over-sea-level-rise-just-got-a-boost-from-the-supreme-court/.

Recent appellate cases from 2023 further spotlight the value judgments behind procedural reforms and court rulings—including access to justice and human rights values behind the justices' rejection of the 2015 federal proportionality standard. For example, in *In re Hawai'i Electric Light Co.*,[352] a stunning opinion by Associate Justice Todd Eddins, with a remarkable concurrence by Associate Justice Wilson, the Hawai'i Supreme Court affirmed the Hawai'i Public Utility Commission's denial of regulatory approval to establish a biomass power plant on Hawai'i Island.[353] Using human rights language to ground this climate change case, one law professor observed that both the majority opinion and the concurrence "g[a]ve[] teeth to the state constitution's promise of a 'clean and healthful environment'" while also "looking to substantive due process, the public trust doctrine, and state constitutional environmental provisions."[354]

In *James B. Nutter & Co. v. Namahoe*,[355] a noteworthy opinion by Chief Justice Recktenwald—featuring a sharply disadvantaged individual experiencing homelessness against a corporate entity and its lawyers—the court ruled in favor of the Native Hawaiian former homeowner whose Hawai'i Island home had been foreclosed over a failure to make a $500 home repair.[356] The court concluded that the mortgage company and its lawyer had committed "fraud on the court" and improperly pursued a "harsh and unreasonable" foreclosure.[357] One attorney involved in the case "called it perhaps the most significant decision in Hawaii foreclosure law."[358] And the list of exemplary cases goes on.

Through a Critical Procedure lens, these cases, both then and now, reflect how procedure has empowered groups with comparatively lesser power to assert, develop, and resolve legal claims against institutional or corporate entities. The cumulative outcomes of these cases demonstrate how procedure has substantively balanced inequities and the scales of justice. And they reveal how high-stakes litigation in state courts, with import and consequences for the broader Hawai'i populace, have restored public confidence in the civil justice system, "reshaping . . . mainstream public consciousness about what is right and just."[359] Importantly, they also mirror the backgrounds, ideologies, and politics of the Hawai'i justices (including those who expressly rejected proportionality) leading the way.

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352. 526 P.3d 329 (Haw. 2023).

353. *Id.* at 330–31.

354. *Id.* at 335; Martha F. Davis, *Hawaii Supreme Court Takes on the Climate Crisis*, STATE CT. REP. (Apr. 5, 2023), https://statecourtreport.org/our-work/analysis-opinion/hawaii-supreme-court-takes-climate-crisis (quoting HAW. CONST. art. XI, § 9).

355. 528 P.3d 222 (Haw. 2023).

356. *See id.* at 226.

357. *Id.* at 239, 242.

358. John Hill, *How a Reverse Mortgage Lender Took a Hawaii Man's Home Over a $500 Repair*, HONOLULU CIV. BEAT (Apr. 6, 2023), https://www.civilbeat.org/2023/04/how-a-reverse-mortgage-lender-took-a-hawaii-mans-home-over-a-500-repair/.

359. *See* Yamamoto, *supra* note 1, at 786.

Without the Hawai'i judiciary's historic and current commitments to these closely embraced values and its efforts to advance access to justice, vulnerable and underrepresented individuals and groups may not have access to state courts (or to information exchanged during discovery) to assert, develop, and present substantive legal claims of public significance to the Hawai'i populace. Thus, these important rulings reflect procedural value choices for open court access and robust claim development in order for lesser-resourced and lesser-empowered claimants to fully litigate oftentimes novel claims of substantial public importance. And the Hawai'i justices' recent rejection of the proportionality standard as part of the scope of discovery, on its face, appears to further those procedural values about the impacts of the state's legal process.

But there is more to consider. Practice is showing that fair and balanced implementation of the proportionality standard by judges and lawyers can promote open court access and full claim development, especially where a large, well-resourced defendant initially possesses most of the relevant liability evidence. Part IV below explores this updated assessment of the revised federal proportionality standard.

IV. A NEW DIMENSION TO PROPORTIONALITY: A CALL FOR A MORE NUANCED APPROACH

Part IV seeks to respond, in part, to some of the scholarly critiques of the federal proportionality standard and to some of the rationales behind the Hawai'i Supreme Court's express rejection of that standard. It highlights the affirmative benefits of proportionality, including balancing power between asymmetrical parties, uplifting the role of state court judges, and giving voice to litigants in civil discovery, all of which have thus far been obscured in past debates. It calls for a more balanced, nuanced approach in ongoing and future conversations among state rulemakers concerning the adoption of the federal proportionality standard.

A. Proportionality: A Legitimate Judicial Tool

Critics rightly expressed concerns about the federal proportionality standard's potential to stifle discovery, particularly in certain types of employment discrimination, civil or constitutional rights violations, product or professional liability, or financial abuse cases where a corporate or institutional defendant may possess most of the information and knowledge needed to prove liability.[360] But, with the development of additional case law in federal courts, there are more examples presenting a cautious approach with these concerns in mind. Of course, because of the potential for normative judgments, heuristics, and inconsistent applications—particularly where courts may exercise discretion—some may argue that these examples are negligible and not fully representative or determinative of how federal judges may predominantly apply the proportionality factors.

360. *See* discussion *supra* Section II.B.

This may, in fact, be true. However, what has emerged, coming more distinctly into view since the early critics' warnings, are two key observations.

First, although there have been inconsistent applications among federal courts, the federal proportionality standard has become a legitimate tool for judges to deploy in managing discovery disputes. Some critics assumed and raised alarms that certain federal judges might apply the standard in a manner that would primarily benefit defendants, sharply cutting off disadvantaged plaintiffs' access to important information.[361] But those critiques may have been overstated.[362] In numerous instances, federal judges have applied the federal proportionality standard in an even-handed, fair manner. In many ways, prior observations that the "amended rule has not fundamentally changed the governing principles" appear true.[363] "Courts have continued to engage in a nuanced, fact-specific approach to analyzing discovery requests . . . and are especially liberal in allowing discovery" in various contexts.[364] For example, as detailed below, the notoriously conservative Fifth Circuit Court of Appeals recently reversed a district court's grant of summary judgment, ruling that the individual plaintiff was entitled to further discovery from the institutional defendant to support her claims of employment discrimination and retaliation.[365] Indeed, these types of rulings suggest that at least some courts are especially wary of applying discovery standards, including the federal proportionality requirement, in ways that may potentially stifle discovery and impede claim development in information asymmetry cases.[366]

Second, even if the critiques were not exaggerated, the critics apparently underestimated the impact of their critiques on federal courts. Federal judges responded to the critics' warnings and, at times, did so directly in their discovery orders or appellate opinions.[367] They read, digested, and incorporated the scholarship of civil procedure scholars and critics into their decisions.[368] As described below, they acknowledged that proportionality analyses should not turn on narrow conceptions of efficiency.[369] Instead, some judges adopted a more standardized approach, applying all proportionality factors in a balanced manner.[370]

Now that additional case law has developed at the federal level, there are more robust examples of even-handed applications of the federal proportionality standard, which may quell fears of some state rulemakers.

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361. *See* discussion *supra* Section II.B.
362. *See* Klonoff, *supra* note 12, at 1991 (agreeing that initial concerns by early critics may have been "overblown").
363. *See id.* at 1971.
364. *See id.*
365. *See* discussion *infra* Section IV.A.1.
366. *See* discussion *infra* Section IV.A.1.
367. *See* discussion *infra* Section IV.A.2.
368. *See* discussion *infra* Section IV.A.2.
369. *See* discussion *infra* Section IV.A.2.
370. *See* discussion *infra* Section IV.A.2.

Since 2015, it has become clearer that the federal proportionality standard, itself and as applied, may not be as harmful as initially predicted by the early critics. The critics were certainly not wrong—pitfalls and dangers still exist. However, when applied in a fair, just, and balanced way, the revised federal proportionality standard may provide openings for potential affirmative benefits.

Further judicial determinations and rulings interpreting and applying the proportionality standard in state courts will likely be needed to guide and shape discovery practice in state court litigation. However, the following examples illustrate the proportionality standard's potential equalizing nature in disputes where vulnerable plaintiffs might otherwise be stonewalled by privileged defendants. They also present potential approaches that might address concerns about inconsistent applications of the revised proportionality standard in state courts.

1. Balancing Power in Asymmetrical Cases

A notable example of a federal court seeking to balance power in an information asymmetry case is from the Fifth Circuit Court of Appeals.[371] In *Miller v. Sam Houston State University*,[372] the Fifth Circuit Court of Appeals reversed the district court's grant of summary judgment on employment discrimination, retaliation, and hostile work environment claims by a professor against universities and state university systems.[373] It found, in relevant part, that the district court had abused its discretion in refusing to allow the professor to conduct sufficient discovery before ruling on summary judgment motions.[374] The district court had mostly controlled the very limited discovery exchange, even attending and admonishing the plaintiff at her own deposition.[375] And, despite the plaintiff's repeated discovery requests, the lower court effectively blocked her from obtaining key information needed to prove her claims before summary judgment briefing, such as any deposition testimony from defendants (i.e., University officials) and documentary evidence (i.e., performance records concerning other faculty members, pay records, work assignments, and applications and related communications regarding employment decisions).[376] As the appellate court recognized, "[f]rom the start, the district court effectively stifled [the plaintiff's] attempts at discovery[,]" and her

371. *See, e.g.*, David Smith, *How Trump Reshaped the Fifth Circuit to Become the 'Most Extreme' US Court*, THE GUARDIAN (Nov. 15, 2021, 3:00 PM), https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us (observing that recent judicial appointments "skew[] one of the most conservative - and influential - courts in America even further to the right" such that it may be the "most dangerous" and even "too extreme" for the Supreme Court).

