Washington University Law Review

Volume 92
Issue 2 *Midwestern People of Color Legal Scholarship Symposium*

2014

A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights

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Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights*, 92 Wash. U. L. Rev. 455 (2014).
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A DIAMOND IN THE ROUGH: TRANS-SUBSTANTIVITY OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ITS DETRIMENTAL IMPACT ON CIVIL RIGHTS

SUZETTE MALVEAUX*

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* Professor of Law, The Catholic University of America, Columbus School of Law. I am especially grateful for the insights and feedback I received from Professors Arthur R. Miller, A. Benjamin Spencer and Catherine E. Smith, and John Vail, Esq. Much appreciation also goes to the following Research Assistants: Sara Michaloski, Katherine Olson and Megan Gibson of the Columbus School of Law, and Babatunde M. Cadmus of the Washington & Lee School of Law. Thank you to the Washington & Lee School of Law and the Columbus School of Law, who generously supported this project during my visit and sabbatical respectively. Thank you also to the Midwestern People of Color Legal Scholarship Conference for its support of the piece as a work-in-progress. Finally, this article is dedicated to my mother—my best friend, anchor and inspiration.

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INTRODUCTION

The Federal Rules of Civil Procedure are celebrating their seventy-fifth anniversary this year. On this diamond anniversary, the celebration is tempered by the uncomfortable truth that for many individuals, the Rules are stacked against them. For workers and others challenging discrimination through the civil litigation system, the Rules appear less like diamonds, and more like diamonds in the rough.

The Federal Rules of Civil Procedure apply to all federal civil actions in the same manner, regardless of the substantive right being pursued. In other words, the Rules are trans-substantive.[1] This principle has been a central tenet of the civil litigation system since the Rules' enactment in 1938.[2] However, this one-size-fits-all approach to process has been increasingly questioned in a society growing in complexity, size, and specialization. Developments in the modern civil litigation system have led to the devolution of this approach.

Moreover, it is well established that the Rules have a negative disparate impact on certain substantive areas of law and types of cases. The language, interpretation, and application of the Rules reveal an undeniable pattern of substantive-specific impact. After three-quarters of a century, there are enough data points to support this pattern. The blow that employment discrimination and civil rights claims have taken at the hands of procedural law lays bare any pretense that procedural rules operate in a

1. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) (defining "trans-substantivity"). There are "a few minor exceptions." *Id.* This Article uses the term "trans-substantivity" to refer to the same rules being applied to cases regardless of the underlying substantive rights. This is distinct from the same rules being applied to cases regardless of size—another common use of the term. There have been significant debate and proposals over non-trans-substantive proposals based on case size, which fall outside the scope of this Article.

2. Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules*," 2009 WIS. L. REV. 535, 536, 543–44 (describing trans-substantivity as a "foundational assumption" of the original Rules).

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neutral fashion. There are numerous pressure points and a myriad of ways that such claims have disproportionately suffered.

The record is replete with examples of how the procedural rules, and their application and interpretation, have taken a toll on workplace discrimination and civil rights claimants vying for court-entry and merit-based decisions. For example, as an initial matter, it has become harder for claimants to enter the federal court system. The Supreme Court has interpreted Rule 8's pleading requirement in such a way that it forces complaints to clear a higher bar to survive dismissal.[3] The greater risk of dismissal compromises enforcement, deterrence, and the right to be heard. Depriving access to the civil litigation system undermines fairness, due process, and the well-established preference that cases be decided on the merits rather than on procedural grounds.

Another example of disproportionate hardship for claimants challenging discriminatory practices is the restrictive application and interpretation of Rule 23,[4] the modern class action rule. Far from simply being an intricate joinder device, this aggregation method is designed to empower everyday people to promote and enforce public policy. The Court's heightened commonality standard[5]—like the pleading one—and stricter back pay threshold[6] threaten court access and a formal resolution on the merits, but on an even grander scale. The denial of class certification—especially in cases involving small value claims and poor claimants—can mean the denial of relief altogether for such litigants and the underenforcement of anti-discrimination statutes more generally.

Even when employees and others are successful at class certification, their success is often short-lived. No sooner have claimants been approved of as a class, than the defendant mounts an interlocutory challenge to certification—one it will likely win.

But plaintiffs permitted to seek class certification are the fortunate ones. Arbitration agreements that compel employees to forgo class actions—along with other procedural protections—are increasingly common in employment contracts and enforced by the courts. Employers not able to litigate their way out of class actions may contract their way out instead. And if class actions are the only realistic way the law will be

3. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–63 (2007).

4. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

5. *See* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013).

6. *See Dukes*, 131 S. Ct. at 2541.

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enforced, employers have effectively contracted for immunity. In sum, the elevated class action hurdles jeopardize law enforcement, employer deterrence, and employee compensation for Title VII cases.

Other examples of procedural mechanisms that haven fallen more harshly on civil rights litigants include a liberalized summary judgment standard,[7] erosion of the breadth and depth of discovery, harsher application of Rule 11, and more rigorous treatment of expert testimony. All of these make it easier for defendants to dispose of cases before a determination on the merits.

In sum, since the Rules' origination, and certainly over the last quarter-century, there has been a growing shift away from court access,[8] particularly for civil rights and workplace discrimination cases.[9] This access to justice problem stems from numerous developments, including: a higher pleading standard; stricter class certification; greater deference to arbitration agreements; and more liberal grants of summary judgment.[10] While any one of these developments alone would present a formidable challenge to plaintiffs, the confluence of them is tantamount to a sea change.

It may be true that some procedural rules—purely ministerial in nature—will affect cases alleging different substantive rights unequally. This is not surprising, nor inherently wrong. What is wrong is when the burden falls consistently and more heavily on a distinct class of claims and claimants—as it does for employment discrimination and civil rights claims and their litigants. That wrong is exacerbated when the substantive claims and their proponents are those society has decided—as a policy matter—to afford special consideration and protection because of centuries of historical and modern subordination. Given the centrality of rule trans-substantivity in the civil litigation system and the open secret that it is

7. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (holding that the moving party need not "support its [summary judgment] motion with affidavits or other similar materials *negating* the opponent's claim"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that substantive evidentiary standard at trial applies at summary judgment stage); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (imposing a plausibility standard to summary judgment context).

8. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309–10 (2013) (describing "procedural stop signs" that have undermined court access); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 358–66 (2010).

9. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519–22 (2010).

10. *See* Miller, *supra* note 8, at 310–47; A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to* Twiqbal *Apologists*, 60 UCLA L. REV. 1710, 1737 (2013).

significantly flawed—because of its unfair impact on workplace and civil rights claims—it is time for a change.

Part I of the Article briefly describes the evolution, justifications, and critiques of rule trans-substantivity. Part II explains how the language, interpretation, and application of the Rules have undercut court entry and merit-based decisions for those alleging employment discrimination and civil rights violations. Part III contends that the legitimacy of trans-substantivity is in jeopardy and proposes some ways that the bench, bar, and public may reconcile a trans-substantive process system with a robust democracy.

I. TRANS-SUBSTANTIVITY

Trans-substantivity—the principle that the federal procedural rules apply to all cases regardless of the underlying substantive rights at issue[11]—has been a fundamental principle of the civil litigation system since the Rules' origination in 1938.[12]

From their inception, the Rules were intended to facilitate resolution on the merits.[13] Process yielded to substance and the Rules were merely the vehicle through which important policies were enforced and democracy worked.[14] The purported neutrality of the Rules gave license to court-supervised rulemaking, which occurred outside of the formal political process.[15] Promulgation of rules evenly applied across substantive areas enabled the Supreme Court rather than Congress to engage in rulemaking without offending the democratic process.[16] Thus, trans-substantivity legitimized the allocation of rulemaking power to the courts and substantive policy-making power to the legislature.[17] And the Rules Enabling Act of 1934 checked this power-sharing arrangement by

11. Marcus, *supra* note 1, at 376 (defining "trans-substantivity").

12. Burbank, *supra* note 2, at 536, 543–44.

13. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) ("It is a means to an end, not an end in itself . . . .").

14. *See id.* at 519 (role of the procedural rules is "to aid in the efficient application of the substantive law"); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (explaining "rules of procedure" must be "continually restricted to their proper and subordinate role[,] to the ends of substantive justice"); *see also* Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006) (noting the 1938 Rule drafters "viewed the design of procedural rules as primarily an engineering task devoid of substantive policy choice, and viewed judges as engineering experts in matters of procedural design").

15. *See* Marcus, *supra* note 1, at 396.

16. *See id*. at 398, 417–19.

17. *See id*. at 374–75, 398, 416.

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forbidding courts from enacting rules that would "abridge, enlarge or modify any substantive right."[18]

The drafters of the Rules deliberately chose a trans-substantive civil litigation system.[19] They sought to simplify a system that had been mired in writs dictating different procedures for different causes of action in the common law courts.[20] With the merger of common law and equity courts, the rigidity and formality of the writs were abandoned.[21] In their stead, all courts acquired greater flexibility and discretion—attributes adopted from equity.[22] A uniform set of procedural rules was not only easier for lawyers and judges to learn and to apply,[23] it consequently made the civil litigation system more accessible.[24] Thus, trans-substantivity did not simply make the law more uniform and predictable, but more democratic.

Trans-substantivity, however, has not been a panacea.[25] To the contrary, trans-substantivity creates certain inefficiencies. For example, robust discovery rules may cast too wide a net in cases where little, if any, discovery is needed.[26] Trans-substantive rules—designed for general consumption—are admittedly blunt instruments designed for rough justice. Their contours make them fair game for manipulation and abuse.[27] Time and resources are wasted as a result of such loss of focus and precision.[28] As a consequence of such inefficiencies, one tradeoff is

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18. 28 U.S.C. § 2072(b) (2006). Of course, the line between what constitutes substance and procedure has proven less stark and has resulted in robust debate. *See* Marcus, *supra* note 1, at 399–400 (describing historical debate over "the substance-procedure dichotomy" and citing sources).

19. Steven N. Subrin, *The Limits of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378–79 (2010).

20. *Id.* at 379–82.

21. *Id.*

22. *Id.* at 386. For a discussion of the advantages and disadvantages of the law and equity systems, *see id.* at 380–81, 387–88.

23. *Id.* at 387. Drafting one set of rules—as opposed to several—is arguably more practical as well. *See id.* 388; *see also id.* at 383 ("[I]t took the English centuries to evolve to the different writs with their different procedural incidents.").

24. *See* Spencer, *supra* note 8, at 354 n.6; *One Size Fits All*, *supra* note 16, at 387–88.

25. *See* Subrin, *supra* note 19, at 388 (noting "substantial cost" and years of writing "about the detriments of this wide-open procedural system").

26. Marcus, *supra* note 1, at 416–17.

27. *See, e.g.*, Subrin, *supra* note 19, at 388 (discussing how "the widest array of discovery possibilities in litigation known to humankind" irresistibly tempts lawyers to expand litigation for strategic reasons and "income maximization").

28. *Id.* at 388–89.

increased and unfettered judicial discretion[29]—vulnerable to partiality and seldom overturned on appeal.[30]

The one-size-fits-all approach to process in the civil litigation system is increasingly suspect in a society far more complex, specialized, and larger than ever before.[31] Developments in the modern civil litigation system have led to the breakdown of trans-substantivity.[32] Congress[33] and state legislatures[34] have enacted substance-specific procedural reforms. Courts have not applied the Federal Rules uniformly[35]—a practice that can be interpreted at best as judicial discretion and adaptation,[36] or at worst as

29. *See generally* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) ("Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense.").

30. *See* Subrin, *supra* note 19, at 391. Professor Stephen N. Subrin also credits trans-substantivity with increased settlements and a consequent reduction in trials. *Id.* at 393.

31. Marcus, *supra* note 1, at 372–73.

32. *Id.* at 426; Subrin, *supra* note 19, at 404.

33. Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1502 (1992); *see, e.g.*, Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104–67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77–78 (2006)); 15 U.S.C. § 78u-4(b)(1)–(2) (2006) (subjecting securities fraud claims to heightened pleading standard); Y2K Act, 15 U.S.C. §§ 6601–6617 (2006) (subjecting Y2K litigation to heightened pleading); Prison Litigation Reform Act of 1996 ("PLRA"), Pub. L. No. 104–134, 110 Stat. 1321–66 (codified as amended at 18 U.S.C. §§ 3624(b), 3626 and in scattered sections of Titles 28 and 42 (2006)) (heightened pleading requirement enacted to reduce prison litigation); *see also* Marcus, *supra* note 1, at 404–07 (discussing various substance-specific procedural federal law).

34. Marcus, *supra* note 1, at 404, 407–09 (citations omitted) ("[D]ozens of state legislatures have departed from the trans-substantivity principle and enacted special pleading requirements for medical malpractice cases."); Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 1012–15 (2004) (discussing trans-substantivity and procedural reforms taken to address medical malpractice litigation). *See generally* Seymour Moskowitz, *Discovery in State Civil Procedure: The National Perspective*, 35 W. ST. U. L. REV. 121, 124–25 (2007) (discussing substance-specific state rules).

35. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (describing imposition of heightened pleading requirement in lower courts); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 444–51 (1986) (describing development of elevated pleading standard by lower courts in discrete substantive areas, including civil rights); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 692 (1984) (discussing the stricter pleading requirements adopted for civil rights cases).

The Supreme Court pushed back to such lower court adventurism in interpreting the Rule 8 pleading standard, but ironically engaged in its own overreaching by reinterpreting Rule 8's criteria more restrictively. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–63 (2007); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 73–77, 78–80 (2010).

36. For example, following the Supreme Court's seminal pleadings cases, *Twombly* and *Iqbal*—requiring plaintiffs to put forth sufficient evidence to make a plausible claim to overcome dismissal—some lower courts vary the amount of factual information required, based on informational asymmetry and type of claim. *See, e.g.*, Arista Records, LLC v. Doe 3, 604 F.3d 110, 121 (2d Cir. 2010) (explaining the plaintiffs had a plausible copyright infringement claim, even though "no more

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judicial hostility and overreaching,[37] depending on the beholder's eye.[38] The federal district courts, in their capacity to craft local rules "not inconsistent with" the Federal Rules, have also eroded trans-substantivity by creating their own "substance-specific" procedure.[39] This devolution has not gone unnoticed.[40]

The propriety of trans-substantivity has been the subject of robust commentary and debate.[41] Indeed, twenty-five years after the Rules'

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definitive assertion as to lack of permission seems possible when the users remain anonymous"); Donahoe v. Arpaio, 869 F. Supp. 2d 1020, 1068 (D. Ariz. 2012) ("Due to . . . the asymmetry of information between Plaintiffs and Defendants regarding which Defendants actually took, ordered, supervised, or approved certain actions, the Court cannot now dismiss any claims [of warrantless searches and seizures] . . . ."); Watrous v. Town of Preston, No. 3:10-CV-597, 2011 WL 1743508, at *2 (D. Conn. May 3, 2011) ("The plausibility standard does not impose an across-the-board, heightened fact pleading standard."). This flexible approach enabling vulnerable cases to survive Rule 12(b)(6) dismissal rings non-trans-substantivity.

37. *See* Miller, *supra* note 8, at 334 n.184 (citations omitted) (noting criticism of Court's unilateral revision of the Rules without honoring the rulemaking process); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 90–94 (2010) ("With *Twombly* and *Iqbal*, it is quite possible that the Court implicitly abandoned or compromised its devotion to the transsubstantive character of the Rules.").

38. *See generally* Marcus, *supra* note 1, at 377 ("A number of commentators, generally critical of trans-substantivity, argue that the vast discretion the Federal Rules give district judges renders the federal system only superficially trans-substantive.").

39. *Id*. at 377, 414; *see* Tobias, *supra* note 33, at 1503–05 (criticizing local rules and related experimentation for eroding trans-substantivity); Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503, 510 (1996) (criticizing local rules for undermining trans-substantivity). *But see*, Marcus, *supra* note 1, at 414 ("A survey of ten federal districts shows that only about five percent of all local rules could arguably be deemed substance-specific."). The Manual for Complex Litigation, "which specifically suggests that judges tailor numerous particular procedures to individual complicated lawsuits," has also been called "a monument to non-trans-substantivity." Tobias, *supra* note 33, at 1505 (discussing MANUAL FOR COMPLEX LITIGATION (SECOND) §§ 33.1-6 (1985)).

40. Tobias, *supra* note 33, at 1506 (discussing commentators, including Professor Robert Cover and former Advisory Committee Reporter, Professor Benjamin Kaplan) ("[F]or a considerable period, commentators have been exploring the decline of trans-substantivity."); *see, e.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526 (1986) ("[T]he premise of trans-substantive rules has been silently undermined—de jure and de facto.").

41. *See, e.g.*, Bone, *supra* note 14, at 1159 (noting trans-substantivity may not be the best choice because "different substantive policies sometimes justify different procedural choices"); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989) (concluding that "judicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future."); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989) (analyzing critiques of the trans-substantivity of the Rules); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776–79 (1993) (critics of trans-substantivity may be "making a mountain out of a molehill."); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1016 (2008) (describing limit of trans-substantivity on "war on terror" cases and exploring substantive-procedural dichotomy); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 841 (1991) ("Essentially, the disagreement between the participatory advocates and the traditionalists

fiftieth anniversary, analysis of the doctrine continues in the same vein. The principle continues to come under significant fire because of its failure to permit explicit adaptation when the Rules have a negative impact on civil rights and their beneficiaries.[42] Critics have proposed eradicating trans-substantivity[43] and creating substance-specific procedural rules.[44]

The fiction of rule neutrality is hard to deny.[45] The language,[46]

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involves whether the trans-substantive vision of the rules has any continuing vitality or claim to legitimacy."); Subrin, *supra* note 19, at 377 ("I have argued for three decades that the underlying transsubstantive philosophy of the Federal Rules of Civil Procedure is flawed."); Marcus, *supra* note 1, at 374 ("The embrace of substance-specific procedure highlights the brittleness of trans-substantivity's theoretical underpinnings."); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57, 77–97 (1994) (recognizing the current shortcomings with trans-substantivity); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 45–56 (1994) (explaining how substance-specific rules could relieve costs and pressures on defense attorneys); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1791–1801 (1992) (analyzing whether complex litigation conflicts with trans-substantivity).

42. Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85, 92 (1991) (footnote omitted) ("Increasingly, civil procedure literature stresses procedure's impact on particular sets of rights or on particular groups. . . . [M]uch contemporary scholarship has disparaged trans-substantive approaches . . . ."); Tobias, *supra* note 33, at 1506, 1508 (noting how legal scholarship is "increasingly discredit[ing] the . . . idea that procedure can be applied without fully considering its substantive impacts on particular rights [such as civil rights] or specific groups [such as minorities]"). *See, e.g.*, CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 57–99, 158–74 (1979); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 642–48 (1986); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 359–81 (1990).

43. *See, e.g.*, Tobias, *supra* note 33, at 1508 (footnotes omitted) ("It is entirely too late to transfigure trans-substantivity, much less remain transfixed by it, and trans-substantivity should now go 'gentle into that good night.' The preferable approach is to transcend trans-substantivity, to acknowledge candidly its limitations, and to recognize and meet forthrightly the compelling challenge of formulating procedures that will efficaciously treat civil litigation in the twenty-first century.").

44. *See, e.g.*, Subrin, *supra* note 41, at 41, 45–56 (arguing for less restrictive discovery rules in cases that tend to take longer, such as products liability and employment discrimination); *id.* at 55 (noting suggestion for "different procedures for different types of cases" by former Reporter to the Advisory Committee, Benjamin Kaplan and others). *See also* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716–17 (1988) (noting a difference between uniformity and trans-substantivity and that certain types of cases, such as RICO cases, may need their own particular uniform rules); Stempel, *supra* note 41, at 58–60 (same). *See generally*, Subrin, *supra* note 41, at 28 n.4 (listing Professor Stephen B. Burbank's scholarship urging modification of transsubstantive procedure).

45. Many scholars have debunked the notion of rule neutrality. *See* Mullenix, *supra* note 41, at 823 (noting that "public interest partisans" believe that "there are no such things as 'facially neutral rules'" and that "litigation embodies class, race, gender, and economic struggles"); Judith Resnik, *The Domanin of Courts*, 137 U. PA. L. REV. 2219, 2224–27 (1989) (rejecting notion that rules are applied neutrally and evenly to parties); Yamamoto, *supra* note 42, at 396 ("[S]cholars and jurists generally acknowledge now that procedure is neither value-free nor a science."); *id.* at 396 nn.258–59 (citing sources and noting that "[t]he debate is by no means over" and at times "has been acerbic").

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interpretation, and application of the Rules reveal an undeniable pattern of substance-specific impact. This reality, exposed over three-quarters of a century, belies a blurrier line than the clean trans-substantive and substance-specific dichotomy.[47] Rule creation, translation, and enforcement must be recognized for the value-laden enterprise that it is.[48] As the original drafters of the Rules, Charles E. Clark and others, recognized: even purportedly neutral concepts emanating from the procedural rules—like efficiency, accuracy, and access—are "values" themselves.[49]

The critique of the one-size-fits-all approach to civil process has a long history and many critics. The principle has already been undermined at the margins and now is starting to unravel beyond the seams. As Professor Carl Tobias warned almost one quarter century ago, "insofar as perpetuation of a trans-substantive theory of the Rules has restricted the vindication of underlying substantive rights, trans-substantivity may have become the enemy of substance."[50] The next section explores just how formidable an opponent trans-substantivity has become for fair employment and other civil rights claims and their advocates.

II. PROCEDURE DISPROPORTIONATELY HARMS EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS CLAIMS

It is well established that the Rules have a disproportionate adverse effect on certain substantive areas of law and kinds of cases. Over the last seventy-five years, sufficient evidence[51] has mounted to demonstrate the inequitable toll process has taken in the civil rights and employment area.[52]

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46. The choice between two procedural options may have very different consequences for the realization of certain substantive rights. *See* Marcus, *supra* note 1, at 379 ("A choice of one trans-substantive procedural rule over another, even if made for reasons totally disconnected from any particular substantive policy preference, can significantly impact the enjoyment of rights and the discharge of duties.").

47. *See* Marcus, *supra* note 1, at 378 ("Because procedural rules can have regular, predictable impacts that differ by substantive area of litigation, trans-substantivity and substance-specificity are ideal types at two ends of a spectrum.").

48. *See id*. at 379–80 (discussing distinction between substance, procedure, and value-neutrality).

49. *See id.* at 419; *see also id.* at 397 (citing Charles E. Clark, *Procedural Aspects of the New State Independence*, 8 GEO. WASH. L. REV. 1230, 1234 (1940)).

50. Tobias, *supra* note 33, at 1507; *id.* at 1508 ("[T]he procedural mechanisms developed and applied must facilitate litigants' vindication of substance, thereby effectuating congressional intent and freeing substance from the shackles of procedure.").

51. *See* discussion *infra* Part II.

52. *See* Spencer, *supra* note 5, at 479–80 (footnote omitted) ("From motions for sanctions under Rule 11, to summary judgment motions, to pleading standards, employment discrimination claims

History has shown how the procedural rules, and their application and interpretation, have unfairly taxed workplace discrimination and civil rights claimants vying for court-entry and merit-based decisions. Although the empirical data available to support this conclusion has at times been mixed,[53] the disputes over impact tend to be more in degree than kind.[54] When viewed from a wide-angle lens, the data reveals a distinct pattern of court denial and disenfranchisement for workers and others alleging discrimination and civil rights violations. This disparate impact of pleadings, class actions, and summary judgment, among others, is acutely problematic.

A. Pleadings

As an initial matter, it has become harder for claimants to enter the federal court system. This is because the Supreme Court has interpreted Rule 8's pleading requirement in such a way that claimants have a higher bar to clear to survive dismissal. Although applicable to all cases, this bar has been particularly formidable for those alleging workplace discrimination and civil rights violations.

Since the inception of the Rules, access was designed to be easy. The pleadings requirements were designed to put the parties and the court on notice of the basic parameters of a dispute.[55] Rule 8[56] and the

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have faced a gauntlet of procedural hurdles that otherwise do not apply to civil actions.").

53. *See, e.g.*, Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 13–16 (2002) (noting conflict between Federal Judicial Center and American Judicature Society studies on whether civil rights plaintiffs were disproportionately affected by Rule 11).

54. *See* discussion *infra* Part II.A.3.a (pleadings) and note 361 (Rule 11).

55. The initial drafter of the Federal Rules, Charles E. Clark, set forth "notice pleading":

> [W]e must decide what we expect of the pleadings . . . . If it is proof of the other fellow's case, that is a vain hope . . . . What we can expect . . . is such a statement of the case as will isolate it from all others, so that the parties and the court will know what is the matter in dispute, the case can be routed through the court processes to the proper method of trial and disposition, and the judgment will be *res adjudicata*, so that the same matter cannot again be litigated.

