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# SIMPLIFIED PLEADING, MEANINGFUL DAYS IN COURT, AND TRIALS ON THE MERITS: REFLECTIONS ON THE DEFORMATION OF FEDERAL PROCEDURE

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*When the Federal Rules of Civil Procedure were promulgated in 1938, they reflected a policy of citizen access for civil disputes and sought to promote their resolution on the merits rather than on the basis of the technicalities that characterized earlier procedural systems. The federal courts applied that philosophy of procedure for many years. However, the last quarter century has seen a dramatic contrary shift in the way the federal courts, especially the U.S. Supreme Court, have interpreted and applied the Federal Rules and other procedural matters. This shift has produced the increasingly early procedural disposition of cases prior to trial. Indeed, civil trials, especially jury trials, are very few and far between today.*

*The author examines the significant manifestations of this dramatic change, and traces the shift in judicial attitude back to the three pro-summary judgment decisions by the Supreme Court in 1986. Furthermore, he goes on to discuss the judicial gatekeeping that has emerged regarding (1) expert testimony, (2) the constriction of class action certification, (3) the enforcement of arbitration clauses in an extraordinary array of contracts (many adhesive in character), (4) the Court's abandonment of notice pleading in favor of plausibility pleading (which, in effect, is a return to fact pleading), (5) the intimations of a potential narrowing of the reach of in personam jurisdiction, and (6) a number of limitations on pretrial discovery that have resulted from Rule amendments during the last twenty-five years.*

*All of these changes restrict the ability of plaintiffs to reach a determination of their claims' merits, which has resulted in a narrowing effect on citizen access to a meaningful day in court. Beyond that, these restrictive procedural developments work against the effectiveness of private litigation to enforce various public policies involving such matters as civil rights, antitrust, employment discrimination, and securities regulation.*

*Concerns about abusive and frivolous litigation, threats of extortionate settlements, and the high cost of today's large-scale lawsuits motivate these deviations from the original philosophy of the Federal Rules, but these concerns fail to take proper account of other systemic values. The author argues that these assertions are speculative and not empirically justified, are overstated, and simply reflect the self-interest of various groups that seek to terminate claims asserted against them as early as possible to avoid both discovery and a trial. Indeed, they simply may reflect a*

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\* Copyright © 2013 by Arthur R. Miller, University Professor, New York University School of Law. What follows is a substantial elaboration of thoughts expressed in my Inaugural University Professorship Lecture on March 19, 2012, at the New York University School of Law. I am grateful to my colleague (and coauthor, on other publications) Helen Hershkoff for her suggestions and intellectual provocations.

*strong pro-business and pro-government orientation of today’s federal judiciary. The author cautions that some restoration of the earlier underlying philosophy of the Federal Rules is necessary if we are to preserve the procedural principles that should underlie our civil justice system and maintain the viability of private litigation as an adjunct to government regulation for the enforcement of important societal policies and values.*

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INTRODUCTION

For over half a century, my professional life has centered around federal court procedure in civil cases.<sup>1</sup> Thinking about what I perceive to be happening at present and what used to be leads me to feel that the time has come for a few reflections. As I begin, I am reminded of a recurring scene in corporate intrigue and mob movies. Just as a terrible fate is about to befall someone, the villain often says, “It’s not personal; it’s business.” But for me, the following reflections about what I have seen and experienced as an academic, commentator, and practitioner in the world of federal civil procedure over these years are both “business” and “personal.” And the reader should be advised, some are very personal.

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<sup>1</sup> I was extremely fortunate to have learned the basics of civil procedure from a stellar teacher and scholar at the Harvard Law School—the late Professor and Judge, Benjamin Kaplan—who was to become my mentor and, in time, my Harvard Law School colleague and friend. It was Ben who made me a procedure wonk. Arthur R. Miller, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1354 (2011).

## I

## FEDERAL CIVIL LITIGATION: THEN AND NOW

Throughout the years, I always have believed in the purposes of the Federal Rules of Civil Procedure (“Federal Rules”) as embedded in Rule 1 by the people who wrote them a little more than seventy-five years ago.<sup>2</sup> As Rule 1 tersely states, the goal is “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>3</sup> I have come to believe that we have strayed from that mandate. The drift is producing negative consequences for our civil justice system, as well as for some of the democratic principles underlying it. The drift creates a need for adjustment and redirection.

When the Federal Rules were promulgated in 1938, they embodied a justice-seeking ethos. As has been recognized repeatedly by the Supreme Court, the distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.<sup>4</sup> To that end, the original rulemakers established a relatively comprehensible, plainly worded, and nontechnical system. The drafters provided generalized provisions relating to the various procedural structures, often drawn from federal equity practice—thereby promoting discretion, flexibility of judicial application, and simplicity of operation.<sup>5</sup>

Because the rulemakers were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior

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<sup>2</sup> I entered the profession when the Federal Rules of Civil Procedure were twenty years young. These reflections are being published as the Federal Rules have reached their seventy-fifth anniversary.

<sup>3</sup> FED. R. CIV. P. 1. *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1011, 1029 (3d ed. 2002) (explaining the history and purpose of the Federal Rules).

<sup>4</sup> *See, e.g.*, *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (“The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.”); *Foman v. Davis*, 371 U.S. 178, 181–82 (1962) (reversing a lower court’s dismissal on technicalities due to the preference for resolution of disputes on their merits); *see also* 4 WRIGHT & MILLER, *supra* note 3, § 1029 (discussing Rule 1 as an example of the drafters’ intent that disputes be resolved on their merits); B.H. Carey, *In Favor of Uniformity*, 18 TEMPLE L.Q. 146, 146 (1943) (using the purpose of the Federal Rules to argue for their uniform state court adoption); John J. Parker, *Improving the Administration of Justice*, 3 F.R.D. 245, 245–46 (1944) (discussing the impact of the Federal Rules on federal court procedure).

<sup>5</sup> The history of the Federal Rules and the philosophical objectives of those who drafted them are chronicled in Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–75 (1987). *See also* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 316–17 (1938) (noting the improved flexibility and simplicity of the Federal Rules as promulgated in 1938).

English and American procedural systems—that is, the common law forms of action and then the codes<sup>6</sup>—the Rules established an easily satisfied pleading regime for stating a grievance that abjured factual triviality, verbosity, and technicality. Relatively little was demanded of the plaintiff.<sup>7</sup> As exemplified by several of the skeletal Official Forms attached to the Rules,<sup>8</sup> the pleader merely had to say that she felt aggrieved and state what was desired<sup>9</sup>—something metaphorically analogous to *Oliver Twist*'s simple request, “Please, sir . . . I want some more [gruel].”<sup>10</sup>

This pleading regime was followed by rules that made available a wide-angle discovery into the facts underlying the dispute's merits, enabling the parties to secure any information relevant to the subject matter of the action.<sup>11</sup> The objective was obvious and seemingly unobjectionable: The parties should have equal access to all relevant data; litigation was to be resolved based on the revealed facts, not on who was better at chicanery or hiding the ball.<sup>12</sup> A summary judgment procedure was available when there was no “genuine dispute as to any material fact,” enabling a district judge to resolve a lawsuit as a matter of law, but the Supreme Court cautioned that the motion was to be granted infrequently.<sup>13</sup> Philosophically, the gold standard of federal

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<sup>6</sup> The rigidity and technicality that characterized common law procedure and the codes is illustrated in JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, *CIVIL PROCEDURE: CASES AND MATERIALS* 501–53 (10th ed. 2009).

<sup>7</sup> *Id.* (explaining the Federal Rules' purpose).

<sup>8</sup> *E.g.*, FED. R. CIV. P. forms 4–7, 11. Since 1948, the Forms are said to be “sufficient under these rules” in Rule 84. The Advisory Committee's Reporter called the forms “the most important part of the rules.” Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 191 (1958).

<sup>9</sup> *See* FED. R. CIV. P. 8(a)(2)–(3). One of the architects (indeed, probably the chief architect) of the Federal Rules referred to this as the cornerstone of the new system. *See* Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 154–55 (1948) (stressing that the Federal Rules should abandon “detail” and embrace “brevity”).

<sup>10</sup> CHARLES DICKENS, *OLIVER TWIST* 29 (1839).

<sup>11</sup> *See generally* FED. R. CIV. P. 26–37 (discovery rules).

<sup>12</sup> As articulated by the Supreme Court, because of the discovery rules, “civil trials in the federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.” *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); *see also* *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) (“Modern instruments of discovery . . . with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues of facts disclosed to the fullest practicable extent.”).

<sup>13</sup> FED. R. CIV. P. 56(a). Examples of that restrained use of the procedure are found in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159–60 (1970), and *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Indeed, in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256–57 (1948), the Court remarked: “[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which the Court should draw inferences with caution . . . .”

civil dispute resolution was a trial. When appropriate, that meant trial by jury.

Trying to reach the right result after an adversarial contest on a level litigation field seemed a worthy *raison d'être* for a procedural system. Thus, the Rules always have felt very American in spirit—like apple pie, baseball, and the flag. Promoting the Rules' objectives appeared to be a useful outlet for one's professional energies; thinking about my labors since graduating from law school in 1958, I would like to think it has been time well spent.

The bench and the bar pursued that vision of the civil justice process, and law schools taught it for many years following the promulgation of the Federal Rules.<sup>14</sup> But, of course, both our society and our profession have changed dramatically, and American civil litigation has been altered substantially over the years. Before examining the deviations from the original philosophical objectives of the Rules that concern me, I will identify in brief compass some of the significant phenomena that have impacted federal litigation since 1938 that bear on what has happened in the world of procedure.

The typical lawsuit when the Rules became effective involved a single plaintiff and a single defendant jousting about what usually were relatively simple matters. Dockets were more modest in length, and the federal judiciary was a fraction of its present size. Today, issues of science, technology, communications, economics, national policy, and legal complexity characterize federal litigation. Moreover, in the past few decades, we have experienced a tremendous growth in multiparty, multiclaim, and multidistrict disputes. In addition, of course, there has been an extraordinary expansion of class and mass actions—a development that, to this point, largely has been unique to the United States but in various forms has begun to take on the indicia of a multinational trend.<sup>15</sup> These actions feature disputes about a

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<sup>14</sup> See 4 WRIGHT & MILLER, *supra* note 3, § 1029 (discussing the purpose and construction of the Federal Rules). The Federal Rules have been embraced in whole or in part in a significant number of states. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356–57 (2003) (identifying thirty-three states that have adopted all or most of the Federal Rules).

<sup>15</sup> Often characterized (and rejected) as an exemplar of American exceptionalism, the class action has been a subject of considerable study around the globe in recent years as many other judicial systems have begun to feel the pressure of litigation arising out of mass phenomena. See OSCAR G. CHASE, HELEN HERSHKOFF, LINDA SILBERMAN, YASUHEI TANIGUCHI, VINCENZO VARANO & ADRIAN ZUCKERMAN, *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 390–400 (2007) (observing the American class action system through a comparative perspective); CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE* 1–3 (2008) (rejecting the widely held belief that European aggregate litigation reform should aim to emulate American class actions);

tremendous range of highly intricate matters often having a scale previously thought inconceivable that challenge even the most gifted attorneys and jurists—dangerous pharmaceuticals, asbestos and other toxic substances, mass disasters, mind-numbingly complex financial transactions, technology disputes, defective products, and improper governmental conduct.

The appearance of behemoth-like lawsuits has led to the recognition that disputes arising out of conduct having mass consequences and today's globalized commerce, communication, and information flow cannot be resolved the old fashioned way—one by one. That has put enormous pressure on our courts to modify existing procedural norms and has led some to question the limits of traditional civil litigation.<sup>16</sup> Not surprisingly, these developments have been accompanied

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COMMISSION OF THE EUROPEAN COMMUNITIES, GREEN PAPER ON CONSUMER COLLECTIVE REDRESS (2008) (discussing options for resolving mass consumer claims; no action has yet been taken by the European Union); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 192–97 (2009) (noting that the relationships between counsel, parties, and courts in European systems would be markedly different than in American class actions); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401–03 (2002) (discussing other countries' views toward American class actions as a procedural device worth studying but not adopting). Indeed, several nations have adopted a variety of aggregate litigation procedures, including Brazil, Denmark, Israel, Sweden, and the Netherlands, although none of them can be characterized as American-style class actions. See Deborah H. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 (2011) (noting that at least twenty-one countries have some type of “class action”); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 21–25 (2009) (identifying the differences and similarities between United States and European class action devices). The Dutch initiative is particularly striking because it permits representative organizations and defendants to reach out-of-court settlements and petition the Amsterdam Court of Appeals for approval. *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure) [Rv] art. 1069 (Neth.); see also James M. Newland, Brian P. Moher & Jason W. Reynar, *A Touch of Dutch: Group Actions in the Netherlands*, 6 CLASS ACTION 394, 395–96 (2012) (describing the Dutch system in the context of several prominent cases).

<sup>16</sup> See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1631–34 (2004) (discussing the administrative nature of class action settlements); Judith Resnik, *Compared to What? ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628 (2011) (discussing two divergent conceptions of aggregate litigation from a due process perspective); Symposium, *Aggregate Litigation: Critical Perspectives*, 79 GEO. WASH. L. REV. 293 (2011) (discussing future of aggregate litigation in class and nonclass contexts). Two striking legislative developments in this vein are the enactment of the Multiparty, Multiforum Jurisdiction Trial Act, 28 U.S.C. § 1369 (2006), in 2002 and the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1469, 1711–1715 (2006). Both statutes replaced the historic requirement of complete diversity of citizenship, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806), with one of minimal diversity to facilitate and expand federal subject matter jurisdiction over certain categories of complex cases having multistate characteristics. The American Law Institute also has

by an increase in judicial caseloads, the protraction of lawsuits, a movement toward modes of “alternative dispute resolution,” and a growing incidence of transnational litigation presenting yet another set of complexities.

The societal, legal, and technological revolutions that followed World War II transformed the business of our national courts. Over the past sixty-five years, we have witnessed the most extraordinary growth in federal and state substantive law in this country’s history. The workload of the federal courts in the 1930s, when the Federal Rules were birthed, consisted of a relatively limited number of subject areas of significance—there was a touch of antitrust, a little copyright, a few patent cases, various interstate commerce matters, and a range of diversity of citizenship cases. The securities laws were in their infancy, the civil rights revolution was yet to happen, due process and equal protection doctrines were relatively underdeveloped, and textually neuralgic statutes like the Racketeer Influenced and Corrupt Organization Act (RICO),<sup>17</sup> the Employee Retirement Income Security Act (ERISA),<sup>18</sup> and the impenetrable Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001<sup>19</sup> were not yet enacted. Yesterday’s actions based on federal question subject matter jurisdiction represent a very small element of what is now on the dockets of our national courts. Much contemporary diversity litigation has magnified in dimension and complexity. Today’s worlds of civil rights, employment discrimination, environmental, consumer protection, pension, high-tech, and product safety litigation largely did not exist when the Federal Rules were formulated. Most of them still did not exist when I was in law school; there were not even law school courses on those subjects in the 1950s.<sup>20</sup>

This combination of increased complexity, expansion of the substantive law, and the growth of multiparty, multiclaim, and multi-district litigation that have accompanied the development (and proven

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been very active on the subject. First it approved the Complex Litigation Statutory Recommendations and Analysis with Reporter’s Study in 1994, which I served as Reporter. *See* AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER’S STUDY, at vii (1994) (listing author as reporter). Then the Institute approved the Aggregate Litigation Project in 2010, which I served as an advisor. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, at v (2010) (listing author as advisor).

<sup>17</sup> 18 U.S.C. §§ 1961–1968 (2006).

<sup>18</sup> 29 U.S.C. §§ 1001–1461 (2006).

<sup>19</sup> Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of U.S.C.).

<sup>20</sup> A perusal of the catalogues of top-tier law schools demonstrates the enormous curriculum enrichment that has taken place in the years since.

essential to the effectuation) of many of the new fields of law has given rise to one of the most striking changes in the culture and processing of civil litigation I have witnessed during my professional life—the emergence and magnification of judicial management. The genesis of judicial management lies in the problems, attention, and judicial experimentation generated by large or complex cases that began to arise in the late 1940s.<sup>21</sup> When a flood of private electrical supply-conspiracy damage actions in the early 1960s inundated the federal courts, Chief Justice Warren responded by appointing a select group of district judges who developed a systematic approach for processing the cases that led to their much faster resolution than anyone anticipated.<sup>22</sup> That successful experience was followed by the enactment of the Multidistrict Litigation Act in 1968, which established the Judicial Panel on Multidistrict Litigation and provided for the intrasystem transfer of related cases for consolidated pretrial treatment.<sup>23</sup> That, in turn, caused many to focus on the special procedural issues that often arise in “big” cases and that have proven to be a significant factor in promoting the utilization of management techniques by federal judges. Indeed, some view the Panel’s application of the 1968 statute over the years as the “primary vehicle” for the processing of complex and dispersed civil litigation.<sup>24</sup>

Some of the judicial experiences and methods employed during these years were captured initially in the *Handbook of Recommended Procedures for the Trial of Protracted Cases* and then incorporated

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<sup>21</sup> See 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3861 (3d ed. 2007); see also Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2274–77 (2008) (linking the development of more involved case management to the Judicial Panel of Multidistrict Litigation).

<sup>22</sup> The background of these events is described in Phil C. Neal & Perry C. Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 621–22 (1964), and James R. Withrow & Richard P. Lark, *The “Big” Antitrust Case: Twenty-Five Years of Sisyphean Labor*, 62 CORNELL L. REV. 1, 3–4 (1976).

<sup>23</sup> 28 U.S.C. § 1407 (2006); see also 15 WRIGHT, MILLER & COOPER, *supra* note 21, §§ 3861, 3865 (discussing the operation of the Judicial Panel on Multidistrict Litigation). At one point, I expressed the hope that aggregation through the section 1407 transfer mechanism would be an effective way to deal with the enormous backlog of asbestos cases in the federal courts. See Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419, 453–60 (1997). Today’s reality is that multidistrict litigation (MDL) practice has grown enormously across the substantive spectrum. See Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793–98 (2010) (reporting on a Federal Judicial Center study showing the tremendous number of federal civil cases involved in the MDL process).

<sup>24</sup> Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324 (2008).



into the influential original *Manual for Complex Litigation* (the “*Manual*”) <sup>25</sup> in 1968. The *Manual* has been revised and updated several times in the years since.<sup>26</sup> A number of the *Manual*’s general principles regarding judicial control, the scheduling of the pretrial process, the pretrial elimination of extraneous matters, and the promotion of settlement and alternative dispute resolution were encapsulated in an extensive revision of Federal Rule 16 in 1983, while I was serving as the Reporter to the Federal Rules Advisory Committee of the Judicial Conference of the United States. A 1993 amendment further elaborated that Rule.<sup>27</sup> As a result, the notion of judicial management was officially validated by the Rule’s amendment, making it applicable to all actions in the federal district courts.<sup>28</sup> Management was further enshrined in the civil justice system when Congress enacted the Civil Justice Reform Act in 1990,<sup>29</sup> which led to the promulgation of district

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<sup>25</sup> 25 F.R.D. 351 (1950); see also 15 WRIGHT, MILLER & COOPER, *supra* note 21, §§ 3861, 3868 (describing the process that created the *Manual for Complex Litigation*). The document originally was entitled the *Manual for Complex and Multidistrict Litigation* (the “*Manual*”). The antecedent of the *Handbook* was the *Prettyman Report on Procedure in Antitrust and other Protracted Cases*, 13 F.R.D. 62 (1951), but the profession was not ready to utilize its contents at the time of its publication. The original *Manual* had no official status, and some district court judges felt it was inconsistent with their perception of the judicial function and how best to allocate their time. That resistance was one of the motivations for the 1983 revision of Rule 16. See ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULE OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984).

<sup>26</sup> I had the honor of serving as an informal reporter to assist the panel of experienced judges selected by the Coordinating Committee for Multiple Litigation of the U.S. District Courts (who were veterans of the electrical supply-case experience) in drafting the original *Manual*. The motor force behind the drafting of the *Manual* was the leadership of William H. Becker, Chief Judge of the Western District of Missouri. He was a fervent believer in the importance of early judicial control of cases and of an absolutely firm scheduling set at the outset. I still remember his oft-repeated message: “Put a case on a schedule with trial on a certain day and never deviate. If everyone understands that, the case will settle if it can be settled.”

<sup>27</sup> The amendment clarified a number of details of Rule 16 practice, such as deadlines, matters covered by the scheduling order, and the district court’s authority. In 2006, the Rule was amended again to take account of discovery relating to electronically stored information. See generally 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1521–1522 (3d ed. 2010) (explaining the Rule’s amendments).

<sup>28</sup> *Id.*

<sup>29</sup> Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.). The Act’s requirements governing delay plans were sunset in 1997 and no longer are in effect. *Id.* § 103(a). However, there are questions as to whether certain aspects of the Act and the plans produced under it remain in force. Carl Tobias, *Fin-de-Siècle Federal Civil Procedure*, 51 FLA. L. REV. 641, 661–62 (1999). The independent utility of the statute and the plans are questionable given Rule 16 and the *Manual*. See Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1281–85 (1997) (discussing the tension between the Civil Justice Reform Act and the Federal Rules of Civil Procedure).

court expense and delay plans embodying many of the principles and practices described in the *Manual* and in Rule 16.<sup>30</sup> The combined effect of these developments has been profound. Their application over the years has made judicial management a basic characteristic of civil practice in the federal courts,<sup>31</sup> one that empirical evidence suggests has been considered useful by many litigators<sup>32</sup> and judges.<sup>33</sup>

As a result of the passage of time and the profession's ever-increasing experience with the multidistrict litigation statute, Rule 16, and the *Manual*, the role of the district judge (or the magistrate judge in many actions) as a case manager generally is accepted today by most practitioners and jurists. Indeed, many federal litigators apparently would prefer firmer and more constant judicial control of their cases.<sup>34</sup> This shift in judicial orientation toward management (and, in many cases, toward facilitating pretrial settlement) and away from (some would say at the expense of) traditional modes of adjudication

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<sup>30</sup> All ninety-four district courts issued plans, which typically provided for differentiated case management, limitations on discovery, greater use of alternative dispute resolution, and various forms of judicial settlement assistance. Judicial Conference of the United States, *The Civil Justice Reform Act of 1990 Submitted by the Judicial Conference of the United States*, 175 F.R.D. 62 (1997).

<sup>31</sup> See *United States v. Massachusetts*, 781 F. Supp. 2d 1, 24 (D. Mass. 2011) ("Today the mantra is judicial management: management and more management."); Edward D. Cavanagh, Twombly, *the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 888 (2008) (characterizing judicial management as a basic aspect of civil litigation that the *Twombly* decision ignores).

<sup>32</sup> See AM. BAR ASS'N SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 3, 6, 11, 123–44 (2009) (observing very high satisfaction with judicial case management practices among lawyers); EMERY G. LEE III & THOMAS E. WILLGING, NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 27–33 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) (observing that the majority of both plaintiffs' and defense lawyers thought that discovery rules achieved their stated goals effectively).

<sup>33</sup> See WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX CASES: A HANDBOOK FOR LAWYERS AND JUDGES* 1–7 (1982) (detailing the evidence in favor of close judicial case management in antitrust cases); Robert F. Peckham, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 255–60 (1985) (arguing for increased case management to reduce litigation costs); see also James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 676 (1998) (concluding that a substantial majority of lawyers and a "vast majority" of judges favor judicial management of discovery).

<sup>34</sup> I heard this view expressed by several speakers at the May 2010 Litigation Review Conference at the Duke Law School convened by the Civil Rules Advisory Committee of the Judicial Conference. The meeting was attended by an impressive array of judges, litigators, corporate counsel, and academics. For a summary of the Conference, see John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 542 (2010), in which the author, a distinguished federal district judge, notes the substantial agreement on the need for the active judicial management of litigation.

has been controversial,<sup>35</sup> however. Some commentators have expressed the view that the shift toward judicial management has transferred too much power and discretion to the district judge, impaired the ability to secure a trial on the merits, diluted the stature of jury trials, and diminished the autonomy of the advocates. Although the intensity of this cross-current of opinion has diminished in recent years, the difference in viewpoints on the subject has hardly been eliminated.<sup>36</sup>

Whatever the merits of the debate may be, one thing seems clear: Judicial management represents a significant modification, and perhaps an unquantifiable debilitation, of the historic bilateral adversary system that has characterized civil proceedings in common law courts for centuries. That bilateral model has been replaced to some degree by a process that is more akin to a triangulated shared power and functional relationship between the judge and the lawyers. Perhaps the shift is an inevitable byproduct of the multidistrict litigation statute, Rule 16, and the *Manual*, as well as the growing pressure on the system from “big” cases. Indeed, when I was called upon to discuss the 1983 amendment of Rule 16 with various groups in my role as Reporter, I opined (somewhat rhetorically) that the then-new rule reflected the view that “the adversary system as we know it has become too costly and inefficient a device for resolving civil disputes.”<sup>37</sup> The reality is that it is no longer accurate to say that a lawsuit is the “lawyer’s case” or to view the judge as a relatively passive referee or umpire. Increased judicial management and participation

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<sup>35</sup> See Robert E. Keeton, *Time Limits as Incentives in an Adversary System*, 137 U. PA. L. REV. 2053, 2057 (1989) (arguing that judges should devote themselves to judging and the duties of “care and control, stewardship over the trial, superintendence . . . direction and leadership”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 528 (1986) (discussing the growing view of both judges and consumers of judicial resources that the ultimate goal is to facilitate settlement); Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 152–53 (1994) (explaining that management emphasizes efficiency and speed at the expense of other values). Compare Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982) (arguing that case management could lead to due process concerns), with Stephen Flanders, *Blind Umpires: A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 520–22 (1984) (arguing that not all types of case management are cause for concern).

<sup>36</sup> Currently, a lively discussion centers on the question of what is the most appropriate and effective utilization of the time of district judges, a question that is related to widespread concern about the so-called “vanishing trial.” See *infra* notes 81–86 and accompanying text; see also Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 689–97 (2010) (outlining the arguments for and against judges using their time to manage cases).

<sup>37</sup> Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 20 (1984).

may be a contributing factor to the willingness of judges to terminate litigation short of trial, a major theme developed below.

Judicial involvement in matters traditionally left to the adversary process is most extensive in class actions because—in addition to the management matters described in Rule 16 that apply to all civil actions—Rule 23 requires the district court to determine (1) the adequacy and selection of the class’s representative and counsel, (2) the contours of the class and any subclasses, (3) the relationship between class counsel and class members, (4) the content of notices sent to class members, (5) the fairness of any proposed settlement, and (6) the fees, if any, to be awarded to the class’s attorneys.<sup>38</sup> But it is not uncommon to see extensive management by district judges (and magistrates) in mass or complex cases that lie outside the ambit of Rule 23. Recent years also have seen the emergence of what has been called the “quasi-class action,” which supposedly justifies judicial control over collective settlements and attorneys’ fee matters that previously were left to the advocates in non-representative, non-class action certified cases.<sup>39</sup> The magnitude of this tectonic shift in the handling of civil cases has yet to be measured or evaluated systematically, and precisely how the balance eventually will be struck between judicial management and the traditional adversary methodology remains to be seen.<sup>40</sup>

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<sup>38</sup> See FED. R. CIV. P. 23.

<sup>39</sup> *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271–72 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); see also *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*6 (D. Minn. Mar. 7, 2008), amended by 2008 WL 3896006 (D. Minn. Aug. 21, 2008). For a discussion of the *Zyprexa*, *Vioxx*, and *Guidant* MDL proceedings, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 113–20 (2010) and AM. LAW INST., AGGREGATE LITIGATION PRINCIPLES 174–76 (2010). In the litigation brought by the 9/11 responders seeking compensation for respiratory ailments, a non-class action, District Judge Hellerstein initially rejected the proposed settlement of over 10,000 claims and sought the reduction of attorneys’ fees. An enhanced settlement was approved. See Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron O. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127 (2012) (describing the various stages of the 9/11 litigation). Judicial authority for these interventions in a nonclass setting, which lacks some of the procedural safeguards made available for class actions by Rule 23 is controversial. See, e.g., Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270–74 (2011).

<sup>40</sup> There are other examples of this shift. For example, the limited mandatory disclosure provision now found in Rule 26(a) calling for the automatic turning over of certain categories of information as a precursor to formal discovery is thought by some to be inconsistent with the adversary model. See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 632 (2010). The provision has had a checkered history, and its utility remains unclear. See generally 8A CHARLES ALAN

In a different but perhaps no less significant category of change since the promulgation of the Federal Rules, law has become a business as much as a profession. Like many, I mourn that shift. Law practice today is highly competitive and territorial. Professional courtesy in some respects is in eclipse. Lawyers on both sides of the “v.”—and often even on the same side of the “v.”—troll for clients and play turf games to secure control over potentially lucrative lawsuits. In some contexts there is so much money on the table that the litigation stakes promote unprofessional motivations and behaviors. The mega law firms, some now global in character, are partnerships in name only. The pressure of contemporary business economics has destroyed several marquee firms: The most recent stunning example is the bankruptcy of the highly regarded Dewey & LeBoeuf.<sup>41</sup> As has been said, “Money is weak glue.”<sup>42</sup> The Supreme Court—sadly in my view—has validated lawyer advertising in the name of free speech,<sup>43</sup> leading some members of the bar to become TV pitchmen. Law firm marketing, replete with wining and dining, networking meetings at posh resorts, and glossy brochures, is now commonplace. Sometimes the dealmaking among plaintiffs’ lawyers vying for leadership in a case (and a larger portion of the potential attorney’s fees) has the feel of haggling in the Grand Bazaar in Istanbul. The defense side similarly sees itself as being in the legal business as much (or more than) the legal profession. The difference on the defense side is that the acquisition and retention of clients and the division of a litigation’s workload and its spoils among firms simply is a more genteel and less visible process. In sum, all too many firms have become bottom-line profit maximizers.

