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Bespoke Discovery

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Bespoke Discovery

*Jessica Erickson**

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INTRODUCTION

The U.S. legal system gives contracting parties significant freedom to customize the procedures that will govern their future

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disputes.¹ With forum selection clauses, parties can decide where they will litigate future disputes.² With fee-shifting provisions, they can choose who will pay for these suits.³ And with arbitration clauses, they can make upfront decisions to opt out of the traditional legal system altogether.⁴ Parties can also waive their right to appeal,⁵ their right to a jury trial,⁶ and their right to file a class action.⁷ Bespoke procedure, in other words, is commonplace in the United States.

Far less common, however, are bespoke *discovery* provisions. Potential litigants rarely agree to alter the scope of discovery prior to a dispute.⁸ Once a lawsuit is filed, the Federal Rules of Civil Procedure encourage parties to work together to develop a joint discovery plan,⁹

1. See, e.g., Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) (“[M]ini-codes of civil procedure are being created by courts, agencies, and a multitude of private providers. The aspiration for a trans-substantive procedural regime embedded in the Federal Rules has been supplanted by an array of contextualized processes.”); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 517 (2011) (describing the “widespread perception that customized procedure is an increasingly important feature of contracting practice among U.S. firms”).

2. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (upholding a forum selection clause on the back of a cruise ship ticket).

3. See Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 507 (2013) (stating that “courts are perfectly willing, in theory, to enforce contracts for attorney’s fees” but also noting that “they often find ways to avoid enforcement by strictly construing the agreement, finding that there is no prevailing party because no party won everything it asked for, or significantly reducing the amount of attorney’s fees”).

4. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (upholding an arbitration agreement in an employment agreement); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (enforcing an arbitration clause that prohibited class actions or any aggregation of claims in the arbitration).

5. See 2 AM. JUR. *Appeal and Error* § 204 (2010) (“Though there are a few cases to the contrary, the rule prevailing in the great majority of the jurisdictions is that an [appellate waiver] is valid and binding, and, when properly pleaded, will constitute a bar to proceedings taken in violation of the agreement.”).

6. See, e.g., *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (“Although the right of trial by jury in civil actions is protected by the Seventh Amendment to the Constitution, that right, like other constitutional rights, may be waived by prior written agreement of the parties.”); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 185 (“Parties may also waive their right to a jury trial by signing a pre-litigation contract with a waiver provision in it. However, these waivers are only enforced if they are knowing, voluntary, and intelligent.” (footnote omitted)); Jane Spencer, *Companies Ask People to Waive Right to Jury Trial*, WALL ST. J., <https://www.wsj.com/articles/SB109269232752592826> (last updated Aug. 17, 2004, 12:01 AM) [<https://perma.cc/QP6D-C6X6>].

7. See, e.g., *DIRECTV*, 136 S. Ct. at 471 (holding that the Federal Arbitration Act (“FAA”) does not permit states to prohibit class-arbitration waivers in arbitration agreements).

8. See, e.g., Erin O’Hara O’Connor et al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 166–67 (2012) (summarizing empirical evidence demonstrating that parties rarely contract around default discovery rules); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1872 (2015) (stating that “[t]he vast majority of contracts are silent” on the matter of discovery).

9. See, e.g., FED. R. CIV. P. 26(f) (requiring the attorneys of record in all civil cases requiring initial disclosure to confer and “attempt[] in good faith to agree on [a] proposed discovery plan” at

but parties rarely negotiate such agreements *ex ante*. Nor are bespoke discovery agreements common in arbitration.¹⁰ Even when parties agree to arbitrate their claim, they seldom negotiate the scope of their discovery rights once they get into arbitration. Scholars examining the empirical record have deemed bespoke discovery provisions so rare as to be nearly mythical.¹¹

The lack of bespoke discovery is surprising given the criticism so often directed at the discovery process. Parties complain that discovery is too expensive and that its costs are too often disproportionate to the amount at stake in litigation.¹² They also argue that parties can use broad discovery requests to force their opponents to settle.¹³ Indeed, a recent amendment to the Federal Rules of Civil Procedure sparked more than 2,300 comments to the Advisory Committee, many of which bemoaned the high costs of discovery in many cases.¹⁴

Although bespoke discovery could help contracting parties avoid these costs, there has been little scholarly examination into how parties

least twenty-one days before the pretrial conference with the judge); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 501 (2007) (“The idea of customization . . . is already well established within discovery.”).

10. See, e.g., O’Hara O’Connor et al., *supra* note 8, at 166–67; Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 57 (noting that “[o]nly a handful of credit card arbitration clauses” include provisions that limit discovery).

11. See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1109 (2011) (noting that “while the use of class-arbitration waivers has grown, the use of discovery limits remains surprisingly static”).

12. See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF CORPORATE COUNSEL 1 (2010), http://www.uscourts.gov/sites/default/files/iaals_general_counsel_survey.pdf [<https://perma.cc/2ZNU-XXDR>] (“Approximately nine out of ten respondents disagreed with the statement that ‘litigation costs are generally proportionate to the value of the case.’”); 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.”). Although the recent amendments to the federal rules make proportionality a more explicit part of discovery requests, corporate counsels have previously noted that litigating parties often ignore the stated rules. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra*, at 26 (reporting that “over 70% indicated that parties ‘overuse permitted discovery procedures (beyond what is necessary/appropriate for the particular case)’”).

13. Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 528 (2009):

[O]ur current world of high transaction costs enables the logic of frivolous litigation—a logic of extortion and brinksmanship. A frivolous suit is valueless absent a credible threat of harmful cost imposition from prosecution, and a determined plaintiff can make such a threat, thereby coercing a defendant to pay for the avoidance of greater financial harm.

(footnote omitted).

14. See *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002> (last visited Sept. 28, 2018) [<https://perma.cc/XK4B-F3KG>].

can—and should—use it. Several scholars have noted that contracting parties can likely alter their discovery rights in future litigation,¹⁵ while others have recommended litigation prenuptials in the commercial setting that include discovery.¹⁶ No scholar, however, has specifically examined the potential of bespoke discovery.

This Article aims to fill that gap by examining how bespoke discovery can help address wide-reaching concerns about the discovery process. As used here, bespoke discovery includes all *ex ante* agreements between two or more parties regarding how they will collect and exchange information in any future disputes between them. This definition is intentionally limited to *ex ante* agreements. While the Federal Rules of Civil Procedure encourage parties to negotiate over the scope of discovery once the litigation is filed,¹⁷ bespoke discovery is focused on agreements that parties reach *before* a dispute arises. In this way, bespoke discovery is similar to other dispute-resolution provisions, such as forum selection provisions or jury trial waivers, often included in commercial contracts.

Contracting parties can use bespoke discovery to address many of the complaints about the discovery process in both traditional litigation and arbitration. To address concerns that discovery is too expensive,¹⁸ parties can agree *ex ante* to limit the scope of discovery, place caps on the number of depositions or document requests, or enter into binding discovery budgets. Similarly, to address concerns that discovery costs are often too one sided, parties can agree to share the costs of discovery or require that discovery requests specifically identify

15. See, e.g., Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1346 (2012) (“The conventional wisdom repeated in treatises and commentaries is that parties have broad power to contract for discovery limits *ex ante*, but these claims rely on flimsy case law support.” (footnote omitted)); S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027, 1078 (2014):

Both the Third and the Seventh Circuits therefore appear to agree that parties may contractually agree to amend standard rules of procedure relating to a variety of issues, including discovery. This view is consistent with that taken by commentators who consider discovery to be one of the easiest practices to regulate by private procedural contract.

(footnote omitted).

16. See, e.g., Daniel B. Winslow & Alexandra Bedell-Healy, *Economical Litigation Agreements: The “Civil Litigation Prenup” Need, Basis, and Enforceability*, 11 PEPP. DISP. RESOL. L.J. 125, 138 (2010) (providing a model “Economical Litigation Agreement” that includes provisions related to discovery that parties can adopt at the start of their relationship).

17. See FED. R. CIV. P. 26(f)(2).

18. See, e.g., AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 16 (2009), http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf [https://perma.cc/2NU9-ZXY5] (showing survey of trial attorneys with large majority agreeing that electronic discovery is too expensive).

the documents at issue. In other circumstances, parties may want to require all discovery requests to be approved by a neutral third party, limit discovery to the exchange of documents, or even eliminate discovery altogether. In short, private ordering offers contracting parties a variety of ways to shape the discovery process to their particular needs.

These benefits notwithstanding, bespoke discovery is not a panacea for the problems in the litigation system. It is only possible where the parties have a preexisting relationship, and even then, sophisticated parties may still have trouble predicting their discovery needs in a dispute that has not yet arisen. These challenges are compounded for less sophisticated parties, who may not be in a position to bargain over detailed contractual terms or understand the implications of complex litigation clauses. Consumers clicking “I agree” on an online contract and employees presented with a take-it-or-leave-it contract as a condition of employment may not appreciate the costs of waiving their discovery rights should they later end up in litigation. In short, bespoke discovery can help address long-standing problems with the discovery process, but it can also exacerbate existing inequalities.

This Article proceeds as follows. Part I discusses why the rise of bespoke procedure has left the discovery process behind. Part II examines bespoke discovery in greater depth, describing the various modifications to default discovery rules that parties can include in their agreements, as well as possible legal limits on these modifications. Part III uses a more focused lens to explore the benefits and drawbacks of bespoke discovery for both sophisticated commercial parties and their less sophisticated counterparts.

I. DISCOVERY AND THE BESPOKE PROCEDURAL REVOLUTION

A. *The Rise of Bespoke Procedure*

The U.S. legal system is based on the idea that a single set of procedural rules will govern all civil disputes. Rule 1 of the Federal Rules of Civil Procedure states that the rules apply “in all civil actions and proceedings in the United States district courts,”¹⁹ and most states have similar rules.²⁰ Yet the reality has always been far more

19. FED. R. CIV. P. 1.

20. See, e.g., FLA. R. CIV. P. 1.010 (“These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply.”); N.Y. C.P.L.R. 101 (MCKINNEY 2018) (“The civil practice law and rules shall govern the

complicated. Many procedural rules are only default rules, allowing parties to opt out and craft their own procedures.²¹ Courts have frequently upheld these opt-outs, allowing parties to send their claims to arbitration,²² waive their right to a jury,²³ change how they will receive service of process,²⁴ agree not to appeal a decision against them,²⁵ and waive their right to file a class action.²⁶

Parties regularly take advantage of these opportunities. Empirical studies have found that contracting parties routinely agree to send future disputes to arbitration²⁷ or choose a specific court in which to litigate.²⁸ They often agree on whether a judge or jury will decide their dispute²⁹ as well as how they will allocate the costs of these

procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.”).

21. As explained *infra* Section II.B, the limits on parties' ability to craft their own procedures within the legal system are unclear, although scholars have tried to discern certain broad parameters.

22. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (noting the federal policy favoring arbitration).

23. See *CFTC v. Schor*, 478 U.S. 833, 848–49 (1986) (noting that “personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried” are subject to waiver); Moffitt, *supra* note 9, at 494 (“As a general matter, federal courts will enforce contractual waivers of jury rights, though they will construe the contracts narrowly.”).

24. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964) (stating that “it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether”).

25. See 2 AM. JUR. *Appeal and Error* § 204 (2010) (“Though there are a few cases to the contrary, the rule prevailing in the great majority of the jurisdictions is that an [appellate waiver] is valid and binding, and, when properly pleaded, will constitute a bar to proceedings taken in violation of the agreement.”).

26. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (holding that state laws invalidating class action waivers on unconscionability grounds are preempted by the FAA).

27. See, e.g., O'Hara O'Connor et al., *supra* note 8, at 161 tbl.1 (finding that 51.5 percent of CEO employment contracts include an arbitration clause); Rutledge & Drahozal, *supra* note 10, at 17–18 (finding that “95.1% of the dollar value of outstanding credit card loans in the sample was subject to credit card agreements with arbitration clauses”); Weidemaier, *supra* note 8, at 1919 (examining four hundred contracts entered into over a fifteen-year period by a range of U.S. and non-U.S. parties and finding that 48.2 percent included arbitration provisions).

28. See Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1981 (2006) (finding that fifty-three percent of corporate merger agreements specified a forum for litigation); Weidemaier, *supra* note 8, at 1917 (finding that nearly forty percent of sample contracts included a forum selection clause for either litigated or arbitrated claims).