372. 986 F.3d 880 (5th Cir. 2021).

373. *Id.* at 884.

374. *Id.* at 891.

375. *Id.* at 886–87.

376. *Id.* at 886–88.

"requested discovery on multiple occasions . . . was denied, almost instantly, at every turn."[377]

In concluding that the district court had abused its discretion by denying discovery, the court of appeals acknowledged that while district courts generally have broad discretion in deciding discovery matters and must apply the scope of discovery parameters, including proportionality, as set forth in amended FRCP 26(b)(1), the "standard is broad, especially when viewed in the context of Title VII."[378] Citing to a case decided in 1983—the year that the FRCP was first amended to include proportionality principles—the Fifth Circuit Court of Appeals reaffirmed that the "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases"—the classic category of cases reflecting asymmetry.[379] The appeals court thus refused to "uphold a ruling which has failed to adhere to the liberal spirit of the Rules."[380] Consistent with trends in other courts, the Fifth Circuit Court of Appeals seemed to rely on pre-amendment case law in resolving this discovery dispute, and also interpreted the dispute in the context of broad, liberal discovery principles that existed before amended Rule 26(b)(1).[381] This reliance on pre-amendment principles may lead some to believe that the outcome of this case would have been no different prior to the proportionality amendment.[382] But the court's emphasis on information asymmetry—a new proportionality factor under the amended rule—not only reflected the amended rule's utility as a judicial tool, but also increased the chances of guaranteeing a favorable outcome to this disadvantaged plaintiff.

The court's assessment thus may seem aligned with past precedent, and therefore ordinary, in some respects. Yet in other ways, the case appears extraordinary. Viewed through a Critical Procedure lens focusing on the differential group impacts and the empowerment or disempowerment of types of claimants,[383] this case offers an example of one of the more well-known conservative appellate courts endeavoring to apply the federal proportionality standard and governing discovery principles in a way that balances power between asymmetrical parties—in ways that uplifts the

377. *Id.* at 886, 892.

378. *Id.* at 891 (citing Trevino v. Celanese Corp., 701 F.2d 397, 405 (5th Cir. 1983)).

379. *See id.* (quoting *Trevino*, 701 F.2d at 405).

380. *Id.* (quoting Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991)). Other Circuit Courts have also recently reaffirmed "the liberal spirit of the Federal Rules" and the sentiment that "the Rules 'strongly favor full discovery whenever possible.'" *See, e.g.*, Akridge v. Alfa Mut. Ins. Co., 1 F.4th 1271, 1276 (11th Cir. 2021) (quoting Adkins v. Christie, 488 F.3d 1324, 1331 (11th Cir. 2007); Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1189 (11th Cir. 2013)).

381. *See* Klonoff, *supra* note 12, at 1972, 1974–75 (analyzing that, although the commentators and critics "all argue that the new proportionality language represents a paradigm shift for evaluating discovery disputes and that earlier case law is now essentially irrelevant . . . courts have continued to rely heavily on pre-amendment case law" in the context of class action suits).

382. *See id.* at 1991 ("Despite references to proportionality in various post-amendment cases, the analyses in the pre- and post-amendment cases are largely the same [in the class action context].").

383. As the court of appeals wrote, "[t]o put it simply, the [district] court's discovery restrictions suffocated any chance for [the professor] fairly to present her claims." *Miller*, 986 F.3d at 892.

voices of plaintiffs, fosters adjudication of public values, and promotes litigant access to justice.

To do so, and with a "sense of déjà vu," the Fifth Circuit Court of Appeals cited to post-amendment precedent in an information asymmetry case where the court similarly reversed and remanded the case on summary judgment grounds, observing that the same district court had abused its discretion in refusing the plaintiff's requests to conduct sufficient discovery.[384] In finding that the district court had abused its discretion in *Miller*, the court of appeals noted that "the court's discovery restrictions suffocated any chance for [the plaintiff] fairly to present her claims."[385] And it further recognized the significant procedural link crucial to the plaintiff's claim development between the requested discovery and the pending summary judgment motions.[386] For example, the appellate court explained that the plaintiff had sought to depose two university department chairs—"two witnesses who fairly likely have knowledge of facts highly relevant to Miller's claims in both cases"—and acknowledged the probative value of these witnesses' deposition testimony as the plaintiff's "claims may well hinge on what was said during [a] call" between these two witnesses.[387] Yet the lower court denied this request, which constituted reversible error.[388]

Although the Fifth Circuit Court of Appeals did not explicitly articulate and apply each of the proportionality factors, its analysis considered how specific discovery requests, which had been denied by the lower court, fell within the scope of discovery insofar as they were relevant and proportional to the needs of the case. The court's meticulous, fact-specific, and nuanced descriptions of the requested discovery, as well as the significance of the requested discovery to the plaintiff's claim development and to the district court's subsequent dismissal of the claims at summary judgment, are linked to at least several of the proportionality factors. Those factors include the importance of the issues at stake in the action, the parties' relative access to the information, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Implicit in the court's factual analysis of each discovery request was the emphasis on the application of one key new proportionality consideration—information asymmetry—to make its discovery ruling comport with larger open access and claim development policies embodied in the broader rules regime and pre-amendment precedent.[389] As the appellate court aptly observed, the plaintiff had shown that "the district court's almost blanket denials of her discovery requests affected her substantial rights," including pursuing her

384. *Id.* at 891 (citing McCoy v. Energy XXI GOM, L.L.C., 695 F. App'x 750 (5th Cir. 2017)).
385. *Id.* at 892.
386. *See id.*
387. *Id.*
388. *Id.*
389. *See id.*

employment discrimination claims on their merits before dismissal on summary judgment.[390] The Fifth Circuit Court of Appeals remanded the case to allow the plaintiff the opportunity to obtain information within the scope of discovery, including that which was relevant and proportional.[391]

Zooming out and taking a broader critical perspective of what was at stake in this case beyond proportionality in discovery, the Fifth Circuit Court of Appeals opened its opinion by recognizing every litigant's "fundamental right to fairness in every proceeding" and by acknowledging that "[w]hen a judge's actions stand at odds with these basic notions, we must act or suffer the loss of public confidence in our judicial system."[392] Citing to a Supreme Court opinion, the court reaffirmed that "[j]ustice must satisfy the appearance of justice."[393] At bottom, then, the Fifth Circuit Court of Appeals not only resolved underlying discovery disputes and vacated the grant of summary judgment, but it also articulated and uplifted procedural justice values of fairness, dignity, and participation.[394]

Many federal district courts have similarly resisted entreaties to further close court access and limit information discovery. They have interpreted and applied amended FRCP 26(b)(1) in the broader context of a liberal discovery regime, which preceded the 2015 FRCP amendments.[395] Like the Fifth Circuit Court of Appeals' ruling in *Miller*, many appear to be careful in applying amended FRCP 26(b)(1) in a fair and evenhanded manner, particularly in labor and employment cases where some disempowered individuals may suffer disadvantages when seeking information exclusively in the corporate or institutional defendant's possession.[396] As part of that application, courts have continued to conduct a nuanced, fact-intensive analysis to ensure that the information sought is proportional and reasonable to prove the claims and defenses.[397]

As the United States District Court for the District of Massachusetts recognized in an employment discrimination suit against Wal-Mart—one

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390. *Id.*
391. *Id.*
392. *Id.* at 883.
393. *Id.* (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).
394. *See id.* at 892.
395. *See, e.g.*, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 314 F.R.D. 397, 408–09 (E.D. La. 2016) (involving a multi-district litigation case involving millions of documents produced by the parties and concluding that "a list of documents reviewed by a witness in preparation for a deposition is discoverable under Rule 26(b), because the list is relevant, proportional to the needs of the case, and not privileged") ("As a rule of discovery, Rule 26 is broadly interpreted to achieve the discovery goal of 'adequately informing litigants in civil trials.'" (quoting Pettit v. Heebe, No. 15-3084, 2016 U.S. Dist. LEXIS 36184, at *3 (E.D. La. Mar. 21, 2016)); Colborn v. Netflix Inc., 608 F. Supp. 3d 736, 741 (E.D. Wisc. 2022) (quoting Hickman v. Taylor, 329 U.S. 495, 506 (1947) for the proposition that the discovery rules of the FRCP "'are to be applied as broadly and liberally as possible' to allow parties to explore possible leads"); Equal Emp. Opportunity Comm'n v. Heart of Cardon, LLC, 339 F.R.D. 602, 605 (S.D. Ind. 2021) (noting that "courts commonly look unfavorably upon significant restrictions placed upon the discovery process" (quoting Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 1108, 1111 (N.D. Ill. 2004)).
396. *See, e.g.*, Brown v. Wal-Mart Assocs., Inc., 616 F. Supp. 3d 137, 145–46 (D. Mass. 2022).
397. *See id.*

of the largest corporate employers in the United States[398]—"[i]n employment discrimination cases, the discovery allowed is even more broad, '[b]ecause employers rarely leave a paper trail—or 'smoking gun'—attesting to a discriminatory intent, [therefore] disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence.'"[399] In that case of public importance, with potential sanctions looming, the district court further explained the context and significance of the discovery, in a way that served as an equalizing measure between a disempowered plaintiff and a well-resourced, powerful defendant:

> The allegations of racial discrimination and hostility in Plaintiff's complaint, if true, are appalling. Yet there is no way to test the veracity of either these allegations or of Walmart's defense in response if Walmart refuses to engage in the discovery process. The Court is hopeful Walmart will understand its discovery obligations more fully going forward and comply with this order to ensure full and fair litigation of this matter and to avoid court sanctions.[400]

In a similar Fair Labor Standards Act class action case in New Mexico, the district court granted the plaintiffs' requests for supervisor contact information, payroll data, and other requested discovery.[401] The court found that this discovery, notably involving ESI, was relevant and proportional to claims that the plaintiffs, and the class that they represented, were underpaid for overtime hours worked.[402] Although the district court did not expressly analyze each of the proportionality factors for each type of requested discovery, the court's reasoning reflected a careful weighing of proportionality factors, including the importance of the issues at stake, the parties' relative access to the 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.[403] For example, in this wage and hour case, the district court acknowledged that "there is likely no information more important than the payroll data" because "without such, how do Plaintiffs prove their FLSA claims that they and the class they represent were underpaid if they can't show the number of overtime hours worked?"[404] The district court underscored the point by noting that the "information sought by Plaintiffs is central to their ability to prove their claim."[405] In balancing the discovery scales, while simultaneously promoting efficiency and a resolution on the merits, the district court admonished the corporate defendants for "slow-walk[ing] their response" and "le[aving] Plaintiffs hanging," noting that their "intransigence

398. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011).
399. *Brown*, 616 F. Supp. 3d at 146 (quoting Vazquez-Fernandez v. Cambridge Coll., Inc., 269 F.R.D. 150, 155 (D.P.R. 2010)).
400. *Id.* at 146.
401. Pruess v. Presbyterian Health Plan, Inc., 579 F. Supp. 3d 1235, 1241–50 (D.N.M. 2022).
402. *See id.*
403. *See id.*
404. *Id.* at 1243.
405. *Id.*

in meeting their discovery obligations is directly, and negatively, impacting the progress of this case."[406]

These recent cases demonstrate an encouraging trend in using the revised federal proportionality standard as a useful, legitimate tool for judges genuinely committed to resolving claims on the factual merits and according to substantive laws. They also reflect the ongoing commitment of federal judges to conduct nuanced, fact-specific analyses that comport with and further broad, liberal discovery principles that advance open court access, claim development policies, and prior case law. Additionally, they highlight how the federal proportionality standard can be applied in an even-handed manner in cases featuring information asymmetries—and in ways that would perhaps surprise some of the early critics.

2. Beyond Efficiency: Applying All of the Proportionality Factors

In addition to applying the proportionality factors in cases where there are information and resource asymmetries between the litigants, other district courts have been explicitly applying all the proportionality factors—not just those speaking to efficiency concerns. To address concerns about potential inconsistencies between decisions articulating what is and is not proportional, some advocates have called for a standardized approach to proportionality in discovery.[407] Some federal district courts have responded to this more standardized proposed approach in positive and creative ways.

In advocating for a uniform proportionality analysis in which all six factors are considered, United States Magistrate Judge Elizabeth D. Laporte and lawyer Jonathan M. Redgrave proposed a standardized proportionality framework that considers the following practices:

> (1) focusing on the specific discovery at issue; (2) recognizing that proportionality is interrelated with relevance; (3) acknowledging that proportionality can support non-binary decisions; (4) assigning the burdens on non-parties more weight than those on parties; (5) raising discovery scope and proportionality issues early in the litigation and then as necessary throughout the litigation; (6) recognizing that the financial value of the claim should not be the controlling factor; (7) acknowledging that discovery will not be perfect; (8) robustly engaging in arguments without relying on superseded case law, rote recitation of the rules, or unsupported assertions about the burden of production; (9) avoiding academic disputes regarding the burden of proof; and (10)

406. *Id.* at 1250.

407. *See* Laporte & Redgrave, *supra* note 3, at 21 (suggesting a high-level approach to standardize proportionality in discovery "in the same manner that the factors enumerated in Rule 23(a) have led to a largely standardized approach to class certification briefing and decisions").

remembering that the proportionality factors also apply to preservation issues.[408]

Citing directly to Judge Laporte and Redgrave's article, some district courts have applied all proportionality factors.[409] One of these instances was a civil rights case in Michigan involving ESI, where four adults with severe developmental disabilities were deprived of medically necessary services and sued the county mental health authority for violating various federal and state laws pertaining to budgeting methodology.[410] The federal district court applied all of the proportionality factors to rule in favor of the disempowered plaintiffs.[411] The court emphasized the importance of the issues, the relative resources of the parties, and their access to the information as significant among its application of all the proportionality factors.[412] In weighing all of the proportionality factors, the district court recognized that the case "involves some of the most vulnerable among us" and "numerous cutting-edge issues in Medicaid and Disability Law."[413] Not persuaded by the county's assertion that it did not have sufficient resources to produce certain emails that were exclusively in its possession, the district court emphasized that the "plaintiffs have less," and "[i]n fact, their complaint is that their budgets are too little to meet their basic medical needs."[414] By even-handedly applying proportionality principles, the court was able to rule on a discovery dispute in a fair and just manner that did not further erect unnecessary barriers or impose further harms to an already disadvantaged and disempowered group.[415]

Other federal judges, perhaps not necessarily applying all the proportionality factors, have similarly responded directly to the early critics' warnings that proportionality analyses should not turn narrowly on efficiency considerations. For example, a federal district court responded directly to the critics in an information asymmetry case involving employment discrimination claims.[416] The Michigan judge cited to Zambrano's *Discovery as Regulation* article, which recognized that "scholars and

408. Endo, *supra* note 13, at 1354–55 (citing Laporte & Redgrave, *supra* note 3, at 51) (summarizing Judge Laporte and Redgrave's high-level framework and observing that the "factors are assessed in a wide variety of cases," even though they have "not yet been adopted wholesale").

409. *See* Waskul v. Washtenaw Cnty. Cmty. Mental Health, 569 F. Supp. 3d 626, 632–34 (E.D. Mich. 2021); Cratty v. City of Wyandotte, 296 F. Supp. 3d 854, 859–61 (E.D. Mich. 2017).

410. *Waskul*, 569 F. Supp. 3d at 630–31.

411. *See id.* at 632–35.

412. *Id.* at 634. The district court applied all proportionality factors consistent with the approach advocated by Judge Laporte and Redgrave, as indicated by the court's citation to their article. *See id.* (citing *Cratty*, 296 F. Supp. 3d at 860).

413. *Id.* at 634 (quoting Joint List of Unresolved Issues Re ECF #196 (Washtenaw County Motion to Quash) and ECF #201 (Plaintiffs' Motion to Compel Re Defendant WCCMH and Non-Party Washtenaw County) at 4, ECF No. 218-1).

414. *Id.*

415. Other district courts have taken similar approaches in applying all proportionality factors, particularly in cases with information asymmetries and ESI. *See, e.g.*, City of Rockford v. Mallinckrodt ARD, Inc., 326 F.R.D. 489, 495–96 (N.D. Ill. 2018); Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 6–10 (D.D.C. 2017).

416. *See* Martin v. Saginaw Cnty. Rd. Comm'n, 606 F. Supp. 3d 639, 642–43, 651 (E.D. Mich. 2022).

judges tend to analyze discovery costs relative to the potential award in a particular case" even though there are six proportionality factors for consideration.[417] Although the court did not undertake an analysis of all the proportionality factors, the court denied the requested grant of the defendant's motion for summary judgment and agreed that additional discovery was appropriate, thereby balancing the asymmetries between the parties.[418]

As another example, in a case with imbalanced resources between individual plaintiffs and a large corporate business, a Minnesota district court expressly discussed the relative resources of the parties.[419] In relevant part, the court stated, "[t]he resources of the parties are a 26(b) proportionality factor, but over and above that, the Court holds [the defendant] at least partly responsible for the creation of the conditions that contribute to the amount of work required to respond" to the requests for productions of documents.[420] "[P]ermitting 'a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.'"[421] The court's observation demonstrates the application of proportionality factors beyond just a cost-benefit efficiency analysis.

For states considering how the federal proportionality standard may be operationalized in civil cases, these examples demonstrate the possibility of balancing power between parties with asymmetrical access to information and resources. This possibility becomes a reality when judges properly understand the revised federal proportionality standard and balance the six proportionality factors in even-handed ways beyond a narrow focus on only efficiency concerns. State courts and rulemakers should not underestimate or overlook this mere possibility because it is a significant, yet underdeveloped, benefit of proportionality in discovery. These examples further illustrate that with proper judicial training, guidance from scholars, and development of case law through appellate rulings, potential to promote access to justice in meaningful ways exists—even in forums that many consider conservative and restrictive to certain types of individual plaintiffs with certain types of legal claims.

