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1938 ALL OVER AGAIN?
PRE-TRIAL AS TRIAL IN COMPLEX LITIGATION

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INTRODUCTION

From the vantage point of today, 1938 seems a long way off. We now find ourselves in a world of civil litigation seemingly far removed from the surroundings familiar to those who crafted the 1938 overhaul of the Federal Rules of Civil Procedure. Settlement rather than trial has emerged as the dominant endgame of civil litigation, especially litigation complex in substance or procedural format. To be sure, settlement was far from unknown to the 1938 rule designers. Still, going from a world of trials in roughly 18.9 percent of federal civil cases circa 1938 to one of trials in only 1.8 percent of such cases in recent years is not a mere difference of degree.[1] If one were to advertise the signature feature of our litigation system in the manner of Coors Light beer, then the resulting television commercial would feature football coach Jim Mora quizzically exclaiming: "Trial? Don't talk to me – trial? Are you kidding me? Trial?!"

Part of the changed setting in which we find ourselves stems from changes in the Federal Rules since 1938. From the standpoint of what we know today as complex litigation, the most striking development arguably consists of the recognition of the modern class action in 1966.[2] The class action device stems from a broadly shared sense that much civil wrongdoing no longer concerns one-off incidents but, rather, gives rise to large numbers of claims that exhibit substantial similarities. In the mid-twentieth century, "Complex Litigation" comprised a distinctive category recognized neither in scholarly discourse nor in law curricula. The term is now familiar in both

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[1] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461, 464 (2004).

[2] *See* FED. R. CIV. P. 23 (1966 amendments).

domains, as evidenced by the emergence of multiple, competing casebooks for use in such a course.[3]

The breadth of civil litigation scholarship today also reflects a difference in kind. If one were to encapsulate the intellectual thrust of civil litigation scholarship circa 1938, then one might say that its defining feature consisted of the elaboration of procedural doctrine. This is not to suggest that the founding generation of the Federal Rules somehow was unaware that procedural doctrine is the byproduct of lawyering, with all its strategic maneuvering and underlying financial dimensions. It is simply to observe that the leading works of the mid-twentieth-century genre of civil litigation scholarship – say, the multi-volume *Federal Practice and Procedure* treatise[4] that remains an indispensible reference today – took as their primary grist the exposition of procedural doctrine as found in judicial opinions. Doctrine rightly will remain an important feature of civil litigation scholarship, just not its exclusive or even primary focus.

Since the early 1970s, civil litigation scholarship has shifted from a more-or-less-exclusive examination of *what judges say* to an additional attentiveness to *what lawyers do* (and why they do it). Phrased differently, the shift has been from a focus on doctrinal architecture to a broader examination of civil litigation in systemic terms. This shift in focus has framed such rich questions as why an anomalously few cases go to trial whereas the vast majority settle and how the underlying financing of civil lawsuits – the structure of attorneys' fees, the permissible modes of capitalization for litigation, and the dominance of insurance for both defense costs and covered losses – influences the conduct of civil lawsuits. This shift has brought with it a broadening of scholarly methodologies, with the exposition of doctrine now supplemented with interdisciplinary research drawn from economics, cognitive psychology, finance, sociology, and statistics, among other non-law disciplines.

We have come a long way from 1938. Yet, at the same time, we find ourselves today in a position curiously akin to the animating impulse behind the 1938 overhaul. Now, as then, scholars, judges, and practitioners in the civil justice system have a lingering – sometimes only vaguely articulated – sense that process *as process* is exerting a substantial influence on the pricing of claims. The concern today is not over the hypertechnicality of civil pleadings that the 1938 reformers famously replaced with our modern notice-

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[3] *See, e.g.*, ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION (2d ed. 2006); RICHARD L. MARCUS ET AL., COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE (5th ed. forthcoming 2010); RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION (2009); JAY TIDMARSH & ROGER H. TRANGSRUD, MODERN COMPLEX LITIGATION (2d ed. forthcoming 2010).

[4] *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (1st ed. 1969).

pleading regime.[5] For our world in which the pretrial process effectively functions as the trial in the overwhelming majority of civil lawsuits, a recurring concern centers on the rough intuition that process itself might operate in a manner that is substantially distortive.[6]

No process for civil litigation realistically can remain entirely seamless or invisible vis-à-vis substantive law. Still, the 1938 reformers surely were correct that claim merit, in light of governing substantive law, should matter vastly more to the resolution of civil claims than whether counsel has said the right words to invoke the appropriate form of action. So, too, today, a host of seemingly distinct developments in civil litigation share a similar, underlying concern. These developments concern what one might call the signal judicial checkpoints on litigation situated within the pretrial phase. From back to front within the pretrial phase, these checkpoints consist of: summary judgment at the conclusion of pretrial discovery;[7] rulings on the admissibility of crucial expert testimony (often, in connection with a summary judgment motion);[8] the determination whether to certify litigation to proceed as a class action;[9] and, most recently in Supreme Court case law, dismissal on the pleadings, before discovery has commenced.[10]

Each of these developments has given rise to a scholarly literature of its own.[11] The enterprise of this Article is to situate each within a framework

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[5] Informative accounts include, *e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006).

[6] For a broader suggestion that "the history of procedure is a series of attempts to solve the problems created by the preceding generation's reforms," see Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).

[7] Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[8] Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

[9] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

[10] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[11] On the Court's summary judgment "trilogy," see, *e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990). On *Daubert*, see, *e.g.*, DAVID P. LEONARD ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE § 6.3.2 (2002); Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563 (2000). On recent developments in the law of class certification, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009).

On the Court's recent pleading decisions, see, *e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Stephen B. Burbank, *The Continuing Evolution of Securities Class Actions*, 2009 WISC. L. REV. 535; Kevin Clermont & Stephen Yeazell, *Inventing Tests, Destabalizing Systems*, 95 IOWA L. REV. 821 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1525642; Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2010);

that is broader in both temporal and methodological terms. Specifically, my suggestion is that each of these developments presents, in one form or another, a common underlying question: how to regulate the distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial. In this endeavor, we find ourselves in a position much like that of our procedural forebears in 1938 – just, now, with an undertheorized intuition that their handiwork in our notice-pleading system may itself have become a substantial source of distortion in the pricing of civil claims.[12]

By comparison to 1938, we have at our disposal today a much richer scholarly vocabulary with which to pinpoint and evaluate concerns over the possible distortive effects of civil procedure itself. The reason for this fortunate state of affairs stems from the emergence of the scholarly perspectives identified earlier – perspectives that approach the civil litigation as a system in which doctrinal elaboration coexists with lawyer strategy and finance. This broadened scholarly vocabulary – even in a relatively simplified form, with many of its subtleties suppressed – can help us better to frame the options available to our civil litigation system. As I shall elaborate, some of the more innovative options involve the playing out of some very basic implications from the sea change in civil litigation scholarship.

One unifying concern across the specific debates over summary judgment, admissibility of expert testimony, class certification, and dismissal on the pleadings consists of how civil process approaches an important form of uncertainty – here, uncertainty over the plausible valuation of civil claims in the settlement endgame. Viewed with the aid of our scholarly vocabulary today, the debates over the various pretrial checkpoints center on what one

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Richard A. Epstein, Twombly, *after Two Years: The Procedural Revolution in Antitrust That Wasn't*, GCP: THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY, July 2009, release 2 (copy on file with author); Richard A. Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007); Edward A. Hartnett, *Taming* Twombly, *Even after* Iqbal, 158 U. PA. L. REV. 473 (2010); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Adam Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442786.

[12] In speaking of "distortion," I refer in the manner of the 1938 reformers to outcomes in litigation whereby the choices made as to procedural design overwhelm claim merit under applicable substantive law. Procedure is not inevitably distortive in this sense, however. In some instances, procedural design actually may bring litigation outcomes more closely into line with substantive law, as when certification of a class action "overcome[s] the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Amchem Prods., Inc. v. Windsor, 521 U.S. 592, 617 (1997). For refinement of the concept of claim merit, see Jay Tidmarsh, *Resolving Cases "on the Merits,"* 87 DENVER U. L. REV. 407 (2010).

might label as uncertainty costs – those associated with the bearing of uncertainty over claim value or with the reduction of such uncertainty. The former type of cost consists of the variance of outcomes associated with movement to successive stages of the litigation process, including the default denouement of trial. The latter consists chiefly of the cost associated with the generation of additional information about the underlying claim. In civil litigation today, information-generation in the pretrial phase characteristically entails additional increments of civil discovery – costs that, in a given situation, stand to be imposed by one side on the other and, perhaps, to overcome underlying asymmetries of information across the two sides.[13]

Taken together, the various pretrial doctrines amount to the construction of a distinctively judicial mode for the regulation of variance and cost imposition in civil litigation. Though most of the doctrines apply as much to classic one-on-one lawsuits as to complex litigation, I focus on the latter context here, for that setting enables one most readily to discern the mode of regulation involved and its consequences. For litigation between civil parties, one might say that the court acts as a kind of third-party regulator – one whose operations might fruitfully be examined in the manner of any other enterprise of third-party regulation.

Over the past quarter-century, third-party judicial regulation has moved ever forward within the pretrial phase. In its recent pleading decisions, the Court effectively has pushed such regulation to the very outset of litigation. The push forward within the pretrial process in terms of the timing of regulatory oversight has come along with a shift in emphasis. As I shall elaborate, the shift has been from the regulation of variance associated with movement to successive litigation stages to more of a focus on the regulation of cost imposition via discovery.

The connection between the court as regulator and the thing to be regulated has changed as well. Rulings on summary judgment, admissibility of expert testimony, and class certification all seek to hone directly on situations in which the variance associated with movement to the next stage of litigation would be undesirable in normative terms. By contrast, rulings on motions to dismiss on the pleadings – as recently recast in *Bell Atlantic Co. v. Twombly*[14] and *Ashcroft v. Iqbal*[15]– seek to regulate cost imposition via discovery. But those rulings would do so only indirectly, by preventing the plaintiff from getting in the courthouse door. If anything, in its recent pleading decisions, the Court conveys a striking lack of confidence in direct

[13] On the importance of both cost asymmetries and information asymmetries in connection with pleading standards, see Bone, *Regulation of Court Access*, *supra* note 11, at 919-30.

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

[15] 129 S. Ct. 1937 (2009).

regulation of cost imposition via discovery.[16] In pursuing an enterprise of indirect regulation through judicial inquiry into the plausibility of pleadings, however, the Court risks replication – even accentuation – of the difficulties that the Court itself considers to plague a direct regulatory approach.

The framing of developments in procedural doctrine as an enterprise of third-party judicial regulation opens up the inquiry into possible alternatives. With regard to cost imposition via discovery, first-party regulation – say, through the shifting of discovery costs in the event of summary judgment – might help to lessen the informational problems associated with third-party regulation. But the scholarly literature on cost shifting also suggests the existence of considerable countervailing effects.[17]

Yet another alternative would not cast aside third-party judicial regulation but, instead, seek to refine the regulatory tools at its disposal. In this regard, the major pretrial motions today share a common structural feature. All operate – whether in form or in function – as relatively blunt instruments that signal either "stop" or "go" on the road toward trial. A world of vanishing trials invites exploration of whether procedural doctrine might benefit from the development of additional pretrial motions that are not dispositive but, rather, informative – motions that do not speak to whether trial may occur but seek, instead, to inform directly the pricing of claims via settlement.

This Article elaborates the preceding points in three Parts. Part I traces the transformation of civil litigation scholarship in recent decades, setting forth in streamlined, approachable terms the significance of variance and cost imposition in complex litigation. Part II turns from scholarship to doctrine, casting summary judgment, expert admissibility, class certification, and pleading as key checkpoints in the pretrial phase. Previous scholarship has well rehearsed these developments within their respective spheres. The method of Part II is to deploy the scholarly vocabulary sketched in Part I to offer cross-comparisons of the various pretrial developments, so as to illuminate their prospects as modes of regulation. Part III then speaks to regulatory design, situating our current third-party judicial mode for the regulation in comparison to possible alternatives. As I shall discuss, the exploration of these alternatives brings the discussion full circle, for it pinpoints the degree to which procedural doctrine has yet to integrate some relatively basic insights from our richer scholarly tableau.

I. THE TRANSFORMATION OF CIVIL LITIGATION SCHOLARSHIP

Scholarship on civil litigation today looks different and more varied than scholarship on the same subject circa 1938. From a broad-brush perspective,

[16] See notes 94-95 *infra* and accompanying text.
[17] *See* Part III-A *infra*.

the standout development has consisted of a shift from exposition of procedural doctrine through examination of judicial opinions to exposition of litigation strategy on the part of lawyers – to be sure, strategy deployed "in the shadow of the law."[18] Scholarship along the latter lines situates lawyers not as the vehicles through which courts develop doctrine but as an appropriate subject for consideration in themselves.

