

Procedure's Ambiguity

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By leaving the meaning of a statute—or procedural rule—undecided, ambiguous appellate decisions create space for lower courts to adopt a blend of conflicting approaches, yielding an average result that trims between competing preferences. While compromising in this way may seem to flout basic norms of good judging, this Article shows that opaque “compromise” opinions have plausible normative appeal, given premises about good interpretation often labeled “pluralist.” Judicial pluralists think courts should decide cases in ways interest groups would, hypothetically, accept. To demonstrate the pluralist appeal of opaque decisions, I develop, in turn, two related claims: First, interest groups, under the right conditions, would prefer that courts interpret ambiguous statutes (or procedures) in a way that compromises between contending interests, giving each side some of what it wants. Second, sometimes, interest groups would also prefer ambiguous appellate interpretations—creating space for a blend of conflicting lower court approaches—when that is the only form compromise can take. When both are true, opaque decisions have powerful pluralist appeal.

*Appreciating the pluralist appeal of opaque decisions, in turn, pays off by providing the missing normative foundation for some of the Supreme Court’s most confounding, inscrutable, and reviled procedural decisions: the *Celotex* trilogy, *Bell Atlantic v. Twombly*, and *Ashcroft v. Iqbal*.*

INTRODUCTION

Few Supreme Court opinions are as deeply inscrutable as *Bell Atlantic v. Twombly*¹ and *Ashcroft v. Iqbal*.² To state a claim, these decisions tell us, plaintiffs must plead facts that establish a “plausible” entitlement to relief.³ Yet, the Court

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1. 550 U.S. 544 (2007).

2. 129 S. Ct. 1937 (2009).

3. *E.g.*, *Twombly*, 550 U.S. at 570 (holding that a complaint, to satisfy Rule 8(a), must

has explained so little about the content of this new “plausibility” test that, a year and a half after the Court’s decision in *Twombly*, Judge Stephen Williams noted, “I have yet to meet someone who knows what [the Court’s decision] means.”⁴ And it’s not the first time the Supreme Court has issued puzzling procedural decisions. Over twenty years ago, the Court, in the “*Celotex* trilogy,”⁵ altered federal summary judgment standards in a similarly perplexing way, replacing older, bright-line rules with fuzzy, indeterminate tests that commentators describe as “cryptic”⁶ and “obscure.”⁷

While few have found something good to say about these decisions’ ambiguity, the claim developed in this Article is that ambiguity is, in fact, their greatest virtue. Given the universal condemnation of these cases’ murkiness, this claim may surprise. But celebrating unclear decisions is nothing new. From *Griswold v. Connecticut*,⁸ to *Romer v. Evans*,⁹ to *United States v. Lopez*,¹⁰ to *District of Columbia v. Heller*,¹¹ the Supreme Court decides cases in ways that “leav[e] things undecided.”¹² And when it does, influential minimalists cheer it on.

While defending opaque cases is nothing new, defending *Twombly* or *Iqbal* requires developing a new normative case for opaque decisions—one that pushes beyond minimalists’ usual arguments. Minimalists say that the Supreme Court, by “leaving things undecided,” achieves a number of goods: it limits judicial intrusions on the political process, and, by remitting difficult questions to the political process, it paves the way for democratic consensus building about contested questions of constitutional law.¹³

But murky procedural decisions can’t be explained in these terms. Fuzzy interpretations of procedural standards don’t limit judicial intrusions on the political process—they limit appellate intrusions on lower court discretion. Nor are opaque decisions a catalyst for consensus building about procedure. To the

plead “enough facts to state a claim to relief that is plausible on its face”).

4. Judge Stephen F. Williams, D.C. Circuit Court of Appeals, Panel Discussion at the American Enterprise Institute for Public Policy Research: Life Without Lawyers (Jan. 27, 2009), available at <http://app2.capitalreach.com/esp1204/servlet/tc?cn=aei&c=10162&s=20271&e=10392&&espmt=2>.

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

6. E.g., Martin Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1356 (2005) (characterizing Rule 56 and *Celotex* in this way).

7. *Id.* at 1344; see also *infra* notes 49–63 and accompanying text.

8. 381 U.S. 479 (1969).

9. 517 U.S. 620 (1996).

10. 514 U.S. 549 (1995).

11. 128 S. Ct. 2783 (2008).