On a more positive note, the profession has become more diversified and heterogeneous at all levels and in all categories. Moreover, because of the wide-ranging, significant legal developments designed to meet the quest for social justice that emerged in post-World War II America, we now have something that really did not exist in 1938—the public interest and social action bars. They are composed of professionals who deserve the greatest respect and gratitude because

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WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 2053–54 (3d ed. 2010) (explaining Federal Rule 26(a)’s history and pitfalls); Samuel Issacharoff & George Lowenstein, *Unintended Consequences of Mandatory Disclosure*, 73 *TEX. L. REV.* 753 (1995) (describing uncertainty as to whether mandatory disclosure reduces or increases costs of litigation).

<sup>41</sup> Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, *N.Y. TIMES*, May 29, 2012, at B1. It is the largest law firm bankruptcy in history. *Id.*

<sup>42</sup> *Id.* (quoting Professor William Henderson).

<sup>43</sup> See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381–83 (1977) (holding that lawyer advertising is protected speech under the First Amendment).

they resort to the civil justice system for various ideological, egalitarian, and humanitarian reasons in an attempt to promote public policies and expand the rights and remedies of the people they represent.<sup>44</sup>

Much wonderful and creative legal work in the public interest has been done by lawyers pursuing the private enforcement of public policies—indeed, we sometimes refer to them as private attorneys general.<sup>45</sup> They typically are supported by donations, foundations, contingent fees, or the hope of a court awarded fee, the latter two modes subjecting them to enormous financial risks. Closely related to the core of public interest practitioners are lawyers whose motivations are, in fact, entrepreneurial and others who are both altruistic and entrepreneurial in outlook.<sup>46</sup> Often embedded in the entrepreneurial aspects of the activities of both of these groups lies a strong desire to further the public policies underlying particular cases. Because of the dramatic expansion of substantive rights in recent decades, many more litigation fields now exist for plaintiffs' lawyers—whether entrepreneurial, public interest, or a mixture of the two—to pursue the enforcement or expansion of various regulatory objectives by way of litigation.

The efforts of public interest attorneys go well beyond the classic civil rights and legislative reapportionment battles. Asbestos is held in check by the private bar.<sup>47</sup> Tobacco is cabined by the private bar.<sup>48</sup>

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<sup>44</sup> See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1183–86 (2009) (detailing the sudden rise of the public interest bar in the late 1960s). Not to be ignored, of course, is the rise of the conservative bar as exemplified by the growth of the Federalist Society, now countered by the emergence of the American Constitution Society.

<sup>45</sup> See *Assoc. Indus. of N.Y. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (referring to the term “private attorney generals”—for possibly the first time in American case law), *vacated*, 319 U.S. 739 (1943). See generally William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004) (discussing the history and the role of private attorneys general). The origins of the private enforcement of public policy is traced in Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977–85 (2004).

<sup>46</sup> See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 888–89 (1987) (describing lawyers who pursue litigation for private gain); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 5–11 (2008) (discussing the implicit expectation of entrepreneurial motivations for lawyers through the perspective of Supreme Court case law).

<sup>47</sup> See Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 908–14 (1996) (discussing asbestos litigation by private attorneys); see also Steve Olafson, *21 Steelworkers Who Contracted Asbestos Disease Win \$115 Million*, HOUS. CHRON., Feb. 20, 1998, at 1, available at [http://www.lanierlawfirm.com/law\\_firm\\_news/asbestos\\_disease\\_lawsuit\\_brazoria.htm](http://www.lanierlawfirm.com/law_firm_news/asbestos_disease_lawsuit_brazoria.htm) (describing an asbestos-related verdict against The Carborundum Company).

Defective pharmaceuticals such as diet drugs, Vioxx, and other products are removed from our midst.<sup>49</sup> Illicit financial and market practices of companies such as Enron are halted by the private bar.<sup>50</sup> Today, a number of attempts are underway to hold accountable some of those responsible for the recent financial crisis.<sup>51</sup> Fewer Americans die or become incapacitated by defective products or toxic substances, and important social and economic policies are enforced because of the work of these lawyers.<sup>52</sup>

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<sup>48</sup> See Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 *DEPAUL L. REV.* 219, 226–28 (2001).

<sup>49</sup> See Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 *ST. LOUIS U. L.J.* 451, 484 (2000) (mentioning several products that have been eliminated by the private bar); Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, *N.Y. TIMES*, Aug. 20, 2005, at A1 (discussing a verdict against Vioxx).

<sup>50</sup> See *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, No. MDL-1446, 2008 WL 4178151 (S.D. Tex. Sept. 8, 2008) (approving the plan for allocation of the more than \$7 billion settlement fund recovered in various Enron cases); Gary J. Aguirre, *The Enron Decision: Closing the Fraud-Free Zone on Errant Gatekeepers?*, 28 *DEL. J. CORP. L.* 447, 453–60 (2003) (describing a class action suit challenging Enron's fraud); Milton C. Regan, Jr., *Teaching Enron*, 74 *FORD. L. REV.* 1139 (2005) (describing the Enron machinations and the participants).

<sup>51</sup> Several actions have been brought arising out of the mortgage securitization practices that took place during the recent recession. However, today's pleading burdens have been difficult to negotiate. See *infra* notes 170–219 and accompanying text; see also *Landesbank Baden-Württemberg v. Goldman, Sachs & Co.*, No. 11-4443-CV, 2012 WL 1352590, at \*2 (2d Cir. Apr. 19, 2012) (holding that allegations of fraud in marketing collateralized debt obligations were insufficient despite a showing of Goldman's extensive sub-prime exposure and knowledge of the deterioration of the market). *But cf.* *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 648–49 (S.D.N.Y. 2012) (denying a motion to dismiss and ruling that whether the plaintiff could have uncovered defendant's fraud in marketing collateralized debt obligations was a question of fact). The *Landesbank* and *Dodona* cases are further discussed *infra* at note 209. A few cases suggest that plaintiffs may hold at least some financial institutions responsible under the new pleading regime. See *Pa. Pub. Sch. Emps. Ret. Sys. v. Bank of Am. Corp.*, No. 11 Civ. 733 (WHP), 2012 WL 2847732, at \*18–19 (S.D.N.Y. July 11, 2012) (upholding a complaint alleging that the bank knew of legal problems growing from its method of monitoring mortgages); *Tsereteli v. Residential Asset Securitization Trust*, No. 08 Civ. 10637, 2012 WL 2532172, at \*1–2 (S.D.N.Y. June 29, 2012) (granting class certification in a suit alleging that Credit Suisse Securities (USA) LLC failed to tell investors about the poor quality of loans behind \$642 million in mortgage-backed securities offered in 2006); Mark Hamblett, *Goldman Loses Bid to Dismiss CDO Suit*, *N.Y. L.J.*, June 25, 2012, at 1, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202560558742&slreturn=1>; *Federal Court Approves \$40 Million Settlement in Lehman Brothers Residential Mortgage-Backed Securities Class Action Lawsuit*, *BUS. WIRE* (June 22, 2012), <http://www.businesswire.com/news/home/20120622005424/en/Federal-Court-Approves-40-Million-Settlement-Lehman> (approving the settlement and ending a four-year securities class action against individuals who were associated with Lehman Brothers).

<sup>52</sup> See Reingold, *supra* note 46, at 29–31 (discussing beneficial effects that no longer exist due to de facto elimination of private plaintiffs' lawyers litigating in that area).

The rise of the public interest bar, now nurtured by many law schools, has furthered the enforcement of constitutional and statutory public policies. In effect, we now have an indispensable satellite regulatory system that augments and sometimes serves as a substitute for the work of official governmental agencies that typically are under resourced, captured by the industries they are expected to regulate, or ossified by internal regulation. The Enron debacle has become a poster child exemplifying governmental and private institutions being “asleep at the wheel.”<sup>53</sup> In the face of limited official oversight, the public interest bar watches both commercial and government conduct.<sup>54</sup> In many contexts, the private enforcement of these norms is pursuant to statutory,<sup>55</sup> common law,<sup>56</sup> or constitutional principles;<sup>57</sup> in other instances, it has come as a result of the implication of private rights of action by the courts.<sup>58</sup> Thus, today there are private civil actions under laws relating to antitrust, securities, consumer

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<sup>53</sup> John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 60 (2005) (condemning the Securities and Exchange Commission, Enron's board of directors, the accountants, securities analysts, and the federal criminal laws in the terms quoted in the text).

<sup>54</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283–84 (1976) (describing differences between the historical adversarial system and the current public law model); see also SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 6–10 (2010) (characterizing private lawsuits to enforce legislation as essential to legal infrastructure in the United States); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 71–72 (2010) (discussing the negative effects *Twombly* and *Iqbal* have on the ability for private parties to assist government agencies in the enforcement of substantive law); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1289–94 (1982) (discussing the necessity of private rights of action for the enforcement of substantive law). In Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 372 (2012), my colleague characterizes this duality of enforcement as “regulatory pluralism” and describes this state/private division in various contexts.

<sup>55</sup> See, e.g., 15 U.S.C. § 15 (2006) (authorizing antitrust suits).

<sup>56</sup> See, e.g., CHARLES M. HAAR & DANIEL WILLIAM FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY* 18–20 (1986) (outlining the common law argument for fairness and its modern application); see also Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1555–69 (2010) (detailing common law pathways available for enforcement of state constitutional rights).

<sup>57</sup> E.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that state laws requiring separate Black and White schools are unconstitutional); see also *Brown v. Plata*, 131 S. Ct. 1910, 1941 (2011) (finding conditions in the California prison system unconstitutional); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (finding that the Equal Protection Clause required correction of political malapportionment).

<sup>58</sup> Perhaps the most notable example of the judicial implication of private rights of action is in securities fraud case law. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (describing securities fraud actions as a “judicial oak which has grown from little more than a legislative acorn”).



protection and unfair business practices, civil rights, employment discrimination, the disabled, and—my personal favorite—age discrimination. The enforcement of the underlying policies by private litigation is incentivized by statutory provisions for multiple damages and the possibility of securing attorneys' fees and other litigation costs, as well as fee awards under the judicially created common fund doctrine.

But a backlash has set in against the private enforcement of public policies—a backlash that favors corporate and governmental interests against the claims of individual citizens.<sup>59</sup> Politicians and special interests, sometimes aided, perhaps “innocently,” by the media, vilify the plaintiffs' bar as fee-hawking ambulance chasers.<sup>60</sup> Americans have been defamed as fortune hunters trying to win the litigation lottery. Bogus caseload statistics are propagated, while empirical data is ignored, and fears are spread by claims that there is a litigation explosion in this country and that Americans are paying a litigation tax that renders our businesses uncompetitive.<sup>61</sup> Political

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<sup>59</sup> Interest groups have expended considerable efforts over the years, seeking to reduce the effectiveness of several federal statutes and policies. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 167–73 (2008) (documenting the Federalist Society's rise and impact on the law); Leslie M. Kelleher, *Amenability to Jurisdiction as a “Substantive Right”: The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1194 (2000) (describing the Private Securities Litigation Reform Act from the perspective of special interest groups devoted to reducing the threat of securities lawsuits). In Michael S. Greve, *Atlas Croaks. Supreme Court Shrugs.*, 6 CHARLESTON L. REV. 15, 17–20 (2011), the author attempts to justify the business orientation of the Supreme Court because of what he asserts is the “Constitution's commercial structure.”

<sup>60</sup> See PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* 14–27 (2001) (arguing that the theory of personal rights has led to excessive litigation); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 5–11 (1991) (arguing that personal injury lawsuits have crippled the medical industry and unjustly enriched the legal profession); James R. Copeland, *K Street: A Report on the Litigation Lobby, 2010: A Message from the Director*, TRIAL LAW. INC., <http://www.triallawyersinc.com/kstreet/kstr01.html> (arguing that the cost of tort litigation in the United States constitutes a tax that the Democratic Party is intent on raising); see also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 719 (1998) (describing backlash against the plaintiffs' bar as an artificial attack on the legal system); Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323, 325–26 (2007) (outlining the history of antipathy toward the plaintiffs' bar). The motivation and economics of the enforcement of public policies through litigation by entrepreneurial lawyers is frequently misunderstood or reflexively criticized. See, e.g., Mosi Secret, *Disabilities Act Used by Lawyers in Flood of Suits*, N.Y. TIMES, Apr. 17, 2012, at A1.

<sup>61</sup> See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77–91 (1993) (describing and debunking various inaccurate statistics used to attack the American legal system); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1395–96 (1994) (“We believe America is the most

candidates and office holders score cheap points with attacks on our justice system, cloaking themselves in the deceptive mantle of “tort reform.”<sup>62</sup> Finally, urban legends about certain cases—and sometimes even imagined cases<sup>63</sup>—abound, typically in highly distorted form. The so-called McDonald’s coffee cup case,<sup>64</sup> for example, has been grotesquely misdescribed and, with the aid of simplistic media accounts, has become a cosmic anecdote recounted countless times in the most disparaging terms.<sup>65</sup> Sometimes this backlash makes it feel as if a class struggle between consumers and corporate America is being waged in our courts.

At times, the campaign against private enforcement has been waged at the highest levels. In 1983, President Reagan created a Council on Competitiveness, on which Vice President Dan Quayle later served as chair.<sup>66</sup> One of its avowed objectives was to protect the business community from the so-called “litigation explosion” and its alleged social costs through “deregulation” and “reform” of the justice system. Indeed, one of the Council’s products was a 1991 report entitled “Agenda for Civil Justice Reform in America,” apparently a euphemism for reducing the effectiveness of private enforcement of

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litigious society on earth not because this is true but because the media have told us so over and over again.”); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1116–23 (2012) (analyzing various factors, including media distortion, contributing to the effectiveness of the cost-and-delay narrative); Randall Samborn & Rorie Sherman, *Quayle Spices Up ABA Meeting*, NAT. L.J., Feb. 12, 1992, at 1 (describing a debate between Vice President Dan Quayle and the American Bar Association president over inaccurate statistics).

<sup>62</sup> See LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX; 2010 REPORT 12 (2010) (conducting an empirical study on tort liability regulation enacted without concrete justification as to the need for such regulation); Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401, 1417–21 (2004) (arguing for legislative limits on potential tort recoveries based on extreme cases alone); Dan Quayle, Vice President of the United States, Address to the Annual Meeting of the American Bar Association (Aug. 13, 1991) (using questionable statistics to argue for drastic reforms to the civil justice system).

<sup>63</sup> See, e.g., THE STELLA AWARDS, <http://www.stellaawards.com/> (last visited Feb. 2, 2013) (collecting urban legends).

<sup>64</sup> *Liebeck v. McDonald’s Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994), *vacated*, 1994 WL 16777704 (D.N.M. Nov. 28, 1994).

<sup>65</sup> See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 987–88 & n.15 (2003) (describing the effect of the McDonald’s case). Two years ago—seven years after the case ended—HBO aired a documentary entitled *Hot Coffee* that finally puts the matter in proper perspective. *HOT COFFEE* (The Group Entertainment 2011).

<sup>66</sup> PRESIDENT’S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 6 (1991). President Reagan also led the fight to eliminate the Legal Services Corporation and has been quoted as referring to public interest lawyers as “a bunch of ideological ambulance chasers.” Michael S. Greve, *Why “Defunding the Left” Failed*, 89 PUB. INT. 91, 91 (1987).

various regulatory regimes affecting the business community.<sup>67</sup> Although the Council was disbanded, various “reform” efforts to quell the mythical “litigation explosion” were advanced in Congress during the presidencies of George H.W. Bush and William J. Clinton; most were not adopted.<sup>68</sup> Then, in 1995, heavy lobbying by corporate interests brought about the enactment of the Private Securities Litigation Reform Act<sup>69</sup> over President Clinton’s veto. The Act erected a number of substantial procedural hurdles designed to encumber private securities fraud actions despite the lack of any real empirical proof that there was a need for such hurdles. In retrospect, the enactment seems even more inappropriate given the significant amount of marketplace misbehavior that was going on at that time and in the roughly twenty years since. Much of that marketplace misbehavior required, but was not given, regulatory attention by the Securities and Exchange Commission or other government agencies, making the necessity of an efficacious private enforcement alternative even clearer.<sup>70</sup>

All of these manifestations of the backlash have been given traction by the Supreme Court, which seems to have placed a thumb on the justice scale favoring corporate and government defendants. These manifestations have impaired both access to the federal courts for many citizens and the enforcement of various national policies.<sup>71</sup>

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<sup>67</sup> PRESIDENT’S COUNCIL ON COMPETITIVENESS, *supra* note 66. The document’s political and special interest character was obvious to many. *See, e.g.*, Carrington, *supra* note 40, at 628–30.

<sup>68</sup> The “litigation explosion” is debunked and the attempts at procedural “reform” are discussed in Miller, *supra* note 65, at 985–1003. The statistics relied on by Vice President Quayle in his speeches and the Council Report were extremely shaky at best. *See* Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness’s Agenda for Legal Reform*, 75 JUDICATURE 244, 245–48 (1992) (examining the sources and logic behind the figures used in Vice President Quayle’s speech).

<sup>69</sup> Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.); *see also* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007) (construing 15 U.S.C. § 78u-4(b)(2) (2006), the statutory passage requiring the pleading of a “strong inference” of scienter); Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (indicating that the pleading requirements of the PSLRA have deterred meritorious as well as meritless securities actions). In 1998, Congress preempted virtually all class actions that might relate to the federal securities acts, thereby ending any doctrinal growth in state securities law. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. § 78a (2006)).

<sup>70</sup> The shortfall in governmental oversight is best illustrated, of course, by the havoc wreaked by the Madoff and Stanford Ponzi schemes. Certain provisions of the 1995 legislation did improve some practices in securities cases, however, such as rationalizing the process for selecting the lead representative and class counsel to eliminate the race-to-the-courthouse process that preceded the statute. 15 U.S.C. § 78u-4(a)(3) (2006).

<sup>71</sup> Others have also voiced this critique. *E.g.*, ALAN B. MORRISON, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, *SAVED BY THE SUPREME COURT: RESCUING CORPORATE*

On the substantive side of the law, for example, the judicial creation of new federal rights and remedies by implication from statutes has become extremely rare.<sup>72</sup> In addition, existing rights under certain statutes have been limited.

A few illustrations drawn from interpretations of our securities laws are instructive. First, Supreme Court decisions have eliminated liability in certain legal contexts for aiding and abetting improper marketplace activities no matter how egregious the conduct and the number of people hurt, thereby limiting the opportunity for aggrieved citizens to secure compensation, particularly when the primary offender is insolvent.<sup>73</sup> Next, despite the global nature of the securities market—making the location where a transaction is executed irrelevant (indeed, in many instances fortuitous)—the Supreme Court’s decision in *Morrison v. National Australia Bank Ltd.*<sup>74</sup> sharply limited the right of various groups of investors who did not purchase or sell on a domestic exchange to sue for alleged fraud under our securities laws, even when the defendant company has taken advantage of the American capital marketplace and a meaningful portion of the

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AMERICA 14 (2011) (“I can think of no truly significant case in the last decade that Corporate America has lost.”); Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 637 (2012) (inferring from the *Goodyear* and *McIntyre* decisions that business interests have influenced the Court’s views on personal jurisdiction); Erwin Chemerinsky, *Closing the Courthouse Doors: October Term 2010*, 14 GREEN BAG 375, 389 (2011) (suggesting that the Supreme Court’s 2010 term may have been influenced by pro-business justices).

<sup>72</sup> See, e.g., *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2864 (2010) (refusing to recognize a tort claim under section 301(a) of the Labor Management Relations Act for interference with the collective bargaining agreement); *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075–77 (D.C. Cir. 2012) (not recognizing federal common law because of a lack of legislative guidance and the imprudence of exercising jurisdiction over foreign sovereigns).

<sup>73</sup> *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302–03 (2011) (eliminating secondary liability by reading “make” in the Exchange Act narrowly); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159–64 (2008) (restricting “scheme” liability under the Exchange Act); see also *Cent. Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994) (limiting aiding and abetting liability); Elizabeth Cosenza, *Is the Third Time the Charm? Janus and the Proper Balance Between Primary and Secondary Actor Liability Under Section 10(b)*, 33 CARDOZO L. REV. 1019, 1051–75 (2012) (discussing the narrowing of secondary liability under *Stoneridge* and *Janus*); Donald C. Langevoort, *Reading Stoneridge Carefully: A Duty-Based Approach to Reliance and Third-Party Liability Under Rule 10b-5*, 158 U. PA. L. REV. 2125, 2129–38 (2010) (discussing the *Stoneridge* decision under duty theory in order to identify more novel responses).

<sup>74</sup> 130 S. Ct. 2869 (2010); see also William S. Dodge, *Morrison’s Effects Test*, 49 SW. L. REV. 687 (2011) (discussing the future of extraterritoriality after *Morrison*); Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court’s “Transactional Test,”* 52 VA. J. INT’L L. 405, 430–39 (2012) (discussing the effects of *Morrison* on other areas of law).

misconduct occurred in this country.<sup>75</sup> Other obvious exemplars of the orientation of today's Supreme Court are its campaign financing decision in *Citizens United v. Federal Election Commission*<sup>76</sup> and its repeated diminution of punitive damage awards.<sup>77</sup> Decisions such as these have blunted the effectiveness of several of our regulatory statutes.

This transformation of substantive legal doctrine has been accompanied by a comparable modification of the judicial processing of civil cases. In particular, I am increasingly concerned about procedural changes that have resulted in the earlier and earlier disposition of litigation, often eviscerating a citizen's opportunity for a meaningful adjudication on the merits of his or her grievance. Remember the image suggested earlier—the civil litigation gold standard—trial before a jury. Today, there are hardly any federal civil trials—let alone jury trials.<sup>78</sup> Most courtrooms in federal courthouses are empty

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<sup>75</sup> The *Morrison* decision also held that when unlisted securities are involved, the protections of section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (2006), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (2006), only apply to “domestic transactions.” *Morrison*, 130 S. Ct. at 2884; see also *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67–68 (2d Cir. 2012) (holding that the “domestic transactions” requirement can be satisfied only by creating a plausible inference that either party incurred irrevocable liability within the United States or by alleging that the title to the shares was transferred within the United States).

<sup>76</sup> 558 U.S. 310 (2010).

<sup>77</sup> See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 503–15 (2008) (limiting punitive damages under admiralty common law); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423, 425–26 (2003) (limiting punitive damages under the Due Process Clause); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (same); see also Lauren E. Hume, Note, *Are We Sailing in Occupied Waters?: Rethinking the Availability of Punitive Damages Under the Oil Pollution Act of 1990*, 86 N.Y.U. L. REV. 1441, 1468–73 (2011) (explaining the Court's justifications for, and the economic impact of, limiting punitive damages).

<sup>78</sup> Only 1.0% of the more than 300,000 civil terminations in the federal courts over twelve recent consecutive months occurred after reaching trial. *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2011*, USCOURTS.GOV, <http://www.uscourts.gov/Viewer.aspx?doc=?/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C04Mar11.pdf> (last visited Feb. 12, 2013). In 1952, the figure was 12.1%, and in 1938, it was 19.9%. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1258–59 (2005) (highlighting the decline in trials and jury trials). Jury trials were only 0.73% of total dispositions in 2010, down from 5.49% in 1982. MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INST., *THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS* 3–4 (2011). Even the character of the jury trial has been debilitated. Although historically juries had twelve persons, federal juries now may have anywhere from six to twelve members. FED. R. CIV. P. 48(a); 9B WRIGHT & MILLER, *supra* note 3, § 2491 (describing the history of the jury size requirement). Numerous studies clearly indicate that twelve jurors is preferable to a smaller number for a variety of reasons. See Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 29–32 (1993) (describing predictability and representation issues typical of smaller sample sizes with juries of six as opposed to twelve).

much of the time as judges try fewer and fewer cases. Indeed, a contemporary cliché refers to the “vanishing trial.”<sup>79</sup> Cases simply do not survive until trial; they are settled or, increasingly, dismissed.<sup>80</sup> As the late Judge Richard Arnold of the Eighth Circuit observed: “[S]ome judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.”<sup>81</sup> This is most unfortunate. Trials are open to the public, often use citizen jurors as fact finders and law applicators, provide transparency, are an important aspect of our democratic tradition, and preserve the credibility of our civil justice system.<sup>82</sup>

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<sup>79</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459, 459 (2004); see also Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mazingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 101 (2010) (discussing “the vanishing jury trial”); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006) (stating that the “civil jury trial has all but disappeared”). It is interesting that two of these three authors are federal district judges. Judge William Young of the District of Massachusetts has been indefatigable in his efforts to combat the vanishing trial. See, e.g., *United States v. Massachusetts*, 781 F. Supp. 2d 1, 21–27 (D. Mass. 2011) (arguing, in an addendum, against an “administrative model” of the courts).

<sup>80</sup> See generally Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1951–56 (2009) (evaluating the empirical evidence on settlement). Given the pressures on our courts and the expense and delays so common in litigation, a high level of settlement is to be expected and is generally thought of as highly desirable. Of course, the critical question is how high should that settlement rate be and what judicial pressures to achieve settlement are legitimate. There is some disagreement as to the answer to that question. Compare Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075, 1087 (1984) (arguing for a lower settlement rate), with Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2669, 2692 (1995) (arguing for a higher settlement rate).

<sup>81</sup> Richard Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999). Two federal judges have remarked to me that they consider it a failure if a case on their docket reaches trial. Thus, the development of a possible judicial predilection to promote early disposition of cases as a docket control mechanism should not be overlooked. See Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3, 59–62 (1996) (outlining two themes for such development—information and incentives). Nor should the economic incentives of the prevalent billing-by-the-hour methodology employed by defense firms be overlooked either. There is much talk in the profession of developing new compensation models.

<sup>82</sup> See generally ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 64–65, 71–75, 117–20, 132–33 (2009) (describing some populist themes of the American court system); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270–76 (J.P. Mayer ed., George Lawrence trans., HarperCollins Publishers 2006) (1835) (describing the importance of the jury system as a political institution); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401–03 (2011) (explaining the origin and benefits of the traditional American trial system).

Many reasons have been offered for the paucity of trials. One is that most lawyers today either lack trial experience or believe their courtroom skills have become too rusty to trust.<sup>83</sup> Another possibility is that when the litigation stakes are high, one or both sides may deem merit adjudication too risky—reflecting to some degree a lack of faith in the trial process and perhaps even less in our jury system.<sup>84</sup> Merit-phobia undoubtedly promotes a willingness to settle or, on the part of the defense, an incentive to delay and embrace every possible way to terminate a case short of trial. That mindset, coupled with the reality that a substantial portion of judicial time and energy is being diverted to the management dynamic, may be producing a joint-liminal or subliminal settlement orientation among trial judges and litigators. Indeed, the combination of emphasis on management and today's settlement, or work-out, culture<sup>85</sup> has led one of the nation's most distinguished federal judges—one with both trial and appellate experience—to refer to our federal courts as being more like administrative agencies than judicial tribunals.<sup>86</sup>

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<sup>83</sup> See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 750, 755–56 (2010) (lamenting the decline in the trial experience of attorneys).

<sup>84</sup> See Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 208 (“Fear of juries leads defendants to settle suits, whatever their merits.”); D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 453, 467–68 (2d ed. 2007) (arguing that trials represent an “unacceptable risk and expense” for the modern litigant). The diminished faith in the judicial system also is manifested by the growth in utilization of alternative dispute resolution techniques, most notably by mediation (often court ordered) and contractually imposed arbitration. Federal judges now commonly divert cases into mediation, which often proves time consuming, and accord arbitration provisions extremely expansive construction. See *infra* Part II.D (describing the Court's increasingly liberal reliance on the supposed policies of the Federal Arbitration Act (FAA)). Professor John Langbein argues that the “discovery revolution” and other forms of nontrial procedure, which include judicial management and expanded motion practice, has rendered the trial obsolete, and along with it, jury trial. John Langbein, *The Disappearance of the Civil Trial in the United States*, 122 YALE L.J. 552 (2012). One writer has even suggested that, because settlement is the dominant form of case resolution today, a new set of rules is needed to guide litigants during the settlement process as to the merits and value of their claims, which tend to be distorted otherwise. See J. Maria Glover, *The Federal Rules of Civil Settlement*, 78 N.Y.U. L. REV. 1713, 1750–51 (2012).

<sup>85</sup> The quest for global litigation peace in multiparty cases has motivated the emergence of mechanisms such as the quasi-class action and bankruptcy to achieve the widest possible finality and closure. See *supra* note 39 and accompanying text. The burgeoning literature reveals a wide range of views on the wisdom of this trend. See, e.g., Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 6–11 (2009) (describing the correlation between a procedure's perceived fairness and legitimacy); Erichson & Zipursky, *supra* note 39, at 318–21 (questioning and qualifying the importance of closure when consent is diminished). An excellent discussion of the use of the bankruptcy model appears in Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1015–23 (2012).