Clark, *supra* note 14, at 316.

56. *See* FED. R. CIV. P. 8(a)(2) (a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

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accompanying forms[57] illustrate the ease with which a plaintiff was expected to plead.

Consequently, for over half a century, federal courts opened their doors to those who could craft a complaint that provided basic notice to the defendant of their claims. This threshold, called "notice pleading," was calcified by the Supreme Court in *Conley v. Gibson*[58]—a civil rights case brought by African-American railway workers challenging their union for failing to fairly represent their interests without regard to race. This seminal case established that a complaint should only be dismissed if the plaintiff could "prove no set of facts in support of his claim which would entitle him to relief."[59] A plaintiff could easily initiate a lawsuit because the system was designed to test the merits of plaintiff's case later, after both sides had the opportunity to collect evidence through the discovery process and use other pre-trial procedures.[60] It was important not to let procedural gamesmanship bar ordinary people from seeking justice and relief through the courts. Anchored in this principle, the Supreme Court initially rejected lower courts' efforts to raise the pleading standard in civil rights cases.[61] The Court remained resolute in enforcing *Conley*'s "no set of facts" standard, only requiring plaintiffs to set forth a "short and plain statement of the claim" to put the defendant on notice, as stated in Rule 8.[62] Civil rights complainants were permitted court entry and the opportunity for a merits-based resolution.

After over fifty years, however, the Supreme Court abruptly reversed course—bringing liberal pleading to an end. In *Bell Atlantic Corp. v. Twombly*,[63] an antitrust class action by consumers against Internet and telephone service providers, the Court retired *Conley*'s permissive "no set

57. *See* Clark, *supra* note 14, at 316. Clark described the forms as illustrative of the simplicity expected of the pleadings:

> These forms which I have referred to may prove to be about the most important feature of the new rules. They afford the illustrations to show what the words in the rules proper mean, to show as Rule 84 states, "the simplicity and brevity of statement which the rules contemplate."

Id.

58. 355 U.S. 41 (1957).

59. *Id.* at 45–46.

60. *See* Clark, *supra* note 14, at 318. In drafting the Rules, Charles E. Clark set forth how "notice pleading" would work in tandem with discovery and summary judgment: "Attempted use of the pleadings as proof is now less necessary than ever with the development of two devices to supply such elements of proof as may be necessary before trial. These are discovery and summary judgment, both the subject of extensive provisions in the [1938] rules." *Id.*

61. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–515 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

62. *See Conley*, 355 U.S. at 45–47; FED. R. CIV. P. 8(a)(2).

63. 550 U.S. 554 (2007).

of facts" standard.[64] Plaintiffs could no longer put forth facts showing their claims were possible; instead, they had to put forth facts showing their claims were plausible.[65] In *Ashcroft v. Iqbal*,[66] a constitutional civil rights case by Javaid Iqbal against top government officials, the Court clarified that the new standard applies to all civil actions, including discrimination claims.[67]

This higher pleadings bar has created a harsher standard for plaintiffs challenging discrimination. Intentional discrimination claims,[68] in particular, are more vulnerable to dismissal following *Twombly* and *Iqbal* for reasons described elsewhere.[69] This duo has ushered in a new pleading paradigm that threatens the viability of potentially meritorious civil rights claims because of the potentially adverse impact of the plausibility standard.

1. Excessive Subjectivity

One problem with the Court's importation of a plausibility test at the pleadings stage is that plausibility should purportedly be determined by applying "judicial experience and common sense."[70] The overly subjective and vague nature of the test fails to properly guide judges in how to determine the plausibility of an intentional discrimination claim pre-discovery.[71] Consequently, claims of discrimination are vulnerable to interpretations based on differences among judges, rather than the legal

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64. *Id.* at 562–63.
65. *Id.* at 557–63.
66. 556 U.S. 662, 684–85 (2009).
67. *Id.*
68. For an examination of what evidentiary standard should be required for making a plausible showing of disparate impact discrimination to survive dismissal post-*Twombly* and *Iqbal*, see Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L.J. 287 (2013).
69. *See* Malveaux, *supra* note 35, at 85–101.
70. *Iqbal*, 556 U.S. at 679 (citing Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007)).
71. *Access to Justice Denied: Hearing on* Ashcroft v. Iqbal *Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 17 (2009) (statement of Arthur Miller, Professor, New York University School of Law) [hereinafter *Access to Justice Denied*] (footnote omitted) ("The subjectivity at the heart of *Twombly-Iqbal* raises the concern that rulings on motions to dismiss may turn on individual ideology regarding the underlying substantive law, attitudes toward private enforcement of federal statutes, and resort to extra-pleading matters hitherto far beyond the scope of a Rule 12(b)(6) motion to dismiss. As a result, inconsistent rulings on virtually identical complaints may well be based on judges' disparate subjective views of what allegations are plausible. Courts already have differed on issues that were once settled."); *see also* al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009) ("Post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints.").

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sufficiency of such claims.[72] Predictability, uniformity and clarity are subsequently jeopardized."[73]

Case outcomes may reflect, not legal standards, but variances in personal perceptions.[74] For example, studies reveal that there are significant differences in perception among racial groups over the extent of race discrimination,[75] especially following the election of Barack Obama, the first African-American President.[76] Consequently, some judges, like many Americans, presume that race discrimination is largely historical and rare.[77] This presumption may lead to one judge to conclude—based on the facts before him—that intentional discrimination is implausible, especially in light of other alternative benign explanations

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72. Malveaux, *supra* note 35, at 93.

73. *Id.* at 92.

74. *Id* at 93; *see* Edward A. Hartnett, *Taming* Twombly, *Even after* Iqbal, 158 U. PA. L. REV. 473, 499 (2010) ("Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, or a matter of common sense."); *id.* at 500–03 (describing how judges' different baseline assumptions may lead to differing perceptions of plausibility, especially in discrimination cases).

75. *See* Gary Langer & Peyton M. Craighill, *Fewer Call Racism a Major Problem Though Discrimination Remains*, ABC NEWS (Jan. 18, 2009), http://abcnews.go.com/PollingUnit/Politics/story?id=6674407&page=1 ("[African-Americans] remain twice as likely as whites to call racism a big problem (44 percent vs. 22 percent), and only half as likely to say African-Americans have achieved equality."); K.A. DIXON ET AL., JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 8 (2002), *available at* http://www.heldrich.rutgers.edu/node/113 (finding that African-American employees are five times more likely than their white counterparts to believe that African-Americans are "treated unfairly in the workplace"); Kevin Sack & Janet Elder, *Appendix, The* New York Times *Poll on Race: Optimistic Outlook But Enduring Racial Division*, *in* HOW RACE IS LIVED IN AMERICA 385 (2001) (44% of African-Americans believe they are treated less fairly than whites in the workplace, while 73% of whites believe African-Americans are treated fairly).

76. Malveaux, *supra* note 35, at 93–94; *see, e.g.*, *PBS Newshour: Debate on Race Emerges as Obama's Policies Take Shape* (PBS television broadcast Sept. 16, 2009), *available at* http://www.pbs.org/newshour/bb/politics/july-dec09/rage_09-16.html [hereinafter *PBS Newshour*]; Philip Rucker, *In S.C., One Road Divides Two Ways of Thinking*, WASH. POST, Sept. 22, 2009, at A1 (describing varying opinions on the continued existence of racism after Obama's election and the role of race in opposition to him).

77. Malveaux, *supra* note 35, at 94. For example, in a discussion among columnists and academics with Gwen Ifill, Democratic pollster Cornell Belcher concluded:

> We're two very different countries racially, where right now you have a majority of whites who, frankly, do think we're post-racial because they think African-Americans have the same advantages as they do, while African-Americans do not. And you have a large swath of whites right now who are just as likely to see reverse discrimination as an issue as classic discrimination.

PBS Newshour, *supra* note 76. The presumption against intentional race discrimination may have actually developed much earlier. *See* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1180 (1992) ("After a decade of efforts to enforce Title VII, federal judges apparently began to share the general public's belief that employment discrimination against minorities had been largely eradicated.").

available.[78] The very same facts could lead another judge to just the opposite conclusion. Without a more objective metric to apply pre-discovery, judges are vulnerable to relying on extra-pleading matters when evaluating complaints.[79]

This vulnerability is troubling in light of some courts' hostility to civil rights claims and perception that such cases are largely frivolous.[80] This perception drove a number of federal district courts to routinely impose a heightened pleading requirement for such claims.[81] The Supreme Court corrected this practice on numerous occasions,[82] until it applied its own arduous requirement in *Iqbal*—also a civil rights case.[83]

Empirical studies indicate that judicial hostility to Title VII claims continues to impact litigation outcomes. For example, in a study analyzing federal civil cases from 1970 to 2006, Professors Kevin M. Clermont and Stewart J. Schwab found that plaintiffs challenging employment discrimination did not fare well in federal court.[84] In particular, "employment discrimination cases constitute one of the least successful categories at the district court level, in that plaintiffs win a very small

78. *See* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 675 (2003); *see also Access to Justice Denied*, *supra* note 71, at 90 (statement of Debo P. Adegbile, then-Director of Litigation, NAACP Legal Defense & Education Fund) ("Because this new plausibility standard appears dangerously subjective, it could have a potentially devastating effect in civil rights cases that come before judges who may, based on the nature of their personal experiences, fail to recognize situations in which discrimination or other constitutional wrongs require redress.").

79. Malveaux, *supra* note 35, at 96.

80. *See, e.g.*, Valley v. Maule, 297 F. Supp. 958, 960–61 (D. Conn. 1968) ("A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety.").

81. Malveaux, *supra* note 35, at 95; *see* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 950–51, 956–57 (1990); *see also Maule*, 297 F. Supp. at 960–61 (citing cases). Court application of a heightened pleading standard for civil rights cases is well documented. *See generally* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post*-Conley *Era*, 52 HOW. L.J. 99, 104–111 (2008) (describing historical application of heightened pleading standard in civil rights cases); Fairman, *supra* note 35, at 1027–32; Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 576 (2002); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750–52, 1759 (1998); Wingate, *supra* note 35, at 688–89.

82. Malveaux, *supra* note 35, at 95; *see* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993) (rejecting heightened pleading requirement for 42 U.S.C. § 1983 civil rights claims); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512, 515 (2002) (rejecting heightened pleading requirement for Title VII employment discrimination claim); Jones v. Bock, 549 U.S. 199, 213–14 (2007) (rejecting heightened pleading requirement for prison litigation claims).

83. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

84. *See generally* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009).

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percentage of their actions and fare worse than in almost any other category of civil case."[85] In addition, a plaintiff is more likely to lose on appeal.[86] Professors Clermont and Schwab identified an "anti-plaintiff effect" that they attribute to negative judicial attitudes toward employment cases.[87] Various scholars have also noted judicial resistance to civil rights claims in general.[88]

In assessing the propriety of a "judicial experience and common sense" standard for determining plausibility, empirical studies have been instructive. In a study of employment and housing discrimination cases conducted by Professor Raymond H. Brescia, he contends that the manner in which many judges are using the plausibility standard may differ from the Supreme Court's use in *Twombly* and *Iqbal*.[89] Judges rarely explicitly invoked reliance on judicial "experience and common sense" or outrightly dismissed cases on the grounds that there existed an equally plausible legal alternative to plaintiff's case theory.[90] To determine how and to what extent district court judges were using the plausibility test, Professor Brescia examined a subset of ninety-five post-*Iqbal* cases in which motions to dismiss were granted in full with prejudice and solely non-

85. *Id.* at 113. In particular, from 1979 to 2006, the plaintiff success rate before judges for such cases was 19.62%, while the plaintiff success rate for other types of cases was 45.53%. *Id.* at 130. *See also* Michael Selmi, *Why Are Employment Discrimination Cases so Hard to Win?*, 61 LA. L. REV. 555, 560–61 (2001) (indicating that in employment discrimination cases, plaintiffs are "half as successful when their cases are tried before a judge than a jury, and success rates are more than fifty percent below the rate of other claims").

86. Clermont & Schwab, *supra* note 84, at 110–11. In particular, from 1988 to 2004, the percentage of appeals reversed after plaintiffs' trial wins was 41.10%, while those after defendants' trial wins was 8.72%. *Id.* at 110.

87. *Id.* at 115. The perception that civil rights claims are largely frivolous may be fueled in part by the significant number of such claims filed by prisoners, a phenomenon which has diminished but not disappeared under the PLRA. *See* Crawford-El v. Britton, 523 U.S. 574, 597 n.18 (1998) (describing drop in prisoner case filings since the enactment of the PLRA).

88. John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 342 (1997) (describing federal judges' dislike of employment cases); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 790 (2005) ("Unfortunately for Title VII plaintiffs, the hostility of the federal judiciary to employment discrimination claims has been widely recognized."); Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546 (2001) ("[C]ourts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits."); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 63 (2000) (discussing "the reluctance and doubt [by judges] that greet claims asserted by civil rights plaintiffs"); Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 585 (2003) (describing "unsympathetic" application of Title VII by the courts).

89. Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 240–41 (2011–2012).

90. *Id.*

disparate impact claims were raised.[91] Professor Brescia concluded that less than half of these cases explicitly invoked the *Twombly* and/or *Iqbal* plausibility standard and, when the standard was cited, rarely did district courts go beyond boilerplate language.[92] Professor Brescia found that in only four of the ninety-five cases did a court explicitly invoke the "more plausible" test, *i.e.*, comparing the plaintiff's allegations to an alternative explanation for defendant's conduct.[93] This could suggest that the vague and value-laden pleading paradigm established by the Supreme Court may not have fiercely taken hold as some had initially feared.

Professor's Brescia's study is tempered, however, by an established and growing literature on the prevalence of cognitive and unconscious bias that may be at work. Such literature contends that despite their best efforts, judges' backgrounds and attitudes play a significant role in case outcomes.[94] Before this backdrop, it is not surprising that many judges would not flagrantly report that they rely on their judicial experience and common sense when assessing the plausibility of a claim or an alternative explanation, if they were even aware that they did so. Scientific studies also explain how intuition can increase the risk of inaccurate and impartial decision-making. They have found that judicial decisions based on

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91. *Id.* at 240–43.

92. *Id.* at 278.

93. *Id.* at 279.

94. Legal realists adhere to this notion. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 4–5 (1994). Nugent explains:

> Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors. This ideal, however, while appealing to most judges, does not coincide with the findings of behavioral scientists, whose research has shown that human beings rarely, if ever, conform to such idealistic principles.
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> . . . .
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> [I]t is exactly through this blind faith in their impartiality that judges may gain a false sense of confidence in their decisions. They may fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections.

Id. (footnote omitted). *See* Hart, *supra* note 88, at 789 & n.253 (citing literature). *See also* Howard T. Hogan, *Some Thoughts on Juries in Civil Cases*, 50 A.B.A. J. 752, 753 (1964) ("Our judgment of issues of fact must always be based in part upon what we, as individuals [*i.e.*, judges], are—the sum total of our experiences, our backgrounds, our prejudices and our limitations."); Schultz & Petterson *supra* note 77, at 1167 ("There is little disagreement that judges' political, social, and personal values may affect their decisions.").

Formalists, on the other hand, describe judicial decision-making as a mechanical and deliberate application of the law to the facts. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999); Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 420–21 (1992).

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intuition[95]—while beneficial and accurate under some circumstances[96]—may also "'lead to severe and systematic errors'" and biased decision-making.[97] In an empirical study of the judicial reasoning and decision-making of 252 trial judges, along with other studies, the authors concluded:

> [I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. Today, the overwhelming majority of judges in America explicitly reject the idea that these factors should influence litigants' treatment in court, but even the most egalitarian among us may harbor invidious mental associations.[98]

The study found that automatic, intuitive judgment is more likely to occur than active deliberation when trial judges labor under heavy dockets and time pressures.[99] The authors noted that such intuitive determinations were unlikely to be corrected by appellate courts whose oversight is rare and limited,[100] and whose standard of review is deferential to the trial court.[101] While recognizing the prevalence of judges' "best efforts" at making

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95. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007) ("Despite their best efforts . . . judges, like everyone else, have two cognitive systems for making judgments—the intuitive and the deliberative—and the intuitive system appears to have a powerful effect on judges' decision making."); *id*. at 6 ("Our results demonstrate that judges, like others, commonly make judgments intuitively, rather than reflectively, both generally and in legal contexts."); *see also* R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1420 (2006) ("Deciding judicial cases inescapably requires the exercise of intuition."). *See generally* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

96. Guthrie, *supra* note 95, at 29 ("The intuitive approach to decision making is quick, effortless, and simple, while the deliberative approach to decision making is slow, effortful, and complex. The obvious advantage of the former is its speed; judges with heavy dockets can rely on intuition to make judgments quickly.").

97. *Id*. at 31 (quoting Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974)); *Id.* at 43 ("The intuitive approach might work well in some cases, but it can lead to erroneous and unjust outcomes in others.").

98. *Id.* at 31 (footnote omitted); *see also id*. at 5 (footnote omitted) ("[J]udges are predominantly intuitive decision makers, and intuitive judgments are often flawed . . . . [I]ntuition is generally more likely than deliberation to lead judges astray. We suspect this happens with some frequency, but even if it is uncommon, millions of litigants each year might be adversely affected by judicial overreliance on intuition."). *See also* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006) (explaining how the Implicit Association Test reveals that the majority of people make decisions based, at least in part, on biased assumptions of race or gender); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512–14 (2005) (describing implicit bias revealed through association tests performed).

99. Guthrie, *supra* note 95, at 35 (footnotes omitted) ("Judges facing cognitive overload due to heavy dockets or other on-the-job constraints are more likely to make intuitive rather than deliberative decisions because the former are speedier and easier.").

100. *Id*. at 4–5 & nn.16–17.

101. *Id*. at 32.

deliberative decisions,[102] the study encourages the legal system to take an active role in helping judges do this.[103]

Recognizing that judges may interpret what is plausible through a lens informed by background and experience is not to disparage their character or suggest they harbor ill will.[104] It recognizes that judges must guard against relying on extrajudicial factors when making rulings based on a standard that is excessively subjective or promotes intuitive decision-making. Acknowledging this vulnerability and establishing a more objective and clear standard for determining the legal sufficiency of a complaint would guard against such disparate impact and realign process with democracy.

2. Informational Asymmetry

Another problem with the Court's importation of a plausibility test at the pleadings stage is the difficulty of unearthing evidence of discriminatory intent prior to discovery. Demonstrating a plausible claim of intentional discrimination at this early stage of litigation can be difficult—if not impossible.[105] This is because discrimination has become more subtle and institutional—taking on the form of stereotypes and unconscious bias, discussed above.[106] Its covert nature makes discrimination harder to expose at this juncture.[107] Plaintiffs also labor to unearth discrimination pre-discovery because of the unequal access they have to evidence.[108] Evidence—such as a defendant's intent or

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102. "We believe that most judges attempt to reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors." *Id.* at 43 (quoting Nugent, *supra* note 94, at 4).

103. *Id.* at 43. While noting the prevalence of intuition, the authors also concluded that at times judges can and do override its influence with deductive reasoning, resulting in more just outcomes. *Id.* at 3, 9, 13, 18–19, 27–29. *But see id.* at 37–38 & n.187 (citing studies that conclude deliberation can result in inferior outcomes than those from intuition where aesthetic judgment is involved).

104. *Compare* Nugent, *supra* note 94, at 4 (noting belief that "judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.") *with* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (describing "bad judges" as those who are "incompetent, self-indulgent, abusive, or corrupt").

105. Malveaux, *supra* note 35, at 89.

106. *See supra* Part II.A.1. Malveaux, *supra* note 35, at 39 ("[P]ervasive institutional changes in the contemporary workforce—such as work structure, evaluative models, and relational dynamics—can facilitate bias in employer decision-making that more easily eludes detection and disproportionately works to the detriment of minorities and women.").

107. *Id.* at 89–90.

108. *Id.* at 91.

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institutional practices—is often in the defendant's exclusive possession.[109] Many individuals, not surprisingly, are at a significant disadvantage when challenging the misconduct of employers, corporations, and other institutions because of this informational asymmetry.[110]

3. *Greater Dismissals of Employment Discrimination and Civil Rights Cases*

The Supreme Court's more taxing interpretation of what Rule 8 requires of a complaint has made it harder for litigants to gain court access and have employment discrimination and civil rights claims resolved on the merits.[111]

a. *Empirical Support*

Empirical data uniformly reveals that defendants are more likely to file motions to dismiss for failure to state a claim post-*Twombly* and *Iqbal*.[112] Studies by the Federal Judicial Center and numerous scholars have unearthed a statistically significant increase in the filing rate of 12(b)(6)

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109. *Ledbetter v. Goodyear Tire & Rubber Co.* is illustrative. 550 U.S. 618, 641–43 (2007) (holding plaintiff's claim was barred because of the statute of limitations). Unaware of her employer's initial discriminatory decision to pay her less than her male colleagues, plaintiff Lilly Ledbetter brought suit against her employer Goodyear well after the statute of limitations had expired. *Id.* at 621–24. Unsurprisingly, like so many workers, she did not know that she was being systematically underpaid. *Id.* at 649–51 (Ginsberg, J., dissenting). Congress ultimately responded to this inequity. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.) (reversing the Court's holding). *See also* Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 626 (2011) (providing examples of informational asymmetry in civil rights cases).

110. I have explained this dilemma elsewhere:

> Plaintiffs are caught in a Catch-22. They must put facts in their complaint to nudge their claim from possible to plausible. Often the only way to get such facts is through discovery. But the court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Thus, plaintiffs' complaints die on the vine not because they lack merit, but because plaintiffs do not have the same access to information that the defendant does. By raising the pleading bar to plausibility, the Supreme Court has created an untenable situation for plaintiffs challenging discrimination where there is informational inequality.

Malveaux, *supra* note 109, at 627. *See also* Roy L. Brooks, Conley *and* Twombly*: A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 68–69 (2008); Blaze, *supra* note 81, at 957 (discussing Strauss v. City of Chicago, 760 F.2d 765, 770 (7th Cir. 1985), and noting that plaintiff would not normally have the requisite factual predicate to show the city had a "custom and practice" of discrimination pre-discovery, thereby making it "nearly impossible" for his civil rights claim to escape 12(b)(6) dismissal).

111. The following discussion regarding empirical studies draws from my prior work: Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still out for Civil Rights and Employment Cases Post-*Iqbal, 57 N.Y.L. SCH. L. REV. 719, 727 (2012–2013).

112. Malveaux, *supra* note 111, at 727.

motions to dismiss following the elevated pleading requirement, which can be attributed to *Twombly* and *Iqbal*.[113] This is true not only generally, but also for employment discrimination cases and civil rights cases in particular.[114] In general, under the new pleading standard, plaintiffs are twice as likely to face this dispositive motion: the probability has doubled from roughly 3% to 6%.[115] For employment discrimination cases, the probability increased from 7.7% to 10.1%.[116] For civil rights cases, it increased from 11.7% to 12.7%.[117] Defendants freely admit to strategically filing motions to dismiss as a matter of course,[118] as the statistics bear out. The consequence of this trend is that plaintiffs have to spend greater time and money to stave off early dismissal.[119]

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113. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8 (2011); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7 (2012); *see* THOMAS E. WILLGING, FED. JUDICIAL CTR., USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS, at 12 tbl. 4 (1989) (presenting statistics for the pre-*Twombly* and *Iqbal* period). Professor Brescia confirmed this post-*Iqbal* trend for motions that specifically challenge a complaint's factual allegations. *See* Brescia, *supra* note 90, at 262 ("[P]laintiffs faced a considerably higher number of motions to dismiss in which their pleadings were challenged as lacking specificity.").

114. The civil rights cases are non-prisoner cases brought under 42 U.S.C. § 1983. CECIL ET AL., *supra* note 113, at 8–9 (noting the likelihood of a motion to dismiss for failure to state a claim being filed goes from 10.5% in 2006 to 12.4% in 2010 for civil rights cases). Generally, in civil rights cases, the likelihood of a motion to dismiss being filed increased, but did not reach the statistically significant 0.05 level. *Id.* at 8. For the subcategory of civil rights cases involving non-prisoner § 1983 cases, however, there was a statistically significant increase above the 0.05 level. *Id.* at 9.

115. *Id.* at 10 tbl.2 (noting the probability of filing went from 2.9% in 2006 to 5.8% in 2010, controlling for federal district court and case type); *see* Hoffman, *supra* note 113, at 15.

116. CECIL ET AL., *supra* note 113, at 10 tbl.2.

117. *Id.*; *see also* Brescia, *supra* note 90, at 280–83 (stating plaintiffs in employment and housing discrimination cases are far more likely to face a 12(b)(6) motion to dismiss on factual specificity grounds post-*Iqbal* than pre-*Twombly*).