12. See Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 9, 23 (1996) [hereinafter Sunstein, *Leaving Things Undecided*] (discussing *Lopez* and *Romer*); Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 267 (2008) [hereinafter Sunstein, *Second Amendment Minimalism*] (discussing *Griswold* and *Heller*).

13. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 46–54 (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME].

contrary, they breed intractable disagreement among lower courts about the meaning of procedural standards.¹⁴

The key to defending cases like *Twombly* lies, instead, with a different virtue of opaque decisions. By leaving a problem “to be worked out without authoritative solution,”¹⁵ as Learned Hand put it, opaque appellate decisions can also serve as a vehicle for *compromise*. They create space for lower courts to adopt a blend of different, conflicting interpretations of a statute (or procedure)—yielding an average result that compromises, or “trims,” between competing preferences.¹⁶

While compromising, or trimming, in this way may seem to flout basic norms of good judging, opaque “compromise” opinions have plausible normative appeal, given premises about good interpretation often labeled “pluralist.”¹⁷

Judicial pluralists come in many stripes, but share some basic beliefs: They think values are plural and incommensurable.¹⁸ In the face of conflict between

14. See, e.g., Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 863 (2007) (finding that summary judgment practice both before and after *Celotex* has “var[ied] greatly in activity over time, across courts, and across types of cases”); see *infra* notes 146–53 and accompanying text.

15. LEARNED HAND, THE BILL OF RIGHTS 15 (1958).

16. For a discussion of trimming, see Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049 (2009) [hereinafter Sunstein, *Trimming*]. Sunstein presents trimming as an alternative to minimalism: minimalists leave things undecided, while trimmers, he says, reject leaving things undecided in favor of adopting moderate or intermediate positions. *Id.* at 1055–56, 1080. As I show below, though, leaving things undecided in a minimalist fashion can itself be a trimming strategy. For a discussion of ambiguous decisions as a form of compromise, with a focus on pleading standards in securities law, see Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002).

17. For a general discussion of judicial pluralism, see Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621 (1994). As discussed below, most academic minimalists are not pluralists, at least in the sense used in this Article, which emphasizes the need for judicial compromise between the claims of competing interest groups. For a notable exception, see Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961 (2001). Like many scholars who might be classified as “minimalists,” Schwarzschild does not expressly claim the minimalist mantle. See Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1775–81 (2004) (discussing how many minimalists do not expressly identify themselves as such). Like all minimalists, Schwarzschild advocates that courts decide less rather than more. But unlike other minimalists, he defends this claim from an explicitly pluralist standpoint. Schwarzschild, *supra*, at 973 (“When courts decide fewer public questions, there is space for a more pluralistic patchwork of political outcomes . . .”). To be sure, other minimalists, like Sunstein, occasionally discuss pluralist-sounding themes—emphasizing, say, the need to compromise between competing interests. See, e.g., Sunstein, *Trimming*, *supra* note 16, at 1080 (asserting that “minimalists try to minimize the harm to losers, in a way that reflects a principle of civic respect”). Even so, Sunstein is generally hostile to pluralism as a normative model, at least in the form that is the focus below, and so has left the pluralist case for minimalism largely undeveloped. E.g., Merrill, *supra*, at 622 n.5 (noting that Sunstein “reject[s] pluralism as a normative model”).

18. See Merrill, *supra* note 17, at 629 (“Some pluralists . . . think that . . . any statement

different versions of the good, they are hostile to institutional attempts to impose one set of preferences on those who do not share them.¹⁹ They think courts should, instead, show equal respect to contending interest groups.²⁰ Their ranks include judges like Learned Hand and Chief Justice William Rehnquist.²¹

In particular, pluralists think courts show equal respect to interest groups by deciding cases in ways to which those groups would, hypothetically, assent.²² To develop the pluralist appeal of opaque decisions, this Article, in turn, develops two related claims: First, interest groups, under the right conditions, would prefer that courts interpret ambiguous statutes (or procedures) in a way that compromises between contending interests, giving each interest group some of what it wants.²³ Second, sometimes, interest groups would also prefer ambiguous appellate interpretations—creating space for a blend of conflicting lower court approaches—when that is the only form that compromise *can* take.²⁴ When both claims are true, opaque decisions have powerful pluralist appeal.

about the common good reduces to a statement about the speaker's personal tastes and preferences.”); *see also* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 24–26 (2008) (noting that statutory interpretation must confront the fact that “we all harbor different conceptions of what the right thing is” and have no “independent basis” for determining which is correct); Schwarzschild, *supra* note 17, at 966 (“[L]egitimate human values and goals are many, often incompatible, and not reducible to any single overarching principle or Good.”); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544, 1554 (1988) [hereinafter Sunstein, *Republican Revival*] (contrasting republicanism, which “reject[s] ethical relativism” and “skepticism,” and “posit[s] the existence of a common good,” with pluralism, which views the notion of a common good as “mystical or tyrannical” and is, accordingly, “indifferent among preferences”).