The transformation in civil litigation scholarship is in keeping with the broader decline in the "autonomous" character of law as an academic discipline[19] and the rise of non-law perspectives in legal scholarship generally.[20] Across legal scholarship as a whole, these developments have met with consternation about what some observers see as a troubling "disjunction" between what law professors do and what practicing lawyers do.[21] Without resolving the considerable debate over this claimed "disjunction," one may daresay that the world of civil litigation scholarship has managed to avoid such criticism in considerable part. The usual subject of non-law perspectives on litigation today consists of the behavior of real-world litigators. If anything, much of the most sophisticated scholarship today operates in a kind of voyeuristic relationship with high-level litigation practice.

No article-length treatment of the literature on civil litigation today could do justice to its nuances. My objective here is more focused: to explain on terms approachable to readers from outside the civil litigation literature the central insights that bear upon the pretrial stage. The natural starting point consists of the first effort to understand in a systematic way the crucial strategic decision whether to settle or to go to trial – namely, early economic models of civil litigation.[22]

A. The Significance of Cost Imposition

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[18] *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[19] *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

[20] As a scholar from outside the legal academy once remarked to me: Never has a given discipline so enthusiastically sought to surrender its own comparative intellectual advantage.

[21] *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For other views, see, *e.g.*, Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945 (1993); Robert C. Ellickson, *The Market for "Law-and" Scholarship*, 21 HARV. J.L. & PUB. POL'Y 157 (1997); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993).

[22] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 337-42 (1st ed. 1972). For an exposition in more recent literature, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401-11 (2004).

Viewed today, with the benefit of subsequent scholarship, the earliest sorts of economic models look remarkably reductionist.[23] For ease of modeling, they compressed the costs and benefits of going to trial into a single time period and posited a one-time strategic decision whether to settle instead. Viewed in the context of their time – the early 1970s – the breakthrough made by early economic models cannot be underestimated. They represent the first sustained effort to move from litigation doctrine to litigation strategy and from judicial decisions to lawyer decisions.

For present purposes, a key insight flows from early economic models of litigation, even in their most reductionist form: The costs of litigation bear significantly on settlement. In more formal terms, the "settlement zone" for a given civil lawsuit is defined by the sum of the two sides' litigation costs (C_P for the plaintiff and C_D for the defendant) when there is rough convergence in their respective estimates of the probability of success (p) and the likely award (A) in the event of trial.[24]

This insight about litigation costs takes on particular significance in light of the conventional justification for the notice pleading system put into place by the 1938 Rule overhaul – namely, that "a short and plain statement of the claim showing that the pleader is entitled to relief"[25] will set into motion a process of discovery that will tend to bring about convergence in the two sides' assessment of the merits (in formal terms, their estimates of p and A). When coupled with the vocabulary of early economic models, this design objective for the Rules yields an important prediction about the relationship between litigation costs and claim merit. As p approaches zero, the settlement zone for a given lawsuit will tend to be defined primarily by the sum of the two sides' litigation costs. Low-merit or unmeritorious litigation, in other words, has a settlement value that depends largely upon what one might call the overhead associated with the process of discerning that p is zero or nearly so. Indeed, as the economic literature has advanced in sophistication, commentary has put forward ever richer accounts of this basic insight.[26]

A major source of overhead in litigation, once initiated, consists of discovery under the Rules. The costs of discovery are not exogenous to the strategic decisions of the litigants but, instead, are the product of those decisions. Complex litigation today – in the form of proposed class actions

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[23] The treatment here draws on an earlier overview of the literature on why cases get litigated. *See* Samuel Issacharoff, *The Content of our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265 (2002).

[24] *See* SHAVELL, *supra* note 22, at 401-03.

[25] FED. R. CIV. P. 8(a)(2).

[26] For advanced economic accounts of litigation as a vehicle simply to extract settlement, see, *e.g.*, Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

and otherwise – frequently consists of alleged misconduct on the part of large-scale institutions (paradigmatically, business corporations) that is both complicated in its substance and, often, obscured from the public eye. In such a context, discovery seems, at once, both strongly warranted and substantially troubling.

The warrant for discovery stems from the notion of informational asymmetry – the observation that alleged misconduct obscured from view is hard to pin down, absent some means for the plaintiff to compel the disclosure of information that otherwise would remain in the hands of the defendant. The troubling part comes in the further recognition of cost asymmetry – the notion that compliance with discovery might be significantly higher for the responding defendant than for the requesting plaintiff, due precisely to the underlying asymmetry of information. The resulting concern centers upon the temptation for the side on the short end of the informational asymmetry to run up the cost asymmetry via discovery as a way to expand the settlement zone defined by litigation costs.[27]

As Part II shall discuss in greater detail, the perception of discovery costs as a driver of settlement underlies the Supreme Court's recent invigoration of pleading standards.[28] Yet, at the same time, the Court's reading of Rule 8 as a demand for "plausible" pleadings portends a considerable uptick in motions to dismiss at the outset of litigation.[29] Efforts to fight pretrial costs in the form of discovery, in other words, may come only with added pretrial costs of their own in the form of motions practice. If anything, the greater the disruption to preexisting doctrine occasioned by the effort to fight discovery costs, the greater the costs in terms of invigorated motions practice – essentially, so that both litigants and lower courts can begin to discern what the new doctrine means in operation over the gamut of the civil docket, as recent commentary has suggested as to *Twombly*.[30]

B. The Significance of Risk

In the recent history of litigation scholarship, economic models certainly do not stand alone. Rather, much of the richness of the literature today stems from efforts to test the predictions of early economic models or to refine their formal content. Testing has yielded a considerable empirical literature that

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[27] This is by no means to ignore the possibility of discovery requests from defendants as a vehicle to increase the cost of litigation for plaintiffs. For a suggestion that this scenario is underexplored in the larger debate over discovery costs, see Elizabeth J. Cabraser, *Uncovering Discovery* (on file with author).

[28] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007).

[29] *See* Clermont & Yeazell, *supra* note 11, at 823 n.4 (remarking on the rapidity with which *Twombly* has joined the ranks of the most frequently cited procedure decisions in lower-court case law).

[30] *See id.* at 25.

continues forward in the present day.[31] Refinement has taken two main forms, one that draws on cognitive psychology and the other that deploys finance. Once again, in order to understand doctrinal developments in the pretrial phase, one may extract key insights from these additional models, even while suppressing their many subtleties.

Models of litigation and settlement drawn from cognitive psychology or finance exhibit many differences. For present purposes, however, a shared starting point stands out. Both models posit that the calculus for the "expected value" of litigation presented by early economic models does not capture fully the decision whether to settle. Under both models, the focus is less on cost imposition along the lines of the preceding section and more on the uncertainty of litigation – specifically, systematic differences in how that uncertainty is perceived or financial implications from bearing that uncertainty in itself.

Drawing from literature on human decision making under conditions of uncertainty, cognitive psychological models cast attention to the ways in which litigation uncertainty is perceived – specifically, within the "frame" of a gain or a loss for a given side. The setting of a civil lawsuit forms a natural context for application of the psychological literature, given the casting of gains and losses along plaintiff-versus-defendant lines. As one prominent article observes, "plaintiffs consistently choose between a sure gain by settling and the prospect of winning more at trial," whereas "defendants choose between a sure loss by settling and the prospect of losing more at trial."[32]

Cognitive psychological models supplement this observation about framing with the further insight that humans generally tend to be risk-averse with respect to moderate-to-high probability gains but risk-seeking as to moderate-to-high probability losses.[33] Risk preferences play out conversely, however, with respect to low-probability gains and losses – that is, situations of p equal to zero or nearly zero, in the parlance of the early economic models. Specifically, humans generally tend to be risk-seeking as to low-probability gains but risk-adverse as to low-probability losses.[34] This insight with respect to the low-probability scenario has particular significance for the regulation of the pretrial phase. As Part II shall elaborate, several of the

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[31] For an important empirical challenge to then-existing economic accounts, see Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991). For a more recent empirical finding that plaintiffs generally do not fare better by going to trial rather than by settling, see Randall Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 589 (2008).

[32] Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 129 (1996).

[33] *See id*. at 119.

[34] *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 166-67 (2000).

developments in pretrial doctrine in recent decades seek, in various ways, to discern when litigation is sufficiently low-probability in one respect or another as to be stopped in its tracks.

An additional insight from the cognitive psychological literature on litigation speaks specifically to the role of lawyers. As experienced, repeat-players in the litigation system, lawyers can help to nudge litigant behavior toward more risk-neutral evaluations, in keeping with economic models grounded in the calculus of expected value.[35] The lawyer, however, serves not only as counselor to her client but also, potentially, as financier of the litigation – say, under a contingency-fee arrangement on the plaintiff's side. A shift of attention to the role of the lawyer as financier complicates the picture with respect to risk preferences. Whereas a defendant corporation has only one corporation to lose, the lawyer-financier might diversify her risk of loss over a portfolio of many different lawsuits.[36] Risk spreading in the form of diversification has the same effect found elsewhere in the financial world – namely, enhanced ability to bear risk with respect to any given "investment." Here, too, the low-probability litigation scenario looms large. It is here that a greater willingness to take risk due to the financial arrangements on the plaintiffs' side might accentuate, rather than dissipate, the kind of risk-seeking behavior predicted by the literature on human decision making generally.

Recognition of the lawyer as the potential financier of litigation makes for a natural transition to the insights added by finance-based models. The aspiration here is to model more accurately the pretrial process, not as a one-time decision whether to settle or to go to trial (as under early economic models) but, rather, as a series of options within a multi-stage investment project.[37] At each stage, litigants have the option to settle (and thereby to terminate the project) or to proceed to the next stage, which typically involves the incurring of additional litigation costs, the imposing of costs on the opposition, and the garnering of additional information about the underlying claim.

The characterization of the pretrial process as a series of options makes relevant the literature on options in finance – in particular, the bedrock insight that the value of an option depends upon the extent of variance in the market that prices the underlying asset as to which the option pertains. An investor might purchase an option in one of its most familiar forms – a "put" option or a "call" option – with respect to an underlying asset comprised of

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[35] *See* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 120 (1997).

[36] On specialization within the plaintiffs' bar as a vehicle for risk spreading, see Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 199-200 (2001).

[37] *See* Joseph A. Grundfest & Peter Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1273-74 (2006).

Microsoft shares priced on the NASDAQ stock exchange.[38] In litigation, the underlying asset is the plaintiff's claim, the pretrial process is the pricing market, and the option consists of the opportunity to move to successive stages within that process.

For present purposes, two significant implications flow from finance-based models. The first implication is that the distribution of costs – both temporally within the pretrial process and across the contending sides – matters substantially to the settlement-versus-trial decision at any given stage. The content of pretrial procedure is crucial, as it determines when costs must be incurred and by whom. As Part II shall detail, the major doctrinal developments concerning the pretrial stage have been in the direction of more rather than less judicial scrutiny – whether of trial worthiness, admissibility, class certification, or pleadings. The effect has been to shift earlier in the litigation process the incurring of costs and to do so largely as to the plaintiff's side.

The second implication is related to the first: Litigation that might seem irrational from the standpoint of a one-stage expected-value calculus ala early economic models nonetheless might make sense from a finance-based perspective. The authors of one leading article underscore this insight, explaining how an option-based perspective can identify the "unexpected value" of litigation.[39] By filing and prosecuting a lawsuit, the plaintiff might gain a series of options concerning the underlying asset – her claim – with sufficient variance in its price as to justify the cost associated with early stages of the pretrial process.[40] To put the point in less technical terms: Just as the value of a stock option depends on the volatility in the stock price, so, too, does the value of continued litigation – of proceeding from one pretrial stage to the next, rather than settling – depend on the volatility in the price of the plaintiffs' claim.

The focus of finance-based models on notions of variance and volatility adds considerably to the account of risk in litigation previously offered by cognitive psychological models. Risk matters not just in the sense of whether a given party faces a potential gain or loss in the endgame of litigation. From a finance-based standpoint, risk also matters in the sense that a given party might stand to bear or to impose risk itself in the form of variance.

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[38] In non-technical terms, a put option affords its holder the option to compel the purchase of the shares at a specified price within a specified time period. A call option affords its holder the option to compel the sale of the shares at a specified price within a specified time period.

[39] Grundfest & Huang, *supra* note 37, at 1276. For additional examples of finance-based approaches to litigation, see Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193 (2007); Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation under Uncertainty*, 56 EMORY L.J. 619 (2006).

[40] *See* Grundfest & Huang, *supra* note 37, at 1283-85.