118. *See, e.g.*, John C.S. Pierce & D. Kirby Howard, *To* Twombly *or Not to* Twombly*—That is the Question*, FOR THE DEFENSE, Sept. 2009, at 89, *available at* http://forthedefense.org/articles/2009/09_September/FTD-0909-PierceHoward.pdf (suggesting that after the *Twombly* decision defense attorneys "have an opportunity and even an obligation to test the strength of poorly pled claims [by filing 12(b)(6) motions]"). Similarly, defense attorney John A. Freedman, a partner at Arnold & Porter LLP, explained, "I think I'm more likely to advise a client that given the Supreme Court's guidance on [12(b)(6) motions], yes, you ought to look more seriously at filing a [12(b)(6)] motion [but] don't count on it being granted." *ACS Convention Panel: Access to Federal Courts after Iqbal and Twombly*, AM. CONSTITUTION SOC'Y FOR LAW & POLICY 21:34 (July 18, 2010), http://www.acslaw.org/news/video/acs-convention-panel-access-to-federal-courts-after-iqbal-and-twombly [hereinafter *ACS Convention Panel*].

119. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840–41 (2010) (predicting additional costs for plaintiffs as a result of anticipated increase in 12(b)(6) motions); Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal's *Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 633 (2012) (noting additional 12(b)(6) motions result in "higher costs for litigants and more work for federal judges"). This is not an option for everyone. *See* Hoffman, *supra* note 113, at 17.

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The vast majority of scholars have also found the more rigorous pleading standard is resulting in a greater dismissal rate for employment discrimination and civil rights cases. Several earlier studies bear this out. For example, comparing 12(b)(6) orders shortly before and after *Twombly*, Kendall W. Hannon concluded that under *Twombly*, a civil rights action alleging a constitutional violation[120] "was 39.6% more likely to be dismissed than a random case in the set,"[121] and was more likely to be dismissed after *Twombly* than before.[122] Professor Joseph A. Seiner built on Hannon's work by conducting a similar study that focused on *Twombly*'s impact on cases alleging employment discrimination under

120. Hannon's civil rights claims are constitutional claims. More specifically, he defines "Civil Rights" claims as those "brought under 42 U.S.C. §§ 1981, 1982, 1983 (and § 1983's counterpart against federal officials—so-called *Bivens* actions), and 1985, as well as generalized claims of due process or equal protection violations." Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1836 n.161 (2008). Excluded from the "Civil Rights" category were actions brought under statutes such as Title VII of the Civil Rights Act of 1964, the American with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). *Id.* These actions were categorized as "Federal Other," for which there wasn't sufficient data to conduct a meaningful analysis. *Id.* at 1836 & n.161.

121. *Id.* at 1838. "This result was statistically significant to the 0.05 level." *Id.*

122. *Id.* at 1837. A motion to dismiss a civil rights case was likely to be granted 41.7% of the time before *Twombly*, and 52.9% after *Twombly*. *Id.* The study did not examine whether there was a difference between motions granted with or without prejudice. *See generally*, *id.* at 1815 ("[T]he one area in which this study *does* show a significant departure from previous dismissal practice is the civil rights field.").

The Hannon study analyzed 3287 federal district court orders that responded to a 12(b)(6) motion. *Id.* at 1835. The study compared cases that cited *Conley* in the year prior to *Twombly* with those that cited *Twombly* in the seven months after it was decided. *Id.* at 1835–36; *see* Conley v. Gibson, 355 U.S. 41 (1957). The study examined only those orders published in the Westlaw database. *Id.* at 1829. The study excluded fraud cases governed by Rule 9(b)'s particularity pleading standard; cases brought under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (2000), which are subject to a more stringent standard under the Private Securities Litigation Reform Act (PSLRA), Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. §§ 77–78 (2006)); and in forma pauperis or pro se cases, which are arguably subjected to a lower pleading standard. *Id.* at 1831–33. Cases were also removed from the database if they did not reflect the "spirit" of the search. *Id.* at 1834. These included cases involving motions for summary judgment, to amend, to reconsider a ruling, or to dismiss for lack of subject matter jurisdiction. *Id.*

The methodology has its advantages and disadvantages. Drawbacks of the methodology include its exclusive reliance on the Westlaw electronic database and its timing. Only seven months post-*Twombly*, district courts did not have the benefit of appellate guidance on the appropriate understanding and application of the new pleading standard, and some were seemingly unaware of the standard altogether. *Id.* at 1830. On the other hand, the timing was advantageous. Because the "vast majority" of cases involved complaints drafted pre-*Twombly*, the change in dismissal rate can more readily be attributed to the change in pleading standard rather than a change in attorney drafting. *Id.* at 1831.

Title VII of the Civil Rights Act of 1964.[123] Comparing the dismissal rate of employment discrimination cases one year before and after *Twombly*, Professor Seiner discovered about a 2% increase post-*Twombly*.[124] In another study, Professor Patricia W. Hatamyar Moore found that dismissal orders in general increased from 46% to 48% to 56% two years before *Twombly*, two years after *Twombly*, and immediately following *Iqbal*,

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123. Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1027. The Seiner study analyzed 396 federal district court orders that responded to a 12(b)(6) motion in a Title VII case. *Id.* at 1029. The study compared 191 cases that cited *Conley* in the year prior to *Twombly* with 205 cases that cited *Twombly* in the year after it was decided. *Id.* The study examined only those orders published in the Westlaw database. *Id*. at 1027–28. In contrast to Hannon, Seiner included cases brought by pro se litigants. *Id.* at 1029 n.134.

Because Seiner's methodology is similar to Hannon's, their studies share many of the same strengths and weaknesses. *See id.* at 1029, 1031–32. In addition, given that Seiner's study examines only 396 cases, it is admittedly "difficult to draw any concrete conclusions from a purely mathematical perspective" and the results are not statistically significant. *Id.* at 1030 n.140, 1032.

124. *Id.* at 1029–31. More specifically, in the pre-*Twombly* year, 54.5% of the federal district court orders granted the motion to dismiss in whole, while in the post-*Twombly* year, 57.1% granted the motion. *Id.* at 1029. Additionally, in the pre-*Twombly* year, 75.4% of the court orders granted the motion to dismiss (in whole or in part), while in the post-*Twombly* year, 77.6% granted the motion. *Id.* at 1030.

Professor Seiner duplicated his study for cases alleging employment discrimination under Title I of the Americans with Disabilities Act (ADA) or employment-related retaliation under Title V of the ADA. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 116 (2010). The study analyzed 124 federal district court orders that responded to a 12(b)(6) motion in cases involving either Title I ADA employment discrimination claims or Title V ADA employment-related retaliation claims. *Id.* at 116–17. The study compared fifty-nine cases that cited *Conley* in the year prior to *Twombly* with sixty-five that cited *Twombly* in the year after it was decided. The study examined only those orders published in the Westlaw database. *Id*. The study included cases brought by pro se litigants. *Id.* at 117.

Comparing the dismissal rates one year before and after *Twombly*, Professor Seiner found a similar increase in the dismissal rate of cases under the ADA post-*Twombly*. *Id.* at 120. More specifically, in the pre-*Twombly* year, 54.2% of the federal district court orders granted the motions to dismiss in whole, while in the post-*Twombly* year, 64.6% granted such motions. *Id.* at 120. Additionally, in the pre-*Twombly* year, 64.4% of the court orders granted the motion to dismiss (in whole or in part), while in the post-*Twombly* year, such granting increased to 78.5%. *Id*. at 120–21. Thus, there was a 14.1% increase in the rate at which the ADA cases were partially dismissed post-*Twombly*. *Id*. at 121.

Seiner's ADA study shares the same strengths and weaknesses of his prior Title VII study. *See id.* at 118–21; *see also* Hoffman, *supra* note 113, at 16. Because Seiner's ADA study examines even fewer cases than the Title VII study (396 compared to only 124), the ADA study makes it even more "difficult to draw any substantial conclusions regarding the resulting differentials between the two data sets" from a "purely numerical standpoint." Seiner, *supra* note 124, at 118. Again, the results were not statistically significant. *Id.* at 118–19.

Although Seiner found an increase in the dismissal rates for both Title VII and ADA cases, he did not find an identical judicial reaction to these cases. In the disability context, there has been more confusion and inconsistency over the meaning and application of "plausibility." *Id.* at 121–26.

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respectively.[125] For dismissal orders in civil rights cases,[126] the increase went from 50% to 53% to 58% for the same periods, respectively.[127]

The empirical studies examining *Twombly* and *Iqbal*'s impact on the dismissal rate of employment discrimination and civil rights cases, however, are not unanimous. The outlier is the Federal Judicial Center's report, published later in 2011.[128] The FJC's study, like the other initial studies, found that the percentage of motions to dismiss being granted post-*Twombly* and *Iqbal* had increased.[129] In particular, the dismissal rates

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125. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). This result was not statistically significant. *Id.* at 602 (noting the probability of this distribution occurring by chance is 15.2%—"too high for conventional statistical significance").

The Hatamyar study randomly selected 500 federal district court opinions ruling on a 12(b)(6) motion in the two years before *Twombly*, 500 in the two years after *Twombly*, and 200 in the four months following *Iqbal* for a total of 1200 cases. *Id.* at 555–56. The study examined only those orders published in the Westlaw database. *Id.* at 584. The study excluded prisoner litigation brought under the PLRA and seeking to proceed in forma pauperis. *Id.* at 585. The study also excluded dismissals on grounds other than 12(b)(6), such as lack of subject matter or personal jurisdiction, improper venue, failure to join an indispensable party, and summary judgment. *Id.* at 586. Cases involving a more rigorous pleading standard—such as those alleging fraud or a PSLRA violation—were also excluded. *Id.* at 587. The study included 12(c) motions for judgments on the pleadings and 12(b)(6) motions from any opposing party, such as counterclaims. *Id.* at 588. The study also included pro se cases. *Id.* at 589. After applying these exclusions and inclusions, Professor Hatamyar Moore examined a total of 1039 cases in the database: 444 applying *Conley*, 422 applying *Twombly*, and 173 applying *Iqbal*. *Id.* at 585. Like the Hannon and Seiner studies, Hatamyar's study advises the reader to exercise caution when interpreting the data because of the small data pool and the relatively short time period involving *Iqbal* decisions. *Id.* at 556.

126. Professor Hatamyar Moore categorized type of cases by those listed on the federal district court docket sheet. Because the vast majority of cases identified as "prisoner petitions" alleged civil rights violations, she included "prisoner petitions" in the "Civil Rights" category. The "Civil Rights" category is comprised of:

> [1] Cases in which the plaintiffs alleged federal constitutional violations, whether or not they purported to bring the case under 42 U.S.C. § 1981 (equal rights under the law), 42 U.S.C. § 1983 (civil action for deprivation of rights), 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), or *Bivens* actions.
>
> [2] Cases in which the plaintiffs alleged unlawful employment discrimination on the basis of race, sex, religion, or national origin under Title VII of the Civil Rights Act of 1964.
>
> [3] Cases in which the plaintiffs alleged violations of the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), or the Rehabilitation Act of 1973.
>
> [4] Any other civil rights actions, including sex discrimination under Title IX.

Id. at 591–92 (footnotes omitted).

127. *Id.* at 607. Disaggregating this further for dismissal orders in constitutional civil rights cases, the increase went from 50% to 55% to 60%, and for dismissal orders in Title VII cases, the rate went from 42% to 54% to 53%. *Id.* at 608–09.

128. The FJC published a report in March of 2011 and an update the following November, comparing motion practice in 2006 and 2010. *See* CECIL ET AL., *supra* note 113.

129. *See supra* Part II.A.3.a.

increased from 66% to 75% for all civil cases,[130] from 70% to 78% for civil rights cases, and from 67% to 71% for employment discrimination cases.[131]

However, where the FJC differed was its interpretation of the results. The FJC advised caution in interpreting the results primarily on two grounds. First, the FJC found that, in general, there was an increase in motions granted with leave to amend, but a decrease in motions granted without leave to amend, conceivably providing plaintiffs with more opportunities to fix their complaints.[132] Second, the FJC did not attribute the increased dismissal rate in civil cases to *Twombly* and *Iqbal*. After controlling for additional variables that might explain the higher dismissal rate,[133] the FJC found no "statistically significant increase in the rate at which motions to dismiss were granted" (with or without an opportunity to amend) for all cases, with the exception of those challenging financial instruments.[134] Moreover, the FJC found no statistically significant increase in the dismissal rate for civil rights and employment discrimination cases.[135]

But, more recent quantitative studies following the FJC's report have largely confirmed initial findings of disparate impact on workplace discrimination and civil rights cases. In a study designed to replicate the FJC's work,[136] Professor Hatamyar Moore found a substantially greater

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130. CECIL ET AL., *supra* note 113 at 14 tbl.4. This increase is statistically significant at the $p \leq 0.01$ level. *Id.*

131. *Id.* This increase for employment discrimination cases is not statistically significant at the $p \leq 0.05$ level. *Id.*; *see also* Hoffman, *supra* note 113, at 7 ("As for dismissal orders, the FJC found that in every case category that was examined there were more orders granting dismissal after *Iqbal* than there were before *Twombly*, both with and without prejudice. Most importantly, in every case category examined it was more likely that a motion to dismiss would be granted.").

132. CECIL ET AL., *supra* note 113, at 13. The only instance where this was not true was for cases challenging financial instruments. *Id*. at 14, 21. *See also* Brescia, *supra* note 90, at 270 (failing to find a significant rise in dismissal rates with prejudice post-*Twombly* or *Iqbal*). The FJC found this distinction sufficiently meaningful to break down its analysis and present its findings on the basis of whether a motion to dismiss was granted with or without prejudice. CECIL ET AL., *supra* note 113, at 13.

133. The FJC controlled for differences in caseloads among district courts, types of cases, and the existence of an amended complaint. CECIL ET AL., *supra* note 113, at 13.

134. *Id.* at 21. These cases are comprised primarily of individuals challenging lenders or loan servicing companies over residential mortgages or refinances and are largely associated with the financial housing crisis. *Id.* at 12. These cases were the only type more likely to be dismissed with prejudice. *Id.* at 21. The FJC did not attribute this greater dismissal rate to plaintiffs' failure to sufficiently plead facts under *Twombly* and *Iqbal*. *Id.*

135. *Id.* at 32 ("[W]e found no statistically significant increase [at the 0.01 or 0.05 level] in the likelihood that motions were granted for . . . [non-financial instrument] cases.").

136. Professor Hatamyar Moore's updated study is based on the same design as her original one, except she increased the number of randomly selected federal district court opinions ruling on a 12(b)(6) motion from 200 to 500 in the year following *Iqbal*. Hatamyar Moore, *supra* note 119, at

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dismissal rate post-*Iqbal* than the FJC did.[137] Her updated study—which included a bigger sample of post-*Iqbal* cases—indicated that, in general, 12(b)(6) motions were more likely to be granted in full (with and without leave to amend) post-*Iqbal*.[138] Courts granted such motions at an even higher rate for constitutional civil rights cases.[139] Professor Raymond Brescia's more recent study of employment and housing discrimination cases found little impact on the dismissal rates post-*Twombly*, but considerable increase post-*Iqbal* for such cases.[140] Newer studies indicate that not only are civil rights complaints more vulnerable to dismissal at a statistically significant level post-*Iqbal*, but that this is true regardless of whether a judges grants or denies leave to amend. Evidence shows that while the increase in dismissals is largely due to grants with leave to amend,[141] grants *without* leave to amend are increasing. Civil rights

609–10. Like her prior study, she examined only those orders published in the Westlaw database. *Id.* at 612. The study excluded dismissals on grounds other than 12(b)(6). *Id.* at 610–11. Cases involving a more rigorous pleading standard—such as those alleging fraud or a PSLRA violation—were also excluded. *Id.* The study included only pro se cases subject to the 12(b)(6) dismissal standard or the Rule 8(a)(2) default pleading standard. *Id.* at 611. After applying these exclusions and inclusions, Hatamyar Moore examined a total of 1326 cases in the database: 444 under *Conley*, 422 under *Twombly*, and 460 under *Iqbal*. *Id.* at 611.

In an attempt to replicate the results of the FJC's study, Professor Hatamyar Moore's updated study removed pro se plaintiffs' cases in certain tables for comparison and limited the time frame to cases decided in 2006 and 2010. *Id.* at 608, 618. However, her updated study differed because it drew cases from eighty-six rather than twenty-three federal district courts; relied on the entire 2006 calendar year, but only the first six months of 2010; and included only Westlaw-published cases. *See id.* at 643–44.

137. *Id.* at 608–09.

138. *Id.* at 614. This study found that 61% of motions were granted under *Iqbal*, in comparison to 46% under *Conley*. *Id.* at 609. Moreover, cases are more likely to be terminated under *Iqbal* than *Conley*. *Id.* at 624–26, 648–50.

139. *Id.* at 618–19. The study found that 64% of motions were granted under *Iqbal* for constitutional civil rights cases, in comparison to 41% under *Conley*. *Id.* at 619. Moreover, for "constitutional civil rights cases, courts were 3.77 times more likely to" grant in full a motion to dismiss with prejudice under *Iqbal* than under *Conley*. *Id.* at 623 & tbl.4. And for a motion to dismiss without prejudice for civil rights cases, the "courts were fourteen times more likely to grant" the motion in full, rather than deny, under *Iqbal*. *Id.* at 623. Even when pro se plaintiffs were excluded, constitutional civil rights cases were dismissed at a higher rate. *Id.* at 618–19.

140. Brescia, *supra* note 90, at 239–40. Professor Brescia's study is unique in its focus on a subset of civil rights cases and on dismissals based on the sufficiency of the factual allegations pled. *Id.* at 260. Professor Brescia examined the impact of the new federal pleading standard on motions to dismiss for failure to state a claim under Rule 12(b)(6) and motions for judgment on the pleadings under Rule 12(c) in employment and housing discrimination cases. *Id.* at 239. The study included claims brought under Title VII, the Rehabilitation Act, the ADA, the ADEA, the Family Medical Leave Act, the Fair Housing Act, the Equal Protection Clause, and retaliation provisions. *Id.* at 266. He limited his study to federal district court orders in the Lexis database that assessed the factual specificity of the pleadings forty-one months before *Twombly*, twenty-four months between *Twombly* and *Iqbal*, and nineteen months after *Iqbal*. *Id.* at 262–63. His study does not control for certain factors the FJC did, such as circuit and district courts, or amended complaints.

141. Hatamyar Moore, *supra* note 119, at 606–68, 621.

plaintiffs are running a greater risk of having their complaints dismissed with prejudice and in their entirety.[142] These findings temper optimism that plaintiffs can at least amend their complaints post-dismissal. Admittedly, empiricists still disagree[143]—but overall, the vast majority concludes that the viability of employment discrimination and civil rights cases under the new federal pleading standard has been significantly compromised.

There are a number of reasons why the FJC Study and the overwhelming bulk of empirical work diverge—a full examination of which is beyond the scope of this Article and addressed elsewhere.[144] But, in a nutshell, empiricists primarily disagree over the role and degree of statistical significance,[145] the selection of controlled independent variables,[146] the significance of an opportunity to amend,[147] and the appropriate data pool.[148] Not surprisingly, where there are statistics, there is bound to be a battle of the experts.[149]

This battle is tempered by noteworthy consensus among those doing this complex and worthy empirical work.[150] Empiricists agree that there are more 12(b)(6) motions being filed[151] and granted post-*Iqbal*.[152] This

142. For example, in his examination of employment and housing discrimination cases, Professor Brescia found that courts were not only more likely to dismiss such cases post-*Iqbal*, but also to dismiss them with prejudice. Brescia, *supra* note 90, at 260–61, 268–70.

Professor Hatamyar Moore's updated study indicates that the risk that a 12(b)(6) motion to dismiss will be granted with prejudice, compared to denied, was 1.75 times greater under *Iqbal* than *Conley*. Hatamyar Moore, *supra* note 119, at 605. Unlike her prior study, she found that this risk was statistically significant. *Id.* at 605, 621. Again, unlike her prior study, the probability of a plaintiff's case being entirely dismissed with prejudice was 1.71 times greater under *Iqbal* than *Conley*, which is considered to be a statistically significant rate. *Id*. at 605. The risk for constitutional civil rights cases was 3.77 times greater. *Id.* at 623 & tbl.4.

143. The author of the FJC's report is critical of Professor Hatamyar Moore's study for excluding certain variables, relying on the Westlaw database, and using flawed search terms for capturing post-*Iqbal* decisions. Joe S. Cecil, *Of Waves and Water: A Response to Comments on the FJC Study: Motions to Dismiss for Failure to State a Claim After* Iqbal 25–34 (Fedearl Judicial Center, Draft Mar. 19, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026103. Similarly, Professor Brescia's study is criticized for relying on the Lexis database, not controlling for certain variables, and using pre-*Twombly* cases that are atypical of pleadings practice at the time. *Id.* at 36–37. A follow-up study of a subset of employment and housing discrimination cases by the FJC found an increase in the dismissal rate that did not meet the conventional standards of statistical significance. *Id.* at 35–36.

144. *See generally* Malveaux, *supra* note 111.

145. *See id*. at 733–35.

146. *See id*. at 736.

147. *See id*. at 737.

148. *See id*. at 738–39.

149. "'There are three kinds of lies: lies, damned lies, and statistics.'" MARK TWAIN, MARK TWAIN'S OWN AUTOBIOGRAPHY: THE CHAPTERS FROM THE NORTH AMERICAN REVIEW 185 (Michael J. Kiskis ed., 2d ed. 2010) (quoting Disraeli).

150. Malveaux, *supra* note 111, at 739.

151. *See* discussion *supra* at Part II.A.3.a.

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means that even if the dismissal rate remained the same, the net outcome is that more cases are being dismissed post-*Iqbal*, including those alleging workplace discrimination and civil rights violations.[153] Empiricists also agree that there are inherent limitations of empirical work, in general,[154] and shortcomings of certain design choices, in particular.[155] For example, quantitative studies do not reveal changes in pleadings practice, deterrence from filing potentially viable cases, or dismissals of possibly meritorious cases."[156]

Although helpful, statistics cannot tell the whole story. Much can be learned about the disparate impact of procedural law on substantive law from the attorneys and judges themselves, through anecdotal evidence and case law.

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152. Malveaux, *supra* note 111, at 739; *see* Brescia, *supra* note 90, at 241 ("[T]wo things are clear: motions to dismiss challenging the sufficiency of the pleadings are much more common since *Iqbal*, and far more cases are being dismissed after the release of that decision than before. At least in this regard, then, the initial fears about the impact of *Twombly* and *Iqbal* seem well founded, regardless of whether the dismissal rates have changed dramatically . . . ."); *id.* at 262 ("[A]part from the mere dismissal rate, the number of cases in which complaints were dismissed, either in whole or in part, rose dramatically after *Iqbal*.").

153. As the FJC reports:

> Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted may still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 may result in more cases in recent years with motions granted, even though the rate at which motions are granted has remained the same.

CECIL ET AL., *supra* note 113, at 22; *see also* JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 5 (2011) (finding an increased filing rate of 12(b)(6) motions combined with stable grant rate results in overall increase in percentage of cases dismissed); Cecil, *supra* note 143, at 11 (stating that prior study "explicitly acknowledges that increases in filing rates of motions to dismiss due to *Twombly* and *Iqbal* may result in an increase in the number of motions granted even if the grant rate remains unchanged").

154. Malveaux, *supra* note 111, at 739–40.

155. *Id.* at 739–40 & nn.108–11(discussing design limitations of FJC's initial report); *id*. at 733–39 (discussing criticisms of FJC's methodology and interpretation); *id*. at 743 (discussing FJC's criticisms of more recent empirical studies). The FJC and scholars studying the impact of the new pleadings regime have learned from each other and wisely adapted their approaches in response to mutual critiques. *See id*. at 740 ("Critics have been the catalyst for a variety of subsequent changes, ranging from the FJC's disclosing results at different p-values, to including pro se cases and those containing counterclaims and cross-claims."); *see, e.g.*, Cecil, *supra* note 143, at 1 n.3 (FJC modifications made in response to feedback); Malveaux, *supra* note 111, at 741 & n.115 (describing Professor Hatamyar Moore's updated study attempting to replicate FJC study and build from it).