3. Uplifting the Role of State Court Judges

Key to the above federal court cases that balanced power among parties and yielded fair, just, and balanced outcomes were the federal judges themselves. Likewise, state court judges are essential to analogous state court cases. If state courts are crucial to delivering on the "key promise of

417. *Id.* at 651 (quoting Zambrano, *supra* note 144, at 132).
418. *See id.* at 642–43, 651.
419. *See* Lynch v. Experian Info. Sols., Inc., 569 F. Supp. 3d 959, 964–65 (D. Minn. 2021).
420. *Id.* at 964.
421. *Id.* (quoting Beseke v. Equifax Info. Servs., LLC, No. 17-cv-4971-DWF-KMM, 2018 WL 6040016, at *4 (D. Minn. Oct. 18, 2018); *accord* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 321 n.68 (S.D.N.Y. 2003)).

equal justice for all,"[422] then state court judges are the keepers of that promise. Armed with the revised federal proportionality standard as a useful tool, state court judges may be better equipped to keep that promise—uplifting state courts in the eyes of litigants and the broader community to provide equal justice for all.

Indeed, as state courts are often far removed from the battles before the Supreme Court that tend to dominate political headlines, state courts have the potential to "better reflect the values and customs of the communities they serve and the historic preference of the country's founders for state constitutions and state courts as the first line of defense for our rights and liberties."[423] Compared to federal courts, many state courts also tend to reflect "a body of trial-level judges who are diverse across several measures," which may help to "avoid overall tipping of inferences and even substantive law in favor of the experiences of a homogenous group."[424] That is, with more diverse backgrounds, ideologies, and politics than the federal bench, state court judges may be more likely to focus on context and perform a careful examination of all the proportionality factors, rather than "just following the rules."[425] And although demographic shifts can occur at any time in state court benches, judicial education and training programs[426] have the potential to encourage the development of state case law through careful reasoning delineating what is and is not proportional in certain types of cases and circumstances.[427]

By attentively recognizing their elevated roles, arranging training, additional tools, and resources to apply the proportionality factors as an equalizing measure for litigants, and providing opportunities for state judges to play a central role in actively managing discovery, state courts may help to restore, if not boost, the public's confidence in legal proceedings. State court judges, with their more diverse backgrounds, may also

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422. *The State of State Courts: A 2022 NCSC Public Opinion Survey*, NAT'L CTR. FOR STATE CTS. [hereinafter *The State of State Courts*], https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/state-of-the-state-courts/the-state-of-state-courts-a-2022-ncsc-public-opinion-survey (last visited June 27, 2023).

423. NAT'L CTR. FOR STATE CTS., 2022 STATE OF THE STATE COURTS – NATIONAL SURVEY ANALYSIS 1 (2022), https://www.ncsc.org/__data/assets/pdf_file/0033/85965/NCSC-State-of-the-State-Courts-Analysis_2022.pdf.

424. Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1639 (2019).

425. *See* Nancy Gertner, *Losers' Rule*, 122 YALE L.J. ONLINE 109, 123 (2012).

426. *See id.* (advocating for "judicial-education programs" to train judges "to analyze the merits in a way that privileges jury decisionmaking and reminds the decisionmakers what the law was designed to reform in the first place"); Grimm, *supra* note 13, at 191 (arguing for more aggressive, robust mandatory education and training for federal judges on tools to achieve proportionality).

427. Federal courts' application of proportionality in e-discovery cases remain ambiguous and inconsistent. *See* Kimura & Yamamoto, *supra* note 8, at 180; Kenneth J. Withers, *"Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 BALT. L. REV. 349, 377 (2008). Some scholars have noted that state judges, at times, improvise discovery "on the go" or tailor discovery procedures to each case. *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 784 (2017) (seeking to "define the phenomenon of ad hoc procedure-making"); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1209 (2022) (noting that state court judges "routinely adjust procedures to accommodate the particular litigants before them").

more effectively apply the proportionality factors and balance various competing procedural values, including efficiency, dignity, and participation, so that efficiency does not dominate decision-making at the expense of minorities or disempowered groups.[428]

B. The Affirmative Benefits of Proportionality in the Scope of Discovery

The early critiques of the federal proportionality standard in the scope of discovery raised important concerns. They may also have been overstated. State rulemakers may nevertheless still ask themselves: What are the affirmative benefits of proportionality? Rulemakers in states that have already incorporated proportionality principles into rules setting forth limitations on discovery may query both why the revised federal proportionality standard should be adopted and why proportionality should be elevated to the scope of discovery. Rulemakers in other states may be hesitant to make what has been perceived as sweeping changes in their rules and may seek cautious (yet beneficial) approaches to incorporating proportionality in their state rules regimes. This Section attempts to address these concerns.

1. Elevating Proportionality to the Scope of Discovery in State Rules

States should adopt the federal proportionality standard and incorporate it into the scope of discovery. While amended FRCP 26(b)(1) generally resembles the prior language from FRCP 26(b)(2)(C)(iii), there is a notable restatement of the proportionality factors and difference in emphasis. As one attorney put it, "[t]he difference, of course, . . . is [the] equivalent of a promotion from a late night talk show to a (slightly) more primetime spot."[429] The federal proportionality standard features six factors, including, importantly, the parties' relative access to the relevant information.[430] By contrast, proportionality principles that limit discovery do not expressly include this factor.[431] Moreover, the 2015 proportionality language lists the importance of the issues at stake in the litigation first, as a primary consideration, rather than subsumed nearly last in the list of discovery limitation considerations.[432] These two factors, which especially impact cases with information asymmetries, are critical.

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428. Certain pitfalls and doubts about certain state court judges, particularly those who are elected, may remain. Nonetheless, at least conceptually, including a proportionality requirement in the scope of discovery in state courts opens opportunities for additional judicial management of discovery.

429. J. Ben Segarra, *2015 Amendments to the Federal Rules of Civil Procedure*, A.B.A. (Jan. 3, 2017), https://www.americanbar.org/groups/litigation/resources/newsletters/products-liability/2015-amendments-federal-rules-civil-procedure/.

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

431. Some may argue that "the parties' relative access to relevant information" is implied in the factor referring to the parties' resources, and therefore, is not necessary or was covered in the prior iteration of the proportionality standard in the limitation on discovery. *Compare* FED. R. CIV. P. 26(b)(1) (2015), *with* FED. R. CIV. P. 26(b)(2)(C) (2006).

432. *Compare* FED. R. CIV. P. 26(b)(1) (2015), *with* FED. R. CIV. P. 26(b)(2)(C) (2006).

Moreover, elevating proportionality to the scope of discovery will all but ensure that the parties, attorneys, and judges will focus on and apply it, often as part of an initial discovery analysis. Indeed, it "reflects the salutary goal of encouraging district judges to be more actively involved in discovery disputes."[433] It provides state court judges with an important tool to advance equal justice for all, which may otherwise not be as apparent if it is buried only in the oft-under-utilized limitations to discovery rule.[434] As has been revealed in recent case law, states that choose to incorporate the federal proportionality standard (or a slightly modified version) into their scope of discovery rules likely will not experience drastic impacts in civil discovery.[435] For smaller-valued, routine, lower stakes cases, the litigants and attorneys likely will continue to self-manage discovery issues following proportionality principles without court management. Indeed, as one commentator observed, "[p]roportionality is normally self-evident in such cases."[436] But for those higher valued, complex, high stakes matters, where some may be tempted to complete a proportionality analysis turning only on efficiency considerations, the proportionality factors will be of particular importance and utility. These cases will likely involve ESI.[437] And they will likely involve claims with significant legal issues or amounts in controversy—such as commercial disputes, class actions, multi-party actions, or product liability actions.[438] They are also more likely to reflect information asymmetries. In these types of cases, discovery may begin to dominate the proceedings, as certain litigants may seek to weaponize the discovery process, using it as both a sword and a shield, or may use discovery as a delay tactic.[439] While some may contend that these types of complex, higher-stakes cases comprise a small number of cases on state court dockets, as compared to federal dockets, these cases may implicate important understandings of justice and thus warrant careful attention, especially in terms of seeking key information and claim development in information asymmetry cases.

In these cases—especially in light of procedure's power to empower or disempower social groups and uplift or entomb issues of public concern—careful consideration and weighing of all six proportionality

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433. Klonoff, *supra* note 12, at 1991.

434. *See id.* ("[T]he proportionality language provides a useful tool for judges to rein in abusive discovery.").

435. *See id.* (concluding that "the proportionality amendment thus far does not appear to have had a major impact" in the context of class actions).

436. Gregory C. Cook & Sloane M. Bell, *Alabama Supreme Court Amends Rules 26 and 37 to Address Proportionality and ESI*, 80 ALA. LAW. 97, 98 (2019).

437. *See id.* at 98–99.

438. *See id.*; *see also* Klonoff, *supra* note 12, at 1991 (assessing the application of the 2015 federal proportionality amendment in the context of class actions).