When one speaks of variance, nonetheless, it is crucial to separate positive description from normative evaluation. To observe that movement from one stage of pretrial litigation to the next involves variance is not to say that such variance is necessarily a bad thing. As the next Part shall detail, one may understand several of the pretrial checkpoints elaborated in procedural doctrine decades as seeking, in various ways, to pinpoint situations in which movement to the next litigation stage would entail variance that is normatively troubling.

II. THE TRANSFORMATION OF DOCTRINE FOR THE PRETRIAL PHASE

With the broadened scholarly vocabulary of Part I in mind, one now may turn to the signal developments in doctrine for the pretrial phase of litigation. For complex litigation, the main developments are four-fold: invigoration of summary judgment in civil litigation generally; strengthening of the admissibility standard for expert testimony (often critical in cases that involve complex scientific or other specialized knowledge); emergence of a distinctive law of class certification; and, most recently, tightening of pleading standards at the outset of litigation generally.

As noted earlier, each of these developments has generated a scholarly literature in its own right. My objective in this Part is to situate together these various developments so as better to facilitate cross-comparison in light of our richer conceptual framework today for analysis of civil litigation. From such a bird's-eye view, three points stand out: First, chronology is revealing. Over roughly the past quarter-century, doctrinal development has pushed significant checkpoints for judicial regulation ever earlier in the pretrial phase.

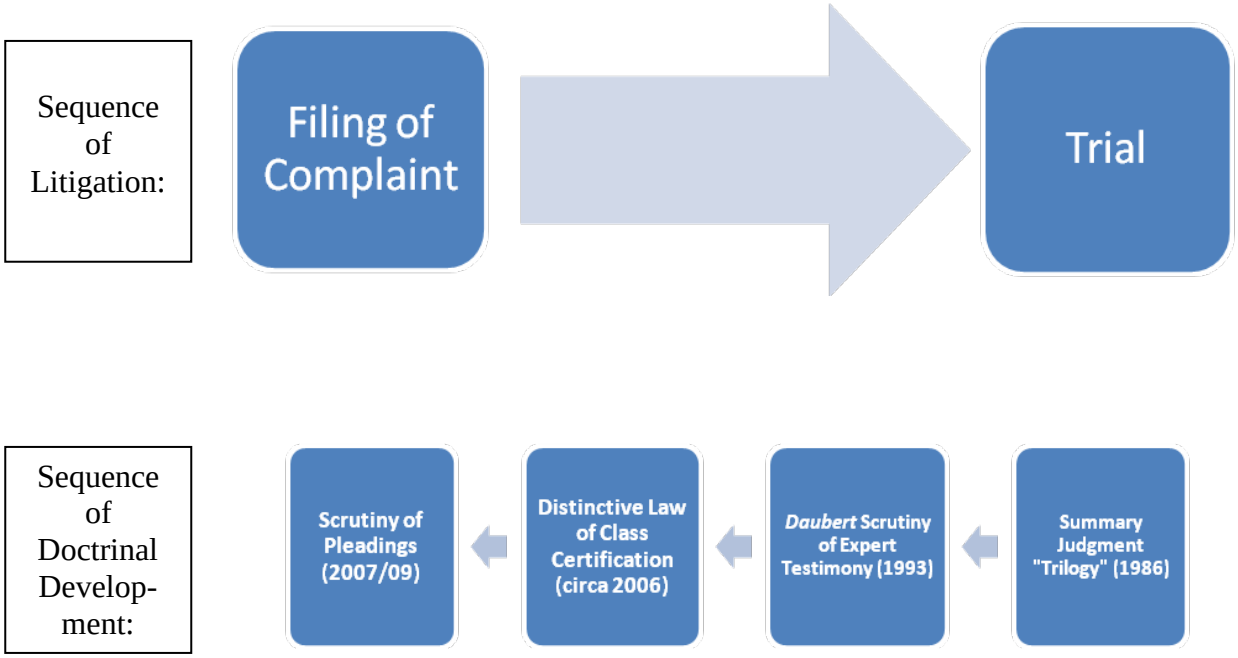
Second, the movement in doctrine over time has involved a shift in emphasis. Broadly speaking, the shift has been away from a primary focus upon the regulation of variance to, now, a substantial additional focus on the regulation of cost imposition. Yet, whereas judicial regulation of variance had proceeded directly to pinpoint variance that is normatively troubling, latter-day judicial regulation of cost imposition has proceeded indirectly. In *Twombly* and *Iqbal*, the Court seeks to capture concerns over the costliness of unwarranted discovery through scrutiny not of the discovery process itself but, rather, of pleading standards.

Third, until recently, each push of judicial scrutiny ever earlier within the pretrial phase has brought with it a distinctive process for limited discovery to inform the particular judicial ruling at issue. Having now pushed judicial scrutiny to the very outset of the litigation process – before discovery has commenced – the Court in *Twombly* and *Iqbal* portends the deployment of such scrutiny without an adequate body of information on which to base its exercise. Or, perhaps more accurately, *Twombly* and *Iqbal* raise the question whether courts may meaningfully identify a domain of civil cases in which

discovery is not needed in order to assess whether the complaint has set forth "enough facts to state a claim to relief that is plausible on its face."[41] The three sections of this Part elaborate on these points, in turn.

A. Pretrial as Trial

Were one to array the four signal developments for the pretrial stage in such a way as to convey their timing chronologically and the particular pretrial phase to which they speak, one would come up with a chart roughly along the following lines:



The chart underscores the steady push of judicial scrutiny ever earlier within the pretrial phase over the past quarter-century. The enterprise begins with the Supreme Court's "trilogy" of decisions from 1986[42] that put firmly

[41] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[42] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). *See also* Joe Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 906 (2007) (empirical analysis suggesting

into place the present-day framework for summary judgment, upon the conclusion of discovery as a whole or, at least, in relevant part.[43] The trilogy famously cast off the previous notion from the Court's 1970 decision in *Adickes v. S.H. Kress & Co*. that "the moving party . . . ha[s] the burden of showing the absence of a genuine issue as to any material fact."[44] The Court instead linked the moving party's burden of production with respect to a motion for summary judgment to that party's ultimate burden of proof at trial.

Specifically, defendants who lack the ultimate burden of proof at trial need not foreclose entirely the existence of a triable issue, as the passage from *Adickes* had indicated. Rather, in discharging the initial burden of production in a summary judgment motion, the defendant simply must "point[] out" to the court "that there is an absence of evidence to support the nonmoving party's case."[45] Rule 56 then "mandates the entry of summary judgment, after adequate time for discovery," against a plaintiff "who fails make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial."[46] As commentators have observed, the crucial move in the Court's trilogy consists of a direction for "inquir[y] into evidentiary sufficiency at the summary judgment stage" – a stance that effectively recasts summary judgment from "a plaintiff's motion . . . to a defendant's motion."[47]

In chronological terms, the next signal development for the pretrial phase of complex litigation comes in 1993, with the Court's exposition in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[48] of the evidentiary standard for admissibility of expert testimony. Here, too, as for summary judgment, there is a non-trivial degree of judicial weighing of evidence. One lower court famously remarked about the emergence of a "brave new world" in which judges "largely untrained in science" must engage admissibility disputes concerning "matters at the very cutting edge of scientific research."[49] As elaborated in subsequent Court decisions, the *Daubert* admissibility inquiry extends beyond bare-bones scrutiny of the expert's professional credentials to such matters as whether the expert's opinion falls "outside the range where

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that the Court's trilogy of decisions largely confirmed preexisting trends in lower-court summary judgment practices).

[43] *See* FED. R. CIV. P. 56(a) (authorizing grants of partial summary judgment as to "all or part of the claim").

[44] 398 U.S. 144, 157 (1970).

[45] *Celotex*, 477 U.S. at 325 (plurality op.).

[46] *Id.* at 322.

[47] Issacharoff & Loewenstein, supra note 11, at 83, 84.

[48] 509 U.S. 579 (1993).

[49] Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995) (panel opinion by Kozinski, J., on remand from Supreme Court).

experts might reasonably differ"[50] and whether there is "too great an analytical gap between the data and the opinion proffered."[51]

Daubert and its progeny are not strictly "procedural" decisions in the sense of the Federal Rules of Civil Procedure. The *Daubert* line of decisions nonetheless flows from their close doctrinal cousin, the Federal Rules of Evidence.[52] Evidentiary rulings have long formed one of the key modes for judicial oversight of litigation in the pretrial phase, such as to counsel against a formalistic distinction between "procedure" and "evidence" in accounts of the judicial role. In practical terms, moreover, *Daubert* bears a close connection to summary judgment itself, given that the admissibility of crucial expert testimony often will determine whether the party that has proffered the expert – characteristically, the plaintiff with the burden of proof on the merits – will be able to put forward a triable issue on an element of its case. The admissibility question presented in *Daubert* itself exemplified this close practical connection to summary judgment, in keeping with centrality of expert testimony to mass tort litigation generally.[53]

The connection to summary judgment is not just practical and conceptual but also one related to matters of timing within the pretrial process. Though not necessarily situated at the end of discovery in the manner of summary judgment, *Daubert* admissibility motions generally come well into the pretrial phase. The objecting party characteristically has taken discovery to pin down the facts or data on which the expert seeks to base her opinion[54] and, often, has put forward a critique of that opinion by way of a contrary expert report.[55]

Now, take the story forward chronologically in procedural doctrine (and backward sequentially within the pretrial phase). The next two developments do not come at or near the end of discovery but, rather, at much earlier stages

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[50] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153 (1999).

[51] General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

[52] The *Daubert* Court construed then-existing Rule 702 of the Federal Rules of Evidence. *See* 509 U.S. at 588-94. Subsequent amendments have written into the rule text much of the *Daubert* framework. *See* FED. R. EVID. 702 (2000 amendments) (permitting an expert witness to testify "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case").

The conceptual affinity of evidence rules and procedure rules is apparent from their common treatment under the *Erie* doctrine. A federal court sitting in diversity jurisdiction applies federal rules as to both evidence and civil procedure, not the rules on those topics of the state in which the court sits.

[53] *See* 509 U.S. at 596. On *Daubert* as a significant, but problematic, judicial checkpoint that effectively polices the progress of mass tort litigation from an immature to a mature stage, see RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 39-43 (2007).

[54] *Cf.* FED. R. EVID. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.").

[55] *See* LEONARD ET AL., *supra* note 11, § 10.2.

of the pretrial process. Rule 23 today directs courts to rule on motions for class certification at "an early practicable time," if not strictly "as early as practicable."[56] The critical development here consists of the emergence, in recent years, of what amounts to a distinctive law of class certification – "distinctive" in the sense of setting apart the content and process of class certification rulings from other rulings in the pretrial landscape. Though not yet cemented into place by way of a definitive Supreme Court decision, the adoption of such a distinctive law of class certification by a broad array of federal appellate courts has accomplished much the same doctrinal result, in substantial part. One may sense the degree of change in what many consider the signature appellate decision in this line: the Second Circuit's 2006 decision in *In re Initial Public Offering Securities Litigation* ("*IPO Securities*"),[57] the framework of which drew from other circuits' precedents[58] and has since elicited endorsements from additional circuits.[59]

Under the framework of *IPO Securities* and similar decisions, the court must affirmatively determine whether the relevant requirements for class certification under Rule 23 have been met by a preponderance of the evidence,[60] even when the dispute over certification – say, by way of competing expert reports – overlaps with the parties' ultimate dispute on the merits.[61] Note here, again, the tasking of the court in the pretrial phase with the weighing of evidence, albeit only for the purpose of making the class certification determination and with no issue-preclusive effect in the event of trial.[62]

In so ruling, the Second Circuit expressly disavowed two of its own earlier decisions that had instructed district courts to ask simply whether the would-be plaintiff class had put forward "some showing" of the predominant common questions needed for certification under the most frequently

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[56] The shift in language stems from the 2003 amendments to Rule 23, which substituted the current language for that in the original 1966 Rule.

[57] *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

[58] As the Second Circuit itself readily acknowledged in *IPO Securities*, its framework finds its roots in aspects of earlier decisions from other circuits – most prominently, the Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). *See IPO Securities*, 471 F.3d at 38 (citing additional, similar decisions from the Third, Fourth, Fifth, Eighth, and Eleventh Circuits).

[59] *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268 (5th Cir. 2007).

[60] *See* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008) (so reading *IPO Securities*); *Hydrogen Peroxide*, 552 F.3d at 307.

[61] *Hydrogen Peroxide*, 552 F.3d at 307; *IPO Securities*, 471 F.3d at 41. Class certification disputes today often play out in terms of competing expert submissions due to the integration of interdisciplinary insights into many of the areas of substantive law – securities fraud, antitrust, employment discrimination, and the like – that are often the subject of proposed class litigation. For further discussion of this point, see Nagareda, supra note 11, at 115-20.