19. *See, e.g.*, Schwarzschild, *supra* note 17, at 973 (suggesting that pluralists resist the “heavy social pall of uniformity”).

20. *See, e.g.*, ELHAUGE, *supra* note 18, at 25 (arguing that, given “reasonable disagreements about what is just and desirable,” the political and judicial process should endeavor to show “equal respect to all persons”).

21. Pluralist themes are evident in Hand’s published writings and speeches. *See* Merrill, *supra* note 17, at 643 n.68 (“Hand too shared many of the tenets of what I have called ultrapluralism . . .”). For discussion of Rehnquist’s pluralism, *see id.* at 631 (characterizing Rehnquist as an “ultrapluralist”).

22. *See, e.g.*, ELHAUGE, *supra* note 18, at 24–25 (claiming his pluralist interpretive theory is consistent with a “fundamental social contract,” under which courts must adopt interpretive approaches that satisfy the condition that “the expected good consequences outweigh the bad” for competing interest groups).

23. “Interest groups,” as I use the term here, are not limited to organized lobbying groups. Rather, the term is used to loosely refer to any identifiable group of preferences that influence the enactment process, including the preferences of those who participate in legislation or rule making and the preferences of those who form the intended audience for a statutory (or procedural) enactment. In the procedural context, this includes not only organized lobbying groups for repeat-player litigants, like the American Trial Lawyers’ Association, or the Chamber of Commerce, but academics and others who contribute to, and influence, the rule-making process, and who have preferences distinct from repeat-player litigants, often informed by larger theories of procedural justice. *See infra* notes 217–33, 246–77 and accompanying text.

24. This idea is consistent with views expressed by some pluralists. *See* HAND, *supra*

Pluralism, in turn, provides the missing normative foundation for the *Celotex* trilogy, *Twombly*, and *Iqbal*. The pluralist case for compromise interpretations, I will show, applies with full force to the ambiguous Federal Rules governing summary judgment and pleading. And, ambiguous appellate interpretations of these Rules are, in turn, the only way to compromise between contending interests. This is true whether interest group conflict in the procedural arena pits trial lawyers against corporate defendants or involves competing views of procedural justice. In either case, the *Celotex* trilogy, *Twombly*, and *Iqbal*, by leaving things undecided, do what's necessary to conciliate conflicting procedural interests. They serve important pluralist ends.

The plan of the Article is as follows. Part I spotlights the *Celotex* trilogy, *Twombly*, and *Iqbal*. These decisions, I will show, leave much about the content of summary judgment and pleading standards undecided. Even so, the usual academic justifications for opaque decisions do not apply to them. How, then, can they be justified?

Doing so requires a pluralist turn, and Part II, accordingly, lays the foundations of a pluralist case for the *Celotex* trilogy, *Twombly*, and *Iqbal*. The first half of Part II explains why, and when, pluralists think courts should compromise, or “trim,” between competing interests. The second half of Part II turns to show why opaque decisions sometimes appeal to pluralists as a trimming strategy.

Part III returns to extend these claims to illuminate the *Celotex* trilogy, *Twombly*, and *Iqbal*. The final Part concludes.

The argument that follows, finally, is not intended as a definitive normative brief for the *Celotex* trilogy, *Twombly*, or *Iqbal*. The goal is more modest: to unpack a possible normative case for decisions that seem, to many observers, hard to defend. As Michael Seidman says, “[o]nly after exploring the best possible

note 15, at 15 (suggesting that it may be best to leave deeply divisive issues to be worked out “without authoritative solution”); Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC MONTHLY, Apr. 2005, at 79, 90 (noting that Rehnquist, in the face of divisive debates, was “less theoretical . . . and [didn’t] attempt to impose a general methodology across the board.” (internal quotation marks omitted)); see also Schwarzschild, *supra* note 17, at 966 (judicial pluralism embraces “the need for compromise and conciliation” between different versions of the good). The claim parallels those made by pluralists about political justice. Cf. ISAIAH BERLIN, POLITICAL IDEAS IN THE TWENTIETH CENTURY (1950), reprinted in LIBERTY 55, 92 (Henry Hardy ed., 2002) (defending the need to show equal respect to different views through “logically untidy, flexible and even ambiguous compromise” that gives each some of what it wants).

