Procedural Design

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The procedural law dictates the sequence of steps that bring a lawsuit from filing to completion. The design of civil procedure in the federal courts is generally described as having the following sequential order: complaint, motion to dismiss, discovery, summary judgment, trial, and finally, appeal. While this is a passable description of the vision of the drafters of the Federal Rules of Civil Procedure in 1938, it no longer describes the reality of federal litigation. Jurisdiction can be determined at the end of the lawsuit rather than the beginning. Judges demand determination of factual disputes before discovery commences through a variety of motions and orders. Hearings that are trials in all but name are held at the commencement of litigation, even as trials are expected to end a suit. Appeals can be brought at any time, even multiple times in one case. This Article is the first to synthesize and explain these developments.

For a variety of reasons explained in this Article, the federal courts take inconsistent and often poorly justified approaches to procedural design. But a procedural system ought to have an articulable design, one that fits with the goals of that system and can be contested based on its ability to achieve those goals. To begin the discussion of the future of procedure, this Article suggests three possibilities: the traditional sequential order described above, a bespoke order in which judges pick the most important issue in the case and adjudicate that issue using the order of motions they think appropriate, or a subject matter order in which procedures are standardized but tailored by case type. Each of these procedural designs has costs and benefits when

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measured against the competing values of accuracy, relative speed of resolution, and cost. Preferences among them are likely to depend on the reader's assumptions about the capabilities of judges and party behavior.

INTRODUCTION

Sarah Palin brought a defamation suit against the New York Times. In such a suit, the plaintiff is required to prove actual malice. The Times moved to dismiss, and the judge ordered the writer of the offending editorial to testify in court. The purpose of the testimony was to determine whether the judge could permissibly infer that the author wrote the editorial with actual malice.[1] But wait a minute, is this not backwards? How can a judge transform a motion to dismiss, which is supposed to be decided taking all the allegations as true, into a live

1. *See* Palin v. N.Y. Times Co., 17-cv-4853 (JSR) (S.D.N.Y. Aug. 10, 2017) (order convening evidentiary hearing) (stating that the author's testimony was required before the court could determine if actual malice existed).

hearing?[2] This incident is part of a larger phenomenon, the erosion of the traditional order of procedure, and this Article explains how it came to pass and what the federal courts should do about it.

Procedure is that aspect of the larger legal order that dictates how a lawsuit proceeds from filing to completion. The procedural design most often associated with the Federal Rules of Civil Procedure and taught in most law school classrooms can be briefly described as follows: A complaint is filed, followed by either an answer or a motion to dismiss (which determines ordinarily whether the court has jurisdiction and whether the plaintiff has stated a cognizable claim for relief). Then, a process of discovery allows the parties to obtain information relevant to their claims and defenses, after which the parties will either move for summary judgment (if there is no issue of material fact for a factfinder to determine) or proceed to trial and judgment, followed by an appeal. This is a simplified version, of course, but it adequately describes what I will call "textbook" procedure because it is the way procedure is taught at most law schools. The defining characteristics of the textbook procedural design are that it is sequential and that the questions asked at each stage correspond to the information the parties are expected to have at that stage. As the litigation proceeds, especially as it proceeds through discovery, parties are expected to have more information and the demands for determining the merits increase.

Drawing on appellate opinions in a variety of procedural areas, this Article demonstrates that the textbook order is not an accurate description of civil procedure in the federal courts.[3] Today, a federal lawsuit may proceed in almost *any* order. For example, although some lip service is paid to the finality requirement before an appeal can be filed, in fact an appeal can follow a motion to dismiss rather than await a final judgment. Ostensibly threshold jurisdictional questions such as standing can be decided after a jury has rendered its verdict. A motion for summary judgment may precede the answer. A nonbinding trial on the merits may be held at the class certification stage, before any dispositive motions on the merits.

Although the phenomena described here may be familiar to experienced litigators, the decline of the textbook order has not been

2. *See* Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc., 723 F.3d 192, 202 (2d Cir. 2013) ("We do not consider matters outside the pleadings in deciding a motion to dismiss for failure to state a claim.").

3. This Article does not address procedural developments in the state courts. For some thoughts on the overlap between state and federal procedural regimes, or lack thereof, see John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003).

documented before.[4] The observation that our old design has been undermined and no new design has replaced it is important because the procedural law ought to have *some* articulable design. As Lon Fuller reminds us, "Law may be said to represent order *simpliciter*. Good order is law that corresponds to the demands of justice, or morality, or men's notions of what ought to be."[5] But it is not enough that the ends of law are good ends; it is also necessary that the means we use to achieve those ends are good. Procedure is one such means. As Fuller explains: "As we seek to make our order good, we can remind ourselves that justice itself is impossible without order, and that we must not lose order itself in the attempt to make it good."[6] It is time to reconsider what design best fits our system.

The sequential order as the default procedural design has been eroding for about forty years.[7] We do not know how pervasive the phenomenon is, but it can affect any case. Indeed, anecdotal evidence indicates that at least some judges do not use the textbook order of procedure as a default in any lawsuit, regardless of subject matter or simplicity.[8]

The first question of procedural design is how much the order of proceedings ought to be standardized. Short of the Red Queen's command of "sentence first, verdict afterwards!"[9] which clearly violates due process, there are numerous ways to sequence litigation. I propose three default procedural designs for consideration: the textbook order, a bespoke order, and a subject matter order. We have already seen that the textbook order consists of a sequence of motions tied to the information likely to be available at each stage of the litigation. Under

4. A few scholars have analyzed how some motions should be sequenced. *See* Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primary and Intrasuit Preclusion*, 63 FLA. L. REV. 301 (2011) (analyzing modern sequencing decisions in the context of jurisdictional determinations and judge/jury factual determinations); Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179 (2013) (analyzing the standards applied at each stage in sequential litigation); Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1 (2010) (modeling sequence of motions with a focus on international adjudication). These scholars assume that judges have discretion to alter procedural sequencing and that this is normatively desirable, an assumption questioned here.

5. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644 (1958). Thanks to Charles Barzun for pointing me to this quote.

6. *Id.* at 657.

7. As you will see below, it began between 1970 and 1980. "Crumbling is not an instant's act/A fundamental pause/Dilapidation's processes/Are organized Decays—" EMILY DICKINSON, *Crumbling is not an instant's Act*, *in* THE POEMS OF EMILY DICKINSON: READING EDITION (R.W. Franklin ed., 2005).

8. For an example, see *Procedures for Cases Assigned to Judge Lee H. Rosenthal*, U.S. DISTRICT & BANKR. CT. S. DISTRICT TEX., http://www.txs.uscourts.gov/sites/txs/files/lhr_16.pdf (last visited Feb. 26, 2018) [https://perma.cc/TV75-GQTA].

9. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865), *reprinted in* THE ANNOTATED ALICE 161 (Martin Gardner ed., 1960).

a bespoke order, by contrast, the judge isolates the dispositive issue(s) in the individual case and tailors a sequence of motions to resolve it. A subject matter order provides standardized sequencing rules for different areas of the substantive law.

The most important thing about procedural design is that it ought to be *contestable*. The problem diagnosed in this Article is a failure to agree on and articulate the most basic principles of a procedural design for the federal courts, a predicate to contesting it. This failure has resulted in a system in which judges make inconsistent and often unexplained procedural choices, sometimes without understanding how these choices have negative systemic effects. The reason contestability is crucial is that procedural design affects litigants' ability to enforce or defend their rights.[10] The courts should be able to explain the logic of procedural design so that people can dispute whether that design is indeed a good one, and perhaps, through that process of justification, a better design will emerge.[11]

What measure should be used to pick among procedural designs? I suggest four criteria to evaluate potential procedural designs for the purposes of preliminary discussion: (1) whether the procedural design provides for a meaningful hearing, (2) how likely it is to achieve an accurate application of the law to the facts of the case, (3) the relative speed of resolution, and (4) the cost of proceedings.[12] The goals of the procedural regime are disputed, and the goals I suggest are open to multiple interpretations and may overlap or be in tension with one another. This Article does not attempt a definitive account of what goals a procedural system ought to have.[13] The point of the discussion is to illustrate the application of some generally agreed upon goals to the procedural designs I describe and, in so doing, begin the discussion.

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10. "The administration of justice is a good test of civilization of the people where it exists." Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 LECTURES ON LEGAL TOPICS, 1921–1922, at 86, 105 (James N. Rosenberg et al. eds., 1926).

11. *Cf.* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683 (2014) (arguing for an administrative law approach to procedural design focusing on reason giving).

12. *See* FED. R. CIV. P. 1 (stating that the rules should be interpreted "to secure the just, speedy, and inexpensive determination of every action and proceeding").

13. For a general discussion of different process values, see Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, which discusses dignity values, participation values, deterrence values, and effectuation values. For an example of a welfarist analysis of procedural values, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1186–1217 (2001). For an analysis of procedure focusing on rights rather than accuracy, see RONALD DWORKIN, A MATTER OF PRINCIPLE 72–103 (1985). For an analysis of procedural values that, while still instrumental, differs from the economic analysis of the procedural law because it does not focus on accuracy of outcomes, see Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1658 (2016).

A final and important note: the term "order" appears throughout the Article and can have multiple meanings.[14] It can mean a sequence of motions, one step following the other. Order can also be a methodical or harmonious arrangement. Finally, order can mean "command" and connote authoritarianism if it is too rigid. Each sense of the term is relevant to this analysis. The debate over what order the procedural law should follow—and whether the order is too rigid, too unpredictable, or just the right balance—echoes the familiar debate about rules and standards.[15] While rules provide certainty and are easy to administer, they can be too rigid and lead to poor results because they are under- or overinclusive. Standards, on the other hand, may allow judges greater flexibility to do justice in the individual case but can also be unpredictable and costly to administer. The question for procedural design is how best to balance flexibility and predictability so that the procedural law is methodical and harmonious without being oppressive.

The insight that the procedural law no longer has an overarching design may be familiar to sophisticated practitioners but is not much addressed in procedural scholarship. It is linked to some ongoing debates in the field, however. Many scholars have pointed out that federal procedural law has become more restrictive, making it especially difficult for individual litigants to obtain redress in the courts.[16] Second, scholars have pointed out that judges have become more involved in managing litigation,[17] a phenomenon that is correlated with (and perhaps has caused) a decline in the trial rates and which has been ongoing for forty years or more.[18] These two

14. Order is not the same as uniformity. For critiques of uniformity as a value, see Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008); and Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2415 (2008), which proposes a three-factor test for determining whether to permit cases about similar subject matter to be decided by different courts.

15. For analyses of rules versus standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *Foreword—The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56–94 (1992); and Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995). *See also* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

16. *See, e.g.*, A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 356 (2010) (noting the use of judicial discretion as well as "the preference for merits-based judgments over those obtained through procedural technicalities"); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of Civil Procedure*, 162 U. PA. L. REV. 1839, 1848–55 (2014) (discussing heightened pleading requirements, limited discovery, increased use of summary judgment, and other reforms negatively impacting cases in the judicial system).

17. *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing increasing judicial management); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978) (advocating judicial management).

18. *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1981–84 (1989) ("The role of the judge, then, was to keep cases moving at a reasonable pace, and to see that cases not be needlessly tried.").

observations—restrictiveness and managerial judging—provide some explanation for the erosion of the textbook procedural design, but this development was not inevitable. A procedural system could be designed to be restrictive but also orderly. The old common law writ system is an example. Similarly, a procedural system could permit significant judicial management but still be organized to follow a required sequence of motions.

The Article begins with a description of the state of procedural design in the federal courts, tracing the evolution of five key doctrines that have eroded the textbook order. Part II is diagnostic, considering possible reasons for the disintegration of the textbook procedural order. Part III is normative, framing the conversation that scholars and rulemakers ought to have going forward. The central question raised by the disintegration of the textbook order is what procedural design ought to replace it.[19] I propose three options—a default sequential order such as the textbook order, a bespoke order, and a substance-specific order—and analyze each one. In the end, this analysis shows that preferences among these designs may hinge on beliefs about individual judges' capacities (especially to exercise discretion) and predictions about party behavior, both of which merit further study.

I. THE DOCTRINES OF DISINTEGRATION

Significant doctrinal changes over the last forty years have led to a disintegration of federal procedural design. This Part demonstrates that changes in five procedural doctrines upend the textbook order of litigation: standing, motions to dismiss, class action certification, summary judgment, and appeals. It is important to be clear from the start that the fact that doctrines structurally permit (or in some cases encourage) disorder does not mean that judges never follow the textbook order. Each of the doctrines described is discretionary in its trigger or in application. What sequence of motions judges ordinarily follow, if indeed they follow any regular sequence, has yet to be documented. Case filing data gives us a sense that disorder is pervasive,[20] but the disintegration described at this stage of the research is a structural one.

19. This can also be framed as a problem of optimal standardization of motion sequencing. *Cf.* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 39–46 (2000) (discussing applications of standardization).

20. The categories of cases especially affected by disintegration of the textbook order make up much of the federal docket. Adding together multidistrict litigation ("MDL") and civil rights cases (which tend not to be MDLs), this phenomenon is applicable to approximately sixty percent of the federal docket. In 2015, approximately thirty-nine percent of the federal pending cases were

A. Standing and Subject Matter Jurisdiction

Justiciability questions such as whether a plaintiff has standing to sue are generally to be decided at the commencement of the litigation.[21] Since standing concerns the power of the court to hear the case at all, a court ought to determine whether it has the power to decide a case as its first act.[22] But the command that standing ought to be determined at the start of the litigation does not fit well with the requirements of standing doctrine as they have evolved since the early 1970s. This Section first briefly describes the evolution of standing doctrine and then explains how these developments upend the order of the procedural law. It then compares these developments in standing doctrine to those in subject matter jurisdiction.

Standing doctrine as it is understood today did not exist for most of American history.[23] Between the founding era and 1920, "what we now consider to be the question of standing was answered by deciding whether Congress or any other source of law had granted the plaintiff a right to sue."[24] This approach fit well with the writ system of pleading;

MDLs, which are largely mass torts. TOMMIE DUNCAN, JUDICIAL PANEL ON MULTIDISTRICT LITIG., 2015 YEAR-END REPORT 1 (2016) (on file with author). About thirteen percent of new filings were MDL cases. *Id.* at 2 n.4. In 2014, the total number of pending MDL cases was thirty-six percent of the federal docket, and eighty-eight percent of these were mass tort cases. DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES, at x–xi (2014), https://law.duke.edu/judicialstudies/conferences/september2014/papers/ [https://perma.cc/6TC2-QSGK]. In 2015, civil rights cases, including prisoner cases, made up about twenty-two percent of federal filings, and personal injury cases about twenty-five percent. *Table 4.4: U.S. District Courts—Civil Cases Filed, by Nature of Suit*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/Table4.04.pdf (last visited Feb. 26, 2018) [https://perma.cc/72AY-VGUC].

21. *See, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 117 (7th ed. 2015) (discussing principles underlying standing doctrine, such as "limiting the judicial process to litigants who will be energetic adversaries," which generally assume determination at commencement).

22. "Because it may affect our jurisdiction, . . . we consider first the District Court's conclusion that the severability provision of the 1977 Amendments would, if valid, deprive appellee of standing . . . ." Heckler v. Mathews, 465 U.S. 728, 737 (1984); *see also* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3531.15 n.1 (3d ed. updated Apr. 2017) (discussing characterization of standing as a jurisdictional issue). As the authors of the Wright, Miller, and Cooper treatise explain, "[I]t is commonly said that standing must exist at the time an action is filed. Post-filing events that supply standing that did not exist on filing may be disregarded . . . ." 13A WRIGHT ET AL., *supra*, § 3531 (citing Utah Ass'n of Ctys. v. Bush, 455 F.3d 1094, 1101 & n.6 (10th Cir. 2006)) (standing acquired after action is filed insufficient); *see also* Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149, 160–162 (2d Cir. 2012) (dismissing case when original plaintiff lacked standing although intervenor had standing). For an argument that the standing inquiry should be abandoned entirely in favor of the motion to dismiss (that is, "a question on the merits of [the] plaintiff's claim"), see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

23. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1064 (2015).

24. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992). This history is largely drawn from Sunstein's work. For a

if a writ was recognized, then the plaintiff could bring a lawsuit.[25] Because of the rigidity of the writ system, the question was a relatively easy one—either a writ was recognized or it was not. This is unlike the modern pleading system, which requires a "statement of the claim"[26] and therefore permits greater flexibility in plaintiffs' assertions that they have a legal claim at all.

In the 1930s, standing began to emerge as a separate set of doctrinal concerns in response to the rise of the administrative state. In 1939, a year after the Federal Rules of Civil Procedure went into effect, the Supreme Court explained that standing to sue required that the plaintiff have a "legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[27] During the period between 1930 and 1960, in response to the Administrative Procedure Act ("APA") and the rise of the administrative state, the Court recognized a standing doctrine focused on the question of whether the plaintiff had a legal right, conceptualized as a cause of action.[28] Standing emerged as a separate legal doctrine, but the inquiry remained focused on whether the plaintiff could assert a legal right.

Whether the legal right in question is determined based on common law and statutory causes of action, or whether it is based on a recognized writ, the legal right approach to standing fit well into the structure of the rules of procedure, particularly pleadings. Pleading a writ correctly, or stating facts sufficient to give notice to the defendant of the cause of action, would also serve the purpose of establishing that the plaintiff had standing because the two inquiries bottomed on the same question: Did the plaintiff state a legally cognizable claim? The federal courts needed to look no further than the motion to dismiss for a procedural tool to determine standing—a procedure which comes conveniently at the start of the litigation when a court should determine whether it has jurisdiction to adjudicate the claim. At the motion to dismiss stage, the court is supposed to ask whether, if all the plaintiff's allegations are taken as true, the plaintiff has asserted a claim for

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different perspective, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004), which argues that current standing doctrine is justified by historical sources.