<sup>86</sup> Higginbotham, *supra* note 83, at 747, 760.

In my view, one of the more significant reasons for the “vanishing trial” phenomenon is that in various ways judges are terminating cases earlier and earlier during today’s highly elaborate and elongated pre-trial phase of litigation. Of course, most dismissals are largely done on motion papers in a manner reminiscent of the old equity practice. It has been a gradual, largely invisible process of the type that my television mentor, Fred Friendly, often would characterize as making policy by one-degree-itis. The plaintiffs’ bar might characterize what is happening more graphically as litigation death by a thousand procedural cuts.

## II

### THE DEFORMATION OF PROCEDURE IN THE FEDERAL COURTS

This acceleration of case disposition has come about because the federal courts have erected a sequence of procedural stop signs during the past twenty-five years that has transformed the relatively uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points. Each of these stop signs reflects a truism: Control over court procedure is a source of societal (not simply litigation) power, and the interpretation and alteration of that procedure frequently is advocated or undertaken to advance some non-litigation objective that may be substantive, economic, philosophical, or all three. There is much that reflects these realities in today’s world of procedure.<sup>87</sup> For example, subject matter jurisdiction statutes, many of the Federal Rules, and the judicial interpretations and clarifications thereof represent inevitable tradeoffs between what often appear to be reasonable competing systemic policy objectives.<sup>88</sup>

One always hopes that the overall procedural system represents a reasonable balance among the competing viewpoints and reflects the core values of society. But when one considers the collective impact of the procedural stop signs posted in the recent past, the result appears to be favoring one side rather than the other, even though various rules and earlier precedents may not have been drafted or decided

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<sup>87</sup> See *supra* notes 66–68 and accompanying text (discussing the work of the Council on Competitiveness); see also Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2224–27 (1989) (rejecting contentions that the Federal Rules are applied neutrally and equally to any given party); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 544 (2001) (exploring the influence of politics on the trajectory of the Federal Rules).

<sup>88</sup> The subject is admirably developed in Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Procedure System*, 90 OR. L. REV. 993 (2012).



originally to achieve that result. Of course, procedural fashions and trends, as found in other societal systems, tend to have a pendular movement, which generally is seen as acceptable. What is unacceptable in my judgment, and what characterizes many of the developments of the past quarter century, is the transformation of the procedural landscape to suit the economic or political agendas of powerful interest groups at the expense of the original philosophical objectives of the Federal Rules of Civil Procedure. Once conceptualized as party neutral, their construction and application no longer appear to be providing a level playing field for the contesting litigants.<sup>89</sup> Let me sketch the early-termination developments that trouble me in a roughly chronological fashion.

### A. Summary Judgment

I mark the beginning of the stop sign era at 1986 when the Supreme Court decided a trilogy of cases invigorating the summary judgment motion.<sup>90</sup> My successor as Reporter to the Rules Advisory Committee—and others—share my view that the Court in essence was unilaterally “rewriting” Rule 56 in these cases.<sup>91</sup> Because summary judgment is largely a defendant’s litigation weapon and a grant

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<sup>89</sup> See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519–22 (2010) (suggesting the disparity has had the greatest impact on civil rights and employment discrimination cases); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 836–39 (1993) (warning that procedural changes often are made for “supposedly neutral” reasons when that is not the case).

<sup>90</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that the petitioner-defendant was not required to negate decedent’s asbestos exposure if respondent-plaintiff lacked evidence to prove that exposure, although the petitioner had been the moving party, thereby easing the movant’s burden on the motion); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (holding that actual malice must be “shown with convincing clarity”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (requiring “sufficiently ambiguous” evidence of a conspiracy to be “plausible”). The judicial attitude toward summary judgment in these three cases, found above, is markedly different from that manifested in the formative years of the Federal Rules. See cases cited *supra* note 13. The literature on these cases is voluminous. See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 787 (1988) (predicting increased grants of summary judgment motions); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 79 (1990) (categorizing the trilogy’s influence in two ways: (1) easing the moving party’s burden as to nonexistence of facts and (2) increasing district court judges’ discretion in granting these motions); Miller, *supra* note 65, at 1055–56 (concluding that Rule 56 has become a “powerful tool”); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 55–56 (1988) (commending the *Celotex* Court’s intent but also accusing the Court of wrongly deciding the facts and, thus, instituting an unclear standard).

<sup>91</sup> Carrington, *supra* note 40, at 646.

of the motion terminates a case before trial, the three decisions have encouraged escalated invocation of the motion by defendants. Judges, following what they perceive to be the Supreme Court's message, and possibly affected by the length of their dockets, the age of many of their cases, and formal and informal institutional pressures to increase their "throughput," have employed summary judgment more frequently.<sup>92</sup> The motion has taken on an Armageddon-like significance; it has become both the centerpiece and end-point for many (perhaps too many) federal civil cases.<sup>93</sup>

Unfortunately, one fears that occasionally judges inappropriately resolve trial-worthy disputed fact issues or characterize cases as implausible,<sup>94</sup> thereby disposing of them on motion rather than allowing them to proceed to trial.<sup>95</sup> Stated differently, the ambit of what is a "genuine dispute as to any material fact,"<sup>96</sup> which must be left for trial according to Rule 56(a) (and, of course, in many cases to a jury according to the Seventh Amendment of the Constitution), has

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<sup>92</sup> See Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL & LEGAL STUD. 861, 896 (2007) (showing an increase in motions made from 12% to 20% of the sample cases from 1975 to 2000 and an increase in the grant rate from 6% to 12% in those years). In John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 539–43 (2007), the author argues that summary judgment is inherently pro-defendant. In conversation, a retired federal judge suggested that because summary judgment grants produce written district court and court of appeals opinions and denials generally do not, other judges may be influenced by the apparent frequency and broadened bases on which those grants are made.

<sup>93</sup> I have written about the implications of the 1986 trilogy at length in Miller, *supra* note 65, at 1044–73.

<sup>94</sup> The Supreme Court seemed to authorize such case disposals on summary judgment in one of the three cases. See *Matsushita*, 475 U.S. at 595 ("The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy.").

<sup>95</sup> In *Scott v. Harris*, 550 U.S. 372, 386 (2007), the Court upheld summary judgment based on its own viewing of a videotape of a police car chase that resulted in a crash giving rise to a civil rights action. The Court concluded that the police conduct was reasonable. *Id.* Justice Stevens believed that the videotape was ambiguous, that the majority was speculating, and that the matter should have been left to jurors. See *id.* at 394–96 (Stevens, J., dissenting). Others who have viewed the video have concluded that the police's use of deadly force was unjustified. See Dan M. Kahan, David A. Hoffman & Donald Fruman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 866 (2009) (noting that twenty-six percent of the people in a test group who viewed the video at least slightly disagreed with the Court's conclusion). One would think the issue's very nature rendered it jury triable.

<sup>96</sup> Prior to a 2010 amendment, Rule 56(c) called for a determination of whether there was a genuine "issue" as to any material fact. The Advisory Committee Notes state that the word "dispute," now found in Rule 56(a), "better reflects the focus of a summary-judgment determination." FED. R. CIV. P. 56 advisory committee's note, *reprinted in* 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 494 app. C (2012).

been reduced. Conversely, what is being decided by judges “as a matter of law” on summary judgment has been enlarged.<sup>97</sup> Put yet another way, a motion designed simply for *identifying* trial-worthy issues has become, on occasion, a vehicle for *resolving* trial-worthy issues. Even when the motion is unsuccessful, summary judgment has become an expensive and time-consuming pretrial stopping point with attendant delay, expense, and risk of premature termination.<sup>98</sup> The effect is to compromise the due process underpinnings of the day-in-court principle and the constitutional jury trial right<sup>99</sup> without any empirical basis for believing that systemic benefits are realized that offset these consequences.<sup>100</sup> As will be discussed, this previously impermissible fact-finding now manifests itself as early as the pleading context.<sup>101</sup>

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<sup>97</sup> See generally 10A WRIGHT, MILLER & KANE, *supra* note 27, §§ 2725–28 (discussing the grounds for summary judgment and judges’ discretion on the motion).

<sup>98</sup> Some writers, particularly in the years following the trilogy, expressed the view that enhancing summary judgment would increase efficiencies, lower expenses, and serve as a wake-up call for the litigants and district judges. See, e.g., Friedenthal, *supra* note 90, at 771 (claiming that summary judgment “could leave judicial resources free to concentrate on those actions for which a trial is required”); William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213, 220 (1987) (arguing that even ungranted motions save resources by drawing focus to disputed issues). It is doubtful that time has proven these predictions accurate, given the enormous resources now devoted to summary judgment motions, their frequency, and appeals from their grant. See Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 249–50 (2011) (stating that attempts to strengthen summary judgment have “unintended consequences”). Moreover, even the statistics showing an increased incidence of Rule 56 motions and their grant, see *supra* note 92, do not tell the full story. As Professor Brooke Coleman points out, the existing scholarship and empirical work do not tell us “whether summary judgment sifts out meritorious cases and at what rate.” Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 706 (2012). She continues: “We also need to know how the summary judgment process deters individuals with meritorious claims from filing. And, we need to know this information across the board, at both the state and federal level.” *Id.* After exploring what we do not know and what may be unknowable, Professor Coleman concludes: “The real question is not so much about the efficiency or fairness of the summary judgment process, but really just about one critical issue—the jury trial.” *Id.* at 725.

<sup>99</sup> See Miller, *supra* note 65, at 1132–34.

<sup>100</sup> See generally *id.* at 1074–1132; David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil Justice*, in CIVIL PROCEDURE STORIES 359, 386–87 (Kevin M. Clermont ed., Thomson/Foundation Press 2d ed. 2008) (2004) (summarizing the tension between summary judgment and constitutional concerns); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 148–58 (2007) (contrasting the summary judgment motion with English common law procedural devices).

<sup>101</sup> See *infra* Part II.E.

### B. Expert Evidence

Seven years after the summary judgment trilogy, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>102</sup> continued the trend of stop-sign erection by emphasizing the concept of judicial "gatekeeping," which has become a pretrial management article of faith. *Daubert* directs district judges to oversee the introduction of economic, scientific, and technological evidence, particularly when it takes the form of expert testimony, in an understandable attempt to screen out unreliable evidence, typically characterized as "junk science."<sup>103</sup> But that attempt is not cost free. The enormous growth (indeed, in the view of many, excessive growth) in the use of expert testimony, which literally has become a cottage industry, in the years under discussion has made *Daubert* hearings a significant aspect of contemporary federal civil litigation.

*Daubert's* high threshold has been particularly burdensome—financially, logistically, and sometimes both—for plaintiffs. This is because plaintiffs often must provide expert testimony or reports about a wide range of subjects—for example, the relevant technology, pharmacology, the environmental impact of the defendant's conduct, or the statistical and economic significance of certain phenomena or behaviors. Since judicial gatekeeping potentially requires screening every challenged expert, it represents another procedural obstacle, another motion, another hearing, and another potential issue on appeal, all causing more delay and expense. This, like other stop signs, plays into the hands of the billing-by-the-hour regime of the law firms that usually represent corporate and other economically powerful interests. It has precisely the opposite effect on contingent fee and public interest lawyers who must bear the increased cost and time investment without any assurance of reimbursement, let alone compensation.<sup>104</sup> And when the defense succeeds on a *Daubert*

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<sup>102</sup> 509 U.S. 579, 589, 597 (1993). Two other cases fill out the so-called *Daubert* trilogy. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999) (applying *Daubert* to technical and specialized expert witnesses); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146–47 (1997) (holding that *Daubert* allows a court to exclude evidence "connected to existing data only by the ipse dixit of the expert"). The *Daubert* Court proceeded without employing the statutory rulemaking process governing the Federal Rules of Evidence, as it had in the Civil Rule context in connection with the summary judgment trilogy and would do the same—even more dramatically—in the pleading context. See *supra* Part II.A (explaining the summary judgment trilogy); see also *infra* Part II.E (critiquing the Court's recent pleading jurisprudence). The substance of *Daubert* is now embedded in Federal Rule of Evidence 702. See FED. R. EVID. 702.

<sup>103</sup> See *Daubert*, 509 U.S. at 589.

<sup>104</sup> There is an analogy, admittedly a rough one, between the expanded assumption of pretrial judicial decisionmaking power reflected in the *Daubert* hearing and the *Markman* hearing in patent litigation, which calls upon the district judge, not a jury, to interpret a

challenge and eliminates an important plaintiff's expert, the plaintiff's case often is so weakened that it may be vulnerable to summary judgment or abandonment—thereby establishing *Daubert* challenges as another avenue for the potential early disposition of cases.

### C. Class Actions

Over the years following *Daubert*, judicially established heightened class action certification requirements and related matters have become a major impediment to the survival and forward movement of these representative proceedings.<sup>105</sup> This reflects the latest redirection in the almost half-century debate over whether Federal Rule 23 should be employed as a regulatory device that can be used to enforce and promote various public policies or whether it should be interpreted more strictly and employed simply as an updated version of traditional joinder procedure.<sup>106</sup> In many instances, these judicially established class action stop signs effectively oblige plaintiffs to establish certain aspects of their cases pretrial, at least to the extent they involve matters deemed related to the Rule 23 certification prerequisites—a rather uncertain benchmark.<sup>107</sup> This can mean litigating

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patent claim and thereby define the scope of the patent well before trial. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). Both are fact-laden pretrial processes that can be extremely resource consuming and dramatically affect the litigation's outcome. See COMPLEX LITIG. COMM. OF THE AM. TRIAL LAW., ANATOMY OF A PATENT CASE 95–102 (2d ed. 2012) (describing the potentially elaborate character of the *Markman* process); Edward Brunet, *Markman Hearings, Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93, 98–109 (2005) (drawing analogies between the *Markman* process and summary judgment proceedings).

<sup>105</sup> The various ways in which federal courts have limited the class action are catalogued in Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 19–101) (on file with the *New York University Law Review*).

<sup>106</sup> The cyclical character of the judicial treatment of the class action and the dual philosophies underlying it are effectively described in David Marcus, *The Creation and Renewal of the Modern Class Action System, 1953–1999*, 90 WASH. U. L. REV. (forthcoming 2013) (on file with the *New York University Law Review*).

<sup>107</sup> The judicial scrutiny of class certification requests has expanded dramatically. See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592, 594, 596–97, 605 (3d Cir. 2012) (reversing class certification and demanding higher factual proof of class definition, class ascertainability, numerosity, and causation); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008) (remanding the certification decision because the district court occasionally departed from the “rigorous analysis” standard); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) (“Rule 23’s requirements must be given their full weight independent of the merits.”), *abrogated by* *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (holding that class certification requires a ruling on each Rule 23 requirement regardless of overlap with merit issues). The commentators have voiced divergent opinions on this development. Compare Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 349 (2011) (arguing that merits scrutiny during class certification simply is part

various aspects of the merits long before trial, without testimony or a jury, and possibly with incomplete discovery—thereby increasing the occasions for pretrial judicial fact-finding. That, for example, has become a significant problem in the securities fraud and antitrust contexts with regard to particular critical issues, such as reliance, causation, or materiality.<sup>108</sup>

The extensive revision of Rule 23 in 1966<sup>109</sup> was designed to rationalize practice under the class action rule and eliminate its meta-physical 1938 text so that it would provide a useful procedural vehicle, particularly for civil rights cases.<sup>110</sup> But more was intended. The amendment also clearly envisioned the use of the class action to empower those without “effective strength” to advance their claims,

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of the ordinary process of judging), and Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 84–87 (2004) (arguing that the best level of merit inquiry in class certification is when “doing so is convenient and useful to analyzing the certification requirement of Rule 23”), with Steig D. Olson, “Chipping Away”: *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 939 (2009) (stating that these developments make “class certification a more onerous and less efficient process for litigants and the court”). At an earlier time, the Supreme Court expressed the view that a federal court lacked the “authority to conduct a preliminary inquiry into the merits of a suit” to determine whether it could proceed as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

<sup>108</sup> The Supreme Court recently declined to require actual proof of loss causation as a prerequisite to class certification. *Erica P. John Fund, Inc.*, 131 S. Ct. at 2186. The quantum of factual proof and legal analysis that should be required and what standard of review should be employed at the certification point are in dispute. See Alan B. Morrison, *Determining Class Certification: What Should the Courts Have to Decide?*, 8 CLASS ACTION LITIG. REP., 541, 541 & n.1 (2011) (noting the struggle of several circuits with these questions). Even more recently, the Supreme Court decided *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, No. 11-1085, 2013 WL 691001 (U.S. Feb. 27, 2013), a securities class action, and concluded that the materiality of a misrepresentation need not be proven but need only be plausibly alleged at the class certification stage to invoke the critical “fraud on the market” presumption (since it is a common question for purposes of determining performance and requiring proof would put the cart before the horse). The Court has also granted certiorari in *Comcast Corp. v. Behrend*, 133 S. Ct. 24 (2012), to determine whether a class may be certified without deciding whether the class has introduced admissible evidence, including expert testimony, to show the case is susceptible to awarding damages on a class-wide basis. Based on oral arguments, the Court also may consider the probity of expert opinions at the class certification stage. Transcript of Oral Argument at 21–23, *Comcast Corp. v. Behrend*, 133 S. Ct. 24 (2012) (No. 11-864) (considering whether a district court should consider more than pure *Daubert* admissibility at the class certification stage).

<sup>109</sup> The history of the class action since the advent of the Federal Rules and the almost constant controversy over the limits of its utilization and the construction of Rule 23 are fully chronicled in Marcus, *supra* note 106. I have described my modest involvement in the 1966 revision elsewhere. Arthur R. Miller, *Some Very Personal Reflections on the Rules, Rulemaking, and Reporters*, 46 MICH. J. L. REFORM 651 (2013).

<sup>110</sup> The original Rule 23 divided class actions into three highly confusing categories based on jural relations that became known as “true,” “hybrid,” and “spurious.” See 7A WRIGHT, MILLER & KANE, *supra* note 27, § 1752.

most notably when each individual's damages were so small that economically they had no independent litigation value.<sup>111</sup> Permitting the aggregation of claims in this latter context incentivizes private remediation of wrongdoing and promotes the important goal of deterrence even if the compensatory payment to each individual is low, thereby enhancing the regulatory utility of Rule 23.<sup>112</sup> When private class actions supplement or substitute for official regulation—as often occurs in the antitrust, consumer, and securities fields, for example—the effect can be to overcome the inefficiency and limitations inherent in governmental enforcement. In combination, the private attorney general concept and the class action serve to subsidize the much-needed private enforcement of public policies as well as to provide access and legal services to those whose economics or claim size deny them any possibility of legal recourse.<sup>113</sup> Over the years following the 1966 amendment, not surprisingly, Federal Rule 23 was employed in an ever-widening range of substantive contexts in cases asserting claims of both a public and a private character.

The significant growth in the utilization of class actions that followed the 1966 revision began to encounter judicial resistance in the

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<sup>111</sup> Benjamin Kaplan, Prefatory Note, "*The Class Action—A Symposium*," 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (expressing the views of the Advisory Committee's Reporter); see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397–98 (1967) (arguing that an opt-in rule would "freez[e] out" "small claims"); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*," 92 HARV. L. REV. 664, 674 (1979) (discussing the misconceptions about the 1966 revisions of Rule 23 and the utility of class actions). As Judge Posner famously remarked, "only a lunatic or a fanatic sues for \$30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>112</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–79, 430 (2005) (arguing for the unenforceability of class action waivers because of the public good such lawsuits can achieve); William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U. MO. KAN. CITY L. REV. 709, 720–25 (2006) (arguing that society should protect the class action lawsuit because it "generates a range of positive externalities"); Klonoff, *supra* note 105, at 91–92 (explaining that collective action waivers substantially impede negative value claims).

<sup>113</sup> See Issacharoff, *supra* note 54, at 10 (noting this subsidization phenomenon); *id.* at 15 ("In important areas of consumer law and economic damages . . . the private class action overcomes distinct disabilities of public enforcement: the problem of insufficient resources . . ."); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144–47 (2000) (arguing that Rule 23 was designed to accomplish such subsidization).

late 1980s, particularly in mass tort<sup>114</sup> and multistate class cases involving the application of different bodies of substantive law.<sup>115</sup> Federal courts increasingly found that plaintiffs did not satisfy the Rule 23(b)(3) requirements of predominance of common questions, the superiority of class action adjudication, and manageability.<sup>116</sup> In the last few years of the twentieth century, the Supreme Court issued opinions making it clear that strict adherence to the requirements of Rule 23 was necessary; it did so first in *Amchem Products, Inc. v. Windsor*<sup>117</sup> and then in *Ortiz v. Fibreboard Corp.*<sup>118</sup> (both nationwide asbestos cases presenting precertification settlements for judicial approval).<sup>119</sup> Although both cases were circumstantially unique and could have been contextually limited, the opinions clearly signaled the

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<sup>114</sup> See generally RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 71–94 (2007) (summarizing various themes in the Supreme Court’s rejection of the class settlements in *Ortiz* and *Amchem*).

<sup>115</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) (explaining that class certification requires that “all litigants are governed by the same legal rules”); Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009) (noting that denial is normal in such situations). See generally Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006) (noting the mismatch between current choice-of-law rules and a national market, and arguing for a default rule of applying the laws of the defendant’s home state); York-Erwin, *supra* at 1802–10 (describing the shift in attitude by the federal judiciary toward class actions with choice-of-law implications).

<sup>116</sup> Three virtually contemporaneous court of appeals decisions set the restrictive tone. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737, 740 (5th Cir. 1996) (decertifying a nationwide class of addicted smokers); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1074, 1081–83, 1085–86 (6th Cir. 1996) (decertifying a product liability class regarding defective penile implants); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297, 1299–1300, 1302 (7th Cir. 1995) (decertifying a class of hemophiliacs claiming damages for contaminated blood). I was the appellate advocate for the classes rejected in two of these cases. See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384–1421 (1995) (describing class certification attempts in various contexts).

<sup>117</sup> 521 U.S. 591 (1997).

<sup>118</sup> 527 U.S. 815 (1999).

<sup>119</sup> See *Ortiz*, 527 U.S. at 861–64 (“[W]e are bound to follow Rule 23 as we understood it upon its adoption . . .”); *Amchem*, 521 U.S. at 620–21 (stating that compliance with Rule 23 is of “overriding importance”). Even before *Amchem* and *Ortiz*, the Court had demanded strict scrutiny of the class action prerequisites in *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 178 (1974), and sharply limited its utility in diversity of citizenship cases in *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973), *superseded by statute*, 28 U.S.C. § 1367 (2006), *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005). The six most recent Supreme Court Rule 23 decisions are discussed in Mary Kay Kane, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015 (2012), which concludes that “there is no overarching theme or theory underlying the Court’s most recent class-action jurisprudence . . .” *Id.* at 1030. Although Professor Kane’s point seems sound as articulated, the direction of decisions seems clear.



containment of the class action by the Court. Justice Breyer dissented in both cases, arguing that the Court was denying class members valuable settlement benefits and that the exigencies of the asbestos crisis called for a much more pragmatic and creative approach to the application of the class action rule that would not undermine its utility as a procedure for achieving the global resolution of large-scale disputes.<sup>120</sup> These cases have signaled what some would call a formalistic construction of Rule 23 and chilled much of its innovative application.<sup>121</sup>

It must be acknowledged, of course, that bringing suits in the class action form precludes some plaintiffs from choosing their own representation and managing their own lawsuits. Claims obviously are instituted, managed, and adjudicated or settled collectively.<sup>122</sup> But because of the costs of litigation, a formalistic reading of Rule 23 and the Due Process Clause provides plaintiffs with only a hollow day in court that never reaches the merits. Realistically, the choice for class members is between collective access to the judicial system or no access at all.

In the employment discrimination context, for example, the Supreme Court's recent highly publicized decision in *Wal-Mart Stores*,

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<sup>120</sup> *Ortiz*, 527 U.S. at 880, 882 (Breyer, J., dissenting) (arguing against the majority's "literal" interpretation); *Amchem*, 521 U.S. at 629, 631–33 (Breyer, J., dissenting) (arguing the case's unique need for settlement through a detailed recitation of the facts); see also Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (describing the cases as an example of "the perfect" being the enemy of "the good"); McKenzie, *supra* note 85, at 977–78 (concluding that the Court's approach was formalistic and rigid).

<sup>121</sup> The restraints on Rule 23 have led litigators to seek other methods of aggregation, including the use of quasi-class action techniques that often employ the Multidistrict Litigation Panel as an organizing and facilitating device for multistate litigation situations. See *supra* note 39 (providing examples and describing the 9/11 settlement). An excellent illustration of this phenomenon is the *Vioxx* pharmaceutical litigation. See Fallon, Grabill & Wynne, *supra* note 24, at 2230–37 (focusing on the economy of information sharing in such an approach); McKenzie, *supra* note 85, at 983–86 (elaborating on the example *Vioxx* provides). It also has encouraged the direct filing of actions in pending multidistrict proceedings. See generally Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. (forthcoming 2013) (on file with the *New York University Law Review*), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2118219&](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118219&) (discussing the conclusion as to the applicable choice of law rule in direct actions).

<sup>122</sup> See *Ortiz*, 527 U.S. at 846 (identifying the tension between the class action and the "historic tradition that everyone should have his own day in court" (quoting 18A WRIGHT, MILLER & COOPER, *supra* note 21, § 4449)); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1063–68 (2002) (discussing the tension between litigant autonomy and class actions). Rule 23(b)(3) class members do have the right to opt out and pursue their rights, but the modest size of the individual claims usually makes that course economically unrealistic.

*Inc. v. Dukes*<sup>123</sup> (a national class action on behalf of women employees alleging various forms of workplace discrimination pursuant to company-wide policy) has increased the burden of showing “significant proof” of a general policy of discrimination in order to secure class certification.<sup>124</sup> It did so by insisting on a showing of a higher level of “commonality” under Rule 23(a)(2) than previously thought necessary by requiring that class members “have suffered the same injury” and that the common questions be “capable of classwide resolution” and “central to the validity of each one of the claims in one stroke.”<sup>125</sup> Nothing in the language of Rule 23(a)(2), the

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<sup>123</sup> 131 S. Ct. 2541 (2011). *See generally* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rodgers*, 125 HARV. L. REV. 79 (2011) (analyzing *Wal-Mart* through the lens of fairness). The *Wal-Mart* class embraced 1.5 million women employees at 3400 locations in forty-one regions; it was clearly too ambitious an effort. To borrow from the title of Cornelius Ryan’s brilliant analysis of the failure of Operation Market Garden in World War II, *Wal-Mart* was “A Bridge Too Far.” The *Wal-Mart* class is now being subdivided with an eye to bringing regional actions. Plaintiffs have commenced several different statewide class actions against the company on substantially identical legal theories. Twelve years after she filed her initial complaint, Betty Dukes returned to the Northern District of California; *Wal-Mart*’s motion to dismiss for failure to state a claim and lack of timeliness has been denied. *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2012 WL 4329009 (N.D. Cal. Sept. 21, 2012). However, the class action brought by former *Wal-Mart* employees in Texas was held to be barred by the statute of limitations. *Odle v. Wal-Mart Stores, Inc.*, No. 3:11-cv-2954-0, 2012 WL 5292957 (N.D. Tex. Oct. 15, 2012).

<sup>124</sup> *Wal-Mart*, 131 S. Ct. at 2553. *See, e.g.*, *Luiken v. Domino’s Pizza, LLC*, No. 12-1216, 2013 WL 399248, at \*5 (8th Cir. Feb. 4, 2013) (decertifying a Rule 23(b)(3) class of drivers for lack of commonality because questions of whether an obligatory charge was a payment for personal services depended on “varying circumstances”); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) (remanding a gender discrimination class action because the district court failed to resolve factual disputes to determine “whether there was a common pattern and practice” that affected the class as a whole).

<sup>125</sup> *Wal-Mart*, 131 S. Ct. at 2551. One wonders whether the threshold commonality requirement of Rule 23(a)(2) has now been converted into a predominance requirement previously textually limited to cases under Rule 23(b)(3). *Id.* at 2565–66 (Ginsburg, J., dissenting) (accusing the majority of “blend[ing]” the two standards); *see also* Robin J. Effion, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 789–804 (2012) (reading *Wal-Mart* as creating an implied predominance requirement). On the other hand, one also wonders whether it has been infused with something in the nature of the “plausibility” requirement now employed in the contexts of Rules 12(b)(6) and 56. *See infra* Part II.E (discussing pleading standards); *supra* Part II.A (discussing summary judgment standards). The *Wal-Mart* decision also significantly limited the utility of the Rule 23(b)(2) injunction class action by restricting any monetary element accompanying the required request for injunctive or declaratory relief to those that are “incidental.” *Wal-Mart*, 131 S. Ct. at 2557 (majority opinion). This may encourage more hybrid class actions—combined Rule 23(b)(2) and 23(b)(3)—and single-issue class actions under Rule 23(c)(4). *See, e.g.*, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 483 (7th Cir. 2012) (reversing the denial of certification under Rule 23(c)(4)); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, at \*7 (S.D.N.Y. Jan. 19, 2012) (“[D]istrict courts should take full advantage of [Rule 23(c)(4)] to certify separate issues . . . .”), *adopted in relevant part* by 83 Fed. R. Serv. 3d (West) 64 (2012). *See generally* 7A

provision's history, or prior jurisprudence justifies these limitations.<sup>126</sup> This burden of pretrial persuasion represents another way of denying class certification well short of any determination of a case's merits, let alone a bench or jury trial. *Wal-Mart* exemplifies and continues a substantial line of decisions at all levels of the federal judiciary heightening the barriers to class certification in various ways.<sup>127</sup>

Compounding these judicial restraints is Congress's acquiescence to institutional lobbying by providers of goods and services, leading to the federalization of virtually all substantial class and mass actions by enacting the Class Action Fairness Act of 2005 (CAFA).<sup>128</sup> That statute burdens the federal courts with an increased number of these cases. It also eliminates state courts as alternative fora and sources for the development of other potentially innovative class action procedures (as well as possibly more welcoming judicial attitudes in some state courts, which clearly was an objective of the legislation's proponents).<sup>129</sup> Yet the Act does nothing to ameliorate the difficulties that

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WRIGHT, MILLER & KANE, *supra* note 27, §§ 1784.1, 1790 (discussing the certification of hybrid and partial class actions). Some courts have extended *Wal-Mart* to class actions under Rule 23(b)(1). *See, e.g.*, *Daskalea v. Wash. Humane Soc'y*, 275 F.R.D. 346, 364 (D.D.C. 2011) (extending the restriction of incidental monetary relief to Rule 23(b)(1)).