Grundfest and Pritchard, in particular, anticipate some of the claims made below. See *infra* notes 139, 180, 193 and accompanying text. Their focus, though, is empirical—they argue that legislative interest groups have incentives to muddy statutory meaning and that courts, in turn, have separate incentives, rooted in their own taste for discretion, to embrace ambiguous decision making, leading them to conclude that ambiguity “may have strong survival characteristics in our multi-branch legal regime.” Grundfest & Pritchard, *supra* note 16, at 636; *id.* at 649 (“Judicial tolerance of legislative ambiguity could . . . reflect a mutually advantageous exchange between the legislative and judicial branches.”). This Article combines some of their insights with pluralist theories of statutory interpretation to develop a new *normative* case that, under the right conditions, courts ought to engage in ambiguous decision making.

reasons why one *might* want to believe in [a judicial practice] . . . can we talk about whether one *would* want to hold such a belief.”²⁵

I. LEAVING THINGS UNDECIDED IN PROCEDURAL CASES

This Part sets up the question that is the focus of the Article. As Part I.A explains, the Court’s controversial interpretation of summary judgment standards in the *Celotex* trilogy, and its interpretation of pleading standards in *Twombly* and *Iqbal*, leave much about those standards undecided. As a result, they bear some comparison to decisions celebrated by minimalists. As Part I.B explains, however, they do not fit minimalists’ standard justifications for leaving things undecided. Can they be justified?

A. The Use of Ambiguity in Procedural Interpretation

Drafted at the height of 1930s technocratic confidence in the ability of federal trial courts to manage adjudicative process, and in the spirit of progressivism’s distaste for the formalism of the common law, the Federal Rules of Civil Procedure depart from procedural codes of the nineteenth century by embracing vague, discretion-conferring tests.²⁶

Indeed, one can almost pick a page at random in any copy of the Federal Rules and find abstract texts, and the abstraction increases in those rules that regulate the pivot points in civil adjudication: pleading,²⁷ amendment,²⁸ compulsory joinder,²⁹ summary judgment,³⁰ and control of the jury.³¹ Rejecting the formalistic nineteenth-century limits on amendment of pleadings, Rule 15 authorizes courts to grant leave to amend pleadings “when justice so requires.”³² Decades of labored interpretation make it easy to overlook the vagueness of Rule 56’s innovative authorization of summary judgment where discovery reveals no “genuine” issue for trial.³³ Rule 8(a)(2)’s delphic requirement that a complaint must include a short and

25. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1009 (1987) (emphasis in original) (making this point with a focus on the practice of judicial review).

26. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967 (2007) [hereinafter Bone, *Procedural Discretion*] (“Case-specific discretion has been at the heart of the Federal Rules ever since they were first adopted in 1938.”); Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002) (“Yet time and again, the Rules adhere to a pervading characteristic. The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis. . . . [V]ast discretion remains at virtually every turn.”).

27. FED. R. CIV. P. 8.

28. FED. R. CIV. P. 15.

29. FED. R. CIV. P. 19.

30. FED. R. CIV. P. 56.

31. FED. R. CIV. P. 50.

32. FED. R. CIV. P. 15(a)(2).

33. See, e.g., Redish, *supra* note 6, at 1356 (noting that the text of Rule 56 is “reminiscent . . . of a cryptic pronouncement by the Delphic oracle” and “ha[s] been largely

plain “showing” of “entitle[ment] to relief” is no more self-explanatory.³⁴ Examples can be easily multiplied.³⁵

Sometimes, federal courts fail to explain procedural decisions. Up to a point, there is nothing questionable about that. Because each case is different and material differences are often so varied and subtle that they cannot be catalogued in advance, it is often difficult to specify the conditions for many routine managerial decisions, even those with significance for the parties. For that reason, decisions granting permissive intervention, for example, are famously opaque, to the point that existing precedent is “of very little value.”³⁶ And, innumerable tiny and uncontroversial housekeeping decisions required by any civil adjudication—extensions of time to serve a complaint or file a motion, for example—are issued, quite reasonably, without any explanation.