[62] *IPO Securities*, 471 F.3d at 41.

invoked subdivision of Rule 23[63] – specifically, whether plaintiffs had done so by way of expert submissions that were not flatly "inadmissible as a matter of law."[64] Today, by contrast, the proffering of *Daubert*-worthy expert testimony or other evidence in the posture of class certification is no longer enough.[65] Rather, such evidence must be persuasive, more likely than not, when considered by the court in light of "all the evidence" that bears on the certification requirements in dispute – that is, including the competing evidence (expert or otherwise) put forward by the defendant in opposition to certification.[66]

The latest chapter of this quarter-century story pushes judicial scrutiny back as far as it can go within the pretrial process – to scrutiny of the complaint, even before a responsive answer is required.[67] In its 2007 *Twombly* decision, the Court interred what it depicted as overreadings of its 1957 language in *Conley v. Gibson* to the effect that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[68] As construed in *Twombly*, the demand of Rule 8(a)(2) for a "short and plain statement of the claim showing that the pleader is entitled to relief" does not countenance "a wholly conclusory statement of the claim" that leaves open a "possibility that the plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[69] The complaint instead must contain "enough facts to state a claim that is plausible on its face" at the inception of litigation.[70]

In 2009, the Court in *Iqbal* went on to clarify that *Twombly* does indeed stand as a transsubstantive construction of the pleading standard in Rule 8,

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[63] *Id.* at 40 (quoting Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999)). Opt-out classes under Rule 23(b)(3) stand as the most frequently sought and most frequently granted type of class action. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 113 (1996). The most hotly-debated certification requirement in Rule 23(b)(3) consists of its demand for a judicial determination of predominant common questions of law or fact. *See* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 998 (2005) (describing predominance requirement as the focus of most disputes today over class certification).

[64] *IPO Securities*, 471 F.3d at 36 (quoting *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001)).

[65] *See* Nagareda, *supra* note 11, at 125-26; Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 REV. LITIG. 71, 111 (2008).

[66] *Hydrogen Peroxide*, 552 F.3d at 320; *IPO Securities*, 471 F.3d at 27.

[67] *See* FED. R. CIV. P. 12(b).

[68] 355 U.S. 41, 45-46 (1957). The *Twombly* Court remarked that, "after puzzling the profession for 50 years, this famous observation [from *Conley*] has earned its retirement." 550 U.S. at 563.

[69] 550 U.S. 544, 561 (2007).

[70] *Id.* at 570.

not an approach beholden to the kind of complex, proposed antitrust class action of the sort presented in *Twombly* itself.[71] The *Iqbal* Court further cast judges in search of "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."[72] Whereas *Conley* had withheld dismissal on the pleadings absent a determination that discovery would be capable of revealing "no set of facts" that would entitle the plaintiff to relief, the *Iqbal* Court cautioned that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[73]

When one arrays summary judgment, *Daubert* admissibility, class certification, and dismissal on the pleadings, an overarching theme emerges. It is no accident that these developments should have emerged piecemeal over the past quarter-century, during the age of the "vanishing trial."[74] In a world of civil litigation – certainly, of complex litigation – dominated by the endgame of settlement, rather than trial, it should come as no surprise that a common intuition should have emerged to fashion the principal checkpoints within the pretrial process into meaningful occasions for judicial regulation – whether in terms of the weighing of evidence (if only for purposes of a specified pretrial motion, such as class certification) or a demand at the outset for "facts" that "nudge[]" the complaint "across the line from conceivable to plausible."[75] Courts no longer can realistically kick the proverbial can of serious scrutiny for civil claims down the road to full-scale fact finding at trial. Rather, in an era in which the pretrial process has become the trial in practical effect, the pretrial phase increasingly has taken on trial-like dimensions.

From the standpoint of comparative law, one might say that civil litigation today, in actual operation, effectively blurs the line between civil-law and common-law trials.[76] The full-scale, front-to-back, common-law trial before a jury[77] has nearly vanished. Its replacement effectively consists

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[71] 129 S. Ct. 1937, 1953 (2009).

[72] *Id.* at 1950.

[73] *Id.* at 1950.

[74] *See supra* note 1.

[75] *Twombly*, 550 U.S. at 570.

[76] This is hardly a development noticed only recently. For a prescient observation along similar lines, prior to the Court's summary judgment trilogy, see Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989). For a classic comparative treatment of U.S. and German civil procedure generally, see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

[77] The steady elaboration of judicial scrutiny at key checkpoints within the pretrial landscape has spawned, in turn, a steady elaboration of commentary that challenges several aspects of this development as unconstitutional based on an originalist account of the right to a civil jury under the Seventh Amendment. *See, e.g.*, Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93

of a regime of sequenced trial-like proceedings on what are formally pre-trial motions, all ruled upon by the judge alone.[78]

B. From Variance Regulation to Cost Imposition Regulation

The richer vocabulary of civil litigation scholarship today enables us to evaluate, by way of cross-comparison, the developments for judicial regulation of the pretrial phase. Broadly speaking, the move to situate judicial scrutiny ever earlier within the pretrial phase has come along with a shift in emphasis from the regulation of variance to an additional – in *Twombly* and *Iqbal*, seemingly dominant – concern for the regulation of cost imposition. At the outset, one must take care to draw out an implication from the overview of the scholarly literature in Part I – namely, that variance and cost imposition are not concepts entirely unrelated to, or independent from, one another. Rather, the insight of finance-based perspectives is precisely that variance has a cost dimension. Indeed, one can understand that cost dimension by reference to the frames of gains and losses highlighted by cognitive psychological perspectives. This section initially elaborates this point in conceptual terms and then lends specificity to the discussion by reference to the particular pretrial motions identified in the previous section.

For the side that anticipates variance in the nature of a potential gain – generally the plaintiff's side in civil litigation – the cost dimension of that variance consists of the cost associated with getting to the particular stage within the pretrial process at which the desired variance is brought to bear upon the defendant. In finance-based terms, one can understand these costs from the plaintiff's perspective as the purchase price of the option to proceed to the next pretrial stage. Once acquired, such an option can have considerable value, ala a put or call option in the stock market that an investor might exercise within a specified time period.

For the defendant situated in the loss frame, variance at any given pretrial stage also has a cost dimension. It consists of the cost associated with the bearing of the risk associated with the possibility of a dramatically pro-plaintiff outcome. It then is this variance of outcome (and its associated risk-bearing cost) that the defendant instead might choose to offload by way of a certain outcome: settlement, priced in terms of the expected value of the

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IOWA L. REV. 1667 (2008); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (2008); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007). For a different account of the historical evidence, see William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653 (2008). I do not enter into this historical debate here.

[78] For a classic critique of this development, see Arthur R. Miller, *The Pre-Trial Rush to Judgment: Are the "Litigation Explosion," "Liability Cases," and Efficiency Cliches Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

underlying claim (*p* times *A*, in the parlance of early economic models) plus a premium for the offloading of the risk.[79]

Now, consider the foregoing observations in terms of the pretrial motions highlighted in the previous section. Summary judgment guards against a particular form of variance: the prospect that, absent summary judgment, the outcome at the next litigation stage – trial – will consist of an unreasonable assessment of the claim on the part of the fact finder. In financial terms, variance in such a form – like the variance of weather patterns for the agricultural industry – is capable of being priced and offloaded accordingly. The point of summary judgment, however, is effectively to provide the defendant with an alternative response: the prospect of gaining certainty by way of summary judgment that terminates the suit entirely, instead of the defendant having to garner certainty – if at all – by offloading via settlement the risk of an unreasonable verdict on the merits at trial.

The important point here is that the source of the variance – the possibility of an unreasonable verdict – is itself normatively undesirable. A non-summary-judgment-worthy claim also gives rise to variance that can and would be priced into any settlement, just not variance that stems from something that is normatively troubling: the prospect that the fact finder might resolve ambiguities about the case in one among many reasonable ways. The further nuance imparted by the Supreme Court trilogy is to reduce the cost to the defendant of deploying the summary judgment motion. Under the trilogy, the defendant simply may insist that the plaintiff – the party with the ultimate burden of proof – show her evidentiary cards. A moving defendant need not affirmatively demonstrate the absence of a genuine issue of material fact.[80]

Not surprisingly, given their practical connection to summary judgment, *Daubert* motions, too, guard against a form of variance thought to be normatively undesirable – here, the risk that the fact finder might credit expert testimony at trial that has the superficial veneer of science or some other body of "specialized knowledge"[81] but that actually includes an "analytical gap" of a speculative nature.[82] This form of variance, too, could be priced, if allowed to persist into trial. The point of a *Daubert* motion, like a summary judgment motion, is to empower the opposing side – again, characteristically, the defendant – to gain certainty by means other than the

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[79] These are by no means the only options that one might imagine for the offloading of litigation risk by defendants. For a discussion of additional possibilities drawn from corporate risk finance mechanisms, see Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009).

[80] *See* text accompanying note 45 *supra*.

[81] FED. R. EVID. 702 (treating alike, for admissibility purposes, expert testimony based on "scientific, technical, or other specialized knowledge"); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (same).

[82] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

pricing of variance into a settlement offer. Unlike a summary judgment motion along the minimal lines countenanced in the trilogy, however, wrangling over a *Daubert* motion is far from a cheap proposition for the movant (or, for that matter, its opponent), as the practice of substantial "*Daubert* hearings" on the admissibility question attests.[83] Even so, with a view to the settlement endgame, even a lengthy *Daubert* hearing may amount to a cheaper and more efficient way to address a wedge issue in litigation relative to a front-to-back trial.

Though situated substantially earlier within the pretrial process, judicial rulings on motions for class certification also play out a broadly similar concern over variance in a normatively troubling form. The oft-noted effect of class certification is to situate for unitary adjudication – in one proverbial roll of the dice[84] – the contending sides' underlying dispute on the merits. A commonplace observation holds that, rather than "roll these dice," the defendant "will be under intense pressure to settle."[85] The scholarly literature, however, has distinguished the positive observation that class certification tends to induce settlement from the normative evaluation of whether such settlement "pressure" is good or bad.[86] The fashioning of an answer to the latter question turns out to be among the primary concerns of the procedural requirements for class certification, buttressed by the kind of "rigorous" judicial inquiry now prescribed in *IPO Securities* and similar decisions.[87]

With some details suppressed for ease of presentation, the critical inquiry in class certification today consists of whether the proposed class comprises a cohesive unit for unitary adjudication. The most frequently contested certification requirement within Rule 23 casts this notion of cohesiveness in

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[83] *See* Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 324 (2007) ("The *Daubert* hearing can be one of the most expensive phases of a trial."); Thomas O. McGarity, *Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 934 (2004) ("Separate *Daubert* hearings can be quite expensive, consuming many hours of attorney and expert witness time.").

[84] The image here stems from the colorful rhetoric used in a controversial decision on the subject authored for the Seventh Circuit by Judge Richard Posner. *See* In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

[85] *Id.*

[86] *See* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1888 (2006).

[87] The phrase "rigorous analysis" appears to have originated in the Supreme Court's opinion in *General Telephone Co. v. Falcon*, 457 U.S. 147, 160-61 (1982) and now serves as a shorthand reference for the kind of judicial approach to class certification analysis subsequently detailed by the federal appellate courts in the *IPO Securities* line of decisions. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 (3d Cir. 2008) (quoting this phrase from *Falcon*, 457 U.S. at 160-61); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 29 (2d Cir. 2006) (same).

terms of whether "questions of law or fact common to the class members predominate over any questions affecting only individual members."[88] In less formal terms, the question is whether unitary adjudication would abide by the logic "if as to one, then as to all" or, instead, would involve the amassing of individual claims that are not relevantly the same – say, a situation in which the class members are not the victims of the same wrong but, rather, a series of differing, individualized wrongs, if any. Like fights over *Daubert* motions, wrangling over class certification has the potential to amount to a costly endeavor for both movant and opponent – at its extreme, after *IPO Securities*, to a process that might approach "a protracted mini-trial of substantial portions of the underlying litigation."[89]

To be sure, class cohesiveness remains very much a matter of degree, for no collection of would-be class members is the same along all imaginable dimensions.[90] Still, insistence upon a rigorous judicial inquiry into class cohesiveness guards against two sorts of problems. "Claim fusion" involves the tendency to cast similarities among the proposed class members at such a high level of generality as to encompass "aspects of disparate individual claims" and, in so doing, to inhibit defense inquiry into pertinent differences.[91] "Cherry-picking" involves the equivalent in aggregate procedure of an unrepresentative sample in statistical analysis, whereby an

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[88] FED. R. CIV. P. 23(b)(3). On the tendency of the terminology in Rule 23(b)(3) to obscure the nature of the inquiry that courts today undertake into the cohesiveness of the proposed class, see Nagareda, *supra* note 11, at 132 (noting that Rule 23(b)(3) in actual operation insists not upon the mere raising of common "questions" but, rather, upon a demonstration that a class-wide proceeding has the capacity to generate common answers). Rule 23(b)(2) gets at a similar notion of class cohesiveness through its insistence upon a judicial determination that the defendant has "acted . . . on grounds that apply generally to the class," such as would – if shown to be unlawful – warrant a form of indivisible relief "respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

[89] *IPO Securities*, 471 F.3d at 41. *Daubert* motions can differ from class certification motions in terms of the manner in which they cast the question for the court. *Daubert* frames the fight over expert testimony as an evidentiary dispute concerning the facts. As framed in the *IPO Securities* line of decisions, a motion for class certification, too, may call for resolution of factual disputes that bear upon satisfaction of pertinent certification requirements. *See id*. at 41. In addition and with considerable frequency today, however, a class certification motion may turn upon competing accounts of underlying substantive law, as manifested in contrary expert submissions from the two sides. *See* Nagareda, *supra* note 11, at 136-37, 141-43, 153-62_(discussing securities, antitrust, and employment discrimination litigation in which ostensibly dueling expert submissions as to class certification are actually dueling over the proper account of substantive law).