25. Sunstein, *supra* note 24, at 178 (discussing various writs, including writs available to the public at large to bring suit).

26. FED. R. CIV. P. 8(a)(2).

27. Tenn. Elec. Power Co. v. TVA, 306 U.S. 118, 137–38 (1939), *overruled in part by* Bond v. United States, 564 U.S. 211 (2011); Sunstein, *supra* note 24, at 181.

28. Sunstein, *supra* note 24, at 182 (explaining that during this period, "the principal question, for purposes of standing, was whether the law had conferred a cause of action").

relief.[29] The old standing inquiry asked even less of the court. It had only to determine whether the plaintiff had filed a writ recognized by common law or statute. If so, then there was a case or controversy that the court could decide, and the plaintiff had Article III standing to sue.

All this changed in 1970. That year, the Supreme Court decided two cases that shifted the standing inquiry from law to facts.[30] Under this new analysis, standing required showing (1) an "injury in fact" and (2) that this injury was "arguably within the zone of interests" of the statute.[31] As Cass Sunstein explains, the basis for these new requirements in either the APA or Article III was very weak.[32] Nevertheless, the language took on a life of its own, and this shift marked a major change in standing doctrine and in the procedure for determining whether a party has standing to sue.

The Court may have thought that moving the inquiry from a question of law to a question of fact would produce a simpler analysis. Instead of asking whether a person ought to have a legal right, which is evidently a normative question, the new inquiry shifted the focus to objectively ascertainable facts. The problem with this approach from a conceptual perspective is that the standing inquiry must still consider which injuries ought to be judicially cognizable. There are many events in the world that people can describe as an injury, and even spend the time and effort to file suit about, yet a court will find that there is no standing because the injury is not one the law recognizes.[33]

The conceptual problem is significant. Equally significant is what demanding a factual inquiry does to the procedural structure in which standing must be determined. An inquiry into whether there is a statutory or common law cause of action fits quite well within the structure of the motion to dismiss because a court need not look beyond the pleadings to determine whether a cause of action exists. An inquiry into whether the plaintiff was *in fact* injured requires the court to go beyond assertions in the pleadings and to turn to evidence. It raises

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29. 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL § 1357 (3d ed., updated Apr. 2017) ("[T]he district judge will accept the pleader's description of what happened to him or her along with any conclusions that can reasonably be drawn therefrom.").

30. Barlow v. Collins, 397 U.S. 159 (1970); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); *see also* Sunstein, *supra* note 24, at 169–170.

31. *Data Processing*, 397 U.S. at 152, 153.

32. Sunstein, *supra* note 24, at 185.

33. *Id.* at 189–190. As Sunstein explains beautifully:

> [T]here are innumerable "injuries in fact" produced by public and private action. Many of those injuries might well produce lawsuits. But an injury can become judicially cognizable if and only if it has received legal status from some source of law. To this extent, the *Data Processing* Court's attempted shift from law to fact was doomed to fail from the beginning.

Id. at 191–92.

questions about what burden of proof the plaintiff must meet to demonstrate injury—must the plaintiff prove injury by a preponderance of the evidence (the same standard the plaintiff must meet at trial), or merely show that her claim of injury is plausible, or meets some other, lower standard? If the plaintiff must demonstrate her injury by a preponderance of the evidence, the defendant or the court must be given an opportunity to review the evidence, which in turn requires some form of discovery in advance of the motion.

The problem is made worse by subsequent developments in standing doctrine which have expanded the injury-in-fact requirement. Today, a plaintiff needs to show three things to demonstrate that she has standing to sue. First, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest" which is both "concrete and particularized" and "imminent" rather than hypothetical or conjectural.[34] Second, there is a causation requirement; "there must be a causal connection between the injury and the conduct complained of."[35] Third, the injury must be "likely" to be "redressed by a favorable decision."[36] Furthermore, "Article III demands that an 'actual controversy' persist throughout all stages of litigation."[37]

Assume that the facts alleged seem, at the commencement of the litigation, to indicate an injury in fact. If at some point later in the litigation the facts are discovered to be different, must the case be dismissed for lack of standing? If this occurs at trial, would the court be required to dismiss the case for lack of standing or to issue a judgment on the merits? It cannot do both. And if the court dismisses for lack of standing at a late stage, what is the preclusive effect of this determination?

To understand these problems, take an easy case. This case is easy because it is a traditional private law case that does not raise the ideological problems the Supreme Court struggles with in the standing context.[38] Suppose that a plaintiff sues in federal court for breach of a debt contract and claims that she has lent the defendant $100,000. Traditionally, the plaintiff would have brought a writ of assumpsit.[39] Today, a plaintiff would likely bring a state law cause of action for

34. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

35. *Id.*

36. *Id.* at 560–61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

37. Hollingsworth v. Perry, 570 U.S. 693, 705 (2013) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013)). The earliest reference to this rule is *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

38. *See* Fallon, *supra* note 23, at 1096–97 (discussing ideological differences in approaches to standing questions among Supreme Court Justices).

39. *See Assumpsit*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "assumpsit" as a "common-law action for breach of [an express or implied] promise or for breach of a contract").

breach of contract. Under a standing rule that requires a legal right, the plaintiff unquestionably has standing *regardless of the result*. Now suppose that at trial, the plaintiff loses. Worse yet, suppose she loses because of a factual determination that the defendant had paid the debt on time. It turns out that she had suffered no injury. Under the current rule, the plaintiff lacked standing at the commencement of the litigation. As a result, the federal court lacks the power to issue a judgment in the case and must dismiss on standing grounds—even though the court has already made a determination on the merits and both parties have gone to the trouble of attempting to prove their case.[40]

What is the effect of this dismissal? A dismissal on standing grounds is preclusive only as to the standing determination itself.[41] This is because the court lacked the power to make a merits determination. The crux of the standing inquiry is, after all, whether the court has the power to decide this case. Should the plaintiff attempt to bring a second lawsuit against the same defendant for the same debt in federal court, the court ought to reject the suit for lack of standing without further factual inquiry because the standing question was already determined in the initial case. But that may not be the end of the matter, because the plaintiff may be able to pursue the same suit in state court. Because there has been no determination on the merits for preclusion purposes and because state courts are not subject to Article III standing requirements, she would not be claim precluded from proceeding in state court.[42] This result is quite silly. And while it may seem unlikely, a structurally similar claim that plaintiffs who have lost at trial lack standing was made to the Supreme Court in the October 2015 term.[43]

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40. I concede that no defendant would make a motion for lack of subject matter jurisdiction in such a case unless there was something else going on, and it is likely that the court would not raise the issue on its own because it can proceed on hypothetical jurisdiction. *See generally* Clermont, *supra* note 4, at 321–24.

41. *See* 13B WRIGHT ET AL., *supra* note 22, § 3531.15 ("A decision finding standing should support issue preclusion, despite the jurisdictional characterization, if the same issue of standing arises in subsequent litigation. The vagaries of standing theory are such, however, that it may often be difficult to conclude that the same issue is presented." (citing Cutler v. Hayes, 818 F.2d 879, 887–890 & n.72 (D.C. Cir. 1987))); *see also* Brereton v. Bountiful City Corp., 434 F.3d 1213, 1218–19 (10th Cir. 2006) (explaining that "the district court's standing ruling precludes [the defendant] from relitigating the standing *issue* . . . but does not preclude his *claim*").

42. She would be issue precluded from relitigating the question of Article III jurisdiction in a subsequent proceeding, which would affect the set of cases that is exclusively within the jurisdiction of the federal courts. *See* 18A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4436 (2d ed. updated Dec. 2017) (noting that "[a]lthough a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question").

43. In *Tyson Foods, Inc. v. Bouaphakeo*, a collective action alleging failure to pay for donning and doffing of protective gear, amici argued that because some employees were found not to be owed back pay at trial, they lacked standing to sue. For a critique of these arguments, see Brief of

The problems illustrated in this hypothetical are real. For example, courts are not sure what standard to apply to standing questions at the pleading stage. Some apply a more lenient standard akin to notice pleading; others applied a more rigorous standard even before plausibility pleading became the law.[44] Furthermore, as the Court explains, although "standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial."[45] This puts courts in the position of deciding standing at summary judgment or after trial.[46] The Second Circuit has commented on this issue, noting that "there is a logical difficulty in determining standing based on the results of a trial, the propriety of which itself depends upon the determination of standing."[47] As a result, some courts upon reaching the trial stage have simply ignored standing doctrine,[48] despite the rule that standing is not waivable.[49]

One response might be simply to recognize that standing to sue will be found in "cases and controversies of the sort traditionally amenable to and resolved by the judicial process."[50] An action for debt that would have traditionally been brought as a writ of assumpsit would

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Amici Curiae Civil Procedure Professors in Support of Respondents at *2–3, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2015) (No. 14-1146), 2015 WL 5719742.

44. *See* 13B WRIGHT ET AL., *supra* note 22, § 3531.15 (discussing the varying approaches applied to standing issues at the pleading stage). *Compare* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) ("It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' . . . but rather 'must affirmatively appear in the record.' " (first quoting Grace v. Am. Cent. Ins. Co., 109 U.S. 278, 284 (1883), and then quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884))), *holding modified by* City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004), *with* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998) ("This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings, so we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations.").

45. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 115 n.31 (1979).

46. *See* Lewis v. Casey, 518 U.S. 343, 357 (1996) (standing disputed after trial); Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992) (standing decided at summary judgment); Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.21 (1982) (noting that plaintiff who had adequately pleaded standing would still need to prove it suffered an injury at trial); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688–89 (1973) (noting that allegations of an injury suffered "must be true and capable of proof at trial").

47. United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 76–79 (2d Cir. 2002) (explaining that standing in a forfeiture proceeding serves only a functional purpose—to determine whether the claimant has a legitimate interest in contesting forfeiture).

48. ACLU v. Mote, 423 F.3d 438, 441 n.1 (4th Cir. 2005) ("[T]he proper course . . . is . . . to accept jurisdiction and address the objection as an attack on the merits, . . . which we do here.").

49. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 (2008) ("[W]e bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits."); *Lewis*, 518 U.S. at 347 n.1 (standing "is jurisdictional and not subject to waiver").

50. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

qualify. Indeed, in similar cases the Court has found that there was standing. But these cases preceded the sea change in standing doctrine that occurred in the 1970s. In *Aetna Life Insurance Co. v. Haworth*, decided in 1937, the Court found standing to sue in an insurer's declaratory judgment action based on the insured's failure to pay premiums owed under a disability insurance policy.[51] And in *Lear, Inc. v. Adkins*, decided in 1969, an inventor was granted standing in his suit against a patent licensee for failure to pay royalties owed under a patent licensing agreement.[52]

More modern cases elide the problem. Most recently in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Supreme Court merely assumed that standing was available on a Lanham Act claim without inquiring as to whether the plaintiff had in fact suffered an injury (rather than merely alleging one).[53] The Court explained: "Lexmark does not deny that Static Control's allegations of lost sales and damage to its business reputation give it standing under Article III to press its false-advertising claim, and we are satisfied that they do."[54] So one must ask, is it sufficient to state a cause of action or must the plaintiff show injury, and if so, when? There is no consistent answer. The current state of affairs invites continuous litigation of the standing issue throughout the lawsuit and on appeal.

Even if in traditional private law cases there is a generally agreed upon norm that adequately pleading a recognized cause of action constitutes standing to sue, this poses several problems. First, the law changes over time, including statutory law. It does not make sense to interpret Article III to incorporate only cases and controversies recognized at some earlier point in time.[55] Second, given that the doctrine is described as a universally applicable test by the Court, the door is open to disputing whether there is an injury in fact in every case. At the moment, standing is probably best understood as a doctrine that

51. 300 U.S. 227, 242–44 (1937).

52. 395 U.S. 653 (1969).

53. 134 S. Ct. 1377, 1386 (2014). For a discussion of the significance of *Lexmark*, see Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807 (2016).

54. 134 S. Ct. at 1386.

55. That tactic has not worked very well in the context of the jury right. For a taste of the complexity of applying anachronistic legal concepts to modern law, see *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 566 (1990). Such a rule would effectively replace pleading with the old writ system through Article III, although there were good reasons for jettisoning that system. In any event, according to Sunstein, the writ system would not achieve the Court's desire to limit standing, as there were common law writs which permitted third-party or "bystander" standing. *See* Sunstein, *supra* note 24, at 178 (describing writs).

is triggered in certain sets of cases.[56] As Richard Fallon has demonstrated, the doctrine of standing has fragmented into ever smaller substantive categories, which can be sliced and diced a variety of ways.[57] Even so, the doctrine is formally applicable to any federal suit. The bottom line is that the stated rule requires the type of evidentiary inquiry that must upend the ordinary structure of a lawsuit in cases where the defendant (or the court) chooses to press it. As the authors of a prominent federal practice treatise explain: "[I]t remains necessary to decide how far to go in examining standing before trial. The dangers to be guarded against are hasty decision, or a lengthy and costly inquiry that delves too far into the merits of the litigation. It seems clear that no uniform approach is possible."[58]

Now let us turn to how standing compares to various subject matter jurisdiction inquiries, all of which ought to take place at the commencement of the litigation for the same reasons as standing should but, like standing, may be disputed at any time. Federal question cases fit best with the idea of a default sequential order. The well pleaded complaint rule explicitly bases its test on the allegations themselves, fitting neatly into the motion to dismiss standard.[59] The imbedded federal question exception, while adding some complexity to the inquiry, is purely legal and can also be determined at the motion to dismiss stage on the information presented in the complaint.[60]

Diversity jurisdiction is slightly more like standing because it too involves a factual inquiry. Whether a defendant is a citizen of a different state than the plaintiff is a question of fact. The court's diversity jurisdiction ought to be decided at the commencement of the litigation, but proof that there in fact is not complete diversity of citizenship requires dismissal on jurisdictional grounds at any time during the litigation.[61] Ordinarily, the process of determining diversity jurisdiction in contested cases begins with the pleadings, because in responding to the plaintiff's jurisdictional allegations the defendant will

56. *See* Fallon, *supra* note 23, at 1062 (noting that although the Court presents standing as a universally applicable test, it is not so applied).

57. *Id.* at 1071–1092.

58. 13B WRIGHT ET AL., *supra* note 22, § 3531.15 (footnote omitted).

59. *See* 13D WRIGHT ET AL., *supra* note 22, § 3566 (explaining that the well pleaded complaint rule directs courts to "look only to the claim itself and ignore any extraneous material").

60. *See, e.g.*, Gunn v. Minton, 568 U.S. 251 (2013) (determining on a motion to dismiss whether a state law claim requiring resolution of an embedded federal question—a hypothetical patent issue—could properly be heard by the state court).

61. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 369 (1978) (dismissing case for lack of subject matter jurisdiction when true citizenship of defendant was determined on the third day of trial); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 126–27 (1804) (dismissing case for lack of subject matter jurisdiction after trial).

affirm or deny his state of citizenship or, instead of answering, will move to dismiss.[62] If the answer indicates that there is not complete diversity but the defendant does not move to dismiss, the court has the power to do so on its own.[63] The requirement that the plaintiff state the basis for jurisdiction and that the defendant respond provides a safeguard against cases where there is not complete diversity going forward.[64] Furthermore, the federal courts have consistently applied the general rule "that, for purposes of determining the existence of diversity jurisdiction, the citizenship of the parties is to be determined with reference to the facts as they existed at the time of filing."[65] That rule is helpful in keeping the factual inquiry cabined to the commencement of the litigation.

Still, it is true that in diversity jurisdiction, as in standing, a contested question of citizenship may require discovery and an evidentiary hearing on a motion to dismiss. At the motion to dismiss stage, the court may look beyond the pleadings to affidavits and documents, or even hold a hearing to determine jurisdiction.[66] And it may be possible to find a defect in diversity late in the game, even at trial. The Supreme Court has recognized this problem and expressly considered the "policy goal of minimizing litigation over jurisdiction" in its decisions.[67] So while the factual foundation for the diversity jurisdiction determination presents a threat to the default sequential order of the Federal Rules, that factual inquiry is more easily cabined to the motion to dismiss stage.

Jurisdictional discovery, which is sometimes required to determine whether diversity exists, is another example of upending the textbook order of litigation. Although its origins are not well established, it is said to have become a phenomenon in the district courts in the 1960s.[68] The practice was not recognized by the Supreme

62. FED. R. CIV. P. 7 (answer); FED. R. CIV. P. 12(b)(1) (motion to dismiss); FED. R. CIV. P. 12(h) (timing of motion to dismiss).

63. FED. R. CIV. P. 12(h)(3).

64. *See* Prizevoits v. Ind. Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996) ("A court is not required to conduct a searching inquiry into the truth of every uncontested jurisdictional allegation."); *see also* 13E WRIGHT ET AL., *supra* note 22, § 3602.1 (discussing the role pleadings play in determining whether complete diversity exists).

65. Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 569–70 (2004); *see also* Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824) ("It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.").

66. *See* 13E WRIGHT ET AL., *supra* note 22, § 3602.1 (listing forms of evidence "from outside the pleadings" that courts may consider).

67. *Grupo Dataflux*, 541 U.S. at 580–81.