29. See, e.g., Theodore Eisenberg & Geoffrey P. Miller, *Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts*, 4 J. EMPIRICAL LEGAL STUD. 539, 541 (2007) (finding that twenty percent of surveyed commercial contracts contained an explicit jury trial waiver); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 418 (finding over one thousand contracts per year in the EDGAR database that contained jury waivers, excluding those contracts with arbitration clauses).

disputes.³⁰ In short, it is now the rare contract that does not provide at least some level of detail about how future disputes between the parties will be decided.³¹

B. The Absence of Bespoke Discovery

Despite the fact that many forms of bespoke procedure are common in commercial contracts, parties almost never reach *ex ante* agreements about the rules governing discovery. One study, for example, found that in commercial agreements in the Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) database, there were only a handful of agreements that addressed discovery at all and only a single agreement in which the parties agreed to contractually limit discovery if they ended up in litigation.³² Bespoke discovery provisions are only slightly more common when the parties agree to arbitrate their disputes.³³ One study found that only 2.1 percent of credit card agreements that provided for arbitration addressed discovery rights in any way.³⁴ Another found that just six percent of CEO employment agreements addressed discovery.³⁵

To be fair, discovery is not the only type of procedure missing from these contracts. Parties frequently agree on *where* they will litigate and *who* will decide the dispute, but they rarely make *ex ante* agreements about *how* they will litigate.³⁶ Commercial contracts rarely address not only discovery but also pleading, joinder, and summary judgment.³⁷ The rise of bespoke procedure, in other words, has almost entirely missed most forms of pretrial practice, discovery included.

30. See, e.g., Hoffman, *supra* note 29, at 419 (“In the EDGAR database, terms shifting costs to the losing party in litigation are omnipresent.”); Weidemaier, *supra* note 8, at 1922 tbl.4 (finding that 23.9 percent of sample contracts included loser-pay provisions).

31. See, e.g., Weidemaier, *supra* note 8, at 1913 (finding that, in a study of contracts that were included in SEC filings between 2000 and 2012, “almost 90% . . . modify the background rules of litigation in some way” and “[i]f we add clauses that expand or limit remedies for breach, only 6.5% of contracts contain no modification at all, except for any choice of law clause”).

32. Hoffman, *supra* note 29, at 411–13.

33. See *infra* notes 55–60 and accompanying text for a discussion of why bespoke discovery might also be useful in arbitration.

34. Rutledge & Drahozal, *supra* note 10, at 39 tbl.7.

35. O’Hara O’Connor et al., *supra* note 8, at 166. *But see* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 104 tbl.9 (2008) (finding that approximately twenty-one percent of sampled franchise agreements addressed discovery in future disputes, although the study was limited to only twenty-eight agreements).

36. See, e.g., Hoffman, *supra* note 29, at 422 (finding that “not all bespoke procedure is equally popular”); Paulson, *supra* note 3, at 473 (“Parties rarely venture beyond a small list of familiar contractual modifications to procedure, including forum selection and choice of law clauses, jury waivers, and some damages limitations.”).

37. Weidemaier, *supra* note 8, at 1872 (“What contracts almost never do—in either arbitration or litigation—is dictate the particulars of pre-trial and trial practice. . . . The vast

Yet discovery is different than these other types of pretrial procedure because the discovery process is so often blamed for the ills of the litigation system. Few general counsel will bemoan the *Celotex* standard³⁸ or Rule 13(g)'s standard for crossclaims,³⁹ but they will regularly criticize the rules governing discovery.⁴⁰ They will also join together to lobby Congress,⁴¹ attend conferences with influential judges and policymakers,⁴² and write angry letters to the Rules Committee demanding changes to the discovery rules.⁴³ Indeed, when the Advisory Committee for the Federal Rules of Civil Procedure was considering amendments to the discovery rules in 2013 and 2014, it received more than 2,300 comments,⁴⁴ more than almost any proposed rules amendment in the past.⁴⁵ Given this broad dissatisfaction with the discovery process, it is surprising that parties do not simply opt out of the default rules, at least where they have the chance.⁴⁶

majority of contracts are silent on matters of pleading, discovery, evidence, the order and burden of proof, and related topics.”).

38. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (holding summary judgment appropriate when the nonmovant fails to establish an element necessary to its claim).

39. FED. R. CIV. P. 13(g) (allowing a crossclaim that “arises out of the transaction or occurrence” at issue in the original claim or a counterclaim).

40. See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 12, at 2 (finding that respondents frequently advocated for reducing “scorched earth” discovery and limiting the number of depositions and interrogatories).

41. Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 243 (1999) (arguing that the groups lobbying in favor of the 1998 discovery amendments primarily included “defendants, especially defendants in product liability, securities, and antitrust cases”).

42. 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, 1140–43 (2015) (describing the attendees at the conference at Duke University that preceded the 2015 amendments to the federal discovery rules).

43. See Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 756 (2016) (stating that the Rules Committee is operating under the influence of “a decades-long anti-litigation lobbying effort” by corporate America).

44. See *Proposed Amendments to the Federal Rules of Civil Procedure*, *supra* note 14 (showing 2,351 comments received on the proposed amendments).

45. Proposed amendments to the federal rules of practice and procedure (and comments thereto) have been published on regulations.gov since the August 2013–14 public comment period. *Rules Comments*, U.S. CTS., <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/rules-comments> (last visited Sept. 30, 2018) [<https://perma.cc/AS5H-DR4Y>]. Amendment proposals before that period, available back to the 2003–04 comment period, are published on the website of the U.S. Courts. *Id.* Before 2013–14, the civil rules public comment period that received the most comments was the 2004–05 period, with 253 comments. See *id.* (select “Civil” and the relevant year in the respective drop-down menus). Since 2013–14, the public comment period with the most comments was the 2013–14 period, with 2,351 comments. See *Proposed Amendments to the Federal Rules of Civil Procedure*, *supra* note 14.

46. Customized procedure only applies in certain types of disputes. The parties in a tort case arising out of a car accident, for example, would typically not be able to negotiate the rules that will govern their dispute *ex ante* because they do not have a preexisting relationship. In many

In theory, the parties can enter into agreements to change these default rules once a case is filed. Indeed, the Federal Rules of Civil Procedure expect parties to confer and agree on the scope and mechanics of discovery.⁴⁷ They also envision that judges will play an active role in managing parties' discovery disputes.⁴⁸ This reliance on ad hoc development of discovery procedures in individual cases is understandable given the transsubstantive nature of procedural rules. The discovery process presents such different challenges across different types of cases that it is next to impossible for a single set of rules to address all of these problems. Moreover, many cases do not involve discovery problems, which makes transsubstantive limits inappropriate. The Federal Judicial Center has found, for example, that the median discovery costs for plaintiffs are \$15,000, while the median discovery costs for defendants are \$20,000—hardly huge sums that deserve widespread public attention.⁴⁹ Some cases involve far more discovery and pose greater challenges, but the problems are far from universal. The rules therefore establish broad principles, leaving ample room for case-specific decisions and oversight once litigation is filed.

In practice, however, it is difficult for parties already engaged in litigation to agree on discovery limits. Once a case is underway, discovery is often a zero-sum proposition. The parties know who needs broad discovery to prove their claims and who is likely to shoulder the bulk of the costs. This knowledge creates strategic advantages that the parties are unlikely to surrender.⁵⁰ Similarly, it is difficult for judges to rein in excessive discovery requests. As Judge Easterbrook has noted, judges inevitably know less about the dispute than the parties, and they have no simple way of determining whether a given discovery request

cases, however, the parties have a relationship before the dispute arises and thus an opportunity to negotiate the terms that will govern any later disputes.

47. See FED. R. CIV. P. 26(f) (requiring the parties to confer “as soon as practicable” to, among other things, “attempt[] in good faith to agree on [a] proposed discovery plan”).

48. See FED. R. CIV. P. 16(c)(2)(F) (providing that, at the pretrial conference, the judge may take appropriate action to control and schedule discovery).

49. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (Oct. 2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/JP7V-BTJ4>] (concluding that “the median cost, including attorney fees, was \$15,000 for plaintiffs and \$20,000 for defendants”).

50. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 899–900 (2009) (“Serious litigation problems should not be left to trial judge discretion as much as they are today. Judges face information and other constraints that impair their ability to manage optimally, especially in the highly strategic environment of litigation.”); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1964 (2007) (arguing that “discretionary control over discovery invites parties to contest discovery matters vigorously, which compounds litigation costs and creates opportunities for strategic abuse”).

will turn up relevant information.⁵¹ He states that, as a result, “[t]he portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow.”⁵² In short, the legal system trusts judges and parties to keep discovery in check once the litigation is filed, but this trust may well be misplaced.

This reality compounds the mystery of why contracting parties have not taken greater advantage of *ex ante* discovery agreements. If judges’ and parties’ future selves cannot prevent discovery problems, one would think parties would be eager to engage in self-help by including bespoke discovery rules in their agreements. The next Section addresses why *ex ante* private ordering is nevertheless so rare in this area.

C. Explaining Bespoke Discovery’s Absence

Scholars have developed a number of theories to explain why commercial contracts so rarely include bespoke discovery provisions. Perhaps parties are hesitant to limit their discovery rights before they know the specifics of the dispute. Or perhaps they do not need to craft custom discovery provisions because they can avoid high discovery costs by sending their disputes to arbitration. This Section examines these conventional explanations, describing why they are unlikely to justify the absence of bespoke discovery provisions. It then develops a new theory that considers both how contractual innovation occurs in commercial contracts as well as the incentives of lawyers to include bespoke discovery in the contracts that they draft.

1. Conventional Theories

There are several possible explanations for why parties do not adopt bespoke discovery provisions in their agreements.⁵³ The first

51. See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) (emphasizing that the “judicial officer always knows less than the parties” and “cannot[] know the expected productivity of a given request”); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007):

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.

(citation omitted) (citing Easterbrook, *supra*, at 638).

52. See Easterbrook, *supra* note 51, at 638.

53. A fourth possible explanation, raised briefly in the literature, is that parties do not want to signal to their counterparties that they are litigious or create fear that either party may not perform their end of the bargain. As others have noted, however, this explanation ignores the fact

possibility is that it is simply too difficult for parties to predict what discovery will be necessary in future disputes. *Ex ante*, the parties can agree on where they will litigate and who will decide their dispute, even if they do not know the exact nature of their claims. It is much more difficult, however, to predict the types of documents that will be necessary to support particular claims or defenses that have not yet arisen. Nor can parties easily predict whether they will need one deposition or a dozen. As a result, until the parties know the exact nature of the dispute as well as their specific discovery needs, they may be reluctant to limit their future litigation rights.

Yet contracting parties precommit themselves all the time, especially in business and commercial dealings. Contract negotiations are all about agreeing to future actions in the face of imperfect information. Parties, for example, agree to sell oil at a set price even though they recognize that the price might rise, or agree to pay a new hire a set salary before knowing how the employee will perform. Parties even routinely agree to more limited rights within the legal system. Arbitration, for example, has more limited discovery rights than the traditional legal system.⁵⁴ When parties opt to send their claims to arbitration, parties waive the broad discovery rights to which they would otherwise be entitled, even though it might later turn out that broad discovery would be in their interest. The turn to arbitration demonstrates that parties do limit their discovery rights indirectly by opting to arbitrate their disputes, rather than directly through the use of bespoke discovery provisions. In short, the lack of bespoke discovery provisions cannot reflect an unwillingness by contracting parties to tie their own hands.

The limited discovery rights in arbitration, however, lead to another possible explanation for the rarity of bespoke discovery. Perhaps parties do not need bespoke discovery because they solve the problems associated with traditional discovery by committing to arbitrate their claims.⁵⁵ Arbitration has traditionally been viewed as quicker and cheaper than traditional litigation in large part because

that parties routinely contract for other types of bespoke procedure, such as forum selection or fee shifting. See Weidemaier, *supra* note 8, at 1873–74. As a result, it seems unlikely that parties would bargain for these protections but stop shy of bespoke discovery out of fear of the signals it might send to the parties on the other side of the deal.

54. See, e.g., Drahozal & Rutledge, *supra* note 11, at 1117 (stating that “reduced discovery is often cited as among the more appealing features of arbitration”).

55. Weidemaier, *supra* note 8, at 1873 (stating that one theory involving bespoke procedure is that “parties can capture many of the benefits of customized procedure by using forum selection and arbitration clauses to allocate disputes to their preferred forum(s)”).

discovery rights in arbitration are often much more limited.⁵⁶ Under this reasoning, rather than designing new discovery rules from scratch, parties simply choose a different venue to litigate their claims that comes along with a new set of default discovery rules.⁵⁷

Yet limited discovery in arbitration is not a sure thing either. It is true that the scope of discovery is generally more limited in arbitration,⁵⁸ but this has started to change. Indeed, the New York State Bar recently stated that “there has been a trend to inject into arbitration expensive elements that had traditionally been reserved for litigation—interrogatories; requests to admit; dispositive motions; lengthy depositions; and massive requests for documents, including electronic data.”⁵⁹ Parties now bemoan the fact that discovery in arbitration has “spiraled out of control,” as arbitrators make ad hoc decisions about how much discovery should occur in many cases.⁶⁰ In general, parties are entitled to less discovery in arbitration, but it is hardly a sure bet.⁶¹ As a result, agreements to arbitrate any future claims do not eliminate the problems associated with discovery.