[90] One recent effort to describe the kinds of intra-class differences that matter to class certification speaks in terms of "those that give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the underlying claims." Samuel Issacharoff & Richard A. Nagareda, *Class Settlements under Attack*, 156 U. PA. L. REV. 1649, 1684 (2008).

[91] Erbsen, *supra* note 63, at 1011.

atypical tail ends up wagging the much larger dog comprised of a unitary merits determination as to the class as a whole.[92]

Details aside, the larger point remains that class certification analysis guards against the deployment of variance and its consequent settlement pressure when unitary adjudication of the merits would generalize illegitimately. By contrast, when claims are relevantly the same, the variance imparted by class certification does not comprise a point of normative concern. Quite the opposite: Certification may well mark a desirable fulfillment of "[t]he policy at the very core of the class action mechanism" – one that the Supreme Court has described in terms of overcoming "the problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights."[93] There – say, in the routine certification today of antitrust class actions for price fixing – class certification gives rise to a whopping degree of variance, effectively making litigation viable when it would not otherwise be so. But that variance and its consequent settlement pressure are thought a virtue, not a vice, of aggregation.

The latest elaboration of judicial regulation for the pretrial phase – the pleading standard of *Twombly* and *Iqbal* – marks a shift in emphasis. Even a casual reading of the Court's opinions cannot help but pick up the attention to cost imposition rather than variance as such. In a striking break from the ethos of the 1938 Rule overhaul, the Court declared: "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'"[94] Rather, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [either the summary judgment stage or trial]."[95] Cost imposition matters, in other words, even when later stages in the litigation process would afford viable checkpoints.

For pleadings today, one might say that the insight of the 1970s-style economic models of settlement has now become the law of Rule 8. That which the Court regards as "no answer" – judicial oversight of discovery – was precisely the answer that the 1938 Rule designers found satisfactory.[96]

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[92] *Id*. at 1010. A third problem identified by Erbsen concerns not the cohesiveness of the proposed class as such but, rather, what he describes as ad hoc lawmaking "to devise substantive and evidentiary shortcuts around management problems that dissimilarity imposes." *Id*. at 1012.

[93] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[94] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007) (quoting *id*. at 573 (Stevens, J., dissenting)). *See also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (reading *Twombly* as a "rejection of the careful-case-management approach" to discovery).

[95] *Twombly*, 550 U.S. at 559.

[96] *See id.* at 573-76 (Stevens, J., dissenting). For a prominent district judge's assessment of the disjunction between efforts at discovery rule reform and on-the-ground judicial

Under the logic of *Twombly* and *Iqbal*, by contrast, "it is only by taking care"[97] to insist upon a complaint with "enough facts to state a claim to relief that is plausible on its face"[98] – facts shorn of "legal conclusions" that are "not entitled to the assumption of truth"[99] – that courts today can prevent the cost imposition that discovery otherwise would occasion. The 1938 answer to concern over cost imposition via discovery, in short, has become today's non-answer. Indeed, the crucial language used by the Court – particularly, the contrast drawn in *Iqbal* between "legal conclusions" and "facts" – reinjects into Rule 8 a version of the law-fact distinction that the 1938 reformers assiduously sought to avoid though the studied omission of their wording of the pleading rule.[100] One of the leading 1938 reformers went on to tout the omission of the word "fact" as having "avoided one of the most controversial points in code pleading."[101]

One nonetheless should take care not to overdramatize the break from the 1938 ethos. A larger conceptual affinity between the Court's recent pleading decisions and the enterprise of the 1938 reforms bears note. The 1938 reforms sought to remove the distortive effect on the resolution of claims then thought to stem from hypertechnical form pleading. The worthy intuition was that, with respect to claim pricing, procedure should introduce as little distortive effect as possible.[102] One may daresay that much the same intuition animates judicial regulation via the various pretrial motions – a process informed by the dominance of the settlement endgame and the recognition that serious scrutiny of litigation cannot realistically be deferred to a trial that, in all probability, will not occur. Today, the underlying sense is that process – the variance and costs that it entails – is again exerting a distortive effect on claim pricing. To cast the present-day decisions in *Twombly* and *Iqbal* entirely as a repudiation of the 1938 ethos would be to miss the deeper conceptual affinity between the two eras.

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practices on the subject, see Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENVER U. L. REV. 227 (2010).

[97] *Twombly*, 550 U.S. at 559.

[98] *Id.* at 570.

[99] *Iqbal*, 129 S. Ct. at 1950. For a suggestion that the prescribed judicial disregard for conclusions in the complaint might be central to enabling the lower courts to make operational the Rule 8 standard, as now construed by the Supreme Court, see Steinman, supra note 11, at 49.

[100] I draw here from the crisp statement of this criticism in Bone, *Plausibility Pleading Revisited*, *supra* note 11, at 864-66. For a defense of the *Iqbal* Court's distinction, see Steinman, *supra* note 11, at 32-34.

[101] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 242 (2d ed. 1947). Several states within the United States as well as foreign legal systems continue to insist upon fact-based pleading. *See* Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 DENVER U. L. REV. 245, 265-78 (2010).

[102] *See* Tidmarsh, *supra* note 5, at 526.

Recognition that *Twombly* and *Iqbal* share more in common with 1938 than might first meet the eye, nonetheless, does not resolve the workability of the Court's approach. On that score, two aspects of the shift to considerations of cost imposition bear note: its indirection as a mode of regulation and its relationship to the other pretrial motions that seek to regulate variance at later stages. The point about regulatory indirection speaks to the effort to forestall cost imposition via discovery not through the regulation of discovery itself – what the Court declares to be a non-answer – but, rather, through its gateway: the pleading that gets the plaintiff into court as a party who then may pursue discovery under Rule 26.[103]

The *Twombly* Court tellingly included a lengthy quote from a 1989 law review article by Judge Frank Easterbrook that derides the enterprise of direct judicial regulation of discovery abuse as involving a fundamental problem of timing. On Judge Easterbrook's account, the court as would-be regulator "cannot . . . know the expected productivity of a given [discovery] request," "cannot measure the costs and benefits to the requester[,] and so cannot isolate impositional requests."[104] The *Twombly* Court's endorsement of this reasoning is ironic. If direct regulation of discovery suffers from a timing problem because the would-be regulator cannot know in advance what discovery will unearth, then one wonders how indirect regulation via pre-discovery inquiry into the plausibility of the complaint will fare any better.[105]

The difficulty of this indirect regulatory enterprise deepens when one considers it by comparison to the project of variance regulation through the other pretrial motions situated at later stages. Each of the motions later in the pretrial process seeks – however imperfectly – to distinguish variance that is

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[103] *See* FED. R. CIV. P. 26 (setting forth parameters for civil discovery).

[104] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 639 (1989) (quoted in *Twombly*, 550 U.S. at 560 n.6). For a recent refinement and extension of Judge Easterbrook's insight concerning timing, see Scott A. Moss, *Litigation Discovery Cannot be Optimal But Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889 (2009), discussed in greater detail infra Part II-C.

[105] For similar criticism, see *Access to Justice Denied: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 16 (2009) (statement of Arthur R. Miller), *available at* 2009 WL 3474101 ("*Twombly-Iqbal* has set up a somewhat illogical dichotomy because the Court entrusted district judges with the freedom to use 'judicial experience and common sense' to dismiss a claim at genesis for noncompliance with a heightened pleading requirement, but disparaged their ability to manage cases in an efficient and economic manner to reach a merit determination.").

On the prospect that the previous *Conley* pleading regime itself involved logical circularity, see Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("Since discovery extends under Rule 26 to anything 'relevant to the subject matter,' relevance must be ascertained through some other mechanism. The only effective alternative is discovery itself. Hence, under *Conley v. Gibson*, an opposing party and the court can ascertain the limits on what is being sought in discovery only by ascertaining what is being sought in discovery.").

normatively troubling from that which is not (or, if anything, that might well be normatively desirable). We know that the variance to which summary judgment, *Daubert*, and class certification analysis respond would be normatively undesirable and thus something to be prevented before-the-fact, because – respectively – a reasonable fact finder could come out only one way on the merits, the proffered expert would testify based on speculation gussied up as science, and the members of the class proposed for unitary adjudication are not relevantly the same.

But, now, consider the scrutiny of pleadings for plausibility. To allow an implausible complaint to proceed forward is to countenance not only cost imposition via discovery but also variance. The problem is that, when judicial scrutiny of plausibility is to occur, the informational base on which the court may ascertain whether variance is normatively good or bad is itself quite thin, precisely because discovery has yet to take place. The plaintiff has spoken in the complaint, but the defendant characteristically has not spoken at all in responsive papers. In hindsight, an implausible complaint that remains implausible imposes both cost and variance that are undesirable, but an implausible complaint that later becomes plausible – the scenario that the now-retired *Conley* language sought to preserve – does not. This, of course, is a further manifestation of the fundamental timing problem involved in the direct regulation of discovery. On this view, the Court's deep skepticism about direct regulation and its consequent gravitation over to indirect regulation under the rubric of pleading standards starts to resemble something of a doctrinal shell game. The next section of this Part asks whether we may gain any traction on the timing problem via cross-comparison of the processes by which courts have come to inform the various other pretrial motions.

C. The Informational Base for Judicial Regulation

The three major pretrial motions focused on variance in complex litigation – summary judgment, *Daubert*, and class certification – share a common operational structure. The elaboration of all three checkpoints in recent decades has come along with a related elaboration of practices – if not hard-edged rules – as to the process by which the court is to inform its ruling. The point is easiest to grasp with respect to a ruling on a motion for summary judgment under the trilogy, situated at the point when discovery has concluded in relevant part. If anything, the trilogy framework – now substantially written into the text of Rule 56[106] – buttresses the informational

[106] *See* FED. R. CIV. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as

base for the court's ruling by aligning the burden of production for a summary judgment motion with the underlying allocation of the burden of proof on the merits.[107]

Daubert motions and class certification motions, too, have spawned an elaboration of processes by which the court may inform its rulings. Though short of full-scale discovery on all aspects of the case, expert discovery – often demarcated separately as such in multi-phase trial plans for complex cases – operates to generate an informational base for the court's *Daubert* ruling. The further practice of "*Daubert* hearings" on motions to exclude expert testimony – hearings that might extend over multiple days in complex disputes[108] – injects additional adversarial testing of the information generated by expert discovery.

The law of class certification has come to much the same approach. The *IPO Securities* line of decisions clarifies that class certification is not a matter of pleading but, rather, of affirmative proof by plaintiffs that the relevant certification requirements have indeed been satisfied.[109] This inquiry presents the judge with "a mixed question of fact and law."[110] Recognition of the factual dimension of the certification ruling, in turn, calls for a process of "controlled discovery."[111] Here, the court stands to exercise "considerable discretion" to strike a delicate balance: "the district judge must receive enough evidence, by affidavits, documents, or other testimony, to be satisfied that each Rule 23 requirement has been met," but without turning the pretrial process for class certification into a "protracted mini-trial."[112]

In *Twombly* and *Iqbal*, the Court pushes judicial scrutiny all the way back to the outset of the pretrial phase and shifts the primary focus from regulation of variance to regulation of cost imposition. Yet, in doing so, the Court effectively inhibits the emergence of an informational base for rulings on motions to dismiss. In practical operation, current law effectively has deemed the cost of building such an informational base to be worth incurring as a vehicle for variance regulation via summary judgment, *Daubert*, and class certification. Yet the cost of building a similar informational base for motions to dismiss on the pleadings – the cost of discovery – is conceived as precisely the thing to be avoided. The consequence is to cast courts on a

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otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

[107] *See* text accompanying note 45 *supra*.