68. *See generally* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 497–98 (2010) (detailing the history of jurisdictional discovery in the

Court until 1978, in the context of a class action, which is consistent with the overall trend toward disintegration of the procedural law's default sequential order over the last thirty-five years, as we shall see in Part II.[69]

Supplemental jurisdiction can also be decided at any time, permitting departures from the textbook order. The doctrine long precedes the Federal Rules of Civil Procedure.[70] The development of supplemental jurisdiction doctrine, however, has been responsive to the changes in joinder doctrine in the Federal Rules, and it remains a better fit with the Rules than standing doctrine does.[71] Prior to the promulgation of the Rules, and for some years thereafter, the test for pendant claim jurisdiction was the "cause of action" test, which determined whether a federal court had subject matter jurisdiction over related state law claims by asking whether the federal and state claims were part of the same cause of action.[72] In *United Mine Workers of America v. Gibbs*, the Supreme Court—explicitly citing the Federal Rules—adopted the now familiar transactions-based inquiry.[73]

The emphasis in the pendent jurisdiction cases on discretion in relation to the stage of the litigation has the negative result of permitting cases to be dismissed even after trial. Justice Brennan

federal courts). Strong notes some examples of jurisdictional discovery as early as 1908, although she calls these rare. *Id.* at 497 n.30. Almost no discovery was permitted at common law. Resnik, *supra* note 17, at 392 n.64; Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869–77 (1933).

69. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 & n.13 (1978) ("For example, where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.").

70. *See, e.g.*, Hoffman v. McClelland, 264 U.S. 552, 558 (1924) (describing former rule for ancillary jurisdiction and citing cases); Lincoln Gas & Elec. Light Co. v. City of Lincoln, 250 U.S. 256, 264 (1919) (discussing pendent claim jurisdiction); Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 823–24 (1824) (indicating basic rule).

71. However, the problem is a product of the FRCP, created by liberal joinder of both claims and parties for subject matter jurisdiction. Ancillary jurisdiction similarly existed prior to the promulgation of the Federal Rules, but the current doctrine was developed in response to the requirements of the rules, including the rules on compulsory counterclaims. *See, e.g.*, Freeman v. Howe, 65 U.S. (24 How.) 450, 460–61 (1860) (recognizing ancillary jurisdiction over an intervenor's nonfederal claim to property held in control by federal court); Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1111 n.51 (1985) (stating that "[t]he current doctrine, however, has developed largely in response to the procedural innovations of the Federal Rules of Civil Procedure"). If diversity jurisdiction were read very narrowly, it would be impossible for a defendant to bring a state law counterclaim, although the rules so require. The courts accommodated. *Id.* at 1071–72 & n.54 (discussing compulsory counterclaims, third-party claims, cross claims, claims in intervention as of right, and claims by a third-party defendant against the original plaintiff as examples of the federal courts' grants of ancillary jurisdiction following the lead of the Federal Rules).

72. Hurn v. Oursler, 289 U.S. 238, 245–47 (1933); Freer, *supra* note 71, at 1067–69.

73. 383 U.S. 715, 725 (1966) (holding that "claims must derive from a common nucleus of operative fact"); Freer, *supra* note 71, at 1069.

explained that although the "question of power will ordinarily be resolved on the pleadings," in some cases "[p]retrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage."[74] But note that in *Gibbs* the Court permitted the state claim to stand despite the federal claim having been dismissed by the judge after trial.[75] This was an implicit recognition that discretion should be exercised in favor of the textbook order to avoid jurisdictional dismissals after trial. The statute codifies this possibility.[76]

In summary, both standing and subject matter jurisdiction doctrine pose a special challenge to the sequence of litigation because these issues may be raised and decided at any time, even after trial, leading to dismissal of the case without preclusive effect even if the case has been decided on the merits. The evolution of standing doctrine since 1970 presents an especially acute version of this problem, because it requires the court to make a factual determination that ordinarily would be made only after discovery is complete. The factual determination in the standing context is more central and more likely to interfere with the textbook sequence of the lawsuit than any other jurisdictional inquiry, but all these doctrines can result in jurisdictional dismissals at the trial stage, which is inconsistent with the textbook order of procedure.

B. The Motion to Dismiss

In the textbook procedural order, the defendant moves to dismiss at the start of the litigation and, if the plaintiff's case survives the motion, it moves on to the discovery stage.[77] Today, plausibility pleading requires a plaintiff to include sufficient factual allegations in her complaint to render her claim plausible.[78] The result is that to survive a motion to dismiss, the plaintiff must have access to evidence.

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74. *Gibbs*, 383 U.S. at 727.

75. *Id.* at 727–29. This may be an example of the Court being responsive to changes in the procedural rules in structuring jurisdictional doctrines so that the system as a whole is coordinated.

76. *See* 28 U.S.C. § 1367(c)(3) (2012) (permitting but not requiring dismissal if all claims over which the court had original jurisdiction are dismissed). For the continuing difficulty this poses, see *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), in which a state claim was dismissed for lack of subject matter jurisdiction under § 1367 two and a half years after filing.

77. Until 2007, all that was required was notice pleading. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

78. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that an allegation "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). On this transition, see generally A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009).

Yet formal exchange of information is impossible because no action has been filed. In some cases, the needed evidence is in the defendant's hands or otherwise inaccessible to the plaintiff, such as evidence of the defendant's mental state or documents solely in the defendant's possession.[79] The plaintiff in such a case will lose the motion, even if she could have prevailed with access to information.

Plausibility pleading makes sense in cases where the plaintiff has facts in her possession at the outset of the lawsuit or access to these facts.[80] But where a plaintiff lacks information that she will ultimately need to prove her case at trial, she must investigate and discover information before filing. Information exchange, in other words, must precede the complaint, upending the traditional order of litigation.[81] Some states permit prefiling discovery under limited circumstances,[82] but it is not authorized by the Federal Rules of Civil Procedure.[83]

The change in formal pleading doctrine began with the Private Securities Litigation Reform Act of 1995, which instituted a higher pleading standard for securities cases in hopes of curbing the number of securities suits.[84] While the law did not reduce filings, it signaled a change in doctrine towards more fact-based pleading, which in turn spurred plaintiffs to conduct prefiling investigations.[85] About twenty years later, the Supreme Court revamped pleadings doctrine in a set of cases involving claims of conspiracy.[86] In these cases, the Court held

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79. The Federal Rules recognize this, but the decisional law does not. *See* FED. R. CIV. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). This is an example of a failure of systemic coordination.

80. By contrast, notice pleading assumes that the defendant is the cheapest cost provider of information.

81. Defendants will rarely provide any information in advance of a lawsuit. Some sort of legal compulsion is almost invariably necessary for plaintiffs to obtain access to information that (potential) defendants have in their possession. Sometimes information may also be in the hands of administrative agencies or other third parties and subject to the Freedom of Information Act or similar state laws.

82. *See, e.g.*, N.Y. C.P.L.R. § 3102(c) (McKinney 2017) (permitting prefiling discovery with court order).

83. FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order."). The triggering event for even initial disclosures is the commencement of the action.

84. The Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(1) to (2) (2012).

85. Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 711 (7th Cir. 2008) ("[T]he plaintiff's lawyers in securities-fraud litigation have to conduct elaborate pre-complaint investigations . . . .").

86. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). *But see* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 335 (2016) (arguing that *Twombly* and *Iqbal* did not replace notice pleading with plausibility pleading, as some feared).

that a plaintiff must assert facts supporting the plausibility of her claim and that what the court called "conclusory" allegations (such as the allegation that there was a conspiracy, for example) would not suffice.[87] The lower courts had been applying something more rigorous than notice pleading for some time, and it is widely agreed that complaints have generally been detailed and fact intensive, so the change in formal doctrine was not as significant a break as it might seem from reading only Supreme Court opinions.[88] Nevertheless, the special circumstance of conspiracy allegations (that the very nature of a conspiracy is to be kept a secret, creating real barriers to plaintiffs who would like to assert facts to support their claims) raise the question of how plaintiffs who do not have access to hidden information, but who have a basis to suspect a conspiracy, are to write an adequate complaint.

This development has spurred scholars to suggest that the Federal Rules should provide for predismissal discovery.[89] This suggestion is inventive, but it also comes at the cost of disordering the textbook sequence. Evaluation of proof is designed to occur at summary judgment or trial, not at the motion to dismiss stage. This explains the consensus that information ought to be requested after the plaintiff has asserted why she is suing, so that the discovery demands can be tailored to the questions that ultimately are to be tried.

A similar "front-loading" problem is evident in so-called *Lone Pine* orders in mass tort litigation, which require the plaintiffs to show evidence supporting their claims at a preliminary stage, typically to survive a motion to dismiss.[90] A *Lone Pine* order can require the plaintiffs to present expert testimony at the motion to dismiss stage, for example, despite the usual rule that courts decide a motion to dismiss based only on the allegations in the complaint.[91] Notably, *Lone Pine*

87. *Iqbal*, 556 U.S. at 678.

88. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (noting the tendency of some lower federal courts to "impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine"); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435 (1986) (observing that many lower courts have promoted fact pleading by refusing to accept "conclusory" allegations).

89. *See* 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, 67 (2010) (arguing that predismissal discovery resolves some of the problems created by plausibility pleading).

90. "The name originated with an unpublished state-court case management order in Lore v. Lone Pine Corp., 1986 WL 637507 (N.J. Super. Ct. Law Div. 1986). Usually, such an order requires the plaintiffs to make a preliminary showing of evidence supporting their claims." 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3866 n.22 (4th ed. updated Apr. 2017).

91. *See, e.g.*, Avila v. Willits Envtl. Remediation Tr., 633 F.3d 828, 833 (9th Cir. 2011) (upholding *Lone Pine* order prior to discovery); Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th

orders require plaintiffs to produce proofs that are in their possession, and could be understood as a more rigorous substitute for initial disclosures if they did not precede the opening of discovery.[92] Some courts permit such motions at the very start of the litigation, although others have held that a determination on a motion to dismiss or even discovery is first required.[93]

In summary, and as illustrated by the anecdote introducing the Article, a motion to dismiss can be an occasion to review and evaluate the evidence in a case or a test of the legal sufficiency of the claim, depending on how a judge chooses to exercise her discretion.

C. Class Certification

When the class action rule was adopted, the idea was that a class certification order would be issued at the commencement of the litigation.[94] Class action doctrine was not well developed in the 1960s and 1970s, although class actions were just as controversial then as they are today.[95] For example, federal jurisdiction over class actions was very limited, and state class action rules were only beginning to be adopted.[96] Indeed, state courts would often refuse to certify national

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Cir. 2000) (upholding district court order requiring plaintiffs to submit prediscovery expert affidavits to establish certain elements of their claim); McManaway v. KBR, Inc., 265 F.R.D. 384, 389 (S.D. Ind. 2009) (granting, in part, a prediscovery order requiring plaintiffs to present proof of injury and causation); *see also In re* Nexium Antitrust Litig., 777 F.3d 9, 21 (1st Cir. 2015) (approving of *Lone Pine* orders in dicta). For a general overview, see Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1167–68 (11th Cir. 2014), which discusses uses of *Lone Pine* orders and circuit court opinions where such orders have been used. For the general rule, see *supra* text accompanying note 90. Some courts, however, will consider documents incorporated into the complaint as well as facts taken into consideration as a matter of judicial notice. *See* 5B WRIGHT ET AL., *supra* note 29, § 1357.

92. FED. R. CIV. P. 26(a)(1)(A) (listing types of information that "a party must, without awaiting a discovery request, provide to the other parties"). Initial disclosures are to be provided within fourteen days after the Rule 26(f) conference. FED. R. CIV. P. 26(a)(1)(C). There is no similar time frame for disclosure of expert evidence. FED. R. CIV. P. 26(a)(2).

93. *Adinolfe*, 768 F.3d at 1168 ("As a general matter, we do not think that it is legally appropriate (or for that matter wise) for a district court to issue a *Lone Pine* order requiring factual support for the plaintiffs' claims before it has determined that those claims survive a motion to dismiss under *Twombly*."); *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008) (*Lone Pine* order used after case had been pending for three years and subject to significant discovery).

94. *See* FED. R. CIV. P. 23(c) (1966) (repealed 2003) (requiring that class certification be determined "as soon as practicable").

95. David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 610–13 (2013) (discussing early controversy over class actions and noting the fact that the arguments have not changed since the 1960s).

96. *Id.* at 628; Zahn v. Int'l Paper Co., 414 U.S. 291, 300 (1973) (holding that multiple plaintiffs must each meet the amount in controversy requirement), *superseded by statute as stated in* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005); Snyder v. Harris, 394

class actions.[97] One basic rule of the road, however, was that class certification, although it could be revisited, should be decided near the commencement of the litigation.[98] Evidence of this norm can be seen in rulings such as *Sosna v. Iowa*, in which the Supreme Court held that a class action may continue to be maintained even if the class representative's claim later became moot.[99] *Sosna* is reminiscent of the rule for diversity jurisdiction that determination of citizenship is based on facts at the commencement of the litigation.[100] Both rules recognize a preference for deciding threshold matters at the commencement of the lawsuit.

More controversial was the question of how much a court could consider the merits as part of or antecedent to the class certification inquiry. The recent and sharp trend has been towards a proceeding on class certification that looks more and more like a trial, and therefore cannot be conducted at the beginning of the litigation. The story begins in 1974 with *Eisen v. Carlisle & Jacquelin*.[101] In that case, the district court had held a hearing to determine whether the plaintiff class was likely to prevail on the merits.[102] The purpose of this hearing was to decide whether to shift the cost of notice to the defendant.[103] Rejecting this approach, the Supreme Court held that the plaintiff bears the cost of notice and that the question for the court to determine on class certification is only whether the plaintiff class meets the class action rule requirements.[104] This holding plagued the courts for many years, spawning arguments over how much of the merits should be considered at the class certification stage.[105] Mostly, lower courts understood *Eisen* to mean that they could not evaluate the merits as part of the class certification procedure.[106] As we shall see, this changed as the class action matured.

U.S. 332, 338 (1969) (holding that class members may not aggregate their claims to meet the amount in controversy requirement).

97. Marcus, *supra* note 95, at 628.

98. *See, e.g.*, E. Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (holding that failure to move for class certification prior to trial is evidence of inadequacy of class representative). The original rule required that class certification be determined "as soon as practicable." FED. R. CIV. P. 23(c) (1966) (repealed 2003). That language was changed in 2003.

99. Sosna v. Iowa, 419 U.S. 393, 399 (1975).

100. *See supra* notes 59–76 and accompanying text discussing subject matter jurisdiction.

101. 417 U.S. 156 (1974).

102. *Id.* at 177.

103. *Id.*

104. *Id.* at 178 (quoting Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971)).

105. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1265–66 (2002).

106. *Id.*

The Supreme Court's rationale in *Eisen* was that a preliminary merits hearing "may color the subsequent proceedings and place an unfair burden on the defendant."[107] The conventional wisdom had been that if plaintiffs had to pay their own notice costs, this would serve as a crude quality screening mechanism: since high notice costs could only be recouped if the class action were successful, risky suits would not be brought in the first place.[108] As class action practice developed and the "blackmail" argument against class actions gained traction, merits or something that resembled merits determinations at earlier stages of the litigation became more popular with the defense bar.[109] That is, potential defendants wanted to winnow class action suits as early as possible both through notice costs and by requiring earlier merits determinations. The strategy of increasing costs has now bled into every class action requirement, in the process upending the textbook order of litigation.

The move towards a more fact-intensive, trial-like process for class certification began in the early 1980s but has accelerated more recently. Conceptually, this transition rested on the idea that the class certification inquiry is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[110] This insight was first noted in a case denying an interlocutory appeal of class certification. The language emerged in the 1970s, but these seeds did not sprout until the 1980s. The history of the relationship between interlocutory appeals (which upend the default sequence) and class certification merits determinations (which also upend it) highlights the insight that one of the main drivers of disintegration was the Court's concern about the rise of complex litigation combined with a lack of attention to systemic procedural design.

Early on, plaintiffs tried to obtain interlocutory appeals of certification denials based on a theory that denial of certification

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107. *Eisen*, 417 U.S. at 178.

108. Marcus, *supra* note 95, at 634–35; *see also* Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 689 (1979) (defending Federal Rule of Civil Procedure 23(b)(3)). Imposing notice costs is unlikely to limit filings much if the class action bar is well financed.

109. The "blackmail" argument is that a very small risk of a very large judgment will cause a defendant to settle meritless claims. For a discussion and critique of the argument, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1385–1430 (2003).

110. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)). The quoted language comes not from a class action case, but rather from a case involving the rejection of an appeal under the collateral order doctrine.

resulted in a "death knell" for the class action.[111] The idea was that if class certification was denied, and the claims were too small to be brought individually, the case could not go forward even if it had merit. The Supreme Court rejected this argument in 1978 on two grounds. First, it held that by operation of the class action rule, the class certification order is provisional.[112] Second, it ruled that the class certification determination is enmeshed with legal and factual questions that go to the merits, so it does not meet the requirements of a collateral order.[113] The insight that closed the door to interlocutory appeals as a matter of course until recently—that class certification is inextricable from the merits—ended up being used in decisions governing the standard for certification. Because class certification inquiries overlap with the merits, the hearing on class certification approaches a trial. Ironically, a decision maintaining the textbook order of civil litigation in one context (limiting interlocutory appeals) was used to justify upending the order of litigation by opening the door to requiring a more rigorous class certification hearing.

The first step down this road was *General Telephone Co. of the Southwest v. Falcon*, a Title VII case decided in 1982.[114] In that case the Court explained: "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[115] Still, *Eisen*'s language cabining merits inquiries at the class certification stage remained influential.[116] The trend towards more rigorous hearings on certification gained steam starting in 2001.[117] This change coincided with two developments. First, in 1998 the Federal Rules were amended to permit interlocutory appeals for class actions.[118] Appellate decisions tended to raise the bar for class

111. *Livesay*, 437 U.S. at 469. The door was opened to interlocutory appeals in *Eisen*, which came to the Supreme Court on an interlocutory appeal, 417 U.S. at 162, but that door was soon shut.