156. *See* Malveaux, *supra* note 111, at 739–40.

b. Practitioner Experience and Judicial Approach

Practitioners reveal that they have changed their pleadings practices when possible to accommodate the more rigorous pleading standard.[157] For example, a survey of lawyers with the National Employment Lawyers Association (NELA), report making more factual allegations in their complaints.[158] Seventy percent of those who filed employment discrimination cases report that they changed the way they structured their complaints post-*Twombly*.[159] Of those lawyers, 94% of them included more factual allegations.[160] More drastically, some lawyers have been chilled or discouraged from pursuing potentially meritorious cases altogether.[161]

Following *Twombly* and *Iqbal*, federal district courts dismiss civil rights cases that they would not have otherwise,[162] and federal courts of appeals affirm most 12(b)(6) dismissals.[163] But even in this landscape,

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157. This experience is not unanimous. *See* THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 25 (2010) (telephone interviews with thirty-five attorneys revealed that most did not see an impact of *Twombly* and *Iqbal* on their practice, other than an increase in costs due to additional 12(b)(6) litigation).

158. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12 (2010).

159. *Id.* at 11–12.

160. *Id.* at 12.

161. *See* JOSHUA CIVIN & DEBO P. ADEGBILE, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, RESTORING ACCESS TO JUSTICE: THE IMPACT OF IQBAL AND TWOMBLY ON FEDERAL CIVIL RIGHTS LITIGATION (2010), *available at* http://www.acslaw.org/sites/defaultfiles/Civin_Adegbile_Iqbal_Twombly.pdf. For example, Elizabeth J. Cabraser, legal scholar and partner at Lieff Cabraser Heimann & Bernstein, LLP, explains *Twombly* and *Iqbal*'s impact on her plaintiff-based practice:

> We spend a lot more time [crafting pleadings] . . . and I will say that we do reject some cases that we believe do have merit because the truth is implausible on its face. You know, history is just one implausible thing after another, and sometimes what happens to people is implausible, too . . . . So, it has had an impact, probably more on my clients and potential clients than on our law firm.

ACS Convention Panel, *supra* note 118, at 12:24. The FJC's empirical data, however, does not support this conclusion. *See* Cecil, *supra* note 143, at 18 ("These findings do not prove that cases are not being deterred from filing in federal court . . . . Nevertheless, these findings offer no support to those who believe that such deterrence is taking place, and no better evidence appears to be available.").

162. *See* Malveaux, *supra* note 109, at 627 & n.33 (citing examples); Malveaux, *supra* note 35, at 86 & n.137 (citing examples); CIVIN & ADEGBILE, *supra* note 161, at 9–10.

163. *See* Hatamyar Moore, *supra* note 119, at 626–27. Professor Hatamyar Moore relies on cases collected by the Rules Law Clerk to the Honorable Lee A. Rosenthal, to the Civil Rules Committee and Standing Rules Committee, up to July 26, 2010. *Id.* at 627 n.62. Of the roughly one hundred appellate court cases collected by the Rules Law Clerk up to July 26, 2010, 73% of them affirmed district court grants of 12(b)(6) motions. Memorandum from Andrea Kuperman, Rules Law Clerk to Hon. Lee A. Rosenthal, to Civil Rules Comm. & Standing Rules Comm. (July 26, 2010) [hereinafter Kuperman Memo], *available at* http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_

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judicial reaction has not been uniform.[164] Some courts are taking a flexible, contextualized approach[165] by allowing pleading upon information and belief[166] when appropriate, liberally granting leave to amend,[167] and permitting the parties to take limited, targeted discovery prior to 12(b)(6) rulings[168]—an approach I have recommended elsewhere.[169]

In sum, there are numerous data points and sources unearthing the trouble that claimants who challenge workplace and other discrimination have in participating in the civil litigation system. Initial entry has been blockaded by a judicial interpretation of the Rules that promotes exclusivity and inequities.

B. Class Actions

Plaintiffs challenging discrimination in the workplace and elsewhere also find it more difficult to act collectively by aggregating their claims in a class action. This is because the Supreme Court has interpreted Rule 23's class certification requirements in such a way that putative class actions have a higher bar to clear to get certified.[170] Although applicable to all

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memo_072610.pdf. Of the forty-six civil rights dismissals under 12(b)(6), 74% of them were affirmed. *Id.* Professor Hatamyar Moore's study does not include cases collected by the Rules Law Clerk beyond July 26, 2010. *See* Hatamyar Moore, *supra* note 119, at 627 n.62. *See* Memorandum from Andrea Kuperman, Rules Law Clerk to Hon. Lee A. Rosenthal, to Civil Rules Comm. & Standing Comm. (Nov. 11, 2011) [hereinafter Kuperman Memo II], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/iqbalmemo_112311.pdf.

164. Malveaux, *supra* note 111, at 744.

165. CECIL ET AL., *supra* note 113, at 2–3; Kuperman Memo II, *supra* note 163, at 4, 5.

166. Kuperman Memo II, *supra* note 163, at 5. *See* Fed. R. Civ. P. 11(b).

167. CECIL ET AL., *supra* note 113, at 13 ("In 2010, 35% of the orders [granting motions to dismiss] granted [the] motions [] with leave to amend at least some of the claims in the complaint, compared with 21% of the orders in 2006."); *id.* at 21; Kuperman Memo II, *supra* note 163, at 5–6.

168. *See* Swanson v. Citibank, N.A., 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting) ("If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss."); Malveaux, *supra* note 35, at 131 n.388, 137–38; *see, e.g.*, Rodriguez v. Plymouth Ambulance Serv., 577 F.3d 816, 821–22 (7th Cir. 2009) (allowing pro se prisoner limited discovery to ascertain names of defendants); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051–52 (9th Cir. 2008) (affirming district court's 12(b)(6) dismissal of the amended complaint after the court permitted discovery to allow plaintiffs to gather facts to meet antitrust pleading requirements); In re Netflix Antitrust Litig., 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (allowing for limited discovery under *Twombly*).

169. *See* Malveaux, *supra* note 35, at 132–41 (describing proposal). This approach addresses the informational asymmetry problem and levels the playing field for civil rights claimants deprived of court access because the defendant has exclusive possession of important evidence pre-discovery.

170. *See* Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1036–41 (2012) (discussing *Dukes*'s elimination of "the 'predominance' standard as a means of determining" certification under Rule 23(b)(2) and noting

cases, heightened certification is a major issue for claims alleging systemic discrimination.

Appropriately, a class action is a procedural anomaly—running counter to the fundamental principle that "litigation is conducted by and on behalf of the individual named parties only."[171] Mandatory class actions[172]—where individual plaintiffs[173] are not entitled to notice, are barred from excluding themselves, and are bound by the results—require robust scrutiny to ensure Due Process is achieved.[174] This extraordinary situation is justified only by a commensurate class homogeneity and cohesiveness, safeguarded by the text of Rule 23 itself.[175] In Title VII cases brought under Rule 23(b)(2), for example, this mandatory class action is justified because all class members share the same goal of eradicating systemic misconduct brought about by a company policy or general practice.[176] The party opposing class certification is also entitled to Due Process and must be afforded an opportunity to defend itself. Individual cases cannot be inappropriately lumped together in a single suit, thereby foreclosing

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that "employment discrimination back-pay claims that before were easily certified under Rule 23(b)(2) now will have additional scrutiny").

171. Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979).

172. Mandatory class actions are those certified under Rule 23(b)(1) or (b)(2). They do not require that class members be given notice or an opportunity to opt out of the litigation, as Rule 23(b)(3) does. Rule 23(b)(1) permits a class action when there is a risk that, in the absence of a class action (a) the party opposing the class will be subject to inconsistent obligations, or (b) as a practical matter, piecemeal litigation of individual class members will impair the interests of other class members who are not parties to the individual lawsuits, as is the case in a trust fund. FED. R. CIV. P. 23(b)(1). Rule 23(b)(2) permits a class action when there is class-wide conduct that makes "final injunctive relief or corresponding declaratory relief" appropriate for the whole class, as is the case for many civil rights claims. FED. R. CIV. P. 23(b)(2).

Alternatively, a class action certified under Rule 23(b)(3)—the "catch-all" provision—requires that class members be provided notice and the right to opt-out because the connection between class members is not nearly as strong. FED. R. CIV. P. 23(c)(2)(B). Plaintiffs with particularly strong claims may do better bringing their cases individually, and as such, enjoy a process that is faster and more interactive. A Rule 23(b)(3) class—the most common type—is permitted when common questions predominate over individual ones and a class action is superior to other methods of resolving a dispute. FED. R. CIV. P. 23(b)(3).

173. Although defendants may seek class certification and form a defendant class, this is rare. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 919 (1998) ("[T]oday defendant class actions are rare and pose special problems of representation and due process . . . ."). Thus, this Article uses the term "defendant" when describing a party opposing class certification and "plaintiff" when describing a party seeking class certification. Defendant class actions are beyond the scope of this Article.

174. The Due Process Clause of the Fifth and Fourteenth Amendments forbids deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amend. V, amend. XIV, § 1.

175. *See* FED. R. CIV. P. 23.

176. Rule 23(b)(2) allows a class action where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" FED. R. CIV. P. 23(b)(2).

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companies' abilities to defend themselves from individual claims.[177] Not surprisingly and appropriately, this procedural exception is only made following a "rigorous"[178] analysis and under very limited circumstances. Such aggregate ligation—while relatively rare—has been largely criticized by those in the business community[179] who argue that the tremendous financial exposure caused by class actions makes class certification akin to blackmail and the pressure to settle irresistible.[180] Critics also argue that class actions are motivated primarily by self-interested plaintiffs' lawyers who use group litigation to enrich themselves to the public's detriment.[181] Indeed, public perception of widespread class action abuse led to passage of the Class Action Fairness Act of 2005 ("CAFA").[182] CAFA provides additional checks and balances for coupon and other class settlements, and liberalized federal jurisdiction for class actions, in response to complaints that some state courts ("judicial hellholes") did not exercise sufficient rigor when deciding class certification.[183] This has led to an increase in

177. This argument was successful in *Wal-Mart Stores, Inc. v. Dukes*, which held that Title VII required an employer to be able to assert affirmative defenses for each individual plaintiff. 131 S. Ct. 2541, 2561 (2011).

178. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160–61 (1982).

179. Corporations and those supporting large, commercial interests—such as the United States Chambers of Commerce—have largely been in opposition to robust class certification. *See, e.g.*, *U.S. Chamber Commends Supreme Court for Limiting Class Action Abuses*, U.S. CHAMBER OF COMMERCE (Mar. 18, 2013, 8:00 PM), https://www.uschamber.com/press-release/us-chamber-commends-supreme-court-limiting-class-action-abuses (supporting measures that limit class actions, including "greater scrutiny of class certification").

180. *See, e.g.*, In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)) (referring to settlements induced by the possibility of a large judgment in a class action as "blackmail settlements"); *see also* Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000) (holding "an appeal ordinarily should be permitted when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle"); Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979) (discussing "*in terrorem*" settlements).

181. Daniel Fisher, *Plaintiff? Is that Really Necessary in a Class Action?* FORBES (February 4, 2014, 10:04 AM), http://www.forbes.com/sites/danielfisher/2014/02/04/plaintiff-is-that-really-necessary-in-a-class-action/ ("[C]lass actions are often more about enriching lawyers than their clients . . . ."); *see generally* Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 76 (2011) ("[T]he bigness of class action damages tempt some lawyers. Some will file a suit for the settlement value rather than to obtain meaningful relief for every class member.").

182. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

183. CAFA § 1712(e) (restricting the circumstances under which a court may approve "a proposed settlement under which class members would be awarded coupons"); H.R. REP. NO. 108-144, at 163 (2003) (Zoe Lofgren, Dissenting Views) (referring to the 2002 Judicial Hellholes Report by the American Tort Reform Association). *See generally* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1–2, 6–8 (2008),

class actions in federal court on diversity of citizenship jurisdictional grounds.[184] This shift from state to federal court under CAFA errs on the side of certification denials and dismissals.[185]

Although there are certainly dramatic examples of class action abuse, this concern is largely overblown and unsupported empirically.[186] Thus, although the certification inquiry is "rigorous," this rigor must be tempered by recognition that aggregation serves at least three important objectives: access, enforcement, and efficiency. First, for many employees and others, a class action is their only meaningful access to the court system. Those with small claims and limited resources are often disinclined, or unable, to challenge powerful corporations on their own.[187] Individually, the litigation costs and attorney's fees may exceed the value of the recovery,[188] resulting in employees foregoing legal action altogether. In the absence of aggregate litigation, an employee may be too fearful of losing her job or of other retaliation to challenge her employer—especially a worldwide, mega-corporation.[189] In this regard, the class action helps level the playing field between those with differential power and resources.[190]

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184. LEE, *supra* note 183, at 7–8; *see also* Kenneth Jost, *Class Action Lawsuits*, 21 CQ RESEARCHER 433, 448 (2010), Miller, *supra* note 8, at 320 (ascribing "the federalization of virtually all substantial class and mass actions" to CAFA).

185. Miller, *supra* note 8, at 320 n.129, 321.

186. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 CARDOZO L. REV. 407, 410 (2008) (rejecting defense bar's argument that class actions "are frivolous and extortionate, brought by legal shake-down artists seeking a quick payoff" because such argument is "self-interested . . . shallow—and also very out of date"); *see also* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1403 & n.51 (2000) (class actions pressure defendants to settle but "critics may well overstate the danger of blackmail against defendants"); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 177–78 (1996) (describing results of the Federal Judicial Center's 1994–95 study on Rule 23 and noting that many potentially abusive claims "were filed as class actions and never certified as such" and "were terminated by rulings on motions to dismiss or motions for summary judgment").

187. *See* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

188. This is known as a "negative value suit." *See* JAY TIDMARSH, 1 CLASS ACTIONS: FIVE PRINCIPLES TO PROMOTE FAIRNESS AND EFFICIENCY § 1.03 at 2 (2013) (defining "negative value case" as one "in which the value of the individual recovery is smaller than the costs of bringing a case").

189. Fisk & Chemerinsky, *supra* note 181, at 76.

190. The class action was developed "as a procedural device to protect individuals from exploitation by large entities." *Id.* at 74. The class action offsets the benefits that large companies receive from their economies of scale, their market and legal power, and their repeat-player advantage. *See id.* at 75–76. *See also* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 222–26 (1990) (describing the

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Second, aggregate litigation promotes law enforcement in several ways. Opting out of class litigation can functionally immunize companies from complying with the law, and eliminates a major instrument of deterrence. Even if employees are able to seek redress for individual harms, in the absence of collective action, they often cannot challenge widespread misconduct as successfully. On an individual basis, employers can more easily mask discrimination. A class-wide challenge enables plaintiffs to more easily obtain evidence[191] that can unearth trends and systemic wrongdoing. In turn, this enables plaintiffs to craft remedies and injunctive relief far greater in scope than what could be done in an individual capacity. The class action net also puts others on notice of discriminatory practices and subsequent remedies of which they may not have been aware.[192] Moreover, if plaintiffs are able to prove a pattern or practice of workplace discrimination in a Title VII class action, they benefit from burden-shifting in their favor. After a discriminatory pattern or practice finding, "[e]ach class member enjoys a rebuttable presumption that she was the victim of the discrimination, subject to the employer's ability to prove otherwise."[193] Moreover, class actions led by private attorneys fill the gap left by government agencies that are often burdened by budgetary and political constraints.[194] As recognized by the Supreme Court and Congress, class actions are part of the Title VII enforcement scheme.[195]

Third, enabling plaintiffs—especially those with small value claims and limited resources—to jointly challenge widespread conduct in a single stroke fosters efficiency. Together, employees can share the risks and burdens of litigation and pool their resources, making it economically feasible to challenge misconduct through the court system.[196] Aggregate

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historical development of group litigation from 1700 to the present); *see generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (explaining the history of the class action).

191. For example, class representatives can justify getting access to statements from management, corporate documents, and companywide statistics.

192. *See* Fisk & Chemerinsky, *supra* note 181, at 76 (employees unlikely to sue because they are unaware of illegality).

193. Malveaux, *supra* note 109, at 631.

194. *Id.*; Fisk & Chemerinsky, *supra* note 181, at 75.

195. Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) ("Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act . . . .").

196. *See* Fisk & Chemerinsky, *supra* note 181, at 76 (describing how absent aggregation, lawyers have no financial incentive to take low-value employment cases, while corporate employers have incentive to cheat employees).

Title VII employment discrimination cases may also be negative-value suits, despite the fact that their claims are not *de minimus*. *See* Suzette M. Malveaux, *Fighting to Keep Employment*

litigation saves judges and parties substantial time and money by resolving similar claims in one case. Not insignificantly, employers enjoy the efficacy and closure a class settlement can offer. In sum, class certification should be demanding, but not so much so that it compromises the numerous benefits aggregation has to offer.

Not only does the class action device play a critical role in the American civil justice system generally, it plays a special role in the civil rights context. Historically, class actions have been central to the civil rights movement—as the procedural vehicle for structural reform in cases from school desegregation to prisoners' rights to employment discrimination. For example, one of the most preeminent Supreme Court cases of the twentieth century—*Brown v. Board of Education*[197]—was a class action.[198]

The modern class action rule, Rule 23, is critical to curtailing workplace discrimination and civil rights violations. Far from simply an intricate joinder device, this aggregation method was designed to empower everyday people to promote and enforce public policy.[199] As indicated by the drafters,[200] the Rule was revised extensively in 1966, "so that it would provide a useful procedural vehicle, particularly for civil rights cases."[201] Through class actions and statutory delegation of private attorney general status to ordinary citizens, private individuals and their counsel supplemented, subsidized, and even substituted official government regulation.[202] Against this backdrop, federal courts applied a liberal approach to class certification, especially in the civil rights context.[203]

Discrimination Class Actions Alive: How Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement*, 26 BERKELEY J. EMP. & LAB. L. 405, 429 (2005) ("Even if plaintiffs may have a greater incentive to pursue their individual claims because of Title VII's $300,000 damage cap, plaintiffs are not able to spread the costs of litigation as class members would be able to in the class action context.").

197. 347 U.S. 483, 495 (1954) (holding unanimously that "separate but equal" doctrine was unconstitutional).

198. The case was, in fact, a consolidation of four separate class actions originating in Delaware, Kansas, South Carolina, and Virginia. *Id.* at 486. There was also a companion case that originated in the District of Columbia. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

199. Miller, *supra* note 8, at 314; *see also* David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang, *1953–1980*, 90 WASH. U. L. REV. 587, 594 (2013).

200. *See* FED. R. CIV. P. 23 advisory committee's note.

201. Miller, *supra* note 8, at 315; *see also* Arthur R. Miller, *Some Very Personal Reflections on the Rules, Rulemaking, and Reporters*, 46 U. MICH. J.L. REFORM 651, 652–53 (2013).

202. Miller, *supra* note 8, at 316.

203. *See* ROBERT H. KLONOFF, EDWARD K.M. BILICH & SUZETTE M. MALVEAUX, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 788 (West, 3d ed. 2012).

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However, class action law has become increasingly obstructionist.[204] As Professor Arthur R. Miller correctly notes: "The class certification motion . . . has become yet another procedural stop sign undermining the utility of one of today's most basic and important joinder mechanisms . . . ."[205] Claimants seeking to challenge discriminatory practices in the workplace and elsewhere[206] have been hit particularly hard by increasingly restrictive applications and interpretations of Rule 23, discussed below.

1. Heightened Commonality[207]

In one of the largest private-employer civil rights class actions in American history, *Wal-Mart Stores, Inc. v. Dukes*,[208] the Supreme Court heightened Rule 23(a)(2)'s commonality requirement. As I have discussed elsewhere,[209] this five to four ruling by the conservative majority raised the bar for one of the easiest class action thresholds, thereby jeopardizing Title VII and related claims going forward.[210]

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204. This was in large measure due to the expansion of civil rights in the 1960s and 1970s.

205. Miller, *supra* note 8, at 321.

206. This does not mean that other substantive legal areas at times have not suffered disproportionately under class action jurisprudence. Mass torts, for example, were the object of significant judicial resistance in the 1980s. *Id.*, *supra* note 8, at 316–17; *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 71–94 (2007) (describing the development of settlement in mass tort class actions); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356, 1384–1421 (1995) (analyzing several contexts of mass torts, including asbestos, silcone gel breast implants, mass disasters, and mass tort property damage, and describing judicial attitudes towards such claims); *see, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (holding that "applicants for contested certification . . . must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597, 620–22 (1997) (strictly applying class certification criteria to proposed class settlement of asbestos claims because of "overriding importance" of enforcing the Rules as written); Castano v. Am. Tobacco Co., 84 F.3d 734, 737, 740 (5th Cir. 1996) (decertifiying national class of smokers because the district court "failed to consider how variations in state law affect predominance and superiority" and did not consider "how a trial on the merits would be conducted"); In re Am. Med. Sys., Inc., 75 F.3d 1069, 1074, 1081–83, 1085–86 (6th Cir. 1996) (decertifying class in product liability case alleging defective penile implants because plaintiffs failed to prove sufficient commonality of factual and legal claims); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297, 1299–1300, 1302 (7th Cir. 1995) (decertifying class of hemophiliacs in case seeking damages for blood contamination).

207. This term comes from Professor A. Benjamin Spencer. Spencer, *supra* note 5, at 445 n.23 (defining "heightened commonality").

208. 131 S. Ct. 2541 (2011).

209. *See generally* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37–45 (2011), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2011/18/LRColl2011n18Malveaux.pdf.

210. As Professor Catherine Fisk and Dean Erwin Chemerinsky recognize:

> [I]n *Wal-Mart* . . . the Supreme Court abandoned any pretense of equilibration and handed large companies huge victories. The significance, of course, is not simply that Wal-Mart's

Dukes involved former and current female employees who brought a class action against Wal-Mart Stores, Inc., on behalf of approximately 1.5 million women, alleging nationwide gender discrimination, in violation of Title VII.[211] Plaintiffs alleged that Wal-Mart gave its local managers unfettered discretion when making pay and promotions decisions, resulting in women being disproportionately underpaid and denied advancement.[212] To demonstrate that class members had enough in common with each other to justify collective action—as required by Rule 23(a)(2)[213]—plaintiffs proffered statistics showing gender disparities in pay and promotions; 120 employee affidavits reporting discrimination; and testimony from a sociologist, concluding that Wal-Mart's corporate culture and personnel practices made it susceptible to gender discrimination.[214]

Conceding that even a single common question would suffice under Rule 23(a)(2), the Court concluded that the women failed to make even this minimal showing.[215] Relying on dicta in a footnote of *General Telephone Co. of the Southwest v. Falcon*,[216] the Court required plaintiffs to demonstrate commonality with "'[s]ignificant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[217] Applying this new elevated commonality standard, the Court concluded that the statistical disparities, anecdotal accounts, and "social framework" evidence[218]

> employees who suffered sex discrimination are unlikely ever to recover damages . . . . The larger concern is that big companies know that it will be much harder to sue them in class actions, and the unscrupulous ones will more often make the choice to enrich themselves at the expense of . . . employees.

Fisk & Chemerinsky, *supra* note 181, at 77.

211. *Dukes*, 131 S. Ct. at 2547.

212. *Id.* at 2548.

213. FED. R. CIV. P. 23(a)(2). This is referred to as "commonality" and is satisfied when "there are questions of law or fact common to the class." Commonality is one of four criteria that every class action must satisfy under Rule 23(a). They include: (1) the class is so numerous that joinder would be impracticable; (2) the class shares common questions of law or fact; (3) the representative parties' claims or defenses are typical of the class; and (4) the representative parties will fairly and adequately represent the class. FED. R. CIV. P. 23(a).

214. *Dukes*, 131 S. Ct. at 2549.

215. *Id.* at 2556–57.

216. *Falcon* involved a lead plaintiff who alleged discrimination against Mexican-Americans. He alleged that he and a class of Mexican-American employees were subjected to intentional discrimination in promotions and that a class of Mexican-American applicants was subjected to disparate impact discrimination in hiring. 457 U.S. 147, 149–51 (1982). The Court found that there were no common questions between the plaintiff and the applicant class. *Id.* at 157–58.

217. *Dukes*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15).

218. *Id.* at 2549.

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proffered fell short of demonstrating that there was sufficient glue to hold the class together.[219]

The Court's application of heightened commonality[220] to the evidence in *Dukes* portends a difficult future for workers attempting to collectively challenge alleged discrimination.[221] *Dukes* is flawed not only for its cramped analysis of the evidence in this case,[222] but also its interpretation of commonality for future Title VII cases.[223] The Court's interpretation goes well beyond Rule 23's text,[224] its historical underpinnings,[225] and decades of Title VII class action jurisprudence.[226] Professor Arthur R. Miller even suggests that, like the pleading standard, the commonality standard may now have imported something akin to a "plausibility" requirement.[227]

Professor Miller's words of caution are well headed, given that one of the bases for the majority's conclusion that commonality had not been met was the Court's incredulity that an employer's "undisciplined system of

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219. *Id.* at 2556–57.