[108] *See* Andrew I. Gavil, *The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience*, 4 J. COMPETITION & ECON. 177, 189 (2008) (*Daubert* hearings "can engage the experts in days of almost trial-like examination and cross-examination").

[109] *See* Nagareda, *supra* note 11, at 100.

[110] *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 40 (2d Cir. 2006).

[111] FED. R. CIV. P. 23(c)(1) (2003 amendments), advisory committee notes.

[112] *IPO Securities*, 471 F.3d at 41.

regulatory enterprise – an indirect one, at that – while at the same time inhibiting them from informing their own deployment of regulation. The resulting danger is the same as in any other regulatory enterprise in which the would-be regulator systematically lacks pertinent information – namely, that the regulator will act based upon ideological or at least idiosyncratic predilections.[113] Whether this fear will manifest itself in case law forms one of the hottest open questions for empirical research on pre-discovery dismissals in the post-*Iqbal* period.[114]

The next Part will consider alternatives to judicial regulation of the pretrial process by way of motions conceptualized along the lines of those in current doctrine. For now, I take as given the implicit premise of current doctrine that courts comprise the available regulatory institution and that they regulate through particular means – namely, dispositive motions designed to determine whether the case should proceed forward to trial or, instead, should be stopped in its tracks.

The Court's pleading decisions have elicited attention from Congress in the form of proposed legislation to restore the *Conley* pleading standard.[115] In order to evaluate such a proposal or to fashion alternatives, one initially would want to assess whether the indirect regulatory enterprise of *Twombly* and *Iqbal* is salvageable or irretrievably flawed. A salvage operation would seek to identify a way out of the timing problem to which Judge Easterbrook points. Interestingly enough, multiple additions to the scholarly literature in the post-*Twombly* period coalesce around such an approach. Yet, at the same time, those sources also pinpoint a potentially serious obstacle to successful salvage: the Court's own subsequent decision in *Iqbal*.

Writing in the period between the two Court decisions on pleading, Richard Epstein offers a way out of the timing problem by reading *Twombly* as speaking to "those cases in which the plaintiff has alleged only public sources for making out its claim"[116] – there, of unlawful antitrust collusion, as distinct from permissible parallel behavior, on the part of incumbent firms in the telecommunications industry to resist competition from would-be rival firms.[117] In public-information cases, "the defendant should be able to avoid

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[113] *See, e.g.*, Burbank, *supra* note 11, at 563-64; Clermont & Yeazell, *supra* note 11, at 834.

[114] *Compare* Memorandum re: Application of Pleading Standards Post-*Ashcroft v. Iqbal*, from Andrea Kuperman to Civil Rules Committee, Standing Rules Committee, Nov. 24, 2009, at 2 (concluding that "most of the case law to date does not indicate a drastic change in pleading standards") (copy on file with author), *with* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empircally?*, 59 AM. U. L. REV. 553, 607-08 (2010) (empirical study suggesting adverse affect of *Twombly* and *Iqbal* on civil rights cases).

[115] *See* S. 1504, 111th Cong. (2009) (bill to restore *Conley* pleading standard); H.R. 4115, 111th Cong. (2009) (same).

[116] Epstein, *(Disguised) Summary Judgments*, *supra* note 11, at 81.

[117] *See Twombly*, 550 U.S. at 551. For extensive accounts of the difficulties associated with an inference of collusion in the particular context of the regulated telecommunications

discovery and obtain a judgment on the pleadings by using the same documents or the same kind of evidence to show that there is no genuine issue of fact left to be decided in the case."[118] By contrast, a defense response that references "private information" would warrant vetting via discovery.[119] On this view, the way out of the timing problem consists of ascertaining when a motion to dismiss pre-discovery may function in much the same manner as summary judgment post-discovery.[120]

In another article from the post-*Twombly*/pre-*Iqbal* period, Robert Bone similarly casts the crucial question in terms of whether the complaint contains "allegations that differ in some significant way from what usually occurs in the baseline [scenario of the sort at issue in the case] and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct."[121] The behavior in which the incumbent telecommunications defendants in *Twombly* had engaged – chiefly, staying out of each other's geographic markets and using similar techniques to deter entry by potential rivals – would be suggestive of collusion in an ordinary competitive market, but not in a heavily regulated one of the sort that prevailed in telecommunications during the relevant period.[122] In effect, the defendants' observed behavior comprised the baseline; and nothing in the complaint identified anything of a private nature, worthy of discovery, that would suggest "a higher probability of wrongdoing" in the form of collusion rather than mere parallelism.

Writing during the same interim period from the vantage point of discovery regulation rather than pleading regulation, Scott Moss points toward a broadly similar insight. Moss observes that the timing problem for discovery regulation gives rise to a pooling phenomenon: When courts cannot ascertain the relative costs and benefits of discovery that has not yet occurred, courts must base their regulation of the discovery process on what Moss labels the "average" characteristics of civil cases generally.[123] The

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industry in *Twombly*, see Bone, *Regulation of Court Access*, *supra* note 11, at 884-85; Epstein, *(Disguised) Summary Judgments*, *supra* note 11, at 84-85; . A leading antitrust commentator adds the further nuance that allegations of collusive market division tend to be more amenable to scrutiny based on readily observable market behavior, in contrast to allegations of price-fixing that typically depend upon the uncovering of evidence in the nature of clandestine collusion. *See* Herbert J. Hovenkamp, *The Pleading Problem in Antitrust and Beyond*, 95 IOWA L. REV. BULL. (forthcoming 2010) (manuscript at 5-6), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1508511.

[118] Epstein, *(Disguised) Summary Judgments*, *supra* note 11, at 81.

[119] *Id*. at 82.

[120] *See id*. (observing that the *Twombly* Court "treated the defendant's motion to dismiss as though it set up a 'mini-summary judgment' that is available solely when the plaintiff relies on public information and its ostensible economic implications").

[121] Bone, *Regulation of Court Access*, *supra* note 11, at 885-86.

[122] *See id*. at 885.

[123] Moss, *supra* note 104, at 897.

result is for the discovery process to exhibit the dysfunctionality famously observed in the "market for lemons" among used cars: specifically, "more bad cases and fewer good cases" on the merits tend to occupy the civil docket due to the inability of courts to discern claim quality in the pre-discovery frame.[124] Moss's notion of a pooling phenomenon as to discovery suggests that the trick for any indirect method of regulation via pleading standards lies in delineation of the relevant pool – one in which the no-discovery prescription that would be imposed by dismissal matches not merely the "average" case in the pool but virtually all of them.

In the interim between *Twombly* and *Iqbal*, in short, a viable salvage operation might have cast the demand for "plausible" pleadings along the lines that Epstein, Bone, and Moss suggest – in terms of situations in which public information or some other feature makes appropriate a no-discovery prescription. Today, however, there is a considerable obstacle to this approach: its tension with the Court's elaboration of the *Twombly* standard in *Iqbal*. The *Iqbal* Court expressly rejected the suggestion that *Twombly* somehow "should be limited to pleadings made in the context of an antitrust dispute."[125] Though not a rejection, in so many words, of a distinction grounded in the public nature of the facts in the complaint, this passage from *Iqbal* comes decently close. Antitrust disputes of the sort presented in *Twombly* – specifically, the line between conscious parallelism and collusion – characteristically turn on the inferences that one permissibly may draw from an array of observed business conduct on the part of the defendant firms.

The particular setting of *Iqbal* adds to the difficulty of a salvage operation. *Iqbal* concerned the Bush Administration's "policy" of classifying persons detained in the aftermath of the September 11, 2001 terrorist attacks as being "'of high interest'" to law enforcement.[126] The critical question raised by the plaintiff's constitutional tort action[127] centered

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[124] *Id*. at 924 (citing George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970)).

[125] 129 S. Ct. at 1953.

[126] *Id*. at 1952.

[127] Specifically, plaintiffs invoked the doctrine of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), whereby personal liability for damages may be imposed based upon a federal officer's violation of the plaintiff's constitutional rights. *See Iqbal*, 129 S. Ct. at 1948. *Bivens* liability nonetheless may not be imposed on a respondeat superior basis; rather, the *Iqbal* Court emphasized that "a plaintiff must plead that each Government-official defendant, through the official's own individual action, has violated the Constitution." *Id*. In light of this limitation on the *Bivens* doctrine, the significance – if any – of pleaded facts suggestive of discriminatory intent on the part of lower-level officials other than the defendants comprised a point of contention amongst the Justices in *Iqbal*. *Compare id*. at 1952 (putting aside allegations as to intent of lower-level officials) *with id*. at 1960 (Souter, J., dissenting) (suggesting that the same allegations bear on the defendant high-level officials' intent, insofar as they "knew of" or "condoned" the intent of lower-level officials).

upon whether certain high-level Administration officials had "purposely" adopted this policy on the basis of unconstitutional discrimination – that is, because of the race, religion, or national origin of those ultimately detained.[128] Given that the September 11 attacks had been carried out by Arab Muslim aliens from nations in the Middle East, any Administration official acting in such a context would have been hard pressed to adopt security policies that somehow would not have a dramatically disparate effect upon persons in precisely those categories.

Still, the benign explanation for the classification policy in *Iqbal* (what the Court described in terms of "keep[ing] suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity"[129]) is not as firmly grounded as the benign explanation for the telecommunication defendants' resistance to competition (self-interest in profit from continuation of the existing market structure). The benign explanation for parallel resistance to competition in the telecommunications industry finds support in a wealth of economics on regulated markets, to the point of comprising a very heavy boulder that the assertion of collusion in the *Twombly* complaint could not budge.[130] By contrast, the benign explanation for the classification policy in *Iqbal* was more in nature of one merely more probable, on balance, than the discriminatory explanation.[131]

All of this suggests that proposed legislation to restore the *Conley* pleading standard slices at the wrong point within the timeline of Supreme Court pleading decisions. Such an approach would blind the law to the admirable connection between the Court's recent pleading decisions and the animating impulse behind the 1938 Rule reforms – namely, reemergence of a rough intuition that procedure itself may be distorting, rather than facilitating, the just resolution of civil claims. A more plausible place to slice by way of reform legislation would be at the joint not between *Conley* and *Twombly* but, instead, between *Twombly* and *Iqbal*. The idea would be to cast *Twombly* as a public information case, in contrast to more typical kinds of civil actions of the sort depicted in the Rule forms (a routine automobile accident sounding in negligence[132]) or the Court's own previous case law (say, a employment discrimination action ala the Court's 2002 decision in *Swierkiewicz v. Sorema N.A.*,[133] which neither *Twombly* nor *Iqbal* purports to

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[128] *See id*. at 1952.

[129] *Id*.

[130] *See* Epstein, Twombly, *after Two Years*, *supra* note 11, at 10 ("The great beauty of *Twombly* was that general economic principles showed why the plaintiffs' case was a nonstarter. No comparable theory helps any government official, when we know that public officials always face temptations to disregard the law.").

[131] For a similar reading of *Iqbal*, see *The Supreme Court – Leading Cases*, 123 HARV. L. REV. 153, 261 (2009).

[132] FED. R. CIV. P. Form 11 (standard-form negligence complaint).

[133] 534 U.S. 506 (2002). The *Twombly* Court distinguished its demand for "enough facts to state a claim . . . that is plausible on its face" from a demand for "heightened pleading" of

overrule). In these more typical settings, an informed picture of the relevant events generally may be had only through discovery of privately-held information on both sides. If policymakers believe such discovery to be too intrusive or disruptive to high-level law enforcement operations that implicate national security, then Congress retains the option to bolster immunity doctrines tailored to that setting.[134] The key would be to avoid letting concern over litigation as a disruption to sensitive antiterrorism operations gravitate over to a more general license for courts routinely to assess the plaintiff's overall, gestalt probability of success under the rubric of pleading standards.

One wonders, nevertheless, whether some manner of salvage operation – wherever it might slice doctrinally – is the only, much less the best, option available to the law, now that doctrine has pressed judicial regulation of the pretrial phase to its logical endpoint of pleading. The next Part takes up these questions, connecting the existing enterprise of judicial regulation for the pretrial phase to larger trends buffeting the landscape of civil procedure.

III. REGULATORY ALTERNATIVES AND THEIR LIMITS

The previous Part highlighted how the present-day prescription for judicial regulation of the pretrial phase faces an important practical challenge. In one way or another, the regulator must inform its decision making – hence, merits discovery prior to summary judgment, *Daubert* hearings, and controlled discovery pertinent to class certification. Extension of this third-party regulatory approach to pleading at the outset of litigation, by contrast, does not bring with it great latitude for informing the regulator.[135] Rather, the cost that would be imposed via discovery in order to inform the regulator is thought to be the very problem to be avoided.