<sup>126</sup> The history of the commonality requirement and the defects in the Court's *Wal-Mart* analysis of it are ably described in A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. (forthcoming 2013) (on file with the *New York University Law Review*), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2113374](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2113374).

<sup>127</sup> *See, e.g.*, *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 841 (5th Cir. 2012) (indicating that the commonality requirement has been transformed); *supra* notes 107 and 116 and accompanying text (discussing the heightened standards for class certification); *see also Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 534 (3d Cir. 2012) (deciding that to certify a Fair Labor Standards Act case the district court, after considering all the evidence, must make a finding of fact that all the class members are "similarly situated"); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 265–67 (3d Cir. 2011) (rejecting expert evidence on calculating damages based on averages and modeling because it was not "common"). *But cf. Keys v. Humana, Inc.*, 684 F.3d 605, 606 (6th Cir. 2012) (reversing a denial of class certification in a pattern of employment discrimination case). The Fair Labor Standards Act cases appear to be an exception to the trend. *See* ADMIN. OFF. OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 125–28 tbl.C-2 (2012), available at

<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

<sup>128</sup> Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1447 (2008) (decrying CAFA's affront to federalism); Issacharoff, *supra* note 115, at 1861–62 ("[T]he motivation behind the legislation was to take multistate class actions out of the hands of state courts . . ."). *See generally* 7A WRIGHT, MILLER & KANE, *supra* note 27, § 1756.2 (describing CAFA).

<sup>129</sup> *See* Burbank, *supra* note 128, at 1447 (arguing that CAFA "represents an affront to federalism"). A basic concern is that CAFA shifts almost all significant class actions to the federal courts and subjects them to heightened certification requirements and eventual dismissal.

have arisen in multistate and national diversity-based class actions. Most particularly, it does not answer the frequent choice-of-law question of whether the district court has to apply the law of multiple states or can identify and apply the law of a single state (a defendant's principal place of business being an obvious, and one would think unobjectionable, example of the latter). When each state's law must be applied, courts are more likely to declare an action unmanageable or lacking in predominance of common questions and thus decline to certify it.<sup>130</sup> An amendment designed to address this obstacle to certification was voted down in the Senate,<sup>131</sup> suggesting that facilitation and simplification of the class certification process were not on the agenda of CAFA's proponents.

The class certification motion thus has become yet another procedural stop sign undermining the utility of one of today's most basic and important joinder mechanisms—admittedly a controversial one in certain applications—for handling relatively modest claims arising from conduct impacting numerous people. Fortunately, some distinguished judges continue to recognize the aggregation of claims through the class action as a “powerful instrument[ ] of social and

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<sup>130</sup> See, e.g., *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1177–78, 1180–84 (11th Cir. 2010) (citing both predominance and manageability concerns); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724–25, 730 (5th Cir. 2007) (citing predominance concerns); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741–44 (5th Cir. 1996) (citing manageability concerns); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2009–10 (2008) (explaining that choice of law is a “monumental barrier to class certification”).

<sup>131</sup> Senator Diane Feinstein proposed an amendment to encourage the application of a single state's law to interstate class actions and the use of subclasses whenever possible. 151 CONG. REC. S1157, S1167 (daily ed. Feb. 9, 2005); see also David Marcus, Erie, the *Class Action Fairness Act*, and *Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1308–10 (2007) (describing the reaction to the amendment and its ultimate failure); cf. Issacharoff, *supra* note 115, at 1862 & n.87 (noting Congress's inability to deal with the choice-of-law problem); *Legal Experts Enter Class Action Debate, Meet With Senate Staff to Discuss Bill*, 72 U.S.L.W. 2446 (Feb. 3, 2004) (describing efforts by Professors Issacharoff, Neuborne, and myself in opposing the passage of CAFA). In addition to the pro-business and anti-class action politics underlying CAFA's enactment, some writers have argued that the application of a single state's law would be inconsistent with federalism principles. See, e.g., Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 578–79 (1996) (deeming such application “iron[ic]” when justified by the national character of the case); Robert A. Sedler, *Interest Analysis, State Sovereignty, and Federally Mandated Choice of Law in “Mass Tort” Cases*, 56 ALB. L. REV. 855, 861 (1993) (arguing that this concern makes such application “highly undesirable”). But see Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 320–21 (1991) (arguing that the federalism concern should be considered on a case-by-case basis). That does not seem to be a barrier when the constitutional standards for choice of law have been satisfied in the selection of a single governing law. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (applying constitutional limitations on choice of law to multistate class actions).

economic policy.”<sup>132</sup> As a result, many cases will not be pursued because they are not economically viable on behalf of individual class members, most particularly those having negative-value claims. The result leaves broad-based harms unredressed. Even when an attempt to block class certification does not succeed, the very elaborate Rule 23 process called for by recent decisions imposes significant additional cost and delay, particularly when interlocutory appellate review of a certification decision is sought and especially when it is granted.<sup>133</sup> The increased costs and heightened risk of noncertification inhibits the institution of potentially meritorious class cases, which often leaves public policies underenforced and large numbers of citizens uncompensated.

#### D. *The Federal Arbitration Act*

*AT&T Mobility LLC v. Concepcion*<sup>134</sup> is another of the Court’s recent class action decisions, this one involving the Federal Arbitration Act (FAA).<sup>135</sup> The case established a further impairment of the day-in-court and jury-trial principles.<sup>136</sup> It upheld a clause in a cellular telephone contract calling for the arbitration of disputes but barring arbitration on a class basis. The five-to-four decision<sup>137</sup> overrode the California court’s conclusion that the clause was unconscionable, suggesting that anything that represented “an obstacle to the accomplishment of the FAA’s objectives” would be swept away by preemption.<sup>138</sup> This decision effectively replaces judges and juries with one-by-one arbitrators in many contexts better served by class actions

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<sup>132</sup> *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring); see also *supra* note 111 and accompanying text (explaining the 1966 amendment’s purpose of providing compensation to those with negative-value claims).

<sup>133</sup> Cf. 7B WRIGHT, MILLER & KANE, *supra* note 27, § 1802 (noting the drain on judicial capacity by various attempts at appellate review prior to the promulgation of Rule 23(f)). See generally FED. R. CIV. P. 23(f) (authorizing such appeals); 7B WRIGHT, MILLER & KANE, *supra* note 27, §§ 1802–1802.2 (discussing the application of the discretionary interlocutory review provision in Rule 23(f)). Interlocutory appellate review, not surprisingly, is used most frequently by defendants.

<sup>134</sup> 131 S. Ct. 1740 (2011).

<sup>135</sup> Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)).

<sup>136</sup> See Resnik, *supra* note 123, at 132–33 (criticizing the Court for failing to analyze due process despite making process-based arguments in favor of arbitration).

<sup>137</sup> The arbitration provision at issue provided for a payment of at least \$7500 and twice the *Concepcion*’s attorneys’ fees if they were awarded more than AT&T Mobility’s settlement offer, leaving open the possibility of a contrary result in a case involving a more onerous one. Moreover, the Court’s opinion also made it clear that the arbitration procedure must be a realistic one. See *Concepcion*, 131 S. Ct. at 1751 (describing the required procedure).

<sup>138</sup> *Concepcion*, 131 S. Ct. at 1748.

or other forms of claim aggregation. As a result, powerful economic entities can impose no-class-action-arbitration clauses on people with little or no bargaining position—through adhesion contracts involving securities accounts, credit cards, mobile phones, car rentals, and many other social amenities and necessities.<sup>139</sup> The practice undoubtedly will proliferate, as exemplified by Microsoft’s June 2012 announcement that it is changing many new contracts to eliminate the possibility of class arbitration.<sup>140</sup> The effect, of course, is that the vast majority of people who would comprise a judicial or arbitration class and possibly secure legal relief are not in a position to invoke their contractual “right” to arbitrate. As a result, these people remain remediless, leaving the challenged conduct undeterred.<sup>141</sup>

*Concepcion* demonstrates the judiciary’s willingness to allow boilerplate arbitration clauses to trump access to the court system in the name of the FAA, a statute enacted in 1925 with the seemingly limited purpose of overcoming the then-existing “judicial hostility” to the arbitration of contract disputes between businesses, which was most commonly manifested in diversity cases.<sup>142</sup> That hostility has

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<sup>139</sup> The single issue in *Concepcion* was the legitimacy of a \$30.22 sales tax fee for a phone advertised as being free, making class treatment extremely appropriate and efficient. A slight variation on Judge Posner’s ringing observation springs to mind: “[O]nly a lunatic or a fanatic [arbitrates] for \$30.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>140</sup> David Lazarus, *Microsoft Pulls Plug on Class Actions*, L.A. TIMES, June 1, 2012, at B1. Dire consequences have been forecast for years. See, e.g., Gilles, *supra* note 112, at 373, 379 (claiming that if permitted to proliferate, class action waivers ultimately will cause “the near-total demise of the modern class action”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638–39 (2005) (discussing the prevalence and impact of mandatory arbitration clauses); Klonoff, *supra* note 105, at 62–63 (suggesting that collective action waivers substantially impede negative-value claims).

<sup>141</sup> See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (noting companies’ wider use of arbitration provisions in consumer contracts than nonconsumer contracts); Sternlight, *supra* note 140, at 1638–39 (discussing the prevalence of mandatory arbitration clauses); see also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–52 (2012) (exploring the wide-ranging consequences of *Concepcion*).

<sup>142</sup> *Concepcion*, 131 S. Ct. at 1747 (describing pre-FAA hostility towards arbitration in general); see also IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 22–23 (1992) (suggesting that pre-FAA hostility may have been greater than it appeared because judges dismissed cases through jurisdictional means). *Concepcion* was preceded by *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), which established a “default rule” that when the contract is silent, a party cannot be compelled to submit to class arbitration unless there is a “contractual basis for concluding that the party agreed to do so.” *Id.* at 1769, 1775 (emphasis omitted); see also *Sutter v. Oxford Health Plans LLC*, 227 F. App’x 135, 137–38 (3d Cir. 2011) (finding, without citation to *Stolt-Nielsen*, no “clear intent to opt out of the FAA rules”).

dissipated. Nonetheless, over the years the Act has been transformed by the Supreme Court through constant expansion into an expression of a “federal policy” favoring arbitration, whether it involves a bilateral business dispute or not.<sup>143</sup> Indeed, the Court has said that the Act “reflects an emphatic federal policy in favor of arbitral dispute resolution.”<sup>144</sup> *Concepcion* strikingly exemplifies the extraordinary judicial extension of the Act’s application to a vast array of consumer contracts that are characterized by their adhesive nature and by the individual’s complete lack of bargaining power (as well as a probable lack of understanding of the arbitration clause’s significance). Federal courts apply the Act even when the judicial forum’s law would render an arbitration clause unenforceable, or when the claims are worth much less than the cost of litigating (or arbitrating) them on an individual basis.<sup>145</sup> This occurs despite the passage in the 1925 Act

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<sup>143</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *see also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (extending the application of the FAA to employment contracts); *Gilmer*, 500 U.S. at 26 (extending the application of the FAA to some statutory claims); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA’s national policy favoring arbitration prevented a state court from providing a judicial forum when the parties had contracted for class arbitration); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1425–43 (2008) (arguing that the FAA has evolved into a “broadly sweeping muscular statute”).

<sup>144</sup> *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)) (internal quotation marks omitted).

<sup>145</sup> *See In re Checking Account Overdraft Litig.*, 459 F. App’x 855, 858–59 (11th Cir. 2012) (reversing the district court’s finding of unconscionability under Georgia law because the arbitration clause in a forty-page checking account agreement allowed the defendant banks to recover expenses and attorneys’ fees relating to claims it prevailed on and allowed them to seize funds jointly owned); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012) (holding that the FAA preempted state law’s invalidation of a class-action waiver); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011) (rejecting a factual record regarding the cost-effectiveness of individual claims as foreclosed by *Concepcion*); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048–50 (N.D. Cal. 2011) (rejecting a showing that it would not be cost effective for an attorney to pursue a claim without class aggregation); *see also In re Gateway LX6810 Computer Prods. Litig.*, No. SACV 10-1563-JST, 2011 WL 3099862, at \*3 (C.D. Cal. July 21, 2011) (finding a mere assertion that a contract is adhesive insufficient to establish procedural unconscionability). The European Communities Council’s Directive on Unfair Terms in Consumer Contracts forbids binding consumers to unfair contractual terms, defined as those “which ha[ve] not been individually negotiated” and “cause[ ] a significant imbalance in the parties’ rights and obligations . . . to the detriment of the consumer,” such as “requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions . . . .” Council Directive 93/13, arts. 1, 6, annex 1(q), 1993 O.J. (L 95) 29, 31, 33 (EEC); *see also* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 844–48 (2002) (elaborating on Europe’s stance toward arbitration).

authorizing an arbitration clause to be overridden “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>146</sup>

The Court’s accepting attitude toward the judicial enforcement of arbitration clauses now extends to disputes involving federal statutory causes of action, unless the applicability of the FAA is overridden by what the Court described as a clear “contrary congressional command.”<sup>147</sup> Similarly, arbitration clauses will preempt established state

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<sup>146</sup> 9 U.S.C. § 2 (2006). The statutory clause was given effect in *In re Checking Account Overdraft Litig.*, 459 F. App’x at 858–59 (finding unconscionable an arbitration clause automatically imposing the defendant’s costs, losses, and expenses on the consumer, and distinguishing *Concepcion*). The Supreme Court also has given the Act’s prerequisites and exclusions extremely narrow construction. *See, e.g., Circuit City*, 532 U.S. at 118–19 (construing narrowly an exclusion for certain contracts of employment). *But see Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (construing broadly “transaction involving commerce” (emphasis omitted)). The Supreme Court’s expansion of the Act beyond its original intent is criticized sharply in Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006).

<sup>147</sup> *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The Court’s broad reading of the FAA appears to have coincided with fears of the so-called “litigation explosion.” *See* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 451 (2011) (suggesting that the Court used the FAA as a “release valve” for increasing litigation). For nearly sixty years, the Court recognized that the “resolution of statutory or constitutional issues is a primary responsibility of courts . . . .” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974), *overruled in part by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). As a result, courts routinely held that the FAA did not require individuals to arbitrate statutory causes of action. *See, e.g., McDonald v. W. Branch*, 466 U.S. 284, 290 (1984) (concluding that a section 1983 claim was not subject to arbitration), *abrogated by Gilmer*, 500 U.S. 20 (1991), *as recognized in Wiedemann v. Oklahoma City*, 76 F. App’x 931, 932 (10th Cir. 2003); *Alexander*, 415 U.S. at 49 (holding a collective-bargaining arbitration agreement cannot displace a Title VII cause of action); *Wilko v. Swan*, 346 U.S. 427, 434–35 (1953) (excluding Securities Act claims from arbitration), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968) (holding that an antitrust claim cannot be decided through the arbitration system), *overruled by Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *as recognized in Kotam Elec., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 726–28 (11th Cir. 1996). The Court, however, reversed course in *Mitsubishi*, 473 U.S. at 640. The holding in *Mitsubishi* was extended to permit arbitration of other statutory rights. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 84 (2000) (allowing arbitration of Truth in Lending Act actions); *Gilmer*, 500 U.S. at 35 (allowing arbitration of age discrimination disputes); *Rodriguez*, 490 U.S. at 483–84 (overruling *Wilko* and allowing the arbitration of Securities Act claims); *McMahon*, 482 U.S. at 238 (upholding a compulsory arbitration clause in a brokerage account agreement for claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organization Act (RICO)). In *Mitsubishi*, the Court placed the burden on Congress to state clearly when it intends to exclude a statutory right from arbitration. *See Mitsubishi*, 473 U.S. at 628 (“[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”). Congress would have to have been clairvoyant when it was legislating prior to cases like *Mitsubishi* and *Gilmer*, let alone prior to the enactment of the FAA, to include the anti-arbitration declarations suggested by the Court. Congress has chosen to protect automobile dealers from arbitration clauses in



principles of law barring certain conduct, thereby interfering with the enforcement of state public policies when arbitration principles or procedures are singled out for special treatment.<sup>148</sup>

Two other recent Supreme Court decisions graphically illustrate the impairment of federal and state policies by an almost automatic honoring of adhesive arbitration clauses. First, in *Compucredit Corp. v. Greenwood*,<sup>149</sup> the Supreme Court insisted that a statute contain a clear statement showing Congress's intent to exclude arbitration of disputes under the enactment and overrode the notice of the right to sue and nonwaiver passages in the Credit Repair Organizations Act.<sup>150</sup> Justice Ginsburg thought these passages had been designed by Congress to protect consumers' right to a judicial forum for violations of the statute.<sup>151</sup> But she was alone in expressing the view that Congress had given consumers a "nonwaivable right to sue" that

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franchise agreements by an amendment to the Automobile Dealers Day in Court Act. *See* 15 U.S.C. § 1222 (2006) ("An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . ."). Congress similarly has protected farmers from such clauses in food producers' printed contracts. *See* Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c (Supp. II) ("Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision." (footnote omitted)). Special interest lobbying obviously was behind both pieces of legislation.

<sup>148</sup> *See, e.g.,* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (ruling that the FAA preempted a Montana statute that conditioned the enforceability of an arbitration clause on compliance with special notice requirements); *Coneff*, 673 F.3d at 1161 (holding that the FAA preempted Washington's substantive unconscionability law); *Kilgore v. KeyBank Nat'l Ass'n*, 673 F.3d 947, 960 (9th Cir. 2012) (preempting a state court's ability to issue an injunction against deceptive practices on behalf of the public), *reh'g en banc granted*, 697 F.3d 1191 (9th Cir. 2012). *But cf.* *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 860–61, 863 (Ct. App. 2011) (invalidating a no-representative-action arbitration clause on a nonwaivable statutory rights theory), *cert. denied*, 132 S. Ct. 1910 (2012). Some Justices have expressed the view that the FAA does not apply to proceedings in state courts. *See infra* note 156 and accompanying text.

<sup>149</sup> 132 S. Ct. 665 (2012).

<sup>150</sup> *Id.* at 672–73 (discussing 15 U.S.C. §§ 1679f & 1679g (2006)). In 2011, a proposed Arbitration Fairness Act was introduced to amend the FAA to invalidate mandatory predispute arbitration clauses in consumer, employment, and civil rights situations. S. 987, 112th Cong. (2011); H.R. 1873, 112th Cong. (2011). No action has been taken on the proposal.

<sup>151</sup> *Compucredit*, 132 S. Ct. at 678 (Ginsburg, J., dissenting) (arguing that Congress's "target audience" favors her position); *see also* *Owen v. Bristol Care, Inc.*, No. 11-04258-CV-FJG, 2012 WL 1192005, at \*5 (W.D. Mo. Feb. 28, 2012) (holding that the right to sue under the Fair Labor Standards Act takes precedence over an arbitration agreement). *But see* *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405 YGR, 2012 WL 1604851, at \*10, \*12 (N.D. Cal. May 2, 2012) (finding nothing in the National Labor Relations Act or the Norris La Guardia Act overriding the FAA).

overcame the FAA's supposed policy favoring arbitration.<sup>152</sup> Second, in a per curiam opinion in *Marmet Health Care Center, Inc. v. Brown*,<sup>153</sup> the Court rejected West Virginia's decision not to enforce arbitration clauses in nursing home contracts in actions involving the death of a patient. The Justices recited the now common proarbitration catechism, found no exception in the Act for personal injury or wrongful death claims, and preempted a West Virginia categorical rule prohibiting arbitration of the particular type of claim before the Court.<sup>154</sup> In both of these cases clear, statutorily expressed public policies were overridden by judicial intuitions about a national policy favoring arbitration extrapolated from a 1925 law that appears to have been designed for a relatively limited purpose.<sup>155</sup>

The Supreme Court's broad reading of the FAA's scope of application and purpose can be compared to its contemporary refusal to find private rights of action under other federal statutes. The Court often has cited the FAA drafters' intent—not the FAA's text—when invalidating state legislation affecting adhesive consumer agreements to arbitrate.<sup>156</sup> In doing so, the Court has relied on its obstacle

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<sup>152</sup> Justices Sotomayor and Kagan concurred in result essentially because of stare decisis. See *Compucredit*, 132 S. Ct. at 675 (Sotomayor, J., concurring in judgment) (finding the arguments equal, and breaking the tie with precedent).

<sup>153</sup> 132 S. Ct. 1201, 1203–04 (2012) (stating that West Virginia's law was contrary to the FAA's terms).

<sup>154</sup> *Id.* Some courts have been willing to make exceptions when the contractual terms for the arbitration are patently one sided. In *In re Checking Account Overdraft Litigation*, 459 F. App'x 855 (11th Cir. 2012), the court struck down a cost-and-fee-shifting provision that operated automatically regardless of who prevailed but operated only in the defendant's favor because South Carolina's general unconscionability doctrine applied to all contracts and did not single out or interfere with the fundamental attributes of arbitration. Therefore, *Concepcion* did not preempt the state contract principle.

<sup>155</sup> See *supra* note 142 and accompanying text (stating that the FAA initially was designed to counteract judicial hostility to businesses arbitrating their disputes).

<sup>156</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (finding that California's rule created an obstacle to FAA's objectives). When determining whether a state law poses an obstacle to the FAA, the Court's reading of legislative history appears selective. In *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), the Supreme Court extended section 2 of the FAA to disputes in state courts involving state substantive law. The majority opinion paid little attention to Justice O'Connor's documentation of the FAA's legislative history, which strongly suggested that the drafters intended the FAA to apply only in federal courts. See *id.* at 25 (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts . . ."); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."); *id.* at 285 (Thomas, J., dissenting) (advocating this same point); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 420 (1967) (Black, J., dissenting) ("[T]here are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts

preemption doctrine, a form of federal common law,<sup>157</sup> and overlooked its presumption against preemption.<sup>158</sup> In contrast, since the 1980s, the Court has followed a strict textualist approach in refusing to employ federal common law to find implied causes of action under federal statutes. In this context, the Court recognizes a private right of action only when a statute's text is clear.<sup>159</sup> In some respects, the Court's presumption against creating federal common law appears to have morphed into a presumption against access to both state and federal courts for remedial purposes when an arbitration clause—even an adhesive one—is present.<sup>160</sup>

Compelled private adjudication essentially is now competing with the public adjudicatory system and replacing access to the courts, the

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. . . ."); MACNEIL, *supra* note 142, at 104 (concluding that no one believed that the FAA would apply in state courts); Moses, *supra* note 146, at 102–03 (arguing that legislative, scholarly, and judicial history indicates the FAA should be treated as a federal procedural law). Although Justice Thomas previously endorsed this reading of the FAA, he no longer appears to support this interpretation. See *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring) (“[C]ourts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration . . .”).

<sup>157</sup> See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 278 (2000) (explaining that obstacle preemption, depending on one's proclivities, can be labeled either “statutory interpretation” or a “doctrine of federal common law”).

<sup>158</sup> See, e.g., *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (“When considering pre-emption, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 425 (2004) (identifying “the notable absence of the presumption in the Court's FAA preemption decisions to date”); see also Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 458 (2008) (“[T]he presumption does yeoman's work in some cases while going AWOL altogether in others.” (footnote omitted)).

<sup>159</sup> Many have documented the demise of the implied private right of action. See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1083 (1997) (“The creation of wholly new implied rights of action has largely passed from the scene.”); Stewart & Sunstein, *supra* note 54, at 1196 (“The Supreme Court . . . has created a strong presumption against judicial recognition of private rights of action.”). After *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204, 1213 (2012), the Court also appears willing to limit *Ex Parte Young* actions. See Stephen I. Vladeck, *Douglas and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13, 14 (2012), <http://yalelawjournal.org/2012/04/30/vladeck.html> (noting that Justice Kennedy likely would have sided with the dissent if the majority chose to reach the issue in *Douglas*). For a discussion of the importance of private rights of action to the enforcement of constitutional and statutory public policies, see *supra* notes 54–58 and accompanying text.

<sup>160</sup> See Richard E. Levy & Robert L. Glicksman, *Access to Courts and Preemption of State Remedies in Collective Action Perspective*, 59 CASE W. RES. L. REV. 919, 927–28 (2009) (juxtaposing the Court's consistent reliance on “a negative inference from Congress's failure to provide an express cause of action” with the Court's less than “equal vigor” when applying the presumption against preemption).

possibility of jury trial, and any process transparency.<sup>161</sup> It thus has enabled business entities to capture control over the manner and means for resolving disputes with their customers. Compounding the deleterious effects of the current extreme applications of the FAA, business entities have a built-in adjudicatory and tactical advantage in arbitration in as much as they are better resourced, more experienced with the arbitration process, and are repeat players in that arena, raising the possibility of favoritism by arbitrators.<sup>162</sup> Moreover, permitting business entities to deny customers the ability to advance claims on an aggregate basis, as *Concepcion* does, quite likely undermines consumer protection and other important public policies.<sup>163</sup>

Surely the Justices forming the majority in *Concepcion*, *Compucredit*, and *Marmet* well understood the pragmatic, economic, and policy implications of extending the 1925 statute across the universe of disputes and areas of substantive law that could not possibly have been anticipated by Congress. In addition, it does not seem reasonable to me to assume that when subsequent Congresses created new federal substantive rights, they intended that their enforcement would be remitted to arbitration by the simple contractual expedient—inserting an adhesive mandatory-no-class arbitration clause—imposed by the party who allegedly violated those rights. Congress also would not have intentionally designed the FAA to jeopardize important state contract or other substantive decisions. Nor does it seem reasonable to assume that someone contracting for a cell phone, acquiring software, or investing with a broker knowingly has waived his or her right to seek the protection of the courts, the potentially claim-saving vehicle of aggregation, or adjudication before a jury. There was a time when the procedural protections in the Fifth,

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<sup>161</sup> See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 507 (2011) (discussing the growth in private rules of procedure agreed to before a dispute arises); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 594–96 (2005) (noting the increase in procedural bargaining as an instrumental part of civil law).

<sup>162</sup> Justice Scalia's opinion in *Concepcion* expresses a concern that class arbitration poses risks for defendants by noting that "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). None of the Justices express concern about "the risk of error" of no compensation or under compensation for plaintiffs, however.

<sup>163</sup> The tension between the need to respect contractual autonomy and the desire to protect statutory rights is well illustrated by comparing *Kilgore v. KeyBank National Ass'n*, 673 F.3d 947, 951 (9th Cir. 2012), in which the court held that the arbitration clause in student loan contracts are enforceable, with *In re American Merchants' Litigation*, 667 F.3d 204, 219 (2d Cir. 2012), in which the court held that arbitration clauses are not enforced in actions challenging credit card terms under antitrust laws.

Seventh, and Fourteenth Amendments were treated more deferentially.

A legislative corrective of the current judicial construction of the FAA would be desirable but is politically unlikely at this time.<sup>164</sup> Fortunately, several judges have shown some resistance to extreme applications of the statute. In *In re American Express Merchants' Litigation*,<sup>165</sup> the latest entry in the seemingly endless litigation over the arbitration question in that case, a two-judge panel of the Second Circuit concluded that a class action waiver provision in an arbitration clause was unenforceable in the antitrust action before them because it effectively would bar the plaintiffs from vindicating their statutory rights.<sup>166</sup> After extensively analyzing and distinguishing many of the Supreme Court's arbitration decisions, including *Concepcion* and *Compucredit*, the panel concluded: "Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong, private enforcement mechanisms and incentives in the antitrust statutes."<sup>167</sup> The panel's opinion made clear, however, that the party seeking to avoid arbitration bears the burden of establishing that the costs of individual arbitration would be prohibitively expensive.<sup>168</sup> As expected, the Supreme

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<sup>164</sup> One bill has been presented to Congress. S. 987, 112th Cong. (2011); H.R. 1873, 112th Cong. (2011). No action has been taken on the proposal. On January 2, 2012, the National Labor Relations Board ruled that a company's mandatory arbitration agreement waiving class actions violated federal labor law. The ruling has been challenged in a case that is now *sub judice* in the Fifth Circuit. *D.R. Horton Inc. v. NLRB*, No. 12-60031 (5th Cir. 2013).