220. The Court elevated the commonality standard in a number of ways. *See* Malveaux, *supra* note 209, at 39, 42–43 (describing "same injury," "common mode" necessary for commonality); Spencer, *supra* note 5, at 463–75 (describing new same injury, centrality, and efficiency requirements of commonality); *see also* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 773–80 (2013) (contending that the Court's new requirement—a common question be central to the case—inappropriately imports a predominance standard into Rule 23(a)(2), in opposition to the drafters' intent for Rule 23(b)(1) and (b)(2) classes). Some fear that this more rigorous commonality standard for class actions will extend beyond class certification to other joinder and consolidation rules that include a common question element. *See* Spencer, *supra* note 5, at 447 & nn.34–35, 449 (citing various rules); Klonoff, *supra*, at 779 n.289 (same).

221. *See* Malveaux, *supra* note 209, at 40 (describing how "[t]he Court gave each type of evidence short shrift").

222. *Id.* at 39–42 (criticizing Court for disaggregating the evidence, as opposed to considering the whole picture).

223. This, of course, depends on how lower courts understand the strictures of commonality post-*Dukes* and the extent to which they follow them. *See* Spencer, *supra* note 5, at 445 & n.26 ("Some courts have been more circumspect in their understanding of *Dukes*, limiting the decision to its facts.") (citing cases).

224. Spencer, *supra* note 5, at 444 ("Nothing in the language or history of Rule 23(a)(2) supports the *Dukes* majority's interpretation of it."); *id.* at 444–46 (explaining how Court's new definition of commonality is untethered from the Rule's text); *see also* Klonoff, *supra* note 220, at 776 ("The majority decision in *Dukes* cannot be squared with the text, structure, or history of Rule 23(a)(2). Nothing in the text of Rule 23(a)(2), or in the Advisory Committee Notes thereto, requires that the common question be central to the outcome.").

225. Spencer, *supra* note 5, at 443–44; *id.* at 451–63 (describing how the *Dukes* interpretation of commonality is counter to the development of Rule 23 and its origins).

226. *See* Malveaux, *supra* note 209, at 38–39; *see also* Miller, *supra* note 8, at 318–19 (footnote omitted) ("*Wal-Mart Stores, Inc. v. Dukes* . . . has increased the burden of showing 'significant proof' of a general policy of discrimination in order to secure class certification. It did so by insisting on a showing of a higher level of 'commonality' under Rule 23(a)(2) . . . .").

227. Miller, *supra* note 8, at 319 n.125.

subjective decisionmaking"—potentially actionable under Title VII—could be the glue that held the class together.[228] The Court's skepticism, if not disbelief, that a majority of Wal-Mart's managers might act—even subconsciously—in a way that disfavors women's employment opportunities[229] prevented the Court from reaching commonality.[230] It stated, without support, that "left to their own devices *most* managers in *any* corporation—and *surely most* managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."[231] The Court required plaintiffs to identify a "common mode" of how supervisors exercised their discretion throughout the company, but then rebuffed the statistics, affidavits, and expert evidence indicating that gender bias might be the modality.[232]

The Court was further dubious of any systemic gender bias because of the existence of an official written anti-discrimination policy.[233] Juxtaposing this written policy with Wal-Mart's policy of giving local supervisors unfettered discretion to make employment decisions, the Court concluded that plaintiffs had not met their evidentiary burden.[234] In stark contrast, the dissent—comprised of all the female justices and Justice Breyer—had little difficulty concluding that Wal-Mart's policy of unchecked discretion could result in systemic bias[235] and, therefore, justify classwide treatment.[236]

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228. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988)).

229. Plaintiffs contended that a "strong and uniform 'corporate culture' permit[ted] bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers." *Dukes* 131 S. Ct. at 2548; *id* at 2563 (Ginsburg, J., concurring in part and dissenting in part) (describing the district court's findings of Wal-Mart's methods used to maintain its corporate culture).

230. Malveaux, *supra* note 209, at 43.

231. *Dukes*, 131 S. Ct. at 2554 (emphasis added).

232. *See id.* at 2554–55 ("[Plaintiffs] have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected."). Additionally, the Court noted that "[i]n a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. [Plaintiffs] attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short." *Id.* at 2555.

233. *Id.* at 2553. *See* Malveaux, *supra* note 209, at 43.

234. *Dukes*, 132 S. Ct. at 2553–54.

235. The dissent stated:

> The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

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Professor A. Benjamin Spencer situates *Dukes* squarely within a current restrictive ethos procedural trend—where societal outgroups[237] asserting disfavored claims against the dominant class[238] are increasingly restricted from court access and merits-based resolutions by higher procedural barriers.[239] He appropriately expresses concern over the majority's threshold skepticism of plaintiffs' discrimination claims and conditional access to the civil litigation system.[240] The Court's demand that plaintiffs produce "significant proof" of a general policy of discrimination as a precursor to its finding commonality, and the Court's reliance on its own prejudgment and worldview[241] when ascertaining what quantum of proof suffices, is untenable.[242] The Court's deciding to hold plaintiffs who challenge systemic discrimination to a higher evidentiary standard[243] for court access, and assessing the merits of those claims—rather than leaving it to a jury[244]—run counter to the Rules' origins and the democratic process.[245]

Id. at 2564 (Ginsburg, J., dissenting) (footnote omitted) (concluding that "[i]t is hardly surprising that for many managers, the ideal candidate [is] someone with characteristics similar to their own").

236. Finding no error of law or abuse of discretion, the dissent deferred to the district court's findings indicating not only potential classwide disparate impact, but disparate treatment gender discrimination. In finding commonality, the district court relied on plaintiffs' evidence suggesting a system of discretionary decisionmaking that operates uniformly across stores, a corporate culture that promotes gender bias, a company failure to check such bias, and pay and promotion disparities that "'can be explained only by gender discrimination and not by . . . neutral variables.'" *Id.* at 2564–65 (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 155 (N.D. Cal. 2004)).

237. Professor Spencer explains that "[m]embers of societal outgroups are 'those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms . . . . [T]hose raising difficult and often tenuous claims that demand the reordering of established political, economic and social arrangements, that is, those at the system's and society's margins.'" Spencer, *supra* note 5, at 484 (quoting Yamamoto, *supra* note 42, at 345).

238. Professor Spencer juxtaposes "members of the dominant class, such as major corporations" against "members of disempowered groups." *Id.* at 449.

239. *Id.* at 478.

240. *Id.*

241. *Id.* at 445 (describing how *Wal-Mart* created a heightened commonality standard under Rule 23(a)(2), fueled in part by "[c]laimant animus, combined with hostility toward and a misunderstanding of claims of discrimination").

242. *Id.* at 476 (footnote omitted) ("Threshold skepticism demands that before a court permits defendants to be subjected to the litigation process itself . . . claimants must demonstrate, up front, that their claims have merit.").

243. This translates into higher financial costs as well. *See supra* note 116.

244. This approach contradicts the prohibition against conditioning class certification on merits that do not overlap with the certification criteria, as stated in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974). *See also* Klonoff, *supra* note 220, at 756 ("Requiring district courts to *resolve* conflicting evidence in ruling on class certification impacts more than just timing and discovery issues. Ultimately, in cases in which the court denies certification because it credits defendant's evidence over plaintiff's evidence, . . . [this] approach usurps the jury's role to weigh and adjudicate conflicting evidence.").

245. Professor Spencer notes the unfairness of this heightened evidentiary burden on plaintiffs

The impact of heightened commonality on Title VII and other civil rights cases is still being revealed,[246] but the direction does not look favorable. At the very least, *Dukes* hands defendants another tool for dismantling group action.[247] Unquestionably, classes the size and scope of the one proposed in *Dukes* will become even rarer.[248] But even classes of less magnitude and scope are suffering a fate similar to *Dukes* because of their underlying theory of liability. Like *Dukes*, many employment discrimination class actions are premised on excessive subjectivity as a discriminatory policy, which grounds Rule 23(a)(2) commonality. Thus, claimants arguing that a policy of unfettered discretionary decision-making is a vehicle for systemic workplace discrimination and disparities face a more formidable battle post-*Dukes*.[249] *Dukes*'s impact has gone

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challenging discrimination, and likens it to similar hurdles in the pleadings and summary judgment arena. Spencer, *supra* note 5, at 479–80; *see* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1867–68 (2008) (arguing that recent Supreme Court jurisprudence on the motion to dismiss diverges from common law interpretation of the Seventh Amendment and noting that "[i]f a court determines that a plaintiff has not satisfied the standards from these cases—the plausibility requirements or the heightened pleading requirements—the case is dismissed at the pleading stage, which eliminates the plaintiff's jury trial right."); Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 144 (2007) [hereinafter *Why Summary Judgment Is Unconstitutional*] (asserting that the Supreme Court has never decided whether summary judgment under Rule 56 is constitutional and arguing that it is not constitutional under the Seventh Amendment).

246. *See* Klonoff, *supra* note 220, at 778 ("The full reach of *Dukes* remains to be seen, and not surprisingly, the results are mixed.").

247. *See id.* at 779 ("At a minimum, commonality almost certainly will become a standard part of a defendant's attack on class certification.").

248. This is not surprising. Cases the magnitude and scope of *Dukes* are rare. Malveaux, *supra* note 209, at 44. Even among those sympathetic to the plaintiffs in *Dukes* concede that the class scope was ambitious. *See, e.g.*, *id.* ("With 1.5 million potential class members nationwide, *Dukes* unquestionably tested the outer bounds of what it takes to hold a class together. Smaller classes are bound to be more successful."); *see also* Deborah M. Weiss, *A Grudging Defense of* Wal-Mart v. Dukes, 24 YALE J.L. & FEMINISM 119, 163–64 (2012) (criticizing plaintiffs' counsel in *Dukes* for, *inter alia*, not proposing regional and issue subclasses when seeking certification); *see generally id.* at 173 ("[T]here is plenty of blame to go around, and some of it must go to the plaintiffs' bar.").

As I've mentioned elsewhere, the plaintiffs' bar has adjusted by bringing smaller cases, which has its own drawbacks. Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After* Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 668 (2013).

249. *See* JOSEPH M. SELLERS, CLASS ACTIONS AFTER *WAL-MART V. DUKES*, AM. LAW INST. 113, 114 (2013) ("[W]here plaintiffs challenge practices of discretionary decisionmaking, *Dukes* has been interpreted to mean that plaintiffs must show evidence of a common mode of exercising discretion . . . ."); *see, e.g.*, Bolden v. Walsh Constr. Co., 688 F.3d 893, 897–89 (7th Cir. 2012) (unanimous reversal of class certification of African-American journeymen alleging discrimination on grounds that supervisors given complete discretion to provide overtime opportunities did not satisfy commonality absent a common direction or guidance); Bennett v. Nucor Corp., 656 F.3d 802, 815–16 (8th Cir. 2011) (affirming denial of class certification post-*Dukes* on grounds that all supervisors did not exercise their discretion in a common way); Valerino v. Holder, 283 F.R.D. 302, 318–19 (E.D. Va. 2012) (court rejected argument that totally discretionary review process created companywide biased

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even beyond Title VII and employment discrimination claims. Cases brought under the Equal Credit Opportunity Act (ECOA),[250] the Fair Housing Act (FHA),[251] and § 1981[252] challenging lenders' discretionary pricing policies as discriminatory have also suffered this fate.[253]

Post-*Dukes*, workers are being forced to engage the merits of their discrimination claims more at the class certification stage. To satisfy commonality, some judges are now requiring a stronger causal connection between an employer's discretionary decision-making policy, on the one hand, and an observed disparity or adverse employment action, on the other—thereby making it more difficult for employees to act collectively.[254]

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testing procedure that would satisfy commonality for class of U.S. Marshals Service employees alleging gender discrimination in promotions and transfers).

But see, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012) (reversing denial of class certification for class of African-American brokers alleging pay discrimination under Title VII and section 1981 on grounds that individual managers exercised their discretion under the influence of companywide policies, thereby distinguishing *Dukes*); Cronas v. Willis Group Holdings, Ltd., No. 06 Civ. 15295(RMB), 2011 WL 5007976, at *4 (S.D.N.Y. Oct. 18, 2011) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011)) (holding that commonality was satisfied because "'whether the excessive subjectivity in pay and promotion decisionmaking . . . had a disparate impact on female officers' . . . 'is capable of classwide resolution . . . .'").

250. 15 U.S.C. § 1691 (2006).

251. 42 U.S.C. §§ 3601–3619 (2006).

252. 42 U.S.C. § 1981 (2006).

253. *See, e.g.*, Barrett v. Option One Mortg. Corp., No. 08-10157-RWZ, 2012 U.S. Dist. LEXIS 132775, at *9-13 (D. Ma. Sept. 18, 2012) (where class of African-American borrowers challenged defendant's loan pricing policy under the ECOA and FHA as discriminatory because it gave brokers discretion to impose non-creditworthy charges, court decertified class post-*Dukes* on basis that brokers did not have a "common mode" of exercising their discretion); In re Countrywide Fin. Mortg. Lending Practices Litig., No. 08-MD-1974, 2011 WL 4862174, at *1-4 (W.D. Ky. Oct. 13, 2011) (denying certification of a putative class of plaintiffs alleging that Countrywide violated the anti-discriminatory lending provisions of the ECOA, the FHA, and the Civil Rights Act because the plaintiffs failed to show that defendant's discretionary policy of allowing brokers to exercise autonomy to form "teams" to sign up new clients and share and service existing clients amounted to a common method of discrimination), *aff'd sub nom.* Miller v. Countrywide Bank, N.A., 708 F.3d 704 (6th Cir. 2013); Rodriguez v. Nat'l City Bank, 277 F.R.D. 148, 155 (E.D. Pa. 2011) (denying class certification in a case alleging violations of the FHA and ECOA and explaining that under *Dukes*, "[p]laintiffs would likely have to show the disparate impact and analysis for each loan officer or at a minimum each group of loan officers working for a specific supervisor"), *aff'd*, 726 F.3d 372 (3d Cir. 2013); In re Wells Fargo Residential Mortg. Lending Discrimination Litig., No. 08-MD-01930, 2011 WL 3903117, at *1-5 (N.D. Cal. Sept. 6, 2011) (denying certification of a putative class alleging that Wells Fargo's discretionary pricing program violated the FHA and the ECOA because plaintiffs did not establish that the discretionary pricing program amounted to a common mode of discrimination as required by *Dukes*).

254. *See* Malveaux, *supra* note 209, at 44–45 (discussing risks involved). Employment discrimination claims are not the only ones experiencing a higher certification hurdle. Similarly, in the antitrust area, the Court reiterated the rigorous analysis and consideration of the merits when they overlap with class certification criteria, as set forth in *Dukes*. *See* Comcast Corp. v. Behrend, 133 S.

In *Dukes*, the Court favored a demanding examination of the merits that touch on any class certification criteria over an arms-length, more suspended approach. This decision put to rest a debate among lower courts over how to interpret *Eisen v. Carlisle & Jacqueline*[255] and *General Telephone Co. v. Falcon.*[256]

Eisen's prohibition of certification conditioned on the merits and *Falcon*'s insistence on a rigorous class certification analysis split the federal courts of appeals over the extent to which courts should address merits at the class certification stage.[257] *Dukes* resolved this debate, clarifying that *Eisen* was no bar to determining the merits when they overlapped with certification standards and that the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[258] However, *Dukes* went so far as to condition class certification on whether plaintiffs could provide *significant proof* of a discriminatory policy—in direct contravention of *Eisen*'s prohibition. Thus, the Court has singled out Title VII cases for special treatment, subjecting plaintiffs to harsher court-entry when acting collectively.[259]

Ct. 1426, 1435 (2013) (reversing certification of Rule 23(b)(3) class where lower court refrained from addressing inconsistency between plaintiffs' expert's damages model and classwide theory of liability).

255. 417 U.S. 156 (1974).

256. 457 U.S. 147 (1982). In *Eisen*, the Supreme Court made clear:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. . . . "[I]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

Eisen, 417 U.S. at 177–78 (quoting Miller v. Mackey Int'l, Inc., 452 F.2d 434 (5th Cir. 1971)). However, in *Falcon*, the Supreme Court explained:

> [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . . [A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) [and one of Rule 23(b)] have been satisfied.

Falcon, 457 U.S. at 160–61.

257. *See generally* Klonoff, *supra* note 220, at 745–51 (describing different court interpretations).

258. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011) (citations omitted).

259. *Dukes* still left open questions about the extent to which merits should be considered and the amount of proof necessary at class certification. For example, *Dukes* did not speak definitively on whether expert testimony at the class certification stage should be subjected to a *Daubert* analysis, but instead offered this *dicta*: "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so . . . ." *Id.* at 2553–54 (citations omitted); *see* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 597 (1993) (holding that for expert testimony to be admissible, the trial judge must determine "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"). Courts remain divided over the propriety of subjecting experts to the *Daubert* test at class certification. *See* Malveaux, *supra* note 248,

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The Court's stricter gatekeeping stance not only potentially bars group relief, but also elevates the amount of discovery—and subsequent costs and time—necessary to penetrate the class certification wall. This creates all the more reason for discovery to be generous in kind and scope. On the contrary, the trajectory for discovery has been increasingly constrictive.[260] Emboldened by the obstructionist civil litigation environment—set forth by *Iqbal* and *Dukes*—employers are now seeking to dismiss class claims on the face of the complaint pre-discovery,[261] and some are prevailing.[262]

Plaintiffs are adjusting to the harsher certification climate to minimize the potentially damaging impact of *Dukes*. Plaintiffs' counsel is bringing smaller cases that are more geographically limited[263] to create a tighter nexus between decision-makers and alleged discriminatory conduct. Other strategies include seeking issue certification under Rule 23(c)(4),[264]

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at 670, 670 n.52 (citing cases); SELLERS, *supra* note 249, at 3 ("Courts post-*Dukes* have reached varied conclusions . . . ."); Klonoff, *supra* note 220, at 758–61 (describing conflicting approaches by courts).

260. *See generally* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674–88 (2010) (discussing the trend toward greater judicial management of discovery to address concerns over cost and delay and concomitant narrowing of discovery).

261. SELLERS, *supra* note 249, at 115 ("In reliance on *Dukes*, defendants have launched earlier and more aggressive efforts to dismiss or strike class allegations arguing that the theories alleged do not satisfy the certification standards set forth in *Dukes* or to attempt to deny certification prior to plaintiffs' filing a motion to certify.").

262. *See, e.g.*, Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 949–50 (6th Cir. 2011) (upholding district court's dismissal of class allegations and not granting plaintiffs additional time or discovery). According to *Dukes*'s class counsel, Joseph M. Sellers, thus far this approach has been the minority one. *See* SELLERS, *supra* note 249, at 115 (citing cases). *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., No. C 01-02252 CRB, 2012 U.S. Dist. LEXIS 135554, at *7 (N.D. Cal. Sept. 21, 2012) (denying Wal-Mart's motion to dismiss class claims challenging discretionary decision-making as discriminatory in narrower regional class post–*Dukes*).

263. Following *Dukes*, the plaintiffs narrowed their class definition to female employees in the California area. The United States District Court for the Northern District of California denied Wal-Mart's motion to dismiss and stated that it would later consider the motion for certification. *See* Dukes v. Wal-Mart Stores, Inc., No. C 01-02252 CRB, 2012 WL 4329009, at *2, *10 (N.D. Cal. Sept. 21, 2012), *perm. app. denied*, No. C 01-02252 CRB, 2012 WL 6115536; Dukes v. Wal-Mart Stores, Inc., No. C 01-2252 CRB, 2013 WL 149685, at *5-6 (N.D. Cal. Jan. 14, 2013) (denying Wal-Mart's request for leave to file a motion for reconsideration); Dukes v. Wal-Mart Stores, Inc., No. 13-80184, 2013 U.S. App. LEXIS 23703 (9th Cir. Nov. 18, 2013) (denying petition for permission to appeal order denying class certification). Similar regional actions have been filed in Texas, Florida, and Tennessee. *See* Odle v. Wal-Mart Stores, Inc., No. 3:11-CV-02954-O, 2013 U.S. Dist. LEXIS 1879 (N.D. Tex. Jan. 7, 2013); Love v. Wal-Mart Stores, Inc., No. 12-619590-Civ., 2013 WL 5434565 (S.D. Fla. Sept. 23, 2013) Phipps v. Wal-Mart Stores, Inc., 925 F. Supp. 2d 875 (M.D. Tenn. 2013).

264. Rule 23(c)(4) states: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4). *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491–92 (7th Cir. 2012) (Posner, J.), *cert. denied*, 133 S. Ct. 338 (2012) (certifying a Rule 23(c)(4) class on the issue of whether Merrill Lynch's employment policies had a disparate impact on African-American employees); United States v. City of New York, 276 F.R.D. 22, 34 (E.D.N.Y. 2011) ("Issue certification of bifurcated liability-phase questions is fully consistent with *Wal-Mart*'s careful attention to the distinct procedural protections

creating subclasses,[265] defining the class more narrowly,[266] distinguishing *Dukes*,[267] filing class actions in state court,[268] and relying on statutes other than Title VII to challenge certain employment practices.[269] These strategies come with costs, some at their peril.[270]

In sum, the Court's heightened commonality standard, like the pleading one, potentially undermines court access and denies formal resolution on the merits, but on an even larger scale. Withholding class certification—especially in cases involving small value claims and poor claimants—may deny relief altogether for such litigants[271] and compromise enforcement of anti-discrimination statutes more generally.[272]

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attending (b)(2) and (b)(3) classes."); *see generally* Klonoff, *supra* note 220, at 807–15 (describing conflicting views over propriety of issue certification and different court approaches).

265. *See* FED. R. CIV. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."); *see, e.g.*, Calloway v. Caraco Pharm. Lab., Ltd., 287 F.R.D. 402, 408–09 (E.D. Mich. 2012) (certifying two subclasses of pharmaceutical employees who alleged that they were laid off without receiving proper notice).

266. *See, e.g.*, In re Rodriguez, 695 F.3d 360, 362–63 (5th Cir. 2012) (affirming the bankruptcy court's grant of certification for plaintiffs' redefined class). *See also* class actions filed post-*Dukes* against Wal-Mart, *supra* note 263.

267. *See, e.g.*, Connor B. *ex rel.* Vigurs v. Patrick, 278 F.R.D. 30, 31–33 (D. Mass. 2011) (denying defendant's motion to decertify a class of 8500 children in custody of the Massachusetts Department of Children and Families, alleging constitutional violations, and noting that the *Dukes* decision "did not change the law for all class action certifications"); Gray v. Golden Gate Nat'l Recreation Area, 279 F.R.D. 501, 518–19 (N.D. Cal. 2011) (certifying a 23(b)(2) class of disabled citizens seeking an injunction under the Rehabilitation Act, 29 U.S.C. § 701, and stating that "[t]hough the Supreme Court did not expressly limit its holding in [*Dukes*] to Title VII employment discrimination cases, Plaintiffs' arguments [that the decision should not apply to injunctive actions under the Rehabilitation Act] are generally persuasive"), *stay granted pending motion for interlocutory appeal*, No. C 08-00722, 2011 WL 6934433 (N.D. Cal. Dec. 29, 2011); Churchill v. Cigna Corp., No. 10-6911, 2011 WL 3563489, at *1-4 (E.D. Pa. Aug. 12, 2011) (granting certification of a portion of a class of insurance policyholders who were denied coverage for autism treatment, distinguishing the facts of the case from *Dukes*, noting Cigna had a clear nationwide policy to deny certain autism treatments, and thus finding the *Dukes* holding "inapposite" in the present case); *see also* Miller, *supra* note 8, at 320 n.127 (noting that collective actions brought under the Fair Labor Standards Act (FLSA) have been largely exempt from *Dukes*'s restrictive commonality trend); SELLERS, *supra* note 249, at 1, 13–26 (same) (citing cases).

268. *See, e.g.*, Kumar v. Gate Gourmet, Inc., 325 P.3d 193 (Wash. 2014) (reversing lower court's dismissal of class action claim alleging violations of Washington's Law Against Discrimination).

269. For example, plaintiffs challenging employment practices based on gender discrimination are turning more to the Equal Pay Act post-*Dukes*. SELLERS, *supra* note 249, at 1, 3–4 (identifying Equal Pay Act—although imperfect—as option post-*Dukes*).

270. For example, a smaller class may be less likely to yield empirical data that is statistically significant, thereby making it more difficult—if not impossible—to meet the certification threshold. Divide and conquer—tried and true.

271. Miller, *supra* note 8, at 318 ("Realistically, the choice for class members is between collective access to the judicial system or no access at all."); *id.* at 322 ("[M]any cases will not be pursued because they are not economically viable on behalf of individual class members, most particularly those having negative-value claims.").