439. *See, e.g.*, Peter Boylan, *Attorneys for Alleged Hawaii Crime Boss Ask Judge to Compel Evidence Disclosure*, STAR ADVERTISER (May 15, 2022), https://www.staradvertiser.com/2022/05/15/hawaii-news/attorneys-for-alleged-hawaii-crime-boss-ask-judge-to-compel-evidence-disclosure/ (quoting U.S. District Court for the District of Hawaii Magistrate Judge Kenneth Mansfield who said, "[i]t's overwhelming and cases [at times] become about discovery and not about the merits").

factors, especially the parties' relative access to relevant information and the importance of the discovery in resolving the issues, as part of an initial scope of discovery analysis may increase efficiencies. Importantly, it may also lead to a decision on the merits in a fair and just manner for the litigants and for society. Elevating the revised federal proportionality standard to the scope of discovery is crucial to providing state court trial judges—overseen by the appellate courts—with an important tool and to creating an opportunity for them to balance power among parties by applying all proportionality factors in a fair, just, and even-handed manner.

2. Applying Proportionality to ESI Disputes

Cases involving ESI are also likely to benefit from elevating the federal proportionality standard to the scope of discovery.[440] With many state courts rejecting heightened pleading and summary judgment standards, the costs of litigation, which can often impede adjudication on the merits, should be a primary concern. With mounting discovery costs, particularly in cases where e-discovery plays a central role, those seeking to vindicate important rights may be dragged through the financial mud, or shut out entirely from the litigation process, due to discovery costs that exceed the amount of controversy at issue. This happens not only in complex litigation matters, but also in the simplest commercial disputes or civil rights cases. Indeed, with the recent explosion of technology (and with more to come), platforms for electronic communications continue to drastically change the way disputes arise and litigation proceeds with all the attendant e-discovery obligations, opportunities, and burdens.[441]

Although many have undoubtedly recognized that e-discovery is distinct and unique from ordinary discovery and has transformed the civil litigation landscape, the explosion of ESI in recent years has continued to have profound impacts in both state and federal courts.[442] With this new tsunami of electronic data flooding e-discovery practice, the ways

440. For state court dockets, there may not be as many cases involving ESI as compared to federal dockets, yet even this smaller portion of cases warrant state rulemakers' attention with respect to the scope of discovery rules and potential proportionality requirements.

441. A few statistics reflect the magnitude of data created and stored every day: (1) For every minute in the day, about "41.6 million messages are sent on Snapchat and Facebook Messager," "a million people log into Facebook," and $1 million is spent on commodities via online shopping; (2) about "[e]very 24 hours, 500 million tweets are published on Twitter;" and (3) about "18.7 billion text messages are sent every day" around the world. Branka Vuleta, *How Much Data Is Created Every Day? +27 Staggering Stats*, SEEDSCIENTIFIC (Oct. 28, 2021), https://seedscientific.com/how-much-data-is-created-every-day/#:~:text=Every%20day%2C%20we%20create%20roughly,does%20Google%20process%20every%20day%3F.

442. *See* Kimura & Yamamoto, *supra* note 8, at 161–63 (describing "four major ways" in which ESI is distinctly "different from ordinary discovery"); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564 (2010) (discussing how e-discovery has "revealed the need for fundamental changes to the American discovery system"); Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 BALT. L. REV. 321, 322–28 (2008) (tracing the broad impacts of e-discovery on corporate America, law firms, and e-discovery vendors).

attorneys seek information and conduct discovery have evolved.[443] And the recent surge of ESI has further reshaped various ongoing debates on discovery costs[444] and underscored obligations to preserve ESI about a likely dispute well in advance of the filing of any lawsuit.[445]

Judges, attorneys, and litigants are faced with dire consequences when proportionality is not applied during discovery, particularly when disputes involve ESI. Indeed, the absence of a clear proportionality standard or any clear affirmative duty to preserve ESI that embraces the principle of proportionality can be destructive—putting individuals or businesses under or leading to stiff, costly sanctions for others. The absence of a proportionality standard may also reflect a local legal culture "that embraces the leave no stone unturned and scorched earth approach to discovery . . . ."[446] Although perhaps unintentionally, it leaves open the possibility of discovery overuse and abuse—particularly for e-discovery—that may deprive litigants, even those with considerable means, from a just, speedy, and efficient case resolution.[447] It may also add to the decline in public trust and confidence in courts, which many consider the "most trusted branch of government."[448]

This leaves state courts to serve an important role in equalizing measures for litigants during discovery, which may be especially paramount if state rulemakers adopt the revised federal proportionality standard to deploy in resolving e-discovery disputes.[449] State court judges could use the "proportionality rule to encourage the parties to work out more of their [ESI] disputes, with the implication that the new language might provide a basis to curtail excessive [e-discovery] demands."[450] With a proportionality rule, attorneys and parties on "both sides will almost certainly reflect on the scope of their own discovery requests as they seek discovery in the context" of a revised scope of discovery rule.[451]

State rulemakers may opt to elevate and apply the federal proportionality standard as part of an initial scope of discovery analysis, which would

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443. *See, e.g.*, Robert Hardaway, Dustin D. Berger, & Andrea Defield, *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 522 (2011); The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 293 (2010).

444. *See* Engstrom & Gelbach, *supra* note 9, at 1047–49 (discussing "the most significant concern" of litigation costs in the "new world[] of discovery"); *see also supra* note 125 (collecting sources on cost-and-delay narratives and related critiques).

445. *See* A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-litigation Spoilation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006–07 (2011) (noting the most salient discovery-related issue among practitioners is the duty to preserve ESI).

446. *See* Roberts v. Clark Cnty. Sch. Dist., 312 F.R.D. 594, 604 (D. Nev. 2016).

447. *See* FED. R. CIV. P. 1.

448. *The State of State Courts*, *supra* note 422 ("NCSC's 2022 survey of public opinion finds that public trust and confidence in the courts continues to slide.").

449. *See* Coleman, *supra* note 15, at 56 ("Because of, and in spite of, that history [which "excluded men of color and all women for centuries" and still struggles to empower anyone other than white men], legal institutions should . . . aggressively pursu[e] equalizing measures.").

450. *See* Klonoff, *supra* note 12, at 1991.

451. *See id.*

be uniformly applicable to all civil disputes. Alabama and Ohio recognized that exact benefit when amending their rules.[452] Others may elect to adopt the revised federal proportionality standard and apply it only to disputes involving ESI, just as the Supreme Court of Texas did.[453] By applying the federal proportionality standard to cases involving ESI—particularly as attorneys and litigants are unlikely to self-manage discovery well in those cases—more efficient, fair, and just outcomes will likely follow.

Thus, this affirmative benefit, which has been obscured in sometimes discordant debates about proportionality, should be front and center in future conversations among state rulemakers. And, for more cautious state rulemakers, especially those who may be skeptical of incorporating the federal proportionality standard in the scope of discovery such that it applies to all civil cases, there is the potential to adopt proportionality to apply only to disputes involving ESI. This might provide better flexibility, predictability, and fair outcomes to both plaintiffs and defendants faced with e-discovery obligations and concerns.

3. Giving Voice to Litigants Through Discovery

Elevating the federal proportionality standard to the scope of discovery might create more opportunities to give voice to litigants on important issues while also fostering, articulating, and amplifying public values and a sense of "justice done." Although critics have rightly focused on how proportionality may be applied in ways that advance goals of efficiency only, proportionality need not be limited to a neutral efficiency or cost-benefit analysis. Value judgments behind proportionality reforms suggest that there may be substantive consequences for certain disadvantaged social groups.

Viewed through a Critical Procedure lens, these value judgments are critically important. For example, the FRCP Advisory Committee's notes cautioned that the proportionality analysis should consider more than just "ordinary costs and burdens into the realm of social and economic consequences for individuals, organizations, governments, communities, businesses, and the judiciary itself"[454]:

> [T]he rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of

452. *See supra* notes 228–30, 232–33, 238 and accompanying text.

453. *See supra* Section III.A.3; *see, e.g.*, FLA. R. CIV. P. 1.280(b)(3), (d)(2) (applying the proportionality standard only to ESI); Michael D. Berman & Alicia Shelton, *The Common-Law Duty to Preserve ESI (Its Trigger, Scope, and Limit) in Maryland State Courts*, *in* ELECTRONICALLY STORED INFORMATION IN MARYLAND COURTS 149, 149, 164–65, 167 (Michael D. Berman, Paul W. Grimm, Alicia L. Shelton, & Diane P. Kilcoyne eds., 2020) (discussing Maryland's application of proportionality to ESI, particularly relating to preservation).

454. *See* Yamamoto, *supra* note 1, at 785.

> discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.[455]

In other words, judges must carefully consider and balance how the proportionality standard may empower or disempower litigants and advance or impede the articulation of public values for litigants and society.

Even before FRCP 26(b)(1) was implemented, scholars had likewise admonished that "proportionality tools must be carefully used" because there is "the danger that monetary value of a case, alone, will control the proportionality analysis, impeding the discovery efforts of parties with limited resources and failing to acknowledge the non-pecuniary importance of public policy-related suits, such as those involving allegations of discrimination."[456] For instance, a "global proportionality approach" toward determining a case's monetary value (i.e., the amount in controversy in light of the importance of the issues at stake) may be helpful in limited cases, such as breach of contract matters. But a "*specific* proportionality approach," or rather asking whether "this particular approach to discovery [is] worth the cost given the information which it will produce," may be a more incisive, helpful inquiry to manage discovery in cases involving constitutional or civil rights disputes.[457] That is, discovery assists with claim development, but it also uncovers destructive, hidden practices by exposing key information that otherwise might never come to light without these discovery tools of civil litigation.