<sup>165</sup> 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

<sup>166</sup> *Id.* at 219; *see also* *Sutherland v. Ernst & Young*, 768 F. Supp. 2d 547, 551–53 (S.D.N.Y. 2011) (concluding that a class action waiver making individual claims effectively valueless could not be enforced). The enforceability of the clause had been before the Second Circuit twice before, as well as the Supreme Court. *In re Am. Express Merch. Litig.*, 634 F.3d 187 (2d Cir. 2011); *In re Am. Express Merch. Litig.*, 554 F.3d 300 (2d Cir. 2009), *vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010). In a somewhat related vein, the district judge in *Cisneros v. American Financial Services, Inc.*, No. C11-02869 CRB, 2012 WL 3025913, at \*2, \*6 (N.D. Cal. July 24, 2012), refused to compel arbitration of a contract deemed procedurally and substantively unconscionable under California law. The contract was written in English but had been negotiated in Spanish; the plaintiff could not read or write English; referenced documents were not attached; and the defendant reserved to itself the right to enforce the contract in court.

<sup>167</sup> *Am. Express*, 667 F.3d at 218. Some cases decided after *American Express* have declined to apply it in actions arising under state law. *E.g.*, *Homa v. Am. Express Co.*, No. 11-3600, 2012 WL 3594231, at \*4 (3d Cir. Aug. 22, 2012) (noting that the FAA preempts the New Jersey Consumer Fraud Act); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234 (11th Cir. 2012) (rejecting as preempted an argument that a class action waiver was unconscionable under Florida Unfair Trade Practices Act).

<sup>168</sup> *Am. Express*, 667 F.3d at 216–18 (relying on *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*

Court has granted certiorari in *American Express*.<sup>169</sup> Depending on how the issue ultimately is resolved, the Second Circuit Court of Appeals's approach in that case might represent a useful, although modest, ray of light in the stifling darkness of today's arbitration-clause enforcement jurisprudence.

### E. Pleading Requirements

Those cases not remitted to arbitration face another early impediment on the procedural road map erected by the Supreme Court: heightened pleading requirements. I suspect it would be hard to find an active federal litigator who has not employed or defended against a motion based on the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,<sup>170</sup> and its 2009 extension and elaboration in *Ashcroft v. Iqbal*.<sup>171</sup> By demanding that the plaintiff plead facts demonstrating that the claim has substantive plausibility, rather than a statement that is legally sufficient and gives notice of the plaintiff's claim, these two cases represent a procedural "sea change" in plaintiffs' ability to survive the pleading stage.<sup>172</sup> They turn their back on over sixty years of federal pleading jurisprudence as well as any possible alternative procedural approaches that might be better suited to meeting the concerns expressed in the Court's opinions.<sup>173</sup> Their effect has been so

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*Inc.*, 473 U.S. 614, 632 (1985)). Widespread use of favorable economic terms comparable to those in AT&T Mobility's contract at issue in *Concepcion* would limit the applicability of *American Express*, even if it remains uncompromised further by the Supreme Court.

<sup>169</sup> *Id.* at 594. The Supreme Court also has granted certiorari in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 786 (2012), in which the Third Circuit upheld an arbitrator's decision to proceed on a class basis under an arbitration clause that did not mention class proceedings. The potential class of physicians, possibly 20,000 in number, asserts Oxford Health Plans improperly denies, underpays, and delays reimbursement claims.

<sup>170</sup> 550 U.S. 544 (2007).

<sup>171</sup> 556 U.S. 662 (2009).

<sup>172</sup> *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (explaining that *Twombly* and *Iqbal* abrogated notice pleading); see also Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 1–2 (2012) (noting the change in pleading standards among lower courts).

<sup>173</sup> See discussion *infra* notes 305–12. Justice Souter's denigration of judicial management in his opinion for the Court in *Twombly* is particularly troubling. Relying on an outdated law review article, he ignored the enormous development and improvements in management technology; the 1983, 1993, and 2000 amendments of the discovery rules; and the impact of the Court's 1986 summary judgment trilogy. See Miller, *supra* note 54, at 54–61 (questioning Justice Souter's opinion). Indeed, the Court spoke favorably of judicial management only a few years before *Twombly*. *Crawford-El v. Britton*, 523 U.S. 574 (1998) (describing judicial management as "efficient," "prompt," and "more useful and equitable" than heightened pleading requirements); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (summarizing judicial management's role in regulating discovery and disposing of unmeritorious claims). Justice Souter dissented in *Iqbal*, perhaps concluding that *Twombly* was being taken too far.

dramatic that cartoons have appeared showing lawyers complaining to their disappointed clients about having been “Twomblyed in the *Iqbals*.”<sup>174</sup> The two cases have been cited thousands of times and have created heightened opportunities for defendants to seek dismissal or, at a minimum, a deferral of discovery and any real consideration of the merits.<sup>175</sup> Not surprisingly, the Federal Judicial Center reports that motions to dismiss are now being invoked with increased frequency, which indicates that the Court’s decisions have magnified litigation costs and affected lawyer behavior.<sup>176</sup> But beyond that, a very close analysis of the Center’s study has led one empirical scholar to warn that the raw statistics mask the fact that the two cases have substantively impacted dismissal practices and outcomes and that the study fails to measure other potentially important, deleterious effects of the two decisions.<sup>177</sup>

Since 1938, the actual language of the core federal pleading provision, Rule 8(a)(2), only has required a “short and plain statement . . . showing that the pleader is entitled to relief.”<sup>178</sup> The rulemakers

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<sup>174</sup> COURTOONS, <http://www.courtoons.net/2009/10/23/twombly/> (last visited Feb. 12, 2013). My less than complimentary views of *Twombly* and *Iqbal* are spelled out at length in Miller, *supra* note 54. The current Reporter to the Advisory Committee explores the post-*Twombly/Iqbal* universe, the difficulties facing the rulemakers, and notes a few possible amendments. Edward H. Cooper, *King Arthur Confronts *TwIqy* Pleading*, 90 OR. L. REV. 955, 967–69, 971–72, 976–89 (2012); see also Lonny Hoffman, *Rulemaking in the Age of *Twombly* and *Iqbal**, 47 U.C. DAVIS L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2123325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123325) (analyzing why neither Congress nor the Advisory Committee has attempted to amend Rule 8 after *Iqbal* and *Twombly*). A very comprehensive discussion of the two cases and their implications appear in SCOTT DODSON, *SLAMMING THE FEDERAL COURTHOUSE DOORS? NEW PLEADING IN THE TWENTY-FIRST CENTURY* (2013).

<sup>175</sup> See, e.g., Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 LITIG. 1, 70 (2009) (discussing the “high price imposed in *Twombly* and *Iqbal*”).

<sup>176</sup> JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUDICIAL CTR., *MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8* (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf); see also Patricia Hatamyer Moore, *An Updated Quantitative Study of *Iqbal*’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 613–14 (2012) (showing that grants of the motion went from 46% in the *Conley* era to 48% following *Twombly* and increased to 61% after *Iqbal*).

<sup>177</sup> Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 36 (2011); see also Hoffman, *supra* note 174 (manuscript at 41–42) (explaining that both the filing and grant rates of motions to dismiss have increased after *Twombly* and *Iqbal*). Some writers have concluded that the 1983 and 1993 amendments to Rule 11 represent increased procedural hurdles and risk, Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 994 (1998), or are applied disproportionately against plaintiffs, Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 870 (1992).

<sup>178</sup> See 5 WRIGHT & MILLER, *supra* note 3, § 1215 (discussing the simplified pleading contemplated by Rule 8(a)(2)).

drafted it that way to permit relatively easy *entre* to the federal courts without technicality or formality.<sup>179</sup> They also recognized that the elaborate and demanding pleading phases of prior systems had become a quicksand of motion practice and a premature graveyard for many potentially meritorious claims.<sup>180</sup> Philosophically, at least, the Federal Rules say: “Feel injured? Well, come on in, this is a friendly, justice seeking litigation system, and we will sort the merits out after everyone has access to the facts through discovery.” It should be acknowledged, however, that during the two decades preceding *Twombly* and *Iqbal*, a number of federal courts—despite an impressive unbroken string of Supreme Court decisions repeating and reinforcing the norm of notice pleading<sup>181</sup>—had begun to deviate from the Supreme Court’s construction of the undemanding requirement set out in Rule 8.<sup>182</sup>

The Court essentially rewrote Rule 8 without anyone’s assistance or any pretense of honoring the statutorily prescribed—and far more

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<sup>179</sup> “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson*, 355 U.S. 41, 48 (1957); see also 5 WRIGHT & MILLER, *supra* note 3, § 1217 (discussing the meaning of the phrase “short and plain” in Rule 8(a)(2)). Others have reached a similar conclusion. See, e.g., Jonah B. Bell, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2270 (2012) (reporting that a significant percentage of cases have been affected by the Court’s decisions); Clark, *supra* note 9, at 154 (explaining the focus of the original Federal Rules).

<sup>180</sup> “Under the common-law system the matter was bad enough with a pleading question decided in every sixth case. But under the Hilary Rules [a collection of English pleading rules] it was worse. Every fourth case decided a question on the pleadings. Pleadings ran riot.” Clark B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 507 (1918).

<sup>181</sup> E.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Conley*, 355 U.S. at 47. Dissenting in *Twombly*, Justice Stevens noted that the Court’s opinion was a “dramatic departure from settled procedural law” and the first by any member of the Court to doubt the adequacy of the *Conley* formulation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting). It also should be acknowledged that in order to discharge its notice-giving functions a pleading inevitably must present some facts.

<sup>182</sup> A number of commentators had noted this development. See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003); Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435 (1996). Two prominent proceduralists have labeled this trend lawless. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 408 (2011) (“Now the Court, in *Twombly* and *Iqbal*, has rewarded that lawlessness with its own acts of lawlessness . . .”). The literature favoring the *Twombly* and *Iqbal* results is catalogued and critiqued in A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. (forthcoming 2013) (on file with the *New York University Law Review*).



transparent and democratic<sup>183</sup>—rulemaking process.<sup>184</sup> The Rule effectively has been changed. Initially, it required “notice” of the claim. Now it requires facts—not conclusions<sup>185</sup>—“showing” (a word in the Rule never previously judicially focused on or accorded any significance) a “plausible” claim, with little guidance as to what that means.<sup>186</sup> And what does it mean? Justice Souter’s *Twombly* opinion only tells us plausibility is something more than purely speculative or possible, but it can be less than probable.<sup>187</sup> Of course, that’s not very helpful.

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<sup>183</sup> See Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L. REV. 571, 575 (2012) (“The Supreme Court has acted lawlessly. It has amended a rule, without going through the explicit and detailed process for amending the Federal Rules that has evolved through the years . . .”). The rulemaking process includes a notice-and-comment period and an opportunity for Congress to review and possibly block a proposed rule amendment. 28 U.S.C. §§ 2071, 2073, 2077 (2006). *Twombly* and *Iqbal* have been characterized by some scholars in political terms, employing words such as “judicial activism,” or as part of the “right/left” dichotomy, or furthering “conservative” and “corporate” interests. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010) (“Many observers . . . see the same old right/left story: the conservatives seek to protect rich or powerful defendants, while the liberals stand with the little plaintiffs.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1325 (2010) (explaining that *Twombly* and *Iqbal* can be read as favoring “corporate and business interests”).

<sup>184</sup> A number of academics have criticized this process. See, e.g., Clermont & Yeazell, *supra* note 183, at 850; Edward A. Harnett, *Taming Twombly, Even After Iqbal*, 474 U. PA. L. REV. 473 (2009); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 454 (2008); Case Note, 121 HARV. L. REV. 305, 313 (2007). The Court repeatedly had expressed its commitment to the rulemaking process. Indeed, it had done so only five months prior to deciding *Twombly* in *Jones v. Bock*, 549 U.S. 199, 212 (2007). In Carrington, *supra* note 40, at 656–57, the author opines that the Court has “lost . . . self-discipline” and “lacks sufficient deference” to the other entities with a stake in rulemaking. See also Miller, *supra* note 54, at 84–89 (discussing the rulemaking process and the effect of *Twombly* and *Iqbal*). A few commentators have expressed the view that the rulemaking process has lost some of its credibility, lacks representative composition, has been politicized by pressures from special interests, and has been undermined by procedural lawmaking in lieu of resorting to the rulemaking process. See Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 798–99 (1991); Stempel, *supra* note 87, at 637. I have sketched briefly my witnessing of shifts in the workings of the Advisory Committee between 1962 and 1990 in Miller, *supra* note 109 (manuscript at 8).

<sup>185</sup> *Twombly*, 550 U.S. at 556–57. The Advisory Committee had rejected comparable proposals, which may be why the Court took matters into its own hands. E.g., 1955 Report of the Advisory Committee, Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Rule 8 (1955), reprinted in 12A WRIGHT, MILLER, KANE & MARCUS, *supra* note 96, at app. F (containing the advisory note reflecting proposed amendments to Rule 8(a)(2)); see also 5A WRIGHT & MILLER, *supra* note 3, § 1201 (describing the history of Rule 8’s modifications).

<sup>186</sup> See *Twombly*, 550 U.S. at 570 (identifying the Court’s standard). “Plausible” thus has become the mantra-like concept for motions under both Rule 12(b)(6) and Rule 56. But does the word have one meaning or two?

<sup>187</sup> *Id.* at 557. The potential for inconsistency of outcome is illustrated by contrasting two recent antitrust cases. Compare *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 216 (3d Cir.

The Court was more specific in *Iqbal*, saying “plausible” means that the pleading must show there is a reasonable possibility of relief.<sup>188</sup> With regard to how district judges are supposed to divine reasonable possibility, Justice Kennedy’s opinion for the five-Justice majority invited them to use their “judicial experience and common sense.”<sup>189</sup> In some circumstances that will suffice, but the formula is far from a satisfactory one. Does it mean that a newly appointed judge has no judicial experience to employ, or that we are supposed to be comforted by assuming that judicial experience is homogeneous among members of the federal bench, or that common sense is generously and equally distributed among them and will be applied in a uniform manner? In addition to those two amorphous factors, the Court instructed district and court of appeals judges to compare the challenged conduct to a hypothesized innocent explanation for the defendant’s actions. This sounds very much like an invitation to evaluate the merits of the plaintiff’s case on the basis of a single document—the complaint—without having the benefit of discovery, let alone anything remotely approximating a trial or the input of a jury.

But a complaint does not speak to any aspect of judicial experience or judicial common sense; they both are irrelevant to stating a claim for relief under Rule 8(a)(2). Nor do plaintiffs—even the most masochistic of them—discuss hypothetical innocent explanations of the defendant’s conduct in their complaints. So what is a plaintiff supposed to plead to state a legally sufficient claim? Not these extraneous matters one would hope. Yet, some lawyers with whom I have discussed the subject fear that *Twombly* and *Iqbal* have so twisted the pleading structure that they now must protectively negate potential defenses and any possible innocent explanations for the conduct being challenged. This extreme view—which sounds a bit like Chicken Little warning that the sky is falling—cannot be correct, although one can understand the apprehension. That is not the type of pleading the rulemakers intended or what a rational twenty-first century pleading system should require. It amounts to the plaintiff anticipating defenses to his own claim and negating them in the complaint, which is inap-

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2011) (finding the trustee did not show plausibility of agreement to restrain trade through circumstantial evidence), *with* *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 167–68 (2d Cir. 2012) (finding that the wholesaler sufficiently alleged a plausible conspiracy).

<sup>188</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>189</sup> *Id.* at 679. Why isn’t it “plausible” and a “reasonable possibility” and within one’s “common sense” that the *Twombly* defendants wanted to prevent competition in their regions and agreed not to compete outside their own respective regions or that in *Iqbal* the Attorney General and the director of the FBI knew of the discriminatory practices suffered by the plaintiff and even condoned them?

propriate pleading in every American procedural system I know anything about.<sup>190</sup> Moreover, one hopes that the district judge's judicial experience and common sense and the merits of the hypothesized innocent explanation do not become elements of the adversarial presentation on a Rule 12(b)(6) motion to dismiss. Yet, that is what *Iqbal* states are the judicial tools to be employed. Does that mean they now are the central significant elements of the inquiry on the motion? These "considerations" are being raised, of course,<sup>191</sup> although the factors of judicial experience and common sense must be presented, if at all, discreetly.

The process described in *Iqbal* appeals too much to judicial subjectivity, which inevitably depends (at least in part) on an individual judge's background, values, preferences, education, and attitudes, as the divisions among both the Justices on the Court and the judges of the Second Circuit in *Twombly* and *Iqbal* indicate.<sup>192</sup> One does not have to be paranoid to be concerned that these highly individualistic considerations are at work and impacting a district judge's thinking on a motion to dismiss, particularly with regard to assessing the complaint's plausibility and the hypothesized innocent explanations for the defendant's conduct. There is simply too much potential for inappropriate merit determinations—based only on the complaint—in the *Iqbal* regime.

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<sup>190</sup> The classic case on the subject is *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 153 (1908), in which the court relied only on a plaintiff's claims and not an anticipated defense to determine subject matter jurisdiction. See also *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830–31 (2002) (finding that a complaint, not an answer, determines if a complaint arises under federal law); Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781 (1998) (discussing the artful pleading doctrine).

<sup>191</sup> The Court's opinions in both *Twombly* and *Iqbal* offered innocent explanations for the defendants' conduct; these explanations were employed in a manner akin to judicial fact-finding. *Iqbal*, 556 U.S. at 679; *Twombly*, 550 U.S. at 556.

<sup>192</sup> See Kahan, Hoffman & Braman, *supra* note 95, at 903–05; see also Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 759 (2009) (asserting that judges dismiss cases based on their own view of the facts). As a now retired district judge has observed: "What is plausible to me, what my common sense indicates, coming from where I come from, may not be what is plausible to other judges [or] what comports with their common sense." Nancy Gertner, *A Judge Hangs Up Her Robes*, 38 LITIG. 60, 61 (2012). Others have noted that excessive judicial discretion may lead to decisions based on individual attitudes. E.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 115 (2009) ("The discretionary power of the judge to follow his or her personal preferences in deciding the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded."); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1146–48 (2012) (analyzing how a judge's already formed attitudes affect judicial decision-making); Marcus, *supra* note 182, at 482 (explaining that discretion allows judges to dismiss pleadings based on personal preferences).

Thus, it is not unreasonable to assume that the new plausibility regime may lead to judges resolving fact issues on a motion to dismiss—as, I believe, has occurred in various contexts ever since the Supreme Court’s 1986 summary judgment decisions described earlier<sup>193</sup>—thereby intruding on a domain historically committed to the trial process and juries, something that even the fact and narrative pleading systems of times gone by never allowed.<sup>194</sup> The motion to dismiss and its antecedents—for hundreds of years—have been viewed as procedures that only determine the legal sufficiency of the statements in the complaint.<sup>195</sup> The motion asks a simple question—does the complaint state a claim the law recognizes? For example, suppose I allege that one of my students gave me a dirty look in class. Whatever procedural system you test that pleading

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<sup>193</sup> See *supra* notes 90–97 and accompanying text (describing summary judgment cases).

<sup>194</sup> I perceive a disturbing and growing judicial trend of judges characterizing allegations that seem to be factual (and therefore to be accepted by the court as true on a motion to dismiss) as conclusory and therefore not binding on the court on a Rule 12(b)(6) motion. The fact versus conclusion dichotomy always has been a dubious basis for testing a pleading. See Walter W. Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 416–19, 423 (1921) (highlighting the impossibility of creating a simple fact versus conclusion distinction); Miller, *supra* note 54, at 23–26 (warning that a fact pleading system invites unbridled judicial discretion). That is why the original rulemakers did not use those words but called for a “statement” of the claim. See *United States v. Employing Plasterers’ Ass’n of Chi.*, 347 U.S. 186, 188–89 (1954) (rejecting the fact versus conclusion dichotomy); FED. R. CIV. P. form 11 (showing the low level of detail deemed sufficient); 5A WRIGHT & MILLER, *supra* note 3, § 1218 (explaining the Federal Rules’ rejection of fact pleading and acceptance of a “statement” entitling relief). Also disturbing is the judicial tendency to ignore the purpose of the second sentence of Rule 9(b), which allows conditions of mind to be alleged generally, and demand factual pleading. See, e.g., *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 612–14 (6th Cir. 2012) (finding allegations of “a discriminatory intent, purpose, and motivation” insufficient to support an inference of “discriminatory animus” but paying lip service to notice pleading). Demanding specificity of these subjective matters is “unworkable and undesirable” and simply represents another pretrial stop sign. 5A WRIGHT & MILLER, *supra* note 3, § 1301.

<sup>195</sup> A refreshing recognition of this point comes from Chief Judge Easterbrook in *Richards v. Mitcheff*, 696 F.3d 635, 636 (7th Cir. 2012):

We appreciate the judicial desire to resolve cases as swiftly as possible. Litigation is costly for both sides, and a doomed suit should be brought to a conclusion before costs are needlessly run up. *Twombly* designed its plausibility requirement as a partial antidote to the high costs of discovery and trial. But neither *Twombly* nor *Iqbal* has changed the rule that judges must not make findings of fact at the pleading stage (or for that matter the summary-judgment stage). A complaint that invokes a recognized legal theory (as this one does) and contains plausible allegations on the material issues (as this one does) cannot be dismissed under Rule 12.

See generally 5A WRIGHT & MILLER, *supra* note 3, §§ 1355–1356 (explaining the history of the motion). One writer questions the constitutionality of the motion to dismiss when utilized in its contemporary aggressive form. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1855 (2008) (arguing the new motion to dismiss standard violates the Seventh Amendment).

under—the Federal Rules, the Codes of the Nineteenth Century, or the earlier common law demurrer<sup>196</sup>—it is vulnerable to dismissal if directing a dirty look at another is not actionable under the governing tort law. In the language of today’s Federal Rule 8(a)(2), the pleader simply has failed to show he or she is “entitled to relief” even if it is assumed that the dirty look was inflicted. However, if the governing law recognized such a tort, the case would be allowed to proceed.

The pleading challenge *never* has had anything to do with what actually happened to the plaintiff, let alone who should win on the merits. Nor was it designed as a mechanism for screening cases based on a judicial evaluation of the merits. As any good civil procedure instructor tells his or her class each year: On a motion to dismiss, the judge only looks at the four corners of the complaint (and what is attached or incorporated by reference) and nothing else to determine whether it is legally sufficient. Indeed, the judge is supposed to bend over backwards, accept the facts as pleaded, and interpret the complaint in the light most favorable to the pleader.<sup>197</sup> Even today, those principles typically are recited in opinions as if they were catechism, but, like many forms of catechism, they then seem to be ignored. At least this reader of opinions suspects that the “bend over backward” rule of construction has been reversed, and occasionally the judicial eye surveys a complaint looking for a ground for dismissal.

Under the impetus of *Twombly* and *Iqbal*, the motion to dismiss may well morph into a trial-type inquiry with the capability of terminating a case at its outset based on little more than judicial intuition and a personal sense of what in the complaint seems convincing and what does not.<sup>198</sup> So, to use a colloquialism from Brooklyn, the land of

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<sup>196</sup> See, e.g., CHARLES E. CLARK, CODE PLEADING § 1978, at 501 (2d ed. 1947); SHIPMAN, COMMON LAW PLEADING 28 (3d ed. 1923).

<sup>197</sup> See 5B WRIGHT & MILLER, *supra* note 3, § 1356 (noting that the purpose of a motion under Rule 12(b)(6) is to test the sufficiency of a pleading); see also *id.* § 1286 (discussing the type of construction needed to evaluate pleading); James A. Pike, *Objections to Pleading Under the New Federal Rules of Civil Procedure*, 47 YALE L.J. 50, 60 (1937) (explaining that the then-new Federal Rules require interpretation of the complaint in the fashion most favorable to the plaintiff). The historic analytic mode of testing the sufficiency of a complaint and the potentially dispositive (and preclusive) effect of a Rule 12(b)(6) motion, see *infra* note 208, distinguishes it from the fact-finding that occurs on a jurisdiction motion or one for a preliminary injunction—which usually applies only to the threshold matter, not the merits. See *Warth v. Seldon*, 422 U.S. 490, 508 (1975) (finding plaintiffs’ standing “unsubstantiated by allegations of fact”).

<sup>198</sup> See Howard M. Wasserman, *Iqbal*, *Procedural Mismatches and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 177 (2010) (noting the expansion of judicial discretion). One distinguished commentator believes the process “offends our fundamental procedural principles.” Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1348 (2010). The observation of the late Judge Richard S. Arnold seems quite apt: “Although you pick up a file and say ‘Well, there is a ninety-eight percent

my youth, in one “fell swoop” these two Supreme Court decisions have destabilized both the pleading standard and the motion to dismiss practice under the Federal Rules.<sup>199</sup> Indeed by empowering district judges to use subjective factors, such as judicial experience and common sense, and to evaluate possible innocent explanations for the defendant’s conduct to determine plausibility, the motion to dismiss begins to merge with summary judgment: It feels a bit like an invitation to resolve factual matters and the underlying merits of the plaintiff’s claims at the very beginning of the case.<sup>200</sup>

Merging the Rule 12(b)(6) and Rule 56 motions would produce a result that is in sharp contrast to the Supreme Court’s previous expressions—namely, that summary judgment was the initial point for screening out cases because the facts supporting the claim were thought to be implausible, but that discovery normally should be permitted until then.<sup>201</sup> What seems to have been overlooked in the current rush to judgment is that sometimes what appears implausible on the face of a complaint proves quite plausible when illuminated by discovery. I cannot help but wonder, and I acknowledge it is nothing more than surmise, whether today’s district judges’ involvement in the maturation of cases through judicial management and the growing judicial habit of advancing the disposition timeline have not subliminally led to intuitive fact-finding by some judges that is legitimized in their minds on an “I know how this should come out” basis.

An example of the concerns I expressed in the preceding paragraphs is *TruePosition, Inc. v. LM Ericsson Telephone Co.*,<sup>202</sup> an action charging a conspiracy to exclude the plaintiff’s technology from

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chance that this is frivolous,” that does not mean you read only two percent of the file.” Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 34 (1996).

<sup>199</sup> The academic literature on these cases has become voluminous. See, e.g., Clermont & Yeazell, *supra* note 183, at 823; Brooke D. Coleman, Essay, *What If?: A Study of Seminal Cases as If Decided Under a Twombly/Iqbal Regime*, 90 OR. L. REV. 1147, 1148 (2012); Cooper, *supra* note 174; Miller, *supra* note 54, at 10; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 1 (2009). One saving grace is the recognition by some courts that *Twombly* and *Iqbal* have created uncertainty, warranting a liberal attitude toward leave to amend a complaint deemed insufficient. See, e.g., Pruell v. Caritas Christi, 678 F.3d 10, 15 (1st Cir. 2012) (reversing failure to grant motion for leave to amend given circumstances); see also *infra* note 214 (noting other such cases).

<sup>200</sup> See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly, How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 62 (2007); Miller, *supra* note 54, at 50–52; Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 15 (2010).

<sup>201</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002); *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998).

<sup>202</sup> 844 F. Supp. 2d 571 (E.D. Pa. 2012).

certain industry standards. In the course of granting the defendant's motion to dismiss, the district court said:

We find that *Twombly* requires a level of factual detail that makes it more likely that the Defendants' conduct was the result of an unlawful agreement rather than some other independent and lawful explanation and that such requirement is not a "probability" requirement. In *Twombly*, the Supreme Court stated, "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that 'the plain statement' possesses enough heft to 'sho[w] that the pleader is entitled to relief.'"<sup>203</sup>

I am skeptical. I always thought "more likely" meant a fifty-one percent likelihood or more. How is that not a probability requirement, which is precisely what *Twombly* and *Iqbal* said is not required to establish a complaint's plausibility? Nothing in the Court's opinions in those cases supports a "more likely" innocence standard. Nonetheless, the quoted passage from *TruePosition* suggests that a district court effectively can treat *Twombly* and *Iqbal* as establishing a proof standard, rely on the complaint and nothing more to evaluate competing licit and illicit explanations for the challenged conduct, weigh them, make a judgment about their relative merits, and thereby effectively decide the case's merits without further ado. If that is true, it provides a striking (in my view, a frightening) illustration of what *Twombly* and *Iqbal* hath wrought.<sup>204</sup>

Moreover, *Twombly* and *Iqbal* both ignore the problem of information asymmetry.<sup>205</sup> In many contemporary litigation contexts, critical information, such as the formulation and testing of a pharmaceutical or the design and manufacture of other products, is entirely in the defendant's possession and unavailable to the plaintiff. One can understand requiring a plaintiff to plead what he or she knows or could know with reasonable effort—in many situations, of course, the plaintiff does not know what happened to him—but it is futile and a bit absurd to tell someone to plead what he or she does not know and cannot access. We no longer live in the simple, long-past

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<sup>203</sup> *Id.* at 584 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

<sup>204</sup> Far more benign applications of the two Supreme Court decisions have appeared. *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 184–85 (2d Cir. 2012) (observing that "[b]ecause plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible," but "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion"); *Nguyen v. Bank of Am.*, No. G-11-290, 2012 WL 33203, at \*3 (S.D. Tex. Jan. 6, 2012) ("The defendant simply seeks to have *Twombly* and its progeny accomplish what was never intended—a pretrial of the facts of a plaintiff's case via the defendant's defenses to those facts.").