272. *See* George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 29 (2012) ("In sum, the holding on commonality in *Wal-Mart*

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2. *Restrictive Certification Options for Back Pay Relief*[273]

In addition to calcifying commonality, *Dukes* stripped workers' capacity to seek back pay under Title VII as a class under Rule 23(b)(2). Like many employees challenging systemic discrimination, the *Dukes* plaintiffs sought not only injunctive and declaratory relief, but also back pay, under Rule 23(b)(2). Back pay is critical because it not only makes plaintiffs "whole," but also encourages voluntary compliance with the law and deters future misconduct.[274]

The Court's unanimous ruling that back pay was not appropriate under the circumstances effectively reversed almost a half-century of Title VII jurisprudence.[275] Courts typically allowed back pay for civil rights cases under Rule 23(b)(2) on the basis that this monetary relief is equitable and critical to Title VII's remedial scheme.[276] Even appellate courts with the most taxing class certification standards have recognized that back pay is consistent with the Rule's constraints.[277] One of the primary purposes of

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diminishes the prospect of certification and in doing so, diminishes the likelihood that a class action will be brought. The net effect is to reduce the defendant's exposure to class-wide liability and the deterrent effect of class actions generally.").

273. This section draws heavily from my prior work, Malveaux, *supra* note 209 .

274. *See* 118 CONG. REC. 7166–70 (1972) (remarks made by Sen. Williams in a section-by-section analysis of The Equal Employment Opportunity Act of 1972); *see also* United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973) (describing the compensatory and deterrent functions of back pay). Because of the primacy of this monetary relief, there is a presumption in its favor when discrimination is established. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419–21 & n.12 (1975); *see also* 1–2 JANICE GOODMAN, MARY ANN OAKLEY, ALICE D. BONNER, EDITH BARNETT & SUZANNE SANGREE, EMPLOYEE RIGHTS LITIGATION § 2.10[2][a][i] (2010) ("Back pay is the most common form of monetary relief in Title VII cases . . . [and is] . . . routinely granted barring extraordinary circumstances."); *id.* ("[T]he denial of back pay to prevailing plaintiffs is a minor exception rather than the rule.").

275. In the first Title VII post-*Dukes* case, the federal district court concluded: "In so holding, a unanimous Supreme Court reduced to rubble more than forty years of precedent in the Courts of Appeals, which had long held that backpay is recoverable in employment discrimination class actions certified under Rule 23(b)(2)." United States v. City of New York, 276 F.R.D. 22, 33 (E.D.N.Y. 2011); *see* 5 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 92.11[1] (2d ed. 2011) (citing cases to support the assertion that "the majority of courts have had little difficulty fitting an action for back pay and injunctive relief into Rule 23(b)(2)").

276. Suzette M. Malveaux, *Class Actions at the Crossroads: An Answer to* Wal-Mart v. Dukes, 5 HARV. L. & POL'Y REV. 375 (2011) (discussing same). *See, e.g.*, *City of New York*, 276 F.R.D. at 31–34 & n.3; Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 169 (2d Cir. 2001) (collecting cases); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415–16 & n.10 (5th Cir. 1998) ("Of course, to the extent the district court applied an incidental damages standard to the plaintiffs' claims for back pay, its analysis was flawed."); *id.* at 425 ("[W]e hold that *nonequitable* monetary relief may be obtained in a class action certified under Rule 23(b)(2) only if the predominant relief sought is injunctive or declaratory.") (emphasis added).

277. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 618–19 & n.40 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011) (citing cases adopting the "consensus view" and noting that "it is . . . well accepted, even by circuits that are generally restrictive in certifying classes seeking monetary damages under

Rule 23(b)(2) was to permit civil rights class actions seeking equitable relief,[278] including back pay. The Advisory Committee Notes make clear that Rule 23(b)(2) permits monetary relief, and that the rule was designed with civil rights at its core.[279]

Notwithstanding this history, *Dukes* conditioned the availability of back pay on whether it was incidental to the injunctive or declaratory relief sought, not on whether it was equitable in nature.[280] The Court concluded that Wal-Mart had a right to individualized rather than formulaic back pay determinations, which meant that such relief was not incidental to the class-wide injunction and declaration.[281]

Dukes makes it more difficult for employees alleging systemic misconduct under Title VII to seek monetary relief because it is harder for them to use the Rule 23 provision designed for such cases—(b)(2). First, the Court does not distinguish between equitable and non-equitable monetary relief as a basis for (b)(2) certification. Thus, back pay no longer gets preferential treatment over compensatory and punitive damages because of its equitable nature. Second, any monetary relief that is not incidental to the injunctive or declaratory relief sought cannot meet the (b)(2) test.[282] *Dukes* requires circuits like the Second and Ninth, and those who had yet to weigh in on the matter, to adopt the harshest standard[283] for

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Rule 23(b)(2), that a request for back pay in a Title VII case is fully compatible with the certification of a Rule 23(b)(2) class").

278. The Advisory Committee Notes make this clear. *See* FED. R CIV. P. 23 advisory committee's note.

279. This is demonstrated by the Committee's Rule 23(b)(2) examples: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." FED. R CIV. P. 23 advisory committee's note.

280. The Court held that monetary relief may not be certified under Rule 23(b)(2) where such relief is *not* "incidental to the injunctive or declaratory relief." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

281. Although the Court never explicitly adopted the Fifth Circuit's "incidental" test for determining whether monetary relief is permitted under Rule 23(b)(2), which is set forth in *Allison v. Citgo Petroleum Corp.*, the Court applied the test to plaintiffs' back pay claims, and concluded that such relief failed. *See id.* at 2560–61.

282. *See* Miller, *supra* note 8, at 319 n.125.

283. The Supreme Court has arguably taken a position *harsher* than any circuit, including the Fifth Circuit—which permitted back pay in (b)(2) civil rights cases. Klonoff, *supra* note 220, at 790.

All of the federal courts of appeals that have addressed the question of whether monetary relief—more specifically, damages—is allowed under Rule 23(b)(2) have concluded that such relief is permitted so long as it does not predominate over the injunctive or declaratory relief. *See* Malveaux, *supra* note 209, at 49 n.89 (citing cases). While the Rule itself does not mention predominance, the Advisory Committee Notes state that so long as the appropriate final relief does not relate "exclusively or predominantly to money damages," (b)(2) certification is appropriate. *See* FED. R. CIV. P. 23 advisory committee's note. Because of the Rule's silence on the matter, the circuit courts have uniformly relied on this guidance. Their only disagreement was how predominance should be

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determining the availability of relief other than injunctive or declaratory relief.[284] Third, courts are more inclined to conclude that back pay must be determined on an individualized, rather than aggregate, basis. This, in turn, would make back pay non-incidental, and therefore uncertifiable under Rule 23(b)(2).[285] Because of the more demanding certification standard under Rule 23(b)(2), employees may opt not to seek monetary relief, or a Title VII class action at all. Others may attempt certification under the alternative class action provision, Rule 23(b)(3), which has its own drawbacks.

Shunting Title VII and other civil rights claims of group harm into Rule 23(b)(3) may also allude survival. First, the certification onus is greater: certification is available only if common issues predominate over individual ones and a class action is superior to other mechanisms for resolving the dispute.[286] Post-*Dukes*, once a court determines that back pay must be calculated on an individualized basis, this raises the specter that individual issues predominate over common ones, thus foreclosing Rule 23(b)(3), as well as (b)(2), certification.[287]

The predominance test under (b)(3) itself is becoming more arduous.[288] For instance, in *Comcast Corp. v. Behrend*,[289] the Court reversed

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determined. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 615–17 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011) (explaining Ninth Circuit's "objective effects" test); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 162–64 (2d Cir. 2001) (explaining Second Circuit's ad hoc balancing test); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (explaining Fifth Circuit's popular "incidental" test);. Malveaux, *supra* note 276, at 400–13 (conducting comparative analysis of predominance tests); *see also* Malveaux, *supra* note 196, at 412–13 (criticizing Fifth Circuit's approach set forth in *Allison*); W. Lyle Stamps, Commentary, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. PUB. L. 411, 411 (2003) (same). *Dukes* rejected a predominance test altogether. *Dukes*, 131 S. Ct. at 2559–60.

284. Moreover, post-*Dukes*, the indivisible nature of relief—including declaratory and injunctive relief—is relevant to (b)(2) certification. SELLERS, *supra* note 249, at 2. *See Dukes*, 131 S. Ct. at 2557; Ellis v. Costco Wholesale Corp., 657 F.3d 970, 987 (9th Cir. 2011) (internal quotation marks omitted) (*Dukes* established that "the key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted"); Klonoff, *supra* note 220, at 791.

Dukes did not answer one of the questions for which it granted review: whether any *monetary* relief is appropriate under (b)(2), which mentions only the propriety of class-wide injunctive and declaratory relief. *See* Petition for Writ of Certiorari for Defendant-Appellant, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277). The Court did not prohibit *monetary* relief. Instead, it prohibited *individualized* relief—whether monetary, injunctive or declaratory. *Dukes*, 131 S. Ct. at 2557 ("[A]t a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule [23(b)(2)]."); *see, e.g.*, Gulino v. Bd. of Educ., 907 F.Supp.2d 492, 507 (S.D.N.Y. 2012) (quoting *Dukes*, 131 S. Ct. at 2557) ((b)(2) certification "is not appropriate 'when each member of the class would be entitled to a *different* injunction'").

285. *See generally* Malveaux, *supra* note 209, at 51.

286. *See* FED. R. CIV. P. 23(b)(3).

287. *See* Malveaux, *supra* note 209, at 48.

288. *See* Klonoff, *supra* note 220, at 792 ("[I]n recent years, the courts have made it far more

certification of a class of two million Comcast subscribers alleging that the company engaged in anti-competitive behavior, in violation of the Sherman Anti-Trust Act.[290] Emphasizing the need for a "rigorous analysis" post-*Dukes*, the Court required plaintiffs' damages model to be consistent with their theory of liability for certification under Rule 23(b)(3).[291] *Comcast* did not adopt the position that there must be class-wide proof of everything at issue to satisfy (b)(3) predominance at the class certification stage. However, emboldened by the opinion, some courts may require plaintiffs to prove that damages can be calculated on a class-wide basis as a condition of Rule 23(b)(3) certification.[292]

Second, civil rights plaintiffs have historically challenged systemic discrimination under (b)(2), partly to avoid the more onerous costs and burdens under (b)(3).[293] Because the latter is not as cohesive and homogeneous as the former, class members must be provided notice of a (b)(3) class action and an opportunity to opt out of the litigation.[294]

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difficult to certify class actions under (b)(3) by summarily finding, after identifying significant individualized issues, that predominance cannot be satisfied. They do so without carefully *weighing* those individualized issues against the common issues.").

289. 133 S. Ct. 1426 (2013).

290. *Id.* at 1430, 1435.

291. *Id.* at 1433–35. The conservative majority stated:

> [I]t is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.

Id. at 1433. The dissent, on the other hand, attempts to reign in the interpretation that individualized damages precludes Rule 23(b)(3) certification on predominance grounds. *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting).

292. *See* John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, *From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, BNA INSIGHTS (May 24, 2013), http://www.bna.com/from-cable-tv-to-washing-machines-the-supreme-court-cracks-down-on-class-actions/ ("[It] also follows from the *Comcast* decision that plaintiffs must put forth a method sufficient to calculate damages on a classwide basis in Rule 23(b)(3) class actions."); *see, e.g.*, Roach v. T. L. Cannon Corp., No. 3:10-cv-0591, 2013 WL 1316452, at *3 (N.D.N.Y. Mar. 29, 2013) (post-*Comcast*, class certification must be denied under Rule 23(b)(3) where plaintiffs do not produce a "damages model susceptible of measurement across the entire class"). *But see* Munoz v. PHH Corp., No. 1:08-cv-0759-AWI-BAM, 2013 WL 2146925, at *24 (E.D. Cal. May 15, 2013) ("The *Comcast* decision does not infringe on the long-standing principle that individual class member damage calculations are permissible in a certified class under Rule 23(b)(3)."); *see, e.g.*, Leyva v. Medline Indus., Inc., 716 F.3d 510, 514–16 (9th Cir. 2013) (holding that class certification denial was abuse of discretion where court required class-wide, over individualized proof of damages, and clarifying that *Comcast* does not require otherwise).

293. A class action may also be brought under Rule 23(b)(1), but this is inapplicable for most civil rights actions.

294. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412–13 (5th Cir. 1998).

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Therefore, even if plaintiffs can clear the (b)(3) certification hurdle, the cost of sending out class notices may be prohibitive.[295]

Thus, between the more rigorous *Dukes* incidental test for monetary relief under (b)(2), and the tougher predominance test and costs and burdens associated with (b)(3), some employees alleging systemic discrimination may be foreclosed from bringing a class action altogether[296]—risking under-enforcement.

Like the response to heightened commonality, plaintiffs' counsel is adjusting to Rule 23(b)(2)'s incidental relief test to minimize the damaging impact of *Dukes*. Employees bringing a pattern-or-practice employment discrimination case involving monetary relief are seeking certification solely under Rule 23(b)(3)[297] or more promisingly a hybrid approach—where group-wide injunctive or declaratory relief is sought under Rule 23(b)(2) and individualized monetary relief is sought under Rule 23(b)(3).[298] This approach addresses due process concerns by giving defendants the opportunity to raise individual affirmative defenses under Title VII, and by giving employees notice of the litigation and the occasion to opt out of a class whose cohesion is admittedly compromised by divergent monetary interests.[299] This lifeline, however, is cast in a sea raging against plaintiffs more generally, as discussed below.

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295. *See* Malveaux, *supra* note 209, at 48; *see also* Malveaux, *supra* note 196, at 425–26.

296. As class action expert Professor John C. Coffee, Jr., notes, this may be the most significant problem *Dukes* poses for future employment discrimination cases:

> The simple truth is that employment discrimination litigation cannot normally be certified under Rule 23(b)(3) because of the "predominance" requirement of that rule . . . . Even in a far simpler, more streamlined case than [*Dukes*], there will still typically be a host of individual issues that will make it difficult (and usually impossible) to satisfy that predominance standard.

John C. Coffee, Jr., *"You Just Can't Get There from Here": A Primer on* Wal-Mart v. Dukes, BNA INSIGHTS (July 19, 2011) (citation omitted).

297. *See, e.g.*, *Dukes*, 131 S. Ct. at 2561 (Ginsburg, J., concurring in part and dissenting in part).

298. *See* SELLERS, *supra* note 249, at 2–3 (citing cases); *see, e.g.*, Gulino v. Bd. of Educ., 907 F. Supp. 2d 492, 505–06, 509 (S.D.N.Y. 2012) (permitting (b)(2) certification of class-wide relief (declaratory judgment and appointment of monitor) and decertifying back pay claims and individualized injunctive relief under (b)(2), with (b)(3) option); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 986–88 (9th Cir. 2011) (injunctive, declaratory and class-wide punitive damages potentially certifiable under (b)(2) and compensatory damages and back pay potentially certifiable under (b)(3)); Easterling v. Conn. Dep't of Corr., 278 F.R.D. 41, 48–51 (D. Conn. 2011) (granting plaintiffs' request to modify certification of liability and class-wide declaratory and injunctive relief under (b)(2) and monetary and individualized injunctive relief under (b)(3)).

299. *See generally* Malveaux, *supra* note 209, at 51–52.

3. Higher and More Hurdles to Class Certification

Not only must those alleging employment and other types of discrimination clear Rule 23 class certification hurdles with them in mind,[300] they must also clear an increasing number of hurdles applicable to plaintiffs in general. These include, *inter alia*, stricter class definition standards,[301] greater scrutiny of numerosity,[302] and elevated concern over adequacy of representation.[303]

Even when employees and other civil rights litigants are successful at class certification, their success runs the risk of being short lived because of increased access to appellate review. Since 1998, the federal appellate courts and the Supreme Court have had the discretion to hear direct appeals of class certification grants and denials under Rule 23(f).[304] This interlocutory challenge—largely exercised by defendants[305]—not only drains plaintiffs' resources and time,[306] but usually results in their defeat.[307] For example, a study examining Rule 23(f) appeals from 1998 to

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300. These include those under *Dukes* discussed *supra*.

301. *See* Klonoff, *supra* note 220, at 761–68 (discussing more recent development of more rigorous and conflicting class definition standards, contrary to the 1966 to 2000 period).

302. *See id.* at 768–73 (describing trend toward requiring more evidentiary proof of numerosity, even where common sense would suggest the criteria is met). Every case must meet the numerosity requirement set forth in Rule 23(a)(1) to be certified as a class action. Rule 23(a)(1) states: "One or more members of a class may sue or be sued as representative parties on behalf of all members only if [] the class is so numerous that joinder of all members is impracticable." FED. R. CIV P. 23(a)(1).

303. *See* Klonoff, *supra* note 220, at 780–88 (describing evolution of adequacy concerns based on omitted claims and discussing differences among courts). Every case must meet the adequacy of representation requirement set forth in Rule 23(a)(4) to be certified as a class action. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In *Dukes*, the Court expressed concern over plaintiffs' decision to forego compensatory damages to enhance their likelihood of obtaining class certification under Rule 23(b)(2). *See Dukes*, 131 S. Ct. at 2559. The Court noted that plaintiffs' strategy might preclude class members from being able to seek compensatory damages in the future on collateral estoppel grounds. *Id.* *Dukes*'s concern is not surprising given an increasing groundswell of similar concerns by other courts in discrimination cases, and a more general trend toward questioning adequacy on the basis of omitted claims. *See* Klonoff, *supra* note 220, at 781–87 (describing discrimination cases).

304. The Rule states: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." FED. R. CIV. P. 23(f). *See* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1802–1802.2 (3d ed. 2005) (describing Rule 23(f) application of discretionary interlocutory review).

305. Miller, *supra* note 8, at 322 n.133 ("Interlocutory appellate review, not surprisingly, is used most frequently by defendants.").

306. *Id.* at 322 (noting cost and delay of interlocutory appellate review process).

307. Klonoff, *supra* note 220, at 741 ("In short, with respect to appellate court review pursuant to Rule 23(f), defendants have benefitted more from Rule 23(f) than have plaintiffs.").

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2012 reveals that the Rule largely favors defendants.[308] More specifically, of the appeals accepted, approximately 69% were from defendants and 31% from plaintiffs.[309] Of the appeals by defendants (to reverse class certification), they were successful 70% of the time.[310] By contrast, of the appeals by plaintiffs, they were successful only 30% of the time.[311] Thus, in today's climate, plaintiffs can expect class certification to be second-guessed and likely overruled.

Plaintiffs permitted to seek class certification at all are the fortunate ones.[312] Arbitration agreements that compel employees to forgo class actions—along with other procedural protections—are increasingly found in employment contracts[313] and enforced by the courts. The Supreme Court's endorsement of arbitration over the last quarter century[314] has encouraged employers to increasingly condition employment on an individual's willingness to forego court access.[315] This endorsement has contributed to a burgeoning practice by employers to insert non-negotiable arbitration clauses in their employment contracts[316]—forcing employees to prospectively waive court access. Recent Supreme Court jurisprudence has

308. Klonoff, *supra* note 220, at 741–42, app. at 832–38 (listing "[o]utcomes of cases appealed under Rule 23(f) between Nov. 30, 1998 and May 31, 2012"). The study excludes defendant classes and cases in which Rule 23(f) review was sought and denied. *Id.* at 832 n.593. The study is comprised of only published cases (including those in LEXIS and Westlaw). *Id.* Moreover, because courts do not always cite Rule 23(f), some cases may be missing. *Id.*

309. *Id.* at 741.

310. *Id.*

311. *Id.*

312. *See* Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rodgers, 125 HARV. L. REV. 78, 118–22 (2011); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 267 (2012) (*AT&T v. Concepcion* essentially "destroys . . . employment class actions").

313. Pre-dispute compulsory arbitration agreements in the employment arena have been on the rise. *See* Suzette M. Malveaux, *Is It the "Real Thing"?: How Coke's One-Way Binding Arbitration May Bridge the Divide between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 80 *available at* http://scholarship.law.missouri.edu/jdr/vol2009/iss1/4 (footnote omitted) ("There has been a proliferation of mandatory pre-dispute arbitration agreements in employment contracts over the last fifteen years. At least one-fifth of all employees are subject to mandatory arbitration."); *id.* at 80 nn.11–12 (citing sources and empirical support, including Theodore Eisenberg & Geoffrey P. Miller's empirical analysis of 2,858 corporate contracts, which "revealed that employment contracts are more likely to have arbitration clauses than other types of contracts; arbitration clauses appeared in 37 percent of employment contracts (the highest percentage among the thirteen contract types studied), but appeared in only 11 percent of all the corporate contracts studied"). A troubling feature of those agreements—the class action ban—is consequently on the rise. *See* Malveaux, *supra* note 109, at 639; Miller, *supra* note 8, at 323 & nn.140–41.

314. Malveaux, *supra* note 313, at 82 & 82 n.26 (citing cases); *id.* at 83 n.37 (citing Supreme Court cases approving of arbitration in civil rights and employment discrimination cases).

315. *Id.* at 83.

316. *Id.* at 80 nn.11–12 (citing sources and empirical support).

encouraged employers' inserting class action bans in such clauses.[317] For example, in *AT&T Mobility LLC v. Concepcion*,[318] the Court held that the Federal Arbitration Act pre-empted California's judicial rule that classified certain class action bans in arbitration agreements as unconscionable.[319] In a closely contested ruling, the conservative majority concluded that a state could not condition the enforceability of an arbitration agreement on the availability of a class action.[320]

Consequently, to the extent that those with small claims and resources are unlikely to challenge powerful corporate employers on their own, class arbitration bans will function as exculpatory clauses. Where arbitration agreements are relatively employee-friendly, individuals may vindicate individual harms. But where systemic, company-wide discrimination occurs, a class arbitration ban will shield an employer from accounting for widespread discrimination.[321]

Indeed, in the context of an antitrust case, the Supreme Court has said so much. In *American Express Co. v. Italian Colors Restaurant*,[322] the Court held enforceable a class arbitration waiver where it was proven that in the absence of collective action, the law would go unenforced.[323] In

317. Malveaux, *supra* note 109, at 642 ("In light of *AT&T Mobility*, companies are even more likely to insert class action bans in their pre-dispute, mandatory arbitration agreements.").

318. 131 S. Ct. 1740 (2011). For a critical analysis of the case, *see* Malveaux, *supra* note 109, at 640–43.

319. 131 S. Ct. at 1745–48.

320. *Id.* at 1744, 1753.

321. The Supreme Court's unwavering deference to federal arbitration has spurred renewed interest in the Arbitration Fairness Act and other legislation designed to curb mandatory, pre-dispute arbitration agreements in employment adhesion contracts. *See* Arbitration Fairness Act of 2013, S. 878, 113th Cong. (finding that "[a] series of decisions by the Supreme Court of the United States have interpreted the [Federal Arbitration] Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress" and amending the Federal Arbitration Act so that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute"); Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (same).

322. 133 S. Ct. 2304 (2013). For a critical discussion of the case, *see* Suzette M. Malveaux, *An Unrecognized Blockbuster; Amex and Class Arbitration*, ACSBLOG (July 22, 2013), http://www.acslaw.org/acsblog/an-unrecognized-blockbuster-amex-and-class-arbitration, *archived at* http://perma.cc/EBX6-JYLD.

323. The issue before the lower courts was whether the class arbitration waiver was enforceable where the merchants had established that costs made it impossible for them to arbitrate their claims individually. *American Express*, 133 S. Ct. at 2308. The evidence demonstrated that the cost of an expert analysis necessary to prove the plaintiff merchants' claims ("at least several hundred thousand dollars, and might exceed $1 million") far surpassed each individuals' potential recovery (some by ten times). *Id.* In the absence of any possibility of cost-sharing with American Express, this made the class action the only viable way to proceed. *Id.* at 2318–19 (Kagan, J., dissenting). Without a mechanism for aggregating the costs of litigation, it would be impossible for the merchants to challenge defendant's alleged unlawful business practices. *Id.* In a 5 to 3 decision, the conservative majority with Justice Kennedy concluded that even if a proposed class of plaintiffs proves that it is economically infeasible

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short, employers not able to litigate their way out of class actions may contract their way out instead.[324] And if class actions are the only realistic way the law will be enforced, employers have effectively contracted[325] immunity.[326]

In sum, the elevated class action hurdle potentially jeopardizes court access, law enforcement, and efficient resolutions of potentially meritorious Title VII cases.[327]

C. Other Procedural Barriers

In addition to these more recent procedural roadblocks, there are a host of other mechanisms that fall more harshly on civil rights litigants, a few of which are mentioned here. More specifically, employees and discrimination victims have taken adverse blows in the areas of summary judgment, sanctions, and discovery.