A final possibility is that it is just too hard to craft bespoke discovery rules. Most customized procedure is relatively simple—the parties agree that they will litigate in New York, for example, or that

56. Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 142 (noting the argument that “arbitration is generally faster, cheaper, and more efficient than its judicial counterpart”); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in HOW ADR WORKS 915, 926 (Norman Brand ed., 2002) (“The greatest strength of arbitration is that the average person can afford it.”).

57. See, e.g., Bone, *supra* note 15, at 1346–47 (“Perhaps the availability of arbitration explains the paucity of cases involving *ex ante* agreements: contracting parties might just switch to arbitration when they are concerned about excessive or abusive discovery in court.”).

58. See, e.g., *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 22 (Oct. 1, 2013), <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf> [<https://perma.cc/2SEB-W92X>] (stating that the arbitrator may require the parties to exchange documents and use his or her discretion to “conduct the proceedings with a view to expediting the resolution of the dispute”); *JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases*, JAMS 4 (Jan. 6, 2010), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf [<https://perma.cc/DXF7-FM28>] [hereinafter *Arbitration Protocols*] (providing that discovery in arbitration “should be limited to documents that are directly relevant to significant issues in the case or to the case’s outcome,” along with other specified limits).

59. N.Y. STATE BAR ASS'N, *ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES 2* (2009), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26861> [<https://perma.cc/C87Q-QC5H>].

60. *Id.*

61. Nor is arbitration necessarily faster than litigation. See Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POLY 579, 585 (2007) (noting that the average time to resolve a case through arbitration is only slightly shorter than the median time to resolve a case through the litigation system).

they will not have a jury. Such terms are not hard to reduce to writing or explain to a client. It is more difficult to craft provisions that create enforceable limits on the scope of discovery. How can parties agree in their contract that they will get some discovery but not too much? Parties may therefore avoid private ordering in discovery because they (or their attorneys) may not know how to draft contractual provisions that will capture the nuances of a future discovery process.

That said, drafting bespoke discovery clauses would hardly be impossible. Parties can set hard, or even presumptive, limits on the number of depositions or interrogatories. Or they can prohibit any discovery before a decision on any 12(b) motion or agree to share the costs of discovery pursuant to a litigation budget established at the start of the case. Alternatively, they can adopt another set of discovery rules, lock, stock, and barrel, so they would not have to draft their private procedural code from scratch, simply trading one set of default procedures for another. In short, contracting for amended discovery rights is difficult, but motivated parties could certainly do it, especially if they are aided by sophisticated counsel.

2. A Theory of Contractual Innovation

Pulling these points together, it is possible for parties to agree to bespoke discovery in their contracts. There would be challenges, as there always are when new terms are added to contracts, but these challenges are not insurmountable. Additionally, as discussed further below, bespoke discovery offers several advantages over the default rules, at least for some parties in some situations. What, then, explains the lack of bespoke discovery? The most likely explanation is the difficulty of contractual innovation combined with market dynamics. Bespoke discovery is a form of contract innovation that simply has not happened yet, partly because such innovation may not be good for lawyers.

Contract theory provides that new contractual terms follow a counterintuitive trajectory. Generally speaking, new terms do not develop gradually over time, with new companies slowly but consistently adopting them. Instead, as several scholars have demonstrated, contract terms are best seen as products subject to familiar cycles of innovation.⁶² These cycles result from “shocks”—or

62. See, e.g., Stephen J. Choi et al., *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 7 (2013) (stressing that when contracting parties disregard a standard and utilize a new form contract, they “take the risk that courts will interpret their terms in an unpredictable way,” leading to a prevalence of the “innovation-to-standardization cycle”); Hoffman, *supra* note 29, at 425 (arguing that “as it turns out, the more common pattern is for the market as a whole to shift

changes in legal interpretations of terms or technological advances.⁶³ Following these shocks, the market as a whole shifts relatively quickly to a new term or set of terms after a brief period of experimentation and development. In other words, contract terms do not change slowly; they change seismically.⁶⁴

In the world of discovery, there has not been a shock to the legal market that would prompt such a seismic shift. The challenges associated with discovery have developed over time without a single event to prompt sweeping change. Discovery is expensive and unpredictable, but it has been that way for a long time. The rise of e-discovery may be a long-term shock to the legal system, but the initial response was to reform the formal rules and send more cases to arbitration. The recognition that these responses have not solved all of the underlying problems has come more slowly, and the legal system now appears to be in a period in which extensive electronic discovery is seen as inevitable rather than as a recent shock to the system.

Moreover, the drafters of commercial contracts (i.e., corporate lawyers) face strong disincentives to include bespoke discovery provisions in their contracts. Law firms benefit significantly from broad discovery. A law firm that convinced its clients to adopt contractual limitations on discovery might later find that it has inadvertently slashed the profits of its litigation department. As a result, the legal market may not want significant contractual innovation in this area.

Additionally, lawyers may rationally be risk averse when it comes to bespoke discovery. Many contractual terms come from the parties themselves. Lawyers turn their clients' handshake agreements into enforceable deals, but the clients themselves decide on the important terms and bear the risk that these terms might not turn out well. By contrast, bespoke discovery terms would likely come from

rather quickly to a new term or set of terms after a period of experimentation and innovation in different possibilities").

63. Professors Choi, Gulati, and Posner examined the sovereign bond market and found that contractual innovation in this market followed a similar pattern as technology innovation. Prior to the innovation, existing terms are sticky and rarely change. *See* Choi et al., *supra* note 62, at 18–20. Following a shock to the market (the authors describe three such shocks to the sovereign bond market between 1995 and 2001), more marginal players experiment with new terms. *See id.* at 17–18. This period of experimentation lasts until more established market players decide that a shift in the contractual standard is inevitable. *See id.* at 21–23. At this point, the more established players start to develop their own versions of the new standard until one is adopted more widely. *See id.* at 23–27. Other scholars have observed similar patterns in the venture capital industry. *See* John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 155 (2014) (pinpointing the rise of cloud computing as the shock to the market, resulting in experimentation of new contractual terms by market players).

64. Hoffman, *supra* note 29, at 425.

lawyers because they involve legal issues outside of their clients' expertise.

Lawyers have often been the drivers on other types of common bespoke procedural terms. For example, lawyers frequently include choice-of-law provisions or arbitration clauses in their clients' contracts. Yet lawyers may be protected from client backlash on these types of clauses because it is more difficult to know in retrospect whether these clauses were a good or bad idea. Take, for example, a contractual provision in which the parties agree to send future disputes to arbitration or agree that these disputes will be governed by New York law. Counterfactuals with forum selection or choice-of-law are inherently difficult, which makes it tougher for a client to second-guess their lawyers after the fact. A recommendation to limit discovery is riskier. If a dispute later arises in which the client cannot obtain the documents they need as a result of these limitations, the client could easily blame the lawyer. On the whole, it might make financial sense for corporations to limit their discovery rights, but in any given case, this gamble might backfire, creating a riskier choice for a first mover—or the lawyer who suggests that their client be a first mover.

In short, that bespoke discovery might be a good idea does not mean that parties will necessarily include it in their contracts. Contractual innovation often requires a precipitating event, and even then, the drafting parties need the right incentives to include the new provisions in their contracts. Bespoke discovery has not yet had its moment in the sun, but in discrete areas of law, corporations may have the necessary incentives to experiment with bespoke discovery.⁶⁵ This does not mean that corporations in these areas will necessarily adopt bespoke discovery. After all, contractual innovation is never a sure thing. Nonetheless, once contracting parties recognize that bespoke discovery is a possibility, they may be willing to consider it.

II. UNDERSTANDING BESPOKE DISCOVERY

Bespoke discovery has promise, but as with so many things, the devil is in the details. This Part first explores the different types of bespoke discovery provisions that parties might include in their contracts. The discussion then turns to whether parties are permitted to draft their own discovery rules in the traditional legal system or

65. For example, corporate boards are starting to experiment with bespoke procedure included in bylaws or charters that would govern shareholder litigation. *See, e.g.,* Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 487 (2016) (stating that “provisions that control the procedure in intracorporate litigation have begun to work their way into corporations’ organizational documents”).

arbitration. As we will see, although there is little clear guidance on the use of bespoke discovery, the few available cases provide reason to be optimistic.

A. Types of Bespoke Discovery

Bespoke discovery includes all *ex ante* agreements between two or more parties regarding how they will collect and exchange information in any future dispute between them. This broad definition, however, does not set out the full panoply of ways in which contracting parties can tie their own hands during the discovery process. Nor do the default rules of most courts or arbitration bodies list the ways in which the rules can be changed. This Section fills that gap, describing several different types of bespoke discovery provisions that parties might want to use in their contracts. Parties can pick and choose among these types of provisions, adopting the ones that best fit their particular circumstances.

1. Scope

First, parties can agree in their contracts to change the default scope of discovery. Under Federal Rule of Civil Procedure 26(b)(1), parties may obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”⁶⁶ This rule creates a fairly broad entitlement to discovery material in the possession of an opposing party.

Parties, however, may be able to contract around this standard, creating different rules regarding the scope of discovery in their future disputes. One option is for parties to permit an even broader scope of discovery than currently allowed under the Federal Rules of Civil Procedure. For example, parties could adopt the prior standard from the federal rules, which allowed parties to obtain any nonprivileged material that is relevant to the “subject matter of the action.”⁶⁷ Although the Advisory Committee has noted that the dividing line between the old standard and the current standard “cannot be defined with precision,”⁶⁸ the old standard was more permissive, allowing parties to obtain discovery if it related broadly to the subject matter of the litigation rather than the current rule’s narrower focus on the discovery related to “any party’s claim or defense.”⁶⁹ Parties could also

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

67. FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment.

68. *Id.*

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

eliminate the proportionality requirement under the current rules, allowing discovery even if a court might find that the request is not proportional to the interests and amount at stake in the litigation.

More commonly, however, parties would likely limit the scope of discovery to control the scope and cost of the litigation. The discovery rules adopted by various arbitration organizations illustrate alternative ways to define the scope of discovery. These rules suggest at least three different approaches to determining the scope of discovery.

First, the rules can allow parties to obtain a narrower, but still flexible, set of documents. For example, the rules can provide that the scope of permissible discovery shall be limited to information and documents that are both “relevant *and material* to the outcome of disputed issues.”⁷⁰ This standard, which comes from the American Arbitration Association,⁷¹ does not allow the parties to obtain all documents relevant to the claims or defenses in the case; instead, the parties must establish that the requested documents are also material to the dispute. Other arbitration bodies use similar standards, requiring, for instance, that discovery requests be “limited to documents that are directly relevant to significant issues in the case or to the case’s outcome”⁷² or “relevant to the claims and defenses at issue and . . . necessary for the fair resolution of a claim.”⁷³

Second, bespoke discovery provisions can limit discovery, either categorically or presumptively, to a certain list of documents.⁷⁴ For example, the Financial Industry Regulatory Authority (“FINRA”) provides a list of documents that are presumptively discoverable in

70. AM. ARB. ASS’N, *supra* note 58, at 19 (emphasis added); see also *International Dispute Resolution Procedures*, INT’L CTR. FOR DISP. RESOL. 25 (June 1, 2014), https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf [<https://perma.cc/K5YT-GK9Q>] (“The tribunal may, upon application, require a party to make available to another party documents in that party’s possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case.”).

71. AM. ARB. ASS’N, *supra* note 58, at 19.

72. *Arbitration Protocols*, *supra* note 58, at 4.

73. *Rules of Procedure for Arbitration*, AM. HEALTH LAWYERS ASS’N 16, <https://www.healthlawyers.org/dr/Documents/Arbitration%20Rules-Old/April%207,%202014.pdf> (last visited Sept. 29, 2018) [<https://perma.cc/W7SE-JGPH>]; see also *Arbitration Rules*, INT’L CHAMBER COM. (Mar. 1, 2017), <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [<https://perma.cc/AWD6-V99A>] (emphasizing case management techniques that limit discovery requests to “documents or categories of documents that are relevant and material to the outcome of the case”); *JAMS Engineering and Construction Arbitration Rules & Procedures for Expedited Arbitration*, JAMS 18 (Feb. 2015), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_construction_expedited_rules-2015.pdf [<https://perma.cc/Z7R7-SWV3>] (limiting discovery requests to those that are “focused on the material issues in dispute and as narrow as reasonably possible”).

74. Similarly, bespoke discovery provisions can rule out certain categories of documents, prohibiting, for example, the parties from having to turn over confidential information, such as business dealings with other companies, select financial information, or customer accounts.

arbitration proceedings between broker-dealers and their customers.⁷⁵ While an arbitrator in a given proceeding can order additional discovery, the FINRA list serves as a guide to help limit the scope of discovery.⁷⁶ This approach is best suited for situations in which the parties can predict the general type of dispute that is likely to arise.