<sup>205</sup> See *Miller*, *supra* note 54, at 43–46.

world that enabled a buyer to appraise the strengths and weaknesses of products, such as an oxcart or plough, at the time of purchase. The average consumer or investor (and even many sophisticated ones) knows very little (indeed, probably nothing) about the formulation or pharmacology of a pill, the hardware of a computer, or the underlying details of a financial transaction, and has little or no realistic ability to investigate these matters. Discovery was designed to provide each side with the ability to obtain relevant information that otherwise was beyond their reach so that the litigation playing field would be level, settlements would be informed, and meaningful trials would be possible.

Since the Supreme Court appears to have denied plaintiffs the opportunity to employ even limited discovery before they plead a plausible case,<sup>206</sup> *Twombly* and *Iqbal* have shifted this information-access balance so that it favors those defendants best able to keep their records, conduct, and institutional secrets to themselves.<sup>207</sup> Yet, I would think that judicial “common sense” suggests that when a plaintiff has no economically or logistically reasonable way of unearthing important information that is in the possession of the defendant, the plausibility barrier needs to be lowered somewhat to allow some contained discovery or to give the plaintiff, whose complaint must comply with and is subject to the sanctions provided by Rule 11, the benefit of the doubt. After all, the Supreme Court did say that the question of a

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<sup>206</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009). *But cf.* *Bausch v. Stryker Corp.*, 630 F.3d 546, 558 (7th Cir. 2010), *cert. denied*, 132 S. Ct. 498 (2011) (“Formal discovery is necessary before a plaintiff [in a product case] can fairly be expected to provide a detailed statement of the specific bases for her claim.”).

<sup>207</sup> See Allison Frankel, *Two More Iqbal Dismissals Emerge in Products Liability Cases*, AM. LAW. (Aug. 4, 2009), <http://www.law.com/jsp/article.jsp?id=1202432738346&slreturn=20120905151932> (noting that *Iqbal* and *Twombly* require plaintiffs to plead information available only after discovery). Recent private conversations that I had with a few sophisticated lawyers from European countries—places where it is fashionable to disparage American pretrial discovery, at least publicly—yielded acknowledgements that our discovery system was much more likely to reach the truth of a situation than the no-discovery approach of the procedural regimes of their own countries. Ironically, two of them admitted seeking discovery assistance from federal courts under 28 U.S.C. § 1783 (2006)—a statute I participated in formulating fifty years ago—for use in litigation pending in their own countries.



pleading's plausibility is contextual.<sup>208</sup> Unfortunately, that notion frequently is not followed.<sup>209</sup>

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<sup>208</sup> *Iqbal*, 556 U.S. at 679; see also Cooper, *supra* note 174, at 986 (noting possible Rule remediations for the asymmetry problem). Potential information asymmetry was one reason the district court's refusal to grant leave to amend was reversed in *Pruell v. Caritas Christi*, 678 F.3d 10, 15 (1st Cir. 2012). My concerns about the application of *Twombly* and *Iqbal* in an information asymmetry context, or any other for that matter, are exacerbated by the prospect that claim preclusion will be extended to a judgment following a Rule 12(b)(6) dismissal when the plaintiff's lack of information makes further pleading impossible. See, e.g., *Carey v. Int'l Union of Operating Eng'rs Local 612*, No. C12-5025 RBL, 2012 WL 1945427 (W.D. Wash. May 30, 2012) (precluding a pro se plaintiff from bringing a second action after he was dismissed with prejudice for failure to state a claim); *Overview Books, LLC v. United States*, 755 F. Supp. 2d 409, 415–16 (E.D.N.Y. 2010) ("It is well-established that for *res judicata* purposes, a Rule 12(b)(6) dismissal is deemed to be a judgment on the merits."), *aff'd*, 438 F. App'x 31 (2d Cir. 2011); *Kuder v. Haas*, No. 2:10-cv-00404 MCE KJN PS, 2010 WL 4983455, at \*3 (E.D. Cal. May 2, 2010), *report and recommendation adopted*, No. 2:10-cv-00404-MCE-KJN-PS, 2011 WL 346442 (E.D. Cal. Feb. 1, 2011) (finding that a prior judgment following a dismissal with prejudice for failure to state a claim justified claim preclusion). But what if the plaintiff subsequently secures sufficient information to recommence? Will he or she be able to surmount a preclusion challenge? Will such a plaintiff, in the alternative, be able to open the original judgment under Rule 60(b)(2)? How much litigation will be needed to provide my hypothetical plaintiff a day in court? For an extended and more nuanced discussion of preclusion based on the pleadings, see 18A WRIGHT, MILLER & COOPER, *supra* note 21, § 4439.

<sup>209</sup> At the risk of being accused of being bitter, my experience as appellate counsel for the plaintiff in *Landesbank Baden-Wurtemberg v. Goldman, Sachs & Co.*, No. 11-4443-CV, 2012 WL 1352590 (2d Cir. Apr. 19, 2012), is illustrative. Had the panel fully stated the facts in its conclusory Summary Order, the plausibility of Goldman Sachs knowing (1) that the subprime mortgage market had previously deteriorated, (2) that the triple-A rating the agencies gave the notes was totally unwarranted, and (3) that there was a substantial likelihood the notes would not be repaid despite the defendant's representations, would have been fairly obvious at the time it sold the certificates of debt obligation (CDO) to the plaintiff in 2006. "Common sense" so dictated. Further, it was a clear case of information asymmetry making the court's demand for contemporaneous documentation unrealistic. Thus, the panel's statement—that the plaintiff should have pleaded facts of Goldman's intent—was a requirement to do something impossible as a practical matter, as well as, seeming inappropriate as a legal matter given the second sentence of Rule 9(b). Ironically, less than two weeks before argument, a district judge in *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 632 (S.D.N.Y. 2012), exercised "common sense" by recognizing the plausibility that Goldman knew of the "increased risks" in the subprime mortgage market and the need to reduce its "long exposure" by shorting the same CDO it was selling to the plaintiffs in that case. Yet, in my case the panel said pleading the defendant's profit motive was not enough—even though the pleading actually alleged Goldman's large inventory of junk, the need to unload it, and Goldman's shorting the same notes to offset the potential loss, just as it did with the notes at issue in *Dodona*. As to the question of the plaintiffs' reasonable reliance, the *Dodona* judge wisely concluded that reasonable reliance was a question of fact that could not be resolved on the pleadings. The cases are basically identical; the only difference is the notes in *Dodona* were sold approximately six months after those in *Landesbank*. The *Landesbank* panel clearly was demanding proof based on unobtainable (but easily discoverable) documents and facts that could not be pleaded. Everyone in the financial and housing industries seems to have known what was going on in the CDO market by 2006. Did "experience" and "common sense" not suggest the case should proceed? Other mortgage-backed securities class actions also have fared better

Employment discrimination cases provide a useful example. A discharged employee often is not told why she was fired.<sup>210</sup> If facts must be pleaded to state a claim for discriminatory discharge, for failure to promote, or for some other actionable practice, it will be difficult if not impossible for the plaintiff to surmount the newly minted pleading requirement. How does the plaintiff show discriminatory conduct—let alone a pattern or practice of discrimination—without access to the history of the employer’s conduct regarding not only the plaintiff but also other employees? The paucity of employment discrimination cases in recent years indicates that in some parts of the nation they are not being instituted with any frequency—let alone surviving.<sup>211</sup> This stands in sharp contrast to the earlier judicial commitment to enforcing the national policy against discrimination in the workplace.<sup>212</sup>

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than *Landesbank*. See, e.g., *Richman v. Goldman Sachs Grp., Inc.*, No. 10 Civ. 3461(PAC), 2012 WL 2362539 (S.D.N.Y. June 21, 2012) (allowing a securities fraud claim).

<sup>210</sup> Since the “at-will” doctrine absolves the employer of any obligation to provide reasons for the discharge, it is only the ability to resort to the employment discrimination statutes that provides a basis for rooting out various nefarious workplace practices. As recently as *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (Easterbrook, J.), a distinguished judge wrote that a Title VII plaintiff only had to say, “I was turned down for a job because of my race.”

<sup>211</sup> Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 241 (2012) (discussing the increase in Rule 12(b)(6) motions and dismissals following *Iqbal*); Schneider, *supra* note 89, at 524 (noting hurdles faced in employment discrimination and civil rights cases); Miller, *supra* note 54, at 77 n.292 (identifying the significant drop in employment discrimination cases after *Twombly* and *Iqbal*); Laura Beth Nelson, Robert L. Nelson & Ryan Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL & LEGAL STUD. 175, 176–77 (2010) (finding that victims of employment discrimination receive cursory legal attention and remedies). After years of dramatic increases in the number of employment cases in the federal courts, the incidence of such cases has declined since the turn of the century. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 104 (2009). The success rate in these cases always has been below that in other litigation categories. *Id.* at 127; see generally Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 123 (2012), <http://yalelawjournal.org/2012/10/16/gertner.html> (“[J]udges have made rules that have effectively gutted Title VII.”). The same tendency to categorize allegations as conclusory, and therefore not to be considered on a motion to dismiss, *supra* note 194, manifests itself in employment discrimination cases. See, e.g., *Khalik v. United Air Lines*, 671 F.3d 1188, 1193–94 (10th Cir. 2012) (dismissing allegations of targeting false investigation and criticisms, and holding that the discriminatory and retaliatory discharge failed the conclusory test).

<sup>212</sup> See, e.g., *Hackley v. Roudenbush*, 520 F.2d 108, 151 (D.C. Cir. 1975) (explaining that Title VII claims involve “the vindication of a major public interest”); *Oatis v. Crown Zellenbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1969) (describing Title VII as a congressional policy “of the highest priority”). A good example of an employment discrimination complaint that survived the pleading hurdle is *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012). In reversing the district court’s dismissal, the court of appeals said: “Keys’s

Similarly, how does a pleader challenge illegal or unconstitutional governmental action—whether by municipal, state, or federal employees—without deposing members of the department in which that challenged conduct took place? But the Supreme Court appears to have made even “pin-point” or “quick-look” discovery unavailable until after the inevitable motion to dismiss has been denied and plausibility established—although the Federal Rules do not require that to be the case, and Rule 26(c)(1)(A) might be read as requiring a showing of “good cause” before the district court can proscribe disclosure or discovery.<sup>213</sup> Fortunately, some judges have recognized the catch-22 character of the Court’s prohibition on discovery and have forged interesting solutions to provide some opportunity to overcome the pleading barrier.<sup>214</sup> Those solutions are appropriate invocations of

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Amended Complaint tenders more than the ‘naked assertion[s]’ devoid of ‘further factual enhancement’ that *Twombly* and *Iqbal* prohibit. . . . [It] contains allegations that are neither speculative nor conclusory; it alleges facts that easily state a plausible claim. The Amended Complaint alleges Humana had a pattern or practice of discrimination . . . .” *Id.* at 610 (quoting *Iqbal*, 556 U.S. at 678) (internal quotation marks omitted). One wonders why the district court failed to see the claim’s plausibility.

<sup>213</sup> In both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court rejected the plaintiffs’ requests for limited discovery to establish that they could satisfy Rule 8(a)(2) and survive a Rule 12(b)(6) motion to dismiss. See generally Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 77 (2012) (explaining courts’ usage of Rule 26(c) to create orders staying discovery). Scholars have argued that the apparent restriction on discovery in *Iqbal* should be limited to cases involving the defense of qualified immunity. Hartnett, *supra* note 184, at 511; David L. Noll, *The Determinacy of Iqbal*, 99 GEO. L.J. 117, 143 (2010). As much as I would applaud that result, it seems doubtful given the Court’s remarks indicating that its analysis applied to all cases.

<sup>214</sup> Judge Jack B. Weinstein of the Eastern District of New York, long a proponent of “getting a sense of the litigation,” has conducted one or more meetings with counsel, and others on occasion, before ruling on a motion to dismiss; the process has the feel of a deposition or mini-trial. See, e.g., Transcript of Hearing, *Biagi v. McAllister Towing & Transp. Co.*, No. 11-CV-3567 (E.D.N.Y. Feb. 12, 2012). According to Judge Weinstein: “In most cases . . . some claims can be orally trimmed as substantive dead wood on hearing the motion. In cases where the plaintiff’s livelihood is involved, such as Fair Labor Standards Act claims, the matter is expedited.” Letter from Judge Jack B. Weinstein to the author (Feb. 16, 2012) (on file with the *New York University Law Review*); see also *Talbot v. Sentinel Ins. Co.*, No. 2:11-cv-01766a-KJD-CWH., 2012 WL 1068763, at \*5 (D. Nev. Mar. 29, 2012) (discovery not stayed when a motion to dismiss challenged only some of plaintiff’s claims). The district courts have largely unreviewable discretion to allow discovery on the basis of a specific showing of need at the early pretrial conference. Judges also can permit specific discovery pending the resolution of a Rule 12(b)(6) motion or deny the motion in favor of authorizing limited discovery and permit a second motion to dismiss thereafter. See *Bagg v. HighBeam Research, Inc.*, 862 F. Supp. 2d 41, 44 (D. Mass. 2012) (authorizing limited discovery before considering a motion to dismiss); *Harris v. Scriptfleet, Inc.*, No. 11-4561, 2011 WL 6072020, at \*3 (D.N.J. Dec. 6, 2011) (denying a motion to dismiss a Fair Labor Standards Act claim because, reasoning backwards, “[i]t cannot be the case that a plaintiff must plead specific instances of unpaid overtime or

“judicial experience and common sense,” and a proper recognition of the need to apply *Twombly* and *Iqbal* contextually.

The Court has said that the new pleading principles apply to all federal civil actions,<sup>215</sup> presumably to honor the principle that the Federal Rules speak to all cases with a single voice (transsubstantivity), even though *Twombly* and *Iqbal* were two substantively highly unique cases. One was an extremely large antitrust class action involving an entire industry. The other was an emotionally charged outgrowth of the events of 9/11, asserting a Pakistani Muslim’s claims of illicit detention and very harsh treatment against high ranking federal officials, the Attorney General, and the Director of the FBI. It was quite unnecessary for the Court to have reached beyond the cases before it, let alone to all federal cases, especially without any assistance from the statutory rulemaking process.<sup>216</sup>

It makes no sense to apply the new pleading standard to the wide swath of relatively simple lawsuits that do not require extensive fact pleading or gatekeeping—with their attendant cost, delay, and risk of premature termination. In one diversity of citizenship case that shows the overextension of *Twombly* and *Iqbal*—one I hope is simply an unfortunate outlier—the plaintiff had slipped and fallen in a grocery store and alleged serious injuries. The court dismissed the action because the plaintiff failed to plead what the substance on the floor was, how it got there, how long it had been there, and whether anyone else had slipped and fallen.<sup>217</sup> How was the plaintiff supposed to know these things without discovery? It is fortunate that a few courts have

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minimum wage violations before being allowed to proceed to discovery to access the employer’s records”); *Club Caribe Condo. Ass’n v. Travelers Excess & Surplus Lines Co.*, No. 11-62673-CV, 2012 WL 529972, at \*4 (S.D. Fla. Feb. 17, 2012) (allowing leave to file an amended complaint and providing a brief discovery period). Many district courts have allowed limited discovery. *See, e.g.*, *Sawyer v. Stolle*, No. 2:11cv446, 2011 WL 6396592, at \*10 (E.D. Va. Dec. 20, 2011) (authorizing limited discovery); *Wilson Oilfield Servs., Inc. v. Vishal Enter.*, No. 7:11-cv-00111-O, 2011 WL 6029948, at \*4 (N.D. Tex. Dec. 5, 2011) (permitting limited discovery to cure pleading defects because, among other reasons, defendant was a foreign corporation and defendant’s counsel previously had refused to schedule a deposition); *Coss v. Playtex Prods., LLC*, No. 08 C 50222, 2009 WL 1455358, at \*5 (N.D. Ill. May 21, 2009) (ordering limited discovery and denying a stay “in the interest of moving the cases forward”).

<sup>215</sup> *Iqbal*, 556 U.S. at 684.

<sup>216</sup> *See* 28 U.S.C. § 2072 (2006) (laying out the statutory process).

<sup>217</sup> *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at \*1–2 (W.D. Va. Aug. 24, 2009). It would be a mistake to dismiss this case and *TruePosition*, described at *supra* notes 202–04 and accompanying text, as outliers. They are not. There are numerous cases reflecting something akin to a merit determination at the pleading stage. A number of these cases are described in the sources cited *supra* notes 174, 183, 209. These decisions make it clear that those who assert that “nothing” or “very little” has been changed by the Supreme Court are being Pollyannaish, are in denial, or are guilty of willful blindness.

taken the circumstances of a particular case's context into account and expressed a willingness to apply *Twombly* and *Iqbal* differentially.<sup>218</sup>

So where have *Twombly* and *Iqbal* left us? Pleading facts now seems to be what is required of plaintiffs, which represents a throw-back to the discarded era of code procedure.<sup>219</sup> The Supreme Court has moved the system from a notice pleading structure, which is what Rule 8 was designed to be, to a fact pleading structure, which is exactly what the Federal Rules were drafted to reject. As a result, even when a potential plaintiff's claims may have merit, cases may not be initiated because the risk of loss without any prospect of compensation, or even the recouping of expenses, is too great. Or, even if a case is brought, it may be terminated without ever reaching the merits. *Twombly* and *Iqbal* are producing more pleading motions, more delays, more costs, more appeals, and potentially more inappropriate dismissals.<sup>220</sup> Indeed, the prevalence of the motion to dismiss and the concomitant deferral of discovery seemingly mandated by *Iqbal* inevitably delay those cases that survive the motion to dismiss from progressing toward a resolution on the merits, potentially cloaking wrongdoing with a de facto litigation immunity.<sup>221</sup> Most distressingly, *Twombly* and *Iqbal* were imposed without any empirical exploration of whether the overall systemic benefits of the early dismissal they engender, hypothesized by a majority of the Court, are greater or less

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<sup>218</sup> See, e.g., *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (“[T]he height of the pleading requirement is relative to circumstances.”).

<sup>219</sup> Some commentators had warned that this regression was upon us even before *Twombly* and *Iqbal*. Fairman, *supra* note 182, at 1011 (highlighting when courts have required heightened notice pleading); Marcus, *supra* note 182, at 435 (documenting the rise of heightened pleading standards).

<sup>220</sup> The effects of the new pleading regime and the existing studies (as well as the author's own) are explored at length in DODSON, *supra* note 174, at 63–96. See also THOMAS E. WILLGING & EMORY G. LEE, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 25–27 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf) (arguing that *Twombly* and *Iqbal* will likely increase litigation costs and unproductive Rule 12(b)(6) motions); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (noting that preliminary data suggests that the costs of heightened pleading may be substantial and not provide the litigation benefits or economies suggested in *Twombly* and *Iqbal*).

<sup>221</sup> See *Talbot v. Sentinel Ins. Co.*, No. 2:11-cv-01766-KJD-CWH., 2012 WL 1068763, at \*5 (D. Nev. Mar. 29, 2012) (discussing the lack of speedy resolutions resulting from delays in discovery because of partial Rule 12(b)(6) motions and arguing that “a stay of discovery is directly at odds with the needs for expeditious resolution of litigation”). As meticulously described in Hoffman, *supra* note 174, at 7 n.14, the Advisory Committee has discussed the pleading question on numerous occasions but not advanced any proposals. Its members apparently are awaiting more experience and research, their attitudes reflecting no “urgent need.” What is striking about Professor Hoffman's account is the apparent absence of any real focus on the indirect effects of *Twombly* and *Iqbal* by the Advisory and Standing Committees.

than the systemic costs of their procedural and public policy side effects.

### F. Personal Jurisdiction

On the final day of the 2010–2011 Supreme Court Term, a plurality of the Justices tried to push the termination clock back even further. In *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>222</sup> the Court divided four-to-two-to-three (a very unusual double-play combination for you baseball fans), regarding the constitutional limits on the jurisdiction of courts over defendants who have not acted directly in the forum and cannot be found there. The plurality departed analytically and linguistically from the Court's personal jurisdiction jurisprudence going back sixty-five years to its seminal decision in *International Shoe Co. v. Washington*,<sup>223</sup> and clearly signaled a desire to contract the constitutional ambit of that jurisdiction. As to the actual result in the case, a majority of the Justices (the plurality and the two concurring Justices) concluded that the Due Process Clause did not permit a New Jersey state court to assert jurisdiction over an English manufacturer whose sizable metal-shearing machine allegedly seriously injured the plaintiff in that state; the defendant marketed its equipment in the United States through an exclusive Ohio agent that was bankrupt.<sup>224</sup>

According to the *McIntyre* plurality opinion, authored by Justice Kennedy, the Constitution “permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”<sup>225</sup> It emphasized that each of the fifty states is a separate sovereign forum, and that reality “requires a forum-by-forum, or sovereign-by-sovereign, analysis,”<sup>226</sup> because

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<sup>222</sup> 131 S. Ct. 2780 (2011). On the same day, the Court also decided *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), a general jurisdiction case of no special significance, although references in Justice Ginsburg's opinion to the defendant's being “at home,” *id.* at 2853–54, 2857, suggest a possible narrowing of that category of jurisdiction. See Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 531 (2012) (analyzing Justice Ginsburg's reference to “at home”).

<sup>223</sup> 326 U.S. 310 (1945). *International Shoe* and subsequent Supreme Court decisions are discussed in 4 WRIGHT & MILLER, *supra* note 3, §§ 1067–1067.4.

<sup>224</sup> The distributor attended a number of trade shows in the United States, none of which were in New Jersey. Nicastro's employer apparently was persuaded to purchase the offending machine at one of those shows. The facts of the case are described in great detail in Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Mach., Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 488–91 (2012).

<sup>225</sup> *McIntyre*, 131 S. Ct. at 2788. The plurality opinion is analyzed at length in Steinman, *supra* note 224, at 491–504.

<sup>226</sup> *McIntyre*, 131 S. Ct. at 2789. Justice Kennedy's opinion also stated that since the United States is a “distinct sovereign,” a defendant may be subject to jurisdiction in a

“each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>227</sup> If that constrained view ultimately prevails with a majority of the Justices, it would create the possibility that a company—domestic or foreign—could structure its distribution system and send products or direct services to one or a few states while avoiding the reach of other courts in a state that did not qualify as a “target” of the defendant, even if the goods or services foreseeably ended up and caused injury there. If that came to pass, in many circumstances consumers and employees would not be able to seek redress in the state where they purchase or receive defective products or services, or live, or were injured. Rather, plaintiffs potentially would have to litigate in distant fora—possibly in foreign countries—or abandon their claims altogether.<sup>228</sup>

Justice Breyer’s concurring opinion, joined by Justice Alito, also concluded that the defendant’s contacts with New Jersey did not meet constitutional standards for personal jurisdiction because the plaintiff had not established that the J. McIntyre company purposefully availed itself of the New Jersey marketplace for selling its machines or placed its machines into the stream of commerce in the United States with an expectation that its products would be purchased by New Jersey users. The two Justices only concurred in the result, however, noting the “limited” factual record<sup>229</sup>—particularly the indication that only a “single isolated sale” occurred in New Jersey<sup>230</sup>—and expressly declined to join in Justice Kennedy’s analysis. In fact, the concurrence negatively characterized the plurality opinion at one point as a “strict no-jurisdiction rule.”<sup>231</sup> Justice Breyer preferred to wait for a case that

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federal court but not in any particular state. *Id.* It is not clear what that passage means. In diversity of citizenship cases, at least the courts of appeal agree that federal courts must follow the jurisdictional principles of the forum state. *See* 4A WRIGHT & MILLER, *supra* note 3, § 1075 (discussing what law governs questions of amenability to suit). Perhaps the passage is an oblique reference to Federal Rule 4(k)(2). *See* 4 WRIGHT & MILLER, *supra* note 3, § 1068.1 nn.67–76 (explaining Rule 4(k)(2)).

<sup>227</sup> *McIntyre*, 131 S. Ct. at 2789.

<sup>228</sup> As is true of his opinion in *Iqbal*, Justice Kennedy’s *McIntyre* opinion ranges far beyond what was needed to reach the result the plurality was advocating.

<sup>229</sup> *McIntyre*, 131 S. Ct. at 2794 (Breyer, J., concurring).

<sup>230</sup> *Id.* at 2792. The plurality, however, states that “up to four machines ended up in New Jersey.” *Id.* at 2790 (plurality opinion). The concurrence is evaluated in Steinman, *supra* note 224, at 508–12, in which the author opines that Justice Breyer’s concurrence embraces the “stream of commerce” rule rather than Justice Kennedy’s reasoning, and disagrees with Justice Ginsburg because he believes that the factual record was not sufficiently robust to support jurisdiction.

<sup>231</sup> *McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring). For example, the concurring opinion explicitly rejects the plurality’s emphasis on sovereignty and the requirement that the defendant “targeted” the forum. *Id.* at 2793. Similarly, according to *Marks v. United States*, 430 U.S. 188 (1977), in which the Justices divided as they did in *McIntyre*, it is the

presented modern issues of commerce and communication before establishing any new personal jurisdiction doctrine.<sup>232</sup>

The concurring Justices may have chosen to join the plurality, but only in result, because there was an absence of facts suggesting that J. McIntyre had delivered its goods into commerce with the expectation that someone in New Jersey would purchase its machines.<sup>233</sup> If that is the case, the concurring opinion is within the range of the Court's prior precedents and even may be consistent with the stream-of-commerce analysis reflected in earlier cases.<sup>234</sup> If that is not the case, *McIntyre* might indicate that six of the Justices reject the constitutional sufficiency of personal jurisdiction based on the stream-of-commerce theory inasmuch as the plurality opinion cast that mode of thinking aside, characterizing it as simply a metaphor for the defendant's purposeful availment of the forum. The four plurality Justices apparently believe that "purposeful availment" requires a manifested intent to "submit to the power of a sovereign"<sup>235</sup>—words a bit reminiscent of the nineteenth-century conception of personal jurisdiction.

Justice Kennedy's opinion expressed concern about the possible jurisdictional burdens that might be imposed on a hypothetical small Florida farmer selling produce to a local distributor who in turn might

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view of the concurring Justices "on the narrowest grounds" that represents the holding of the Court. *Id.* at 193. That was the conclusion in several post-*McIntyre* decisions. *E.g.*, *UTC Fire & Sec. Ams. Corp. v. NCS Power, Inc.*, 844 F. Supp. 2d 366, 376 (S.D.N.Y. 2012); *Dram Techs. LLC v. Am. II Grp., Inc.*, No. 2:10-CV-45-TJW, 2011 WL 4591902, at \*2 (E.D. Tex. Sept. 30, 2011); *Esoterix Genetics Labs., LLC v. McKey*, No. 11 CVS 1379, 2011 WL 3667698, at \*8 (N.C. Super Ct. Aug. 22, 2011). Justice Breyer's opinion, however, does not articulate any jurisdictional theory beyond the status quo, as *Marks* would dictate, that can be used as a doctrinal pedestal for the future.

<sup>232</sup> *McIntyre*, 131 S. Ct. at 2794. In some ways the concurrence seems closer in spirit to the dissent than the plurality. See Steinman, *supra* note 224, at 509.

<sup>233</sup> *McIntyre*, 131 S. Ct. at 2792. This seems to be the view taken in Adam N. Steinman, *The Meaning of McIntyre*, 18 Sw. J. INT'L L. 417 (2012). Professor Steinman is of the opinion that "understood correctly *McIntyre* does not mandate a more restrictive approach to jurisdiction." *Id.* at 420.

<sup>234</sup> See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (dividing four to four on whether the Constitution required a "plus" factor to augment the shipment of goods into the stream of commerce with an awareness that they possibly would alight in the forum). The theory can be traced back to *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (holding that the Due Process Clause is not exceeded when jurisdiction is asserted "over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state"). It was enunciated earlier in *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (1961). The plurality in *McIntyre* explicitly rejected Justice Brennan's pure stream-of-commerce opinion in *Asahi*, 131 S. Ct. at 2789–90. However, although the plurality opinion does not apply it, Justice O'Connor's stream-of-commerce-plus test is cited favorably. *Id.* See generally 4 WRIGHT & MILLER, *supra* note 3, § 1067.4 (discussing *Asahi* and stream-of-commerce theory).

<sup>235</sup> *McIntyre*, 131 S. Ct. at 2788.



vend that produce to grocers across the country.<sup>236</sup> Justice Breyer's concurring opinion indicated concern for an equally hypothetical Appalachian potter being sued in Alaska or Hawaii because one of his cups or saucers (or a coffee mug) had been sent there by a large distributor.<sup>237</sup> Probably because the plurality Justices focused on contacts with the forum (particularly the principle of purposeful availment), state sovereignty, and evidence of the defendant's intent to submit to jurisdiction in the forum, their opinion did not contain any acknowledgement that the hypothesized farmer and potter could be protected from improper assertions of jurisdiction by the principles of fair play and substantial justice recognized in *International Shoe Co. v. Washington*<sup>238</sup> and reprised in *Asahi Metal Industry Co. v. Superior Court*,<sup>239</sup> as well as other opinions of the Court.<sup>240</sup> It is more surprising that the concurring Justices did not advert to the possible application of the fairness prong of the preexisting jurisdiction framework.<sup>241</sup> Despite the concerns expressed for small entrepreneurs in these two opinions, the obvious beneficiaries of the potential restriction on personal jurisdiction the plurality opinion favors will be commercial entities who will be able to secure access to the entirety of the nation by structuring their marketing and distribution systems to avoid the

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<sup>236</sup> *Id.* at 2790.