Amidst the valuable debate over *Twombly* and *Iqbal*, both within the academy and in Congress, we should not suppose that third-party judicial regulation is the only regulatory mode available. At the outset, I should underscore that I do not mean to suggest that the debate over *Twombly* and *Iqbal* somehow forms a suitable occasion to upend entirely our inherited

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the sort rejected by the Court in *Swierkiewicz*. The dispute in *Swierkiewicz* centered on the plaintiff's allegation that he had been fired on account of his national origin in violation of Title VII of the Civil Rights Act and on account of his age in violation of the Age Discrimination in Employment Act of 1967. 534 U.S. at 509.

[134] The *Iqbal* Court's rejection of respondeat superior as a permissible basis to hold high-level officials responsible for discrimination on the part of lower-level subordinates comprises a version of such an approach in existing doctrine. *See supra* note 127.

[135] One recent addition to the literature seeks to remedy this problem by calling for "limited presuit or pre-dismissal discovery." *See* Dodson, *New Pleadings, New Discovery*, *supra* note 11, at 1. For an informative earlier treatment of presuit discovery, see Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217 (2007).

framework of 1938. Given the high level of contentiousness and interest-group warfare surrounding any proposed change in legal policy today along the lines of "civil justice reform," the notion of opening up the full gamut of the Federal Rules of Civil Procedure to a new process of comprehensive overhaul might well hold about as much attraction – and danger – in civil law as calls for a new federal constitutional convention.[136] I instead offer the analysis of regulatory alternatives in this Part as a way to situate within long-term trends the work that might be done in the short term along the lines of a salvage operation for pleading standards.

The main alternatives to third-party judicial regulation are two-fold: One alternative consists of first-party regulation. The law might, in short, seek to address the information problem associated with third-party judicial regulation of cost imposition through alternative mechanisms designed to elicit information about the anticipated value of discovery to the requesting party. A second alternative consists of a shift in the tools deployed by third-party judicial regulation – specifically, the possibility of informing the settlement process not exclusively through motions framed as dispositive "stop" or "go" signals on the road to trial but, conceivably, in addition, through more direct informing of the claim pricing process itself.

As this Part shall elaborate, these two alternatives are interrelated. Both seek in different ways to more fully and explicitly build into procedural doctrine recognition of the claim pricing role of private parties that underlies our present-day world of settlement. In addition, both alternatives speak ultimately to what one might call the interface between conventional litigation under the Federal Rules and its principal institutional rival in recent decades: dispute resolution by private contractual agreement. The prospects for both alternative modes of regulation, moreover, remain informed and tempered by the richer scholarly tableau that we now have for discourse about civil litigation.

A. First-Party Regulation

The salvage operation for pleading doctrine described in Part II turns crucially on the ability of courts or rule amenders to develop a verbal formulation capable of identifying those civil cases – complex or otherwise – in which dismissal on the pleadings is capable of functioning, in Richard Epstein's words, as a form of "disguised" summary judgment.[137] To be sure, the verbal formulation used in future judicial decisions or some amended version of Rule 8 would not stand alone. The law might attempt to structure

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[136] For a prominent suggestion of such a constitutional convention, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 9 (2006).

[137] Epstein, *(Disguised) Summary Judgments*, *supra* note 11.

the submissions involved in the motion to dismiss and its opposition so as to flag for the court whether the situation is indeed of the public-information variety. The idea would be to call for submissions, in the context of the motion to dismiss, broadly similar to the statements of contested and uncontested facts now commonplace in the summary judgment context by way of local court rules.[138] Such an adaptation from summary judgment practice would elaborate, in operational terms, the notion of situations in which dismissals on the pleadings might plausibly function as disguised summary judgments. The idea would be simply to remove the disguise.

Still, evaluation of the parties' submissions, however structured, would remain in the hands of a third-party regulator: the court. Moreover, although the submissions might temper somewhat the timing problem inherent in the regulation of discovery through indirect means, those submissions still would leave open a substantial degree of latitude for judicial favoritism or disfavoritism. The now-decades of experience with on-the-ground application of the summary judgment trilogy, after all, has given rise to a segment of the scholarly literature that suggests the presence of disfavoritism as to some categories of civil claims, such as employment discrimination.[139]

A more fulsome approach would remove – or, at least, lessen the pressure on – the role of the court itself as third-party regulator. Here, the idea would be to make it unnecessary for the court either to estimate the marginal costs and benefits of discovery or to do much the same under the rubric of identifying whether the case is of the public-information variety. A form of what one might call first-party regulation, in short, might substitute for third-party regulation. Specifically, the law might provide for the shifting of discovery costs post-pleading and pre-summary-judgment in the event that the court ultimately grants summary judgment for the responding party. Absent summary judgment, the cost of discovery would remain where it is now: on the responding party. Indeed, in the 1989 article on discovery invoked by the *Twombly* Court, Judge Easterbrook goes on to mention versions of such a first-party regulatory alternative.[140]

Two points stand out when one considers the prospects for such a cost-shifting approach today: first, the degree to which *Twombly* and *Iqbal* inhibit

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[138] *See, e.g.*, D. Ariz. Local Rule 56.1(a) (parties may submit a stipulation setting forth the undisputed material facts for purposes of the summary judgment motion only); C.D. Cal. Local Rule 56-2 (non-moving party must file and serve a "Statement of Genuine Issues" setting forth all genuine issues of material fact); D. Mass. Rule 56.1 (non-moving party must submit statement of disputed material facts); E.D. Okla. Local Rule 56.1(B) (non-moving party must file a statement of disputed material facts).

[139] *See* Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell L. Sch. Research Paper, No. 08-022, 2008), *available at* http://ssrn.com/abstract=1138373 (finding higher summary judgment rates for employment discrimination cases).

[140] *See* Easterbrook, *supra* note 104, at 645.

its pursuit; and, second, the considerable caution imparted by the now-substantial literature on cost shifting that draws on the interdisciplinary tools from Part I. The point of inhibition imparted by the Court's pleading decisions is this: By effectively positioning the defendant to put forward a relatively low-cost motion to dismiss for lack of the requisite "plausible" claim, *Twombly* and *Iqbal* give the defendant no strategic reason to support – whether by rule change or by private contract in a given case – an alternative whereby it would trade away its chance at hitting the dismissal lottery. Once that lottery ticket is issued, as it is by the Court's decisions, any substantial strategic momentum toward a cost-shifting alternative for the defense side is dissipated. That momentum turns crucially on the relative certainty with which the defendant would bear the cost of discovery, precisely what *Twombly* and *Iqbal* lessen – especially in the short term, while lower courts scramble to discern what those decisions mean. In the event that the court denies the motion to dismiss, moreover, there is no strategic reason for the plaintiff at that point to embrace by contract a contingent possibility of later suffering a shift in discovery costs. In these respects, the implicit embrace of third-party judicial regulation in *Twombly* and *Iqbal* may well amount to an especially sticky design choice in institutional terms.

More broadly, cost-shifting proposals have become a familiar part of the mantra for civil justice reform in the popular press in the decades since Judge Easterbrook's discovery article. One prominent popular commentator, for example, contends that, "[b]y not following most of the rest of the world in the 'loser pays' principle, we [in the United States] give lawyers virtual carte blanche to wield these powers without fear that they or their clients will be held accountable when costs are imposed on an opponent in a poor cause."[141]

The transformation in civil litigation scholarship over roughly the same period now affords us greater insight on cost-shifting proposals. The capacity for first-party regulation to respond to the timing problem inherent in third-party regulation of discovery holds genuine attraction. At the same time, the richer scholarly literature today offers substantial cautionary notes, much in keeping with those associated with shifts from third-party governmental regulation to first-party, privatized regulation outside the realm of litigation. Specifically, the elaborated literature on cost shifting in litigation generally[142] suggests that such an approach with respect to discovery likely would have two countervailing effects.

As to the initial decision to sue, one should expect the addition of a contingent possibility of a discovery cost shift against the plaintiff to have the predictable effect, at the margin, of discouraging suit. In effect, the

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[141] WALTER K. OLSON, THE RULE OF LAWYERS 300 (2004).

[142] For a helpful overview of the literature, see James W. Hughes & Edward A. Snyder, *Allocation of Litigation Costs: American and English Rules*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 51 (Peter Newman ed. 1998).

prospect of a discovery cost shift would add to the uncertainty already associated with claiming. In Europe, where a general loser-pays rule predominates, the contingent risk of a cost shift has taken a real-world form: a market whereby litigants may purchase insurance against that risk.[143] Whether the risk of a more limited cost shift as to discovery in the post-pleading, pre-summary-judgment period likewise should be insurable would present a complicated question. The availability of such insurance would tend to dissipate the desired discouragement of litigation as a proverbial fishing expedition.

The effect upon the initial decision to sue would not be the only complication here. In those instances when litigation is commenced, cost-shifting approaches tend toward an escalation of expenditures on both sides.[144] Specifically, each side stands to bear its own expenditures, discounted by the probability that a cost shift might later occur. In effect, each side stands to garner one dollar of benefit from litigation expenditure for less than one dollar in expected cost. The predictable tendency will be toward increased expenditure, in the manner of a one-third-off sale at a department store. A more limited shifting of discovery costs would portend similar difficulties.

Now, consider together the dampened initial incentive to sue and the escalation of expenditures in those suits that are brought. The net effect is far from clear in systemic terms. The civil litigation system could end up spending even more money on fewer cases. This concern is not merely theoretical. An important 2009 report on civil litigation costs in the United Kingdom finds that the general loser-pays rule in that jurisdiction "tends to drive up the costs of litigation" and that there are, at the very least, "conflicting effects . . . upon access to justice."[145]

First-party regulation via some manner of cost shifting, in sum, would seek to harness privately-held assessments of the marginal value of

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[143] Popular advocates of a loser-pays rule point to the existence of such insurance in Europe as a source of assurance that the rule would not undesirably discourage litigation if adopted in the United States. *See* MARIE GRYPHON, GREATER JUSTICE, LOWER COST: HOW A "LOSER PAYS" RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM, Manhattan Institute Civil Justice Report No. 11, Dec. 2008, at 16-18, *available at* http://www.manhattan-institute.org/pdf/cjr_11.pdf. The claim that insurance can serve this function, without also undercutting civil justice reformers' desired discouragement of unfounded litigation, turns crucially on the ability of insurers accurately to distinguish among actions based upon their risk of triggering the loser-pays rule.

[144] *See* Hughes & Snyder, *supra* note 142, at 53-54. For a subsequent suggestion that the escalation effect may be sensitive to the particulars of the cost-shifting regime, see Charles Hyde & Philip L. Williams, *Necessary Costs and Expenditure Incentives under the English Rule*, 22 INT'L REV. L. & ECON. 133 (2002).

[145] *See* FINAL REPORT OF THE RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS 48 (2009), *available at* http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf.

discovery. But in seeking to use those assessments as a regulatory tool, cost-shifting approaches would suffer from much the same difficulties as first-party, privatized regulation generally as a substitute for government – namely, the enabling of strategic behavior on the part of the would-be first parties themselves, whose incentives in litigation are not aligned with the systemic interest in optimal discovery.[146] As a result, reliance on first-party regulation as a panacea in this setting would risk a kind of litigation counterpart to former Federal Reserve Chairman Alan Greenspan's now-infamous befuddlement that private markets had failed to constrain risk taking in the global financial system during a period of government deregulation.[147]

B. From Dispositive Rulings to Informative Rulings

First-party regulation does not exhaust the regulatory options available to the law of pretrial litigation. A second approach would seek to refine the tools available for third-party judicial regulation, not just of pleading and discovery but of the pretrial process more broadly. The signal pretrial motions discussed in Part II share a fundamental structure. All of them comprise traffic signals on the road toward trial, but the signal sent is of a binary, red-or-green sort.

Summary judgment embodies this structure in formal terms. Either the court determines that the case is summary-judgment-worthy and accordingly stops it in its tracks, or the court denies summary judgment and the case proceeds onward to trial (or settlement). The sorts of dismissals on the pleadings of concern today – dismissals with prejudice[148] – operate in the same blunt, red-or-green fashion.

In formal terms, the binary quality of rulings on *Daubert* admissibility or class certification is not so pronounced. A successful *Daubert* motion merely determines the admissibility of the particular expert testimony in question. In practice, however, the operational connection between *Daubert* and summary judgment[149] imparts to the former much of the binary, red-or-green quality of the latter. Likewise, a denial of class certification is not a

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[146] The disjunction between private and public incentives for civil litigation remains among the bedrock insights of economic analysis. *See* SHAVELL, *supra* note 22, at 391-401.