Finally, parties can limit discovery to documents specifically identified and requested by the opposing party, a model that is fairly common in arbitration and in other countries.⁷⁷ The norm in U.S. civil litigation is for the parties to serve broad discovery requests that then put the burden on their opponent to determine which documents are responsive. In contrast, the more typical approach in arbitration and outside of the United States requires the parties to identify the specific documents that they need to support their claims. For example, the International Bar Association provides that all requests for production include “a description of each requested Document sufficient to identify it” or “a description in sufficient detail . . . of a narrow and specific requested category of Documents that are reasonably believed to exist.”⁷⁸ The requesting party must also provide a statement “as to how the Documents requested are relevant to the case and material to its outcome.”⁷⁹

As with nearly all types of discovery limits, this approach is not suitable in all types of cases. Most notably, it would not work in cases in which the opposing party does not know where the crucial information lies. For example, if one party needs access to the other side’s emails to prove their case, it is unlikely that the party will know what specific emails they need, at least without prior access to their opponent’s documents or network. Accordingly, this approach works best in cases where the parties’ relationship is more discrete and the nature of any future dispute is relatively easy to predict.

75. *Discovery Guide*, FINRA 7–17 (Dec. 2, 2013), <https://www.finra.org/sites/default/files/ArbMed/p394527.pdf> [<https://perma.cc/HV6B-RF37>] (providing for the types of documents to be produced during arbitration discovery).

76. *See id.* at 1 (“While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can [] order the production of documents not provided for by the Lists . . .”).

77. *See, e.g.*, Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 6 (2001) (“[N]o other country in the world has any system of discovery approaching that provided for in the Federal Rules of Civil Procedure.”).

78. *IBA Rules on the Taking of Evidence in International Arbitration*, INT’L B. ASS’N 7 (May 29, 2010), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [<https://perma.cc/U35R-RQXG>] (follow “Rules on the Taking of Evidence in International Arbitration (2010)” hyperlink; then select “English” in drop-down menu).

79. *Id.*

Each of the above options assumes that the contracting parties want to allow discovery in any future disputes, albeit with different parameters than the default discovery rules. It is possible, however, that some contracting parties may want to limit parties to the documents and other information already in their possession. In other words, parties might want the scope of discovery to be a null set, at least when it comes to the exchange of documents. As extreme as this option sounds, it does have precedent in the world of arbitration. The discovery provisions in the McCammon Group's arbitration rules, for example, provide that "[n]o discovery shall be required except by the agreement of the Parties or by authority of governing law."⁸⁰ This option is expressly prohibited by other arbitration organizations and may be impermissible in traditional litigation under the Federal Rules of Civil Procedure,⁸¹ but it illustrates the wide array of theoretically possible options in altering the default scope of discovery.

2. Authorization to Obtain Discovery

Parties can also agree that they are only entitled to discovery if their discovery request is specifically approved by a judge or arbitrator.⁸² In a typical civil case, parties conduct discovery on their own, only involving the court if they cannot resolve a particular dispute.⁸³ This approach gives the parties more leeway to push the boundaries and serve more expansive discovery requests because the burden is on their opponent to get the court involved.

80. *Agreement to Arbitrate*, MCCAMMON GRP. 4, <https://www.mccammongroup.com/wp-content/uploads/2016/09/TMG-Agreement-to-Arbitrate-Auto-Fill-April-2018.pdf> (last updated Apr. 10, 2018) [<https://perma.cc/YNP4-KFAA>] (allowing discovery in certain limited situations).

81. *See, e.g., JAMS Policy on Consumer Arbitrations Pursuant to Pre-dispute Clauses Minimum Standards of Procedural Fairness*, JAMS 4 (July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf [<https://perma.cc/2T6S-Z8FK>] [hereinafter *JAMS Policy on Consumer Arbitrations*] ("The arbitration provision must allow for the discovery or exchange of non-privileged information relevant to the dispute."); *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS 3 (July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Std-2009.pdf [<https://perma.cc/QKB3-6EQ5>] (providing that JAMS will only administer mandatory arbitration in employment cases if, among other requirements, the procedure provides for "an exchange of core information prior to the arbitration").

82. As discussed below, this type of provision is more likely to be permissible in arbitration than a court proceeding because it requires the arbitrator or judge to expend greater effort than in a typical case. In arbitration, this is unlikely to be problematic because the parties pay the arbitrator by the hour and it is more common for the parties to set their own procedural rules. In a judicial proceeding, however, the parties do not pay for the judge's time, and the judge may not agree to a different procedure that requires her to expend far more time and effort on the litigation.

83. *See Oscar G. Chase, American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 292–93 (2002) ("American rules of procedure allow the attorneys to pursue the discovery of evidence outside the courtroom and yet be backed by the authority of the court in demanding the cooperation of opponents and witnesses.").

In arbitration, however, the arbitrator is often far more involved in the discovery process, approving each individual request for production of documents. For example, the International Arbitration Association provides that “the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.”⁸⁴ Similarly, in consumer arbitrations, the American Arbitration Association provides that “the arbitrator may direct . . . specific documents and other information to be shared between the consumer and business.”⁸⁵ Parties that prefer this standard but want to keep their cases in the traditional legal system could bring arbitration’s discovery rules into the courtroom by agreeing that all discovery requests be approved by a neutral third party before the other side has to respond.⁸⁶

Discovery under such rules is likely to be narrower because parties would not be able to obtain discovery without first making the case to the arbitrator that the specific discovery they have requested is appropriate. As a result, parties would have a greater incentive to police themselves to avoid appearing unreasonable. This approach makes it more difficult for the parties to serve sweeping discovery requests because requesting parties would know that requests will be reviewed by a third party.

As a more drastic alternative, the parties could even agree to cede control over discovery entirely to a third party, such as an arbitrator or hired discovery expert. In many other countries, it is commonplace for the judge to control the discovery process, deciding what specific documents and other materials are relevant to the parties’ claims and defenses.⁸⁷ While it is unlikely that judges in the United

84. *Arbitration Rules*, INT’L ARB. ASS’N 15 (Apr. 1, 2006), <http://i-a-a.ch/rules06.pdf> [<https://perma.cc/59ET-4XVL>]; see also *AAA Dispute Resolution Board Hearing Rules and Procedures*, AM. ARB. ASS’N 4 (Dec. 1, 2000), <https://www.adr.org/sites/default/files/AAA%20Dispute%20Resolution%20Board%20Hearing%20Rules%20Procedures.pdf> [<https://perma.cc/4C7D-M6X2>] (“The DRB may require the parties to produce documents at or before any hearing.”); AM. HEALTH LAWYERS ASS’N, *supra* note 73, at 16 (“To promote speed and efficiency, the arbitrator, in his or her discretion, should permit discovery that is relevant to the claims and defenses at issue and is necessary for the fair resolution of a claim.”).

85. *Consumer Arbitration Rules*, AM. ARB. ASS’N 20 (Sept. 1, 2014), <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/BF24-B3MW>].

86. Parties would likely have to pay a neutral third party to perform this oversight role. As discussed below, parties likely have broad power to amend discovery rules in their cases, but this does not mean that they can conscript the judge into a new role, especially if this new role is as time consuming as reviewing and approving every discovery request. See, e.g., Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 4 (2014) (stating that “there has always been unease over how much control parties should have”).

87. See, e.g., George Shepherd, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465, 499 (2016) (arguing that the United

States would agree to take such an involved role in litigation, parties could hire a third party to play this role instead. This approach would still make discovery available to the parties but would reduce their ability to unilaterally expand the scope of the discovery process.

3. Types

Parties can also agree on the permissible types of discovery. Under the Federal Rules of Civil Procedure, parties can use a variety of discovery tools, including mandatory disclosures, depositions, requests for production of documents, interrogatories, requests for admissions, and (at least in a subset of cases) requests for physical and mental examinations. In their *ex ante* agreements, however, parties could agree to forego some of these tools or even limit themselves to only one tool. For example, the parties could agree that discovery will be limited to the exchange of documents and will not include other types of discovery, such as depositions or interrogatories. Or they could agree to go without depositions while still permitting other tools. These limits are fairly common in arbitration,⁸⁸ and it is easy to imagine parties wanting to bring these limits into the courtroom.

Parties can also agree to more nuanced limits on discovery. For example, they can agree that they will not restore backup tapes or erased, fragmented, or damaged data.⁸⁹ They can agree that they will use technological means to review e-discovery, such as predictive coding, rather than investing in far more expensive attorney reviewers.⁹⁰ They can also agree that they will not be entitled to information from third parties or their own corporate parents or subsidiaries. Finally, they can agree that they will only preserve documents from certain custodians within their own companies. Each

States should model discovery reforms on the systems in Britain, Europe, or Japan, in which “litigants may sometimes obtain limited discovery after convincing a judge of exceptional need”).

88. See, e.g., AM. ARB. ASS'N, *supra* note 85, at 20 (“No other exchange of information beyond [limited production of documents] is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.”); INT’L CTR. FOR DISP. RESOL., *supra* note 70, at 26 (“Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.”); JAMS, *supra* note 73, at 18 (“Depositions will not be taken except upon a showing of exceptional need for same and with the approval of the Arbitrator.”).

89. See, e.g., *Arbitration Protocols*, *supra* note 58, at 5 (providing that, “[a]bsent a showing of compelling need,” parties do not need to produce metadata or documents from backup servers, tapes, or other media not used in the ordinary course of business).

90. See, e.g., Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 167 (2017) (stating that “\$.73 of each dollar spent [on electronic discovery] is attributed to attorney review”).

of these limits would allow parties to tailor the discovery process to their own particular needs.

4. Amount

Additionally, parties can negotiate the quantity of discovery. The Federal Rules of Civil Procedure include certain numerical limitations, specifying, for example, that parties can conduct no more than ten depositions and serve no more than twenty-five interrogatories during the course of the litigation without permission of the court.⁹¹ When it comes to requests for production of documents or requests for admissions, there are no hard limits,⁹² although even these forms of discovery must be proportional to the needs of the case.⁹³

Parties, however, can agree on different limits *ex ante* in their contracts. They can provide, for example, that they are each only allowed to take two depositions or serve five interrogatories on the other side.⁹⁴ Or they can agree that most depositions will last no more than four hours, with the parties each able to select a single deposition to last longer. Alternatively, parties could tie the amount of discovery to the amount at stake in the case, agreeing, for instance, that in the discovery process, no party shall have to spend more than twenty-five percent of the amount at stake in the litigation. These specifications would reduce the costs of discovery while forcing parties to prioritize the forms of discovery that they think will best help their case.

91. See FED. R. CIV. P. 30(a)(2)(A)(i) (requiring court approval for more than ten depositions); FED. R. CIV. P. 33(a)(1) (“Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.”).

92. See FED. R. CIV. P. 34; FED. R. CIV. P. 36.

93. See FED. R. CIV. P. 26(b)(1) (providing that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case”).

94. For similar examples from arbitration, see *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS 21 (July 1, 2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf [<https://perma.cc/Q4UK-XQ82>] (“Each Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party.”). See also *Arbitration Rules*, MAR. ARB. ASS’N U.S. 12 (Oct. 11, 2017), <http://www.maritimearbitration.com/files/MAA%20Arbitration%20Rules%20112017%20final.pdf> [<https://perma.cc/3Z49-4MHN>] (“The Arbitral tribunal generally will allow one deposition of an opposing Party, or of one person under the control of an opposing Party.”); *Employment Rules and Procedures*, NAT’L ARB. & MEDIATION 6 (July 12, 2017), https://www.namadr.com/wp-content/uploads/2016/07/Emp-Rules_and_Proced.pdf [<https://perma.cc/LBF6-KSWN>] (providing, among other limits, that the parties may only “make requests for up to 30 documents” and all such documents must be ones “upon which the responding Party relies in support of its answers to the interrogatories”).

5. Timing

Parties can also negotiate the timing of discovery. Under the Federal Rules of Civil Procedure, parties are generally allowed to commence discovery after their Rule 26(f) conference.⁹⁵ The rules also permit the parties to use discovery tools in any sequence,⁹⁶ although very little discovery is permitted before the filing of the suit.⁹⁷

The parties, however, can change these rules as well. In their contracts, for example, they can agree that each side will be entitled to specific documents before the filing of litigation⁹⁸ or that discovery will be stayed during the pendency of a motion to dismiss.⁹⁹ They can also provide that the parties must use certain discovery tools first (e.g., requests for production of documents before depositions) or that discovery must occur in stages. They can also specify the maximum length of time that the entire discovery process can take.¹⁰⁰ These requirements have the potential to make the discovery process more efficient, as discussed further below.