When proportionality is properly understood and applied in these cases, litigants may find their voices in the process.[458] As Professor Seth Endo recognized, "[i]t 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."[459] Likewise, Professor Rebecca Hollander-Blumoff explained that discovery is a tool that is "expressly designed to enable participation and voice," giving litigants "the opportunity for meaningful participation by allowing them access to information that will form the basis for their presentation to the court."[460] To these litigants, monetary compensation may not be the end goal. For many, a sense of "justice done," or restoration of their own sense of dignity and faith in the civil justice system, is their primary aim.

For others, exposing harmful practices and seeking changes in behavior—and thus boosting the message of litigants' voices—may be

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455. FED. R. CIV. P. 26(b)(1)(iii) advisory committee's note on 2015 amendments.

456. Carroll, *supra* note 16, at 464 (distinguishing between "*global* proportionality" and "*specific* proportionality" analyses).

457. *See id.* at 466.

458. *See* Endo, *supra* note 163, at 1024, 1030.

459. *Id.* at 1030.

460. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 154–55 (2011).

motivating factors behind discovery efforts. For example, a plaintiff may feel a sense of vindication in exposing racist practices at one of the largest corporations in America and obtaining evidence to support claims of employment discrimination during discovery, and may also put political, social, or economic pressure on corporate America to change. Some scholars consider the discovery process in such cases as serving a regulatory function.[461]

But from a Critical Procedure lens, obtaining this type of discovery in civil suits also engenders "cultural performances," and may even spur larger social or political movements, which in turn, may affect the suits' outcomes.[462] In these cases, courts go beyond serving as sites to define and resolve legal claims and defenses. Rather they become "dynamic sites of cultural performances" where these legal claims are transformed into larger public messages about justice.[463] In this setting, discovery enables litigants—particularly those of comparatively lesser social, economic, or political power—to "challenge dominant understandings, or master narratives, undergirding unfair political or social arrangements."[464] Through discovery, the voices of these litigants become even more amplified in advancing efforts for social justice. Proportionality both opens the door and provides a platform for these voices.[465]

When taking a broader view, it becomes clearer that proportionality's six factors present affirmative benefits to *realize* and *equalize* access to justice to an even greater degree.

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At this juncture, a caveat is in order. This new dimension to the federal proportionality standard must be understood in context. It should not be misunderstood as simply reinforcing some of the federal rulemakers' own apparent self-serving justifications. It should also not be perceived as a veiled way to advance Republican, pro-corporate, conservative defense interests. Quite the opposite. This new dimension can best be viewed as teasing out preliminary insights in two domains.

The first domain relates to *who* applies the proportionality factors. For example, if state court judges are elected, or generally reflect pro-corporate defense biases, then rulemakers may reject the proportionality standard due to well-founded fears of its misunderstanding and

461. *See* Zambrano, *supra* note 144, at 119–20; Endo, *supra* note 163, at 1031.

462. *See* Yamamoto, Haia, & Kalama, *supra* note 109 (describing courts as the sites of cultural performances in controversial cases that shape public perceptions); Yamamoto, *supra* note 1, at 787–88.

463. Yamamoto, *supra* note 1, at 786–88.

464. *Id.* at 787.

465. Given early critics' concerns that the federal proportionality requirement may stifle claim development and access to the courts for certain plaintiffs, it can be inferred that it could "take away" the voice of litigants in the discovery process. This Section does not necessarily argue that the proportionality requirement gives "more" voice to litigants. Rather, it maintains or gives them a voice in important ways.

misapplication by narrowly turning the analysis on efficiency considerations. But, in other states, where judges are appointed through a rigorous vetting process prioritizing candidates with access-to-justice values, more fully understanding current assessments of prior critiques and the affirmative benefits of proportionality (in addition to its pitfalls) may be a worthwhile exercise. Demographics of state court judges evolve and change. But at least initially, considerations of *who* may apply the proportionality factors—and in what context—matters.[466] Viewed through a Critical Procedure lens, this first domain speaks to the notion that politics (sometimes) matters in balancing the scales of justice—even in implementing rule amendments beyond the initial genesis of these amendments.[467] It also underscores how adopting the revised federal proportionality standard may uplift the role of state court judges.

The second domain encompasses the broader procedural values embedded in state civil justice systems. For states that have maintained a liberal notice pleading standard and a plaintiff-friendly summary judgment standard, as opposed to the restrictive, pro-defendant, federal *Twombly–Iqbal* and *Celotex* standards, incorporating the proportionality test may, in fact, address power imbalances and abusive discovery practices that tend to drive up the costs of litigation, thereby impeding claim development. The context in which the proportionality standard is operationalized in state courts should not be underestimated, particularly with the procedural retrenchment of substantive rights in federal courts.

Another salient dimension of this access-to-justice context is the type of issues at the heart of cases. For instance, high-volume, low-stakes, "lawyerless" cases, which make up a majority of state dockets, may not even reach discovery, or there may be rules prohibiting any kind of discovery to begin with. But for lower-volume, slightly higher-stakes, and perhaps more complex cases with lawyer representation—such as those involving contract, tort, employment, business, and other types of similar disputes and those cases involving ESI—the proportionality standard may ensure and yield fairer and more just discovery processes. Moreover, cases where there is asymmetrical access to information—such as those involving employment discrimination, civil rights violations, or product liability claims—may in fact benefit from a careful application of all proportionality factors. Certainly, state rulemakers will need to consider all types of cases and may need to tailor, adapt, and adopt rules accordingly. They may also consider whether judges may need to adapt their approaches to each specific case, or whether a broader, standardized approach may need to be articulated from the outset. This could be done by developing case law

466. *See* Gelbach & Kobayashi, *supra* note 13, at 1118 ("[T]he proportionality standard . . . provides judges with [explicit] equitable discretion to consider normative issues . . . that implicate justice, speed, and expense.").

467. *See* Yamamoto, *supra* note 1, at 782.

with commentary from scholars and practitioners (including in committee or editors' notes).

None of the above suggests that the critics were wrong to raise the alarms about the potential harms of the 2015 federal proportionality standard. Indeed, these well-founded fears and concerns were justified and necessary. But some of these warnings may have been overstated. At least in theory, the possibility for hopeful, practical affirmative benefits of proportionality remains.

This possibility speaks to the need for further empirical studies on the operation of proportionality, in practice at the state and federal levels and in the realm of the preservation of ESI. The time is ripe for these studies, especially in this age of vast electronic discovery. That comprehensive task is beyond the scope of this Article. For now, this Article identifies a key concept for state civil rulemakers: Both in promoting access-to-justice principles (to foster access for vulnerable individuals and communities denied access and claim development by recent "reforms") and in ensuring thoughtful, grounded state civil rulemaking processes, states' interests are best served when they rise above the partisan *politics of proportionality* and consider the nuanced dimensions of the 2015 federal proportionality standard, including both potentially dangerous pitfalls and possible uplifting benefits.

CONCLUSION

Critical Procedure shows how the imbalance of power in the rulemaking process (and the Supreme Court's rulings) have narrowed federal court access and constricted claim development for vulnerable individuals and communities—to the derogation of the guiding values of a genuine *justice* system. But it also illuminates a path for state rulemakers and state courts to rebalance the scales for state litigation through a careful, balanced, and fair deployment of the proportionality principle (just as some federal judges have been doing).

Grounded in a fifty-state survey examining the states' responses to the 2015 federal proportionality amendments, and through this Critical Procedure lens, this Article informs ongoing and future conversations, and at times discordant debates, among state rulemakers contemplating the adoption of the federal proportionality standard. The time may be ripe for at least a plurality of states to re-engage in such conversations. For other states, including those that rejected proportionality, with pending or upcoming changes in the composition of state supreme courts or state legislatures, there may be future opportunities to revisit proportionality conversations. Nothing should be considered "off the table." For the immediate future, this Article is most helpful to states who took a "wait and see" approach or may currently be on the fence about proportionality due in part to the lack of prior guidance or research on state rulemaking efforts.

Looking ahead, we might expect to see more states adopt proportionality principles, but some may tailor them to fit their state's specific needs. Regardless, state rulemakers should be aware of the potential affirmative benefits of proportionality—in theory and in practice—and should strive to rise above any partisan *politics of proportionality*.