112. *Livesay*, 437 U.S. at 469 (citing Federal Rule of Civil Procedure 23(c)(1), which today is found at 23(c)(1)(C) and states, "An order that grants or denies class certification may be altered or amended before final judgment").

113. *Id.* at 469.

114. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982).

115. *Id.* at 160.

116. "Even today, almost thirty years after the decision, courts commonly cite *Eisen* for a general rule barring a preliminary merits inquiry and requiring a certification analysis focused on allegations rather than evidence." Bone & Evans, *supra* note 105, at 1266.

117. In 2001, the Seventh Circuit had held that class certification may require factual determinations that go to the merits. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001). The Third Circuit articulated an even stronger view a few years later. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) (requiring factual determinations supporting Rule 23 findings by a preponderance of the evidence and extending these requirements to expert testimony), *as amended* (Jan. 16, 2009).

118. *See* FED. R. CIV. P. 23(f) (adopted in 1998).

certification. Second, the 2005 Class Action Fairness Act ("CAFA") drew class actions of any significant value into the federal courts, meaning that federal decisions had a greater reach.[119] The more rigorous approach to certification was validated in the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.[120] Lower courts began to require *Daubert* hearings on class certification during this period.[121]

The law has not moved all the way to requiring a full trial on the merits at class certification. For example, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the Supreme Court explained that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[122] Although courts are required to have a rigorous hearing that approaches a trial, the *Amgen* Court reaffirmed that class certification determinations are provisional and not to be relied on later in the litigation.[123] The rule that merits determinations at class certification are nonbinding made sense from an efficiency perspective when class certification determinations were made on very little evidence, but it makes less sense when class certification determinations are subject to the same evidentiary standards applicable at trial.

In some cases, full merits discovery and case development are now required before a class can be certified.[124] Classes are now certified long after litigation has commenced but before trial has occurred. That change in time frame is supported by a slight change to the language of the class action rule in 2003 that recognized this slower road to certification.[125] One result of this delay has been to give defendants the

119. CAFA broadened the citizenship requirement and reduced the amount in controversy requirement to allow more class actions to be brought in federal court. 28 U.S.C. § 1332(d) (2012).

120. 564 U.S. 338, 350 (2011).

121. The Supreme Court granted certiorari on a case that seemed to present that question, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), only to learn that the issue had been waived by the defendant. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 754 (2013).

122. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 464–67 (2013).

123. *Id.* at 477 (stating that "[i]f the class is certified, materiality might have to be shown all over again at trial"); *Wal-Mart*, 564 U.S. at 351 n.6 (explaining that in securities cases, plaintiffs will have to prove that their shares were traded on an efficient market twice: once at certification and again at trial); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) (holding that "the determination as to a Rule 23 requirement . . . is not binding on the trier of facts, even if that trier is the class certification judge"), *decision clarified on denial of reh'g*, 483 F.3d 70, 72 (2d Cir. 2007).

124. Klonoff, *supra* note 121, at 756 (explaining that the result of these developments is "that the class certification decision must inevitably be delayed, possibly until the end of full merits discovery").

125. FED. R. CIV. P. 23(c)(1)(A).

opportunity to pick off class representatives.[126] Another has been that when judges evaluate evidence and make factual determinations at class certification, they usurp the role of the jury.[127] This problem brings us to a final way that class certification procedures alter the traditional sequence of litigation, which also implicates the jury right. Certification may be revisited throughout the litigation, even after trial.[128]

In sum, procedure in class actions is now disordered in three ways. First, merits determinations are moved to the beginning of the suit. The class certification inquiry has been transformed from a preliminary inquiry engaged in at the commencement of the litigation when evidence has yet to be developed into a merits inquiry that is predicated on nearly full merits discovery and significant fact finding.[129] Second, those determinations are subject to appeal at any point in the process, rather than only at the end. Third, class certification decisions may be continually revisited, even after trial.

D. Summary Judgment

Developments in the interpretation of the summary judgment rule demonstrate comfort with determinations of fact and law made without reference to the textbook sequence of litigation. Summary judgment began as an equitable procedure incorporated into the Federal Rules promulgated in 1938. The idea of summary judgment then was that it would "limit the scope of disputes and dispose of frivolous issues and claims."[130] Summary judgement was not expected to be used very often.[131] There were too many issues of material fact to

126. For example, in the Seventh Circuit, it was the law until recently that in order to prevent this from happening, plaintiffs had to file a preliminary motion for class certification. Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011), *overruled by* Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015). This motion was merely a placeholder; the real motion could not be filed until after merits discovery. The idea that an unaccepted settlement offer can moot a case seems to have been put to rest by the Court's recent decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), which held that an offer of settlement did not moot the case when the offer was not accepted by the plaintiff.

127. *See* Klonoff, *supra* note 121, at 756.

128. Mazzei v. Money Store, 829 F.3d 260, 266 (2d Cir. 2016) (decertifying class after trial).

129. Some courts permit defendants to move to strike class allegations prior to discovery. Klonoff, *supra* note 121, at 756–57; *see* Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 950 (6th Cir. 2011) (allowing motion to strike class allegations). *But see* Baker v. Microsoft Corp., 797 F.3d 607, 615 (9th Cir. 2015) (rejecting defendants' motion to strike class allegations), *rev'd on other grounds*, 137 S. Ct. 1702 (2017).

130. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 979 (1987).

131. *Id.* at 980.

dispose of them easily through summary judgment, especially given the liberal joinder provisions of the Federal Rules.[132]

There is a dispute over the question of whether the intent of the rule drafters in 1938 was that summary judgment be rarely used.[133] Some claim that summary judgment was widely understood as a disfavored and risky motion for litigants to make. For example, in the 1960s the Court explained in a complex antitrust case: "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' "[134] By contrast, Judge Clark explained (dissenting from a denial of summary judgment in a copyright case): "It is, indeed, more necessary in the system of simple pleading now enforced in the federal courts; for under older procedures, useless and unnecessary trials could be avoided, in theory at least, by the then existing demurrer and motion practice."[135]

Whatever one's position on the role of summary judgment prior to 1980—as a rarity or a stopgap—all this changed in 1986. That year the Court decided the summary judgment trilogy,[136] making clear that summary judgment should be more widely used. Two of the three cases in that trilogy concerned complex litigation. *Celotex* was an asbestos case, decided as asbestos cases were filling both state and federal courts,[137] and *Matsushita* was an antitrust suit and a multidistrict litigation.[138] As a doctrinal matter, these cases expanded the availability of summary judgment by easing the burden on a defendant moving for summary judgment and by giving district courts more discretion to determine the existence of issues appropriate for a trial.[139]

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132. *Id.*

133. *Compare* William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984), *with* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 141 (1988). *See also* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1899 (1998).

134. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 130 (2010) (questioning whether "the current system of pleadings and pretrial motions undermine[s] important system values," and stating that " '[s]peedy' and 'inexpensive' should not be sought at the expense of what is 'just' ").

135. Arnstein v. Porter, 154 F.2d 464, 479 (2d Cir. 1946).

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

137. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 261 (2006) (describing patterns of asbestos filings).

138. *In re* Japanese Elec. Prods. Antitrust Litig., 388 F. Supp. 565 (J.P.M.L. 1975).

139. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 79 (1990):

> First, these cases eased the initial burden placed on the party moving for summary judgment by permitting a summary judgment movant to prevail without having to establish fully the nonexistence of material facts in dispute. Second, the Court allowed

The trend towards greater use of summary judgment preceded the Court's intervention,[140] but even so, before *Celotex* the summary judgment doctrine was understood to require the defendant to demonstrate that she would prevail at trial.[141] Most courts read *Celotex* as lightening or even limiting that burden, allowing summary judgment motions to be brought before discovery.[142] The case was widely understood to place "essentially no burden at all on a defendant seeking summary judgment."[143]

So understood, the *Celotex* decision upends the textbook order of civil litigation. Instead of conducting discovery and then moving for summary judgment once the claims and defenses can be evaluated in light of the facts, the defendant's summary judgment motion can precede discovery. In such a case, if the information tending to prove her case is in the plaintiff's possession, she can include it in her motion opposing summary judgment. If she does not have access to the information, she may ask the court to defer or deny the motion.[144] Courts have recognized the tension between *Celotex* and the sequence implicitly endorsed by other federal rules. To restore the default sequencing, a minority of courts have interpreted *Celotex* to require that the defendant show reasonable attempts to acquire evidence through discovery before moving for summary judgment.[145]

Concerns about discovery abuse and the idea that summary judgment can be a tool to limit discovery and thereby upend the traditional order of litigation are most prevalent in summary judgment

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> greater district court latitude in determining the existence of issues meriting trial, thereby easing the grant of summary judgment.

But see Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 96 (2006) (questioning the true extent of the expansion of summary judgment availability).

140. The likelihood of a summary judgment motion being brought increased from about twelve percent in 1975 to seventeen percent in 1986 (when the trilogy was decided), and then to nineteen percent in 1988. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 (2007).

141. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970) (clarifying the requirements of the defendant for summary judgment); *see also* David Shapiro, *Motions—The Story of* Celotex*: The Role of Summary Judgment in the Administration of Civil Justice*, *in* CIVIL PROCEDURE STORIES 343–70 (Kevin M. Clermont ed., 2004) (arguing against a reading of the summary judgment rule requiring a defendant to present evidence when the defendant does not bear the burden of proof).

142. As one summary judgment treatise notes, the "caselaw is very clear that 'the fact that discovery is not complete—indeed, has not begun—need not defeat the motion.' " EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 7:1 (updated Dec. 2017).

143. Steinman, *supra* note 139, at 120. Steinman argues that this interpretation is incorrect.

144. FED. R. CIV. P. 56(d)(1).

145. Steinman, *supra* note 139, at 114 (a policy rationale for this approach is "to maintain the integrity of the discovery process set forth elsewhere in the Federal Rules"); *see, e.g.*, Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1105 (9th Cir. 2000) (showing how a minority of courts have interpreted *Celotex*).

opinions in civil rights cases, although they are not limited to that context.[146] The rhetoric in Supreme Court summary judgment opinions in civil rights cases supports the view that these cases have been treated differently with respect to the order of discovery, summary judgment, and trial. Even before the summary judgment trilogy, the Court expressed concern for government defendants in civil rights cases being subjected to "the costs of trial or to the burdens of broad-reaching discovery."[147] The doctrine of qualified immunity developed to address these concerns, and procedural changes followed.

Shortly after the trilogy, the Court again considered the relationship between its approach to summary judgment and civil rights cases in the 1987 case *Anderson v. Creighton*.[148] *Anderson* was a civil rights action brought against an FBI agent and seeking damages for a warrantless search.[149] The defendant had brought a motion to dismiss or, in the alternative, a motion for summary judgment on qualified immunity grounds. There had been no discovery. The Court addressed the issue of whether a plaintiff was entitled to discovery before a summary judgment on qualified immunity grounds in a footnote, writing that discovery can be "'peculiarly disruptive of effective government.'"[150] It explained: "For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation."[151] The Court then stated that on remand the district court should first determine "whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful."[152] If the answer to this question was no "and if the actions Anderson claims he took are different from those the Creightons allege," then discovery may be necessary.[153] This approach does not fit with the textbook order. Summary judgment would ordinarily only be appropriate once there had been discovery on the question of what actions the FBI agent actually took and what information he had at the time. The Court instead collapsed summary judgment with a motion to dismiss.

The difference between the two motions is that the motion to dismiss under Rule 12(b)(6) is generally considered not to go to the

146. Cecil at al., discussed *supra* note 140, use randomly selected cases to demonstrate the increase in summary judgment motions, but their study demonstrates only correlation, not causation.

147. Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

148. Anderson v. Creighton, 483 U.S. 635, 646 (1987).

149. *Id.* at 637.

150. *Id.* at 646 n.6 (citations omitted).

151. *Id.*

152. *Id.*

153. *Id.*

merits, but rather to the sufficiency of the pleading.[154] The summary judgment motion, by contrast, does go to the merits. Of course, the final provision in Rule 12(b) does permit a motion to dismiss to be converted into a summary judgment motion, but until the 1980s that provision would have been difficult to utilize because of the requirements for bringing a summary judgment motion.[155] As a prominent treatise explains: "[A] summary-judgment motion typically is based on the pleadings as well as any affidavits, depositions, and other forms of evidence relevant to the merits of the challenged claim or defense that are available at the time the motion is made."[156] The qualified immunity decisions enabled the merging of motions to dismiss and summary judgment in civil rights cases. But it is important to recognize that this is not only a doctrine that affects qualified immunity cases: *Celotex* is a tort case, *Matsushita* an antitrust action, and *Anderson* a defamation case. All are disfavored, by some lights at least, but quite different.

The procedural rules permit a summary judgment motion to be brought at any time (although presumably after pleadings have been filed),[157] but the requirement that the moving party show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" [158] ought in most cases to follow some fact discovery. One reason for this is that until very recently, there had been general agreement that the facts should be interpreted in the light most favorable to the nonmoving party.[159] Although the rules can be read to permit summary judgment before any discovery is conducted, indeed before the defendant has even answered, the determination of whether summary judgment is appropriate (as opposed to a dismissal for defective pleading) ordinarily requires the application of the law to the facts of the case, and discovery is the method by which facts are ascertained and developed for this purpose.[160] As Justice Jackson wrote

154. 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: CIVIL § 2713 (4th ed. updated Apr. 2017).

155. The possibility of converting a motion to dismiss into one for summary judgment was added in 1948. *Id.*

156. *Id.*

157. FED. R. CIV. P. 56(b) (the default deadline for filing summary judgment is "any time until 30 days after the close of all discovery").

158. FED. R. CIV. P. 56(a).

159. Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 NEV. L.J. 1351, 1357–58 (2015) (describing the general rule and the disruptive effect of Scott v. Harris, 550 U.S. 372 (2007), on this rule).

160. The Advisory Committee Note to the 2010 revision of Rule 56 explains: "Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had." FED. R. CIV. P. 56 advisory committee's note to 2010 amendment.

in 1948: "[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."[161]

So far, we have seen how summary judgment has been transformed into a motion that can be brought at the very beginning of the suit. But summary judgment has also taken territory in the other direction, preventing cases that seem to raise disputes of material fact from being tried by evaluating facts without deference to the nonmoving party. The displacement of trial by summary judgment is not yet complete, and there are plenty of cases which guard the line between one and the other at the Supreme Court level. Still, there are signals that summary judgment may transform fully into a motion that allows the judge to decide questions of fact ordinarily reserved for oral presentation rather than determined on a paper record.

The most visible case illustrating this transformation, which is still hotly disputed, is *Scott v. Harris*.[162] This was a civil rights action alleging excessive force when a police officer in a high-speed car chase engaged in a maneuver that resulted in the plaintiff suffering significant injuries. The officer's dashboard camera recording of the chase was included in the summary judgment motion and eight Justices, upon reviewing the video, agreed that no reasonable jury could find for the plaintiff and that summary judgment was appropriate on the basis of that video.[163] Rather than requiring that the video be viewed in the light most favorable to the nonmoving party, the Court simply interpreted the video. In *Scott* two trends merged: that of summary judgment displacing trial and the rise of interlocutory appeals. The changing summary judgment standard, combined with the law of qualified immunity, permits greater access to interlocutory appeals. This is part of a larger trend eroding the general principle that the appeal follows judgment. We turn to the rise in interlocutory appeals in the next Section.

E. Appeals

In general, scholars and judges have long believed that the appeal should come at the end of the litigation, after a determination of the merits of the case. That is, appeals are only available from a final

161. Kennedy v. Silas Mason Co., 334 U.S. 249, 256–57 (1948).

162. 550 U.S. 372.

163. *Id.*

judgment.[164] As Justice Frankfurter explained in 1940 in refusing to grant an interlocutory appeal: "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."[165] The final judgment rule "by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy" avoids "enfeebling judicial administration."[166] Since the middle of the twentieth century, however, three doctrinal avenues to interlocutory appeal have upended this general rule: appeals available explicitly by statute, the collateral order rule, and appellate mandamus.[167]

Appeals during litigation are now always a possibility, even if they are seldom used in many noncontroversial cases. As Adam Steinman observed: "Although appellate courts exercise this discretion quite sparingly (and justifiably so), it is fair to say that under the prevailing judicial doctrines, no interlocutory trial court order is categorically beyond an appellate court's jurisdiction."[168] Steinman lists more than twenty-two such categories, and these capture only some of the available interlocutory appeals.[169] There have been many complaints that the set of doctrines governing interlocutory appeals are incoherent and too complex.[170] The problem I identify is different: the availability of interlocutory appeals is part of a larger set of doctrines that taken together undo the default sequential order. An important part of this story is that while the doctrinal beginnings of interlocutory appeals can be traced back to the late 1950s, their proliferation is a phenomenon of the 1980s through today.

Appellate jurisdiction is governed by statute.[171] Initially, Congress permitted interlocutory appeals only in cases involving injunctions, receiverships, and admiralty.[172] In 1958, Congress expanded the federal courts' appellate jurisdiction by adding a provision permitting appeals from certain additional orders, but these depended

164. 28 U.S.C. § 1291 (2012) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."). The Supreme Court initially interpreted "final judgment" quite narrowly. *See* Catlin v. United States, 324 U.S. 229, 233 (1945).

165. Cobbledick v. United States, 309 U.S. 323, 324–25 (1940) (deciding that quashing a motion denying a grand jury subpoena is not appealable).

166. *Id.*

167. Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238 (2007).

168. *Id.* at 1242.

169. *Id.* at 1273–75.

170. *Id.* at 1238–39 (collecting criticisms); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662.

171. 28 U.S.C.§ 1291 (2012) (jurisdiction over appeals of final decisions); 28 U.S.C. § 1292(a)–(b) (jurisdiction over interlocutory decisions).