6. Funding

Parties can also change the rules governing the funding of discovery. Under the default rules, parties each pay their own discovery costs.¹⁰¹ As a result, if one party has custody of most of the relevant documents, they pay most of the discovery costs. These cost-allocation rules create incentives for parties to file frivolous claims because parties

95. FED. R. CIV. P. 26(d)(1).

96. FED. R. CIV. P. 26(d)(3).

97. *See, e.g.*, FED. R. CIV. P. 27 (permitting depositions prior to the filing of the lawsuit to perpetuate a witness's testimony).

98. *See Elliott-McGowan Prods. v. Republic Prods., Inc.*, 145 F. Supp. 48, 50 (S.D.N.Y. 1956) (prohibiting a contracting party from accessing the other party's books and records more than one year after the statement for the specified goods was issued in accordance with contract provisions, despite right to pretrial inspection under the Federal Rules of Civil Procedure).

99. *See, e.g.*, Private Securities Litigation Reform Act § 101, 15 U.S.C. § 77z-1(b)(1) (2012) (providing that, in a securities class action, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party").

100. *See, e.g.*, NAT'L ARB. & MEDIATION, *supra* note 94, at 7 ("All discovery must be completed within ninety (90) calendar days after the selection of the Arbitrator except for good cause shown.").

101. *See Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (referencing the "bedrock principle known as the American Rule" by which "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise" (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010))).

may reasonably decide to settle claims to avoid the high costs of defending against them, even if they think they are without merit.¹⁰²

Contracting parties, however, can change these default rules, choosing a different allocation of discovery costs. There are a variety of ways that parties might divide discovery costs through private ordering. First, they can provide that the requesting party will pay the costs of production, which would create incentives for each side to serve more narrowly tailored discovery requests. Second, they can specify that the parties will share the costs equally, an approach that might be preferable if the parties anticipate that one side will possess the lion's share of the discovery material and thus would have to pay the bulk of the expenses under the default rules. Finally, they can agree that they will come up with a litigation budget that will be enforceable by the court. This proposal may sound farfetched, but the United Kingdom now requires parties in many types of litigation to adopt a binding litigation budget, and scholars have proposed a similar approach in the United States.¹⁰³ Accordingly, it is not beyond the realm of possibility that some contracting parties might agree to such an approach as a way to limit their discovery costs.

7. Wholesale Adoption of New Rules

None of these options are mutually exclusive. The parties can pick and choose different combinations of bespoke discovery rules just as they pick and choose the other provisions of their agreement. Alternatively, however, parties might decide to adopt another jurisdiction's discovery rules in their entirety. Although this option would be unusual, it is not all that different from substantive choice-of-law provisions in which parties agree that any future disputes will be governed entirely by New York or California substantive law.

More specifically, just as contracting parties from Texas can specify that New York substantive law will govern their disputes, parties should also be able to decide that they want to adopt discovery rules from another jurisdiction. For example, parties could agree that they will litigate in Virginia federal court but be bound by Virginia state

102. See Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61, 70–74 (2016) (discussing the impact of cost asymmetries in litigation).

103. See, e.g., Tidmarsh, *supra* note 12, at 858–59 (proposing a model by which parties develop a litigation budget at the start of the case and present it to the court for approval); Neil H. Andrews, *Accessible, Affordable, and Accurate Civil Justice—Challenges Facing the English and Other Modern Systems* 3–4 (Univ. of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No. 35/2013, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330309 [<https://perma.cc/TA58-ETUX>] (noting that litigation costs in the United Kingdom had been steadily increasing in recent years).

discovery rules or New York state discovery rules.¹⁰⁴ Alternatively, U.S. and foreign contracting parties could choose to be governed by a foreign country's discovery rules, recognizing that the contracting parties may want the security of the U.S. legal system but not necessarily its expansive discovery rights. Finally, parties might choose to be governed by the discovery rules of a specific arbitration organization. Bringing the discovery rules from arbitration into the legal system would limit discovery but still preserve other rights that come with litigation, such as a right to a jury and a right to appellate review of trial court decisions. In other words, it is at least theoretically possible for parties to mix and match their procedural rules, choosing the discovery rules from one venue and other procedural rules from an alternative venue.

These final examples bring to the forefront deeper questions about parties' ability to contract around the default discovery rules. It is one thing to suggest that parties can restrict the number of depositions in future disputes, change the sequencing of discovery tools, or even limit the scope of discovery. It is another thing altogether to ask a court to throw out its own discovery rules and adopt wholesale another jurisdiction's rules. The next question therefore is whether parties really have that much control over the discovery process.

B. Legal Limits on Bespoke Discovery

Contracting parties likely have significant freedom to alter default discovery rules in both litigation and arbitration, although this freedom is neither unlimited nor well delineated in the law. The Federal Rules of Civil Procedure provide partial guidance on the scope of private ordering in discovery, at least in the federal courts. Rule 29 provides that "[u]nless the court orders otherwise, the parties may stipulate that . . . other procedures governing or limiting discovery be modified."¹⁰⁵ The 1970 Advisory Committee Notes that accompanied the addition of this language stated that, at least at that time, "[i]t [was] common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal

104. As one example of the potential differences, Virginia state discovery rules do not provide for mandatory initial disclosures, VA. R. SUP. CT. 4:1, while federal discovery rules do, FED. R. CIV. P. 26(a)(1). See also 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, 1216–24 (2005) (discussing the differences between state and federal discovery rules).

105. FED. R. CIV. P. 29(b).

mechanism in the rules for giving them effect.”¹⁰⁶ Several states have similar rules as well.¹⁰⁷

Based on this rule and a few isolated cases,¹⁰⁸ some scholars and treatises have argued that parties are free to craft their own discovery provisions.¹⁰⁹ Yet this analysis ignores two possible complications from Rule 29. First, the rule expressly permits courts to limit parties’ ability to use bespoke discovery, and at least some courts have done so.¹¹⁰ For example, the U.S. District Court for the Northern District of Ohio provides in its local rules that, “[a]bsent leave of court, the parties have no authority to modify the limitations placed on discovery by court order.”¹¹¹ This provision does not forbid parties from attempting to craft their own bespoke provisions, but it does expressly invite individual judges to reject discovery agreements in their standing or case-specific orders.

Second, and more significantly, the term “stipulation” typically refers to agreements reached by counsel while a case is pending, not an *ex ante* agreement.¹¹² Neither the express language nor the legislative history of Rule 29 specifies whether the rule only authorizes discovery agreements made once the case has been filed. There are also very few cases interpreting the parameters of the rule.¹¹³ Accordingly, it is an open question whether Rule 29 and state equivalents permit *ex ante* agreements to modify discovery procedures.

106. FED. R. CIV. P. 29 advisory committee’s note to 1970 amendment.

107. *E.g.*, IND. R. TRIAL P. 29; MO. SUP. CT. R. 56.01.

108. *See, e.g.*, Bone, *supra* note 15, at 1346 (pointing out that “[t]he conventional wisdom repeated in treatises and commentaries is that parties have broad power to contract for discovery limits *ex ante*, but these claims rely on flimsy case law support,” often a single case from the 1950s (footnote omitted)).

109. *See, e.g.*, 11–1 MATTHEW BENDER & CO., BENDER’S FORMS OF DISCOVERY § 1.04 (2018) (“[P]rovided there is no inequality of bargaining power, [parties] may also contractually limit discovery with respect to future litigation.”); Noyes, *supra* note 61, at 610 (“So long as the parties agree, and memorialize the agreement with a letter, they may permit absolutely no discovery, permit far broader discovery than the ‘default’ scope of discovery permitted by the Federal Rules, or alter the ‘approved’ procedures for conducting discovery.”); Thornburg, *supra* note 6, at 202 (“Discovery is, after all, party-initiated and parties can choose to limit their discovery. Discovery limits can also be chosen by contract.” (footnote omitted)).

110. *See* FED. R. CIV. P. 29(b) (providing that parties can enter into discovery stipulations “[u]nless the court orders otherwise”); *see also* OHIO R. CIV. P. 29 staff note (stating that Ohio’s version of Rule 29, which is identical to the federal rule, “explicitly makes the court the master of its procedure”).

111. N.D. OHIO R. 26.1.

112. *Stipulation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a stipulation not only as “[a] material condition or requirement in an agreement,” but also as a “voluntary agreement between opposing parties concerning some relevant point”).

113. *See* Paulson, *supra* note 3, at 513 (“Though the 1993 change is twenty years old, there are very few cases involving pre-dispute agreements to limit discovery.”).

If Rule 29 does not apply, the permissibility of these *ex ante* provisions will likely be governed by more general rules regarding bespoke procedure. Here too, however, the law is not clear. Although some scholars claim that bespoke procedure is generally permissible,¹¹⁴ there is remarkably little law to support this conclusion. There are few statutes or rules that delineate when parties can opt out of procedural rules. Relevant cases tend to arise in specific fact scenarios that make it difficult to discern more generally applicable rules.¹¹⁵ For example, the Supreme Court has made clear that parties can enter into forum selection clauses,¹¹⁶ waive their class action rights,¹¹⁷ and opt out of specific applications of the Federal Rules of Evidence,¹¹⁸ but these holdings do not necessarily mean that all bespoke procedural agreements are permissible.

Even in the absence of binding case law, however, there are some clear limits on bespoke procedure more generally. First, parties cannot enter into their own agreements that expand the jurisdiction of the courts.¹¹⁹ This limitation, while obvious, is unlikely to have much impact on bespoke discovery provisions, which govern how, rather than where, the case is litigated. Second, parties cannot waive procedural rights or obligations that Congress or individual states have expressly stated cannot be modified.¹²⁰ This limitation is also unlikely to have much impact in the discovery context because the legislative branch has never expressly stated that these rules are mandatory. Third, parties are subject to normal contract law, which prohibits any contractual provisions that are unconscionable or contrary to public policy.¹²¹ In a number of cases, courts have used the unconscionability doctrine to invalidate bespoke discovery provisions that unreasonably limit one side's access to information, especially in cases involving substantially

114. See, e.g., Noyes, *supra* note 61, at 583 (concluding, with certain exceptions, "that there is a presumption that litigation rules may be modified by an *ex ante* contract and that such a contract is subject to specific performance").

115. See Bone, *supra* note 15, at 1352 ("Still, judges seem quite willing to enforce most agreements as long as they deal with the set of procedures recognized as suitable for *ex ante* specification.").

116. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

117. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

118. *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995).

119. See Moffitt, *supra* note 9, at 465 ("Clearly, for example, the parties cannot—even with consent—create subject matter jurisdiction in a court that otherwise has none.").

120. See Noyes, *supra* note 61, at 583 ("The contract will not be enforceable, however, . . . where Congress has acted to affirmatively prohibit modification of a specific litigation rule . . .").

121. See *id.* at 639 (stating that "courts are much more likely to refuse to enforce such agreements because they are found to be 'unconscionable' or because they are not made 'knowingly, voluntarily and intelligently'").

unequal bargaining power between the parties.¹²² Fourth, parties should not be able to agree on bespoke procedures that significantly impair the rights of third parties.¹²³ This limit, applied to the discovery context, might mean that litigating parties cannot expand the Rule 45 subpoena power¹²⁴ to give them greater ability to get information from third parties.

Beyond these specific rules, scholars have argued that there are other, more fundamental limits on parties' ability to craft their own procedures. Assuming that discovery is not treated differently than other types of procedural private ordering, these suggested limits might apply to bespoke discovery as well. These proposed limits reflect broader foundational concerns about parties' ability to influence the nature of the judicial system itself. Scholars have phrased their concern in different ways. One scholar argues that a court reviewing a bespoke procedural agreement should determine whether the agreement would "impermissibly undermine the institutional integrity of the court."¹²⁵ Another argues that bespoke procedure cannot "irreparably discredit the courts."¹²⁶ Still another argues that bespoke procedure cannot interfere with the judge's ability to engage in principled reasoning, which he argues is the "core element of adjudication."¹²⁷ Regardless of the specific phrasing, the idea is that there are certain attributes of the U.S. judicial system that are so fundamental to its legitimacy that the parties cannot contract around them.

It is unlikely, however, that this idea would invalidate most forms of bespoke discovery. Even if the parties agreed to significantly limit their discovery rights, the court could still engage in principled

122. See, e.g., *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005) (rejecting limitations on discovery because they "could significantly prejudice employees or applicants"); *Domingo v. Ameriquet Mortg. Co.*, 70 F. App'x 919, 920 (9th Cir. 2003) (holding that a contract was unconscionable based in part on discovery limitations); *Lucey v. FedEx Ground Package Sys., Inc.*, Civil No. 06-3738 (RMB), 2007 U.S. Dist. LEXIS 77454, at *35-36 (D.N.J. Oct. 18, 2007) (finding arbitration provision unconscionable in part because of provision "virtually eliminating discovery"). But see *Concepcion*, 563 U.S. at 341-42 (calling into question "case[s] finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery").

