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Gateways and Pathways in Civil Procedure

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ABSTRACT

Over the past thirty years, the U.S. Supreme Court and the Judicial Conference have modified the Federal Rules of Civil Procedure to address concerns that litigation costs too much, takes too long, and leads to unjust results. The Supreme Court's opinions have focused primarily on fortifying what I refer to as the gateways of civil procedure—including motions to dismiss, motions for class certification, and motions for summary judgment—where judges can dismiss cases that do not meet the applicable standards, thereby eliminating additional cost and delay. The Judicial Conference, in contrast, has focused primarily on regulating what I call the pathways of civil procedure—nondispositive, context-specific decisions during discovery and before trial—to target problems of cost and delay while allowing cases to proceed. Scholars have dissected and debated these gateway and pathway changes but have paid less attention to how these conversations—and the underlying rules—interrelate. This Article offers a unified framework with which to understand the Rules' two contrasting strategies to achieve just and efficient outcomes and examines available evidence measuring gateways' and pathways' relative effectiveness at achieving their shared goals. Stepping back, this Article asks how best to understand the roles of gateways and pathways in civil process and considers new, hybrid rules that draw on characteristics of gateways and pathways and may improve on current design.

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INTRODUCTION

The Federal Rules of Civil Procedure seek to "secure the just, speedy, and inexpensive determination of every action and proceeding."[1] This Article observes that the Rules offer two contrasting strategies to achieve this laudable, if elusive, goal. At a series of what I will call gateways[2]—including motions to dismiss, motions for summary judgment, and motions for a directed verdict—judges can dismiss cases that do not meet the applicable standards, thereby eliminating additional cost and delay. Between and beyond these gates lie what I will call pathways[3]—including discovery, pretrial, and trial proceedings—where

1. FED. R. CIV. P. 1. My focus is on the structure of the Federal Rules, a regime that only directly affects the very small percentage of cases that are brought in federal court. *See* Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 757 (2004) (finding that, in 1999, about 3.5 percent of civil cases were filed in federal court). Yet the Federal Rules and the court decisions interpreting the Rules are often reflected in state court practice. Although there may no longer be "true replicas" of the Federal Rules among the states, "the federal model of civil procedure remains substantially influential at the state level." John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2002–2003). Moreover, even states with distinct rules of civil procedure have been influenced by the Federal Rules' evolution and interpretation. *See, e.g.*, Kourouvacilis v. Gen. Motors Corp., 575 N.E.2d 734, 738–41 (Mass. 1991) (adopting the summary judgment standard announced in *Celotex*); Oakley, *supra*, at 360–82 (studying the extent to which recent amendments to the Federal Rules have been incorporated into states' procedural systems); *cf.* McCurry v. Chevy Chase Bank, 233 P.3d 861, 863–64 (Wash. 2010) (declining to adopt the pleading standards announced in *Twombly* and *Iqbal*).

2. Others have described these rules as gates. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 825 (2010) (referring to pleading as, historically, a "pervious gate"). More often, scholars have referred to the judge as a "gatekeeper." *See, e.g.*, Edward D. Cavanagh, *Making Sense of* Twombly, 63 S.C. L. REV. 97, 116–17 (2011) (describing pleading, expert admissibility, class certification, and summary judgment as part of judges' "gatekeeper role"); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 325 (2011) (describing the class action certification decision as a "gatekeeping question"). Judges are perhaps most often called "gatekeepers" when making expert admissibility decisions under *Daubert*. Yet expert admissibility decisions do not fit squarely within my definition of gateway rules. *See infra* notes 40–42 and accompanying text.

3. Pathways share some similarities with what has been referred to as "managerial judging." *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (describing the role of the managerial judge). Managerial judging literature is, however, less focused on the Rules than on the judicial stance toward litigation: Managerial judges are more active, more informal, and more invasive than were judges in prior decades. *See id.* at 376 (contrasting the "[d]isengagement and dispassion" that judges traditionally exercised, enabling them to "decide cases fairly and im-

judges make nondispositive, context-specific decisions about the litigation, including the schedule for discovery and motion practice, how many depositions each side can take, and what evidence can be presented to the jury. With these pathway rules, judges can target aspects of litigation that lead to excessive cost and delay and unjust outcomes while allowing cases to proceed.

Over the past several decades, the Judicial Conference[4] and the U.S. Supreme Court have modified both gateway and pathway rules in response to concerns that litigation costs too much, takes too long, and leads to unjust results.[5] The Judicial Conference has focused on modifying the pathways of civil procedure. Rules amendments have empowered judges to play a more active role in litigation planning, discovery, pretrial conferences, and sanctions.[6] And the Federal Judicial Center (FJC)—the research and education arm of the federal judiciary—publishes handbooks with hundreds of pages of recommendations about the best ways for judges to use pathway rules during discovery, class action litigation, and trial.[7] These Rules amendments and other materials flow from a belief that giving courts increased power to shepherd cases along the pathways can reduce cost and delay while achieving just outcomes.[8]

During this same period, the Supreme Court has made it more difficult for cases to pass through civil procedure's gateways in an effort to achieve these same

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partially," with the "more active, 'managerial' stance" of managerial judges). But scholars have also observed that the so-called pathway rules amendments I describe *infra* in Part II.B are a reflection of the rise of judicial case management. *See, e.g.*, Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 518–19 (2012) (describing the 1983 amendments to Rules 16 and 26 as "formally embrac[ing] active judicial case management").

4. When I refer to the Judicial Conference, I mean to reference the complex rulemaking process that involves the U.S. Supreme Court (which was given statutory authority by Congress under the Rules Enabling Act to create and amend the Federal Rules), the Judicial Conference (required by Congress in 1958 to continually study the rules of federal practice and procedure and make recommendations to the Supreme Court for Rules amendments or additions), and the Advisory Committees appointed to assist with the Judicial Conference's work (one of which focuses particularly on the Federal Rules of Civil Procedure). For a history of civil rulemaking governance, see generally Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993).
5. See *infra* notes 59–60 and accompanying text for descriptions of these concerns.
6. See *infra* Part II.B for a detailed description of these changes.
7. Congress created the Federal Judicial Center (FJC) in 1967, on the recommendation of the Judicial Conference, to orient and train federal judges, research federal judicial procedures and operations, and develop recommendations for improvement. *See* Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (codified as amended at 28 U.S.C. §§ 620–629 (2006)). For a list of FJC publications, see FED. JUD. CENTER, www.fjc.gov/library/fjc_catalog.nsf (last visited July 10, 2013) and *infra* notes 127, 167–168 and accompanying text.
8. *See generally* Part II.B (describing Rules amendments and Advisory Committee statements about the importance of judicial involvement in litigation pathways).

goals. The Court's 1986 decisions in *Celotex*, *Matsushita*, and *Anderson* heightened the burden of production for parties opposing summary judgment and made it easier for judges to grant the motion.[9] *Iqbal* and *Twombly* require dismissal under Rule 12(b)(6) if facts alleged in the complaint do not state a "plausible" entitlement to relief.[10] And in *Wal-Mart*, the Court made clear that district courts must engage in a "rigorous analysis" of class certification motions and evaluate the merits of plaintiffs' claims when intertwined with certification issues.[11] Each of these decisions appears to flow from a belief that cost, delay, and unjust outcomes can best be addressed by giving judges added powers to prevent cases from proceeding to the pathways on the other side of the gates.

Like the Rules amendments themselves, scholarship about gateway and pathway rules has largely evolved along parallel tracks. In recent years, scholars have carefully examined each of the Supreme Court's gateway decisions—asking whether, how, and to what degree the summary judgment trilogy, *Twombly* and *Iqbal*, and *Wal-Mart* changed applicable standards and whether these changes are desirable.[12] Scholars have also examined the Judicial Conference's pathway rules amendments, opining about their clarity and effectiveness, the rise of judicial case management, and the rulemaking process more generally.[13] But scholars have

9. *See infra* Part II.A.3. Whether the summary judgment trilogy actually changed judges' application of Rule 56 or simply reflected judges' changing practices is, however, an open question. *See infra* notes 115–118 and accompanying text for a discussion of this question.

10. *See infra* Part II.A.1.

11. *See infra* Part II.A.2.

12. *See generally, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (analyzing the effects of the summary judgment trilogy); George Rutherglen, *The Way Forward After* Wal-Mart, 88 NOTRE DAME L. REV. 871 (2012) (analyzing the effects of *Wal-Mart* on class certification); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009) (analyzing the effects of *Twombly* and *Iqbal* on pleading). For an elegant analysis of the shared goals of motions to dismiss, motions for class certification, motions for summary judgment, and *Daubert*, see generally Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647 (2011).

13. *See generally, e.g.*, John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010) (arguing for additional Rules amendments to combat discovery abuse); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010) (describing the Judicial Conference's rulemaking process); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (describing judges' discretionary power along what I call the pathways); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227 (2010) (describing changes in pathway rules and practice); Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137 (1994) (arguing that amendments to Rule 16 are too particularized).

paid less attention to how these isolated conversations about gateway and pathway rules—and the rules themselves—interrelate.[14] It is here that I hope to intervene.

With this Article, I offer a unified framework with which to understand the Rules, their distinct strategies to achieve just and efficient outcomes, and the lessons that can be learned from the last thirty years of experimentation. My aims are inspired by the work of this symposium's honoree, Stephen Yeazell, an astute observer of the "connectedness and mutability" of civil process.[15] When writing about the connectedness of civil process, Yeazell has emphasized the fact that changes to one feature of the system will affect the others:

> [A] strong preference for trials as a concluding event in procedure implies that we shall curtail discovery. The opposite point holds true as well: if current efforts to restrict discovery succeed, one likely result will be an increased rate of trials. Advocates of more trials thus need to face squarely the question of how they want to treat discovery.[16]

Other scholars have also appreciated these types of connections, noting that changes to the motion to dismiss gateway will impact which cases can proceed to discovery[17] and that changes to the summary judgment gateway will impact which cases can proceed to trial.[18]

In this Article I focus on a different, but equally important, way in which the rules are connected: Both gateway and pathway rules can be used to further efficient and just outcomes, though by different means.[19] Understanding gateway

14. Some have observed that gateway and pathway rules have a consistent purpose without exploring the distinctiveness of each approach. *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990) ("The summary judgment trilogy seems consistent with the spirit of the 1983 revisions to the Federal Rules in encouraging the judiciary to screen as well as adjudicate cases."); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309–10 (2013) (describing changing standards for expert admissibility, class action certification, enforcement of arbitration clauses, pleading, personal jurisdiction, and discovery limitations as "procedural stop signs" that "suit the economic or political agendas of powerful interest groups at the expense of the original philosophical agenda of the Federal Rules of Civil Procedure"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 358–67 (2010) (describing amendments to Rules 11, 16, 23, and the Supreme Court's decisions in *Twombly* and *Iqbal* as part of a "restrictive ethos" in tension with a "liberal ethos" of open access to the courts and merits-based decisions).

15. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 677.

16. *Id.*

17. *See generally, e.g.*, Spencer, *supra* note 12 (describing the effects of *Twombly* and *Iqbal* on discovery).

18. *See generally* Miller, *supra* note 12 (describing the effects of summary judgment on the right to a jury trial).

19. Gateway and pathway rules can also each lead to unjust and inefficient outcomes when poorly designed or implemented. See *infra* Part IV for a description of the strengths and weaknesses of pathway and gateway rules to address various litigation ills.

and pathway rules as distinct approaches to achieving the same goals reveals the competing philosophies of gateway and pathway design. The Judicial Conference's attention to pathway rules reflects a belief that judges can reduce cost and unjust outcomes with additional powers to limit discovery, join parties, and sanction obstreperous attorneys. The Supreme Court's decisions fortifying gateways reflect a belief that excess costs and unjust outcomes can best be reduced by giving judges greater power to limit what cases can proceed to the pathways on the other side of the gates. Illuminating the shared goals of gateway and pathway rules and their distinct means of achieving efficient and just dispositions can also draw into conversation the historically isolated scholarly critiques of gateway and pathway rules and encourage more cohesive conversations about the state of civil process.

In assessing the proper roles of gateways and pathways in our litigation system, it is also critical to appreciate the mutability of procedural rules over time. "That mutability," Yeazell has written, "robs us of straightforward appeals to traditional procedural values, for it turns out that such values have been changeable, now favoring pleading, now trial, now pretrial as the dominant mode of disposition."[20] Accordingly, we cannot justify procedural design choices on the ground that they are consistent with "traditional" or "timeless" values; instead, Yeazell has written, "we must do the much harder work of arguing for the values more or less from basic principles."[21] By examining the distinctive attributes of gateway and pathway rules and available evidence of their effectiveness at controlling excessive cost and delay and unjust outcomes, this Article offers some basic principles to rely on when deciding how best to craft rules that respond to weaknesses in our current system or the next litigation crisis when it appears on the horizon. Ultimately, I conclude that pathway rules are better suited than gateway rules to address many litigation ills. But another promising approach is to craft hybrid rules that draw from characteristics of gateways and pathways and improve on current design.

The remainder of this Article proceeds as follows. Part I sets out six characteristics that distinguish gateway rules from pathway rules. Part II describes changes to gateway and pathway rules over the past thirty years, emphasizing the Supreme Court's primary focus on gateways and the Judicial Conference's primary focus on pathways. Part III examines available evidence of the extent to which recent gateway and pathway amendments have achieved their goals of reducing cost and delay and reaching just outcomes. And Part IV, drawing on the distinct characteristics of gateways and pathways and empirical evidence of their effects,

20. Yeazell, *supra* note 15, at 677.
21. *Id.*

offers observations about the strengths and weaknesses of gateways and pathways and the untapped potential of hybrid rules that draw from characteristics of gateways and pathways. Part IV also comments on the institutional competence of the Supreme Court and the Judicial Conference to engage in rulemaking.

I. LAYING THE GROUNDWORK

By analogizing federal civil process to a series of gateways and pathways, I offer a unified framework with which to understand the Rules' two contrasting strategies to achieve just and efficient outcomes: Gateway rules limit cost, delay, and unjust outcomes by preventing cases from proceeding to the next stage of litigation, while pathway rules limit cost, delay, and unjust outcomes by controlling troublesome aspects of litigation while allowing cases to proceed. A critical difference, then, between gateways and pathways is that gateway decisions are dispositive and pathway decisions are not. But there are, I contend, five additional characteristics that distinguish pathway rules from gateway rules. These five characteristics—which I will describe momentarily—reflect differences in the burdens on the parties bringing gateway and pathway disputes to the judge, the work of the judge when making gateway and pathway decisions, and the impact of gateway and pathway decisions on a case.

EXAMPLES OF GATEWAY AND PATHWAY RULES

Gateway Rules	Pathway Rules
Rule 12(b) – motion to dismiss	Rule 11 – sanctions for pleadings, motions, and other papers
Rule 23 – class certification	Rule 16 – pretrial conferences
Rule 56(a) – summary judgment	Rule 26(a) – initial disclosures
Rule 50(a) – judgment as a matter of law	Rule 26(c) – protective orders
Rule 59 – motion for new trial	Rule 37 – motion to compel discovery and sanctions

To be clear, in distinguishing the characteristics of gateways and pathways I aim to describe the Rules as they are, not as they should be. Indeed, in Part IV I suggest that we should consider disaggregating these six characteristics of gateways and pathways to create hybrid rules that more effectively target specific concerns of cost, delay, and unjust outcomes. Here, I mean only to suggest that

the Federal Rules of Civil Procedure as currently designed can be roughly separated into two categories—gateways and pathways—based on their distinct effects on judges, parties, and claims.