172. 28 U.S.C. § 1292(a)–(b).

on district court discretion.[173] Appeals under this statutory provision are rarely available, both because the district courts veto them and because the appellate courts have interpreted the statute narrowly.[174] The major source of interlocutory appeals is the collateral order doctrine.

The collateral order doctrine was created in 1949 in *Cohen v. Beneficial Industrial Loan Corp.*, a shareholder derivative suit brought in federal court.[175] The subject matter of the suit is important because the later proliferation of interlocutory appeals through the rulemaking and legislative process has similarly focused on class actions and other aggregate litigation. We shall see why in a moment. For now, it is only necessary to remember that the genesis of the collateral order doctrine is in complex litigation. New Jersey, the state in which the action in *Cohen* was brought, had enacted a statute requiring shareholders to post a bond to bring such a suit.[176] The district court held that the shareholders did not need to post a bond and the company appealed.[177] The Court was faced with deciding whether that decision was appealable and, if so, whether it was correct.

The Court held in *Cohen* that there was a small class of cases "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[178] Today, courts understand *Cohen* to impose a three-factor test.[179] First, the district court order must be "an important issue completely separate from the merits of the action."[180] Second, the order must be effectively unreviewable.[181] Third, the district court order must conclusively determine the issue, and in that sense be "final."[182] Justice Jackson, writing for a unanimous Court with respect to the appealability issue, explained how the collateral order doctrine did not violate the final order rule embodied in 28 U.S.C. § 1291 because "appeal gives the upper court a power of review, not one of intervention."[183] He differentiated

173. 28 U.S.C. § 1292(b).

174. Steinman, *supra* note 167, at 1245.

175. 337 U.S. 541 (1949).

176. *Id.* at 550–51.

177. *Id.* at 545.

178. *Id.* at 546.

179. Steinman, *supra* note 167, at 1248.

180. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 276 (1988) (internal quotation marks omitted) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

181. *Id.*

182. *Id.*

183. *Cohen*, 337 U.S. at 546.

between decisions that are "unfinished or inconclusive" and decisions that are final in the sense that the "District Court's action upon [the] application was concluded and closed."[184]

There have been attempts to apply this doctrine to disqualification motions and discovery disputes, but so far this has not been a successful avenue for review of such matters—they are instead reviewed on a much more discretionary basis under the writ of mandamus, discussed a bit later in this Section.[185] But in one area collateral order interlocutory appeals have proliferated: governmental immunity. There, as we shall see, the lines that seemed easy to draw in *Cohen*—between what is central to the merits and what is separate, and between finality and incompleteness—have faded.

The Court opened the door to appeals based on governmental immunity in a case involving a different type of immunity from suit: double jeopardy. In 1977, in *Abney v. United States*, the Court held that a defendant could appeal the denial of a motion to dismiss an indictment on double jeopardy grounds.[186] The *Abney* decision focused on two arguments. First, the Court held that the question was truly collateral in that it does not touch on the merits of the charge: whether the defendant is guilty or not, he is entitled to protection from double jeopardy. Second, the interlocutory decision is an important one, because double jeopardy "is a guarantee against being twice put to trial for the same offense."[187] Allowing the case to go to trial and then appealing is an insufficient protection.

The same rationale can be applied to immunities from suit. Thus in *Helstoski v. Meanor*, the Court held that an interlocutory appeal was available with respect to an indictment that violated a Congressman's rights to immunity from suit under the Speech and Debate Clause.[188] Shortly thereafter, in 1982, the Court in *Nixon v. Fitzgerald* found a right to appeal determinations of absolute immunity.[189] In 1985, the Court applied the same rule to the defense of qualified immunity.[190]

184. *Id.*

185. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 (2009) ("Postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege."); Cunningham v. Hamilton City, 527 U.S. 198, 210 (1999) (denying interlocutory appeal from discovery sanctions); Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 882 (1994) (no interlocutory appeal from reopening of a settlement); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (holding that a disqualification order is not appealable prior to judgment on the merits).

186. 431 U.S. 651, 659 (1977).

187. *Id.* at 661.

188. 442 U.S. 500, 507 (1979).

189. 457 U.S. 731, 742 (1982) (right to appeal presidential claim of absolute immunity for official acts).

190. Mitchell v. Forsyth, 472 U.S. 511 (1985).

And in the 1990s, the Court expanded interlocutory appeals as of right to Eleventh Amendment immunity.[191] Not only that, but the Court also permitted multiple interlocutory appeals in such cases, from denials of motions to dismiss as well as motions for summary judgment.[192] Between 1979 and today, the landscape of interlocutory appeals changed considerably to include routine interlocutory appeals in cases involving governmental officers.[193]

Qualified immunity does not fit easily into the *Cohen* test, even if it is an immunity from suit rather than a defense.[194] To make it fit, the Court had to find a way to separate the qualified immunity determination from the merits of the case. The problem is that the inquiry in determining whether a governmental actor is entitled to qualified immunity is whether he or she violated clearly established law, which goes to the merits of the case—that is, the question of whether the officer violated the law. The Court got around this problem by asserting a conceptual separation between determinations of law, which are more amenable to appellate review, and determinations of fact.[195] Justice Brennan pointed out in dissent in *Mitchell v. Forsyth*, however, that the inquiry in *Cohen* was not whether the issue was one of law or fact, but rather whether it was separate from the merits of the case.[196] But once the appellate door had been opened to other types of immunity, qualified immunity easily made its way through. The problem has been that the fact/law distinction is notoriously slippery. The Court now finds itself determining what to most observers look like issues of fact, or perhaps the application of law to facts, on interlocutory appeals from summary judgment orders.[197] The important observation for our purposes is that these developments flip what is ordinarily

191. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 145 (1993) ("[T]he value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice.").

192. Behrens v. Pelletier, 516 U.S. 299, 301 (1996).

193. *Cf.* Johnson v. Jones, 515 U.S. 304, 313 (1995) (denying interlocutory appeal in case against a governmental official where the summary judgment motion concerned evidentiary sufficiency, not qualified immunity).

194. Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (stating that qualified immunity "is both a defense to liability and a limited" immunity from the burdens of litigation).

195. *Mitchell*, 472 U.S. at 528 n.9 ("We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law.").

196. *Id.* at 548 (Brennan, J., concurring in part and dissenting in part) ("[T]he Court's test effectively substitutes for the traditional test of *completely separate from* the merits a vastly less stringent analysis of whether the allegedly appealable issue is *not identical to* the merits.").

197. *See, e.g.*, Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (reweighing evidence in a § 1983 action in order "to view the evidence . . . in the light most favorable to [the nonmovant]); Scott v. Harris, 550 U.S. 372, 378 (2007) (requiring consideration of facts depicted in a videotape in a § 1983 action).

assumed to be the order of civil litigation. Appeal comes before trial and even before fact development.

To put these developments in context, the regular use of 42 U.S.C. § 1983 to vindicate Constitutional violations dates from the early 1960s.[198] The doctrine of qualified immunity followed within ten years, although it was not called by that name until 1974.[199] That doctrine was made useful in summary judgment determinations only in 1982.[200] This development set the stage for interlocutory appeals from summary judgment discussed above. The growth of civil rights actions stemming from the reinvigoration of § 1983 and from the passage of the Civil Rights Act of 1964, it has been argued, was a significant reason for the turn against litigation in the federal courts.[201] The phenomenon of constriction, of which the evolution of interlocutory appeals in governmental immunity cases is a part, dates from the late 1970s when the increase in federal court filings began.[202]

Interlocutory appeals similarly expanded in reaction to the growth of litigation permitted by the class action rule, which was amended in 1966, and the concomitant rise in other forms of aggregate litigation. The proliferation of interlocutory appeals in complex litigation has been both statutory and rule based. As we have seen, the Supreme Court initially rejected interlocutory appeals from class certification determinations.[203] In *Coopers & Lybrand*, decided in 1978, the issue was presented on a plaintiff's motion.[204] Justice Stevens, writing for a unanimous court, weighed the costs and benefits of interlocutory appeals. He noted that certification denial may end litigation in small claims class actions, and that "allowing an immediate appeal from those orders may enhance the quality of justice afforded a few litigants."[205] Nevertheless "this incremental benefit is outweighed

198. *See* Monroe v. Pape, 365 U.S. 167 (1961) (upholding use of § 1983 in civil suit to vindicate a Fourth Amendment violation by state police officers); *see also* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 9 (3d ed. 2013) ("Before *Monroe v. Pape*, § 1983 was remarkable for its insignificance.").

199. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974) (establishing doctrine of qualified immunity by that name); Pierson v. Ray, 386 U.S. 547 (1967) (upholding good faith and probable cause defense to § 1983 case).

200. "[T]he *Harlow* Court refashioned the qualified immunity doctrine" in such a way as to "permit the resolution of many insubstantial claims on summary judgment." *Mitchell*, 472 U.S. at 526 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

201. *See* Subrin & Main, *supra* note 16, at 1861–67 (arguing that judges used procedural rules to "take control" of litigation through case management).

202. *See* Spencer, *supra* note 16, at 356 (discussing the valence of procedural change towards restricting access to merits determinations).

203. Coopers & Lybrand v. Livesay, 437 U.S. 463, 463 (1978).

204. *Id.*

205. *Id.* at 473.

by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice."[206] Neither the argument that denial of class certification represented a "death knell" to the class action because no action would be brought at all if small claims could not be aggregated, nor the idea that class action certification decisions were unrelated to the merits, convinced the Court otherwise.[207]

An influential decision from the Seventh Circuit in 1995, voicing concern about the pressure to settle that class certification imposed on *defendants*, changed the conversation.[208] In 1998, the Federal Rules of Civil Procedure were amended to include an interlocutory appeal of class action certification decisions.[209] This rule is the only time to date that the civil rulemakers have exercised their power to make appellate rules.[210] The remaining interlocutory appeals in the complex litigation context have been legislatively created and focused on supporting the federal courts' expanded exercise of jurisdiction. In expanding diversity jurisdiction over some mass torts in 2002, Congress provided for interlocutory appeals.[211] Similarly, in expanding diversity jurisdiction over class actions in 2005, the Class Action Fairness Act allowed interlocutory appeals of remand orders so that defendants facing remand of class actions to state courts could appeal immediately.[212]

The final category of interlocutory appeals is appellate mandamus. This form of interlocutory appeal has been read into the All Writs Act,[213] providing that the federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[214] The availability of appellate mandamus was first recognized in 1957 in a dispute over the use of a special master in a set of antitrust cases.[215] The Supreme

206. *Id.* This rationale was reaffirmed recently. Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1707 (2017).

207. *Livesay*, 437 U.S. at 470.

208. That decision was *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1294, 1298–99 (7th Cir. 1995), which granted a writ of mandamus on class certification and explained that the pressure to settle as a result of even a small risk of massive liability renders the certification decision effectively unappealable. Klonoff, *supra* note 121, at 739 ("It was not until 1995, however, with the decision in *Rhone-Poulenc*, that the Committee focused extensively on such an amendment to Rule 23.").

209. FED. R. CIV. P. 23(f).

210. *See* 28 U.S.C. § 1292(e) (2012) (interlocutory appeals); Steinman, *supra* note 167, at 1238.

211. 28 U.S.C. § 1441(e)(3) (providing for appeals from remand orders).

212. 28 U.S.C. § 1453(c) (providing for appeals from remand orders).

213. 28 U.S.C. § 1651(a); *see* Steinman, *supra* note 167, at 1258–72 (analyzing the doctrine of appellate mandamus).

214. 28 U.S.C. § 1651.

215. La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

Court's support for appellate mandamus has waxed and waned over the years, and the availability of this form of interlocutory appeal is discretionary and fact specific.[216] The Court has stated that appellate mandamus is an "extraordinary remedy" only available in cases of "judicial 'usurpation of power' or a 'clear abuse of discretion.' "[217] But the flexibility of this vehicle for appeal is such that it can encompass any order issued by a district court, including discovery orders.

Some argue that the doctrines expanding appellate jurisdiction are a response to shifts in civil litigation, especially the shift from trial to motion practice.[218] The Courts of Appeals have developed a series of doctrines allowing appeals from motions so that they can control outcomes before judgment because motion practice rather than trial is the location of meaningful decisions. There are certainly some indicia of this in complex litigation, where the increase in appellate intervention has largely been a method of limiting the availability of the class action device.[219] The dynamics of settlement have been particularly important to the development of interlocutory appeals in class actions.[220] Increased concern about the way that motions affect settlement leverage—the "blackmail" thesis—encouraged expansion of appellate jurisdiction. The rationale for interlocutory appeals for immunities sounds a similar note; the concern there is that defendants not be exposed to the risk and cost of litigation, which must be policed in an ongoing manner.

Regardless of the reason or the policy soundness of interlocutory appeals in discrete substantive areas, their growth threatens "litigation coherence."[221] Civil rights cases can find themselves travelling up and

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216. Steinman notes that "the Supreme Court had never endorsed appellate mandamus as a means of interlocutory review by the federal courts of appeals." Steinman, *supra* note 167, at 1259–60. For example, in 1964, the Court approved an interlocutory appeal for physical examinations under Rule 35. Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964). But in *Kerr v. U.S. District Court*, 426 U.S. 394, 395–99 (1976), the Court disapproved of an appellate mandamus in a case involving discovery of prison personnel records, and in *Cheney v. U.S. District Court*, 542 U.S. 367, 379–80 (2004), the Supreme Court approved of an appellate mandamus relating to discovery sought by the Vice President.

217. *Cheney*, 542 U.S. at 380.

218. "As the center of litigation moves further out of their reach, appellate courts will sporadically try to regain the level of control they exercised at the turn of this century." Yeazell, *supra* note 170, at 664.

219. Klonoff, *supra* note 121, at 739.

220. *See, e.g.*, *In re* Deepwater Horizon, 785 F.3d 986, 993 (5th Cir. 2015) (permitting interlocutory appeal of administration of class action settlement agreement).

221. Behrens v. Pelletier, 516 U.S. 299, 315 (1996) (Breyer, J., dissenting) ("Taken together, these requirements, as set forth in the Court's cases, help pick out a class of orders where the error-correcting benefits of immediate appeal likely outweigh the costs, delays, diminished litigation coherence, and waste of appellate court time potentially associated with multiple appeals.").

down the appellate ladder several times.[222] Increasingly, this has been the case with all class actions.[223] In sum, appeals need not any longer come at the end of the suit, following a final judgment, but can be filed any time at the court's discretion.

F. Some Counterexamples

Before turning to the significance of the disintegration of procedural order described so far, it is important to note some contrary evidence. The most obvious example of a traditional motion that comes out of sequence is the motion for a preliminary injunction, which asks the judge to hold a hearing and determine the likelihood of success on the merits—a determination which often is the "whole ball game"[224]—at the commencement of litigation. The preliminary injunction, however, is widely understood as an "extraordinary"[225] remedy, a departure from the usual rule of determination of relief after the merits which requires significant justification. (Even if, perhaps, this is not the case in fact.) In that sense, it is more like a writ of mandamus in the appellate context. That exigent circumstances were required for a preliminary injunction supports the view that in the run of cases civil procedure embraced the textbook sequence.

We have also seen that the rules have always stated that summary judgment motions can be brought at any time until thirty days after the close of discovery, and, since 1948, motions to dismiss have been able to be converted into summary judgment motions to facilitate decision at the commencement of the lawsuit. There are surely other long-standing exceptions to the textbook order of how a case is to proceed. For the most part, however, until the 1980s these were understood to be exceptional deviations from a regular order, rather than items on an à la carte menu of procedural tools without sequential order.

By contrast, the courts have actively considered sequencing in the context of jurisdictional motions brought at the start of a lawsuit. For example, if a defendant brings a motion to dismiss based on lack of standing and lack of personal jurisdiction, which motion should come

222. *Id.* at 321.

223. *See* M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 840 (5th Cir. 2012) (remanding class certification); Klonoff, *supra* note 121, at 731 (noting rise of "potential impediments to class certification"); David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 790 (2016) (describing a new era of restrictions on public interest class actions). *See generally* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016) (arguing that backlash against aggregate-damages class actions has detrimentally impacted other forms of class actions).

224. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 33 (2008).

225. *Id.* at 24.

first?[226] What is more, the judicial and statutory approach to diversity jurisdiction generally deviates from the trend towards the decline of the textbook sequence. For example, if the plaintiff's recovery is below the amount in controversy requirement in a diversity case, the statute provides that the court may award costs but not dismiss for want of jurisdiction.[227]

Despite these counterexamples, the general trend has been the disintegration of the sequential order. The following Part suggests some explanations for this change. Understanding the reasons for these developments is necessary to analyze what procedural design the federal courts ought to adopt, because any procedural design must match the needs of the administration of justice to succeed.

II. REASONS FOR DISINTEGRATION

The Supreme Court has stated that "no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings,"[228] and yet this Article has described a disorder in federal procedural law. This Part explores the explanations for the decline of the textbook order. Understanding the reasons for disintegration is crucial to formulating a path forward.

There are four interrelated reasons for the disintegration of procedure. The connecting thread between them is judicial discretion. The structure of the Federal Rules provides a default sequence of motions within which judges have significant discretion. The first reason for disintegration is that judges have exercised their discretion to alter the order of procedure in response to substantive concerns in civil rights, prisoner, mass tort, antitrust, and consumer class action litigation, although the federal courts have not systematized these changes or made them explicit. Second, these same substantive concerns have led to increased judicial focus on case disposition, and especially on culling cases as early as possible in the litigation process, which has upended the textbook sequence of motions because the textbook sequence favors culling later in the process. Third, concerns at the appellate level regarding the untethered exercise of discretion by district courts and the desire to exercise control over pretrial motions have led appellate judges to alter the textbook order to facilitate appellate review. Fourth, judges making procedural law often seem to

226. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 587–88 (1999) (holding that the district court may consider a personal jurisdiction motion before subject matter jurisdiction); Clermont, *supra* note 4, at 21–24 (discussing motion order and analyzing cases).