APPENDIX

STATES' RESPONSES TO THE 2015 FEDERAL PROPORTIONALITY STANDARD[468]

STATE	CURRENT SCOPE OF DISCOVERY RULE[469]	OTHER RELEVANT DISCOVERY RULES	RESPONSE TO 2015 FRCP 26(b)(1)	METHOD & DATE OF ADOPTION
Alabama	ALA. R. CIV. P. 26(b)(1)	ALA. R. CIV. P. 26(b)(2)	Adopted	Rule Amendment December 2018
	Alabama incorporated the federal proportionality standard with some minor word changes. The Committee Notes to the Alabama Rules of Civil Procedure, as amended in 2018, emphasized that the federal proportionality standard was especially helpful in cases featuring information asymmetries or ESI. ALA R. CIV. P. 26(B)(1) Comm. Notes.			
	For further discussion, see *supra* Section III.A.2 and notes 228–30 & 238.			
Alaska	ALASKA R. CIV. P. 26(b)(1)	ALASKA R. CIV. P. 26(b)(2)(A)	Status Quo	
Arizona	ARIZ. R. CIV. P. 26(b)(1)	ARIZ. R. CIV. P. 26(b)(2)	Adopted	Rule Amendment July 2018
	Arizona also incorporated proportionality principles in other rules amendments, such as Rule 16(a)(3) and Rule 37(h). *See* Brett Donaldson & John Wittwer, *The 2018 Amendments to the Arizona Rules of Civil Procedure: What Do They Mean to the Practicing Trial Lawyer?*, COMMON DEFENSE (2018), https://www.cavanaghlaw.com/blog/2018/05/the-2018-amendments-to-the-arizona-rules-of-civil-procedure-what-do-they-mean-to-the-practicing-trial-lawyer/.			
Arkansas	ARK. R. CIV. P. 26(b)(1)		Status Quo	
	The Arkansas Supreme Court has appointed a Committee on Civil Practice. The Committee proposed an overhaul to the discovery rules in 2019, often paralleling the FRCP rules, but it did not suggest adopting the federal proportionality standard. *See In re Arkansas Supreme Court Committee on Civil Practice – Recommendations to Revise Discovery Rules*, 2019 Ark. 399, https://www.arcourts.gov/sites/default/files/In_re_Amendments_to_Rules_of_Civil_Procedure_26-37_and_45.pdf.			
California	CAL. CIV. PROC. CODE § 2017.010	CAL. CIV. PROC. CODE § 2017.020	Rejected	
	In 2017, the California Supreme Court overturned a trial court's denial of broad, early-stage discovery as the lower courts had relied on the proposed 2015 federal concept of proportionality to narrow the scope of discovery in the case. *Williams v. Sup. Court*, 398 P.3d 69 (Cal. 2017).			
	For further discussion, see *supra* Section III.A.4 and notes 262–65.			

468. Blank spaces indicate that information was unavailable.
469. * Includes Discovery Limitations.

Colorado	COLO. R. CIV. P. 26(b)(1)	COLO. R. CIV. P. 26(b)(2)	Adopted	Rule Amendment December 2015

Colorado incorporated the federal proportionality standard with some minor word changes. To some of the rulemakers, Colorado's incorporation of the 2015 federal proportionality standard reflected efforts to promote access to justice.

For further discussion, see *supra* Section III.A.2 and notes 227 & 236–37.

Connecticut	CONN. R. SUPER. CT. CIV. § 13-2		Status Quo	
Delaware	DEL. R. CIV. P. SUPER. CT. 26(b)(1)		Adopted	Rule Amendment August 2019

Delaware incorporated the federal proportionality standard with some minor word changes.

Florida	FLA. R. CIV. P. R. 1.280(b)	FLA. R. CIV. P. R. 1.280(d)	Status Quo	

Florida retains pre-2015 proportionality language that applies only to ESI. Florida's Civil Procedure Rules Committee, as demonstrated through their meeting minutes, considered, and presently put on hold the extension of proportionality beyond ESI and to all Florida litigation. *See* Civil Procedure Rules Committee, Meeting Agenda, 15 (Jan. 19, 2023); Jim Ash, *Supreme Court Workgroup Responds to Comments on its Proposals to Speed the Resolution of Civil Cases*, FLA. BAR NEWS (Sept. 22, 2022), https://www.floridabar.org/the-florida-bar-news/supreme-court-workgroup-responds-to-comments-on-its-proposals-to-speed-the-resolution-of-civil-cases/.

Georgia	GA. CODE ANN. § 9-11-26(b)(1)		Rejected	

In *General Motors, LLC v. Buchanan*, 874 S.E.2d 52 (Ga. 2022), the Georgia Supreme Court explicitly distinguished the Georgia discovery rules from the 2015 federal proportionality standard, clearing restraints from Georgia discovery rules to allow for broad discovery constrained only by relevance.

For further discussion, see *supra* Section III.A.4 and notes 257–60.

Hawai'i	HAW. R. CIV. P. 26(b)(1)	HAW. R. CIV. P. 26(b)(2)	Rejected	

For an in-depth case study and further discussion, see *supra* Section III.B.

Idaho	IDAHO R. CIV. P. 26(b)(1)(A)	IDAHO R. CIV. P. 26(b)(1)(B), (C)	Status Quo	
Illinois	ILL. SUP. CT. RULE 201(b)	ILL. SUP. CT. RULE 201(c)	Trailblazer (Pre-2015)	Rule Amendment July 2014

For further discussion, see *supra* Section III.A.1 and note 219.

Indiana	IND. R. TRIAL P. 26(b)*		Status Quo (except commercial courts)	

As of May 2023, the Supreme Court of Indiana has launched a civil case management pilot project utilizing a pathways approach for discovery, which mostly adopts the 2015 federal proportionality standard, except the "parties' relative access to relevant information" factor, in the scope of discovery rule. *In re Civ. Case Mgmt. Pathways Pilot Project*, 208 N.E.3d 1273, 1274 (Ind. 2023).

Iowa	IOWA R. CIV. P. 1.503	IOWA R. CIV. P. 1.503(8)	Status Quo	

The Iowa Supreme Court implemented an Expedited Civil Action Rule in 2015 that accelerates claims seeking $75,000 or less in damages. Despite incorporating the spirit of proportionality as a method for increasing access to state courts, the state judiciary chose not to formally adopt the 2015 federal proportionality standard into its civil discovery rules. *See generally* Kratky Doré, *supra* note 198.

Kansas	KAN. STAT. ANN. § 60-226(b)(1)	KAN. STAT. ANN. § 60-226(b)(2)	Adopted	Rule Amendment July 2017

Kansas incorporated the federal proportionality standard verbatim.

Kentucky	KY. R. CIV. P. 26.02		Status Quo	

Louisiana	LA. CODE. CIV. P. 1422		Status Quo	

Maine	ME. R. CIV. P. 26(b)	ME. R. CIV. P. 26(b)(6)	Status Quo	

The limitations to discovery apply only to ESI.

Maryland	MD. R. CIV. P. CIR. CT. 2-402(a)	MD. R. CIV. P. CIR. CT. 2-402(b)	Status Quo	

Maryland has a Standing Committee on Rules of Practice and Procedure. The Committee actively suggests recommendations (even for non-scope discovery rules) that mirror the federal amendments. In 2022, the Committee relied, in a piecemeal fashion, on the 2010, 2006, and 1980 FRCP amendments for rule crafting inspiration. *See* Standing Committee on Rules of Practice and Procedure, Notice of Proposed Rule Changes (July 11, 2022) (available at https://www.mdcourts.gov/sites/default/files/rules/reports/211threport.pdf).

Massachusetts	MASS. R. CIV. P. 26(b)(1)	MASS. R. CIV. P. 26(f)(4)	Status Quo	

Massachusetts considered whether to adopt the 2015 FRCP amendments but ultimately decided to take a unique "wait and see" approach as to the federal proportionality standard. For further discussion, see *supra* Section III.A.3 and notes 203, 239, & 243–45.

The limitations to discovery apply only to ESI.

Michigan	MICH. CT. R. 2.302(B)(1)	MICH. CT. R. 2.302(B)(6)	Adopted	Rule Amendment January 2020

Michigan incorporated the federal proportionality standard with some minor word changes.

Minnesota	MINN. R. CIV. P. 26.02(b)*		Adopted	Rule Amendment July 2018

Minnesota incorporated the federal proportionality standard verbatim.

Mississippi	MISS. R. CIV. P. 26(b)(1)	MISS. R. CIV. P. 26(b)(5)	Status Quo

Mississippi undertook a Rules of Civil Procedure Revision Project in 2015 to "conduct a comprehensive review" of the Mississippi rules on the heels of the 2015 FRCP amendments. Committee notes are not available, but comment letters from the public address potential changes including embracing the federal proportionality standard. *See* Andy Lowry, Letter (May 23, 2016), *available at* https://courts.ms.gov/research/rules/rulesofcivilprocedure/rulesofcivilprocedure.php.

The limitations to discovery apply only to ESI.

Missouri	MO. SUP. CT. R. 56.01(b)(1)	MO. SUP. CT. R. 56.01(b)(2)	Adopted	Rule Amendment July 2019

Missouri incorporated the federal proportionality standard with some minor word changes. Missouri also retained the prior scope of discovery language ("reasonably calculated to lead to the discovery of admissible evidence"). As part of the rulemaking process, there were some tensions between the Missouri State Judiciary and the Missouri State Legislature, which was detailed in McMillian, *supra* note 225. *See also supra* note 225.

Montana	MONT. R. CIV. P. 26(b)(1)	MONT. R. CIV. P. 26(b)(2)	Status Quo

Montana has an Advisory Commission on Rules of Civil and Appellate Procedure, but none of their records are currently accessible to the public. *See generally* Advisory Commission on Rules of Civil and Appellate Procedure, *available at* https://courts.mt.gov/Courts/boards/advisory.