[147] *See The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. On Oversight and Government Reform*, 110th Cong. 17 (2008) (statement of Alan Greenspan, Former Chairman, Federal Reserve Board), *available at* http://oversight.house.gov/images/stories/documents/20081024163819.pdf ("[T[hose of us who have looked to the self-interest of lending institutions to protect shareholders' equity, myself included, are in a state of shocked disbelief.").

[148] The *Iqbal* Court notably did not dismiss with prejudice but, instead, remanded the case to the district court so as to afford the opportunity to "seek leave to amend [the] deficient complaint." 129 S. Ct. at 1954.

[149] *See supra* note 53 and accompanying text.

final judgment but, instead, leaves the individual lawsuit of the class representative pending before the court as a formal matter. Still, the practical necessity of aggregation to make litigation viable in the settings at "the very core"[150] of the modern class action device means that a certification denial often can be fatal in fact. The inclusion in Rule 23 of an opportunity to seek interlocutory appellate review of class certification rulings[151] and the recognition by appellate courts that decertification sometimes may sound the "death-knell" for litigation stem from this practical reality.[152]

From the perspective of 1938, one may readily understand the binary, red-or-green quality of the existing pretrial motions, even those like class certification unfamiliar to the 1938 reformers.[153] A world in which full-scale trial is a non-trivial possibility is one in which the fundamental question in the pretrial stage is simply whether to proceed to trial. When trial has become not merely the exception but vanishingly rare, it is no longer clear that the fundamental question for civil procedure consists of whether trial should occur. Rather, a world dominated by settlement moves to the fore the question of what the settlement terms should be. That question, to be sure, is not entirely removed from expectations of what would happen in the event of full-scale trial, even if that event remains largely hypothetical. Under even the most simplified economic model of settlement, the variables cast in terms of the probability of plaintiff success on the merits (*p*) and the resulting award (*A*) both look to the scenario of trial. Still, if the steady elaboration of judicial oversight during the pretrial stage suggests anything, it is that the regime of civil procedure bequeathed to us by 1938 – the civil litigation process itself, apart from the denouement of trial – is capable of exerting a distortive effect upon claim pricing.

Viewed from the standpoint of even the most simplified efforts at systemic analysis of our litigation system, the binary, red-or-green quality of the signal pretrial motions seems odd. For purposes of claim pricing in a settlement mode, the important question in most civil cases consists not of whether the plaintiff's case is so problematic as to be worthy of disposition by way of a red-or-green pretrial motion. Rather, the important question usually is more fine-grained: In economic terms, what is *p* and what is *A*, roughly speaking?

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[150] *Amchem*, 521 U.S. at 617.

[151] *See* FED. R. CIV. P. 23(f) (authorizing interlocutory review, at discretion of relevant federal court of appeals, of determinations to grant or deny class certification).

[152] *See In re* Lorazepam & Clorozepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002) (noting that whether decertification would function as a death-knell is a significant consideration in the discretionary determination of federal appellate courts to entertain a Rule 23(f) interlocutory appeal).

[153] The modern literature on the class action largely postdates the 1938 reforms. *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

At best, the signal pretrial motions put the court in the position of estimating these crucial variables only indirectly – say, as part of a determination, on a motion for summary judgment, that a reasonable fact finder might credit the non-moving party's account of the merits. Indeed, one familiar defense-side adage speaks of the value of making a motion for summary judgment, even when one is confident it will be denied, so as to compel the court to engage itself with the case and, in the course of its denial order, to hint at, or even to signal, its tentative view of the merits – all as a source of information about *p* and *A* for settlement purposes. Of the various pretrial motions of concern in complex litigation, class certification perhaps comes closest to direct estimation of *p*, at least in situations when the parties' competing evidence on the certification question overlaps with their dispute on the merits and the court then must resolve that dispute under a preponderance standard, if only for purposes of making the certification ruling.[154]

In an important article, Geoffrey Miller proposes that procedural law should make much more overt and systematic these sorts of indirect estimates of *p* and *A* under the current pretrial motions.[155] Specifically, Miller sketches a framework whereby parties could request, and courts could provide, what he describes as a "preliminary judgment" – that is, the court's own "provisional judgment on the merits of the case based on the information provided by the parties."[156] Under this approach, such a preliminary judgment "would convert into a final judgment after the expiration of a reasonable period of time," during which any party against whom the preliminary judgment is issued may object.[157] In the event of such an objection, the preliminary judgment "would be vacated" and the case returned to the ordinary posture of judicial regulation under the conventional pretrial motions.[158]

An exhaustive assessment of Miller's preliminary judgment proposal is beyond the scope of this Article. The notable point for present purposes consists of the alternative regulatory strategy that the proposal suggests, when viewed in light of the Court's recent effort to fashion a coherent regime for third-party judicial scrutiny of civil pleadings for plausibility. A preliminary judgment along the lines Miller suggests effectively would form a neutrally-assessed "anchor" for settlement negotiations[159] – in particular, an

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[154] *See supra* notes 60-61 and accompanying text (discussing *IPO Securities* framework for class certification analysis).

[155] *See* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165.

[156] *Id.* at 167.

[157] *Id.* at 167-68.

[158] *Id.* at 168.

[159] *Id.* at 179. By contrast, the usual concern about anchoring in the dispute resolution literature is that the anchor will be misleading – for instance, because it is based upon cognitive bias or other distortions in assessment. *See* Chris Guthrie, *Insights from Cognitive*

anchor from which the parties could evaluate the merits (*p* times *A*) independently from the cost imposition and variance associated with additional litigation stages.

Specifically, the information imparted by the preliminary judgment might inhibit – at least marginally and, perhaps, quite substantially – settlement demands that effectively build in components derived from cost imposition and variance in themselves, apart from the assessment of the merits that the court has provided. In this sense, the preliminary judgment might serve a useful information-eliciting function – effectively, spotlighting situations in which the proposed price of settlement contains a substantial distortive component derived from our inherited procedural regime of 1938. To be sure, the optional character of the preliminary judgment – the ability of either side to prevent it from becoming a final judgment – leaves open the prospect of a return to settlement negotiation under the usual, binary array of pretrial motions. Still, the anchor generated by the preliminary judgment would remain as a desirable source of influence on bargaining.

The difference between such an approach and the Court's current enterprise of pleading regulation is considerable. In casting the pleading standard in terms of an inquiry into plausibility, the Court largely transfers to the pleading context the timing problem inherent in direct judicial regulation of discovery. The effect of a preliminary judgment – precisely by honing on claim pricing as such, not on the additional pricing of pretrial process itself – is to work around the timing problem in a different fashion. Rather than attempt to assess what discovery plausibly might bring to light before it has occurred, the anchor provided by a preliminary judgment would serve a similar preventive objective through other means: by highlighting the cost imposition component in any eventual settlement demand.

Again, a substantial question would remain as to whether the defendant could resist such a settlement demand. That question goes to the weight – if one will – of the anchoring effect that the preliminary judgment would have on settlement, even when it does not become a final judgment in its own right. Still, when one considers the difficulties of the Court's third-party regulatory enterprise and those associated with first-party regulation via cost shifting, the notion of a preliminary judgment holds genuine promise – conceivably, without as much in the way of unanticipated distortions.

In shifting from dispositive rulings to what one might call informative rulings, law reform would seek more fully and explicitly to integrate the reality of settlement and the pricing function that it serves into the fabric of civil procedure doctrine itself. Here, again, contemporary scholarly literature is helpful. One of the persistent concerns raised about the civil justice

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Psychology, 54 J. LEGAL EDUC. 42, 44-45 (2004); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 138-41 (1994).

system in recent years speaks to the emergence of "managerial judges."[160] In capsule form, the concern is that judges awash in overburdened civil dockets have taken on an active, but largely unreviewable, role of shepherding, coaxing, and sometimes even bludgeoning parties toward settlement. On the usual critique of this phenomenon, our civil litigation system effectively has reduced the opportunities for litigation – especially, of a complex sort – to elicit definitive judicial opinions that would wrestle with the substantive legal principles at issue in the civil justice system.[161] The canonical twentieth-century case of *Brown v. Board of Education*, after all, took the procedural format of a class action.[162]

A related strand of the scholarly literature speaks with consternation to the emergence of a rival regime for civil justice – one centered not on courts as public institutions but, instead, on privatized dispute resolution by way of contractual agreements. It is no coincidence that the trend toward judicial regulation of the pretrial process in conventional litigation should have emerged at the same time that alternative dispute resolution (ADR) has become a distinctive mode of civil justice, both in real-world operation and as a branch of the scholarly literature. Here, too – if one may speak in broad-brush terms – the general tenor of the literature at the intersection of litigation and, say, arbitration has been one of lament, bordering on alarm. The usual concern is that significant segments of what was formally civil litigation are now shunted off, ostensibly by way of contractual consent, to an opaque regime of arbitration that lacks the process protections and accountability of the civil lawsuit.[163] The considerable ferment today over arbitration clauses in consumer contracts that purport not only to require the arbitration of disputes but also to waive the opportunity to do so on an aggregate basis – whether in a class-wide arbitration or a conventional class action – illustrates this broader concern.[164]

The possibility of a shift from dispositive pretrial motions to informative ones suggests a different response, both to the phenomenon of managerial

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[160] The term derives from Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). For further elaboration of similar concerns, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003).

[161] *See* Resnik, *Managerial Judges*, *supra* note 160, at 425-26.

[162] 347 U.S. 483, 495 (1954).

[163] *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 599-600 (2005).

[164] *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005). For my assessment of this debate, see Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1895-1909 (2006).

judges and to what one might call the litigation-ADR interface. For managerial judges, the prescription consists not of a return to judicial modes from bygone decades but, instead, of more transparent systematizing of the managerial component itself. The notion would be to recognize overtly a judicial role that is not of a binary, red-or-green, trial-or-no-trial variety and, in so doing, to structure and regulate that role. For the relationship between conventional litigation and ADR, a similar prescription would consist not of transplantation in only one direction, whereby ADR would come to entail much of the formality, decisional rigor, and appellate oversight of litigation – at its limit, such that the "A" in the moniker would come to look like not much of an "alternative" at all.[165] Rather, transplantation also might occur in the opposite direction. Seen in this light, the notion of a preliminary judgment is not as jarring or transformative as it might seem initially. It instead would incorporate into civil litigation the kind of privatized, rent-a-judge processes often used by parties to inform their settlement negotiation.[166]

CONCLUSION

Over the past quarter-century, two developments have focused attention on the role of uncertainty in complex civil litigation. The scholarly literature has shifted from a well-nigh exclusive focus on the elaboration of procedural doctrine to a significant – even dominant – focus today on analysis of civil litigation in systemic terms, centered on the strategic behavior of lawyers. This richer scholarly literature has given rise to a more precise conceptual vocabulary with which to pinpoint the phenomena of cost imposition and variance in litigation dominated today by the endgame of settlement, not trial. This scholarly literature has emerged contemporaneously with a transformation of procedural doctrine, whereby judicial regulation of critical checkpoints has moved ever earlier within the pretrial phase. This shift in timing also has come with a shift in emphasis – most evident in the Court's recent pleading decisions – from concern over variance to concern over cost imposition as a feature that potentially distorts the claim pricing process.

This Article has urged a broadened perspective on these developments, in keeping with the richer array of scholarly tools now available for the study of complex litigation. We find ourselves today in a situation not unlike that which famously confronted those who crafted our inherited 1938 regime of civil procedure. Now, as then, the concern is that procedure itself is exerting a distortive effect on the resolution of civil claims. The distortion now

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[165] For similar concern about recent critiques of arbitration, see Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1.

[166] *See* Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 30-31 (2004).

suspected stems not from the nineteenth-century regime of code pleading that the 1938 reforms rightly displaced but, rather, the unanticipated outgrowth of the 1938 reforms themselves.

In a world of vanishing trials, there is room for efforts to refine the present-day enterprise of third-party judicial regulation of variance and cost imposition by way of pretrial motions, cast in binary, red-or-green terms. The ferment over *Twombly* and *Iqbal* demands nothing less. A more fulsome elaboration of the insights provided in the scholarly literature would broaden the options available for law reform. First-party regulation by way of cost shifting holds a degree of promise to overcome the informational difficulties encountered by third-party judicial regulation, but only with a considerable potential for countervailing problems occasioned by the strategic incentives of first-party litigants themselves. A more promising alternative consists of an effort to come explicitly to grips with litigation as a process of claim pricing via settlement and to retool pretrial motions less as modes of disposition vis-à-vis trial and more as sources of reliable information for the settlement process. Civil litigation as a process of civil settlement, in short, demands a distinctive law of civil settlement procedure.