227. 28 U.S.C. § 1332(b) (2012).

228. Woodford v. Ngo, 548 U.S. 81, 90–91 (2006).

be unaware of the effect of their decisions on other areas of the procedural law or unwilling to take systemic effects into account. This lack of coordination also contributes to upending the textbook order.

A. Judicial Discretion and the Substantive Law

Rule 1 explains that "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts."[229] Charles Clark, the architect of the Federal Rules, promised a simple set of rules that would be applicable across all cases and would solve some of the problems associated with the Field Code and previous procedural regimes, which were perceived by many as too technical and imposing unnecessary barriers to just merits determinations.[230] The Federal Rules no longer look so simple.

The problem with Clark's approach was that cases can be very different from one another, from the number of parties, to the stakes of the case, to the complexity of the evidentiary and legal questions raised. Differences among cases pose a problem for a set of rules meant to govern all cases. Complexity is not evenly distributed across subject matter, so that, for example, an antitrust case will present procedural difficulties different from a contract action. The Federal Rules' broad approach to joinder of claims and parties exacerbates this problem. It was solved by permitting broad judicial discretion to apply the rules as warranted by the circumstances. The soul of the Federal Rules, it might be said, is judicial discretion, and discretion may be the price for their (relative) simplicity.[231] Indeed, the rules bear within them the "elemental rust" of discretion, and the result has been disintegration.[232]

There is a tension between the norm of consistency, that is, the idea that the rules are applicable to all cases regardless of subject matter, and the reality of judicial discretion in rule application, which permits judges to treat different substantive areas of the law differently.[233] The existence of the rules and related statutes governing

229. FED. R. CIV. P. 1.

230. *See* Subrin, *supra* note 130, at 937–46 (describing complaints about the civil justice system from the 1800s through the early twentieth century); *id.* at 964 (describing Clark's preference for discretion in rulemaking).

231. On the multiple meanings of discretion, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 48–51 (Bloomsbury Acad. 2013) (1977). Federal judges making procedural decisions are bound by case law as well as the general principle that the rules be interpreted to "secure the just, speedy, and inexpensive determination of every action," FED. R. CIV. P. 1, but there is a great deal of play in the joints.

232. DICKINSON, *supra* note 7.

233. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 386–410 (2001) (discussing the different ways courts interpret Rule 23 for securities as opposed to

all cases creates the appearance of consistency across cases, although in fact the rules are not always applied consistently across or even within a given subject matter. The tension between the systemic structure, which promises uniform order, and the discretion in individual cases, which results in disorder, is exposed in the doctrines discussed so far in this Article. In each of the examples discussed, judicial responses to substantive problems—responses that were permitted by the discretionary application of the overarching rules—resulted in disorganization. Standing doctrine evolved in response to public law cases under the APA; the standards for motions to dismiss, class certification, and interlocutory appeals evolved in response to complex and civil rights litigation.

Doctrinal changes driven by substantive concerns sometimes migrate to other substantive areas. Even in cases where the doctrines altering the order of proceedings have remained siloed, the possibility of such migration remains alive because the exercise of judicial discretion so readily permits it. For example, the Supreme Court did not limit the plausibility pleading standard,[234] but instead specifically explained that it was universally applicable and stated that to rule otherwise would be "incompatible with the Federal Rules of Civil Procedure."[235] A similar phenomenon is seen in the development of the injury-in-fact requirement of standing doctrine, which may have begun in the administrative law realm but is now routinely applied to every case.[236]

In sum, disintegration is in part the result of the use of judicial discretion to tailor procedures to solve problems presented in specific substantive contexts, but the norm of procedural consistency across cases means that it is not always limited to those contexts.

B. Culling Cases

A second reason for disintegration is the desire to cull cases earlier in the litigation either in specific subject areas or across the

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mass torts class actions, differences which are attributable to the subject matter and not to doctrinal requirements).

234. For example, the Supreme Court originally rejected special pleading for civil rights cases. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–15 (2002) (holding that a federal court may not apply a heightened pleading standard to Title VII cases); Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166–68 (1993) (holding that a federal court may not apply a heightened pleading standard to civil rights cases brought under § 1983).

235. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (citing FED. R. CIV. P. 1).

236. *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (applying injury-in-fact requirement in statutory damages case); Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386–90 (2014) (applying to allegations of lost sales).

board. Culling was a judicial response to the general perception of a "litigation explosion."[237] That perception was, in turn, a product of the increase in federal causes of action created in the 1960s and 70s, although many perceived the change not as due to a rise in causes of action, but rather due to an increase in litigiousness in American society and a concomitant increase in meritless suits.[238] Concerns about meritless litigation led to greater judicial focus on distinguishing the wheat from the chaff earlier than the textbook sequence dictated. It also led to greater emphasis on settlement over adjudication. This approach can be contrasted with the emphasis on developing information for merits determinations, a key feature of the textbook order.[239]

Plausibility pleading, *Lone Pine* orders accompanying motions to dismiss, minitrials at class action certification hearings, and summary judgment motions in which the defendant merely points to the plaintiff's lack of evidence are all innovations aimed at culling cases, preferably as early as possible in the litigation. The enlargement of federal jurisdiction over class actions was driven by a similar rationale based in the belief that federal judges are better able to distinguish the meritorious from the meritless suits than state judges. Under these rules, if at the start of the case the plaintiff lacks the necessary information to maintain her suit prior to discovery, she may find her case dismissed or lose on summary judgment. The structure has the effect of suppressing information and promoting settlement more often than rectitude. Standing doctrine is the outlier here, in that it upends the order of litigation by requiring *more* information than would ordinarily be available at the start of the litigation. It is therefore open to being decided at any time, even after significant costs have already been incurred. These changes were largely directed at winnowing cases in particular subject areas, which happen to be those that saw increased filings in the latter quarter of the twentieth century: mass torts, civil rights, public law litigation under the APA, and consumer class actions.[240]

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237. *See* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992).

238. *See generally* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

239. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1972–73 (2007) (noting that the main focus of the judicial role under the rules promulgated in 1938 was trying cases rather than actively managing the process of litigation).

240. Whether there is in fact a lot of meritless litigation in these categories is disputed. There are anecdotes on both sides, but little data. *See* Sachin S. Pandya & Peter Siegelman, *Underclaiming and Overclaiming*, 38 LAW & SOC. INQUIRY 836 (2013).

Balancing early dismissal with the need for information to decide cases accurately presents some difficulty.[241] But the desire to cull cases early on need not lead to the kind of disorder that has evolved in the procedural law. The sequence imagined by the Federal Rules of Civil Procedure—from ease of pleadings to discovery to summary judgment or trial—privileged information production and truth seeking over early (and inexpensive) determinations. One could instead have an orderly regime that emphasizes early case evaluation over truth seeking and resolution on the merits. The common law writ system provides such an example; it was an orderly system designed to dismiss cases with minimal information.[242] I do not mean to imply that the writ system was a good approach to procedural design; it was too rigid and allowed too many cases to be determined on technicalities rather than the merits.[243] The contrast between the writ system and the textbook order demonstrates the import of procedural design to outcomes.

C. Appellate Control

A third reason for disintegration is the courts of appeals' desire for control. The increased availability of appellate review before judgment has been driven by a perceived need for better control over judicial discretion at the district court level and is part of the larger emphasis on dispositive motions and the trend towards dismissing lawsuits early.

In the early 1980s, Judge Friendly argued that greater appellate review was necessary to assure consistency across cases, especially as the federal system grew in size.[244] Perhaps appellate judges reached this conclusion after they realized that the structure of the Federal Rules of Civil Procedure brought fewer decisions up for their review than previous procedural systems did.[245] While interlocutory review is an attractive method for controlling the discretion of district court judges, it is difficult to implement in a regime that as a matter of

241. *See* Kaplow, *supra* note 4, at 1271.

242. In the common law system, there was no discovery or motion practice to speak of and cases were either screened early or they went to trial. Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 407, 412 (1998).

243. *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246 (1989) ("Formulation of new theories of legal rights is simpler, virtually by definition, under a pleading system that is not constructed in terms of old legal categories, as was code pleading and common law pleading.").

244. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982).

245. *See* Yeazell, *supra* note 170, at 664.

doctrine grants judges broad discretion in decisionmaking, especially when that determination is fact based.[246]

Sometimes the introduction of interlocutory review has been substance specific, creating standards that can be consistently applied in all cases in one area of law. Qualified immunity appeals are an example of this. The Supreme Court has held that suits against public officials should be evaluated early on so that government officials are not distracted from their work by litigation.[247] A similar rationale is behind the increased availability of interlocutory appellate review of class action certification, as well as interlocutory review of subject matter jurisdiction over class actions and mass torts. In class certification, for example, Rule 23(f) addressed the concern that without interlocutory review defendants will feel undue pressure to settle even nonmeritorious cases or will be burdened with unnecessary costs of litigation that will make it harder for them to stay in business.

Those cases which single out a specific type of suit for regular appellate review represent not so much disorder as a new order: an order based on the substantive legal issues triggering different sets of procedures. Once the differences among types of cases are catalogued, the sequence to be followed in each substantive category of cases becomes clear. To reveal the order, what is needed is to shift one's focus from procedure to substance. This shift in procedural design in turn requires substantive justifications for different treatment, such as special solicitude for governmental officers. It also requires reasoned consideration of related rules affected by the changing procedural design because the entire system is interconnected.

At other times the introduction of interlocutory appeals has been less targeted. Appellate judges have transformed what ordinarily would be questions of the application of law to fact into pure legal questions to enable interlocutory appeals from summary judgment decisions in cases as varied as mass torts, antitrust, and civil rights.[248] For these cases, the push for greater control over district court decisionmaking—ostensibly to promote consistency—has led to greater incoherence in appellate jurisdiction.

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246. For example, a regime of heavy appellate review is not consistent with the standards applicable to discovery, which is a good explanation for the denial of interlocutory appeals from discovery determinations. *See, e.g.*, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) (declining to grant interlocutory review to a district court ruling regarding the attorney-client privilege). But such appeals are sometimes granted. *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 379–80 (2004).

247. *See supra* Section I.D (discussing qualified immunity).

248. *See* Wolff, *supra* note 159, at 1357–58. This is not only true in qualified immunity cases. Requiring an evaluation of the sufficiency of the evidence, as in cases like *Matsushita* and *Celotex*, similarly turns a question of the application of fact to law into a pure question of law.

For the most part, the policy of heightened review and the disruption it causes to litigation coherence has been insufficiently justified. What differences among cases justify interlocutory review? What empirical support, if any, is needed to justify this divergence? How ought the tension between the litigant's need to obtain resolution while facts are still relatively fresh in witnesses' minds and the desire for appellate control of district court decisionmaking be resolved in particular areas of the law? There is little evidence that courts have given any consideration to these trade-offs.[249] Instead, the decisions seem ad hoc, responsive to the felt needs of the individual case rather than the system as a whole, and not reliant on any empirical data.

D. Lack of Systemic Coordination

A final reason for disintegration is that judges making procedural law in individual cases are poorly positioned to consider the systemic effect of their decisions. Indeed, judicial opinions rarely demonstrate awareness of the effects of the decision on other areas of the procedural law. The results of decisions attempting to mold the procedural law to the perceived need to cull certain types of lawsuits, to increase appellate control, or simply to create a procedure more suited to requirements of the substantive law reverberate through the system.[250] This phenomenon is the product of what Mirjan Damaska, in his comparative study of procedural systems, called a "coordinate" system as distinct from a "hierarchical" one.[251] That is, in the federal procedural system "what appears to be the best solution in a particular case will not be readily sacrificed to certainty and uniformity in decisionmaking."[252] This is a structural feature of procedural law, expressed in the devolution of sequencing to the district court level.

Consider standing doctrine. In the development of the injury-in-fact rule to cabin the types of public law cases that Article III courts were required to hear, there is no evidence that the Supreme Court

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249. Except perhaps in dissent. *See* Behrens v. Pelletier, 516 U.S. 299, 314–15 (1996) (Breyer, J., dissenting).

250. *See* 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, 2113 (1989):

> [T]he steps in a developed procedural system are interrelated. Early steps in the process rest on anticipation of what is to come, and later steps clearly flow from preceding ones. . . . After commencing down a trail to substantive variations in rules, Congress would find it hard to stop short of complete differentiation that would seriously complicate federal court practice in the manner that the common law procedure did.

251. Mirjan Damaska, St*ructures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 509 (1975).

252. *Id.*

considered the inefficiencies of deciding standing later in the litigation, including at trial, or the relationship between a standing inquiry that follows trial and preclusion doctrine. Similarly, there is no evidence that in articulating a new factual standard for pleadings the Supreme Court considered the relationship between Rule 8, which provides that the pleader must show that she is entitled to relief, with Rule 9, which states that conditions of mind may be alleged generally, or Rule 11, which provides that parties may plead on information and belief.[253] In class certification, as well, there is little evidence that courts have considered what effect conducting nonbinding merits determinations that approximate trials at the class certification stage will have further along in the litigation process. In the case of class actions there is a practical explanation for the lack of attention: settlement in class actions appears inevitable. But if a case does not settle, then the court will duplicate at trial the work it already did at the certification stage. This may become a bigger problem, as there is some evidence that more class actions are going to trial.[254] Furthermore, there is no evidence that, in creating and expanding the collateral order doctrine to exercise more control over judicial discretion in complex litigation and civil rights, the appellate courts meant to encourage litigation over the availability of interlocutory appeals in other substantive areas. There is one important exception: jurisdictional sequencing at the motion to dismiss stage has been explicitly considered by the courts in a thoughtful manner.[255]

This raises a question of institutional competence. In several instances, the Supreme Court has not adequately considered the existing procedural design in its decisions, which appear to be piecemeal reactions to the problems posed by the individual case. Although many doctrines affecting the entire procedural system have always been judge made, from standing to preclusion, changes to the procedural law in the last thirty-five years do not inspire confidence in the courts' capacity to think about procedural design holistically. Courts must pay greater attention to the systemic effects of procedural decisions across the board and make clear when such decisions are substance specific and when it is sensible to export them from their doctrinal silos. This means considering not only the effect of a rule change on different types of cases, but the effect of that change on the

253. FED. R. CIV. P. 8(a)(2) (claim for relief); FED. R. CIV. P. 9(b) (pleading conditions of the mind); FED. R. CIV. P. 11(b)(3) (representations to the court).

254. *See* Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1641–50 (2016).

255. For an analysis of these decisions and their effect on preclusion, see Clermont, *supra* note 4, at 24.

operation of the other rules in the system. Appellate courts, including the Supreme Court, could benefit from input from the Civil Rules Committee as they consider such changes in the context of an individual case.[256]

At the district court level, tailoring the procedural order requires the judge to possess a great deal of information both about the case before her and about the run of similar cases. Steven Gensler and Judge Lee Rosenthal explain that "[o]nly a sufficient amount of good and reliable information from the parties will accurately identify the real and important issues in the case and the best ways to investigate and resolve them."[257] Obtaining this information is costly, sometimes even impossible. Information costs are usually associated with the process of discovery, but obtaining the information the judge needs to decide the sequence of motions also imposes costs which would be borne by both judge and parties, except for the fact that by all reports this information is rarely elicited. "Too often there is no serious discussion about what motions might be filed. Too often there is no serious discussion about the sequence or timing of any contemplated motions. And too often there is no serious discussion about the relationship between those motions and discovery."[258] Because of the information costs of creating a bespoke procedural sequence, judges fail to coordinate within the case as well as across cases.

There is good reason to predict that devolving rulemaking to individual federal judges in individual cases will lead to disintegration, because these judges, making sequencing decisions in the moment, are not well placed to think about the effects of their individual decisions on the entire system. A decision about procedural order should be justified with reference to the systemic benefits of that rule across cases, and this is difficult to do with the information provided in any single case. Predicting the effects of procedural change in the case before them on the system is challenging because it requires thinking through the interplay between the rules and what other judges might do. Individual judges are also in a poor position to evaluate the antecedent substantive legal regime to which a given procedure applies, especially given the type of information they can obtain from the litigants before them to assist them in this evaluation. For these institutional reasons, many scholars have expressed skepticism as to

256. *See* Scott Dodson, *Should the Rules Committee Have an Amicus Role?*, 104 VA. L. REV. 1 (2018).

257. Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 520 (2012).

258. *Id.* at 528.

the ability of judges to make determinations about sequencing on an ad hoc basis.[259]

There is little evidence that the legislative branch is better suited than the courts to making such determinations, at least without expert assistance. The various rules of civil procedure and the procedural law are interrelated. Experts in the structure of the procedural rules are more likely to see these interrelationships and the effects of one rule change on other rules than congressional staffers who are unfamiliar with the procedural system or lobbyists with their own interests.[260] Furthermore, some doctrines (such as Article III standing) are outside congressional control.

In sum, disintegration has been the result of several developments that are all bottomed on the judicial discretion made possible by the Federal Rules themselves. Discretion permits judges to adjust the sequence of motions to address perceived problems in certain substantive areas and to adjust the standards for those motions, which in turn upends the relationship between motions and discovery. The exercise of individual discretion has spurred increased appellate control as well as decreased coordination. Since the very beginning the Federal Rules have had the possibility of upending the order they set out, but the process of decay became much more significant over time.