The first, and arguably most significant, distinction between gateways and pathways is that gateway rules are case dispositive and pathway rules are not. Some gateway rules are always dispositive: Motions to dismiss, motions for summary judgment, and motions for judgment as a matter of law, when granted, will end the case.[22] Other gateway rules do not authorize the court to enter a judgment or dismissal, but they are usually dispositive as a practical matter. Take, for example, class certification. Class certification decisions are not formally dispositive; even when a court denies a motion for class certification, class representatives can proceed with their individual cases. Yet when individual class members have small damages claims, litigation is economically feasible for lawyers only if the cases are brought on behalf of a large class. A class certification denial will often therefore be the "death knell" for the case.[23]

In contrast to gateway decisions, pathway decisions are typically not dispositive in substance or effect. Unlike a summary judgment decision or a decision to deny class certification, a court's decision to, say, limit the number of depositions each party can take will rarely end a case. This is not to suggest that a court's pathway decisions cannot inform, hasten, or forestall the resolution of litigation. As Yeazell has observed:

> [R]uling on discovery disputes, deciding joinder issues, conducting pretrial and settlement conferences, and, sadly, punishing lawyers for misbehavior . . . is important, required, and often practically dispositive. But it does not, by itself, produce a judgment that finally disposes of the case in the way that a trial, successful summary judgment motion, or a dismissal on the pleadings does. Instead, these judicial decisions provide a framework within which the parties decide how to evaluate settlement or abandonment of the underlying lawsuits.[24]

22. Of course, when these motions are denied they are not case dispositive. The one exception that comes to mind is a motion for a new trial under Rule 59, which is case dispositive when denied.

23. Marcus, *supra* note 2, at 325 ("Denial of class certification can be the 'death knell' of the case, and a grant supposedly can create such a death threat to defendant that settlement is her only option."); Nagareda, *supra* note 12, at 688 ("[A] denial of class certification is not a final judgment, but instead leaves the individual lawsuit of the class representative pending before the court as a formal matter. Still, the practical necessity of aggregation to make litigation viable in the settings 'at the very core' of the modern class action device means that a certification denial often can be fatal in fact. The inclusion in Rule 23 of an opportunity to seek interlocutory appellate review of class certification rulings and the recognition by appellate courts that decertification sometimes may sound the 'death-knell' for litigation stem from this practical reality." (footnotes omitted)).

24. Yeazell, *supra* note 15, at 639.

Courts' rulings on motions to amend, motions to compel discovery, or motions to bifurcate a trial can lead to settlement or voluntary dismissal. But, in these instances, the parties, rather than the courts, decide to end the case given the relative costs and benefits of proceeding.

The second distinction between gateway and pathway rules follows from the first: Because gateway decisions are case dispositive, a court's decision to close a gateway is generally appealable. There are exceptions to this rule. For example, a gateway decision that disposes of a claim but not the entire case is not immediately appealable.[25] And when a dispositive motion is denied—and the gateway remains open—the decision is not immediately appealable.[26] But it is fair to say that when a district court closes a gateway, the court of appeals generally opens a window. Pathway decisions, in contrast, are not immediately appealable: A party cannot appeal a court's decision to limit discovery or exclude a witness from trial until a final judgment has been entered in the case.[27] And, as a practical matter, most pathway decisions will never be appealed at all. Courts of appeals review district courts' pathway decisions under the deferential "abuse of discretion" standard and will not reverse unless the decision resulted in "substantial" error.[28] Given these exacting appellate standards, Yeazell has observed, "trial courts exercise essentially final power on such matters even when the trial decision is appealable."[29]

A third distinction between gateways and pathways concerns their distributional effects: When gateway decisions reduce cost and delay, they generally do so by disposing of plaintiffs' claims, whereas courts' pathway decisions impact plaintiffs and defendants more equitably. Motions to dismiss (when granted) and class certification (when denied) reduce cost and delay by preventing plaintiffs from moving forward with their claims. And although both defendants and plaintiffs can move for summary judgment, the summary judgment gateway is far more often closed in defendants' favor: Defendants are almost three times as likely to move for summary judgment,[30] and defendants' summary judgment

25. For example, a court's decision to grant partial summary judgment in favor of the plaintiff, conclusively establishing one element of the plaintiff's claim, is not immediately appealable. And dismissal (whether by summary judgment or Rule 12(b)(6)) of only one of several claims is not immediately appealable unless the district court recites that the dismissal is final, as required by Rule 54(b).

26. Note, however, that decisions on class certification are always appealable. *See* FED. R. CIV. P. 23(f).

27. District courts can, however, certify nondispositive motions for interlocutory appeal. *See* 28 U.S.C. § 1292 (2006).

28. *See* Yeazell, *supra* note 15, at 664–65.

29. *Id.* at 665.

30. *See* JOE S. CECIL ET AL., FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 5–6, 13 (2007) (studying summary judgment practices in six districts

motions are more likely than plaintiffs' to be granted.[31] In contrast, pathway decisions to limit discovery or sanction an obstreperous party may more equitably be used against both defendants and plaintiffs to reduce cost and delay.[32]

A fourth distinction between gateway and pathway rules is that pathway rules allow courts to choose from a wider variety of possible resolutions responsive to the circumstances of the case. For example, a judge faced with a motion for a protective order based on the burdensomeness of a discovery request has several options: She can grant or deny the requested protective order, or she can address the concerns underlying the motion by requiring the requesting party to pay the costs of producing the discovery or by limiting the scope of the request. Gateways do not allow this range of judicial discretion. Gateways can either be open or closed: A motion for summary judgment can either be granted or denied. Of course, a summary judgment motion regarding several claims can be granted in part, allowing one claim to go forward while dismissing the others. But, when considering each claim, the court has only two choices at the gateways: grant or deny.

The fifth distinction between gateway and pathway rules relates to the fourth: Given the context-specific nature of judges' pathway decisions, judges can rely on a much broader range of information when shepherding cases along the pathways. Pathway decisions—addressing questions like who should bear the costs of a document search or whether "justice so requires"[33] granting a motion to amend—require judges to consider the amount of evidence necessary to prove or disprove claims, the relative burdens of producing information, the financial wherewithal of the parties, the location of the most valuable witnesses and evidence, and the good faith of the attorneys involved.[34] Gateway decisions require judges to con-

over twenty-five years and finding that defendants made approximately 72 percent of summary judgment motions (2526 motions by defendants compared to 967 by plaintiffs)).

31. *See id.* at 13–15 (finding that defendants' summary judgment motions were granted between 40 and 49 percent of the time during the twenty-five-year study, while plaintiffs' summary judgment motions were granted between 29 and 36 percent of the time).

32. Consistent with this observation, a recent Federal Judicial Center attorney survey found that plaintiffs' attorneys and defense attorneys share roughly the same views about the amount of information generated by discovery and the cost of the discovery process relative to the stakes of the case more generally—suggesting that district judges make roughly equitable pathway decisions in response to motions from plaintiffs and defendants. *See infra* notes 188–191 and accompanying text.

33. FED. R. CIV. P. 15(a).

34. *See, e.g.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 311 (1986) (observing that managerial judges, in making pathway decisions, "must take into account the hard economic reality that procedural resources are limited and that decisions must be made on a sound, 'business-like' basis as to which opportunities to pursue and which to pass by"); Gensler & Rosenthal, *supra* note 3, at 519 ("[An essential feature of] active judicial case management . . . [is] custom tailoring the pretrial process and the trial itself to what makes sense for the particular case. . . . Rule 16 and its enthusiastic endorsement of case management are based on recognizing that no one-size-fits-all model can efficiently and fairly apply to every case. It is the

sider the facts of the case as they relate to the applicable legal standards—whether the plaintiff's complaint states a plausible claim for relief, or whether there is a genuine dispute of material fact—but do not allow for the same granular considerations of methods and sources of proof, resources of the parties, conduct of the litigants, and other context-specific considerations.

Sixth, pathway decisions may be less formally requested and issued than gateway decisions.[35] For example, lawyers may write letters instead of briefs when seeking to compel discovery—the judge's memo endorsement on the victor's letter will be recorded by the clerk but not published as an opinion. A court's Rule 16 order setting discovery and briefing schedules will not appear on Westlaw. And a court's ruling on a motion in limine issued during a pretrial conference will be transcribed by the court stenographer but may not be turned into a written order. To be clear, attorneys may brief pathway issues, and courts may publish pathway decisions. But parties are more likely to extensively brief gateway motions, and courts are more likely to write formal, published opinions in response.

To summarize, gateway rules lead to dispositive, appealable decisions; generally benefit defendants when granted; are decided based on the facts of the case and governing legal standard; and are more often attended by legal formality. Pathway rules lead to nondispositive, not immediately appealable decisions; impact plaintiffs and defendants more equitably; are applied in a flexible manner based on context-specific considerations; and more often result in informal applications by the parties and informal decisions by the judge.

Having described six features that distinguish gateways from pathways, I should acknowledge that not all rules fall neatly on one side or the other of the gateway/pathway divide. Pathway decisions can, under some circumstances, be case dispositive or appealable.[36] Gateway decisions, under some circumstances,

judges who are responsible, using the parties' suggestions and information, for custom tailoring the pretrial process to the needs of each case." (footnote omitted)).

35. *See, e.g.*, Resnik, *supra* note 3, at 378 ("Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.").

36. For example, the court has power, under Rules 11 and 37, to dismiss a case (or enter judgment against a defendant) as a sanction for failing to comply with pleading or discovery rules. Such dismissals would be appealable. Another example is denial of a motion to intervene as of right, which is immediately appealable when denied because "it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance" and "the order denying intervention has the degree of definitiveness which supports an appeal therefrom." Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 524–25 (1947). In other respects, sanctions motions and motions to intervene have the characteristics of pathways.

will not be immediately appealable.[37] Pathway disputes can be extensively briefed and result in lengthy opinions.[38]

The decision to admit an expert's testimony provides another example of the permeability of the distinction. Expert admissibility decisions have several gateway characteristics: Post-*Daubert*, expert admissibility questions are likely to be extensively briefed and formally decided, given that courts must engage in what the Ninth Circuit called the "heady task" of determining "whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'"[39] Expert admissibility decisions can also be dispositive: When the exclusion of an expert would eliminate any material factual dispute, the court's decision to exclude the expert will be inseparable from its decision to grant summary judgment.[40] Even when not formally dispositive, expert admissibility decisions can be dispositive as a practical matter. Like class certification denials, the exclusion of a plaintiff's expert may cause the plaintiff to "narrow the case, drop the case altogether, or accept a reduced settlement" and may cause the defendant to move for summary judgment; exclusion of a defendant's expert may cause the defendant to "accept certain allegations by plaintiffs" or settle.[41] And like other gateways, the effects of *Daubert* are believed to be "decidedly pro-defendant" in civil litigation.[42] But expert admissibility decisions also have pathway qualities: Unlike gateway rules, expert admissibility decisions are not immediately appealable and do not directly concern the merits of the case.

37. *See supra* note 25 and accompanying text (describing certain gateway decisions that are not immediately appealable).

38. *See, e.g.*, Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 315–24 (S.D.N.Y. 2003) (setting out standards for production of electronic discovery).

39. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315–16 (9th Cir. 1995) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–95 (1993)).

40. *See* LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE FEDERAL STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION 56–57 (2001) (finding that summary judgment motions were made in one-third of the *Daubert* motions examined and was granted about half the time).

41. *Id.* at 55.

42. Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 473 (2005); *see also* Sandra F. Gavin, *Managerial Justice in a Post-*Daubert *World: A Reliability Paradigm*, 234 F.R.D. 196, 212 (2006) ("Th[e] shift to the pretrial arena significantly raises the costs and risks for plaintiffs while diminishing the costs and risks for defendants particularly when *Daubert* and summary judgment intersect."); Nagareda, *supra* note 12, at 669 (noting that "*Daubert* and its progeny . . . reduce the cost to the defendant of deploying the summary judgment motion"); Miller, *supra* note 14, at 313 ("*Daubert*'s high threshold has been particularly burdensome—financially, logistically, and sometimes both—for plaintiffs.").

The nature of a rule can also change over time. For example, modifications to Rule 23 by the Judicial Conference and the Supreme Court have made class certification decisions more gateway-like in recent years: The Judicial Conference amended Rule 23 to allow interlocutory appeals of class certification decisions,[43] and the Supreme Court has made clear that courts can assess the merits of a class's claims when deciding whether to certify the class.[44]

One final point: Although I have created two distinct categories, gateways and pathways are connected in multiple ways by the operation of litigation dynamics.[45] For example, the summary judgment gateway affects the ways in which lawyers navigate the discovery pathway—knowledge that a summary judgment motion may be looming on the horizon impacts what information parties seek during discovery. A court's gateway decision—about whether a plaintiff has created a factual dispute sufficient to defeat summary judgment—may also turn on a pathway decision—whether the court granted that plaintiff access to requested discovery. And a gateway decision—like summary judgment—will determine whether the parties are allowed to proceed to the pretrial and trial pathways on the other side of the gate.

II. THE SHIFTING STRUCTURE OF CIVIL PROCESS

The structure of civil litigation has changed significantly over the past one hundred years. Before 1938, pretrial civil litigation could be understood as one complex and highly fortified gateway—the pleadings process.[46] Once parties passed through that gateway, they quickly arrived at trial.

The Federal Rules restructured pretrial civil litigation as a series of increasingly formidable gateways, each followed by a series of broader pathways. After a

43. *See* FED. R. CIV. P. 23(f).

44. *See infra* notes 83–92 (describing the changing standards for evaluating class certification motions).

45. This observation about the connectedness of different stages of civil process has been made by Yeazell and others, though without the gateway and pathway terminology. *See supra* notes 16–18 and accompanying text.

46. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) ("[The common law pleading system] was premised on the assumption that by proceeding through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer, eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case. The system was wonderfully scientific. It also proved to be excruciatingly slow, expensive, and unworkable. The system was better calculated to vindicate highly technical rules of pleading than it was to dispense justice."); Clermont & Yeazell, *supra* note 2, at 824 (describing the pre-Rules pleading stage as one that "had become the center of legal attention, ended up mired down in battles over technicalities, and provided a vehicle for monumental abuse").

plaintiff filed her complaint, the defendant could move to dismiss the case on the ground that the complaint failed to state a claim upon which relief could be granted or had another facial flaw. If the plaintiff defeated the motion to dismiss, the parties could proceed to discovery. At the completion of discovery, the case might pass through another gateway—summary judgment. If the court found a material factual dispute and denied summary judgment, the case entered another broad pathway—preparation for trial and trial itself. During and after trial, the litigants could invoke a final series of gateways—motions for judgment as a matter of law and motions for a new trial.

For many years after the promulgation of the Federal Rules, the gateways of civil procedure performed a limited function: to weed out the most meritless cases.[47] Judges also played a relatively small role in regulating litigation's pathways. Although the Supreme Court lauded discovery as a means of unearthing the facts of the case before trial,[48] litigants largely managed discovery on their own. The Rules enabled judges to be involved in pretrial case management,[49] but courts were not responsible for individual cases until they were ready to be tried.[50] Instead, pretrial matters, when they arose, "would be presented to whichever judge was scheduled to perform the type of activity required."[51] And, before the 1983 Rules amendments, "the trend in discovery rulemaking was toward changes that reduced judicial oversight and involvement."[52]

The realities of civil litigation have changed a great deal since the Federal Rules were promulgated in 1938. Filings have increased and judicial dockets have

47. *See, e.g.*, *infra* notes 65–67 and accompanying text (describing the historical permeability of the Rule 12(b)(6) gateway); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998) (writing that the original purpose of Rule 56, as drafted in 1937, "was to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer").

48. As Justice Douglas wrote, discovery, "together with pretrial procedures[,] make[s] a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); *see also infra* notes 131–132 and accompanying text (describing the Court's positive view of broad discovery in *Hickman v. Taylor*).

49. *See* Charles E. Clark, *Pre-trial Orders and Pre-trial as a Part of Trial*, 23 F.R.D. 319, 506 (1958) (describing the pretrial order, authorized by Rule 16, as a "highly useful procedural device").