123. Yet, as Professor Bone persuasively argues, this limitation should not be stretched too far. See Bone, *supra* note 15, at 1373. Party decisionmaking in litigation may already harm third parties in a number of ways, and yet no one seriously suggests prohibiting any party decisions that impact third parties. As a result, Professor Bone suggests that "[t]he important question therefore is not whether party-chosen rules might harm third parties but instead whether, and by how much, those rules are likely to exacerbate the harmful effects that already exist." *Id.*

124. FED. R. CIV. P. 45.

125. Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1205 (2000).

126. Noyes, *supra* note 61, at 583.

127. Bone, *supra* note 15, at 1390.

decisionmaking based on the facts the parties have available to them. The institutional integrity of the courts does not depend on a specific quantum of discovery. The most problematic examples would likely arise in cases that already raise other concerns. For example, the institutional integrity of the courts might be threatened if courts routinely enforced private agreements that deprived vulnerable parties of the evidence needed to prove their claims, but such agreements should already be suspect under the unconscionability doctrine. Conversely, run-of-the-mill discovery provisions, especially between sophisticated commercial parties, should be enforceable.

The limits outlined above would still give parties broad ability to craft *ex ante* discovery rules. Given the lack of clear legal guidance in the area of bespoke procedure, however, it is possible that future courts might decide on even more stringent limits. One scholar, for example, argues that courts are not bound at all by parties' litigation choices.¹²⁸ This argument starts with the proposition that parties are subordinate to the law and judicial authority. Accordingly, they cannot craft their own procedural rules unless the law expressly empowers them to do so.¹²⁹ This view, however, is contrary to the approach generally taken by the courts. Although the Supreme Court has not laid down a general rule governing the extent to which the Federal Rules of Civil Procedure can be overridden by the parties, it has held that both the Federal Rules of Criminal Procedure and the Federal Rules of Evidence are "presumptively waivable."¹³⁰ Similarly, in upholding a forum selection clause and certain other forms of bespoke procedure,¹³¹ the Supreme Court has held that the key inquiry is whether the clause was fundamentally fair, a standard that the Court has easily found satisfied.¹³² In other words, at least over the last thirty years, the Supreme Court has been fairly accepting of bespoke procedural clauses,

128. Dodson, *supra* note 86, at 19.

129. *See id.* (asserting that parties are subordinate "unless the law empowers or allows party dominance").

130. *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995) ("Absent some 'overriding procedural consideration that prevents enforcement of the contract,' courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections." (quoting 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5039, at 207-08 (1977))). It is important, however, not to read the Supreme Court's holding in this case too broadly. It is one thing to hold that the parties can waive a federal procedural protection altogether. It is a very different thing to say that parties can replace a rule with a different procedural standard and then demand that the court apply that standard. As one example, even if parties can agree that neither will file 12(b)(6) motions, it is not clear that they can alternatively draft a different 12(b)(6) standard and then ask the court to apply their standard rather than the *Twombly* standard.

131. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

132. *See id.* ("It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."). This was not always the case.

even if it has never laid down a general rule for the area.¹³³ This history provides reason to be optimistic that courts would uphold bespoke discovery provisions in private contracts.

The same is likely true in arbitration, although parties who choose to arbitrate their disputes may also face limits on their ability to contractually limit discovery. First, traditional contractual defenses apply in arbitration as well. As a result, parties should not be able to enforce limits on discovery that are unconscionable or contrary to public policy. Second, although each arbitration body has different minimum guidelines, it is not uncommon for arbitration rules to prohibit the parties from waiving all of their discovery rights. For example, one arbitration body provides that any consumer arbitration must “allow for the discovery or exchange of non-privileged information relevant to the dispute.”¹³⁴ A contractual provision that barred discovery entirely would be void under these protections. Other arbitration bodies have very different default rules, with some even providing for no discovery at all.¹³⁵ As a result, parties who decide to arbitrate their disputes must review the applicable rules of their arbitration organization to determine if and to what extent they can create their own bespoke discovery rules.¹³⁶

To summarize, although the legal limits are not set in stone, bespoke discovery is likely permissible in the U.S. legal system. These provisions will be subject to traditional contractual defenses and therefore cannot be unconscionable or against public policy. Courts may also reject bespoke clauses that interfere with the institutional integrity of the courts. In arbitration, parties should also be cognizant of any specific limits from their arbitration organizations. Broadly speaking, however, contracting parties likely have wide latitude to devise their own rules to govern discovery in any future disputes between them.

133. Admittedly, however, these cases are in factual contexts other than discovery, and there are other cases, often in the state courts, in which judges have been more skeptical of parties' efforts to do an end run around standard procedural rules. *See, e.g.,* Am. Benefit Life Ass'n v. Hall, 185 N.E. 344, 345 (Ind. App. 1933) (“It is far better for the courts to make the rules of evidence for all cases, as it is only by such method that any uniformity can be attained and any degree of certainty assured.”); *State v. Downey*, 2 P.3d 191, 200 (Kan. Ct. App. 2000) (“The parties are precluded from devising their own rules of evidence.”). As a result, it is certainly possible that the federal courts could articulate a different rule if parties tried to change more central aspects of the legal system or that courts in other jurisdictions could be more skeptical of bespoke procedure.

134. *JAMS Policy on Consumer Arbitrations*, *supra* note 81, at 4.

135. *MCCAMMON GRP.*, *supra* note 80, at 4.

136. Arbitrators are likely to be less concerned with the “core attributes” or the impact of bespoke discovery rules on the “institutional integrity” of the arbitration process, especially given the long history of private ordering in arbitration.

III. THE PROMISE AND PERIL OF BESPOKE DISCOVERY

If parties can indeed enter into bespoke discovery agreements, the final question is whether it is in their best interests to do so. This Part addresses the costs and benefits of bespoke discovery, recognizing that they may well depend on the sophistication of the contracting parties. The analysis first explores how bespoke discovery can benefit sophisticated parties before turning to the challenges of bespoke discovery for their less sophisticated counterparts.

A. Bespoke Discovery and Sophisticated Parties

Assuming that parties can enter into bespoke discovery agreements, should they do so? This Section first explores how bespoke discovery can benefit sophisticated parties by both reducing the total costs of discovery and addressing cost asymmetries that distort incentives. It then turns to the challenges of bespoke discovery for these parties, examining the difficulties of predicting optimal discovery limits before disputes arise. This Section provides a foundation to consider the risks of bespoke discovery for less sophisticated parties in the next Section.

1. The Value of Cost Reduction

The greatest value of bespoke discovery is that it allows contracting parties to reduce their future litigation costs. Most types of bespoke discovery would limit the total volume—and therefore the total costs—of discovery. Bespoke discovery provisions are especially well suited to reduce discovery costs because they can be used selectively in those situations in which discovery costs are most likely to be problematic.

In the majority of civil cases, limitations on discovery are not necessary. Empirical research has demonstrated that discovery does not impose significant costs in most cases.¹³⁷ In a 2009 study, for example, the Federal Judicial Center found that most attorneys in the study thought the amount and costs of discovery in their cases were “just the right amount.”¹³⁸ Most parties also spend relatively low

137. See, e.g., Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1687–88 (2013) (discussing studies and concluding that “[e]ven if more cases engage in substantial discovery today, all can agree that discovery does not lead to excessive costs, delay, or unjust outcomes in cases in which little or no discovery is exchanged”).

138. LEE & WILLGING, *supra* note 49, at 27–28. Nor do most parties use the full amount of discovery available to them. Studies have shown, for example, that although parties are permitted ten depositions as a matter of right, nearly half of respondents took no nonexpert depositions. *Id.*

amounts on discovery—plaintiffs report spending 1.6 percent of the amount at stake on discovery, while defendants report spending 3.3 percent.¹³⁹ These figures suggest that discovery costs generally tend to be fairly low and therefore across-the-board discovery reforms are likely not necessary.

The reality is quite different in a subset of cases, usually those that are more complex. The Federal Judicial Center's study found that attorneys in approximately twenty-five percent of cases believed that the costs of discovery were too high relative to the amount at stake in the case.¹⁴⁰ Other studies back up these impressions. For example, a 2008 survey of Fortune 200 companies found that in cases with total litigation costs of more than \$250,000, the ratio of the average number of discovery pages to the average number of exhibit pages—that is, pages actually utilized in some fashion at trial—was 1,044 to 1.¹⁴¹ Attorneys in another study estimated that sixty percent of discovery materials did not justify the cost associated with obtaining them.¹⁴²

This empirical data suggests that expansive discovery is a problem in some, but certainly not all, cases, which means that transsubstantive solutions sweep too broadly. Yet these cases tend to capture the public's attention and drive procedural reform.¹⁴³ In *Bell Atlantic Corp. v. Twombly*, for example, the U.S. Supreme Court justified more stringent pleading standards on the grounds that more careful screening of cases is necessary “to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a . . . claim.”¹⁴⁴ The Supreme Court's solution of heightened

at 10. In those cases in which the parties did take nonexpert depositions, they only took an average of 3.8 for the plaintiffs and 2.8 for the defendants. *Id.* Similarly, although parties are entitled to serve twenty-five interrogatories, approximately twenty percent of parties do not serve any interrogatories at all. *Id.* at 9.

139. *Id.* at 43.

140. *Id.* at 28.

141. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES app. 1, at 16 (2010), http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf [<https://perma.cc/S2YG-ZQX9>].

142. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 230 n.24. In another study of attorneys who represent both plaintiffs and defendants, nearly fifty-three percent agreed or strongly agreed that “parties increase the cost and burden of discovery in federal court through delay and avoidance tactics.” LEE & WILLGING, *supra* note 49, at 71–72.

143. Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 392–93 (2010) (“We do not know if the so-called large cases constitute five percent, ten percent, or more of the entire federal docket. We do know that it is those cases that tend to occupy a good deal of the attention of federal judges and the press.” (footnote omitted)).

144. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (alteration in original) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

pleading standards, however, was a poor fit for the underlying problem. If discovery costs are not a significant problem in most cases, it makes no sense for the Supreme Court to raise pleading standards in all civil cases. Targeted solutions, in other words, are more appropriate than across-the-board approaches.

Moreover, even focusing on those cases with excessive discovery costs, the Supreme Court has chosen an approach that is ill suited to address the specific problems in these cases. Professor Joanna Schwartz has discussed how the Supreme Court has primarily chosen to fortify the *gateways* of litigation—such as motions to dismiss, class certification, and summary judgment—when addressing concerns about the costs and delay in litigation.¹⁴⁵ Yet while these efforts might reduce costs, it is less certain that they are effective in weeding out only meritless claims. Dismissing a plaintiff's claims if they do not have sufficient factual support at the start of the case leads to the dismissal of meritless and meritorious claims alike. As Professor Schwartz argues, “If discovery in a case is too expensive or slow but the case has enough merit to proceed to the next stage of litigation, then closing the gateway and dismissing the case is too harsh a remedy.”¹⁴⁶

The Judicial Conference has chosen a different strategy to address excessive discovery costs—greater judicial oversight of the discovery process. In successive rounds of amendments to the Federal Rules of Civil Procedure, the Judicial Conference has given judges greater power over the discovery process.¹⁴⁷ Rule 16 now encourages judges to exercise close supervision over discovery in the pretrial conference,¹⁴⁸ while Rule 26 gives judges the power to determine whether the parties' discovery requests are “proportional to the needs of the case” and to narrow the scope of discovery in other ways for good cause.¹⁴⁹

Yet it is extremely difficult for judges to impose any meaningful limits on the discovery process.¹⁵⁰ Judges always know less than the parties about the details of the dispute and thus are in a poor position to know whether specific discovery requests will lead to relevant

145. See Schwartz, *supra* note 137, at 1672 (arguing that “the Court fortified [the pleading] gateway in response to concerns that the high costs and other burdens of litigation cause defendants to settle weak cases and suffer other harms and that district court judges are ineffective at managing the pretrial pathways in a way that would prevent these injustices”).

146. *Id.* at 1691.

147. *Id.* at 1678.

148. FED. R. CIV. P. 16.

149. FED. R. CIV. P. 26.

150. Easterbrook, *supra* note 51, at 638 (“Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.”).

information.¹⁵¹ Additionally, judges are juggling significant caseloads and therefore face structural disincentives to micromanage the discovery process in individual cases.¹⁵² In short, the traditional solutions to the high costs of discovery in certain types of cases—new transsubstantive pleading standards or greater judicial management—are unlikely to work.