<sup>237</sup> *Id.* at 2793 (Breyer, J., concurring).

<sup>238</sup> 326 U.S. 310 (1945).

<sup>239</sup> 480 U.S. 102 (1987).

<sup>240</sup> To the dismay of many in the profession who follow these matters, *McIntyre* failed to undo the confusion sown by the three opinions in *Asahi* twenty-four years earlier. See, e.g., Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 *LOY. L.A. L. REV.* 341, 386 (2012) (“[T]he clerks let their Justices down, the Justices let their colleagues down, and the Court let us all down.”); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 *GEO. WASH. L. REV.* 202, 228 (2011) (arguing that *McIntyre* not only does not resolve the ambiguities left by *Asahi*, it “further confuses the law of specific jurisdiction”).

<sup>241</sup> The continued vitality of the fair-play-and-substantial-justice prong of constitutional due process analysis is now in question, given the *McIntyre* plurality's and concurrence's failure to advert to it. See *Kidston v. Res. Planning Corp.*, No. 2:11-cv-2036-PMD, 2011 WL 6115293, at \*3 n.2 (D.S.C. Dec. 8, 2011) (“After *McIntyre*, the relevance of fairness as part of the jurisdictional inquiry is unclear.”); see also Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 *S.C. L. REV.* 745, 761 (2012) (noting that although *McIntyre* likely abrogated the *Burger King* due process analysis, lower courts continue to apply it). Also left in disarray are personal jurisdiction questions relating to claims arising from a defendant's activities on the Internet and whether the analysis would be any different if the defendant were a U.S. manufacturer. One writer analyzes the *Nicastro* opinion in terms of where it fits on a formalist-functional spectrum and concludes that the Court “produced a dysfunctional consequence that ignores the reality of contemporary international commerce.” Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicastro*, 16 *LEWIS & CLARK L. REV.* 905, 911 (2012).

purposeful availment of most (or all in the case of a foreign enterprise) of the states.<sup>242</sup>

Justice Ginsburg's dissenting opinion was joined by Justices Kagan and Sotomayor.<sup>243</sup> Her opinion (1) reminded the plurality of some of the Court's prior jurisdiction decisions and the degree to which her four colleagues were departing from them, (2) distinguished other cases (particularly *Asahi*), (3) argued that since *International Shoe* the Court had given "prime place to reason and fairness,"<sup>244</sup> and (4) offered a number of facts not noted in the other two opinions.<sup>245</sup> The dissent concluded, consistent with the analysis of earlier opinions of the Court, that since J. McIntyre had purposefully availed itself of the U.S. market and sought "purchasers from anywhere in the United States,"<sup>246</sup> it also purposefully had availed itself of any state in which its Ohio distributor sold its products.<sup>247</sup>

Taken together, the three opinions in *McIntyre* give the impression that the record was deficient on certain possibly critical matters that might have affected the view of one or more of the Justices.<sup>248</sup> For example, it was assumed that the defendant's large machine actually was shipped from England to Ohio and then transported from Ohio to New Jersey;<sup>249</sup> it is possible (indeed it seems more logical) that it went from England directly to New Jersey. It also is unclear whether the company's liability insurance covered accidents wherever they occurred. Similarly, was the assumption that the Ohio distributor was an independent entity accurate?<sup>250</sup> Additional lacunae in the factual elements relating to the jurisdiction question exist regarding the

<sup>242</sup> Precisely this concern animated some of the criticism of the *Asahi* decision. *E.g.*, David E. Seidelson, *A Supreme Court Conclusion and Two Rationales that Defy Comprehension: Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 53 *BROOK. L. REV.* 563, 579 (1987).

<sup>243</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J., dissenting). Justice Ginsburg's opinion is analyzed in Steinman, *supra* note 224, at 504–08 (noting Justice Ginsburg's emphasis on the fairness prong of the jurisdictional inquiry).

<sup>244</sup> *McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

<sup>245</sup> The plurality opinion seems clear on its application to domestic defendants. *Id.* at 2790 (plurality opinion). The concurring opinion is much more guarded on the point. *Id.* at 2793–94 (Breyer, J., concurring).

<sup>246</sup> *Id.* at 2797 (Ginsburg, J., dissenting) (internal quotation marks omitted).

<sup>247</sup> *Id.* at 2801. Justice Ginsburg found it reasonable that the suit was brought in the state of injury. *Id.* at 2796.

<sup>248</sup> The three opinions contain varying descriptions of the facts. *See generally* Steinman, *supra* note 224, at 489–91 (noting the disagreement among the opinions as to the method of sale, relevance of trade shows, and number of machines defendant had sold in the forum state). Justice Ginsburg appears to include matters not in the record. 131 S. Ct. at 2796 (Ginsburg, J., dissenting) (describing facts that postdate the case's events); *see also id.* at 2792 (Breyer, J., concurring) (criticizing sharply the use of nonrecord material).

<sup>249</sup> *McIntyre*, 131 S. Ct. at 2786 (plurality opinion); *id.* at 2792 (Breyer, J., concurring).

<sup>250</sup> *Id.* at 2786 (plurality opinion); *id.* at 2796 (Ginsburg, J., dissenting).

warranties on and the servicing of the machine in New Jersey.<sup>251</sup> Clarity on some or all of these matters might well have changed the jurisdictional calculus. The factual gaps in the record and their potential significance suggest that future counsel faced with a motion to dismiss based on *McIntyre* may be advised, indeed obligated, to pursue expensive and time-consuming jurisdictional discovery that is likely to be resisted by the defense.<sup>252</sup> Thus, in addition to the retrogressive feel of the *McIntyre* plurality opinion, and the potential restraint on the plaintiff's selection of a forum that may materialize from the views expressed by four of the Justices, *McIntyre* may produce a burdensome front-loading of the pretrial process, once again leading to increased costs and protraction.

I fear that if the plurality opinion's analysis in *McIntyre* gains traction in the lower federal courts or is adopted by a Supreme Court majority in a future case, the personal jurisdiction defense will become yet another procedural stop sign, one posted at the very genesis of the case.<sup>253</sup> At the least, *McIntyre* is an open invitation for defense

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<sup>251</sup> For elaboration on this thought, see Alan B. Morrison, *The Impacts of McIntyre on Minimum Contacts*, 80 GEO. WASH. L. REV. ARGUENDO 1, 4–5 (2011) [http://groups.law.gwu.edu/LR/ArticlePDF/Morrison\\_SME\\_Arguendo.pdf](http://groups.law.gwu.edu/LR/ArticlePDF/Morrison_SME_Arguendo.pdf).

<sup>252</sup> The reference in Rule 8(a)(1) to pleading jurisdiction generally has been read as a reference to subject matter jurisdiction. *See, e.g.*, *Sterling Homex Corp. v. Homasote*, 437 F.2d 87, 88 (2d Cir. 1971) (holding that Rule 8(a) applies only to subject matter jurisdiction); *AF Holdings LLC v. Does 1-1,058*, No. 12–0048(BAH), 2012 WL 3204917, at \*15 (D.D.C. Aug. 6, 2012) (“For purposes of Rule 8, ‘jurisdiction’ refers to subject matter jurisdiction.”); 5 WRIGHT & MILLER, *supra* note 3, § 1206 (explaining that Rule 8(a)(1) refers to subject matter jurisdiction). This clearly was the intent of the drafters of the Rules, as is evidenced by the words “grounds for the court’s jurisdiction.” These are words of subject matter—not personal—jurisdiction. In addition, original Form 2 (now Form 7) only contains illustrations of pleading various types of subject matter jurisdiction. FED. R. CIV. P. form 7; *see also* AM. BAR ASS’N, FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. 43 (1938) (referring to the provision for alleging jurisdiction as “necessary in the federal system”). Nonetheless, a few cases have appeared in which the court erroneously extended Rule 8(a)(1) to the pleading of personal jurisdiction and super-imposed the *Twombly* and *Iqbal* pleading standard. *E.g.*, *Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC* No. 5:09–cv–00467, 2012 WL 1112162, at \*8–9 (S.D. W. Va. Mar. 30, 2012) (applying *Iqbal* and *Twombly* to pleading personal jurisdiction); *Haley Paint Co. v. E.I. Dupont De Nemours and Co.*, 775 F. Supp. 2d 790, 798–800 (D. Md. 2011) (same).

<sup>253</sup> It is far too soon, of course, to know how the lower federal or state courts will react to the jurisdiction-limiting passages in Justice Kennedy’s plurality opinion. Certain early opinions, however, do repeat some of the more controversial passages that seem to depart from earlier doctrine. *E.g.*, *Pangaea, Inc. v. Flying Burrito LLC*, 647 F.3d 745, 746 (8th Cir. 2011) (explaining that sovereignty is the key); *Dejana v. Marine Tech., Inc.*, No. 10–CV–4029 (JS)(WDW), 2011 WL 4530012, at \*5 (E.D.N.Y. Sept. 26, 2011) (holding that defendant must have “targeted” the forum). A number of opinions factually distinguish *McIntyre*. Some cases do so by noting that the *McIntyre* concurrence specified that only one of the defendant’s machines had reached New Jersey. *See, e.g.*, *Original Creations, Inc. v. Ready Am., Inc.*, 836 F. Supp. 2d 711, 717 (N.D. Ill. 2011); *Brooks & Baker, LLC v.*

attorneys to exploit this stop sign and reflexively challenge jurisdiction. What's next? A sign on the courthouse door proclaiming, "Closed"?

### G. Discovery

Although it deviates somewhat from the chronological presentation, no catalog of the major procedural events of the last quarter century would be complete without mention of the significant change in attitude regarding the commitment of the original Federal Rules and their drafters to a relatively unfettered and self-executing discovery regime. This shift is reflected in a series of periodic amendments to the Rules that were stated to be motivated by an understandable desire to reduce the density and the cost of discovery. When articulated in those terms, the amendments' objective seems unobjectionable. But there certainly were other motivations, such as the ongoing concern of defense interests that (in addition to discovery's frequently condemned burdensome character) unconstrained discovery allows plaintiffs to look behind their clients' curtains—thereby providing access to otherwise unobtainable information that possibly cuts too close to the substantive bone and endangers the defense's position on a dispute's merits. Vulnerability to discovery, after all, always has been a *bête noire* of both business and government defendants.

The changes in the discovery regime began in 1983, during my service as Advisory Committee Reporter, when Rule 26 was amended to eliminate a sentence that stated: "Unless the court orders otherwise . . . , the frequency of use of these [discovery] methods is not limited."<sup>254</sup> Although that deletion appears innocuous, the elimination of the passage was read by some—with some justification—to negate any lingering notion that discovery was limitless and permitted "fishing" expeditions.<sup>255</sup> As the Advisory Committee's Note accompanying the amendment makes clear, the deletion was a signal that "excessive" and "needless" discovery was to be avoided.<sup>256</sup> That message was reinforced by the simultaneous addition of the language now found in Rule 26(b)(2)(C) directing district judges to avoid discovery that is unreasonably cumulative, duplicative, or obtainable from some

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Flambeau, Inc., No. 2:10-cv-146-TJW-CE, 2011 WL 4591905, at \*4 (E.D. Tex. Sept. 30, 2011). Possible doctrinal futures are explored in Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617 (2012).

<sup>254</sup> FED. R. CIV. P. 26(a) advisory committee's note, reprinted in 97 F.R.D. 165, 216 (1983). See generally 8 WRIGHT, MILLER & MARCUS, *supra* note 40, § 2003.1 (discussing the 1983 amendments).

<sup>255</sup> See, e.g., *In re Convergent Techs. Secs. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

<sup>256</sup> 97 F.R.D. at 216.

other source, as well as discovery that is unduly burdensome or expensive given the needs of the particular case. Thus was born the concept of “proportionality” in discovery.<sup>257</sup> The amendment also emphasized the importance of judicial involvement in the discovery process and was designed to work in tandem with the simultaneous amendment of Rule 16, validating and promoting the judicial management discussed earlier.<sup>258</sup>

In describing the rule amendments at that time, I remarked on several occasions that the changes represented a “180-degree shift” in thinking about discovery.<sup>259</sup> I must confess, from my Reporter’s vantage point, I did perceive the need for imposing some restraint on cumulative and excessive discovery. Discovery’s cost seemed to be rising (which at least in part appeared to be a product of it having become a “profit-center” for many law firms working on an hourly-fee basis), the overuse and high cost of experts was becoming apparent, and discovery activity was thought to be causing marginal, unnecessary, and even unethical lawyer behavior.<sup>260</sup> The Advisory Committee obviously was like-minded.

In retrospect, our collective judgment was more impressionistic than empirical.<sup>261</sup> The practice of invoking the aid of the Federal Judicial Center to study and report on matters being considered by the Advisory Committee and the development of sophisticated empirical research techniques were to come later. Also the stimulus for the 1983 changes may have reflected too narrow a range of cases and outside comments on drafts of the proposed amendments. Simply put, we may have failed to consider the considerable array of lawsuits in which

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<sup>257</sup> See 8 WRIGHT, MILLER & MARCUS, *supra* note 40, § 2008.1 (discussing the meaning and application of the principle of proportionality in discovery). The Advisory Committee Note also urged judges to be more “aggressive” in “discouraging discovery overuse.” 97 F.R.D. at 216. Additionally, the Advisory Committee is now considering a proposed revision to Rule 26(b)(1); the revision is expected to narrow the scope of discovery by “conditioning availability of information on ‘proportionality.’” See Memorandum from the Center for Constitutional Litigation (n.d.) (on file with the *New York University Law Review*) (highlighting the proposed changes to Rule 26(b)(1) and predicting that such changes would fundamentally “transform the civil justice system”).

<sup>258</sup> See *supra* notes 21–36 and accompanying text.

<sup>259</sup> MILLER, *supra* note 25, at 32–33.

<sup>260</sup> See Am. Bar Ass’n, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 141–42 (1980) (“Discovery . . . is too easily abused . . .”). The Special Committee’s First Report is reprinted as an appendix to the Second Report. *Id.* at 149. See generally David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979).

<sup>261</sup> The one discovery study relied on by the Committee and cited in its Note did not indicate that anything was fundamentally wrong with the discovery system. PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* 35 (1978).

discovery did not pose any particular difficulty or cases in which the discovery needs of the parties were asymmetrical, making its availability especially necessary. I think time has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26.<sup>262</sup>

The “shift” in attitude has continued over the years even though there is considerable reason to believe that discovery usually works well, is quite limited in most cases (indeed, it is nonexistent in many cases), and its burdensomeness poses problems in a relatively thin band of complex and “big” cases.<sup>263</sup> In 1993, Rule 30 was amended to limit the number and duration of depositions that could be taken without judicial authorization,<sup>264</sup> and Rule 33 was amended to create a presumptive limitation on the number of interrogatories that could be propounded.<sup>265</sup> Then, in 2000, Rule 26(b)(1) was modified to limit the scope of discovery to material “relevant to any party’s claim or defense” rather than to the more open-ended “subject matter” of the action as it had been since 1938.<sup>266</sup> This last change sends a signal, but it is one with rather Delphic qualities.

Although one might argue that these changes do not represent a dramatic undermining of federal discovery, they clearly look in a philosophically different direction than did the original rules. All of

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<sup>262</sup> See discussion *infra*, notes 281–87. Committee composition also may have contributed to its willingness to accept the representations concerning discovery hyperactivity.

<sup>263</sup> See Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–86 (1998) (reviewing studies showing that one-third to one-half of all litigations involve no discovery). *But cf.* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (arguing that discovery is “dysfunctional, with litigants utilizing discovery excessively and abusively”).

<sup>264</sup> Compare FED. R. CIV. P. 30 (1992) (requiring leave of the court to take more than thirty depositions) with FED. R. CIV. P. 30 (requiring leave of the court to take more than ten depositions). See 8A WRIGHT, MILLER & MARCUS, *supra* note 40, §§ 2104, 2113 (discussing this change).

<sup>265</sup> Compare FED. R. CIV. P. 33 (1992) (permitting service of interrogatories by each party), with FED. R. CIV. P. 33 (1993) (permitting service of up to twenty-five interrogatories by each party).

<sup>266</sup> See 8 WRIGHT, MILLER & MARCUS, *supra* note 40, § 2008 (explaining the 2000 amendment and its impact); Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875 (2001) (analyzing the amendment); see also Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001) (warning that the 2000 amendment will increase procedural barriers to relief without curbing litigation costs). The shift in orientation of the Advisory Committee and other participants in the rulemaking process is evidenced by the fact that in 1978 a virtually identical proposal was rejected. See Memorandum from Walter R. Mansfield, Chairman of the Advisory Comm. on Civil Rules to the Comm. on Rules of Practice and Procedure 6–8 (June 14, 1979). Rule 26(b)(1) does provide that on a showing of “good cause,” the court may expand discovery to cover “any matter relevant to the subject matter” of the action. FED. R. CIV. P. 26(b)(1).

the enumerated rule alterations were designed to constrict discovery.<sup>267</sup> It seems fairly obvious that discovery restrictions can impact other policies negatively and should be undertaken cautiously.<sup>268</sup> Broad access to discovery is often a necessity in lawsuits by private attorneys general because in many substantive contexts we are quite dependent on that type of litigation to augment governmental enforcement of federal normative standards. Recent events in both the financial and real estate markets, for example, have laid bare the consequences of underenforcement of federal regulatory policies.

It seems odd, therefore, to be impeding the efficacy of this important method of effectuating national as well as state policies. Discovery is often the key that opens the door to information critical to the remediation of violations of important constitutional, statutory, and common law principles. Therefore it is imperative that controls on access to discovery (*Twombly* and *Iqbal*) and the scope of discovery (the Rule amendments)—particularly controls that are inconsistent with the underpinnings of the 1938 Rules—be shown to be justified and carefully balanced against the need to preserve the civil enforcement role performed by elements of the private bar. Moreover, any limitations on access to discovery or its scope must be flexible enough to take account of the negative potential of constriction and differences in substantive context.<sup>269</sup>

Debates about the positives and negatives of wide-angle discovery have gone on for decades—often with great intensity—and they undoubtedly will continue; the subject always has been an attractive target for defense interests. The focal point of contention occasionally changes: Sometimes it is the number or length of depositions, and at other times the discussion centers on excessive or intrusive document discovery. At present, discovery relating to electronically stored information is beginning to raise issues that may dwarf all that has come before; it already is dramatically altering today's discovery debate and certainly will impact those that inevitably will take place in the future.<sup>270</sup>

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<sup>267</sup> The discovery rules were amended on several other occasions during the period under discussion in ways that are not presently relevant.

<sup>268</sup> See generally Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 818 (1981) (explaining that discovery is essential to “the evolution of substantive law”).

<sup>269</sup> Higginbotham, *supra* note 83, at 751–52.

<sup>270</sup> The burdens and challenges of e-discovery are being confronted by various groups including the Advisory Committee on Civil Rules and the Sedona Conference. In 2006, Rules 26(f), 33(d), 34, and 37(f) were amended to deal with certain aspects of electronic information. See generally 8, 8A & 8B WRIGHT, MILLER & MARCUS, *supra* note 40, §§ 2003.1, 2051.1, 2178, 2218–19, 2284.1 (explaining the process and impact of the

## III

## THE CONSEQUENCES OF AND PURPORTED JUSTIFICATIONS FOR THE DEFORMATION OF FEDERAL PROCEDURE

When one steps back from the individual changes that I have described and takes a panoramic view of these developments—as well as the other issues that federal courts now demand be focused on early in the proceedings, such as the great growth in challenges based on defenses of preemption, standing, qualified or absolute immunity, abstention, exhaustion of administrative remedies, and statutes of limitation and other time restrictions<sup>271</sup>—there is no secret about what is happening, or frankly why, and whom it all benefits. To use a sports metaphor, these cumulative procedural changes feel like judicial piling on. The consequences of the procedural movements of the last twenty-five years are seismic. Previously, we had a commitment to trial and, when appropriate, jury trial—all in public view. Realistically, of course, a trial has been a mere possibility because a settlement culture has dominated practice in the federal courts for many years.<sup>272</sup>

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amendments). Rulemaking and other e-discovery efforts continue, and a second generation of Federal Rule amendments is likely. Some relief from the rigors and expense of electronic discovery as well as greater accuracy of retrieval apparently can be achieved, ironically, by the growing availability of sophisticated digital search techniques. See *Moore v. Publicis Groupe*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 607412, at \*1 (S.D.N.Y. Feb. 24, 2012), *adopted sub nom.* *Moore v. Publicis Groupe SA*, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (holding that computer-assisted document review can be appropriate in large-data-volume cases). See generally Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf> (analyzing and comparing automated and manual document review techniques).

<sup>271</sup> See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418 (2003) (holding that an action under California's Holocaust Victim Insurance Relief Act impermissibly interfered with the President's conduct of foreign affairs and was preempted); *Crosby v. Nat'l Foreign Trade Councils*, 530 U.S. 363, 388 (2000) (holding the Massachusetts law prohibiting the state and its agencies from making purchases from Burma invalid under the Supremacy Clause); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 744 (9th Cir. 2012) (finding that ATM cardholders lacked standing to challenge price-fixing of interchange fees); *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315, 318 (4th Cir. 2012) (rejecting a preemption defense); *Baker v. United States*, 670 F.3d 448, 456 (3d Cir. 2012) (declining to extend time requirements of federal appellate rules for a motion to reopen, even when the untimely filing was caused by court personnel); *Authors Guild v. Google, Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012) (rejecting a challenge to associational standing in a copyright infringement case).

<sup>272</sup> See, e.g., Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORD. L. REV. 1177, 1200–01 (2009) (noting the growth of settlement in federal courts); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1625 (2004) (noting that, of the nearly 20,000 asbestos cases filed each year in the 1990s, on average just sixty reached a jury).



Then the increased invocation of summary judgment began to replace the possibility of trial. Now we have a potentially dispositive pleading motion coming even earlier than the summary judgment motion—which, when granted, prevents any discovery or trial. Finally, *McIntyre* may prove to offer a heightened possibility of a dismissal for lack of jurisdiction. The settlement culture now seems accompanied by a dismissal culture.

Although the settlement of civil disputes generally is considered a virtue, settlements either are less likely to occur given the leverage defense interests have secured through the heightened prospect of early termination, or they are more likely to result in under compensation without being accompanied by an acknowledgement of wrongdoing or an agreement to halt the challenged conduct. In either event, the result will be to reduce the effectuation of important policies in many contexts.

All of these pretrial obstacles have created procedural opportunities for defendants to avoid a trial on the merits—opportunities that also generate billable hours—that are being used with increasing (and statistically significant) frequency.<sup>273</sup> Not surprisingly, for example, *Twombly* and *Iqbal* have led to a constantly mounting number of decisions in a myriad of substantive contexts, producing an increase in the number of dismissals, particularly post-*Iqbal*.<sup>274</sup> The resulting reflexive defense response to a complaint is analogous to that of Pavlov's dogs to the dinner bell—move to dismiss.<sup>275</sup> More motions, more delays, more costs, more appeals, and earlier and possibly inappropriate dismissals. The system appears to be suffering from a significant case of premature termination.

We are moving toward a civil justice system in which an increasing number of actions may be stillborn. Not only is case disposition occurring earlier, it is being based on less and less information regarding the facts and merits of a dispute. A trial provides live evidence based on completed discovery, examination, cross-examination,

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<sup>273</sup> See CECIL, CORT, WILLIAMS & BATAILLON, *supra* note 176, at 8. The notion that *Twombly* and *Iqbal* have not substantially impacted dismissal practices and outcomes is forcefully contested in Hoffman, *supra* note 174. The author points to the additional costs imposed by the significant increase in motions to dismiss, the greater incidence after *Iqbal* of the motion being granted, and the limits inherent in the Federal Judicial Center's (FJC) study, such as the inability to measure the potentially meritorious cases that are not being brought because of *Twombly* and *Iqbal*. CECIL, CORT, WILLIAMS & BATAILLON, *supra* note 176, at 46–47, 55; see also DODSON, *supra* note 174.

<sup>274</sup> See Hoffman, *supra* note 177, at 24–25 (critiquing the FJC study); see also CECIL, CORT, WILLIAMS & BATAILLON, *supra* note 176.

<sup>275</sup> As of February 25, 2013, *Twombly* has been cited in 75,634 cases and *Iqbal* has been cited in 52,974 cases that are reported in the Westlaw service.

and often the deliberation of a jury. Summary judgment (and class certification), although primarily based on lawyers' papers, often is delayed until after merit (or class action) discovery has been completed and all the relevant informational cards theoretically are face-up. But even that is not always true. The motion to dismiss, however, is based only on the complaint. Not discovery. Not evidence. Not witness testimony. Not cross-examination. Not the voice of the community. Adjudication based on paper should be the exception, not the rule. Adjudication based on a single paper—the complaint—as evaluated by subjective factors such as judicial experience and common sense and an abstract comparison to a hypothesized innocent explanation of the defendant's conduct is a process that is alien to me. Personal jurisdiction challenges, of course, have nothing to do with the central justice question—who should win and who should lose.

Supreme Court decisions, congressional enactments, and Federal Rule amendments since the summary judgment trilogy have accorded primacy to efficiency and cost reduction (at least as these goals are seen through the eyes of defense interests). In some respects these objectives are understandable since there are concerns—of uncertain dimension and significance—about how effectively the civil justice system is functioning in terms of various metrics, such as cost, delay, and efficiency that provide some justification for what has happened over the past quarter of a century. Federal judges have very real docket pressures. Discovery, particularly e-discovery,<sup>276</sup> can be extremely resource consumptive in large-scale cases. Managing cases through what often is a complex and lengthy pretrial process has become exceedingly cumbersome and dilatory; the capacities of and resources available to the federal judiciary are far from limitless.<sup>277</sup> Not surprisingly, the Federal Rules, so simply and sparsely texted originally, now read in significant part like the Internal Revenue Code as amendments multiply and lengthen and the pretrial litigation field has become littered with costly and time-consuming friction points. Yet, ironically, much of the “mischief” in recent years that I have described has come about because of the judicial reconstruction of plainly worded rules with unambiguous intent.

It is axiomatic, of course, that there is a need for constant reevaluation of how civil cases are being processed by the federal courts, and procedural change should be embraced when the need for it has

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<sup>276</sup> See *supra* note 270 (discussing electronic discovery pressure).

<sup>277</sup> A distinguished court of appeals judge has discussed the problems of a court system with limited resources when it is confronted by a world of “limitless expectations” and “limitless litigation.” Diarmuid F. O’Scannlain, *Access to Justice Within the Federal Courts—A Ninth Circuit Perspective*, 90 OR. L. REV. 1033, 1039, 1046 (2012).

been demonstrated. However, the dimension and direction of the changes I have described in these pages have tipped the scales against access, the day-in-court principle, and jury trial. These are some of our most important litigation values and they have been compromised by the erecting of procedural stop signs. That has produced collateral systemic and societal costs that are far too high, especially when the supposed need for many of these changes and their efficacy lack any real empirical support and the significance of the pressures and litigation practices that are cited as reasons for bringing them about is suspect.

A majority of the Justices in *Twombly* and *Iqbal* offered three propositions to justify the changes they were making in the pleading regime: (1) The threat of abusive litigation behavior and frivolous lawsuits is present; (2) the possibility of extortionate settlements against businesses must be avoided; and (3) litigation is expensive.<sup>278</sup> Only the dissenting Justices paid attention to the possibility that there were procedural pathways other than heightened pleading that might ameliorate these concerns and that institutional and societal values also were at stake.<sup>279</sup> Presumably these and related concerns, such as that about possible aggregate liability expressed in *Concepcion*,<sup>280</sup> also undergird the judiciary's establishment of many of the other pretrial stop signs of the recent past. But how real are they?

Assertions of abusive and frivolous lawsuits are not new. When I was the Reporter to the Advisory Committee, in the late 1970s and first half of the 1980s, the focus was on containing the pretrial process, because that is where litigation cost and delay reside. Even then the defense bar and their clients were voicing complaints about abusive and frivolous litigation and the need for cost reduction—the drumbeat was constant and noisy. Urban legends and cosmic anecdotes were being propagated. Chief Justice Warren Burger sponsored a high visibility conference on litigation, one major theme of which was finding a

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<sup>278</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007); see also *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (dismissing the complaint for failing to plead harm with specificity, in part because a more liberal pleading rule would allow plaintiffs to misappropriate scarce judicial resources for the purpose of coercing a greater settlement); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting in part) (lauding *Twombly* and *Iqbal* for “requir[ing] the plaintiff to conduct a more extensive precomplaint investigation . . . creat[ing] greater symmetry between the plaintiff’s and the defendant’s litigation costs, and by doing so reduc[ing] the scope for extortionate discovery”).

<sup>279</sup> See the dissenting opinion of Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer in *Iqbal*, 556 U.S. at 687, and that of Justice Stevens joined by Justice Ginsburg in *Twombly*, 550 U.S. at 570.