In a few areas, however, the Supreme Court has formulated procedural standards in puzzling ways that spawn enormous controversy. Summary judgment is one. Pleading is another. Below, I provide an overview of the Court’s formulations of applicable standards in both areas.

1. The *Celotex* Trilogy

Jonathan Molot observes that the Supreme Court “tends to announce broad principles in earlier cases only to revise and narrow them in later ones.”³⁷ The Court’s summary judgment cases fit this pattern to a tee.

In *Adickes v. S.H. Kress & Co.*,³⁸ the Supreme Court severely limited the availability of summary judgment by requiring parties who do not bear the burden

irrelevant to the shaping of modern summary judgment doctrine”).

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

35. The same can be said of Rule 11’s authorization of sanctions “suffic[ient] to deter” repetition of improper pleading, FED. R. CIV. P. 11(c)(4); or of Rule 19’s directive that persons whose “interest” “as a practical matter” will be “impair[ed] or impede[d],” FED. R. CIV. P. 19(a)(1)(B)(i), must be joined “if feasible,” FED. R. CIV. P. 19(b); or of Rule 23’s condition that class actions for damages must be “superior to other available methods” of adjudication, and, indeed, many of the other requirements for aggregation, FED. R. CIV. P. 23(b)(3); or of Rule 59’s permission to set aside a jury judgment and order a new trial “for any reason for which a new trial has heretofore been granted,” which does not define the level of generality at which previous permissions should be interpreted, FED. R. CIV. P. 59(a)(1)(A); or of Rule 16’s broad authorization to trial courts to handle pretrial conferences in a manner that is “appropriate,” FED. R. CIV. P. 16(c)(2), and that facilitates the “just, speedy, and inexpensive disposition” of the action, FED. R. CIV. P. 16(c)(2)(P). Rule 16 converts many of the federal rules governing timing, sequencing, and even the subject matter of motion practice and discovery into discretionary default rules, so long as ad hoc, court-ordered variations are approved with litigant input at a pretrial conference and comport with the latitudinarian requirements of modern due process doctrine. *See* FED. R. CIV. P. 16.

36. 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1913 (2d ed. 1986); Bone, *Procedural Discretion*, *supra* note 26, at 1970 (asserting that in the procedural arena, “case precedent offers little constraint . . . because balancing tests and discretionary decisions are normally too fact-specific to support generalizations”).

37. Molot, *supra* note 17, at 1833.

38. 398 U.S. 144 (1970).

of proof at trial to support a motion for summary judgment with evidence that, if uncontradicted, affirmatively disproves key elements of the nonmoving party's claim—a burden that proved extremely difficult to meet, particularly in cases that turned on circumstantial evidence about state of mind.³⁹ If defendants met that high burden, an influential series of lower courts had held in the 1960s (with tacit support from the Supreme Court) that plaintiffs only needed to present evidence raising a “slight[] doubt” as to the facts.⁴⁰ Together, *Adickes* and the prevalent “slightest doubt” standard transformed summary judgment into a rarely utilized device.⁴¹

Pushback began in lower courts in the late 1970s as trial and circuit courts proved willing to ignore prior precedent, particularly in the large, complex cases that began to crowd federal dockets in the late 1960s.⁴² The pushback culminated in the Supreme Court's 1986 *Celotex* trilogy. In *Celotex Corp. v. Catrett*,⁴³ the Court limited *Adickes* by, in effect, confining it to its facts, recognizing that a defendant can meet its initial burden by “pointing out” a lack of evidence in the record supporting the plaintiff's claim, rather than affirmatively supporting the defendant's own side of the story.⁴⁴ And in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁴⁵ and *Anderson v. Liberty Lobby, Inc.*,⁴⁶ the two other prongs of the trilogy, the Court seemed to reject the “slightest doubt standard,” requiring nonmoving plaintiffs who bear the burden of proof at trial to come forward with “substantial” evidence raising more than a “metaphysical doubt”⁴⁷ about whether a “reasonable” jury would decide in their favor.⁴⁸

Friends and foes of the decisions have noted that the trilogy's “cryptic”⁴⁹ and “obscure”⁵⁰ language, while “interpreted by some to be defendant-oriented,” “sends

39. *Id.* at 158–60.