Bespoke discovery offers distinct advantages over these approaches. First, parties must *choose* to include bespoke discovery in their contracts. This opt-in approach means that bespoke discovery will be used in situations in which both parties have reason to believe that the costs of broad discovery in their particular dispute will exceed its benefits. Unlike the transsubstantive pleading rules adopted by the Supreme Court in *Twombly*, bespoke discovery should, at least in theory, be tailored to the subset of cases in which discovery is most likely to be excessive. Second, parties themselves decide on the specific limits that will apply in their lawsuits. Parties should have more information than judges about the specific nature of their disputes and thus should be in a better position to predict the types of restrictions that will be appropriate. And they have the financial incentives to enforce these restrictions.

Bespoke discovery also addresses the strategic incentives that have contributed to escalating discovery costs. Discovery presents its own version of the prisoner's dilemma.¹⁵³ If each party thinks that the other side will serve sweeping discovery requests, it will respond in kind, even if more limited discovery would otherwise be in the parties' collective interest. By agreeing to *ex ante* limits on discovery, the parties can tie their own hands and avoid unnecessary discovery requests.¹⁵⁴

151. See *id.* (asserting that because judicial officers “always know[] less than the parties,” they cannot “know the expected productivity of a given [discovery] request”).

152. See, e.g., Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 97 (2009):

The simplest and most common means by which judges reduce their workload is by insisting that the parties resolve their own pretrial disputes, especially those relating to discovery. Judges often are able to create and sustain a credible threat of retribution toward litigants—a threat that in turn limits the number of discovery disputes over which the judge must preside.

153. See, e.g., Bone, *supra* note 15, at 1355:

[P]arties to a lawsuit face a collective-action problem at the discovery stage. In one version of the problem, it is a classic prisoner's dilemma: each party anticipates that the other will use discovery abusively, so each responds in kind, and the result is an equilibrium in which both sides are worse off than if they had exercised restraint.

154. See, e.g., Giacomo Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 177–78 (2011) (“As in the typical Prisoners' Dilemma, each party, fearing that the other party will not cooperate, ends up in a worse situation

Parties are also better able to reach such agreements before disputes arise.¹⁵⁵ Once a lawsuit is filed, parties have a much better sense of their strategic positions vis-à-vis the discovery process.¹⁵⁶ They know, for example, which side is likely to have most of the discoverable information and thus who will have to bear the brunt of discovery costs. Parties that benefit in this calculus will be reluctant to give up their advantage.

This fact reflects a central weakness with the current approach to private ordering in litigation. The Federal Rules of Civil Procedure anticipate that parties will meet and confer about appropriate discovery limits after the litigation is filed.¹⁵⁷ By that point, however, the parties can already predict the likely winner and loser under the default rules, which will make it difficult to agree to ad hoc adjustments. Before the dispute arises, however, the parties do not know on which side of the lawsuit they will ultimately be and thus are closer to the Rawlsian veil of ignorance.¹⁵⁸ This positioning allows them to view the dispute more dispassionately, increasing their willingness to commit to mutual restraint.

Reducing the breadth of discovery through private ordering has one final benefit—it allows parties to benefit from the limited discovery normally found in arbitration while keeping their dispute in the judicial system. Litigants choose arbitration because they think that, on the whole, it will benefit them more than litigating in court, often because they think the costs of discovery are too high in a traditional judicial proceeding.¹⁵⁹ Yet litigants also face downsides when they choose

(i.e. overspending) than the one that would be reached had the parties coordinated their actions (i.e. not requesting broad discovery).”).

155. See, e.g., Bone, *supra* note 15, at 1340 (“To be sure, agreement [about procedural limitations] can be more difficult to reach after a dispute materializes.”).

156. *Id.* at 1341.

157. FED. R. CIV. P. 26(f)(1)–(3).

158. The veil of ignorance developed in John Rawls’s book *A Theory of Justice* is a thought experiment in which people are asked to develop rules knowing nothing about their own future positions, talents, or resources. This perspective, Rawls argues, would take personal considerations and biases out of rulemaking. JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971); see also Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 *UCLA L. REV.* 1803, 1847 (1997) (“To the extent that impartiality is considered a central or fundamental value by the procedure community, it may be that this community’s own commitments require it to employ something like the Rawlsian procedure when designing procedure.”).

159. See, e.g., Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 *HARV. NEGOT. L. REV.* 1, 16–17 (2014) (surveying parties who chose to arbitrate their disputes and finding that “[a] majority—roughly six in ten respondents—said they chose arbitration because it afforded a more satisfactory process than litigation and limited the extent of discovery”).

arbitration—they lose their right to an appeal,¹⁶⁰ for example, and they lose the judiciary's expertise in applying its own jurisdiction's law. Bespoke discovery allows parties to get the best of both worlds. They can limit discovery without going to arbitration, thus reaping the other benefits of the judicial system.

It is important to recognize that this type of private ordering is only possible when the parties have a preexisting relationship. Contracting parties can include bespoke discovery provisions in their agreements, just as they might include forum selection or choice-of-law provisions. Parties in tort cases, however, may not be in a position to use bespoke discovery, especially if they do not have a prior relationship.¹⁶¹ Moreover, private ordering can be expensive, especially when the negotiations and contracting relate to a dispute that may never arise. In the short term, many parties may well decide that it is not worth the expense of negotiating and drafting these provisions. As with all new contractual innovations, however, these costs will likely fall once courts provide guidance on the legality of specific terms and these terms then become more standardized.¹⁶²

2. The Advantages of Cost Symmetries

Bespoke discovery also allows contracting parties to address cost asymmetries in discovery. The American rule requires each side to pay its own litigation costs regardless of who ultimately prevails in the case.¹⁶³ As scholars have long noted,¹⁶⁴ although this rule has its benefits, it can also create incentives for some plaintiffs to file meritless claims and other plaintiffs not to file meritorious claims. Bespoke discovery can help address both situations.

First, cost asymmetries in litigation can incentivize plaintiffs to file meritless claims. The default discovery rules assume that costs of discovery are generally low and fall roughly evenly on both sides, and in most cases, this assumption is correct. As discussed above, empirical

160. See Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1110 (2012) ("The virtual absence of substantive review is one of the most striking features of the arbitration process. Barring unusual circumstances, parties and arbitrators have only one chance to 'get it right.'").

161. This is not to say that bespoke discovery provisions will never work in tort litigation. In certain types of tort cases, the parties do have a preexisting relationship and therefore an opportunity to bargain over the terms of their future disputes.

162. Davis & Hershkoff, *supra* note 1, at 527 ("[T]he cost of customization will predictably decline over time as later users free-ride on existing private terms.").

163. Macon Dandridge Miller, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1349 (2002).

164. *E.g.*, Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 VA. J.L. & TECH. 59, 91 (2013).

data from the Federal Judicial Center demonstrate that the costs of discovery in most cases are less than \$20,000.¹⁶⁵ Even in cases in which discovery is voluminous, its burdens typically fall roughly evenly on both sides.¹⁶⁶ Most cases therefore do not present a significant cost asymmetry, either because discovery costs are relatively small or because these costs fall evenly on both parties.

In some types of cases, however, there *is* a significant cost asymmetry.¹⁶⁷ These cases tend to share two key characteristics. First, the defendants in these cases typically have possession of most documents relevant to the case. These claims often turn almost entirely on the defendant's conduct, making the defendant's record of key importance in the case.¹⁶⁸ Second, in cost-asymmetric cases, it is often difficult and therefore costly for the defendant to identify the relevant documents.¹⁶⁹ In a case that turns on a single transaction or event, defendants can pinpoint the key custodians and identify the relevant documents fairly easily. In cases in which the allegations sweep more broadly, however, the defendant will have to search through far more records and interview far more employees to identify the relevant information.

The necessity of such a broad review increases the defendant's discovery costs as well as the corresponding incentives to enter into a nuisance settlement. If a case survives a motion to dismiss, the next opportunity for dismissal typically does not come until summary judgment, which does not occur in most cases until after the parties have completed discovery and incurred the associated costs. As a result, if the case survives the 12(b)(6) hurdle, defendants are often willing to settle for substantial amounts. These incentives mean that economically rational plaintiffs will file claims that they know have little merit and economically rational defendants will pay to settle them.

On the flip side, cost asymmetries can also make it more difficult for plaintiffs to pursue low-value claims. A plaintiff with a low-value

165. A study by the Federal Judicial Center found that the median discovery costs for plaintiffs were \$15,000, while the median discovery costs for defendants in these same cases were \$20,000. LEE & WILLGING, *supra* note 49, at 2.

166. *See id.*

167. *See, e.g.,* Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1103 (2016) ("Discovery allows one party to externalize a large share of the responsibility and costs of his discovery request to his adversary.").

168. *See* Stancil, *supra* note 152, at 127 ("[C]laims in which the plaintiff's internal pretrial costs are low tend to be claims for which there will be little inquiry into the plaintiff's activities or damages.").

169. *See id.* at 130 ("[T]he cases with the largest internal defense costs tend to be those (1) in which the scope and depth of genuinely discoverable information under Rule 26(b)(2) is significant, and (2) without an obvious factual transaction around which to limit discovery.").

claim may not be willing to spend the money required to pursue it, even if the claim would ultimately be meritorious. For example, if a claim worth \$10,000 has a seventy percent chance of success, but it will cost the plaintiff \$8,000 to prove the claim, a rational plaintiff will not file suit. The cost asymmetry in these cases is not between the defendant's costs and the plaintiff's costs but rather between the plaintiff's costs and the amount at stake in the litigation.

Discovery essentially presents the opposite of the situation outlined above. Rather than plaintiffs being able to externalize their discovery costs on defendants, the problem in these cases is that plaintiffs have to internalize some of the discovery costs themselves, which can reduce the net value of their claims. Defendants can also exacerbate these asymmetries by flooding plaintiffs with irrelevant discovery material or otherwise forcing plaintiffs to engage in a broader process than they would have otherwise chosen. The legal system has tried numerous strategies to address the incentives associated with low-dollar-value claims, including liberal joinder rules and proportionality requirements in discovery.¹⁷⁰ Yet these approaches could still leave plaintiffs with meritorious claims that cost them too much to pursue.

Bespoke discovery rules could help parties address these strategic incentives. Two of the discovery tools discussed in Section II.A could be helpful in cases involving discovery asymmetries. First, parties could include cost-shifting provisions in their contracts. Parties frequently include fee-shifting provisions in their contracts,¹⁷¹ but these provisions only require *losing* parties to contribute to their opponents' attorneys' fees. In contrast, cost-shifting rules would require each side to share the costs of litigation, regardless of which side ultimately prevails. Cost shifting is also a more targeted approach than fee shifting because it only applies to discovery costs. Other litigation costs—including the costs of filing and responding to motions and the costs of preparing for trial—would remain with the party incurring the costs. Cost shifting addresses the specific cost asymmetries that arise in the discovery process.

170. See FED. R. CIV. P. 26(b)(1) (providing broad proportionality requirements for relevant information in discovery); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 315–16 (2013) (stating that amendments to the class action rules “clearly envisioned the use of the class action to empower those without ‘effective strength’ to advance their claims, most notably when each individual’s damages were so small that economically they had no independent litigation value”).

171. See, e.g., Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 353 (2013) (“[P]arties contract out of the American rule on fees in over 60% of contracts.”).

Second, parties could use *ex ante* contractual provisions to shrink the overall scope of the discovery. For example, in cases in which cost asymmetries are likely, parties could agree that they will negotiate litigation budgets at the start of the case to constrain the total costs of discovery. These budgets, which are now mandatory in certain classes of cases in the United Kingdom, could ensure that discovery costs do not drive litigation decisions.¹⁷² Similarly, the parties could agree that they will turn over the discovery process to a neutral third party, such as a paid arbitrator. The parties would be able to obtain limited discovery only after convincing the third party that their requests meet an agreed-upon standard—for example, that the documents are material to a claim or defense or, more stringently, that the documents are essential to allowing the requesting party to prove their claim or defense.

In short, bespoke discovery can benefit parties in the litigation process both by reducing the total scope of discovery and by addressing cost asymmetries that distort parties' incentives. As we will see, however, bespoke discovery also presents its own challenges for contracting parties.

3. The Challenges of Prediction

For all of the benefits of bespoke discovery, it also presents risks. Concerns about the impact of bespoke discovery on unsophisticated parties are addressed in the next Section, but even sophisticated parties should be cognizant of the potential risks of predicting the optimal limits on discovery in their prelitigation agreements. This Section outlines several specific factors that may reduce the benefits of *ex ante* contracting.

First, before the dispute arises, it can be difficult for the parties to predict the appropriate levels of discovery. Contracting parties may have some sense of the nature of their likely disputes, but the impact of specific contractual limits may be harder to calculate.¹⁷³ Will a narrower scope of discovery keep one side from obtaining the key documents they need to prove their case? Will the dispute be one that requires three depositions or ten? These questions are hard to answer before the parties know the specific nature of their dispute and their relative

172. *See, e.g.,* Tidmarsh, *supra* note 12, at 858–59 (proposing a model by which parties develop a litigation budget at the start of the case and present it for the court for approval).