<sup>280</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (identifying the risks that class arbitration poses to defendants).

way to “serve the interests of justice” that was “more speedy and less expensive.”<sup>281</sup>

As the great baseball philosopher Yogi Berra might say, the complaints sounded in recent times are *déjà vu* all over again.<sup>282</sup> But all of this was new to me at the time. So, as a cub Reporter I spent several months going to bar association meetings and judicial conferences, asking people to talk to me about their experiences with abusive behavior and frivolous litigation so that I could aid the Committee in pursuing intelligent rule revision. Like Diogenes, the Greek philosopher, with a lamp searching for the truth about abuse and frivolity, I listened and listened and listened. In due course, I reported to the Committee that I had learned a great deal about these two litigation evils. I could tell them with considerable confidence that, according to the practicing bar, a frivolous lawsuit is any case brought against your client and litigation abuse is anything the opposing lawyer is doing.

More than thirty years have now passed, and I really cannot do any better. We never have defined either abusive litigation behavior or frivolous lawsuits; we never have measured the frequency of either; we do not know who is guilty of such conduct or which side of the litigation is more prone to commit such conduct; and the line between proper and improper advocacy is, as it always has been, obscure and context dependent.<sup>283</sup> Yes, there are cases that most people would agree should not have been initiated and there are motions and discovery requests and objections that should not have been made.<sup>284</sup> How many? We don't know. In the main, most assertions of abusive behavior or frivolous lawsuits are anecdotal and subjective. Abuse and frivolity simply lie in the eye of the beholder. Despite the amorphousness and lack of real knowledge or common understanding about what constitutes litigation misbehavior, these assertions motivate judicial decisionmaking, apparently including that of Supreme Court Justices.

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<sup>281</sup> Warren E. Burger, *Preface* to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 5, 6 (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>282</sup> *United States v. Manni*, 810 F.2d 80, 81 (6th Cir. 1987); 39 Authors, *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697, 714 n.100 (1997).

<sup>283</sup> See AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTI-TRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 227 (2009) (characterizing the notion that there is “widespread frivolous antitrust litigation” as a “myth[ ]”); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (“We know remarkably little about frivolous litigation.”); Mullenix, *supra* note 61, at 1395–96 (arguing that the myth of American litigiousness is not grounded in fact).

<sup>284</sup> See, e.g., Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996) (collecting tales of discovery abuse).

What of extortionate settlements (also known as legalized blackmail, or bounty hunting in some quarters)?<sup>285</sup> How many times do they occur? Again, we simply do not know. Nor do we even know what an extortionate settlement is or how to recognize one.<sup>286</sup> We do not have benchmarks, let alone a consensus, of what one is or how many there have been. But it is a charge that is easy to make. Yes, we do sometimes hear a settling defendant or some third person proclaim the following: “Oh, we were extorted.” “That was a lawyer’s case, only they benefitted.” “We were forced to settle.” How do we know any of these pronouncements are true? Cases are settled for a myriad of varied human and business reasons that simply reflect the self-interest of the parties. Many of them have little or nothing to do with the litigation’s merits or costs, such as concerns about regulatory matters, public perception, clearing a contingent liability off the books, the preservation of privacy, or a lack of resources to continue the litigation.<sup>287</sup> And when the size of an attorney’s fee award is contrasted with the individual class member’s recovery, to imply that a settlement was extortionate or that “only” the lawyer benefitted, mention rarely is made of the cumulative award to the class or its size, the societal therapeutics or deterrent value of the case, or the risks assumed by lawyers working on a contingent fee basis.

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<sup>285</sup> See Coffee, *supra* note 46, at 888 (referring to some plaintiffs’ lawyers as “bounty hunter[s]”); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 843 (1974) (noting that class actions have been characterized by some as “legalized blackmail”).

<sup>286</sup> Nonetheless, courts repeat the rhetoric. See, e.g., William O. Gilley Enters. v. Atl. Richfield Co., 588 F.3d 659, 668 (9th Cir. 2009) (dismissing conclusory allegations as “*in terrorem* increment of the settlement value” (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007))); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (explaining that class certification creates “intense pressure to settle”); *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 698 (S.D. Fla. 2009) (denying class certification because of the “potentially annihilating” effect of aggregate liability for the minimum damage remedy prescribed by the Fair and Accurate Credit Transaction Act). There are “intense pressures to settle” and a fear of economic “annihilation” on both sides of the litigation. That does not equate to “extortion,” although the leveraging effect of aggregation has to be acknowledged. However, the observation of Justice (then Judge) Sotomayor in *In re Visa Checking Mastermoney Antitrust Litigation*, 280 F.3d 124, 145 (2d Cir. 2001) seems apropos: “The effect of certification on parties’ leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class . . . may enhance this effect, this alone cannot defeat an otherwise proper certification.” In Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003), the author rebuts the claim that certification causes settlement of weak claims.

<sup>287</sup> Was the \$162 million settlement between Fred Wilpon and Saul Katz, the owners of the New York Mets [baseball team], and the bankruptcy trustee of the Madoff Estate, who has been trying to reclaim funds for the Madoff Ponzi scheme victims, extortionate, as some assert, or just good “business” given the risks of continued litigation? See Ken Belson, *Mets and Picard Become Unlikely Allies*, N.Y. TIMES, Mar. 20, 2012, at B10.

Finally, what about costs? Of course, no one likes them. But again we really don't have a sophisticated understanding of the economic aspects and behavioral implications of litigation, although that is changing as research accumulates. The empirical studies we have had, which often simply have been impressionistic or superficial, have focused almost exclusively on defense costs—rarely on the plaintiff's, the system's, or society's costs. Ironically, they suggest that in most cases costs are less than what they often are claimed to be; that costs quite understandably correlate with litigation stakes; and that the very high cost cases represent only a rather small portion of the federal workload.<sup>288</sup> Yet complaints about litigation expense by defense interests are incessant and directed at all actions. Professor Danya Shocair Reda calls this a persistent “cost-and-delay narrative” and attributes it to “media distortion of legal stories,” “the interest of the defense bar in propagating the narrative,” and “political battles over what role law should play in society.” In her judgment, it all appears to be yet another illusion propagated to further other self-interested purposes.<sup>289</sup> She concludes, “When these [cost] ranges are compared with the dominant descriptions of discovery costs found in attorney surveys, judicial opinions, and public discourse, it becomes clear that the costs narrative is out of touch with the empirical data.”<sup>290</sup> The last factor she identifies, of course, is the contemporary echo of the

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<sup>288</sup> EMERY G. LEE, III & THOMAS E. WILLGING, FED. JUDICIAL CTR., CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1–2 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) (reporting that costs represent between one and three percent of total litigation stakes). See Miller, *supra* note 54, at 61–71, for a fuller discussion. Empirical studies of costs have been relatively consistent over the years in concluding that litigation expenses, particularly discovery costs, are not excessive. See, e.g., WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 185–87 (1968) (finding that discovery costs are typically low, and that the conventional wisdom to the contrary arises from a minority of very expensive litigations); CONNOLLY, HOLLEMAN, & KUHLMAN, *supra* note 261, at 19–40 (finding that half of the cases surveyed involved no discovery requests, and that eighty-eight percent of cases involved fewer than five depositions or interrogatories); THOMAS E. WILLGING, JOHN SHAPARD, DONNA STIENSTRA & DEAN MILETICH, DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 2 (1997) (“Generally, discovery expenses represented 50% of litigation expenses and 3% of the amount at stake in the litigation.”); see also Emery G. Lee, III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 787 (2010) (arguing that the myth of discovery abuse “has never been supported by a single empirical study of costs”); Mullenix, *supra* note 263, at 685 (explaining that one-half to one-third of litigations involve no discovery).

<sup>289</sup> Reda, *supra* note 61, at 1116–17.

<sup>290</sup> *Id.* at 1115–16.

deregulation objective of President Reagan's Council on Competitiveness discussed earlier.<sup>291</sup>

Even as to the high-cost cases, we do not know how much of the expenditure and delay in a given case are the result of tactical decisions by defense counsel to interpose motions and to resist discovery—driven by economic self-interest or reflecting litigation practices of attrition and dilatoriness—rather than of hyperactivity on the part of plaintiffs. Yet the various procedural stop signs I have discussed—all of which are based on the triad of concerns articulated by the Court in *Twombly* and *Iqbal*—apply to every federal case regardless of its dimension, policy significance, or the ability of particular claimants to bear the attendant burdens.

The federal procedural system has shifted dramatically in recent years in ways that impede and disadvantage substantial categories of plaintiffs. Moving the specter of case termination forward in time obliges potential plaintiffs to engage in preinstitution investigation to the extent they can gain access or have the financial wherewithal. This intrinsically is not a bad thing, but typically is far from an adequate substitute for discovery. Often this includes finding informants among a defendant's employees or detrimentally affected customers (which is what plaintiff's lawyers often must do in the hope of pleading enough to survive a motion to dismiss). Could it be that it is now the defense bar that has been empowered to extort settlements that are artificially low by subjecting plaintiffs to increased cost, delay, and the risks of running afoul of the various procedural stop signs that dot the pretrial landscape? In other words, maybe defendants extorting plaintiffs is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or maybe the fault lies on both sides. Or maybe "extortion" really is a nonissue—little more than rhetoric. The point is: We simply do not know. Yet despite this vacuum of knowledge, dramatic procedural shifts have occurred based on unsubstantiated assertions and assumptions.

The Supreme Court's opinions in *Twombly*, *Iqbal*, *Wal-Mart*, and *Concepcion*, the plurality opinion in *McIntyre*, and other judicial pronouncements reveal that a number of federal judges (and Justices) seem singularly concerned about the litigation burdens on corporations and government officials.<sup>292</sup> But should we not also care about the litigation burdens on plaintiffs? Or that mandatory arbitration

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<sup>291</sup> *Id.* at 1117; see also *supra* notes 66–68 and accompanying text (discussing the Council on Competitiveness).

<sup>292</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 558 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011). The same might be said of the many

clauses—particularly non-class action clauses—often allow defendants to shift costs to plaintiffs and deter the vast majority of those detrimentally affected from seeking relief? Should we not care about cases being dismissed prematurely despite obvious information asymmetry, or about cases involving important national policies and principles either not being commenced or dismissed because of some pretrial stop sign? Should we not care, for example, that possible antitrust, civil rights, consumer violations, and product failures are not being deterred—or that people who have been injured by such conduct are not being compensated or are being improperly detained or otherwise mistreated by government action? Don't these all represent costs—perhaps unquantifiable ones—to society? Yet matters such as these have not been evaluated or quantified and never appear on the litigation cost-benefit balance sheet.<sup>293</sup> These concerns are lost in the cacophony about abuse, delay, frivolousness, extortion, and cost. For some, the “cost-and-delay narrative” is an enticing elixir, one that is easily consumed but perhaps one that is lacking in nutritional value.<sup>294</sup>

What I have described puts this nation's longstanding legislative and judicial commitment to the private enforcement of its public policies and constitutional principles in harm's way. In *Twombly*, why did the Court choose to grant a motion to dismiss the complaint—thereby immunizing a significant industry from even a modicum of discovery and the potential of merit adjudication? In doing so, the Court refused to allow even a limited (judicially controlled) inquiry into the possibility that the private enforcement of the antitrust laws was necessary to eliminate the conduct (if established) that was called into question. Years earlier the Court had cautioned against using even the much more mature summary judgment motion in antitrust cases given their special character and complexity.<sup>295</sup> If the procedural rules are not receptive to lawsuits designed to vindicate the objectives of our

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rulemaking changes in recent years regarding discovery matters. *See* discussion *supra* notes 256–71.

<sup>293</sup> None of the available empirical evidence purports to measure these deterrent effects or the deleterious consequences of inappropriate procedural dismissals. Indeed, it is doubtful that they can be effectively or accurately researched. *See* Hoffman, *supra* note 177, at 27–31 (explaining the difficulty of measuring the number of prospective claimants deterred, meritorious cases dismissed, and the kinds of motions routinely made).

<sup>294</sup> I occasionally wonder whether the Advisory Committee and I were under the influence of the “narrative” when we proposed the notion of proportionality in discovery now found in Rule 23(b)(2)(C). *See* discussion *supra* notes 254–57 (explaining the Rule's history). A rereading of the Committee Note, the preparation of which in my day was largely a Reporter's task, suggests that might have been the case.

<sup>295</sup> *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (noting the presence of difficult issues of motive and intent, proof largely in the possession of the alleged conspirators and hostile witnesses).



constitutional and statutory policies, or if cases pursuing that end cannot be lodged in a convenient forum or survive a motion to dismiss, such cases will not be instituted and those policies will not be furthered. That is not what our procedural system, as reflected in the words of Rule 1, is designed to achieve. Yes, we would like to resolve lawsuits in a speedy fashion and the process should be as inexpensive as possible. But remember that remaining word in Rule 1—“just.”<sup>296</sup> Seeking a “just” result is at least as important as the other two objectives, and it requires that a meaningful and merit-oriented opportunity be given to our citizens to present their grievances. I fear that after seventy-five years, the application of the Federal Rules has lost its moorings; I fear that some in the profession, both on the bench and in the practicing bar, have lost sight of the goals our procedural system should pursue.

By short-circuiting the civil justice process the Supreme Court has downgraded our commitment to the day-in-court principle, diminished the status of the right to jury trial, and substituted accelerated decisionmaking by judges—or arbitrators—for adversarial trials and the occasional voice of the community. It should be obvious that procedural stop signs primarily further the interests of defendants, particularly those who are repeat players in the civil justice arena—large businesses and governmental entities.

People frequently ask me: “Is this a business-oriented Supreme Court?” Or occasionally, someone will assert, with a certain bite in his or her voice: “The Chamber of Commerce seems to have a seat on the Supreme Court; any truth to that?” I don’t believe that, but others have voiced sentiments in that general vein.<sup>297</sup> Despite that expression of faith, I think it is fair to say that a number of the Justices (as well as other federal judges) have a predilection (perhaps subliminal) that favors business and governmental interests. Surely, a significant number of opinions in recent years do show that orientation.<sup>298</sup> Nor

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<sup>296</sup> FED. R. CIV. P. 1.

<sup>297</sup> See Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1; Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Business*, 46 MICH. J. L. REFORM 537 (2013); Ian Millhiser, *Chamber of Commerce’s Top SCOTUS Litigator Admits Justices Give Special Treatment to Chamber*, THINKPROGRESS (Mar. 14, 2011, 2:01 PM), <http://thinkprogress.org/economy/2011/03/14/150447/scotu-hearts-the-chamber/?mobile=nc>.

<sup>298</sup> Admittedly, every once in a while a significant Supreme Court decision emerges that looks in a neutral or opposite direction. See, e.g., *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (holding that a state court consumer class action is not precluded by a prior federal court refusal to certify a similar action); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (holding that plaintiffs in a securities fraud action need not prove loss causation to secure class certification); see also *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that a New York statute limiting a plaintiff’s ability

do I think it unfair to say that some Justices on the current Court and some members of the federal judiciary are disenchanting with civil litigation and wish to limit it,<sup>299</sup> which, of course, negatively impacts access and works against those in our lower and middle economic classes who want *entre* to the civil justice system.<sup>300</sup> That is an unfortunate echo of today's societal inequities and reflects the stunning disparity in power, people's income, and status in our nation.

It is far too simplistic to think that the mere ability to commence a civil action suffices to discharge the justice system's obligation to provide citizens a day in court. The capacity to enter the courthouse only to be diverted to arbitration or crucified once inside on a pleading motion is hardly meaningful access. Additionally, access without sufficient attention to procedural detail and process is little more than the patina or trappings of a meaningful day in court—it is not the substance of one. That is demonstrated by the dismal experience with the perfunctory handling of many of what possibly will turn out to be millions of home mortgage foreclosures that have occurred in the recent recession. It appears that in an unknown number of instances, foreclosures have occurred despite a plethora of failures to recognize serious procedural defects. Insufficient attention to detail—usually regarding the documentation supposedly establishing title in the party seeking foreclosure, the use of robo-signatures, or the failure to provide proper notice—has cost many Americans their homes as a result of an invalid or inattentive process.<sup>301</sup> Fortunately,

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to seek class certification in a suit for recovery of a penalty was superseded by the text of Rule 23).

<sup>299</sup> The current enchantment with arbitration is evidence of that disenchantment. See *supra* notes 135–69 and accompanying text (explaining the growth of, and Supreme Court support for, arbitration). See generally Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (arguing that the Rehnquist Court was consistently motivated by its mistrust of civil litigation); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 311 (2012) (asserting that the Roberts Court has reshaped the rules of civil procedure to the benefit of business interests).

<sup>300</sup> Other scholars have expressed concern that the various procedural restraints that I have discussed have marginalized some people or social out-groups. See Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 504 (2012) (arguing that procedural limits on court access harm society by keeping marginalized plaintiffs from pursuing meritorious civil rights claims); A. Benjamin Spencer, *Essay: The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 361–62, 366–70 (2010) (“Civil procedure tends to . . . protect[ ] commercial defendants against claims by members of various out-groups.”).

<sup>301</sup> The Inspector General of the Department of Housing and Urban Development reported a significant number of affidavits not signed on personal knowledge or did not follow a review of the underlying documents, as well as notaries not witnessing affiant signatures. The Inspector General also has identified the possible use of falsified legal documents. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOUS. AND URBAN DEV.,

that problem has now become visible. The Massachusetts Supreme Judicial Court, for example, has recognized the “substantial power” of foreclosing parties employing the mortgage securitization process and has insisted that they “follow strictly” the statutory requirements.<sup>302</sup>

What has occurred in the mortgage industry and the repetitive appearances of Ponzi schemes and securities frauds are but exemplars of two of the eternal truths of our (and perhaps any) society: “Greed is a growth industry,” and “regulators are always one step behind those they regulate.” Precursors to today’s financial debacles dot our economic history. And even now we are witnessing a scandal relating to the manipulation of a global benchmark interest rate, the London Interbank Offered Rate (Libor), during the financial crisis. Lawsuits have been filed, major banks have been fined,<sup>303</sup> and more legal wrangling most assuredly will come.<sup>304</sup> How will our civil justice system react? Will today’s early-termination procedure deny us an

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MEMORANDUM NO. 2012-FW-1802, BANK OF AMERICA CORPORATION FORECLOSURE AND CLAIMS PROCESS REVIEW 5 (2012), available at [http://www.hudoint.gov/Audit\\_Reports/2012-FW-1802.pdf](http://www.hudoint.gov/Audit_Reports/2012-FW-1802.pdf); see also Pa. Pub. Sch. Employees’ Ret. Sys. v. Bank of Am. Corp., No. 11 Civ. 733 (WHP), 2012 WL 2847732, at \*2 (S.D.N.Y. July 11, 2012) (finding that signatures by bank officers used to secure mortgage foreclosures were not based on personal knowledge and allegations to that effect allowed the complaint to survive a motion to dismiss).

<sup>302</sup> U.S. Bank Nat’l Ass’n v. Ibanez, 941 N.E.2d 40, 49–50 (Mass. 2011) (quoting Moore v. Dick, 72 N.E. 967 (Mass. 1905)); see also Gretchen Morgenson, *Audit Uncovers Extensive Flaws in Foreclosures*, N.Y. TIMES, Feb. 16, 2012, at A1. The government has secured an \$8.5 billion settlement from ten banks to resolve claims of foreclosure abuse. See Jessica Silver-Greenberg, *Banks to Pay \$8.5 Billion to Speed Up Housing Relief*, N.Y. TIMES, Jan. 8, 2013, at B1. Similar problems of meaningful access arise in the pro se litigant context. One proposal for correction appears in Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 478–83 (2002), in which the authors note that a pro se plaintiff’s “inability to secure legal advice may prevent a meritorious claim from ever being presented to a judge.”

<sup>303</sup> See, e.g., Katharina Bart, Tom Miles & Aruna Viswanatha, *UBS Traders Charged, Bank Fined \$1.5 Billion in Libor Scandal*, REUTERS (Dec. 19, 2012), <http://www.reuters.com/article/2012/12/19/us-ubs-libor-idUSBRE8BI00020121219> (explaining the Libor scandal, fines, and criminal prosecutions); Will Hutton, *Bank Rate-Fixing Scandals Reveal the Rotten Heart of Capitalism*, THE OBSERVER (N.J.), Dec. 23, 2012, at 30 (describing the “Libor scam” and the huge fines imposed on the Swiss Bank UBS); *Timeline: Libor-Fixing Scandal*, BBC NEWS (Dec. 19, 2012), <http://www.bbc.co.uk/news/business-18671255> (reporting on the investigations and consequences of attempts to manipulate the Libor and Euribor rates).

<sup>304</sup> See, e.g., Nathaniel Popper, *Rate Scandal Stirs Scramble for Damages*, N.Y. TIMES, July 11, 2012, at A1. Even more recently, reports of banks failing to monitor customer activities involving money laundering have surfaced. See Landon Thomas, Jr. & Mark Scott, *HSBC Reveals Problems with Internal Controls*, N.Y. TIMES (July 12, 2012, 5:52 AM), <http://dealbook.nytimes.com/2012/07/12/hsbc-to-apologize-at-senate-hearing>; see also Jessica Silver-Greenberg, *Regulator Says Bank Helped Iran Hide Deals*, N.Y. TIMES, Aug. 7, 2012, at A1 (reporting that New York regulators have charged British bank Standard Chartered with helping the Iranian government to launder billions of dollars illegally through its New York branch that might be used to support terrorist activities).

explanation and possibly an adjudication on the merits as to whether the challenged conduct corrupted the financial marketplace?

What appears to be happening simply does not resemble the procedural process that some of us once knew. Frankly, I do not think a system that focuses on gatekeeping, early termination, and erecting procedural stop signs befits the aspirations of the American civil justice system. To me this is a myopic field of vision and, as suggested above, betrays either an antilitigation, antiplaintiff, pro-business, and pro-government orientation, or pro-management bias, or a combination thereof. At a time when the complexities of American life seem to increase and acts of private and public misconduct constantly are coming to light, our courts should focus on how to make the civil justice system provide a level litigation field that is receptive to promoting our public policies—deterring those tempted to violate them—and providing efficient procedures to compensate those who have been damaged.<sup>305</sup> Our judges should concentrate on effectuating the vision of the rulemakers of the 1930s by reviving and extending the principles of citizen access and the resolution of disputes on their merits,<sup>306</sup> even though the realities of modern life and the limited nature of our judicial resources necessitate that in many situations access and adjudication must be on an aggregate rather than an individual basis.

It is said that necessity is the mother of invention. Perhaps the time has come to declare that our civil justice system is in a state of necessity and that we need to resurrect the system many of us were proud to practice or teach (or adjudicate). If there are legitimate concerns about litigation costs or lawyer behavior, there are a myriad of possibilities other than putting up procedural stop signs. Certainly various aspects of judicial management—particularly with regard to

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<sup>305</sup> See Patrick E. Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997) (“Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.”).

<sup>306</sup> In J. Douglas Richards & John Vail, *A Misguided Mission to Revamp the Rules*, TRIAL, Nov. 2009, at 52, two distinguished plaintiffs’ lawyers argue that the case has not been made for major deviations from the original objectives of the Federal Rules. They also criticize proposals by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System entitled *Civil Case Law Management Guidelines and Its Set of Pilot Project Rules*. *Id.*; see AM. COLL. OF TRIAL LAW. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIVERSITY OF DENVER FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Apr. 15, 2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>. The proposals are criticized further in CTR. FOR CONSTITUTIONAL LITIG. PC, NINETEENTH CENTURY RULES FOR TWENTY-FIRST CENTURY COURTS? AN ANALYSIS AND CRITIQUE OF 21ST CENTURY CIVIL JUSTICE SYSTEM (2010).

our treatment of pretrial motion practice and controlling excessive discovery—should be viewed as works in progress and developed and refined more than they have been.<sup>307</sup> Greater attention needs to be given to professional conduct, through more sophisticated education and sanctioning techniques—although, admittedly, these efforts have not been entirely successful in the past.<sup>308</sup> Concomitantly, we should try to come to grips with that basic question: How do we want our judges spending their time? Other approaches may require experimentation by the Congress, the rulemaking process, individual judges, and more empirical research and academic exploration. It also may be that other disciplines that study or have experience with dispute resolution and various aspects of management and organizational science have something to offer our civil justice system.

The legal profession owes it to the larger community to employ its inventive skills and explore a wide range of possibilities, some previously viewed as unthinkable. For example, consideration should be given to abandoning the transsubstantive principle requiring that the Federal Rules be “general” and applicable to all cases—a notion that supposedly is embedded in the Rules Enabling Act.<sup>309</sup> In reality it exists today in name only.<sup>310</sup> That might encourage giving serious

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<sup>307</sup> See Miller, *supra* note 54, at 77–81 (discussing the theoretical evolution of case management). For example, some believe that judicial management should be enhanced and made more meaningful. Others are of the view that judges should have more direct involvement in the process and not delegate as much case management to magistrate judges as some do. See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96–97 (2009). In Brian T. Fitzpatrick, Twombly and Iqbal Reconsidered, 87 NOTRE DAME L. REV. 1621, 1643–46 (2012), the author discusses methods for controlling discovery and expresses the view that regulating pleading standards may not be the best option because “judges . . . have neither the information nor the incentives to make wise decisions about which cases are worthy of discovery.”

<sup>308</sup> The subject has been given increased attention in recent years. See, e.g., David F. Levi & Mitu Gulati, “Only Connect” Toward a Unified Measurement Project, 58 DUKE L.J. 1181 (2009) (describing a symposium at Duke Law School on measuring judges and justice). Some very promising work is being done in developing a new metric called “bench presence” by District Judge Young and Professor Singer, designed to measure what they consider to be benchmarks of judicial productivity: accuracy of adjudication and procedural fairness. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity* (2012) (unpublished manuscript) (on file with the *New York University Law Review*).

<sup>309</sup> 28 U.S.C. § 2072(a) (2006).

<sup>310</sup> See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324, 333–34 (2008) (advocating against the view that transsubstantivity is an “independent value” of the Federal Rules); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“[U]niformity and trans-substantivity . . . are a sham.”); David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) (predicting the demise of the transsubstantivity principle and discussing its historical development); Miller, *supra* note 54, at 90–94 (“With Twombly and Iqbal, it is

thought to putting cases on different litigation tracks and devising different procedures that are deemed appropriate for the characteristics of the cases posted to each track.<sup>311</sup> None of these is inconsistent with or need be pursued at the expense of a continued commitment to the speedy and inexpensive determination of lawsuits.<sup>312</sup> Indeed, they might be more consistent with our historic litigation values and a quest for results that are just, than they have been with the procedural stop signs erected in the recent past.

### CONCLUSION

Each year I ask my first-year civil procedure students: “Why do we have courts?” In times past I thought I knew the answer and could guide my charges to it. But after asking the question for more than fifty years and contemplating the procedural changes of the last quarter century, I am no longer clear as to what that answer is in the real world of litigation. More to the point, a Supreme Court that appears preoccupied with early termination and magnifying ways of avoiding adjudication on the merits or diverting disputes to arbitration seems no further advanced in answering the question than my students and I have been throughout these years.

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quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules.”).

<sup>311</sup> I outlined the avenues of inquiry mentioned in text and a few other possible lines of procedural modification in Miller, *supra* note 54, at 103–31; see also Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 293–96 (2009) (proposing structural changes to the rulemaking process); Andrew D. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*, 43 ARIZ. ST. L.J. 461, 472–79 (2011) (explaining Arizona’s success with tracking).

<sup>312</sup> The tracking concept has been talked about for many years and, as a practical matter, already exists in federal practice in several contexts. See Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002) (critiquing the Advisory Committee’s simplified rules project, and noting that the existing Federal Rules allow for different approaches to different litigation tracks); Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985) (proposing the creation of a formal fast-track litigation path in order to import the strengths of alternative dispute resolution into the federal judicial system); Miller, *supra* note 54, at 118–25 (noting that the Rules allow for tracking in judicial management of discovery and proposing the further adoption of tracking, perhaps according to the British model); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENVER U. L. REV. 377, 398–405 (2010) (proposing the adoption of a simple track for low-dollar-value cases, ensuring quick claim resolution and limiting litigant and systemic costs). Tracking has been part of management practice in England and Wales for a number of years. See Miller, *supra* note 54, at 118–25. Another possibility, admittedly counterintuitive after *Twombly* and *Iqbal*, is limited and controlled pre-action investigatory discovery, currently unavailable under the Federal Rules. See, e.g., DODSON, *supra* note 174, at 147–48; Miller, *supra* note 54, at 105–08.

Our aspirations should be those that our Founders embedded in the Constitution; that committed us to the rule of law; that prized the image of a level litigation field; and that motivated engraving “equal justice under law”<sup>313</sup> above the entrance to the U.S. Supreme Court building.<sup>314</sup> They should not be to impede meaningful citizen access to our justice system or to impair the enforcement of our public policies and constitutional principles by constructing a procedural Great Wall of China or Maginot Line around the courtrooms in our courthouses.

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<sup>313</sup> The phrase can be traced to the Funeral Oration by the Athenian leader Pericles in THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 89 (W. Robert Connor ed., Richard Crawley trans., Everyman 1993) (c. 431 B.C.E.). It also may paraphrase a passage in Chief Justice Fuller’s opinion in *Caldwell v. Texas*, 137 U.S. 692, 697 (1891), in which the Justice declares that the Fourteenth Amendment prohibits the States from depriving any person of “equal and impartial justice under the law.”

<sup>314</sup> Is it coincidence or symbolic that the entrance is now closed, ostensibly for security reasons?