III. OPTIMAL PROCEDURAL DESIGN

So far I have described a procedural system in which judges may, at their discretion, alter the sequence of motions rather than having the sequence of motions correspond to the textbook order. These changes ought to spur renewed discussion about procedural design. This Part considers three approaches to procedural design: sequential ordering, bespoke procedure, and substance-specific procedure. It evaluates each of them in light of the admonition of due process that the litigant is entitled to "notice of the case against him and opportunity to meet it,"[261] as well as the stated goals of the Federal Rules of Civil Procedure: "to

259. *See, e.g.*, Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 889, 900 (2009) (questioning the capacity of district judges to adequately analyze the optimal pleading rule in a given case); Kaplow, *supra* note 4, at 1271 (same); David Marcus, *Trans-substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1195, 1223 (discussing the difficulties judges face in crafting substance-specific procedure and defending the norm of trans-substantivity).

260. *Cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (an empirical study of legislators' understanding of methods of statutory interpretation used by the courts showing the knowledge gap between legislators and courts).

261. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

secure the just, speedy, and inexpensive determination of every action."[262]

The underlying principle of this discussion, and indeed the important contribution of this Part of the Article, is that individuals need to know both what the order of the procedural law is and how it is justified so they can contest that sequence. Because procedures can determine outcomes, it is particularly important that they are contestable.[263] That contestation requires a theory of procedural design. This Part presents alternative designs and demonstrates how they might be contested based on their ability to realize procedural goals.

There are several potential goals for a procedural regime.[264] For the sake of framing the debate, I consider the goals articulated by the governing law on procedural design: the due process clauses and Rule 1.[265] These legal sources are both incomplete and capacious, open to a wide range of interpretation which can change over time. One might well quarrel with the goals chosen here and pick other ones to replace or to enhance them. One might also correctly point out that these goals could support many different approaches to procedural design. The point is not to provide the definitive argument for what goals a procedural system should meet, something that merits book-length treatment, but rather to illustrate the application of judicially recognized goals to the procedural designs on the table. This discussion is meant to illustrate how the potential procedural regimes laid out may be analyzed, picking values that have been shown to garner some agreement in the courts in principle, if not application, with the understanding that this is the beginning of the conversation.

A. The Goals of Procedural Design

Drawing on Rule 1, I evaluate the procedural design based on four goals: (1) whether the procedural design provides for a meaningful hearing, (2) how likely it is to achieve a just resolution of the dispute,

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262. FED. R. CIV. P. 1.

263. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (discussing the ability to contest laws and policies as a democratic norm).

264. *See supra* note 13 (listing sources discussing procedural values).

265. FED. R. CIV. P. 1. Due process requires that individuals have notice and the right to be heard "at a meaningful time and in a meaningful manner." Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (internal quotation marks omitted) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

(3) the likely speed of resolution, and (4) whether it achieves justice and speed while minimizing cost.[266]

A meaningful hearing is one in which the litigant has an opportunity to present her case before an impartial judge who will treat her with equal concern and respect. Due process requires little more; it does not, for example, require an appeal.[267] But implied in the idea of a meaningful opportunity to present one's case is that one must have access to sufficient information to adequately present that case and access to a judge who is open minded to that presentation.[268] One complaint of the writ system was that it denied a meaningful hearing, disposing of cases on technicalities. The need for information brings us to the question of the relationship between two additional goals of procedural design: accuracy and the merits.

A second goal of procedural design is to attempt to provide a just determination of the action on the merits. Justice in this context can mean a variety of things. Here I define a just determination to be one that correctly applies the law to the facts of the case. This means that the litigants and the judge must have access to those facts relevant to making a decision. It does not mean, however, that the resolution must be correct every time. There is no system in which a decisionmaker is always correct, and even if it were a possibility the likelihood is that the costs would greatly exceed the benefits.[269] Accordingly, the procedural rules must promote accuracy such that the case has a fair chance of reaching the correct result.[270] It is difficult to quantify what that probability must be, and I will not try to do so here.

A third goal is that the determination be relatively expeditious. This requirement recognizes that a decision may be correct but if rendered too late may be of little use to the litigant.[271] In some cases, gathering information and producing legal arguments to reach a correct

266. All of these might be put under the general heading of efficiency—that is, a procedural law that is structured to maximize social welfare by taking into account the costs of the system as against the system's effect on primary behavior. Kaplow, *supra* note 4, at 1187.

267. Cobbledick v. United States, 309 U.S. 323, 325 (1940) (stating that "the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice").

268. *See* Lahav, *supra* note 13, at 1667–68 (discussing the importance of equal concern and respect of litigants); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (arguing that the core of due process is adjudicatory independence).

269. Furthermore, the correct application of law to facts is often contested; that is why a lawsuit is filed in the first place. This makes measuring accuracy difficult.

270. *See* Bone, *supra* note 239, at 1981–84 (discussing accuracy as a probabilistic concept).

271. *See* A.A.S. Zuckerman, *Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353 (1994) (arguing in favor of a regime that privileges speed over accuracy).

result takes time, and so speed must sometimes be traded off against accuracy.

The fourth and final goal is that the procedural design should be alert to balancing these values with the costs of procedure. Costs can be defined in a variety of ways. For example, this could simply mean the lay definition of the term, which is to say that the goals of accuracy and speed should be met with a minimum of waste. Other costs to be considered include planning costs. A system ought to provide a sufficiently predictable order so that the litigants can estimate the cost of suit in advance, so that they can calculate the economic benefit of filing at all, settling the case, or proceeding through each phase of litigation. If litigants are risk averse, uncertainty, including uncertainty of procedural ordering, is a cost.

Each of these goals require trade-offs. Likely, the court system must balance the goal of accuracy with those of relative cost and speed. For example, even if a system that promised one hundred percent accuracy was possible, it would likely be too costly given what is at stake in the case. A system may move cases to resolution relatively quickly but require a significant investment in resources to do so accurately, an investment that is greater than the social value of the additional speed or even of the case itself.

B. Three Procedural Designs

Having briefly described some basic goals for a procedural regime, I now turn to evaluating three potential procedural designs with attention to those goals. The analysis here is not meant to be definitive, but instead to frame the discussion for reconsidering the sequence of motions in civil litigation. The basic observation is that there are levels of standardization available, and the choice between a stronger or weaker default organization of procedure has consequences for the operation of the court system and its ability to realize the values described above.

1. Default Sequential Ordering

As described earlier, the textbook order of civil procedure is characterized by a sequential order of motions that are calibrated to the information available at the stage of the litigation in which they are brought. This order proceeds as follows, although not every case must go through all the steps: filing, motion to dismiss or answer, discovery, summary judgment, trial, and finally, appeal. Motions at the start of the litigation, when little exchange of information has occurred, are

focused on legal standards. As the lawsuit proceeds through discovery and the parties have had the opportunity to develop facts, the motions may consider more factual issues and go to the merits, which may be determined at summary judgment or trial.

Because the textbook order calibrates the nature of the motion on the continuum of pure law to application of the law to the facts of the case based on the expected information available to the parties at each stage, it meets the due process requirement of providing a meaningful hearing. It also promotes accuracy of decisionmaking, as it puts a premium on the relationship between information access and motion structure. When the motion standard does not fit the information available, however, such as with the current standard for motions to dismiss for failure to state a claim or motions to dismiss on standing grounds, the sequence seems out of step with the informational requirements of the motions and risks neglecting the requirement of a meaningful hearing because of the informational barriers. Such doctrines require a different sequence of motions than that dictated by the textbook order. In the examples above, an appropriate sequence would interpose some targeted discovery prior to a motion to dismiss.

The textbook order is intended to facilitate a cumulative determination of the case rather than discontinuous determinations.[272] By this I mean that the gathering of information and motion practice is supposed to lead up to a trial (or more likely, a summary judgment motion) that determines the case in a single episode. The assumption that a proceeding ought to be cumulative and that the pretrial phase is intended to prepare for this determinative moment is what drove the idea that appeals should follow final judgment, and it is the assumption behind the argument, articulated by Justice Frankfurter, that the "momentum would be arrested by permitting separate reviews of the component elements in a unified cause."[273] It is also the idea behind Justice Breyer's more recent expression of concern about "litigation coherence."[274]

By contrast, discontinuous determinations involve deciding the issues in piecemeal hearings. It may be more practical in some cases to isolate dispositive issues and adopt the more discontinuous approach of serial factual evaluations. For example, suppose that it is possible to determine a core issue that will end the case—say that the statute of limitations has expired—at the start of the litigation. The parties have

272. *See* Arthur Taylor von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609, 609–10 (1988).

273. Cobbledick v. United States, 309 U.S. 323, 325 (1940).

274. Behrens v. Pelletier, 516 U.S. 299, 315 (1996) (Breyer, J., dissenting).

sufficient information to prove this fact. Still, it cannot be decided on a motion to dismiss because the determination requires some facts, and on a motion to dismiss the court is limited by the content of the complaint. It would be accurate and appropriate to determine the statute of limitations question right at the start of the lawsuit, based on affidavits, on a motion for summary judgment. The rules permit this.[275]

Without a doubt a summary judgment motion would be a more accurate, cost effective, and speedy way to resolve the case than the alternative of going through the entire discovery process. The problem is that a motion for summary judgment prior to discovery does not correspond with the textbook sequence. In such a case the textbook order would be too rigid. This example illustrates that any adherent of the textbook order would still want the possibility of taking some decisions out of order to facilitate the just, speedy, and inexpensive determination of the case. Some flexibility of sequencing to meet the needs of the case is necessary in any procedural design. The difficulty is where to draw the line so that the exception does not become the rule.

The statute of limitations example provides an easy case. Statutes of limitations questions are able to be neatly separated from the remainder of the lawsuit and can allow the court to determine the claim or even the entire suit on one motion, saving both time and effort. The picture becomes more complex when the motion proposed is linked to other legal and factual issues raised in the case and not dispositive of the entire case or even the entire claim. For example, suppose that a defendant seeks early determination of one key issue (but one that does not resolve the action entirely) and that the discovery of information necessary to resolve that issue overlaps with information that will be needed later to resolve other issues. Further, suppose that a database would be searched for one piece of information in the initial motion and then would need to be searched again for subsequent motions.[276] It would not be efficient to provide access to information in this discontinuous way and would better serve the court and parties to complete the entirety of discovery with respect to that database at once, and use that information to resolve the issues in the case to which it is relevant.

275. FED. R. CIV. P. 12(d) (Result of Presenting Matters Outside the Pleadings).

276. I am grateful to Judge Rosenthal for this example, which echoes reports from class action lawyers stating that judges sometimes bifurcate class and merits discovery with a similar wasteful result.

2. Bespoke Procedure

If the sequential order sometimes seems too rigid, bespoke procedure suffers from the opposite problem: it is so flexible that it appears to have no backbone at all. Under a bespoke procedure, the judge evaluates the case and determines which sequence of motions is best suited to the case before her. The order of motions is discontinuous. Rather than following a sequence which builds up to a trial at which the decisionmaker determines all or most of the issues presented in the case, the judge determines issues in the order that is best calculated to get to the heart of the matter.[277] This discontinuous sequence of motions may include, for example, multiple partial motions for summary judgment or multiple motions to dismiss. It may include appeals of crucial issues before trial. Whereas the sequential order focuses on the relationship between available information and the type of motion presented, the bespoke procedure does not have this limiting principle. Instead it focuses on identifying the core issues of the case and deciding what is necessary to resolve them.

If the judge can identify the core issues in the case, the result is a more targeted resolution on the merits. For example, a bespoke procedure can easily accommodate the summary judgment motion based on the expiration of the statute of limitations mentioned earlier.

This form of procedural design raises three difficulties, however. First, the judge may have difficulty identifying the core issues in the case and therefore require repetitive or duplicative motion practice. Second, the judge needs to obtain adequate information to determine the core issues, which imposes greater up-front costs and increases the risk that cognitive biases will affect decisionmaking as compared with sequential ordering. Third, outsized dependence on judicial discretion in sequencing increases risks of strategic behavior by the parties or satellite litigation around the question of sequencing.

Identifying core issues. The bespoke approach to procedural design requires the judge to take careful measure of the case before her to determine the sequence of motions.[278] In a bespoke order there will still be a sequence of motions, but rather than being determined in advance by rulemakers as in the textbook order, the sequence is

277. What I describe here is similar to John Langbein's description of the German procedural system. Drawing on earlier work by Benjamin Kaplan and Arthur Taylor von Mehren, Langbein writes: "[T]he court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case." John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830 (1985).

278. For a description of an engaged judge determining procedural order, see Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013).

determined by the judge for that individual case. The focus of this type of order is, as noted, to identify the core issue or issues in the case and focus pretrial motions on the determination of those issues. For this approach to be effective, the judge and the parties must cooperate in isolating the relevant issues and the appropriate order for their determination. It is unlikely that the judge can do this from pleadings or party-initiated motions alone. Accordingly, it requires heavy judicial involvement, limitations on litigant autonomy, and significant up-front information costs.

The risk of this approach is that the judge will err in determining what the core issues are or that the judge will err in determining the appropriate order of motions despite correctly identifying the core issues. Returning to the example of the database containing information that can be used to determine multiple issues, suppose that the judge orders narrow discovery of a database focused on a single issue that the judge believes will be dispositive. After discovery and motion practice it becomes apparent that the issue will not end the case, and the next episode in the litigation requires revisiting that same database. This piecemeal approach will result in duplicative discovery, increased costs, and delay of the determination of the proceedings—all without a real corresponding benefit to the parties. The capacity of judges to accurately determine the core issues, to be flexible when there is no core issue or when multiple issues overlap, and to permit cumulative determinations in those cases is crucial to a bespoke system. This raises questions such as whether judges are capable of doing this for every civil case that they are assigned. The concern is that, either because of time constraints or because of the skills and judgment required, this asks too much of judges.[279]

Information costs and cognitive biases. One reason that judges may have difficulty identifying the core issues in a case is that the Federal Rules permit flexible joinder of both claims and parties. A case may consist of multiple claims, and parties and issues raised by those claims may be at the core of the case against one party but not against the other, or core with respect to one claim but not another. To determine the relationship between these moving parts requires significant initial investment in information gathering and strategic thinking about how best to organize the case. Without such initial information gathering and development of the appropriate sequence for that case, the likelihood of increased costs due to duplicative, repetitive,

279. *See* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2029–31 (1997) (describing problems with both flexibility and rigidity in judicial decisionmaking, as well as the problem of unreviewability of certain decisions).

or erroneous motions is increased in comparison to a predetermined sequence of motions that treat litigation cumulatively and combine a number of relevant, interlacing issues. For a bespoke system to avoid waste, the judge must be committed to an initial investment of time and effort.

Does this mean that a bespoke system is necessarily less efficient than a sequential order? The answer to this question can only be determined by empirical study of like cases proceeding under alternative regimes. It is possible that if the judge is willing to put in the effort to determine the appropriate order and the core issues in the beginning and to choose a sequence of motions corresponding to the information needed to decide core issues, then the bespoke system should be no costlier than a sequential system, and perhaps less costly if nonessential issues are not litigated.[280] On the other hand, if the judge does not invest the time or makes errors in determining the core issues, leading either to important issues not being determined on the merits or to duplicative or repetitive discovery or motion practice, then the bespoke system will be less efficient. Some judges have expressed concern that there is insufficient information gathering to determine what motions might be filed and when, and the relationship between those motions and discovery.[281] How judges will fare on average under these demands requires further study.

Because a bespoke system imposes higher information gathering and analysis costs on the judge at the commencement of the litigation, it may also lead to greater effect of cognitive biases on judicial behavior than a sequential system with a largely predetermined order.[282] Indeed, the recognized phenomenon of individuals being blind to their own biases is likely to make it more difficult to address these problems in a system that determines the order of proceedings case by case.[283]

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280. Gensler & Rosenthal, *supra* note 257, at 520 ("Only a sufficient amount of good and reliable information from the parties will accurately identify the real and important issues in the case and the best ways to investigate and resolve them.").

281. *Id.* at 528.

282. Judicial cognitive biases have been noted by the judiciary in the context of sentencing. *See, e.g.*, United States v. Navarro, 817 F.3d 494, 501 (7th Cir. 2015) (describing the anchoring effect in sentencing: "[H]ad the government's initial recommendation started at a lower point, Navarro likely would have received a lower sentence."); United States v. Ingram, 721 F.3d 35, 40 (2d Cir. 2013) ("When people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to 'anchor' their subsequent judgments . . . to the initial number given."); *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (describing experiments testing cognitive illusions among judges including anchoring bias, framing bias, hindsight bias, egocentric bias, and the representativeness heuristic).

283. *See* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution to Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 492 (2014) (describing "blind spot" bias—that is, people's inability to perceive their own biases—and citing sources).

For example, if judges engage in value-motivated cognition, that is, the tendency to privilege their own view of contested facts, they may structure the bespoke procedure to achieve the outcome that results in their view being vindicated.[284]

Consider the majority's evaluation of the underlying facts in *Wal-Mart Stores, Inc. v. Dukes*, a gender discrimination case in which the Supreme Court addressed the procedural standard for certifying class actions: "[L]eft 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."[285] In this case, the Court was supposed to be evaluating the requirement of the class action rule that class members share common questions of law or fact, but it was doing so in light of its prior factual assumptions about human behavior. These assumptions are disputable and would otherwise have been the focus of the merits phase.[286] Because the order of motions and the accompanying standards applied to determine those motions at varying stages of the litigation depend not only on legal analysis but crucially on the relationship between law and facts, the risk of error due to motivated cognition in developing bespoke sequencing is significant.[287]

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284. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 843 (2009) (describing value-motivated cognition as "simultaneously experienc[ing] overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites"). More encouragingly, a recent study has found that professionalization limits the effects of motivated reasoning for decisions that require legal reasoning. *See* Dan M. Kahan et. al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349 (2016). This study raises the question of how much a very discretionary regime of procedural order requires legal reasoning as opposed to fact evaluation. Most of the disordered motions I have discussed involve some form of fact evaluation, even when that fact evaluation is presented under the guise of a pure question of law. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (discussing these categories as pragmatic rather than essential).