50. *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674–75 (2010) ("For the first several decades of practice under the Civil Rules, cases were put on the master calendar, which meant that they were not assigned to any particular judge until they were ready for trial."). Note, however, that Charles Clark believed that large cases should be assigned to a single judge for pretrial case management. *See* Clark, *supra* note 49, at 508.

51. Gensler, *supra* note 50, at 675.

52. *Id.* at 676 (describing amendments to Rule 33 and Rule 34 in 1970 that decreased judicial oversight of discovery).

expanded.[53] Cases have become larger: Class actions and multidistrict litigation are more frequent.[54] The plaintiff's bar has become better financed, allowing plaintiffs to bring these large-scale cases.[55] Lawsuits have become the vehicle for seeking political and institutional reform.[56] And far fewer cases are tried:[57] Instead, most are resolved through motion practice or settlement.[58]

These changes have led—in scholarly literature, judicial briefs and opinions, and Rules Committee deliberations—to concerns about cost, delay, and unjust outcomes. Defense lawyers—and those sympathetic to their plight—describe a tidal wave of frivolous cases brought against government and corporate defendants that require massive expenditures to defend and often result in unmerited settlements.[59] Plaintiffs' lawyers—and those sympathetic to their plight—complain that defense attorneys "obscure key facts through voluminous production and through aggressive use of privilege and work product doctrine arguments," ratch-

53. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 81–82 tbl.3.9 (1985) (finding an approximately 400 percent increase in federal civil filings between 1960 and 1983); Yeazell, *supra* note 15, at 634 ("[I]n 1990 federal district judges had caseloads roughly twice as large as their brethren had a half century earlier.").

54. *See, e.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 509 (1986) (describing the shift from simple diversity cases to complex litigation in federal courts).

55. *See, e.g.*, Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, SEDONA CONF. J. 1, 26 (2011) (describing how plaintiffs' lawyers "banded together as consortia or committees, acting essentially as *ad hoc* law firms, to prosecute a particular piece of complex litigation" and, through that coordination, "overcame the limitations of the contingent fee economic model (small firm size/litigation underfunding) to achieve economies of scale, and amass a sizeable costs fund with which to counteract attrition tactics"); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1780–82 (2013) (describing third-party financing of litigation).

56. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467–72 (1980) (describing the rise of institutional reform litigation on behalf of prisoners, students, and mental hospital patients); Yeazell, *supra* note 55 (describing evolving litigation trends that align plaintiffs' lawyers with Democratic interests).

57. *See, e.g.*, Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1955 (2009) (finding that, of all federal district cases terminated in fiscal year 2005, just 1.3 percent were adjudicated at the trial phase); Yeazell, *supra* note 15, at 633 (describing a drop in trial rates from 1938, when around 20 percent of civil cases were tried, to 1990, when only 4.3 percent of filed civil cases resulted in trials—a decline of almost four-fifths).

58. *See, e.g.*, Clermont, *supra* note 57, at 1955–56 (finding that, of all federal district cases terminated in fiscal year 2005, "approximately 67.7% were coded as settled in one way or another," and "around 20.7% were adjudicated at the pretrial process, as by a motion under Federal Rule 12 or 56"); Yeazell, *supra* note 15, at 638 (finding that the number of cases settled between 1940 and 1990 rose from about 14 percent to about 34 percent).

59. *See, e.g.*, Beisner, *supra* note 13, at 549 ("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement."); *see also infra* Part II.A (describing fears of costly but meritless cases pushing defendants to settle).

eting up costs and pressuring plaintiffs to drop their claims.[60] Although commentators may disagree about who is at fault, litigation cost, delay, and unjust outcomes are, unquestionably, of great concern.

Two entities—the Supreme Court and the Judicial Conference—have been most directly engaged in modifying the structure of civil process to address these concerns. And they have approached this project in distinct ways.[61] The Supreme Court has primarily fortified litigation gateways in an effort to prevent weak cases from passing through those gateways into discovery and trial. And the Judicial Conference has primarily structured litigation pathways in a manner intended to increase case management, encourage judges to protect against unnecessary discovery, and punish lawyers who misbehave. This Part describes the gateway and pathway rules modifications made by the Court and the Judicial Conference. It also offers insight into the different ways in which these institutions approach rulemaking and rule interpretation, a topic I address in Part IV.[62]

A. Fortifying the Gateways

Over the past thirty years, the Supreme Court has made it more difficult to pass through several gateways in apparent distrust of what lies on the other side of those gates: discovery and trial.[63] The Court's opinions, advocates' briefs, and scholarship sympathetic to these decisions reflect concern about the high costs associated with discovery and trial, fear about the competence of judges and juries to shepherd cases along the pathways, and a belief that unfair outcomes result when cases pass through the gateways. Some contend that the Court's gateway decisions have been motivated by an antiplaintiff bias.[64] As my description of

60. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1733 (2012); *see also id.* (noting that "[d]efendants also can delay the production of critical documents and information in order to prolong informational asymmetries").

61. It is worth noting that the Supreme Court does have a role in the Judicial Conference, as the Chief Justice is the presiding officer of the Judicial Conference and appoints all members of the Advisory Committees. See *supra* note 4 for a description of the organization of the Judicial Conference and see also *Judicial Conferences of the United States*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/JudicialConference.aspx (last visited July 11, 2013), for general information about the Conference and Committees.

62. *See infra* Part IV.C.

63. This is not to say that the Supreme Court has never interpreted pathway rules. *Hickman v. Taylor*, 329 U.S. 495 (1947) is a seminal Supreme Court pathway decision defining the discoverability of attorney work product. *See infra* notes 131–132 and accompanying text. More recently, the Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—what are arguably pathway decisions regarding the standards for expert admissibility.

64. *See* Miller, *supra* note 14, at 364 ("The Supreme Court's opinions in *Twombly, Iqbal, Wal-Mart* . . . and other judicial pronouncements reveal that a number of federal judges (and Justices)

gateways and pathways in Part I makes clear, gateways are most often closed in defendants' favor. Accordingly, the Court's decisions to fortify gateways necessarily disproportionately harm plaintiffs. I am, however, taking no sides on the question of whether the Court's decisions were driven by Justices' interests in prejudicing plaintiffs and protecting defendants. Instead, I take at face value the ways in which the Justices described their priorities and concerns in oral argument and in their opinions.

1. Motions to Dismiss

In the *Twombly* and *Iqbal* decisions, the Supreme Court significantly expanded courts' powers to grant motions to dismiss for failure to state a claim. For most of its existence, Rule 12(b)(6) was, as Kevin Clermont and Stephen Yeazell have described, a "pervious gate."[65] A complaint could only be dismissed for failing to state a claim under Rule 12(b)(6) if there was "no set of facts" that would entitle the plaintiff to relief.[66] A Rule 12(b)(6) motion challenged "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[67] And once parties passed through the gateway of Rule 12(b)(6), they could engage in broad discovery geared "to narrow and clarify the basic issues between the parties" and "ascertain[] the facts, or information as to the existence or whereabouts of facts, relative to those issues."[68]

For many years before *Twombly* and *Iqbal*, parties[69] and lower courts[70] expressed concern that a plaintiff could force defendants to engage in expensive

seem singularly concerned about the litigation burdens on corporations and government officials"); *cf.* Clermont & Yeazell, *supra* note 2, at 850–52 (describing and dismissing this theory).

65. Clermont & Yeazell, *supra* note 2, at 825.

66. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

67. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

68. *Hickman*, 329 U.S. at 501.

69. *See, e.g.*, Brief of Respondent at 20, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (No. 91-1657), 1992 WL 511941 (arguing for heightened pleading in municipal liability claims because "a paralysis of governmental decision-making may occur if responsible local officials, concerned about potential judgments against their municipalities for alleged constitutional torts, must look over their shoulders at strict municipal liability for unknowable constitutional violations," and observing that, "[w]ith the tremendous costs and burdens of defending civil rights litigation, the same result will likely occur even though the plaintiff's allegations may ultimately be adjudged to be without merit").

70. *See, e.g.*, Elliott v. Perez, 751 F.2d 1472, 1476 (5th Cir. 1985), *abrogated by Leatherman*, 507 U.S. 163 (adopting heightened pleading for claims against government entities on the ground that "allowing broadly-worded complaints, such as those of the plaintiffs here, which leaves to traditional pretrial depositions, interrogatories, and requests for admission the development of the real facts underlying the claim, effectively eviscerates important functions and protections of official immunity").

and time-consuming discovery when the plaintiff's claims satisfied the lenient *Conley* standard but the plaintiff could not ultimately prevail. Based on these concerns, district courts and courts of appeals imposed heightened pleading standards in certain cases, including § 1983 claims against municipalities[71] and employment discrimination claims.[72] Yet when these cases came before the Supreme Court, the Court, in unanimous opinions by Justices Rehnquist and Thomas, respectively, reversed, citing *Conley* and relying in part on the role of a pervious gateway in the civil procedure system.[73]

In 2007—five years after the Court rejected heightened pleading in a Title VII case on the ground that it would "'too narrowly constric[t] the role of the pleadings'"[74]—the Supreme Court changed course and reinterpreted Rule 8 to require that plaintiffs plead "plausible" factual allegations that "raise a right to relief above the speculative level" in antitrust cases.[75] The seven-Justice *Twombly* majority justified the plausibility standard by observing the potential negative effects of unbridled discovery on defendants:

> [S]omething beyond the mere possibility of loss causation [in a Sherman Act claim] must be alleged, lest a plaintiff with "a largely groundless claim" be allowed to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."[76]

This concern was particularly acute, the Court held, with expensive antitrust discovery.[77]

In earlier decisions, the Supreme Court took it as a given that courts' case management authority allowed judges to limit or stage discovery when appro-

71. *See, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 954 F.2d 1054 (5th Cir. 1992), *rev'd*, 507 U.S. 163.

72. *See, e.g.*, Swierkiewicz v. Sorema N.A., 5 F. App'x 63 (2d Cir. 2001), *rev'd*, 534 U.S. 506 (2002).

73. *See Swierkiewicz*, 534 U.S. at 512 (concluding that *Conley*'s "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims"); *Leatherman*, 507 U.S. at 168 ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"). The Court also concluded that it should not amend the Rules without going through the formal rulemaking process. *See Swierkiewicz*, 534 U.S. at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting *Leatherman*, 507 U.S. at 168)).

74. *Swierkiewicz*, 534 U.S. at 511 (alteration in original) (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976)).

75. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

76. *Id.* at 557–58 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)) (internal quotation marks omitted).

77. *See id.* at 558.

priate.[78] Yet, in *Twombly*, the Court rejected case management as an adequate means to protect defendants from the costs and burdens of discovery in weak cases:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries"; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a § 1 claim.[79]

The Court thus justified the plausibility pleading standard on the grounds that district courts cannot effectively prevent discovery abuse and that the costs of discovery are so high that they force defendants to settle weak cases.

In *Iqbal*, the Supreme Court expanded *Twombly*, holding that all complaints—not just complaints alleging Sherman Act violations—need to assert plausible claims for relief.[80] In justifying its position, the *Iqbal* majority reiterated its rejection of the "careful-case-management approach," concluding that the perils of unbridled discovery were even more extreme in suits involving defendants who are government officials.[81]

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78. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court remanded a case for the district court to reconsider whether the defendants were entitled to qualified immunity. Justice Scalia, writing for the majority, affirmed the plaintiff's contention that discovery might be necessary to resolve the qualified immunity issue, writing: "Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity." *Id.* at 646–47 n.6. And in *Crawford-El v. Britton*, 523 U.S. 574, 599 (1998), another case concerning qualified immunity, Justice Stevens, writing for the majority, observed that a trial court can "manage the discovery process [by limiting or staging discovery] to facilitate prompt and efficient resolution of the lawsuit."

79. *Twombly*, 550 U.S. at 559 (alteration in original) (citations omitted) (internal quotation marks omitted).

80. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

81. *Id.* at 685–86 ("If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. . . . It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that

Although the majority in *Iqbal* did not directly address district court judges' ability to cabin discovery—as had the majority in *Twombly*—some justices expressed concern during oral argument that district judges could not be relied upon to protect government officials from the burdens of meritless litigation. When counsel for Iqbal argued that Attorney General John Ashcroft and Federal Bureau of Investigation (FBI) Director Robert Mueller would be protected from the inconveniences of discovery unless discovery from lower-level officials confirmed the need for Ashcroft's and Mueller's depositions, Justice Scalia responded, in an exasperated tone: "Well, I mean, that's lovely, that—that the—the ability of the Attorney General and Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge."[82]

Twombly and *Iqbal* thus made it more difficult for plaintiffs to pass through an early gateway of civil procedure—the motion to dismiss under Rule 12(b)(6)—which stands between the initial complaint of wrongdoing and the discovery of facts underlying those claims. As both decisions indicate, the Court fortified this gateway in response to concerns that the high costs and other burdens of litigation cause defendants to settle weak cases and suffer other harms, and concerns that district court judges are ineffective at managing the pretrial pathways in a way that would prevent these injustices.

2. Class Certification

Two years after *Iqbal*, the *Wal-Mart* decision fortified another early gateway—the class certification motion. The proper scope of this gateway, like that of pleading, has been the subject of decades of debate. Class certification was, for many years, considered a pervious gateway. In *Eisen*, decided in 1974, the Supreme Court found "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[83] This language in *Eisen* "quickly came to stand for a general rule prohibiting any preliminary investigation of the merits at the certification stage."[84] In 1982, the Court in

causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.").

82. Transcript of Oral Argument at 35–36, *Iqbal*, 556 U.S. 662 (No. 07-1015).

83. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

84. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1265 (2002). Notably, *Eisen* was a case in which investigation of the merits "benefited the plaintiff class by allowing notice costs to be shifted" to the defendant, but it has been "much more

Falcon described the gateway as more restrictive than the Court had suggested in *Eisen*, instructing courts evaluating motions for class certification to conduct a "rigorous analysis" of the Rule 23(a) requirements and observing that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[85]

The Supreme Court resolved the apparent conflict between *Eisen* and *Falcon*[86] in *Wal-Mart v. Dukes*,[87] a nationwide class action alleging sex discrimination by the retailer against its female employees. In *Wal-Mart*, the Court rejected as "the purest dictum" any suggestion in *Eisen* that the merits of a class action were not relevant to certification decisions, embraced the reasoning in *Falcon* that courts must conduct a "rigorous analysis" before certifying a class, and observed that "[f]requently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim."[88] The *Wal-Mart* majority also made it more difficult to pass through the class certification gateway by viewing commonality narrowly, requiring that the plaintiff class show that all its members "have suffered the same injury."[89] The Court explained that this requirement meant the plaintiff class had to show not "merely that they have all suffered a violation of the same provision of law" but instead that their claims "depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor."[90] In 2013, in *Comcast Corp. v. Behrend*,[91] a five-justice majority of the Supreme Court reaffirmed courts' responsibility to "probe behind the pleadings" and assess the merits of plaintiffs' claims—including their damages theories—at class certification.[92]

Unlike *Iqbal* and *Twombly*, concerns about the pathways following class certification did not make an appearance during oral argument or in the Court's decisions in *Wal-Mart* or *Comcast*. Yet, since the 1960s, when the modern class action rule was promulgated, there has been heated debate about the effects of a permeable class certification gateway on litigants' and judges' decisions following

frequently" applied "to cases in which an investigation would benefit the defendant by screening out frivolous or weak class action suits." *Id.* at 1265–66.

85. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160–61 (1982).
86. *See* Bone & Evans, *supra* note 84, at 1268–76 (describing confusion in lower courts after 1982 about how to balance the Court's holdings in *Eisen* and *Falcon*).
87. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
88. *Id.* at 2552 & n.6.
89. *Id.* at 2551 (quoting *Falcon*, 457 U.S. at 157).
90. *Id.*
91. 133 S. Ct. 1426 (2013).
92. *Id.* at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551).

certification.[93] Aspects of this debate parallel longstanding debates about the effects of lenient pleading standards on litigation costs and outcomes. An anonymous memo provided to the Advisory Committee while *Eisen* was pending before the Supreme Court warned that Rule 23(b)(3) class actions, seeking monetary damages, "force defendants into settlement regardless of the merits of the claims because the cost of defense or the size of potential recovery is intimidating" and "procedures utilized by courts to make such actions 'manageable' result in procedural unfairness."[94]

After the Court decided *Eisen*, scholars raised the same concerns about the effects of a lenient class certification standard on defendants. Robert Bone and David Evans argued that *Eisen*'s forgiving standard would lead to class certification in weak or frivolous cases and that certification in those cases would create "substantial settlement leverage" given the high costs of managing a class action.[95] In their view, discovery was a significant contributor to these high costs: "[I]n an employment discrimination suit, certification of a company-wide class puts company-wide policies or practices at issue, expanding the opportunities for class counsel to engage in extensive and intrusive discovery. By promulgating a simple document request, the class attorney can force defendants to engage in a costly search of company records."[96]

Amicus briefs submitted to the Supreme Court in *Wal-Mart* echo these concerns. The U.S. Chamber of Commerce wrote that lenient class certification standards "have serious repercussions for American business. . . . [They present a] risk of gargantuan verdicts—not to mention bankruptcy."[97] Their amicus brief warned that "defendants faced with improvidently certified, meritless lawsuits feel 'intense pressure to settle' before trial."[98] Another amicus brief, submitted on behalf of the defense bar, asserted that the Ninth Circuit's lenient approach to class certification amounted to an "enormous hydraulic pressure on defendants to settle cases."[99] The brief argued that millions of dollars sought as damages, combined with extensive discovery, could "force a corporation to settle the suit, even if

93. *See generally* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15–20 (2000) (describing the longstanding debate over class certification standards and their effects on parties).

94. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 16 (1991) (quoting from anonymous memo).

95. Bone & Evans, *supra* note 84, at 1291–92.

96. *Id.* at 1300.

97. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 21, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 288900, at *21.

98. *Id.* at 22 (quoting *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995)).

99. Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner at 3, *Wal-Mart*, 131 S.Ct. 2541 (No. 10-277), 2011 WL 288903, at *3.

it is meritless and has only a five percent chance of success."[100] In briefs filed in *Comcast v. Behrend,* amici similarly argued that a fortified gateway at certification was necessary to avoid "blackmail settlements" after certification.[101] As with pleading, discussions of the class certification gateway focus on the fear that allowing frivolous or weak cases to get to discovery is unduly costly and will lead to inequitable results.

3. Summary Judgment

Approximately twenty years before the Court began fortifying the pleading and class certification gateways, the Supreme Court issued three opinions about the summary judgment gateway that addressed similar concerns about costs, delay, and unjust outcomes at trial.

Before 1938, summary judgment was intended to allow courts to strike "any frivolous or sham defense to the whole or to any part of the complaint."[102] The text of the 1938 rule was a "dramatic expansion" in that it made summary judgment available in any case and to any party.[103] But the Rule allowed parties to seek summary judgment only when the evidence showed "that there [was] no genuine issue as to any material fact and that the moving party [was] entitled to judgment as a matter of law."[104] And, as Samuel Issacharoff and George Lowenstein have observed, federal district judges long viewed their power to grant summary judgment "warily, perceiving it as threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and determinations of credibility, and the right to have one's cause advocated by counsel before a jury."[105] In 1962, in *Poller v. Columbia Broadcasting System, Inc.*, the Supreme Court warned that "[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"[106] And in 1970, in *Adickes v. S. H. Kress & Co.*, the Supreme Court held that the party moving for

100. *Id.* at 21.
101. *See, e.g.*, Brief of Intel Corp. as Amicus Curiae in Support of Petitioners at 5, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (No. 11-864), 2012 WL 3643757, at *5 (arguing that not requiring that experts satisfy the *Daubert* standard "would lead to certification in some cases where there was no scientifically acceptable method to prove on a class-wide basis damages or other elements necessary to class treatment, potentially forcing defendants to consider paying out class settlements in meritless cases").
102. Issacharoff & Loewenstein, *supra* note 14, at 76.
103. For a description of the history of summary judgment, see John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 566–67 (2012).
104. FED. R. CIV. P. 56(c) (1938).
105. Issacharoff & Loewenstein, *supra* note 14, at 77.
106. 368 U.S. 464, 473 (1962).

summary judgment bore the burden of proving "the absence of a genuine issue concerning any material fact."[107]

In 1986, in *Matsushita*, *Anderson*, and *Celotex*, the Supreme Court gave courts broader authority to grant summary judgment motions. The Court in *Matsushita* gave district courts discretion to assess the plausibility of the parties' contentions and grant summary judgment if the nonmoving party could show only "some metaphysical doubt as to the material facts."[108] The Court in *Anderson* made clear that judges deciding summary judgment motions should apply the same standard as they would in a motion for directed verdict; the question was whether "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."[109] And in *Celotex*, the Court shifted the burden of production from the party bringing the summary judgment motion to the party with the burden of proof at trial.[110]

The Court in *Celotex* justified its decision on the ground that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[111] The Court noted that, before the Federal Rules were enacted, motions to dismiss were the "principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources."[112] Because the Rules (as interpreted before *Twombly* and *Iqbal*) made motions to dismiss a relatively easy gateway to pass through, the Court concluded:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but *also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis*.[113]

A "just, speedy, and inexpensive"[114] determination of lawsuits required, the *Celotex* court held, liberal use of the summary judgment gateway to avoid costly trials of weak claims.

107. 398 U.S. 144, 159 (1970).
108. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
109. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).
110. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).
111. *Id.* (citing FED. R. CIV. P. 1).
112. *Id.*
113. *Id.* (emphasis added).
114. FED. R. CIV. P. 1.

The effects of *Matsushita*, *Anderson*, and *Celotex* on summary judgment practice are unclear. Although many have asserted that the trilogy caused more defendants to seek summary judgment and more judges to grant the motion,[115] the Federal Judicial Center's 2007 study found that an increase in summary judgment motions began ten years prior to the trilogy and that grant rates did not increase after the summary judgment trilogy was decided.[116] But even if *Matsushita*, *Anderson*, and *Celotex* did not change filing and grant rates, there is, Arthur Miller has written, "no doubt that the decisions break with the Court's prior attitude in *Poller* and *Adickes*."[117] *Celotex,* Steven Gensler and Lee Rosenthal have argued, "simultaneously assured judges already open to summary judgment that their decisions would not be unduly second-guessed and burnished summary judgment's image among those judges who had been less receptive."[118]

B. Structuring the Pathways

While the Supreme Court has made it more difficult to pass through several litigation gateways in an effort to address concerns about cost, delay, and unjust outcomes, the Judicial Conference has addressed these same concerns by focusing on the pathways of civil process.[119] In recent decades, the Conference has amended rules governing pretrial litigation and offered recommendations to courts managing class action litigation and trials about the most effective ways to employ existing pathway rules. Notably—and in marked contrast to the Supreme Court's gateway decisionmaking process—the Judicial Conference has responded to

115. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 14, at 73–74; Miller, *supra* note 12, at 984; Wald, *supra* note 47, at 1935.

116. *See* 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).

117. Miller, *supra* note 12, at 1029.

118. Gensler & Rosenthal, *supra* note 3, at 518.

119. This is not to say that the Judicial Conference has not considered amendments to gateway rules: The Advisory Committee on Civil Rules considered amending Rule 23 following the Supreme Court's *Eisen* decision. *See* Bone & Evans, *supra* note 84, at 1276 ("Several commentators have criticized the *Eisen* rule, and the Advisory Committee on Civil Rules has on occasion considered, though never approved, proposals to eliminate it." (footnote omitted)). Several changes have been made to Rule 56 over the years, although they concern primarily what materials can be considered in summary judgment motion practice, not what standard of review trial judges should apply when evaluating the evidence. Interestingly, when the Advisory Committee did approve more substantial amendments to Rule 56, they were rejected by the Judicial Conference. For a history of these recommended changes to Rule 56, see generally Lee H. Rosenthal, *The Summary Judgment Changes That Weren't*, 43 LOY. U. CHI. L.J. 471 (2012).

empirical studies and public commentary about pathway rules' effectiveness by altering the Rules multiple times over the decades.[120]

1. Pretrial Practice

Beginning with the 1983 amendments to the Federal Rules, the Judicial Conference made a conscious choice to "concentrate on the pretrial phase as the best hope for meaningfully attacking cost and delay."[121] The Conference's Rules amendments encourage judges to take a greater role in pretrial conferences and discovery and heighten incentives for litigants to act in good faith.

Pretrial Conferences. Rule 16 was initially limited in scope: It gave litigants the option of holding a pretrial conference before the scheduled trial date to "aid in the disposition of the action."[122] In 1983, the Judicial Conference amended Rule 16 to require district courts to issue an order early in the litigation process that set the schedule for joining parties, amending pleadings, filing motions, and conducting discovery.[123] Amendments in 1983 and 1993 outlined a wide range of additional actions courts could take during pretrial conferences, including eliminating frivolous claims, amending the pleadings, obtaining admissions and stipulations of fact, and any other means of "facilitat[ing] . . . the just, speedy, and inexpensive disposition of the action."[124] The Rules Committee explained that these changes to Rule 16 were informed by empirical studies showing that when judges actively manage cases during the pretrial stage, "case[s] [are] disposed of by settlement or trial more efficiently and with less cost and delay."[125] After studies in the mid-1990s showed that active case management could, in some instances, increase overall litigation costs,[126] the FJC's Civil Litigation Management Manual began

120. *See infra* Part IV.C for further discussion of differences between Judicial Conference and Supreme Court rulemaking and rule interpretation.

121. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 55 (2010).

122. FED. R. CIV. P. 16 (1938) (authorizing the parties to consider "(1) The simplification of the issues; (2) The necessity or desirability of amendments to the pleadings; (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) The limitation of the number of expert witnesses; (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; (6) Such other matters as may aid in the disposition of the action").

123. *See* FED. R. CIV. P. 16(b) (1983).

124. FED. R. CIV. P. 16(c)(16) (1993). For details of the changes to Rule 16 in 1983 and 1993, see FED. R. CIV. P. 16(c) (1983); FED. R. CIV. P.16(c) (1993). For an overview of the original Rule 16 and its amendment in 1983, see David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).

125. FED. R. CIV. P. 16 advisory committee's note (1983).

126. *See* JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 54–57 (1996)

urging judges "to not apply time-consuming case-management practices to those cases that have low dollar value and are otherwise straight-forward factual disputes involving settled principles of law" because judicial involvement under these circumstances is unnecessary and may only add to the costs of the case.[127]

Discovery. Rule 26(b), as originally written, authorized parties to depose witnesses regarding "any matter, not privileged, which is relevant to the subject matter" of the litigation.[128] Amendments to the rule in 1946 made clear that even inadmissible testimony was discoverable, so long it might reasonably lead to the discovery of admissible evidence.[129] The next year, in *Hickman v. Taylor*,[130] the Supreme Court applauded the Rules' liberal discovery provisions and emphasized the breadth of allowable discovery, writing:

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.[131]

The Court in *Hickman* expected that broad discovery rules would "narrow and clarify the basic issues between the parties" so that "civil trials in the federal courts no longer need be carried on in the dark."[132] Yet, over the next several decades, courts and commentators came to believe that liberal rules and limited judicial oversight led to discovery abuse.[133] As District Judge Gerald Goettel commented at a national conference on discovery reform: "Discovery was intended to be a

(finding that case management can increase the costs of discovery unless the court imposes a short time limit for discovery); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 652–54 (1998).

127. FED. JUDICIAL CTR., CIVIL LITIGATION MANAGEMENT MANUAL 4 (2d ed. 2010) (noting that "[e]xperience and anecdotal information" informed this recommendation).

128. FED. R. CIV. P. 26(b) (1938). The 1938 Rules additionally allowed parties to inspect the property and documents or the other party if the evidence was "material to any matter involved in the action" and they could "show[] good cause therefor." FED. R. CIV. P. 34 (1938).

129. *See* FED. R. CIV. P. 26 (1946) ("It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."). For a discussion of the historical background of the 1938 discovery provisions and amendments to the discovery rules, see generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

130. 329 U.S. 495 (1947).

131. *Id.* at 507 (footnote omitted).

132. *Id.* at 501.

133. *See, e.g.*, Warren E. Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, 70 F.R.D. 83, 95 (1976) ("[A]fter more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and overused.").

domesticated bird dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight."[134]

Amendments to Rule 26(b) attempted to address cost and efficiency concerns by presumptively limiting the range of discovery and encouraging judicial involvement in discovery exchange. In 1983, the Judicial Conference amended Rule 26(b), to give courts the power to limit otherwise relevant discovery when cumulative, duplicative, burdensome, or expensive.[135] In 1993, Rule 26(b) was amended again, to require courts additionally to consider "the importance of the proposed discovery in resolving the issues."[136] These amendments were intended to reduce the cost and delay associated with "[e]xcessive discovery and evasion or resistance to reasonable discovery" by "encourag[ing] judges to be more aggressive in identifying and discouraging discovery overuse."[137]

Rules amendments have also presumptively limited the use of specific discovery tools. For example, in 1993, Rule 30(a)(2)(A) was added, limiting the number of depositions that parties could take absent court order.[138] In 2000, Rule 30(d)(2) was added to limit each deposition to a period of seven hours.[139] And in 2006, the Judicial Conference amended Rule 26 to explicitly include electronically-stored discovery, but it also limited the discoverability of e-discovery that is "not reasonably accessible because of undue burden or cost."[140] The Rules necessitate court involvement in any expansion of these presumptive limits.

Initial Disclosures. Several amendments to Rule 26(a)—governing initial disclosures—have also attempted to reduce litigation costs and avoid discovery abuse. In response to concerns that the adversarial nature of discovery "creates significant functional difficulties for, and imposes costly economic burdens on,

134. Edward F. Sherman, *The Judge's Role in Discovery*, 3 REV. LITIG. 89, 196–97 (1982) (quoting Judge Goettel).

135. *See* FED. R. CIV. P. 26(b)(1)(iii) (1983) (requiring that the amount of discovery be related to "the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake"); Subrin, *supra* note 129, at 744–45.

136. FED. R. CIV. P. 26(b)(2)(iii) (1993).

137. FED. R. CIV. P. 26 advisory committee's note (1983). Arthur Miller, the reporter for the Advisory Committee in 1983, offered a similar explanation at a presentation to judges about the purpose of the amendments. *See* FED. JUDICIAL CTR. EDUC. & TRAINING SERIES, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 28–30 (1984).

138. *See* FED. R. CIV. P. 30(a)(2)(A) advisory committee's note (1993).

139. *See* FED. R. CIV. P. 30(d)(2) advisory committee's note (2000). Note that this provision is now found in FED. R. CIV. P. 30(d)(1).