1. Summary Judgment

It is well established that the summary judgment standard—heightened by the Supreme Court's *Celotex* trilogy in 1986[328]—makes it easier for

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to individually pursue their cases in arbitration, an arbitration agreement that forbids them from bringing the case as a class action is enforceable under the FAA. *Id.* at 2312. Pursuant to an agreement's terms, a party is compelled to pursue its claim individually—regardless of whether individual arbitration is impossible or irrational to bring. *Id.* at 2309, 2311.

324. One caveat is *Oxford Health Plans LLC v. Sutter*. 133 S. Ct. 2064 (2013). *Sutter* unanimously concluded that an arbitrator acts within his power under the FAA when he determines whether the parties agreed to class arbitration. *Id.* at 2071. This case allows arbitrators to authorize class actions in arbitration, so long as the authorization is based on the text of the contract. *Id.* at 2069. This means that companies will need to insert explicit class action bans in their arbitration agreements to ensure that an arbitrator interprets the contract to prohibit class actions in arbitration. *Id.* at 2069–71. A contract does not have to explicitly allow class actions for them to be permitted. *Id.* This ruling is not surprising given the Court's consistent deference to arbitration decisions and arbitral power.

325. The notion of "contracting" is generous given that such arrangements are often take-it-or-leave-it deals, where employees have no bargaining power.

326. *See* Klonoff, *supra* note 220, at 822–23 ("The combined effect of *Concepcion* and *American Express* is to deal a crippling blow to the adjudication of many kinds of small-claims cases.").

327. Miller, *supra* note 8, at 322 ("The increased costs and heightened risk of noncertification inhibits the institution of potentially meritorious class cases, which often leaves public policies underenforced and large numbers of citizens uncompensated."); *see also* Spencer, *supra* note 8, at 364 ("Ultimately, a restrictive interpretation of class-certification standards tends to preclude classes from proceeding to a resolution of their claims on the merits."). This obstructive federal class action jurisprudence is exacerbated post-CAFA, because "the vast majority of significant class actions [are] heard in federal court." Klonoff, *supra* note 220, at 745; *id.* at n.91 (citing studies showing how CAFA shifted most class actions to federal court).

328. The trilogy includes: Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (holding that the moving party need not support its summary judgment motion with evidence negating the opponent's claim); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that substantive

defendants to dispose of cases before a determination on the merits.[329] The drafters of Rule 56[330] intended for summary judgment to be a rare event—reserved only for "simple issues where the facts are on the surface,"[331] and where there is "no real defense on the facts."[332] Genuine issues were better left for jury trial.[333] However, disposition of cases by summary judgment has become far more common.[334] Unsurprisingly, this development has disproportionately hurt those alleging workplace and other forms of discrimination.[335] The "prominent role" this procedural vehicle has played

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evidentiary standard at trial applies at summary judgment stage); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (imposing a plausibility standard to summary judgment context).

329. *See* D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 35–36 (1988) (analyzing "the new approach to summary judgment" following the *Celotex* trilogy and arguing that "many of the burdens flowing from recent changes in the system have fallen more heavily upon plaintiffs than defendants").

Some scholars dispute whether the trilogy merely reflects a trend to dispose of cases under Rule 56 that existed prior to 1986. *See* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862, 906 (2007) (questioning whether trilogy led to increased summary judgments); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004) (increased summary judgments started in 1970s); *Why Summary Judgment Is Unconstitutional*, *supra* note 245, at 140 n.3 (comparing different views on the impact of the trilogy on reduction in trials).

330. Rule 56 states that summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

331. Clark, *supra* note 14, at 318.

332. *Id.* at 319.

333. *Id.* at 319 (in context of discussing role of summary judgment, drafter of the original Rules notes "in the case of a real dispute, there is no substitute anywhere for a trial").

334. *See* Schneider, *supra* note 9, at 537 ("Federal trial judges are now more likely to grant summary judgment [post-trilogy.]"); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1942 (1998) ("[J]udges will stretch to make summary judgment apply even in borderline cases which, a decade ago, might have been thought indisputably trial-worthy.").

335. *See* Clermont & Schwab, *supra* note 83, at 104, 128 & n.68 (concluding that "federal courts disfavor employment discrimination plaintiffs" and that "pretrial adjudication particularly disfavors employment discrimination plaintiffs" on the basis of five years of empirical data); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (examining governmental data and concluding that employment discrimination plaintiffs "win a lower proportion of cases during pretrial"); Burbank, *supra* note 329, at 622 (noting study on employment discrimination cases in Seventh Circuit and concluding that "some litigants. . . are not receiving reasonable opportunities to present their claims"); Cecil et al., *supra* note 329, at 886–89 & n.66 (noting the increase in summary judgment motions being granted against plaintiffs alleging civil rights violations and citing statistics showing that, with respect to "defendants' motions in which the court took some action [in civil rights cases] . . . there are 2.59 defendants' motions granted in whole or in part for each defendant's motion denied, compared with 1.33 motions in torts cases, 1.42 motions in contracts cases, and 1.45 motions in 'other' cases"); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 17–18 (Cornell

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in this substantive area is "striking."[336]

Empirical studies bear this out: "Summary judgment motions by defendants are more common in [employment discrimination and civil rights] cases . . . are more likely to be granted . . . and more likely to terminate the litigation."[337] Comparing summary judgment grants across various substantive areas, the Federal Judicial Center found in a 2007 study that in employment discrimination and civil rights cases, grants were the highest: 73% and 70% respectively.[338] In a 2008 Federal Judicial Center study, the grants were even higher: 77% and 70% respectively.[339] By contrast, grants were 61% for torts and 59% for contracts cases.[340] Professor Joseph Seiner, in conjunction with the Federal Judicial Center, also conducted a 2006 study revealing that a plaintiff alleging employment discrimination had over an 80% chance of having his/her claim dismissed, in whole or in part, by summary judgment.[341] The deleterious use of this

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Law Faculty Publications, Paper No. 108, 2008), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1107&context=lsrp_papers (empirical study shows "[s]ummary judgment rates in employment discrimination and other civil rights cases are consistently higher than rates in contract and tort cases").

336. Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson 2–3 (Aug. 13, 2008) [hereinafter 2008 Cecil Memorandum], *available at* https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf; *see also* Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 224–25 [hereinafter *Oddball* Iqbal *and* Twombly] ("While there may be debate on what constitutes a procedural revolution, the effect of summary judgment on employment discrimination appears to be such a revolution. Defendants move for summary judgment as a matter of course in this area."); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 32 (2010) [hereinafter *The New Summary Judgment Motion*] ("Judges dismiss employment discrimination cases more often under motions for summary judgment than most other types of cases.").

337. 2008 Cecil Memorandum, *supra* note 336, at 3.

338. Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson 6 tbl.3, 9 tbl.4 (June 15, 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf.

339. 2008 Cecil Memorandum, *supra* note 336, at 9 tbl.4.

340. *Id.* Additional measures bear out the same trend. For employment discrimination and civil rights cases, at least one summary judgment motion was granted, in whole or in part, at a 20% and 10% rate respectively. *Id.* at 16 tbl.11. In contrast, for torts and contracts, the rates were 5% and 6% respectively. *Id.* For employment discrimination and civil rights cases, they were terminated by summary judgment at a 15% and 6% rate. *Id.* at 17 tbl.12. In contrast, for torts and contracts, the rates were 3% and 4% respectively. *Id.*

341. Seiner, *supra* note 123, at 1033 tbl.C. Summary judgment dismissals of employment discrimination cases may be even higher in specific federal jurisdictions. For example, in a study conducted by a law firm in Atlanta of employment discrimination cases in the Northern District of Georgia in 2011 and 2012, such cases were dismissed, in whole or part, at a 95% respectively. *See* AMANDA FARAHANY & TANYA MCADAMS, BARRETT & FARAHANY, LLP, ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS FOR CASES IN WHICH AN ORDER WAS ISSUED ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN 2011 AND 2012 IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA 3 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326697.

procedure to dismiss cases alleging race, national origin, gender, disability, and age employment discrimination has been well documented.[342]

The disproportionate summary disposition of workplace discrimination and other civil rights cases has been prompted by familiar forces—Supreme Court jurisprudence, docket pressures[343] and judicial bias.[344] As with pleadings and class certification, summary judgment gives a district judge significant discretion to make or break a case.[345] Once again, this power renders plaintiffs more vulnerable to the personal predilections of judges,[346] who are generally less diverse and more sheltered than juries.[347]

This was seen quite poignantly in *Scott v. Harris*,[348] where the Supreme Court ironically came to the non-unanimous conclusion that there was no

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342. *See* Schneider, *supra* note 9, at 550 & nn.156–61 (citing articles documenting "the special use of summary judgment to dismiss sexual harassment and hostile work environment cases, race and national origin discrimination cases, Americans with Disabilities Act (ADA) cases, age-discrimination cases, and prison-inmate cases"); Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, *supra* note 336, at 32 ("In the 1990s, several articles discussed the specific effect of summary judgment on the dismissal of employment discrimination cases."); Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 245, at 141 n.5 (citing articles contending that summary judgment is misused in cases involving hostile environment, the ADA, and Title VII claims); *see, e.g.*, Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 71 (1999) (arguing "that federal courts are misusing summary judgment in hostile environment cases brought under Title VII"); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (explaining how summary judgment is misused in favor of defendants in ADA cases); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (explaining how summary judgment is misused in Title VII and ADEA cases); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 895–96 (2006) (finding that "courts treat certain types of employment discrimination cases differently" and that race and age employment discrimination cases are more likely to be dismissed under summary judgment); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–11 (2007) (arguing that summary judgment is granted more often in sexual harassment and hostile work environment claims based on gender); *see generally*, Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 89–90 (2006) (explaining how production burden works against plaintiffs generally, including in summary judgment).

343. *See* Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997) (Posner, J.) (citations omitted) ("The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures . . . .").

344. Schneider, *supra* note 9, at 542–43, 545.

345. *Id.* at 542, 539 (describing summary judgment as "do or die" moment for plaintiffs).

346. *See, e.g.*, Schneider, *supra* note 342, at 714–15 (explaining how summary judgment can "permit[] subtle bias to go unchecked" in gender discrimination cases).

347. Schneider, *supra* note 9, at 542–43 & n.126; *see, e.g.*, Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998) ("Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace . . . .").

348. 550 U.S. 372 (2007).

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genuine issue of disputed fact over whether a police officer used excessive force in a high-speed chase, in violation of a motorist's constitutional civil rights.[349] Overturning both the district court and appellate court's denial of summary judgment for the defendant, the Court concluded that no reasonable jury could have found for the plaintiff.[350] The irony that judges on both of the lower courts and one justice on the Supreme Court took the opposite position did not escape legal critics.[351]

As Professor Elizabeth M. Schneider explains, this procedural barrier's impact has been to under-enforce workplace discrimination and other civil rights laws, to render invisible attendant legal and personal harms, and to impede the law's development.[352] Although Rule 56's language is facially "neutral," its impact has been skewed against those purportedly harmed by discriminatory practices.

A related potential disproportionate procedural harm to workplace discrimination and civil rights claims is court treatment of expert testimony and other evidence. The admissibility of expert evidence, governed by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[353] is conditioned on such evidence being reliable and relevant.[354] Professor Elizabeth M. Schneider describes how the need for social science experts in cases involving stereotyping and cognitive bias make them particularly vulnerable to an increasingly tighter admissibility standard.[355] As the *Daubert* standard is applied more stringently and broadly, employment discrimination and civil rights cases at summary judgment, class certification, and trial may be at greater risk of dismissal.[356]

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349. *Id.* at 386.

350. *Id.* at 375–76, 379–80, 386.

351. *See* Schneider, *supra* note 9, at 547–48; Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 894–97 (2009). Justice Stevens himself recognized the contradiction. *See Scott*, 550 U.S. at 389–90 (Stevens, J., dissenting).

352. Schneider, *supra* note 9, at 543, 551, 556.

353. 509 U.S. 579 (1993). *See also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (establishing that the *Daubert* requirement applies to all expert testimony rather than just to "scientific" testimony); General Electric Co. v. Joiner, 522 U.S. 136, 141–42 (1997) (holding that the abuse of discretion standard of review applies to a district court's decision to exclude expert evidence).

354. *Daubert*, 509 U.S. at 597.

355. *See* Schneider, *supra* note 9, at 552–55 ("Since expert testimony is now widely used in civil rights and employment discrimination cases, there is good reason to believe that the lethal combination of *Daubert* and summary judgment has affected these cases as well."); *see, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011) (emphasis added) (citation omitted) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *We doubt that is so*, but even if properly considered, [the expert's] testimony does nothing to advance respondents' case.").

356. *See* Schneider, *supra* note 9, at 552–56.

2. *Sanctions*

The history of Rule 11 reveals that it has been more harmful to employment discrimination and civil rights claimants and their counsel than others. In 1983, Rule 11 was amended to make sanctions mandatory and to eradicate the "good faith" defense available to support a questionable pleading.[357] Under this amended version of the Rule, studies revealed that plaintiffs and their counsel were far more likely to be the target of a Rule 11 sanctions motion and far more likely to be sanctioned under the Rule than defendants and their counsel.[358] Civil rights plaintiffs and their lawyers, in particular, were sanctioned more often.[359] Similar to the debate over pleadings' disparate impact, empirical studies differed over the disparate impact of rule-based sanctions.[360] Following a

357. *See* Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *Public Policy: The Use and Impact of Rule 11*, Public Policy, 86 NW. U. L. REV. 943, 946-49, 956 (1992).

358. Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *Public Policy: The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 953 & 954 tbl.2 (1992) (finding that "the plaintiff's side was the target of sanctions in 70.3% of the cases in which sanctions were imposed" compared with 28.4% for defendants and 1.3% for both and that, "[w]ith regard to formal Rule 11 activity not leading to sanctions, the plaintiff's side was the target in 57.6% of the cases in which such activity occurred" compared with 34.7% for defendants and 7.7% for both); Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, *The Federal Judicial Center's Study of Rule 11*, 2 FJC DIRECTIONS 3, 3 (1991) ("Rule 11 sanctions are sought more frequently against plaintiffs than defendants" and "[m]otions for sanctions against the plaintiff are more likely to be granted than those against the defendant") *See also* Hart, *supra* note 53, at 13–15 (study of federal district court judges conducted by the Federal Judicial Center in 1990 "concluded that sanctions were sought more often against plaintiffs than defendants and that motions for sanctions against plaintiffs were more likely to be granted than those against defendants . . . . Like the FJC study, the [American Judicature Society] study [of attorneys] also found that plaintiffs and their counsel were the target of Rule 11 sanction activity to a far greater extent than defendants and their counsel."); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 870 (1992) (noting the likelihood that Rule 11 has worked against plaintiffs).

359. Spencer, *supra* note 8, at 360 ("[I]t is by now commonly felt that prior to the amendment to its current form in the early 1990s, Rule 11 was disproportionately used to sanction plaintiffs' counsel in civil rights actions."); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988) ("Rule 11 is being used disproportionately against plaintiffs, particularly in certain types of litigation such as civil rights [and] employment discrimination . . . ."); Hart, *supra* note 53, at 12–13 ("The early studies found that plaintiffs were sanctioned much more frequently than defendants, particularly in civil rights cases."); s*ee, e.g.*, *id.* at 15 (noting the 1992 American Judicature Society study of attorneys "concluded that civil rights cases were disproportionately impacted by Rule 11"); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1938 (1989) (noting that in the Third Circuit in a one year period from 1987 to 1988, "Rule 11 had a disproportionately adverse impact on civil rights plaintiffs, in that civil rights plaintiffs, their lawyers, or both were sanctioned at a rate (47.1%) far higher than the rate for plaintiffs as a whole (15.9%), and higher still than the rate for plaintiffs in non-civil rights cases (8.45%)").

360. The results of empirical studies were not uniform. On the one hand, the American Juridicature Society's study concluded that when "lawyers were asked to report the effects Rule 11 has had on their practices . . . [o]nly in the area of civil rights did the results clearly differ by side represented. In that category, plaintiffs' lawyers' behavior was affected much more than their opponents' conduct." Marshall et al., *supra* note 358, at 946. Moreover, "[a]lthough civil rights cases

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groundswell of protest, the Rule was ultimately amended in 1993 to give judges more discretion when meting out sanctions.[361] Even this discretion, however, can be exploited in a climate of increasing hostility to civil rights claims.[362]

3. Discovery

Finally, the scope of discovery—one of the cornerstones of the adjudicative process—has steadily eroded since the Rules' inception. Initially designed to favor fishing expeditions[363] over litigation by

made up 11.4% of federal cases filed, our survey shows that 22.7% of the cases in which sanctions had been imposed were civil rights cases." *Id.* at 965–66 & tbl.9. In contrast, "contracts cases represent 23.0% of cases filed but account for only 15.9% of sanctions; personal injury cases constitute 19.2% of cases but account for only 15.1% of sanctions. In this regard, our evidence tends to confirm the commentary about Rule 11's disproportionate impact on civil rights cases." *Id.* When "compar[ing] civil rights cases with a category that groups together the contracts and 'other commercial' categories . . . the commercial and contracts category represents 32.8% of cases filed and accounts for 34.6% of the sanctions, a ratio that makes civil rights cases (11.4% of cases; 22.7% of sanctions) stand out as the type of case most prone to the imposition of sanctions." *Id.* at 968. The authors noted that "the prevalence of sanctions in civil rights cases might relate as much to the complexity of the law in that area as to any ideological predisposition that makes judges more prone to impose sanctions in civil rights cases." *Id.* at 967.

On the other hand, the FJC's study concluded that "[t]he imposition rate of sanctions in civil rights cases was not out of line with that in other types of cases" and that "Rule 11 has not been applied disproportionately against represented plaintiffs or their attorneys in civil rights cases, nor has it been applied to reasonable arguments advanced by plaintiffs' attorneys in civil rights cases." Wiggins, Willging & Stienstra, *supra* note 358, at 4. *See also* Hart, *supra* note 53, at 13–15 (explaining 1990 Federal Judicial Center study of federal district court judges concluded that "civil rights plaintiffs were not disproportionately impacted by Rule 11").

361. The 1993 revision was "intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule." FED. R. CIV. P. 11 advisory committee's notes (1993). Specifically, "[t]he revision broadens the scope of" the attorney's "obligation to the court to refrain from conduct that frustrates the aims of Rule 1 . . . but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court." *Id.*. *Compare* FED. R. CIV. P. 11 (1992) *with* FED. R. CIV. P. 11. *See* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 11.03 (3d ed. 2009) ("The 1993 amendments . . . clarified and liberalized the standard for complying with Rule 11.").

362. For example, even after the 1993 amendment of Rule 11, civil rights claimants and their counsel may still be chilled from bringing such "disfavored" claims. *See* Hart, *supra* note 53, at 104–09 (arguing that "the 1993 amendments have not been successful in reducing Rule 11's chilling effects [on civil rights cases] primarily because many of the causes of the chilling effects continue to exist in practice"); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 994 (1998) (arguing that the 1983 and 1993 Rule 11 amendments erect greater procedural hurdles and risks); *see also* Yamamoto, *supra* note 42, at 397 ("A rule structured to deter all frivolous filings may be neutral by its terms and nevertheless partial in its effects. Certain types of potential litigants may be more severely impacted because their social situation generates disproportionate numbers of claims deemed frivolous by current norms.").

363. Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition'

ambush,[364] this stage of the adjudicative cycle has been reigned in over the last three decades.[365] In an effort to curtail costs and abuse, the discovery rules have understandably grown restrictive over time,[366] as illustrated by a few examples. This trend started with the 1983 amendments to Rule 26, explicitly recognizing the limits of discovery[367] and requiring judges to exercise their discretion to ensure that discovery was subject to an appropriate cost-benefit proportionality analysis.[368] A decade later, the discovery rules underwent further retraction with limitations put on the number and duration of depositions[369] and the number of interrogatories.[370] In 2000, Rule 26 was revised to cut the scope of discovery even further.[371] Electronic discovery rules were created in 2006 that enable producing parties to withhold information under certain circumstances and share costs when particularly burdensome.[372] More recently, the Advisory

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serve to preclude a party from inquiring into the facts underlying his opponent's case."); Spencer, *supra* note 8, at 365 ("'[F]ishing expeditions' were allowed under the discovery rules.").

364. *See* Clark, *supra* note 14, at 318 (describing discovery rules as vehicle for preventing surprise at trial and as "fairer, and more productive of truth in ultimate analysis").

365. Miller, *supra* note 37, at 52 ("For a quarter century, successive amendments to the Federal Rules had impressed limits on the extent of discovery, established mandatory disclosure, and narrowed the scope of what matters could be inquired into under the discovery rules.").

366. *See* Miller, *supra* note 8, at 353 (noting "series of periodic amendments" to the discovery rules over twenty-five years designed to "reduce the density and the cost of discovery"); *see also id.* at 354.

367. Rule 26 was changed in 1983 to no longer include, "Unless the court orders otherwise . . . , the frequency of use of these [discovery] methods is not limited." FED. R. CIV. P. 26(a), 97 F.R.D. 165, 214 (1983).

368. *See* Miller, *supra* note 8, at 353–54. Rule 26 reflected this priority by directing judges to ensure discovery was not "unreasonably cumulative or duplicative, or . . . obtain[able] from some other source that is more convenient, less burdensome, or less expensive." FED. R. CIV. P. 26(b)(2)(C)(i). This is also referred to as proportionality. *See generally*, 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2008.1 (3d ed. 2010) (explaining discovery proportionality).

369. Rule 30 was changed in 1993 from allowing a party to take thirty depositions to ten without leave of court. *Compare* FED. R. CIV. P. 30 (1992) *with* FED. R. CIV. P. 30.

370. Rule 33 was changed in 1993 from allowing a party to propound an indeterminate number of interrogatories to twenty-five. *Compare* FED. R. CIV. P. 33 (1992) *with* FED. R. CIV. P. 33.

371. Rule 26(b)(1) was changed in 2000 from limiting the scope of discovery to the "subject matter" of the litigation to material "relevant to any party's claim or defense." *Compare* FED. R. CIV. P. 26(b)(1) (1999) *with* FED. R. CIV. P. 26(b)(2). The 2000 amendment permits a court to "order discovery of any matter relevant to the subject matter" only upon a showing of "good cause." *See* FED. R. CIV. P. 26(b)(1). *See also* WRIGHT, MILLER & MARCUS, *supra* note 368, § 2008 (describing impact of 2000 rule amendment).

372. FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost."); FED. R. CIV. P. 26 advisory committee's note ("[S]ome sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.").

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Committee proposed extensive changes to the discovery rules: shifting proportionality to a more prominent status;[373] eliminating the forms;[374] and cutting back the number and duration of depositions, the number of interrogatories, and the number of requests for admissions.[375]

Unquestionably, there has been significant debate over the appropriate breadth and depth of discovery.[376] Evidence of this ongoing debate is most

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Rules 26(f), 33(d), 34, and 37(e) were changed in 2006 to take into account electronic discovery. FED. R. CIV. P. 26(f)(3)(C) ("A discovery plan must state the parties' views and proposals on . . . any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."); FED. R. CIV. P. 33(d) (allowing parties to produce business records in response to interrogatories "[i]f the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information)"); FED. R. CIV. P. 34(a)(1)(A) (allowing parties to request "any designated documents or electronically stored information"); FED. R. CIV. P. 34(b)(1)(C) (permitting the requesting party to "specify the form or forms in which electronically stored information is to be produced"); FED. R. CIV. P. 34(b)(2)(D) (permitting parties to object "to a requested form for producing electronically stored information"); FED. R. CIV. P. 34(b)(2)(E) (establishing requirements for producing electronically stored information and stating that "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and . . . [a] party need not produce the same electronically stored information in more than one form"); FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."). *See* WRIGHT, MILLER & MARCUS, *supra* note 368, at § 2003.1 (describing amendments); 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2051.1 (3d ed. 2010) (describing amendments); 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2178, 2218–19, 2284.1 (3d ed. 2010) (describing amendments).

373. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE: REQUEST FOR COMMENT 289 (2013), *available at* http://www.ediscoverylaw.com/files/2013/11/Published-Rules-Package-Civil-Rules-Only.pdf [hereinafter PRELIMINARY DRAFT] (adding language to require that discovery is "proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit"). *See also* Memorandum from Hon. David G. Campbell, Chair, Advisory Comm. on Civil Rules to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice and Procedure 260 (2013), *in Preliminary Draft*, *supra*. [hereinafter Campbell Memorandum]; Notice of Hearings of the Judicial Conference Advisory Committees on Rules of Bankruptcy and Civil Procedure, 78 Fed. Reg. 49768-01 (Aug. 15 2013).

374. Campbell Memorandum, *supra* note 373, at 260, 275–76 ("Part I.C. presents for action a recommendation to approve for publication a proposal that would abrogate Rule 84 and the Rule 84 official forms."); *see also* PRELIMINARY DRAFT, *supra* note 373, at 329 (abrogating Rule 84).