40. The most influential articulation of the “slightest doubt” test is found in *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (applying the slightest doubt test in the course of refusing summary judgment against a suit by a plaintiff against Cole Porter for plagiarism). The Supreme Court gave tacit approval to a restrained approach to summary judgment in *Poller v. Columbia Broadcast Systems, Inc.*, 368 U.S. 464, 472–73 (1962).

41. See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crises,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1023–24 (2003) (noting that until the late 1970s and early 1980s, “the reported decisions reveal few cases of any complexity adjudicated under Rule 56”).

42. *Id.* at 1028 (noting that there is some evidence that “lower federal courts were becoming more amenable to granting [summary judgment] . . . even before the 1986 trilogy”); *id.* at 1048 (noting that “by 1986 summary judgment may have been undergoing a transition from its . . . disfavored status to one of greater judicial receptivity”).

43. 477 U.S. 317 (1986).

44. *Id.* at 325.

45. 475 U.S. 574 (1986).

46. 477 U.S. 242 (1986).

47. *Matsushita*, 475 U.S. at 586, 588; see Redish, *supra* note 6, at 1334 (noting that *Matsushita* “seemingly adopt[ed] the ‘substantial evidence’ test”).

48. *Anderson*, 477 U.S. at 248.

49. Redish, *supra* note 6, at 1356.

50. *Id.* at 1344.

mixed signals.”⁵¹ *Celotex*, for example, “fail[ed] to provide clear guidance on what is required of the movant to satisfy the initial burden of production on a Rule 56 motion,”⁵² and, indeed, is silent about the scope of the new burden’s availability. A big part of the problem is *Celotex*’s exceedingly cursory treatment of *Adickes*: Rather than explicitly overturning *Adickes*, or explaining how *Celotex* and *Adickes* fit together, then—Associate Justice Rehnquist’s opinion states, cryptically, that “[i]t also appears to us . . . , on the basis of the showing before the Court in *Adickes*,” that *Adickes* reached the right outcome.⁵³ And, in the wake of *Celotex*, some circuits have treated *Celotex* as an “unusual” case and have implied that, in ordinary cases, a moving party must follow the direction of *Adickes*, by coming forward with evidence disproving a plaintiff’s case⁵⁴—a restrictive interpretation that recalls the “wariness (if not downright hostility) toward summary judgment [in the early Rule 56 case law].”⁵⁵ Others, while giving broader scope to *Celotex*, have divided over the stringency of the showing that *Celotex* anticipates a moving party must make.⁵⁶

The vague phrasings of *Matsushita* are even more opaque.⁵⁷ Because the Court’s application of the “metaphysical doubt” standard did not range beyond *Matsushita*’s unusual facts (involving a complicated antitrust claim), the decision does not “completely nail[] down” whether it is the slightest doubt or substantial evidence test that controls beyond its facts, or what, exactly, differentiates the two

51. Miller, *supra* note 41, at 1132–33.

52. *Id.* at 1039.

53. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

54. E.g., *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607 (11th Cir. 1991). The Ninth Circuit took a similar, somewhat restrictive view of *Celotex* several years later. *Nissan Fire & Marine Ins. Co. v. Fitz Cos.*, 210 F.3d 1099, 1105 (9th Cir. 2000). While these decisions reflect a minority approach to the defendant’s burden in reported decisions, reported decisions are notoriously poor indicators of the frequency or basis for summary judgment denials, and, in addition, some evidence suggests lower court practice is only loosely correlated with appellate interpretations of summary judgment standards. See, e.g., Cecil et al., *supra* note 14. The upshot is that much uncertainty remains about exactly how restrictively or broadly *Celotex* is being interpreted, on average, among lower courts.

55. William W. Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HAST. L.J. 1, 12–13 (1993).

56. See, e.g., Petition for Writ of Certiorari at 9–12, *Daubert v. Merrell Dow Pharm., Inc.*, 516 U.S. 869 (1995) (No. 95-198) (arguing that the Fifth, Seventh, Tenth, and Eleventh Circuits have interpreted *Celotex* to place no burden on the movant, while the remaining circuits have retained some form of burden on the movant); see also Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1048 (1989) (posing “the fundamental, unresolved question of summary judgment: What is the burden of production on the moving party, particularly the defendant, when this party will not have the burden of proof at trial?”); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 104 (2006) (providing an overview of the “significant ambiguities with respect to both the moving defendant’s burden and the nonmoving plaintiff’s burden”).