140. FED. R. CIV. P. 26(b)(2)(B); FED. R. CIV. P. 26(b)(2)(B) advisory committee's note (2006).

our system of dispute resolution,"[141] the Judicial Conference amended Rule 26(a) in 1993 to authorize judges to require parties to disclose, without formal discovery requests, information about "potential witnesses, documentary evidence, damages, and insurance" that would be "relevant to disputed facts alleged with particularity in the pleadings."[142] The amendment was intended to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information," thus reducing litigation time and expense.[143]

The amendment of Rule 26(a), requiring broad initial disclosures, was criticized from the start.[144] An early and prominent critic of the amended Rule 26(a) was Justice Scalia. Dissenting from the Court's approval of the amendment, he contended that the rule would increase the costs of discovery, as lawyers would argue about what information is relevant to litigation and would "place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side."[145] As a reflection of the tepid reception the rule received more generally, many courts exercised the option to opt out of the requirement altogether.[146] In 2000, the Judicial Conference amended the rule to require courts to use initial disclosures in most cases, but it narrowed disclosure requirements to information "that the disclosing party may use to support its claims or defenses," so that parties were no longer required to disclose harmful information.[147]

Sanctions. The Judicial Conference has also employed sanctions as a tool to curb meritless and expensive litigation. Before 1983, Rule 11 was what Thomas Rowe has referred to as "a sleepy little eight-sentence rule" requiring only that a lawyer certify, by signing a pleading, that there was "good ground" to support the

141. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978).

142. *See* FED. R. CIV. P. 26(a)(1) advisory committee's note (1993). The rule additionally required parties to supplement disclosures with information about expert witnesses. Finally, the amended rule required that, as the trial date approached, each side identify witnesses and evidence that each side expected to offer at trial. If a party withheld materials pursuant to a privilege or work product protection, the amended rule required the party to provide notice and enough information that the opposing party could evaluate the assertion of privilege or protection. *See* FED. R. CIV. P. 26(a)(5) advisory committee's note (1993).

143. FED. R. CIV. P. 26(a) advisory committee's note (1993).

144. For a description of disapproval of the amendment by the American Bar Association, President Bush, the House Judiciary Committee, and the House of Representatives more generally, see Carrington, *supra* note 13, at 632.

145. *See* Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 511 (1993) (Scalia, J., dissenting).

146. *See* DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1998), *reprinted in* 182 F.R.D. 304, 309–10 (1998) (examining district courts' use of initial disclosures under Rule 26(a)).

147. *See* FED. R. CIV. P. 26 advisory committee's note (2000).

contentions in the pleading and that it was not "interposed for delay."[148] Because the original rule was considered ineffective at deterring litigation abuses, the Judicial Conference amended Rule 11 in 1983 to "emphasiz[e] the responsibilities of the attorney and reenforc[e] those obligations by the imposition of sanctions."[149] The amended Rule 11 required lawyers to affirm the factual and legal bases for their contentions and the good faith of their actions, and it required judges to sanction lawyers who violated these obligations.[150]

The amended Rule 11 led to what was considered an "explosion" of satellite litigation about sanctions, diverting time and money away from the merits of the underlying claims.[151] As a result, Rule 11 was again amended in 1993. The 1993 amendments attempted to reduce the burdens of sanctions litigation by creating a twenty-one-day safe harbor so that sanctionable conduct could be addressed and resolved by the parties without involving the court. The 1993 amendments additionally gave courts discretion to not impose sanctions and instructed courts to limit sanctions to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[152]

The Rules also authorize sanctions for improper behavior during discovery. The 1983 amendments created Rule 26(g), which applies the Rule 11 standards to discovery: Attorneys (or parties, if unrepresented) must affirm that all discovery requests, responses, and objections are made in good faith and with factual and legal support, and courts must impose appropriate sanctions on offenders.[153] The Rules Committee described Rule 26(g) as providing "a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."[154] And Rule 37 empowers courts to order sanctions when parties inadequately respond to discovery requests or fail to comply with court orders related to discovery.[155] In 1970, in response to

148. Thomas Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence With Civil-Law Judging*, 36 SW. U. L. REV. 191, 194 (2007).

149. FED. R. CIV. P. 11 advisory committee's note (1983).

150. *See id.*

151. Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 100 (1993); *see also id.* at 100–01 (describing studies and criticism of the effects of Rule 11).

152. *See* FED. R. CIV. P. 11(c)(2) (1993).

153. *See* FED. R. CIV. P. 26(g) advisory committee's note (1983). Although Rule 23(g) is similar to Rule 11, it does not contain "Rule 11's safe-harbor and deterrence limit provisions." *Id.*

154. FED R. CIV. P. 26(g) advisory committee's note (1983).

155. Rule 37(a) authorizes a party to move for a court order compelling discovery from a party who has failed to disclose information under Rule 26(a), failed to answer a discovery request, or provided an incomplete or evasive response. If a party fails to comply with a court order issued under Rule 37(a), the court can impose sanctions as outlined in Rule 37(b). And a court can impose sanctions

concerns that judges imposed sanctions only when parties willfully violated discovery obligations, the Judicial Conference amended the rule to make clear that "even a negligent failure came within Rule 37" and "to encourage judges to be more alert to abuses occurring in the discovery process."[156] Amendments in 1980, 1993, 2000, and 2006 authorized sanctions for failure to comply with new discovery obligations, including duties to disclose under Rule 26(a); failure to participate in framing a discovery plan under Rule 26(f); and failure to retain electronically-stored information.[157]

2. Class Action Litigation

Although Rule 23 has existed since 1938, the original rule was "highly formalistic" and difficult to apply.[158] In 1966, the Judicial Conference almost entirely amended Rule 23 to make it easier for courts to certify classes.[159] Beginning in 1991, the Advisory Committee undertook a ten-year review of Rule 23—"replete with subcommittee meetings, committee meetings, mini-conferences, major conferences, and countless telephone conferences"—to address, among other issues, the same concerns that animated *Wal-Mart*: that class certification

under Rule 37(d) if a party fails to attend a deposition or to respond in any manner to a discovery request.

156. FED R. CIV. P. 37 advisory committee's note (1970).

157. *See* FED R. CIV. P. 37 advisory committee's note (1980) ("New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order."); FED R. CIV. P. 37 advisory committee's note (1993) (describing revisions to Rule 37(a) as "reflect[ing] the revision of Rule 26(a), requiring disclosure of matters without a discovery request"); FED R. CIV. P. 37 advisory committee's note (2000) (describing newly added Rule 37(c)(1) as addressing parties' failure to amend initial disclosures, required by Rule 26(e)(2)); FED R. CIV. P. 37 advisory committee's note (2006) (describing the addition of Rule 37(f) as addressing "a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use").

158. Bone & Evans, *supra* note 84, at 1259; *see also* Resnik, *supra* note 94, at 8–9 (describing Rule 23 in 1938).

159. *See* Resnik, *supra* note 94, at 9 (observing that the revisions to Rule 23 "enable[d] more cases to be certified as class actions"). Following the 1966 revisions, Rule 23 requires plaintiffs seeking class certification to show that the class is so numerous that joinder is impossible, that the class members' claims share a common question of law or fact, that the class representatives' claims are typical of the class more generally, and that the class representatives and their lawyers can adequately represent the interests of the class. In addition, the class must show that there is a risk of inconsistent judgments, that the disposition of one case will be dispositive of all cases in the class, or that common questions predominate and class action treatment is superior to other forms of resolving the disputes. *See* FED R. CIV. P. 23(a); FED R. CIV. P. 23(a) advisory committee's note (1966).

created "unwarranted pressure to settle."[160] Based on this review, the Advisory Committee proposed several amendments to Rule 23 in 1998, although only one was adopted: the right to interlocutory appeals of class certification grants and denials.[161] The Advisory Committee endorsed this change in recognition of the fact that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[162]

After 1998, the Advisory Committee focused on developing amendments that "provided courts with the tools, authority and discretion to closely supervise class-action litigation" instead of focusing on "substantive certification standards."[163] Among the amendments adopted in 2003 was an elimination of the requirement that class certification decisions be made "as soon as practicable," allowing for precertification discovery.[164] The Advisory Committee made clear that "[a]ctive judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery.'"[165]

The Rules offer less guidance about how courts should navigate the postcertification pathway decisions in class actions. Rule 23(d) authorizes courts to issue orders—in conjunction with Rule 16 scheduling orders—that "determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument."[166] But the remainder of pathway rules—governing scheduling orders, discovery, and sanctions—apply equally to both standard and complex litigation.

Courts do, however, have an additional source of guidance about how to shepherd class actions along the pathways: publications by the Federal Judicial

160. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 23 MISS. C. L. REV. 323, 328 (2005). Mr. Rabiej was chief of the Rules Committee Support Office, which staffs the Judicial Conference's Advisory Committees, from 1992–2010. *Id.* at 323 n.1.

161. *Id.* at 367 (observing that the Advisory Committee did not reach consensus on the other proposed amendments to Rule 23).

162. FED. R. CIV. P. 23 advisory committee's note (1998). The Advisory Committee also made this change so that plaintiffs would not have to "proceed[] to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation" to secure appellate review. *Id.*

163. Rabiej, *supra* note 160, at 368.

164. The "as soon as practicable" language was amended to allow courts to make class certification decisions "at an early practicable time" in recognition that "[t]ime may be needed to gather information necessary to make the certification decision." FED. R. CIV. P. 23 advisory committee's note (2003).

165. FED. R. CIV. P. 23 advisory committee's note (2003).

166. FED. R. CIV. P. 23 advisory committee's note (1966).

Center. The Federal Judicial Center's Manual for Complex Litigation—versions of which have been published since the creation of the Federal Judicial Center in the late 1960s—offers hundreds of pages of recommendations about how courts should manage every aspect of class action and other complex litigation.[167] The FJC also publishes abbreviated pocket guides that focus on issues particularly relevant to class action litigation, including the selection of counsel, the timing of class certification, settlement, and attorneys' fees.[168] The guides offer "an array of litigation management techniques and procedures" for courts and litigants to tailor to the particular circumstances of their cases.[169]

3. Trial

Although Rule 16 has, since its inception, provided for conferences soon before trial, amendments to Rule 16 in 1983 and 1993 emphasized the broad range of orders a judge can make before trial to "improv[e] the quality of the trial through more thorough preparation."[170] Some of these orders focus directly on trial practice, including orders to "avoid . . . unnecessary proof and cumulative evidence,"[171] "order . . . a separate trial . . . with respect to a claim . . . or any particular issue,"[172] "order[] . . . a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law,"[173] and "establish[] a reasonable limit on the time allowed to present evidence."[174] These amendments allow courts to adjudicate issues preemptively in order to "provide for an efficient and economical trial."[175]

The Rules offer less guidance for judicial pathway decisions during the trial itself. As Elizabeth Thornburg has observed:

> Boiled down to the mandatory elements, the rules require that if a jury is requested in a timely manner, there will be a jury of six to twelve people who must reach a unanimous decision. There will be some kind of evidence, mostly in open court. If there is a jury, the judge will give it some kind of charge, requesting some kind of verdict. The

167. *See, e.g.*, FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH (2004).
168. *See, e.g.*, BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES (3d ed. 2010).
169. FED. JUDICIAL CTR., *supra* note 167, at 2.
170. FED. R. CIV. P. 16(a)(4) (1983).
171. FED. R. CIV. P. 16(c)(4) (1983).
172. FED. R. CIV. P. 16(c)(13) (1993).
173. FED. R. CIV. P. 16(c)(14) (1993).
174. FED. R. CIV. P. 16(c)(15) (1993).
175. *Id.* advisory committee's note.

> parties must be treated in a way that is not facially unequal. But that is about it.[176]

Judges have wide discretion to manage every aspect of trial, including whether claims will be heard together, the trial schedule, the selection of jurors, the admissibility of evidence, the timing of closing arguments, the instructions to the jury, and the jury's verdict form.[177] Although the rules governing trial decisions have changed little in the past decades,[178] the FJC's manuals are intended to offer courts guidance about how to manage pretrial and trial pathway decisions efficiently and effectively.[179] Suggestions intended "to improve the quality of the trial and reduce its length and cost" include "streamlining voir dire procedures," "conducting short daily conferences with counsel to identify upcoming witnesses and exhibits, to anticipate problems . . . and to assess the progress of the case more generally," "avoiding unnecessary proofs by narrowing disputes or by encouraging stipulations," and "minimizing or avoiding sidebar conferences, arguments, and other proceedings that disrupt the trial day."[180]

III. SURVEYING THE LANDSCAPE

Over the past thirty years, the Supreme Court has fortified gateways in fear that discovery and trial impose undue cost and delay and lead to unjust results. During that same period of time, the Judicial Conference has structured pathway rules to give judges additional powers to manage litigation and lawyers added incentives to act in good faith. And publications by the Federal Judicial Center have offered recommendations to judges about how best to exercise their broad discretion on the pathways.

The shared aims of gateway and pathway modifications have been to reduce cost and delay and achieve just outcomes. In this Part, I consider the extent to which the changes to gateways and pathways have achieved these goals. The available evidence, though inconclusive,[181] both affirms concerns about pathways' effectiveness and calls into question the Supreme Court's approach. Although fears of

176. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1262 (2010) (footnotes omitted).

177. *See id.* at 1275–87 (describing judges' broad managerial discretion during trial).

178. The standard for admissibility of expert evidence is a significant exception to this observation. *See supra* notes 39–42, 63 (discussing *Daubert* and *Kumho Tire*).

179. *See generally* FED. JUDICIAL CTR., *supra* note 127; FED. JUDICIAL CTR., *supra* note 167.

180. FED. JUDICIAL CTR., *supra* note 127, at 109–10.

181. Many scholars have observed the difficulty of gathering data about litigation practices and the inconclusiveness of available data. *See, e.g.*, Rowe, *supra* note 148, at 193 ("[T]he limited empirical evidence on managerial judging's effectiveness at reducing delay and cost . . . remains . . . fairly inconclusive.").

discovery and trial appear to be overblown, judges' pathway decisions sometimes fail to protect against excessive costs, delay, and unjust outcomes. Yet the Supreme Court's fortified gateways appear ill suited to address these problems and can create problems of their own: Each of the Court's decisions has been criticized for increasing the costs of litigation, leading to unjust outcomes, and unfairly and disproportionately harming plaintiffs.[182]

A. Pleading versus Discovery and Case Management

In *Twombly*, the Supreme Court justified fortifying the pleading gateway instead of relying on "careful case management" in part based on "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side."[183] In support of this notion, the Court cited a 1989 article by Judge Easterbrook in which Easterbrook wrote: "Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."[184] Although neither the Supreme Court nor Judge Easterbrook appeared to rely on any empirical evidence of discovery practices in reaching the conclusion that discovery abuse is unchecked by courts, a few recent studies support these concerns. Yet most studies of discovery and judicial case management over the past few decades tell a more optimistic story.

As an initial matter, it is unclear how frequently federal cases involve discovery at all. A 1998 study by the Federal Judicial Center found that discovery is not exchanged in almost 40 percent of federal cases, and only about three hours of discovery occurred in another "substantial percentage" of cases.[185] Even if more

182. For arguments that the Court's gateway decisions increase cost and unjust outcomes, *see infra* notes 201–208 and accompanying text (discussing pleading); *infra* note 218 and accompanying text (discussing class certification); *infra* notes 221–235 and accompanying text (discussing summary judgment). For arguments that the Court's gateway decisions disproportionately harm plaintiffs, see Issacharoff & Loewenstein, *supra* note 14, at 75, arguing that "summary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants," Miller, *supra* note 12, arguing that the expanded availability of summary judgment practice after the trilogy compromises plaintiffs' right to their day in court, and Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 224–27, asserting that the *Twombly* and *Iqbal* pleading standards disproportionately harm plaintiffs who bring employment discrimination claims and other types of cases that require proof of intent.

183. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (internal quotation marks omitted).

184. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

185. Court Rules, 192 F.R.D. 340, 357 (2000). Note, however, that the Committee does not indicate what that "substantial percentage" is. An earlier study by the Federal Judicial Center found that 72 percent of the cases had no more than two discovery events and that no discovery occurred at all in 52 percent of cases. PAUL R. CONNOLLY ET AL., FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28–29 (1978).

cases engage in substantial discovery today, all can agree that discovery does not lead to excessive costs, delay, or unjust outcomes in cases in which little or no discovery is exchanged.