173. *See, e.g.,* Bone, *supra* note 15, at 1334 (“Both sides assume that all the benefits and costs can be catalogued, roughly measured, and weighed properly. But this assumption is flawed. Benefits and costs are extremely difficult to evaluate in the intensely strategic environment of litigation.”).

strategic positions. The Federal Rules of Civil Procedure anticipate that the parties will engage in significant private ordering once the case is filed,¹⁷⁴ but by that point, the parties have a much better sense of the nature of the dispute and the type of discovery they will need to prove their claims or defenses.

A second challenge of bespoke discovery is that it requires parties to invest in drafting and negotiating a new set of contractual provisions. It is fairly inexpensive for contracting parties to include more traditional forms of bespoke procedure in their contracts because these clauses have been around for years and there is boilerplate language that parties can use. Bespoke discovery is new, however, which means that parties would have to spend time negotiating specific language. Additionally, there is little law around bespoke discovery.¹⁷⁵ As a result, parties would have to invest the time to draft these provisions even while recognizing that a court might ultimately find them unenforceable or interpret them in an unexpected way.

Over time, these costs will fall as boilerplate language develops and courts begin to interpret this language. Yet some amount of contract-by-contract tailoring will always be necessary. It is easy to amend a forum selection clause by simply inserting a new choice of forum. It is harder, and thus more expensive, to craft tailored discovery provisions that will be appropriate for the parties' specific relationship and the specific disputes they are likely to have.

Finally, bespoke discovery requires parties to negotiate over discovery that may never occur. Once the dispute is filed, parties have an incentive to spend the time and money necessary to negotiate over their discovery rights because these negotiations will impact the litigation. *Ex ante*, however, parties know that they may never end up in court and that any dispute resolution provisions they negotiate may be irrelevant. Parties thus must invest time and money negotiating over terms that they may never end up needing. In short, bespoke discovery presents both financial and legal risks for contracting parties.

These challenges mean that bespoke discovery is most likely to be used in a narrow set of circumstances. First, it is best suited for situations in which the contracting parties have significant reason to worry about discovery. For example, if the parties have previously been in situations in which they felt that discovery was too broad or negatively impacted their incentives in the litigation, they may be more willing to invest the time *ex ante* to limit discovery in future disputes. They also may take the initiative of suggesting such provisions to their

174. *E.g.*, FED. R. CIV. P. 29.

175. *See supra* Section II.B.

attorneys, even if these attorneys would have been reluctant to bring up the idea on their own.¹⁷⁶ Alternatively, bespoke discovery could be helpful for contracting parties from different countries that are trying to negotiate where to litigate their future disputes. A French company, for example, might be far more comfortable litigating in U.S. courts if it did not have to worry about broad U.S.-style discovery.

On the other hand, it is important not to become too pessimistic about these concerns. Parties already opt out of the default discovery rules in a variety of ways, including by opting in to arbitration. Most arbitration bodies have default discovery rules, and these rules are often quite specific and far narrower than the default rules in the litigation system. For example, parties that agree in their contract to arbitrate their dispute before JAMS, the largest private alternative dispute resolution service in the world, agree that document requests will be limited to “documents that are directly relevant to the matters in dispute or to its outcome,”¹⁷⁷ a far narrower standard than the default rules in the federal courts.¹⁷⁸ They also agree that they will take no more than one deposition unless the arbitrator permits additional ones.¹⁷⁹ As a result, the idea that parties will never agree to tie their own hands in discovery is belied by the fact that parties frequently agree to do just that.

Nonetheless, focusing just on sophisticated contracting parties, bespoke discovery has risks. These risks are not insurmountable, but it will take determined parties with heightened incentives to contract around default discovery rules. As we will see, the legal system has a different cost-benefit calculus to consider when it comes to less sophisticated parties.

B. Bespoke Discovery and Unsophisticated Parties

At the same time that it benefits sophisticated parties, bespoke discovery could also exacerbate the inequalities in bargaining power that already exist in civil litigation. It is one thing for sophisticated parties to bargain over the scope of their discovery rights in future litigation. It is another thing altogether for these same sophisticated parties to include bespoke discovery in their boilerplate agreements with unsuspecting customers or employees.

176. As discussed above, attorneys may have their own incentives not to suggest bespoke discovery to their clients. *See supra* Section I.C.2.

177. JAMS, *supra* note 94, at 19.

178. FED. R. CIV. P. 26(b)(1) (allowing parties to obtain discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case”).

179. JAMS, *supra* note 94, at 21–22.

In this regard, bespoke discovery raises many of the same concerns raised about other types of bespoke procedure. Scholars have long criticized boilerplate contracts in which individuals agree to arbitrate their claims, waive their right to file a class action, or appeal an adverse ruling.¹⁸⁰ The provisions create the very real possibility that individuals may waive their rights without knowledge that they have done so or without the market power to contest them.

The legal system offers some limited protection against these concerns. As discussed above, bespoke discovery is subject to traditional contract defenses, including the defense of unconscionability.¹⁸¹ A few courts, especially in California, have held that more extreme forms of bespoke discovery clauses are unconscionable, at least when used on a take-it-or-leave-it basis against vulnerable plaintiffs.¹⁸² Unconscionability doctrine, however, is unlikely to be a panacea when it comes to procedural overreach in discovery. Overall, courts have been quite reluctant to invalidate bespoke procedures, even in situations involving significant inequalities of bargaining power.¹⁸³

The Supreme Court has also cautioned lower courts from invalidating arbitration agreements specifically on this ground. In *AT&T Mobility LLC v. Concepcion*, the Court stated, albeit in dicta, that the Federal Arbitration Act (“FAA”) would prohibit states from finding an arbitration agreement unconscionable on the ground that it failed to provide for the full discovery rights to which parties are entitled under the Federal Rules of Civil Procedure.¹⁸⁴ The Court also noted that the FAA would prohibit such outcomes even if the discovery

180. *E.g.*, Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704–05 (2012).

181. *See supra* note 122 and accompanying text.

182. *See Paulson, supra* note 3, at 513–14 (“The availability of discovery has become a lynchpin of state law unconscionability, and courts have not hesitated to find arbitration agreements unconscionable that attempt to limit the amount of discovery available to plaintiffs.”); *see also* *Domingo v. Ameriquet Mortg. Co.*, 70 F. App’x 919, 921 (9th Cir. 2003):

Lacking the ability to conduct adequate discovery, the employee will almost never be in a position to move for summary judgment. She will, however, be quite vulnerable to such motions on the part of [the employer]. And [the employer] will be in a far better position to make such motions, as the witnesses to the allegedly wrongful action will generally be in its employ.

183. *See, e.g.*, David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1242–44 (2013) (citing post-*Concepcion* lower court decisions upholding bespoke arbitration agreements).

184. 563 U.S. 333, 341–42 (2011) (holding that traditional contract defenses cannot be used to invalidate as “unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery”).

limitations disproportionately disadvantaged vulnerable parties,¹⁸⁵ one of the key rationales used by courts to invalidate bespoke discovery provisions as unconscionable. Accordingly, although the Supreme Court has not directly addressed the legality of bespoke discovery, it has strongly suggested that such provisions are not barred by unconscionability doctrine, at least where the provisions are included in arbitration agreements.¹⁸⁶

Ultimately, the legal system relies on the market, not traditional contract defenses, to police bespoke procedure. Yet this reliance is deeply problematic. Consumers and other contracting parties often do not know about boilerplate provisions in these contracts, and even if they did, they typically do not have an opportunity to negotiate their terms.¹⁸⁷ Moreover, unlike stipulations entered into during litigation, parties agreeing to *ex ante* limitations are often unrepresented by counsel and thus may not appreciate the consequences of limiting their discovery rights. And even if the market requires only a small handful of erudite consumers or employees to watch out for contractual overreaching,¹⁸⁸ there is no incentive for even this handful to police drafters given that many contractual terms can be modified unilaterally.¹⁸⁹ As Professor David Horton has argued, “The fact that drafters enjoy the power to alter procedural terms unilaterally

185. *Id.* at 342 (“Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue.”).

186. Horton, *supra* note 183, at 1244 (“More generally, *Concepcion* has sown confusion about the degree to which judges remain free to find arbitration clauses unconscionable.”).

187. See, e.g., Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 136 (2018):

One of the biggest criticisms of private procedural ordering is that the agreements to limit procedure or opt out completely via arbitration are a result of unfair bargaining power between the parties. Therefore, according to this argument, these agreements do not reflect a state of affairs in which each party has meaningfully consented to procedural alterations.;

James Gibson, *Boilerplate’s False Dichotomy*, 106 GEO. L.J. 249, 254–55 (2018) (arguing that “the market fails boilerplate” because “[i]n many cases, its terms are first made available to consumers late in the game after they have already made significant, unrecoverable investments in the transaction” and “the cost to consumers of processing boilerplate—reading and assessing it—is too high”).

188. See, e.g., Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1414 (1983) (“[N]ot every consumer must shop for warranties to make warranty markets responsive to consumer preference.”).

189. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 608 (2010) (“Many consumer contracts expressly permit unilateral modifications by the drafter.”).

undermines the bedrock economic assumption that adherents can impose market discipline on procedural terms.”¹⁹⁰

This point highlights the core challenge for all types of bespoke procedure. Bespoke procedure benefits the sophisticated while potentially harming their more unsophisticated brethren. Sophisticated parties can bargain over their procedural rights and reach mutually beneficial and efficient agreements. There can be real efficiency gains when these parties spend time carefully negotiating procedures for their future disputes. Yet this same ability to waive procedural rights hurts more vulnerable parties. The existing legal framework offers scant protection to those who are less legally savvy. As a result, bespoke discovery is a step toward greater efficiency for some parties but a step toward greater inequality and vulnerability for others.

It is cold comfort to say that these inequalities already exist in the legal system. It is true that pro se litigants are already vulnerable under existing rules and that sophisticated parties already have considerable procedural advantages. Recognizing this fact, however, is different than proposing new avenues of inequality, especially when these avenues move the legal system further away from its core values of equality and access to justice. Bespoke discovery may be just another step away from these ideals, but every such step should prompt policymakers to scrutinize anew just how much private ordering the law should allow in the name of efficiency.¹⁹¹

Scholars have proposed legal reforms that could help address these concerns. First, as outlined above, trial courts could require litigants to disclose on the civil cover sheet if they have waived or agreed to modify any provisions of the Federal Rules of Civil Procedure or state procedural codes.¹⁹² These disclosures could then be a mandatory topic of discussion at the pretrial conference.¹⁹³ This requirement would bring all types of bespoke procedure before the courts, allowing judges to review these waivers and modifications to determine if they adequately protect vulnerable litigants. Second, courts could interpret traditional contract defenses such as unconscionability more robustly to protect litigants. If these protections applied equally in both arbitration and litigation, they would have a greater chance of

190. *Id.* at 609.

191. *See, e.g.*, Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1823 (2015) (arguing that “making changes to the Civil Rules and doctrines in order to simply make litigation cheaper—as a matter of a litigant’s financial bottom line—is not acceptable” if the cost-benefit calculus does not also take into account other negative effects on the parties and the judicial system more broadly).

192. *See* Davis & Hershkoff, *supra* note 1, at 556–58.

193. *Id.* at 558.

surviving a challenge under the FAA. Third, the Judicial Conference could put more explicit protections into the Federal Rules of Civil Procedure, specifying when parties can waive or modify specific rules. These specifications could both guard against procedural abuses in adhesion contracts and provide greater clarity to all contracting parties.

CONCLUSION

Discovery bears the brunt of the criticism directed at the litigation system. Critics claim that discovery is too expensive and sweeping and too often resembles a fishing expedition. Even if these problems do not exist in all, or even most, cases, they are prevalent enough to prompt repeated amendments to the Federal Rules of Civil Procedure. Yet the solutions do not rest exclusively with amendments to the formal rules. Litigants already have the power to fix these problems on their own through bespoke discovery provisions. In their *ex ante* agreements, contracting parties can limit discovery, change the default funding mechanisms, or even eliminate discovery altogether. Sophisticated parties, in other words, can negotiate discovery rights the same way they might negotiate other provisions in their contracts.

At the same time, bespoke discovery creates risks for less sophisticated parties. The widespread use of adhesion contracts means that many contracting parties already unknowingly waive their right to file a class action or try their case before a jury. One can easily imagine a similar boilerplate eliminating discovery making it impossible for plaintiffs to prove their claims. Federal courts will likely enforce this boilerplate, just as they have repeatedly enforced other forms of bespoke procedure buried deep within commercial contracts. Bespoke discovery has promise for some, but it also creates peril for those who depend on the broad default discovery rules to vindicate their claims.