Nebraska	NEB. SUP. CT. R. 6-326(b)(1)	Status Quo

The Nebraska Supreme Court formed a Civil Justice Reform Committee to analyze and assess the state civil justice system and propose improvements to make justice systems more innovative and cost-effective. *See* Civil Justice Reform Committee Named by Nebraska Supreme Court, (Feb. 19, 2019), *available at* https://supremecourt.nebraska.gov/civil-justice-reform-committee-named-nebraska-supreme-court.

Nevada	NEV. R. CIV. P. 26(b)(1)	NEV. R. CIV. P. 26(b)(2)	Adopted	Rule Amendment June 2019

Nevada incorporated the federal proportionality standard verbatim. The Nevada Rules of Civil Procedure are generally based upon the FRCP. *See* Mark Gibbons, Kristina Pickering, & Todd E. Reese, *Overview of the 2019 Amendments to the Nevada Rules of Civil Procedure*, NEV. LAW., June 2019, at 8.

New Hampshire	N.H. R. SUPER. CT. 21(b)		Status Quo
	New Hampshire has an Advisory Committee on Rules, but no public documents since 2015 indicate that a post-2015 update incorporating the federal proportionality standard has been considered. *See generally* Meeting Minutes – Advisory Committee on Rules (available at https://www.courts.nh.gov/resources/committees/advisory-committee-rules/meeting-minutes).		
New Jersey	N.J. CT. R. 4:10-2(a)	N.J. CT. R. 4:10-2(g)	Status Quo
	The New Jersey Civil Practice Committee has briefly considered the 2015 federal proportionality standard and has tabled any decision as to whether it should be incorporated into New Jersey's civil rules. *See* 2022 Report of the Supreme Court Civil Practice Committee, 216 (January 2022) (available at https://www.njcourts.gov/sites/default/files/sccr/reports/cpcreport22.pdf). The limitations to discovery apply only to ESI.		
New Mexico	N.M. R. CIV. P. DIST. CT. 1-026(b)(1)	N.M. R. CIV. P. DIST. CT. 1-026(b)(2)	Status Quo
	New Mexico has a Rules of Civil Procedure Committee, but no documents are currently accessible for public review.		
New York	N.Y. C.P.L.R. § 3101		Status Quo (except commercial courts that adopted for ESI only)
	New York has an Advisory Committee on Civil Practice. The federal proportionality standard was not mentioned in their 2023 report, and no other previous reports are currently accessible to the public. *See* Report of the Advisory Committee on Civil Practice (January 2023) (available at https://www.nycourts.gov/LegcyPDFS/IP/judiciaryslegislative/pdfs/CPLR%202023%20Final%20Report.pdf).		
North Carolina	N.C. GEN. STAT. § 1A-1 26(b)(1)	N.C. GEN. STAT. § 1A-1 26(b)(1a)	Status Quo (except business courts)
	North Carolina has a Chief Justice's Rules Advisory Commission that was officially established in 2019, but no meeting minutes have yet addressed the federal proportionality standard. *See generally* North Carolina Judicial Branch, Rules Advisory Commission Meeting Information (last visited Apr. 29, 2024) (available at https://www.nccourts.gov/commissions/chief-justices-rules-advisory-commission/rules-advisory-commission-meeting-information).		
North Dakota	N.D. R. CIV. P. 26(b)(1)(A)	N.D. R. CIV. P. 26(b)(1)(B)	Status Quo

Ohio	OHIO CIV. R. 26(b)(1)	OHIO CIV. R. 26(b)(6)	Adopted	Rule Amendment July 2020

The Ohio Civil Justice Task Force, the Ohio Supreme Court Commission on Rules of Practice and Procedure, the Ohio Supreme Court, and the Ohio Senate Judiciary Committee, through a slow and cautious rulemaking process over about five years, eventually adopted the 2015 federal proportionality standard.

For further discussion, see *supra* Section III.A.2 and notes 210, 221, 223, 232–33, 238, & 452. Ohio incorporated the federal proportionality standard verbatim.

Oklahoma	OKLA. STAT. TIT. 12 § 3226(B)(1)	OKLA. STAT. TIT. 12 § 3226(B)(2)	Adopted	Statute November 2017

Oklahoma incorporated the federal proportionality standard with some minor word changes. Oklahoma also retained the prior scope of discovery language ("reasonably calculated to lead to the discovery of admissible evidence"). *See supra* note 225.

Oregon	OR. R. CIV. P. 36(B)(1)		Status Quo

Oregon has historically taken a very different approach to rulemaking than the Federal standards. *See generally Survey of the Oregon Bench & Bar*, *supra* note 242.

For further discussion, see *supra* note 242.

Pennsylvania	231 PA. CODE § 4003.1		Status Quo

An explanatory note to rescinded § 4009 reinforces proportionality under Pennsylvania law as it applies to ESI. The scope of discovery in § 4003.1 retains the broader discovery standard of "reasonably calculated to lead to the discovery of admissible evidence" and does not contain any proportionality factors. 231 PA. CODE § 4009 (explanatory comment).

Rhode Island	R.I. SUPER. CT. R. CIV. P. 26(b)(1)*	R.I. SUPER. CT. R. CIV. P. 26(b)(6)	Status Quo	

Rule 26(b)(6) relates only to ESI.

South Carolina	S.C. R. CIV. P. 26(b)*		Status Quo

South Dakota	S.D. CODIFIED LAWS § 15-6-26(b)*		Status Quo

Tennessee	TENN. R. CIV. P. 26.02(1)*		Status Quo

Tennessee has amended other discovery rules (e.g., Rule 34 in 2019) since the 2015 amendments, notably not addressing FRCP 26. As of June 2023, the Tennessee Advisory Commission on the Rules of Practice and Procedure must open its meetings to the public following a constitutional challenge by a Tennessee journalist, overturning the blanket Administrative Office of the Courts' meeting closure policy. *See* Deborah Fisher, *Commission on Court Rules in Tennessee Opens Meetings to Public After Federal Court Order* (June 21, 2023), https://tcog.info/commission-on-tennessee-court-rules-opens-meetings-to-public-after-federal-court-order/).

Texas	TEX. R. CIV. P. 192.3(a)	TEX. R. CIV. P. 192.4	Status Quo (except court ruling applied it to ESI only)	

In *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017), Texas applied proportionality factors, similar to FRCP 26(b)(1), to an ESI dispute. Texas's scope of discovery rule retains the "reasonably calculated to lead to the discovery of admissible evidence" standard.

For further discussion, see *supra* Section III.A.4 and notes 246–50.

Utah	UTAH R. CIV. P. 26(b)(1)	UTAH R. CIV. P. 26(b)(3); 26(b)(4); 26(c)(5)(A)	Trailblazer (pre-2015)	Rule Amendment November 2011

For further discussion, see *supra* Section III.A.1 and notes 217–18.

Vermont	VT. R. CIV. P. 26(b)(1)	VT. R. CIV. P. 26(b)(2)	Adopted	Rule Amendment September 2017

Vermont adopted the 2015 federal proportionality standard verbatim, noting that it had not incorporated the pre-2015 proportionality factors at all until this amendment. *See* Order Promulgating Amendments of the Vermont Rules of Civil Procedure, VT. SUP. CT. (July 2017) (available at https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRCP1_26_34%28b%29_37%28f%29_55%28c%29-DiscoveryRules_0.pdf).

Virginia	VA. SUP. CT. R. 4:1(b)(1)*	Status Quo

Washington	WASH. SUPER. CT. CIV. R. 26(b)(1)*	Status Quo

The Washington Court Rules and Procedures Committee is calendared to review the state rules of civil procedure in the 2023-24 cycle. *See GR 9 – Supreme Court Rulemaking and Schedule for Review*, WASH. COURTS, https://www.courts.wa.gov/court_rules/?fa=court_rules.gr9summary (last visited Apr. 29, 2024).

West Virginia	W. VA. R. CIV. P. 26(b)(1)*	Rejected

West Virginia considered and rejected the 2015 federal proportionality standard as part of its rulemaking process, observing that proportionality principles are set forth in Rule 26(b)(2)(C).

For further discussion, see *supra* Section III.A.4 and notes 254–56. On January 31, 2024, the West Virginia Supreme Court of Appeals approved amendments to the West Virginia Rules of Civil Procedure, which will be effective as of January 1, 2025. Adoption of Amendment to the West Virgina Rules of Civil Procedure, No. 21-Rules-12, W. VA. JUDICIARY, 1, 67–68 (effective Jan. 1, 2025), https://www.courtswv.gov/sites/default/pubfilesmnt/2024-01/Rules%20of%20Civil%20Procedure%20-%20Amendments%20Effective%20January%201%202025_0.pdf.

Wisconsin	WIS. STAT. § 804.01(2)(a)*	Adopted	Legislative Action July 2018

Wisconsin incorporated the federal proportionality standard verbatim. Departing from standard practice, the Wisconsin legislature exercised its power to implement changes without consulting the Wisconsin Supreme Court or the Judicial Council, thereby circumventing the normal rulemaking process. *See* Billings, Gegios & Bialzik, *supra* note 231, at 12.

For further discussion, see *supra* Section III.A.2 and notes 231 & 234–35.

Wyoming	WYO. R. CIV. P. 26(b)(2)*	Adopted	Rule Amendment March 2017

Wyoming incorporated the federal proportionality standard verbatim.