It is also unclear how much discovery actually costs when it is exchanged. Recent attorney surveys offer starkly different answers to this question: Eighty-seven percent of the attorneys recently surveyed by the American College of Trial Lawyers (ACTL) reported that discovery was too expensive.[186] Lawyers for Civil Justice recently surveyed Fortune 500 companies and found that legal fees and costs had jumped from an average of $66 million in 2000 to almost $115 million in 2008.[187]

But other studies over the past several decades have found that attorneys believe discovery costs are often proportional to the case, are relatively modest, and do not affect parties' decisions to settle. In a 2009 survey by the Federal Judicial Center, attorneys reported that the median cost of litigation in cases where some discovery was exchanged was between $15,000 and $20,000; attorneys reported that discovery accounted for between 20 and 27 percent of these estimated litigation costs.[188] Survey respondents reported that the costs of discovery were also modest as compared to the total stakes of the case: The median reported ratio of discovery costs to stakes was 1.6 percent for plaintiffs and 3.3 percent for defense attorneys.[189] Discovery costs were, according to the majority of respondents, "just the right amount" as compared to the stakes in the case.[190] Only 10.9 percent of defense attorneys and 7.5 percent of plaintiffs' attorneys surveyed reported that discovery produced "too much information."[191] Previous attorney surveys conducted over the past several decades have reached similar conclusions.[192]

186. AM. COLL. OF TRIAL LAWYERS, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, at A-6 (2008) [hereinafter ACTL STUDY].

187. *See* LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010).

188. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 35–38 (2009) [hereinafter FJC 2009 ATTORNEY SURVEY].

189. *Id.* at 2.

190. *Id.* at 27–28.

191. *Id.* at 27 (reporting that 56.6 percent of plaintiff attorneys and 66.8 percent of defense attorneys reported that discovery generated "just the right amount" of information, and that "plaintiff attorneys (36 percent) were more likely to rate the information generated as too little . . . than defendant attorneys (22.4 percent)").

192. For descriptions of prior studies, see Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998), describing a 1997 survey of over 1100 attorneys in closed cases finding that median discovery

Evidence is also mixed about the frequency with which the costs of discovery force parties to settle. Eighty-three percent of the attorneys surveyed by the ACTL reported that "litigation costs drive cases to settle that should not settle on the merits."[193] But 49.8 percent of plaintiffs' attorneys and 52.6 percent of defense attorneys recently surveyed by the FJC reported that the costs of discovery had no effect on settlement decisions.[194] A significant—though smaller—percentage of attorneys surveyed by the FJC did report that discovery costs increased the likelihood of settlement.[195] But this fact, on its own, does not show that discovery costs led to *unjust* settlements; it shows only that discovery costs informed litigants' decisions about whether to proceed.

There is one point on which surveyed attorneys seem to agree: Effective judicial case management is the key to controlling excessive cost and delay during discovery. "Where abuses occur," the ACTL survey observed, "judges are perceived not to enforce the rules effectively."[196] But attorneys also appear to believe that more active judicial case management can effectively limit cost and delay.[197] Attorneys surveyed by the ACTL "overwhelmingly agreed that early and regular involvement of a judicial officer in a case results in lower costs (67% in agreement), a narrower range of issues in dispute (74% in agreement), and greater client satisfaction (71% in agreement)."[198] As one attorney surveyed by the ACTL observed: "Judges need to actively manage each case from the outset to contain costs; nothing else will work."[199]

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expenses represented just 3 percent of the stakes of the case and that "[m]ost attorneys—representing plaintiffs and defendants alike—thought the discovery or disclosure generated by the parties was about the right amount needed for a fair resolution of their case. Fewer than 10% thought the process generated too little information, and about 10% thought the process generated too much information." *See also* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1111–16 (2012) (describing studies from the 1960s, 1970s, and 1990s).

193. ACTL STUDY, *supra* note 186, at A-6.

194. FJC 2009 ATTORNEY SURVEY, *supra* note 188, at 33.

195. *See id.* at 32 ("In sum, 27.4 percent of plaintiff attorneys and 30 percent of defendant attorneys indicated that the costs of discovery increased, to some extent, the likelihood of settlement in the closed case.").

196. ACTL STUDY, *supra* note 186, at 2.

197. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8–9, 16 & fig.8 (2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf (reporting results from attorney surveys through the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the National Employment Lawyers Association, and concluding that the "responses . . . suggest that many attorneys think that active management of discovery by district and magistrate judges serves a useful purpose").

198. ACTL STUDY, *supra* note 186, at A-6.

199. *Id.* at B-2.

Other scholars have tried to make sense of these conflicting attorney survey responses and have complained more generally about the lack of "sound empirical investigation" that could illuminate the costs and effects of discovery.[200] Based on available evidence, it is impossible to know how frequently our discovery system leads to unjust and inefficient outcomes. At the very least, all can likely agree that civil discovery does sometimes lead to these unfortunate results and that there is room for improvement. But, for three reasons, the Supreme Court's decisions in *Twombly* and *Iqbal* appear ill suited to address concerns about excessive cost and delay during discovery.

First, although Rule 12(b)(6) motions post *Twombly* and *Iqbal* do appear to result in more case and claim dismissals overall,[201] there is no reason to believe that only meritless cases are weeded out of the system. Alexander Reinert studied cases decided over the course of ten years, isolated approximately one hundred cases that would likely have been dismissed under the plausibility standard, and found that more than half of them resulted in a settlement or plaintiffs' verdict.[202] Reinert's findings do not preclude the possibility that at least some of the settlements were the result of an *in terrorem* increase in settlement value or that at least some of the plaintiffs' jury verdicts were unreasonable. But his findings do, as he wrote, "seem to contradict" the contention that "the vast majority of the cases that will be dismissed under a heightened pleading scheme like that imposed by *Iqbal* and *Twombly* are meritless or frivolous."[203]

Second, the standard announced in *Twombly* and *Iqbal* cannot effectively address problems of cost and delay in nonfrivolous cases. Gateways are dispositive by their very nature; they prevent a case from proceeding to the pathways on the other side of the gate. But there is no reason to believe that only meritless

200. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432 (1994); *see also id.* at 1432–42. For careful analysis of the methodologies employed in the ACTL and FJC attorney surveys, and an argument that the FJC's methodology reduces concerns about the subjectiveness of attorney surveys, see Reda, *supra* note 192, at 1102–16.

201. The Federal Judicial Center found that the total number of motions to dismiss filed increased by 55 percent between 2006 and 2010, and of these motions filed, 75 percent were granted in whole or in part (an increase of almost 10 percent). *See* JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 14 tbl.4 (2011). Jonah Gelbach recently used data gathered by the Federal Judicial Center to estimate the effects of the heightened pleading standard and found that the new standard "negatively affected" plaintiffs—in that it prevented discovery or settlement—in at least 18.1 percent of civil rights and employment discrimination cases and at least 21.5 percent of other cases. *See* Jonah B. Gelbach, *Locking the Doors to Discovery?*, 121 YALE L.J. 2270, 2277–78 (2012).

202. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011).

203. *Id.* at 166.

cases impose excessive discovery burdens. Instead, studies have tied discovery volume to a number of factors that have nothing to do with the merits of the underlying claims.[204] If discovery in a case is too expensive or slow but the case has enough merit to proceed to the next stage of litigation, then closing the gateway and dismissing the case is too harsh a remedy. Instead, nondispositive pathway modifications—like fewer depositions, cost shifting in discovery, or sanctions imposed on the attorney—are better suited to address the problems of excessive cost and delay in cases with some merit. Moreover, *Twombly* and *Iqbal* do nothing to address situations in which *defendants* unnecessarily increase cost and delay during discovery; only by shepherding cases along the pathways can courts address concerns about defendants' behavior.

Third, the pleading standard articulated in *Twombly* and *Iqbal* imposes costs of its own. Yeazell and Clermont predicted that the "fogginess" of *Twombly* and *Iqbal*'s test would increase the number of motions to dismiss filed: "[A]ny defendant's lawyer, faced with a complaint employing the minimalist pleading urged by Rule 8's wording and the appended Forms' content, commits legal malpractice if he or she fails to move to dismiss with liberal citations to *Twombly* and *Iqbal*."[205] The possibility of having a claim dismissed at an early stage—and the delay associated with motion practice—is further enticement for defense attorneys to file motions to dismiss. Not surprisingly, then, the Federal Judicial Center found that the number of motions to dismiss filed rose from 4 percent in 2006 (before *Twombly* and *Iqbal*) to 6.2 percent in 2010 (three years after *Twombly* and one year after *Iqbal*)—an increase of 55 percent.[206] The number of motions filed may continue to rise as defense attorneys become more seasoned in post-*Iqbal* motion practice.[207] These additional motions will invariably lead to their own form of cost and delay; attorneys will need to be paid for the time spent drafting briefs sup-

204. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6–8 (2010) [hereinafter FJC MULTIVARIATE ANALYSIS], http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf (describing factors that increase discovery costs, including the importance of nonmonetary stakes and the structure of attorney representation); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 791–92 (1998) (describing studies finding that the volume of discovery is tied to the number of parties involved, the number of claims, the subject matter of the dispute, and the amount in controversy).

205. Clermont & Yeazell, *supra* note 2, at 841.

206. *See* Gelbach, *supra* note 201, at 2291 (citing CECIL ET AL., *supra* note 201, at 9–10).

207. *See* Elizabeth J. Cabraser, Presentation at the *UCLA Law Review* Symposium, Twenty-First Century Litigation: Pathologies and Possibility (Jan. 24, 2013) (observing that Rule 12(b)(6) motions are now brought in every case she files).

porting and opposing the motion to dismiss, and several months may elapse between the time the defendant files the motion and the court renders its decision.

Moreover, the majority of these motions do not result in case dismissals, adding further to the costs of litigation. The FJC's study found that the number of motions denied or granted with leave to amend rose from 55 percent in 2006 to over 60 percent after 2010. For cases in which motions to dismiss are granted with leave to amend, the parties must spend additional time and money to amend the complaint and, likely, relitigate the motion to dismiss. And for those cases in which motions to dismiss are denied, the costs of litigation have increased because they now include the cost of briefing and deciding the motion. Motions to dismiss, then, reliably reduce litigation costs in only the less than 40 percent of cases in which the motion to dismiss is granted in whole or in part without leave to amend[208]—assuming the cost of briefing the motion to dismiss is lower than the litigation costs would have been had the claim or claims proceeded to discovery. In other words, the *Twombly* and *Iqbal* standard may simply be replacing cost and delay from discovery with cost and delay from motion practice.

In coming years, scholars will continue to examine the effects of courts' discovery supervision, case management, and pleading decisions on case filings and dispositions. Thus far, evidence suggests that courts' pathway decisions—although sometimes effective—do not eliminate excessive cost and delay and unjust outcomes in all cases. But there is little reason to believe that the Court's decisions in *Twombly* and *Iqbal* effectively target those cases in which discovery cost and delay remain a problem. Moreover, *Twombly* and *Iqbal* may lead to the dismissal of meritorious cases and may increase the costs of litigation overall.

B. Class Certification versus Class Action Litigation

As with claims about the need for fortified pleading gateways, little empirical data supports calls for fortified class certification gateways. As Charles Silver has written, "the charge that class actions subject defendants to excessive settlement pressure" relies on "factual assertions that are questionable or unproven."[209] Class actions are expensive to litigate and can lead to multimillion dollar settlements.[210] But empirical studies of class actions from the 1970s onward suggest

208. *See* CECIL ET AL., *supra* note 201, at 14 tbl.4.

209. Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003).

210. The amount of class action settlements vary significantly by litigation area: Securities and commercial settlements have been found to average about $100 million, but labor, employment and civil rights settlements have been found to average under $10 million. *See* Brian T. Fitzpatrick, *An*

that concerns of blackmail settlements in meritless cases are overstated.[211] In a 1996 study, the Federal Judicial Center examined class actions in four districts and found no evidence that "the certification decision itself, as opposed to the merits of the underlying claims, coerced settlement with any frequency."[212] Indeed, the researchers found that the case management practices employed by courts in class actions "limit the ability of a party to coerce a settlement without regard to the merits of the case."[213]

Contrary to assertions that class certification will lead immediately to settlement, the Federal Judicial Center found that, of the four districts studied, the majority of certified class actions proceeded through discovery to summary judgment.[214] And when class actions did settle, the timing of the settlements "did not support any inference of a relationship between certification and settlement."[215] This is not to say that class certification has no impact on litigation decisions; instead, as Bryant Garth has observed, "it is clear that certified class actions in general have more settlement clout and a greater staying power."[216] As Garth's study of over one hundred proposed class actions revealed:

> [C]ertified class actions were three times as likely as uncertified cases to go to trial on any aspect of the claim (17% vs. 6%) . . . . Almost two-thirds of the uncertified cases ended in summary judgment for the defendant (22%), simply died or never really got started (combined as 33% . . .), or were remanded or transferred (9%). While 28% of the uncertified cases resulted in some form of "settlement," the settlement rate was 78% for the certified cases.[217]

Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. EMPIRICAL LEGAL STUD. 811, 828 (2010).

211. For one of the earliest studies on this subject see CLASS ACTION STUDY, PREPARED AT THE DIRECTION OF HON. WARREN G. MAGNUSON, CHAIRMAN, FOR THE USE OF THE COMMITTEE ON COMMERCE, UNITED STATES SENATE (Comm. Print 1974).

212. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61 (1996) [hereafter 1996 FJC CLASS ACTION STUDY].

213. *Id.*

214. *See id.* at 33 (finding that courts ruled on summary judgment motions in 85 percent of cases in two districts and 60 percent of cases in two other districts—and motions were granted in whole or part in 54 to 68 percent of the cases).

215. *Id.* at 62 (finding that a quarter of the cases settled within two months of certification, but at least a quarter of the cases took longer than a year after certification to settle).

216. Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC'Y REV. 237, 265 (1992).

217. *Id.* at 263. The Federal Judicial Center's 1996 study of class actions in four federal district courts similarly found that "[c]ertified class actions were more than two times more likely to settle than cases that contained class allegations but were never certified." 1996 FJC CLASS ACTION STUDY, *supra* note 212, at 60.

Given this evidence, the grant of class certification may be less a death sentence for defendants than the denial of class certification is a death sentence for plaintiffs.

Although there are no studies examining the effects of *Wal-Mart* on class action litigation, assessing the merits at class certification may lead to increased costs or unjust outcomes. Any serious assessments of the merits of class action claims at certification will require significant discovery, often including expert testimony. As Richard Marcus recently observed, parties may consider "something approaching full discovery" as essential before class certification.[218] Accordingly, the fortified class certification standard may simply push the costs of class action discovery before the class certification stage, resulting in limited cost savings.

On the other hand, if courts significantly limit discovery at the class certification stage in an effort to reduce costs, they will increase the likelihood of unjust outcomes—as did *Twombly* and *Iqbal*. The restrictive view of commonality in *Wal-Mart* and the rigorous assessment of merits and damages models encouraged by *Wal-Mart* and *Comcast* will undoubtedly lead to fewer classes certified; it remains to be seen whether these modifications to class action certification serve their intended purpose of screening out meritless cases that would force defendants to settle were they to proceed. The most salient point, perhaps, is that there is scant evidence that meritless, settlement-forcing cases exist in any meaningful number.

C. Summary Judgment versus Trial

Despite the Court's belief—echoed in subsequent scholarship[219]—that summary judgment prevents "unwarranted consumption of public and private resources" by avoiding trial,[220] available evidence suggests that summary judgment adjudications can cost the same as or more than trial. In 1983, a study of "ordinary" cases found that trials, on average, amounted to less than 10 percent of attorneys' time spent on the case overall.[221] Trials have become longer in recent years.[222] But even today's longer trials appear to cost no more than summary judg-

218. Marcus, *supra* note 2, at 356.

219. For a description of scholarship laudatory of summary judgment's efficiencies, see Miller, *supra* note 12, at 1044–45.

220. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

221. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 (1983).

222. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459, 478 (2004) (finding that the trial rate dropped from 11.5 percent of federal civil cases in 1962 to 1.8 percent of cases in 2002, but that "[c]ivil trials that lasted four days or more were 15 percent of trials in 1965 and 29 percent of trials in 2002; trials of three days or more rose from 27 percent to 42 percent over the same amount of time").

ment motion practice. Participants in the Federal Judicial Center's 2009 attorney survey reported that cases that went to trial cost litigants about 24 percent more than cases that did not go to trial, all else being equal.[223] And a ruling on summary judgment increased plaintiffs' costs by approximately 24 percent and defendants' costs by approximately 22 percent, controlling for other factors.[224]

When one accounts for comparative costs in judicial time and court resources, summary judgment may well be less efficient than trial. Although summary judgment is intended to reduce docket pressures and ease trial scheduling,[225] at least some district court judges believe that summary judgment adjudications take longer and are more burdensome than trial. As District Court Judge Brock Hornby recently explained:

> For most cases judges, magistrate judges, and their law clerks collectively spend more time resolving summary judgment disputes and the ancillary motions they spawn than they would handling the trials. Someone must match up factual assertions; determine whether they are supported, adequate, and admissible at trial; decide whether a Rule violation justifies ignoring an asserted fact; fit all that into a legal analysis; and write an opinion that will withstand scrutiny.[226]

District Judge Marjorie Rendell echoed these concerns, writing:

> I find it curious that summary judgment motions are thought to be an economical way of avoiding trial when they, in and of themselves, are costly undertakings indeed: costly to litigants in terms of attorney hours devoted to their preparation, and costly in terms of the expenditure of judicial time and effort. Once the motion, the answer, the reply and the surreply have been filed, the judge then examines the four corners of the 1500 pages of deposition testimony and determines whether there are genuine issues of material fact—any one of which would thwart the entire motion—and whether movant is entitled to judgment as a matter of law.[227]

223. FJC MULTIVARIATE ANALYSIS, *supra* note 204, at 7–8.
224. *Id.* at 6, 8.
225. *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990) ("The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures in general and to the pressure of the criminal docket in particular, makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the nonmoving party . . . .").
226. D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 275 (2010).
227. Marjorie O. Rendell, *What Is the Role of the Judge in Our Litigious Society?*, 40 VILL. L. REV. 1115, 1120 (1995).

And for the approximately 40 percent of summary judgment motions that are denied,[228] there are certainly no efficiency gains—the case must then proceed to trial. Accordingly, denied summary judgment motions have been described as "deadweight losses to society."[229]

So, summary judgment may not save litigant or court time—does it lead to more accurate results? Summary judgment has been justified as a way to avoid what Richard Nagareda called "a particular form of variance: the prospect that, absent summary judgment, the outcome at the next litigation stage—trial—will consist of an unreasonable assessment of the claim on the part of the fact finder."[230] Yet summary judgment decisions appear to produce their own form of variance: the prospect that a court deciding a summary judgment motion will unreasonably view the evidence as undisputed.

Many scholars and courts have observed that trial courts misapply summary judgment standards. Although Rule 56 is intended to allow courts to separate the wheat from the chaff, the summary judgment trilogy is feared to "provide adequate cover for a court that, for whatever reason, has an expansive definition of chaff and hence is impatient with the pleas of a litigant to continue with an apparently weak case."[231] Judge Patricia Wald has criticized courts' "frequent conversion [of the summary judgment standard] from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case."[232] Moreover, Richard Marcus has observed, courts are entering this gestalt verdict based on motion papers and exhibits, not the complete trial record.[233]

The fate of summary judgment decisions on appeal offers further reason to fear that courts are regularly misapplying the summary judgment standard. As Jeffrey Stempel has observed in a recent article, if district courts were correctly applying the standard, their affirmance rate should be close to 100 percent: "[B]y

228. FED. JUDICIAL CTR., ESTIMATES OF SUMMARY JUDGMENT ACTIVITY IN FISCAL YEAR 2006, at 7 tbl.3 (2007), http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf.

229. D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 888 (2006); *see also* Issacharoff & Loewenstein, *supra* note 14, at 103 (describing additional expenditures incurred during summary judgment as a "deadweight loss to society").

230. Nagareda, *supra* note 12, at 669.

231. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 623 (2004).

232. *See* Wald, *supra* note 47, at 1917.

233. *See* Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 769 (1989) ("Summary judgment relies entirely on written materials (except for the theoretical possibility of live testimony at the hearing). To the extent partial summary judgment eliminates significant elements of the case before trial . . . it may rob the trial of context for those elements that remain to be decided.").

definition the motion is to be granted only when there is *no* genuine dispute of material fact, *no* need for credibility determinations, *and* the law clearly directs a particular result."[234] Yet, Stempel concluded, after reviewing several studies, that "summary judgment on appeal fares no better than the bulk of cases reviewed and falls far short of the near-perfect track record it logically would have on appeal if being properly administered at trial."[235] Given the high rate of reversals, it may not make sense to rely on summary judgment as protection against unjust outcomes at trial. Frequent reversals also translate into additional attorney and court time on appeal and after the case is remanded to the district court.

IV. MOVING FORWARD

Over the past thirty years, the Supreme Court and the Judicial Conference have been engaged in parallel efforts to improve the efficiency and accuracy of our system of civil litigation. The Court has approached this project by making it more difficult to pass through the gateways of civil procedure. The Judicial Conference has approached this project by reshaping and adding structure to the pathways of civil procedure. Although judges' pathway decisions do not always protect against excessive cost, delay, and unjust outcomes, criticisms of the pathways appear to be overblown. And the Supreme Court's gateway decisions create problems of their own: Each has been criticized for increasing the costs of litigation and leading to unjust results. Viewed as a collection of distinct efforts to achieve the same goals, the Supreme Court's decisions and Judicial Conference's amendments offer insight about the strengths and weaknesses of gateways and pathways and raise broader questions about the optimal design of the Rules.

A. Strengths and Weaknesses of Gateways and Pathways

The distinct characteristics of gateways and pathways may help explain why pathway rules have surpassed the Supreme Court's meager expectations and gateway rules have fallen short of the Court's lofty goals. Evidence from the past thirty years of experimentation may also help illuminate more generalizable insights about the ability of gateways and pathways to reduce cost, delay, and unjust outcomes. Following are some preliminary observations about the strengths and weaknesses of gateways and pathways drawn both from their characteristics

234. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 650 (2012).
235. *Id.* at 651.

described in Part I and from evidence about the effects of gateway and pathway modifications described in Part III.

Dispositive nature. Gateways' dispositive nature ensures that cases cannot incur additional costs along the subsequent pathways, and so they may be better suited than pathways to weed out frivolous or meritless cases.[236] But gateways' dispositive nature also makes them ill suited to address concerns about excessive costs and delay that arise for reasons unrelated to the merits of the underlying claims.[237] In these situations, improved pathway decisions are better able to pinpoint costly aspects of the litigation while allowing the case to continue.

Gateways' dispositive nature also means that an error—in the design of a rule or its implementation by the judge—will have more dramatic consequences for the parties. Judges make dozens of pathway decisions in any given litigation, but, likely, far fewer gateway decisions. Accordingly, parties and lawyers may conclude that the outcome in a case was just while not agreeing with any number of pathway decisions the court made in the course of that litigation. Given the dispositive nature of gateways, a party or lawyer who disagrees with a court's gateway decision is far less likely to agree with the result of the case.

Appealability. Gateways' appealability offers an extra layer of protection against unjust outcomes: Because pathway decisions are not dispositive, there is no final judgment and no immediate appellate review.[238] But, for most gateways, the protection of appellate review is only available when the gateway is closed (and the case is dismissed). When the gateway is left open—and the parties can proceed to discovery or trial—the losing party cannot appeal.[239] As a result, the Court's decision in *Iqbal* to make it more difficult to pass through the pleading gateway did nothing to address Justice Scalia's concern that a district court judge would

236. *See* Phillip Carrizosa, *Rights Lawyers Most Frequent Rule 11 Targets*, L.A. DAILY J., Sept. 25, 1992, at 1 (stating that Ninth Circuit judges believe motions to dismiss and motions for summary judgment are the most effective tools to address meritless lawsuits); Elizabeth C. Wiggins et al., *The Federal Judicial Center's Study of Rule 11*, 2 FJC DIRECTIONS, Nov. 1991, at 3, 21, 29 (stating that over 50 percent of judges surveyed reported that motions to dismiss and motions for summary judgment are "very effective" but that only a small fraction of judges—between 6.6% and 11.7%—reported that Rule 11 motions are "very effective" at deterring groundless complaints, answers, and motions).

237. *See supra* note 204 and accompanying text (noting that the volume and cost of discovery is often tied not to the merits of the case but to other factors including the number of parties involved, the number of claims, the subject matter of the dispute, the amount in controversy, the importance of monetary stakes, and the structure of attorney representation).

238. *See* Yeazell, *supra* note 15, at 660–61 (observing a shift in power from appellate to district courts as district judges make more pathway decisions that are insulated from appellate review).

239. One exception, mentioned *supra* note 26 and accompanying text, is class certification, which is appealable regardless of which side prevails.

determine whether and when Ashcroft and Mueller would be deposed.[240] If a district court judge denies a motion to dismiss, the case will proceed to discovery and appellate review will be unavailable until a final judgment in the case.[241] To the extent that the Supreme Court, in issuing *Iqbal*, was concerned about the unchecked power of a district court to allow high level defendants to be deposed absent appellate oversight, this power remains unchecked for every case in which a motion to dismiss is denied.

Discretion and tailoring. Courts' broad pathway discretion can lead to widely varying results. Anecdotes and studies show that, even when presented with the same case, judges may exercise their pathway discretion in dramatically different ways.[242] Gateway rules have been applauded for requiring judges to apply bright line rules and affording them less discretion.[243] Yet, the Supreme Court's decisions over the past thirty years have muddied gateways' bright line rules and made them more difficult to follow. Before *Iqbal* and *Twombly*, judges assessing a motion to dismiss needed only to decide whether the allegations in a plaintiff's complaint, assumed to be true, stated a claim for relief. After *Iqbal* and *Twombly*, judges must assess whether the allegations in the complaint are "plausible"—a process the Court described as a "context specific task that requires the reviewing court to draw on its judicial experience and common sense."[244] Before the summary judgment trilogy, judges needed only to decide whether there was a genuine dispute of material fact. After the trilogy, courts must evaluate the "caliber and

240. *See supra* note 82 and accompanying text (describing this exchange during oral argument in *Iqbal*).

241. If the motion to dismiss is made on qualified immunity grounds, as it was in *Iqbal*, there can be interlocutory appeal. But the appeal should be limited to a consideration of qualified immunity, not whether pleading requirements were met. *Cf.* Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009) (deciding, on an interlocutory appeal of qualified immunity, that the pleading requirements were not met).

242. E. Donald Elliott has described a controlled experiment at a judicial conference resulting in dramatically different results depending on the judge—"Based on her intuition that the case had little merit, one trial judge would have required thousands of plaintiffs to file individual, verified complaints—a move that would have made it all but impossible for the plaintiffs' lawyer to pursue the cases. On the other hand, another trial judge confronting exactly the same hypothetical case would have ordered the defendants to create a multi-million dollar settlement fund." Elliott, *supra* note 34, at 317. Note that this experiment was conducted at a time when class certification decisions had more pathway characteristics and judges were not to assess the merits as part of their class certification decision. *See* Part II.A.2 (describing these changes).

243. *See* Elliott, *supra* note 34, at 311 ("[D]ecisions to narrow issues through managerial techniques are based on fundamentally different kinds of considerations from those that justify granting traditional motions to narrow issues. A judge who narrows the issues in a case by granting a motion to dismiss or for partial summary judgment must act according to law and provide a reasoned justification, subject to appellate review. The idea that decisions to foreclose certain issues and lines of inquiry are 'managerial,' on the other hand, implies that these decisions are not based on the legal merits of the parties' positions.").

244. *Iqbal*, 556 U.S. at 679.

quantity" of evidence offered by both sides and assess whether the plaintiff has offered more than a "scintilla of evidence" to support her claims.[245] Not surprisingly, given the doctrines' complexity, available evidence suggests that judges inconsistently apply current standards for summary judgment and plausibility pleading.[246] Gateways—as currently crafted—may be no better than pathways at limiting variation across cases.

Courts' wide discretion on the pathways also has a bright side: Pathways give courts the ability to pinpoint litigation concerns and tailor resolutions to pathway disputes that address those concerns. As just one example, pathway rules give courts greater discretion to take into account inequities in adversaries' resources. Although courts cannot require parties to spend a limited number of hours preparing summary judgment briefs, courts can limit the number of depositions each party can take or shift the costs of producing discovery.[247] Indeed, the Advisory Committee's 1983 notes for Rule 26(b) explicitly encourage courts, when deciding whether to limit discovery, to consider "the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests."[248] We do not know how often judges abuse their discretion along these pathways, but we do know that, when used correctly, pathways may be better suited than gateways to target and resolve problematic aspects of a nonfrivolous case.

Formality. Pathway decisions' informality may offer more opportunity for unfettered discretion. Because gateway motions are likely to be more extensively briefed, gateway decisions are more likely to be published, and decisions closing gateways are subject to immediate appellate review, gateway adjudications might be more carefully considered overall. Yet the formality of gateway decisionmaking also means that gateway decisions take more money and time to adjudicate than pathway disputes.

To summarize, gateways' dispositive nature reduces cost and delay by preventing meritless cases from proceeding, but may not dispose of the right cases as a matter of design or application, and gateway briefing adds time and delay to the litigation. Pathways' nondispositive, context-specific nature can lead courts to use

245. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252–54 (1986).

246. *See supra* notes 231–233 and accompanying text (describing criticisms of summary judgment adjudications); *see also* Alex Reinert, *The Impact of* Ashcroft v. Iqbal *on Pleading*, 43 URB. LAW. 559, 577 (2011) (observing that "lower courts' treatment of *Iqbal* is hardly a model of consistency, especially as it relates to state of mind allegations").

247. *See* Elliott, *supra* note 34, at 331–32 ("[M]anagerial judging might enhance the quality of civil justice in some cases by protecting clients from the excesses of their own lawyers" and by being able to "identify and repress strategic manipulation of costs and delay" by opposing counsel).

248. FED. R. CIV. P. 26 advisory committee's note (1983).

their discretion in widely varying—and largely unchecked ways—but also allows courts to address problematic aspects of a case without dismissing it altogether. Individual pathway decisions also take less time and money to adjudicate.

What is there to take from these general observations about the strengths and weaknesses of gateways and pathways? Clearly, neither type of rule is a silver bullet that can cure the imperfections of modern civil procedure, and neither type of rule should be written off as a useless appendage. Pathway rules, when applied effectively, can pinpoint problems of cost, delay, and unjust outcomes—but it is far from clear how often judges use these tools to their best advantage. And pathway rules, when improperly designed or applied, may be counterproductive.[249] Gateways can effectively dispose of meritless cases, but gateway adjudication is expensive, time consuming, and fundamentally ill suited to address concerns of cost and delay unrelated to the merits of the underlying claims. And because closed gateways primarily dispose of plaintiffs' claims, they frustrate other principles underlying our procedural system, including the right to a day in court and a trial by jury.[250] Accordingly, although gateways have an important role to play in our procedural system, the Supreme Court's repeated fortification of gateways in distrust of the pathways that lie on the other side of those gates seems misguided. Well-designed and well-implemented pathway rules can effectively address concerns about cost and delay during discovery and other pretrial proceedings—the periods, both the Court and the Judicial Conference seem to agree, that raise the most concern. Although the Judicial Conference's pathway amendments and litigation manuals have not eradicated discovery abuse or wasteful pretrial proceedings, they appear, incrementally, to be addressing these problems.