375. Campbell Memorandum, *supra* note 373, at 267 (proposing "presumptive numerical limits" on several forms of discovery); PRELIMINARY DRAFT, *supra* note 373, at 300–01 (reducing the number of depositions from ten to five and reducing the duration of each deposition from one day of seven hours to one day of six hours); *id.* at 305 (reducing the number of interrogatories from twenty five to fifteen); *id.* at 310 (adding section 36(a)(2), which states that "[u]nless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit").

376. An extensive examination of this is beyond the scope of this Article. *See* Miller, *supra* note 8, at 356 ("Debates about the positives and negatives of wide-angle discovery have gone on for

recently illustrated by the avalanche of comments and testimony proffered in response to the Advisory Committee's latest discovery proposals.[377] This latest round of procedural contention also illustrates the familiar divide and high stakes of procedural reform. This is not a neutral enterprise. Not surprisingly, efforts to constrain discovery and control costs have worked to the detriment of plaintiffs and prevented their claims from being resolved on the merits.[378] And concerns over the magnitude and pervasiveness of expensive discovery[379] have proven to be overblown.[380] Even so, the Advisory Committee's recent proposed

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decades—often with great intensity—and they undoubtedly will continue . . . .").

377. *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=USC-RULES-CV-2013-0002 (last visited Nov. 9, 2014) (2343 comments on proposed amendments to the Federal Rules of Civil Procedure, most in opposition to the limits imposed by the proposed changes); *see also infra* note 380.

378. *See* Spencer, *supra* note 8, at 364–65. *See also* Jeffrey Stemple, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 605–06 ("Reduced scope may, depending on how judges construe the [then] new standard, bar plaintiffs from using larger defendant workforce and employment practices data to bolster circumstantial evidence of discrimination."); *id.* at 603 ("A more sustained look at how claim-or-defense relevancy might work in particular cases suggests that [then] Proposed Amended Rule 26(b)(1) will indeed be likely to favor defendants, particularly in cases involving discrimination, product liability, and environmental protection . . . .").

379. There has been significant criticism from the bench, bar, and scholars of the scope, burdens, costs, and abuse of discovery. *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (expressing concern over how expensive discovery can be in massive antitrust case); ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1086 (1979) (Powell, J., dissenting) ("[T]he widespread abuse of discovery . . . is a prime cause of delay and expense in civil litigation."); Marrese v. Am. Acad. of Orthopaedic Surgeons, 726 F.2d 1150, 1161–62 (7th Cir. 1984) (en banc), *rev'd*, 470 U.S. 373 (1985) (observing how parties use discovery to coerce opposition into settlement and criticizing "predatory discovery"); ABA SECTION OF LITIG., REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, 1 (1977) (describing "discovery abuse"); William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978) ("Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy."); *see infra* note 406.

380. *See* Miller, *supra* note 8, at 355 ("[D]iscovery usually works well, is quite limited in most cases . . . and its burdensomeness poses problems in a relatively thin band of complex and 'big' cases."); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684–85 (1998) (studies indicate that one third to one half of cases do not involve any discovery); ADVISORY COMM. ON CIVIL RULES, REPORTER'S MEMORANDUM REGARDING DUKE CONFERENCE SUBCOMMITTEE RULES PACKAGE 83 (2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf ("In most cases discovery now, as it was then [1983], is accomplished in reasonable proportion to the realistic needs of the case. This conclusion has been established by repeated empirical studies, including the large-scale closed-case study done by the Federal Judicial Center for the Duke Conference."); *see also* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVERY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, 28 (2009), *available at* www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf; Alexander Dimitrief et al., *Update on the Federal Rules Advisory Committee*, 7 J.L. ECON. & POL'Y 211, 217–18 (2010) (statement of Emory G. Lee). The Advisory Committee's latest proposals are designed to address a proportionality problem that admittedly exists in only a small subset of cases, but would be

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discovery amendments continued along the familiar restrictive course charted.[381]

As a number of scholars—myself included—have warned, a course correction is in order because of the potential danger the proposed rules pose for cases involving employment discrimination and civil rights.[382]

III. RE-LEGITIMIZING TRANS-SUBSTANTIVITY

In sum, as scholars take the time to commemorate the seventy-fifth anniversary of the Federal Rules of Civil Procedure, a sobering conclusion is inescapable. The trans-substantive nature of the civil litigation process has resulted in a troubling trend away from court access and merit-based resolutions for workplace and civil rights claims. The application and

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applied to all substantive areas. Relying on such atypical cases to make sweeping, systemic reforms to all cases risks making bad law. Letter from Suja A. Thomas, Professor, University of Illinois College of Law, to Advisory Comm. on Civil Rules & Comm. on Rules of Practice & Procedure 3–5 (Feb. 13, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1185 ("Legal change should not occur where atypical cases motivate legal change and the change affects typical cases. This can create bad law."); *see also* Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law (See, e.g., The Lack of Judicial Restraint in* Wal-Mart, Twombly, *and* Ricci), 48 WAKE FOREST L. REV. 989, 1006–08 (2013) (arguing that the atypical facts of *Twombly*, including the high cost of discovery to be borne primarily by defendants, resulted in a change in the law that now affects cases with more typical facts); Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, *supra* note 336.

Professor Arthur R. Miller, who served as the Reporter to the Advisory Committee at the time of the 1983 discovery amendments, concedes that he and the Advisory Committee were swayed more by impressions than data, and influenced largely by a narrow range of cases and comments. Miller, *supra* note 8, at 353–55.

381. This article went to publication prior to the Advisory Committee's approval of the final version of the proposed amendments, which adopted some recommendations and withdrew others.

382. *See generally Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Senate Judiciary Comm., Subcomm. on Bankruptcy and the Courts*, 113th Cong. 2 (Nov. 5, 2013) (statement of Arthur R. Miller, Professor, New York University); *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?*: *Hearing Before the Senate Judiciary Comm., Subcomm. on Bankruptcy and the Courts*, 113th Cong. 10 (Nov. 5, 2013) (statement of Sherrilyn Ifill, President, NAACP Legal Defense & Educ. Fund); Letter from Stephen Burbank, Professor, University of Penn. Law School, to Comm. on Rules of Practice & Procedure (Feb. 10, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0729; Letter from Helen Hershkoff *et al*., to Comm. on Rules of Practice & Procedure (Feb. 5, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0622; Letter from Suzette M. Malveaux, Professor, Columbus School of Law, Catholic University of America, to Comm. on Rules of Practice & Procedure (Feb. 14, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-1650; Statement of Arthur R. Miller, Professor, New York University, to Comm. on Rules of Practice & Procedure (Jan. 9, 2014), *available at* http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0386; Letter from Beth Thornburg, Professor, SMU Dedman School of Law, to Comm. on Rules of Practice & Procedure (Jan. 31, 2014), *available at* http://www.regulations.gov/#!documentDetail; D=USC-RULES-CV-2013-0002-0499.

interpretation of the Rules, and sometimes the Rules themselves,[383] have disproportionately damaged those most in need of society's institutional protection to the point where the legitimacy of rule trans-substantivity should be revisited. A paradigm that systematically excludes significant swaths of its population—particularly the disenfranchised[384]—from its administration of justice is ultimately a threat to democracy.[385]

Re-legitimizing a trans-substantive rule system may require a multi-faceted approach, drawing upon various stakeholders to participate in ameliorating a flawed system. This Article introduces some initial ideas for charting a course back to a more democratic civil litigation system.

A. Judicial Realignment with the Rules' Underlying Principles

Given the Supreme Court's seminal role in requiring victims of discrimination to scale ever higher walls to reach a more exclusive and elusive forum for justice, this is where change must begin. Jurisprudential realignment with the values and purposes behind the Rules would set in motion robust participation in a civil litigation process committed to substantive rights. Through interpretation of neutral text, Supreme Court precedent would reflect back principles consistent with the history and purpose of the Rules. Interpretations that don't violate the spirit or the letter of the Rules would incentivize the lower courts to apply the Rules in harmony with the drafters' intent.

A realignment would emanate the core values and objectives made plain by the Rules' founders. The drafters of the Federal Rules eschewed form over substance.[386] From their inception, the Rules were subordinate to substantive law.[387] Gamesmanship was disfavored,[388] and court access and merit-based resolutions were prioritized.[389] The Rules' originators

383. *See* Spencer, *supra* note 8, at 369 (describing restrictive impulses in rulemaking for Rules 16, 11 and 56).

384. *Matthew* 25:40 (New Revised Standard Version) ("And the king will answer them, 'Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me.'").

385. *See* Yamamoto, *supra* note 42, at 345 ("Reforms that discourage court access for minorities asserting 'marginal' rights claims reflect value judgments about the purposes of adjudication and the desirability of broad-based participation in the litigation process.").

386. Clark, *supra* note 14, at 297–300.

387. *Id.* at 297, 299.

388. Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation").

389. Clark, *supra* note 13, at 518–19.

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emphasized neutrality and fairness through uniform treatment[390]—a formal equality model. Process was the gateway to justice and the embodiment of democracy. Prior to the Rules, the inflexibility and rigidity of the common law system required plaintiffs to conform their claims to recognized forms or writs, which often left them without remedy and shut out of the adjudicatory system altogether.[391] Consequently, common law was replaced with an equity-based system.[392] This merger of law and equity resulted in a simpler, less rigid, more accessible route to the civil litigation system.[393]

Moreover, procedure not only had to be impartial, but also have the appearance of impartiality.[394] The drafters' attention to public perception reveals the centrality of it to a successful dispute resolution scheme. Process merely perceived as illegitimate made it so. Without this imprimatur, procedure lacked validity.

In enacting the Federal Rules, the original rule-makers also sought to balance two arguably competing objectives: removing artificial barriers to dispute resolution on the merits; and protecting courts' administrative prerogatives.[395] The Rules were designed to promote citizen access to justice, while allowing for the orderly and efficient administration of the civil litigation system.[396] This dual intention is reflected in the text of Rule 1 itself, which states that the Rules should be "construed and administered

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390. Clark, *supra* note 14, at 299 ("Regular procedure is necessary to secure equal treatment for all; it is necessary, too, for the quite as important factor of the *appearance* of equal treatment for all.").

391. *Id.* at 308–10.

392. *Id.* at 309–10. The Rules drafters concluded:

> When the historic reasons for division [between law and equity] had for several centuries ceased to have point, there seemed, as there was, no reason for penalizing suitors for having come to the wrong court, or having come to the right court in the wrong way. And so the code reform caused the abolition of the forms of action, the union of law and equity, and the use of the one form of action for all civil causes.

Id. at 310.

393. *Id.* at 308–10, 319–20. *See also* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982 (1987) (arguing that equity is responsible for the prioritization of access).

394. Clark, *supra* note 14, at 299 ("Regular procedure . . . is necessary . . . for the quite as important factor of the *appearance* of equal treatment for all."); *see also id.* at 299–300.

395. *See id.* at 300 (internal quotations omitted) ("One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable.").

396. Although the Rules were meant to ease the burden of entry, they remain standardized codes of conduct, tempered by judicial discretion. Spencer, *supra* note 8, at 366 ("[T]here are two sides to civil procedure. The first is access-promoting and favors resolution of disputes on the merits. The other is more restrictive and cost-conscious, creating various doctrines that frustrate the assertion and prosecution of potentially meritorious claims.").

to secure the *just, speedy, and inexpensive* determination of every action and proceeding."[397]

The primacy of court access and merits-based resolutions is reflected in the Rules themselves and in their interaction with one another. Simplified[398] and permissive[399] notice pleading, robust discovery,[400] liberal amendments[401] and generous aggregation[402] worked symbiotically to give litigants access to the civil justice system and the underlying evidence in their cases.[403] Litigants were further protected by rules that made dispositive motions rare,[404] irrational outcomes impotent,[405] and judicial

397. FED. R. CIV. P. 1 (emphasis added).

398. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."); Spencer, *supra* note 8, at 354 ("[P]romoting the vision of open access espoused by the drafters was the introduction of simplified 'notice pleading,' which was designed to minimize greatly the number of cases dismissed on the pleadings."); Yamamoto, *supra* note 42, at 356–57 (the move to notice pleading from "archaic fact-pleading [meant m]ore people with legal grievances could gain entry into the system"); *see* FED. R. CIV. P. 8.

399. Professor A. Benjamin Spencer correctly notes how Rule 11 reflects a commitment to access and the liberal pleading regime originally established in Rule 8:

> [T]he current post-1993 version of Rule 11—with its safe-harbor provision, emphasis on deterrence, and allowance for innovative legal arguments—was meant to complement simplified pleading by ensuring truthful allegations without deterring litigants from asserting what some may view as tenuous claims.

Spencer, *supra* note 8, at 354–55.

400. *See id.* at 355 ("The innovation of modern discovery ushered in by the rules further promoted access by enabling plaintiffs to initiate their claims without having to have full and complete information."); Stemple, *supra* note 378, at 535–36 ("'Fishing expeditions' were to be allowed in the interests of developing facts in a relatively efficient way so that legal disputes could be determined in light of maximum factual information."); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 697–700 (1998); Hickman v. Taylor, 329 U.S. 495, 507 (1947); *see* FED. R. CIV. P. 26–37 (relating to discovery).

401. *See* Spencer, *supra* note 8, at 356 ("Liberal amendment rules permit parties to cure errors or omissions by amending their pleadings to add claims, defenses, or parties as necessary."); *see also* FED. R. CIV. P. 15(a)(2) (courts "should freely give leave [to amend pleadings] when justice so requires").

402. *See* Spencer, *supra* note 8, at 355 ("Liberal joinder rules, as well as the class-action device, have promoted access by enabling parties with substantially related claims to prosecute together claims that they might otherwise have been unavailable to sustain individually."); *see, e.g.*, 28 U.S.C. § 1407(a) (2006) (multidistrict litigation statute); FED. R. CIV. P. 13(a) (compulsory counterclaim); FED. R. CIV. P. 20(a) (party joinder); FED. R. CIV. P. 23 (class actions); FED. R. CIV. P. 24(b) (permissive intervention);; FED. R. CIV. P. 42(a) (consolidation of actions).

403. *See* Burbank, *supra* note 329, at 603 ("Rule 56 was intended to function as an equilibrating device that would discipline the results of notice pleading and profit from those of broad discovery.").

404. Clark, *supra* note 14, at 318–19; Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 245, at 173; McGinley, *supra* note 342, at 230–32 (prior to *Celotex* trilogy, lower courts were hesitant to grant defendants summary judgment in federal discrimination suits because plaintiffs more easily made out a prima facie case). *See also* Spencer, *supra* note 8, at 356 (footnote omitted) ("The disinclination of courts toward default judgments further indicates the preference for merits-based judgments over those obtained through procedural technicalities."); *see also* FED. R. CIV. P. 60(b) (allowing judge to set aside default judgment entered under Rule 55).

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discretion[406] readily available to funnel cases to trial when necessary.

This trek from the courthouse door to trial, however, has always been tempered by rules that discourage unnecessary costs,[407] delay,[408] and inefficiencies.[409] Access is not unlimited. To be sure, this system of rules embodies serious trade-offs.[410] Due process and democracy undergird the promise of a litigant's "day in court" and an opportunity to vindicate her rights before a jury of her peers. But pragmatism checks any expectation of unfettered entree. Federal courts overwhelmed by bourgeoning dockets and limited resources are served well by rules that rein in costs, keep cases moving, and encourage efficiencies.

Striking the proper balance between the dueling goals of justice and efficiency has been the sine qua non of the civil justice system. Since the Rules' inception, and especially over the last quarter century, the

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405. *See* Spencer, *supra* note 8, at 356 (footnotes omitted) ("The motion for judgment as a matter of law, the motion for new trial, and the motion for relief from judgment each provide litigants with an opportunity to seek a just, accurate resolution of their cause where the conclusion of the jury seems clearly inconsistent with the truth."); *see* FED. R. CIV. P. 50 (judgment as a matter of law); FED. R. CIV. P. 59 (new trial); FED. R. CIV. P. 60 (relief from judgment).

406. *See* Spencer, *supra* note 8, at 356 ("Judicial discretion is rooted in the concern that disputes be resolved on their merits rather than procedural technicalities, resulting in a group of civil rules that permit judges to exercise significant discretion in the interest of justice.").

407. *See, e.g.*, FED. R. CIV. P. 26(b)(2)(C)(iii) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."); FED. R. CIV. P. 26(b)(2)(B) (making cost-sharing available in electronic discovery context).

408. *See, e.g.*, FED. R. CIV. P. 26(b)(2)(C)(ii).

409. *See* Spencer, *supra* note 8, at 357–58 (giving examples). For example, the rules governing joinder of claims and parties and supplemental jurisdiction promote efficiency by permitting those with similar claims to resolve them collectively. *Id.*; *see* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."); Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 LEWIS & CLARK L. REV. 295, 298 (2005) ("[S]upplemental jurisdiction promotes fairness and judicial economy, and complements the liberal joinder rules of the Federal Rules of Civil Procedure."); *see also* 28 U.S.C. § 1367 (2006) (supplemental jurisdiction); 28 U.S.C. § 1407(a) (2006) (multidistrict litigation statute); FED. R. CIV. P. 13(a) (compulsory counterclaim); FED. R. CIV. P. 20(a) (party joinder); FED. R. CIV. P. 23 (class actions); FED. R. CIV. P. 24(b) (permissive intervention); FED. R. CIV. P. 42(a) (consolidation of actions). A more modern example is the initial disclosures rule, which was enacted in 1993 to save litigants the cost and time involved in seeking basic information from their opposition. *See* FED. R. CIV. P. 26(a)(1) (initial disclosures).

410. *See, e.g.*, Spencer, *supra* note 8, at 365 n.71 ("Although the cost concerns associated with the production of inaccessible electronically stored information are valid, the question is whether a rule that presumptively protects such information against production will have an unfair adverse impact on litigants' access to the information they need to make their case.").

pendulum has swung from a "liberal ethos"[411] of procedure to a "restrictive" one, resulting in a "deformation of federal procedure."[412] Fueled by the increase in public rights litigation of the 1960s, especially class actions, many have sought—through procedural reform—to squelch what they perceived as an explosion of "frivolous" litigation, discovery abuse that extorted settlements, and other unscrupulous conduct.[413] This backlash or "counterrevolution"[414] has disproportionately harmed those challenging discriminatory employment practices and other civil rights. The courts have been at the epicenter of this devolution, often leading the way. So too can the courts—and most importantly the Supreme Court—chart a course more faithful to the Rules' history and guiding principles.

Admittedly, determining a normative prescription for a rule system that toggles between unfettered participation and maximum efficiency is difficult. Such a prescription begs the question of what side the civil litigation should err: toward greatest inclusion or complete efficiency? The choice sets up a false dichotomy. Nonetheless, given the challenges of a civil litigation system in a pluralistic society[415] subjected to limited regulation,[416] there must be some give.

Professor Eric K. Yamamoto observes, "From a utilitarian perspective, some indignity suffered by a minority of the populace [those denied court access] is an unavoidable and tolerable result of system shrinkage in the interest of efficiency."[417] Utilitarianism would suggest that some disparate impact of the Rules on a minority of claims and claimants is inevitable and

411. *See* Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?* 43 TEX. TECH. L. REV. 587, 587–88 (2011) ("When the Federal Rules were promulgated—that was in 1938, over 70 years ago—they had a very liberal ethos to them."); Marcus, *supra* note 35, at 439 ("Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labeled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

412. Professor Arthur R. Miller persuasively makes this point in Miller, *supra* note 8, at 357–71.

413. *See* Spencer, *supra* note 8, at 359 & n.35–38, 364.

414. *Id.* at 359; Risinger, *supra* note 329, at 35 (observing consensus view that there is a "counterrevolution" in civil procedure).

415. In a society so diverse, there are inevitable clashes. *See* Miller, *supra* note 8, at 361 (emphasis added) ("In the main, most assertions of abusive behavior or frivolous lawsuits are anecdotal and subjective. Abuse and frivolity simply *lie in the eye of the beholder*.").

416. *See* Subrin, *supra* note 19, at 387, 396 (noting private litigation's role in enforcing national public policies in the United States, as opposed to greater administrative agency participation and safety nets doing the same in other Western democracies); *id.* at 397 n.80 (noting "the place in our country . . . [for] private litigation to effectuate public norms"); *see also* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) ("[D]iscovery is the American alternative to the administrative state. . . . Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.").

417. Yamamoto, *supra* note 42, at 390.

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acceptable. It may be correct that some procedural rules—purely ministerial in nature—will affect cases alleging different substantive rights unequally.[418] This is to be expected, given the differences in proof structures, evidentiary requirements, and nature of the claims themselves.[419] There is nothing intrinsically wrong with this.

The wrong occurs when a distinct class of claims and claimants—such as employment discrimination and civil rights claims and their litigants—suffer disproportionately and consistently. This wrong is particularly problematic because it targets those substantive claims and claimants who should be afforded greater protection because of centuries-old and current subordination. Society has gone so far as to identify protected classes worthy of the greatest protection when government conduct threatens to deprive society's most vulnerable members due process or equal protection. Ironically, the very beneficiaries of this heightened protection are deprived substantive relief because of procedural obstacles. Constitutional civil rights claims and federal statutory ones designed to protect outgroups become futile and empty gestures in the face of oppositional process. What one hands gives, the other takes away.

Against this backdrop, the question of what side court interpretation should err on—maximum inclusion or greater efficiency—becomes easier. The former is the correct normative choice. This backdrop also reveals that the question itself is flawed. The judiciary must err on the side of democracy. Only then will a system of rule trans-substantivity be legitimate.

B. Rulemakers' Analysis of Procedural Disparate Impact on Substantive Rights

Second, the civil rulemaking process can play a meaningful role in preserving the integrity of trans-substantivity by adopting a disparate impact test similar to the one used in Title VII litigation. Congress and the Supreme Court have developed a framework for assessing when neutral laws that disproportionately deny employment opportunities to protected individuals are illegal.[420] This test for ferreting out laws that are fair in form, but discriminatory in practice, can serve as a model for the Advisory

418. *Id.* at 397–98.

419. Marcus, *supra* note 1, at 423.

420. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 1981, 2000e et. seq. (2006)) (clarifying and codifying disparate impact theory for Title VII cases); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (establishing disparate impact theory for Title VII cases).

http://openscholarship.wustl.edu/law_lawreview/vol92/iss2/8

Committee's own assessment of when Rules that have a similar impact should be rejected or amended. The rulemaking process could create a presumption of illegitimacy for civil procedural rules that have a disproportionate negative impact on workplace discrimination and other civil rights claims. The Advisory Committee—as designer, architect and gatekeeper of the Rules—is positioned to make a distinct impact as the danger and demise of rule trans-substantivity looms larger.

C. Congressional Corrective Legislation

Finally, it may be time again for Congress to draft curative legislation to reign in the restrictive ethos that permeates modern judicial rule interpretation and application. Like the Civil Rights Act of 1991—which addressed a myriad of cramped Supreme Court interpretations of the Federal Rules that had a disparate adverse impact on Title VII cases under the Civil Rights Act of 1964[421]—ameliorative legislation may be warranted at this juncture. The pendulum has swung so far from the liberal to restrictive ethos that a course correction is in order. Not only are the Federal Rules the subject of increased reflection and scrutiny at their seventy-fifth anniversary, but so are a number of federal civil rights statutes at similar seminal anniversaries.[422] Retrospects of such civil rights statutes should include an appraisal of the civil rule system's impact on the realization of substantive rights. In the absence of judicial restraint, Congress may be forced to pull the pendulum back to the original intent of the Rules' drafters. Such course correction would minimize the harm to discrimination cases and reclaim trans-substantivity's legitimacy.

CONCLUSION

This Article continues an important conversation about the role of trans-substantivity in the federal civil court system and in a democracy. Given the myriad ways that trans-substantivity disfavors discrimination claims, it is time for the bench, bar, and public to reconsider the propriety of this time-honored principle and to fashion creative solutions to preserve its legitimacy. The seventy-fifth anniversary of the Rules would call for a

421. *See* Leigh Anne Gilbert Hodge, *The Civil Rights Act of 1991: A Legislative Response to the Supreme Court's Weakening of Civil Rights Remedies in the Workplace*, 22 CUMB. L. REV. 801 (1992); Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801 (1992).

422. For example, there have been commemorations for the fiftieth anniversary of the Civil Rights Act of 1964, upcoming fiftieth anniversary of the Voting Rights Act of 1965, and the sixtieth anniversary of *Brown v. Board of Education*.

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diamond jubilee. However, given how flawed the language, application, and interpretation of the Rules can be for those challenging discriminatory conduct, it is clear that the Rules are still diamonds in the rough.

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