285. 564 U.S. 338, 355 (2011).

286. Compare this statement with the dissent's critique: "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." *Id.* at 372 (Ginsburg, J., concurring in part and dissenting in part). A similar allegation could be made about *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009), which states that as between an explanation for arrests of Muslim aliens based on their "potential connections to those who committed terrorists acts" and "purposeful, invidious discrimination . . . discrimination is not a plausible conclusion."

287. *See* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1983–84 (2004) (discussing the relationship between exchanges of factual narratives outside litigation and through formal procedural devices).

Some facts will clearly dictate the ideal sequencing of proceedings from the perspective of accuracy, speed, and cost, as in the statute of limitations example. But often the relationship between fact and law is more complex and subject to varying interpretations—indeed, this is likely why the case is in the courts in the first place. Careful attention to facts and to the risk of bias can mitigate these concerns, but that requires significantly greater judicial investment than an off-the-shelf procedural order. For these reasons, it is possible that a bespoke system is more prone to error than a sequential system. The question is whether the costs of mitigating that error are greater than the costs imposed by the relative rigidity of a sequential system.

A final note on information and error costs. In the bespoke system, more of the costs of information forcing and strategy are borne by the judge, who must determine and analyze information in order to structure an appropriate procedural order for the case. By contrast, in a sequential system, the corresponding cost of rigidity is borne by the parties. Furthermore, one would predict that the bulk of the costs in a textbook order are due to waste, whereas the costs of a bespoke order are more likely to be due to error and uncertainty. If we assume that the costs of rigidity in the sequential order are equal to the costs of error and uncertainty in the bespoke order, we face two distinct allocation-of-costs questions. First, is it better to have more accuracy at a somewhat greater risk of costs imposed by rigid or unnecessary procedures? Second, assuming no preference between the two, how are costs best distributed as between judges and parties? This brings us to the third challenge of a bespoke system, which is that it may increase costs by encouraging strategic behavior and satellite litigation.

Strategic behavior and satellite litigation. Both parties and judges engage in strategic behavior in litigation, although they are trying to maximize different things.[288] It is well recognized that parties engage in strategic behavior, but the idea that judges might also engage in strategic behavior and that this creates an important litigation

288. On strategic behavior in litigation generally, see Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982), which discusses the problem of distribution and utility maximization; and Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996), which examines strategic choices with regard to fee arrangements. Judges also engage in strategic behavior because their interactions with parties are dynamic. *See* Bone, *supra* note 239, at 1997–2000 (illustrating how a judge might influence litigation as a strategic player). For an overview of the literature, with a focus on substantive law, see Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341 (2010).

dynamic has not been often discussed.[289] For example, judges may try to make their jurisprudential mark, avoid being overturned by appellate courts, minimize their workload, encourage settlement, or meet particular deadlines such as avoiding having too many motions on the six-month list.[290]

In a discretionary system, parties may have an incentive to behave strategically to manipulate the judge's choice of order, perhaps capitalizing on their predictions of judicial incentives. A judge who fears appellate review may be more likely to put off summary judgment motions in § 1983 cases to encourage settlement. Knowing this to be the case may encourage plaintiffs to press harder in discovery or defendants to be more resistant to discovery than they would otherwise, thereby increasing the costs of litigation to the parties.[291] A judge who prefers early summary judgment motions may encourage parties to settle more cheaply than they ought to because they lack the information necessary to oppose the motion successfully.[292] And defendants, aware of the expense of early summary judgment motions on the plaintiff, may encourage the judges to permit such a motion in order to push the plaintiff towards a lower settlement. A judge who is concerned about managing the minitrial now required for certification of class actions may be more inclined to encourage the parties to file dispositive motions before class discovery and certification, even though the results will not bind class members who might thereafter bring repetitive litigation. The defendant may have an incentive to present the case as more complex or raise numerous weak arguments to add to the judicial workload to encourage such dismissal. The plaintiff may have an incentive to do the opposite, that is, to downplay issues and present fewer of them to encourage the judge to hold a hearing.[293]

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289. For an exception, see Bone, *supra* note 239, at 1997–2000, which asserts that the judge is a strategic player; and Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993), which focuses on appellate judges.

290. *See* 28 U.S.C. § 476(a)(1) (2012) (requiring preparation of a semiannual report that indicates motions that have been outstanding for more than six months). For another fascinating example of the exercise of strategic behavior by judges, in this case coordinated at the district level, see Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 247–84 (2016), which describes an interpretation of procedural rules to encourage patent filings in the Eastern District of Texas.

291. *Cf.* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 143 (arguing that the regime that allows judges to decide the order of constitutional adjudication "invites strategic behavior by courts and litigants").

292. *See* Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 811 (empirical study finding that many lawsuits settle without significant information).

293. Judges may also wish to settle massive numbers of suits so that they can focus their efforts elsewhere. For a discussion of judicial interests in mass torts, see Rubenstein, *supra* note 233, at 427.

The adversarial system cannot take care of the problem of litigant strategic behavior on its own because parties are not always evenly matched and because some parties are better placed to engage in strategic behavior than others.[294] If the judge is bound by a standardized procedural order, however, there are fewer opportunities for litigants to manipulate judicial ordering of litigation to their own ends and to the detriment of the system.

Furthermore, as these examples illustrate, parties are more likely to dispute the judge's bespoke order when they think that they can influence it to their own benefit, leading to satellite litigation about the order of proceedings and diverting resources to litigating order that might be better used to litigate the merits. On the other hand, contestability of decisions of order is an important baseline value. Parties should have an opportunity to dispute a bespoke order if they think that the judge's chosen order is mistaken because it negatively effects accuracy, speed, or cost. The risks of error and cognitive bias in setting bespoke procedure make contestability a feature of litigating the individual case. By contrast, in a more standardized system, contestation occurs at the rulemaking or legislative level.

A bespoke order is more likely to attract intermediate appellate review for these same reasons, as the appellate courts seek to impose checks on lower court sequencing decisions. The trend towards increasing interlocutory appeals has been attributed to the rise of discretion, and a bespoke regime invites more regularized interlocutory review of procedural ordering decisions. This raises again the question of whether it is better to place the costs of control on individual litigants and judges, or on a more standardized determination of sequencing.

3. Subject Matter Ordering

A third approach to procedural design is substance-specific procedure. Under this regime, the procedural sequence varies by subject matter, but in contrast to the bespoke regime it is relatively consistent for each type of case. There are some movements in this direction already underway in the federal courts. For example, we have already seen the emergence of subject matter ordering with respect to interlocutory appeals of qualified immunity determinations and class actions. The Federal Judicial Center, working with judges and lawyers, has developed initial discovery protocols for employment cases, which only apply to cases involving certain types of employment actions. This

294. For a discussion of structural issues in the summary judgment context, see Issacharoff & Loewenstein, *supra* note 139, at 74.

has been shown to reduce motion practice in such cases, but not to change the timing of resolution.[295] No one has attempted to evaluate whether it alters the probability of correct application of the law to the facts.

Some districts have initiated pilot programs to set the sequence of proceedings for other types of cases, sometimes very specific types of lawsuits involving repeat players. For example, the Southern District of New York created a set of procedures for civil rights cases brought under § 1983 only against the City of New York.[296] That protocol had some strange provisions, such as requiring the plaintiff to make a settlement demand within six weeks after the defendant's answer, based, one imagines, on initial disclosures which were due (under the plan) within twenty-one days after the defendant's answer.[297] My interviews with plaintiff-side lawyers indicate that most of them opted out of this plan because the initial disclosures were inadequate in all but the most routine cases and because the plan focused too much on encouraging settlement in cases where the plaintiffs were seeking public vindication. This evidence is anecdotal; to date no formal study of this plan has been conducted. The drive to create substance-specific procedures that encourage settlement in civil rights cases seems strong among judges—whether or not this is what parties want. The same court has a mandatory mediation requirement for employment discrimination cases.[298] Regimes that favor settlement have the benefit of reducing judicial workload, but do not always promote social welfare.

In other areas of the procedural law, such as standing doctrine, substance-specific approaches do not seem to adequately explain the disintegration of the textbook sequence of motions. The pathway remains open, however, even in doctrinal areas that cannot be addressed through district court level protocols. For example, the Supreme Court could adopt a substance-specific approach in standing cases, requiring the injury-in-fact test to apply only in cases involving administrative law and utilizing a cause of action test for other areas of the law. This will present a line-drawing challenge, but it can be done in a pragmatic way.

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295. EMERY G. LEE III & JASON A. CANTONE, FED. JUDICIAL CTR., REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 1 (2015).

296. *See Plan for Certain § 1983 Cases Against the City of New York*, U.S. DISTRICT CT. S. DISTRICT N.Y., http://www.nysd.uscourts.gov/rules/1983%20Revised%20Plan%20and%20Exhibits.6.10.14.pdf (last visited Feb. 28, 2018) [https://perma.cc/S7NL-V9ZJ].

297. *Id.* ¶¶ 4, 7.

298. In re: Cases Assigned to Mediation by Automatic Referral, S.D.N.Y. Jan. 3, 2011, http://www.nysd.uscourts.gov/rules/Standing_Order_ADR_01032011.pdf [https://perma.cc/EC6Z-YH9S].

Whether protocols aimed at creating a special sequence for specific types of cases will promote the right balance between accuracy, speed, and costs depends on the protocol. The whole point of substance-specific procedure is that one size does not fit all. In addition, the protocol may be resisted if it is trying to achieve results that are at odds with the parties' preferences. For example, in the § 1983 protocol in the Southern District of New York, judicial preferences for settlement were inconsistent with plaintiff preferences for vindication. In that case, it is also possible that the nature of the initial disclosures was such that the plaintiffs did not believe that the procedures sufficiently assured accuracy.

The creation of substance-specific protocols at the district court level is also consistent with the trend toward devolution to local rules. This creates infinite possibilities for variety and experimentation among district courts and individual judges. The question raised by this phenomenon, like that of bespoke procedure but on a smaller scale, is whether the most effective process for making procedural rules is at the national, local, or judge level. Should reform be top-down or bottom-up? There are benefits to each approach. Ideally, experimentation in procedural regimes would be undertaken with the intent to study their effect and decide whether to scale up implementation, rather than under pressure to solve local problems in the manner best suited to serve the immediate interests of individual judges of the trial court. That said, judges facing localized and repetitive problems in managing cases need to have ways to solve those problems. A coordinated attempt to consult with the bar and judges to develop solutions is a good beginning.

Some scholars have suggested that the procedural rules ought to be adjusted depending on the harmfulness of the act in question.[299] A substance-specific procedure would by definition match the substantive law, making some types of cases easier to pursue than others. This, in turn, requires normative judgments about what acts are harmful, how to measure that harm, and how to calibrate the procedure to the perceived harmfulness of the act. Such determinations are very difficult to make, as oftentimes people litigating (as well as judges) have multiple goals and varying perceptions, indeed profound disagreement, about the harmfulness of the act in question. That difficulty is illustrated in the recent discovery amendments, which require that discovery be calibrated to the value of the case, but then proceed to include so many definitions of value as to leave the limitation entirely

299. *See* Kaplow, *supra* note 4, at 1190 (questioning whether tailoring procedural rules to the particular case types would best address "deterrence, chilling, and system costs").

to the discretion of the individual judge.[300] This approach limits the ability of the appeals courts to police the lower courts.

The reason for this problem is that people disagree about the purpose of litigation. For example, in civil rights cases, publicity, vindication, and deterrence may be more important to the plaintiff than money. The monetary value of the case may be very low, but the value of the right may be high by other measures. The same may also be true in some traditional private law cases, especially personal injury tort cases where deterrence is an important goal. Some scholars think that the difficulty of political agreement on the relative value of rights and of procedural protections for those rights is the reason that the Federal Rules of Civil Procedure are so general and devolve so much power to judicial discretion. As Robert Bone explains: "It is much easier for rulemakers to compromise on a general rule that leaves the controversial issues to the discretion of the trial judge than to resolve the disagreement at the level of drafting the general rule itself."[301]

A case-by-case determination of the structure of procedure gives tremendous power to individual judges to determine litigants' ability to vindicate their rights.[302] This fact raises a separation-of-powers issue. If the legislature creates a substantive right that the judge does not approve of, that judge should not be able to subvert that right by imposing greater procedural barriers to prevent its enforcement.[303] Furthermore, it is hard to know where to draw the line. If a local rule

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300. *See* FED. R. CIV. P. 26(b) (limiting the scope of discovery). The Advisory Committee Note to the 2015 Amendment explains:

> It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendment.

301. Bone, *supra* note 239, at 1974–75.

302. *See* Martha Minow, *Politics and Procedure*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 79 (David Kairys ed., 3d ed. 1998) (examining various characterizations of procedure and how procedure influences the court and thus the outcome of the case); Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1341–59 (2012) (discussing unequal distribution of "litigation costs"). Even the rules regarding service of process can result in a meritorious case being lost. *Cf.* Hanna v. Plumer, 380 U.S. 460, 461–64 (1965) (holding that service of process in a diversity action must be made according to the Federal Rules of Civil Procedure, rather than the state rule, and thus reversing summary judgment for the respondent claiming improper service under state law).

303. *But see* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (stating that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy").

creates special procedures for certain types of cases, and these procedures alter the ability of individuals to enforce their rights relative to the baseline of the textbook order, the fact that this alteration is district wide rather than individual does not diminish the impact of the procedural change. Indeed, at any level (individual judge, district, circuit, or national) if the calibration of rules to rights is not explicit, and is instead hidden under the rubric of pure procedural changes, this is cause for concern because it hides substantive choices that ought to be justified and open to contestation.[304]

It should be evident by now that the procedural law is not an invisible and reliable baseline for effectuating rights, a blank canvas against which legislatures and courts can create substantive law. It would be useful to know what legislators know and expect when they legislate rights and what design of the procedural law would meet these expectations. There is reason to suspect that that the individuals who draft legislation are not familiar with the technical workings of the procedural law.[305] They may be familiar with high-profile procedural rules, such as the class action rule, for example, but even so may not always think of the effects of such rules when passing specific legislation.[306]

Another challenge to substance-specific procedure is the administrability problem created by departures from the interrelated scheme of the Federal Rules. We saw in Part II how the disintegration of the textbook order has affected rules that seem unrelated to the judicial decision on a particular procedural issue, and as a result the rules are uncoordinated and lack coherence. Substantive rulemaking would require thinking through how changes to any single rule affect all other interrelated rules, resulting in a separate rule scheme for each cause of action. As Paul Carrington has explained, "After commencing down a trail to substantive variations in rules, Congress would find it hard to stop short of complete differentiation that would seriously

304. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1092 (2008) ("Procedure cannot provide a total escape from hard substantive choices; when the main benefit of procedure is that it hides those substantive choices, we ought to be concerned.").

305. Congressional staffers often do not understand the canons of statutory construction. *See* Gluck & Bressman, *supra* note 260, at 902 (indicating that drafters are familiar with and use certain canons such as *Chevron*, but there are others that drafters knowingly reject or of which they are unaware). Gluck and Bressman's work indicates that proceduralists would likely be surprised by what congressional staffers do and do not know about the rules.

306. *But see* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 2–3 (2009) (introducing the argument that legislators are not aware of the effect of the class action rule on rights enforcement and that the result is an accountability problem). For a critique of this argument see Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 1001–02 (2011), which asserts that legislators are aware of the class action rule's effect on individual rights and substantive law.

complicate federal court practice in the manner that the common law procedure did."[307] Substance-specific procedure is not impossible, but requires significant investment and thoughtfulness.

Embedded into the structure of the rules is one last challenge: the permissive joinder rules allow litigants to bring cases with multiple claims in one lawsuit, making it difficult to decide which rules regime should apply. The common law pleading regime allowed only a single writ for this reason. For example, suppose that a litigant brought a lawsuit which included both employment discrimination and breach of contract claims—which procedural regime should apply, the one governing contracts or the one governing employment discrimination? Would a court need to determine whether one type of claim dominated the other and how would this determination be made? Or would the two claims proceed on parallel tracks? Perhaps the judge would apply a bespoke order. Whatever the standard applied, these questions would likely be litigated. Such satellite litigation about the procedural regime to be applied would increase costs.

In sum, the main benefit of a substance-specific procedural design is that it can provide a more perfect fit between the value of the right to be vindicated and the procedural law. The costs are that it would require a substantial revision to the procedural law for each subject area, would make resolution of multiple claims in one lawsuit difficult, and may spur satellite litigation. The fact that such a regime requires rulemakers to face the substantive effects of procedural rules head on can be described as either a benefit or a cost, depending on one's point of view.

CONCLUSION

The normative claim of this Article is that the Federal Rules of Civil Procedure ought to have a contestable procedural design. As a descriptive matter, the major contribution of this Article has been to lay out the decay of textbook procedure, a phenomenon that has not been documented before, and to suggest some reasons for these developments. Responding to the loss of an agreed upon procedural design in the federal courts, I provide a framework for debating procedural design going forward. Our system has migrated toward a patchwork order with elements of both the bespoke and substance-specific procedural systems, yet without apparent consideration of procedural design. Each of the procedural designs suggested here has costs and benefits, many hinging on the predicted behavior of judges

307. Carrington, *supra* note 250, at 2113.

and litigants. The challenge remains to find the right balance between tailoring to the individual case and systemic justice, and to be explicit about these choices so that they can be contested. In picking a procedural design, judges should remember that "we must not lose order itself in the attempt to make it good."[308]

308. Fuller, *supra* note 5, at 657.