B. The Promise of Hybrid Reforms

Another promising approach may be to craft hybrid rules that draw from characteristics of gateways and pathways and improve on the Rules' current design. Recall that, by my definition, gateway rules lead to dispositive, appealable, grant-or-deny decisions based on the facts of the case and governing legal standard, and more often are formally requested by the parties and rendered in opinions. Pathway rules, in contrast, lead to nondispositive, not immediately appealable

249. *See, e.g.*, *supra* notes 142–146 and accompanying text (describing criticisms of the 1993 amendments to Rule 26(a)); *supra* notes 150–151 and accompanying text (describing criticisms of the 1983 amendments to Rule 11).

250. *See* Miller, *supra* note 14, at 359–60 (arguing that rights to judicial access, a day in court, and a jury trial have been frustrated by increasing judicial "stop signs," including *Daubert*, pleading standards, and class certification standards).

decisions, are applied in a flexible manner based on litigation-specific considerations, and more often result in informal applications by the parties and decisions by the judge.[251] But, as I made clear in Part I, the six characteristics that distinguish gateways from pathways are not intrinsically bound. Indeed, gateways' and pathways' current combination of characteristics may enhance costs, delay, and the danger of unjust outcomes.

For example, several gateway characteristics compound the cost and time needed to litigate at the gateways: The motions are likely briefed, decisions are likely published, and the decisions are both dispositive and appealable. Each of these factors will increase the amount of time and money taken to brief and decide issues at the gateways. And several characteristics of pathways increase the chances of unjust outcomes: The decisions are informally requested, applied with a great deal of judicial discretion, and are not subject to appellate review. Each of these factors will increase the likelihood of wide variation in application.

What if, instead, the characteristics that currently distinguish gateways from pathways were recombined to create rules that more effectively targeted specific concerns of cost, delay, and unjust outcomes? A few examples of hybrid rules follow. Whatever one thinks of the merits of these particular proposals, they illustrate the wider range of procedural tools available once we disaggregate the characteristics of gateways and pathways.

The appealable pathway decision. Although pathway decisions are not appealable absent a final judgment, they can sometimes be dispositive in effect. One example, offered by courts and scholars, is the concern that courts' pathway decisions may elevate the costs of discovery in ways that force unjust settlements. In order to address these concerns, pathway decisions that are case-dispositive in effect could be subject to appellate review.

Imagine a court were to demand that a defendant produce e-discovery at the cost of tens of thousands of dollars. The defendant, evaluating the costs of discovery as compared to the costs of settlement, might conclude that settling would be more cost effective. In this instance, the defendant could reach a settlement in principle with the plaintiff, conditioned on the defendant's right to appeal the discovery order. The cost of the appeal would be factored into the settlement—so the defendant would have to pay the plaintiff a premium for the right to appeal—but if the defendant truly believed the pathway rule was wrongly decided, he might consider the right to appeal worth the cost. Settlement would not, following this proposal, preclude appellate review. But discovery decisions

251. *See supra* Part I for a detailed description of the six distinct characteristics of gateways and pathways.

would not likely flood the appellate courts because the appealing party would need to pay a settlement premium for the review.

The context-specific dispositive motion. Another hybrid approach is to amend gateway rules so that judges can make context-specific decisions about the application of the rules based on the particularities of the litigation. Richard Nagareda suggested that the *Twombly* decision be modified to require plausible pleading in circumstances in which information is publicly available but not in situations in which the relevant information is privately held.[252] In recent years, courts have followed Nagareda's approach even though *Twombly* and *Iqbal* do not explicitly endorse a context-specific application of plausibility pleading.[253]

Steven Gensler and Judge Lee Rosenthal have offered a similar hybrid proposal regarding summary judgment. Gensler and Rosenthal have criticized modern summary judgment practice because it reflects none of the "custom tailoring and communication" characteristic of what I call the pathways.[254] Instead, they have written, "summary-judgment practice seems to have missed the case-management revolution."[255] Gensler and Rosenthal have suggested integrating "case-management values" into summary judgment practice by holding premotion conferences: Courts could quickly dispose of futile motions before briefing, identify issues that need only limited briefing, and focus motion practice on issues that require full briefing.[256] Gensler and Rosenthal have also suggested incorporating summary judgment motion practice into early case planning and encouraging judges to hear oral argument so that the court can better "tailor the resolution process to what works best for resolving that particular motion."[257] Courts might even apply cost-shifting techniques used when handling discovery: If, for example, a party insists on filing a gateway motion the court has discouraged, the cost of the opposing party's brief could be shared by the parties or borne by the other side in an effort by the court to "identify and repress strategic manipulation of costs and delay."[258]

These proposals, in my view, improve on current design. Conditioning the Rule 12(b)(6) standard on whether relevant information is publicly available safeguards against the dismissal of meritorious claims. And increased communication about and context-specific assessment of proposed summary judgment motions can weed out motions that need not be filed, save time and money on

252. *See* Nagareda, *supra* note 12, at 681–82.
253. *See* Reinert, *supra* note 246, at 565 (observing that "courts have seemed somewhat willing to forgive thin pleadings when the extent of informational asymmetry between the parties is high").
254. Gensler & Rosenthal, *supra* note 3, at 520.
255. *Id.*
256. *Id.* at 520–21.
257. *Id.* at 521.
258. Elliot, *supra* note 34, at 332 (describing the role of a managerial judge during discovery).

motions that can be resolved quickly, and focus attention on issues central to the case. This is not to say that judges should have free rein to decide when and whether to apply the Rules: Such a proposal could lead to doctrinal incoherence and a piecemeal dissolution of transsubstantivity as courts apply different standards to different types of cases. But the type of context specificity proposed by Nagareda, Gensler, and Rosenthal seems well suited to address targeted concerns about the pleading and summary judgment standards without opening the floodgates.

The formalized pathway decision. Another hybrid—the formalized pathway rule—could be used to increase uniformity in pathway decisions. For example, Jonathan Molot has encouraged judges to write opinions in significant discovery orders so that courts would "begin to set precedent regarding the sequence and quantity of discovery for particular categories of cases (e.g., commercial disputes, products liability claims, or employment discrimination suits) and particular types of disputes within those categories (e.g., complex facts, multiple parties, high dollar amounts at stake)."[259] Encouraging written opinions in discovery and other pathway decisions might be, as Molot has suggested, "a sensible first step"[260] toward more uniformity on the highly discretionary pathways.

It is unclear that this proposal would improve on current design. It is hard to imagine that discovery rulings would be binding on other cases, given their context-specific nature. And requiring formalized decisions would increase the time spent on such determinations. Assessment of this proposal should also take into account the extent to which other sources of guidance for trial courts, including reports by the Federal Judicial Center about best practices for pretrial case management, fulfill this need.[261]

The merits-based, nondispositive motion. A proposal I consider less promising than the other proposals I have mentioned is one to increase the use of "informative motions"—statements of a case's perceived merits that can be used to inform settlement decisions without disposing of the case.[262] Geoffrey Miller, for exam-

259. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 90 (2003).

260. *Id.*

261. *See* Gensler, *supra* note 50, at 683–84 (describing various reports written by the Federal Judicial Center, the Federal Courts Study Committee, and the U.S. Judicial Conference reflecting the best ways for courts to use the Rules).

262. *See* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 167–68 (recommending that courts enter a "preliminary judgment"; a "provisional judgment on the merits of the case based on the information provided by the parties" that would "convert into a final judgment after the expiration of a reasonable period of time," during which the parties could object and, upon objection, return the case to the pretrial litigation phase); Nagareda, *supra* note 12, at 653 ("A world of vanishing trials invites exploration of whether procedural doctrine might benefit from the development of additional pretrial motions that are not dispositive but, rather, informative—

ple, has suggested that courts could provide a "preliminary judgment" on the merits of the case that could become final if neither side objected.[263] Unlike other suggested reforms, the merits-based, nondispositive motion may not improve on the Rules' current design.

As a preliminary matter, it is unclear that such reforms are necessary. Lawyers are constantly evaluating a case's merits: when accepting a case on contingency, crafting discovery plans, and considering settlement offers. Lawyers surveyed by the Federal Judicial Center overwhelmingly reported that "the disputed issues central to [cases are] adequately narrowed and framed for resolution" by the end of discovery—and before summary judgment.[264] So lawyers develop a point of view about the merits of their cases without the assistance of a court's preliminary judgment. A judge's assessment of a case's strengths and weaknesses may be useful because it offers an outsider's evaluation of case value. If so, the question then becomes whether formally issued "preliminary judgments" would be more useful to litigants than the informal assessments of merit and value that judges already offer during pretrial conferences and settlement negotiations.

Against any additional potential usefulness of these preliminary judgments must come consideration of their accuracy and cost. Given courts' inaccuracies making summary judgment and other gateway decisions, there is reason to be skeptical that judges can accurately predict what a jury might decide. And given the cost and time taken to prepare and resolve summary judgment decisions, formally written "preliminary judgments" or "informative motions" would replicate the costs of summary judgment motions or add additional costs to the system if both types of motions were allowed. Any lawyer advocating zealously for their client would want to put significant effort into preparing materials that would aid the judge's decision. And the time taken by the judge to assess and write a decision would also take significant resources. If the judgments were less formally written, they would cost less but also might be indistinguishable from what judges, magistrates, and mediators already do orally in settlement conferences. Although more study would be necessary to evaluate this hybrid proposal, I fear that merits-based, nondispositive motions would lead to additional cost and delay without substantially improving case outcomes.

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motions that do not speak to whether trial may occur but seek instead to inform directly the pricing of claims via settlement."); *see also* Glover, *supra* note 60, at 1766 (modifying Miller's proposal such that a court's "preliminary judgment that is issued after discovery on a discrete issue under a targeted discovery regime should directly inform the allocation of additional discovery entitlements").

263. Miller, *supra* note 262, at 167.

264. *See* FJC 2009 ATTORNEY SURVEY, *supra* note 188, at 47 fig.22.

C. The Procedure of Rulemaking

Any future Rules amendments—be they new gateways and pathways or hybrid reforms—should be guided by an understanding of each rule's characteristics and by evidence about the effects of prior gateway and pathway modifications. Accordingly, a final observation draws on the analysis in Part II and concerns the relative capacities of the Judicial Conference and the Supreme Court to engage in this type of evidence-based rulemaking. Others have noted that the Supreme Court's recent procedural decisions have violated the Rules Enabling Act of 1934, which authorizes the Judicial Conference to make and amend the Rules.[265] Evidence from the past thirty years indicates that the Judicial Conference is also better institutionally situated than the Court to engage in procedural rulemaking.

Amendments by the Judicial Conference—at least in recent years—have been the product of extensive study, deliberation, and review. Over the past few decades, the Federal Judicial Center has surveyed attorneys and judges and examined dockets and closed cases in an effort to understand aspects of the litigation system and consider possible Rules changes.[266] And any proposed amendments require "notice, comment, and a good deal of consultation among bench and bar"—a process that, though sometimes criticized as "creaky and sometimes unimaginative or worse," has the benefit of "heading off ill-considered quick fixes."[267] Over the past thirty years, the Judicial Conference has repeatedly amended the Rules, been criticized for the amendments, studied the effects of the amendments, and instituted subsequent reforms to improve on their prior efforts.[268]

The Court's decisions to fortify gateways, in contrast, have been made without any systematic efforts to understand the strengths and weaknesses of civil

265. *See* Carrington, *supra* note 13, at 656–67.

266. For an overview of empirical research informing Rules amendments, see Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002). Even those who sometimes disagree with the Federal Judicial Center's methodology and findings would agree that the Judicial Conference has endeavored to engage in evidence-based rulemaking.

267. Clermont & Yeazell, *supra* note 2, at 847.

268. *See, e.g.*, *supra* notes 142–147 and accompanying text (describing amendments to Rule 26(a) in 1993 that required initial disclosure of all relevant evidence, concerns that the broad rule would increase discovery cost and delay, and the subsequent amendment of Rule 26(a) in 2000 so that parties would not be required to disclose harmful information); *supra* notes 149–152 and accompanying text (describing amendments to Rule 11 in 1983 that made it easier to seek sanctions against attorneys, an increase of satellite litigation around sanctions, and the subsequent amendment of Rule 11 in 1993 so that parties could more easily resolve sanctions disputes without involving the court).

process.[269] The small number of cases heard by the Court cannot possibly offer an informed view of the litigation landscape more generally. Given that most pathway decisions cannot be appealed, the cases that reach the Court are far more likely to concern gateway rules. And cases like *Iqbal*, that do catch the Court's eye, have a tendency to be outliers. So, unless the Justices make a point of studying contemporary civil practice, they may well hear only about the most unusual of cases and be poorly situated to understand how gateway and pathway rules regularly function.

The Court's decisions suffer from a more fundamental flaw: a lack of understanding about the text and basic structure of the Rules. The Court in *Twombly* relied on Judge Easterbrook's contention in a 1989 article that judicial case management did not work but took no notice of the 1993 amendments to the Rules that attempted to address Easterbook's concerns.[270] During oral argument in *Iqbal*, the Justices demonstrated little understanding of which pathway rules might be used to address inefficiencies in the system, much less the degree to which they worked. Justice Breyer asked the respondent what power district court judges had to limit litigation of meritless cases, observing:

> Certainly, there have been many cases where, for whatever reasons, the plaintiffs included allegations that were just factually very unlikely. I want to know where the judge has the power to control discovery in the rules. That's—I should know that. I can't remember my civil procedure course. Probably, it was taught on day 4.[271]

The Court's gateway modifications were similarly untested. Perhaps unsurprisingly, these gateway rules—unmoored by empirical study or a basic understanding of the structure of civil process—have proven less than effective at accomplishing their intended goals. The Court could endeavor to base its decisions on a more robust understanding of modern civil litigation and on empirical studies examining the Rules' effects. However, even if the Court better understood the structure and text of the Rules, case-by-case adjudication is a less preferable means of designing and maintaining a procedural system. The Judicial Conference is better situated to study the state of civil litigation, design Rules amendments that address pervasive litigation ills, evaluate the effects of those amendments, and adjust the Rules when they fall short.

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269. Clermont & Yeazell, *supra* note 2, at 848 ("It is not uncommon for empirical scrutiny to contradict things that 'everyone knows' about litigation, and so it is possible to create very bad procedure by failing to verify folk wisdom. Data, if available, would be key in deciding whether pleading should play a greater gatekeeping role." (footnote omitted)).

270. *See* Carrington, *supra* note 13, at 649.

271. Transcript of Oral Argument at 17–18, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015).

CONCLUSION

Over the past thirty years, the Judicial Conference and the Supreme Court have modified what I call gateway and pathway rules to address concerns about rising costs, delay, and unjust outcomes. The Court and Conference have taken significantly different approaches to achieving these goals: The Court has fortified litigation's gateways to prevent cases from getting to the pathways on the other sides of the gates and the Judicial Conference has given courts additional powers to shepherd cases along the pathways. Empirical evidence offers reason to question both the Court's reliance on gateways and criticism of judges' pathway decisionmaking. But the primary goal of this Article is not to condemn particular Court decisions or laud particular Rules amendments. Instead, its aim is to focus—as Stephen Yeazell has encouraged us to do—on the connectedness and mutability of the Rules. By understanding the characteristics of gateways and pathways and their strengths and weaknesses, examining the Rules in action, and experimenting with hybrid rules that have both pathway and gateway characteristics, we can best hope to create a procedural system that will "secure the just, speedy, and inexpensive determination of every action and proceeding."[272]

272. FED. R. CIV. P. 1.