57. Redish, *supra* note 6, at 1350 (noting that neither the “substantial evidence” standard nor the “slightest doubt” standard are “self-defining”).

standards.⁵⁸ Lower courts, as with *Celotex*, have varied in their interpretations of the case's scope and effect, particularly where factual issues turn on proof of state of mind, credibility, or circumstantial evidence. Some courts continue to exhibit the traditional reluctance to grant summary judgment, while others claim broad license to grant summary judgment where, for example, inferences for or against the nonmoving party are "equally plausible,"⁵⁹ or the nonmoving party has failed to raise concrete doubts about the credibility of the moving party's witnesses.⁶⁰ The Federal Judicial Center's surveys of summary judgment practice have found, not surprisingly, that all summary judgment practice is local: disposition rates vary greatly from district court to district court, even within the same circuit, and even with respect to the same classes of claims.⁶¹

While the Court might have clarified its rulings by siding with one of several highly theorized accounts of summary judgment burdens in the contemporary academic literature, it avoided doing so.⁶² To the extent that the Court explained the decisions in light of larger policies, the trilogy offered cross-cutting advice: encouraging the use of summary judgment in *Celotex*, while urging caution in *Anderson*.⁶³ In the end, the trilogy is equivocal, providing fodder for both advocates and opponents of aggressive judicial use of the summary judgment device.

2. *Twombly* and *Iqbal*

The Court's pleading precedents follow the same pattern as its summary judgment precedents. In early decisions of first impression, the Court announces a wide principle; in later decisions, the Court, in the face of changing circumstances, "revise[s] and recast[s] the principles it has announced in earlier decisions" in an obfuscating way.⁶⁴

58. *See id.* at 1357.

59. Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 492 (1988) ("The Court's ambiguous opinion in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* might be read as suggesting that if the judge in an antitrust case finds the competing inferences of the plaintiff and the defendant to be equally plausible, summary judgment may be granted to the defendant unless the plaintiff is able to produce additional evidence.").

60. *See, e.g.,* *Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558, 1562 (D.C. Cir. 1990) (noting that when plaintiffs haven't raised concrete doubts about defendants' witnesses, summary judgment is appropriate for defendants because plaintiffs are "not entitled to reach the jury merely on the supposition that the jury might not believe the defendants' witnesses"); *see also* Miller, *supra* note 41, at 1064–65 (noting that post-trilogy, courts in certain types of cases "routinely weigh evidence . . . and make credibility determinations").

61. Cecil et al., *supra* note 14, at 863.

62. *See, e.g.,* Redish, *supra* note 6, at 1344.

63. *See, e.g.,* Miller, *supra* note 41, at 1132–33. The problem is exacerbated by the Court's decision in *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992), which is inconsistent with an expansive reading of *Matsushita* to authorize summary judgment in cases involving equally plausible inferences from circumstantial evidence. *See, e.g.,* Schwarzer & Hirsch, *supra* note 55, at 6.

64. Molot, *supra* note 17, at 1833.

A half-century ago, Justice Hugo Black, writing for the Supreme Court in *Conley v. Gibson*,⁶⁵ instructed that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁶⁶ A literal reading of the opinion—a reading almost certainly intended by Justice Black, a great champion of wide, restraining rules—imposed stringent restraints on the ability of lower courts to toss complaints that lack supporting factual allegations, since the instances in which it appears “beyond doubt” that the plaintiff will not prove any facts supporting his claim are rare.

As with summary judgment, the pushback began in lower courts, as trial judges throughout the 1980s and 1990s demanded that plaintiffs include factual support for key allegations, particularly in complex litigation.⁶⁷ It ended in the Supreme Court, in *Bell Atlantic v. Twombly*.⁶⁸ *Twombly* grew out of a massive class action against the nation’s local telephone and DSL providers, which have enjoyed de facto monopolies for local telephone services since the break up of AT&T in the 1980s.⁶⁹ The complaint alleged that the defendants had conspired to restrain trade in the market for local telephone services by refusing to compete in each other’s territories and erecting a variety of barriers to access their markets.⁷⁰ Although the complaint identified a series of actions that purportedly stemmed from this agreement, defendants argued the complaint failed to state a claim because: (1) the allegations of conspiracy were conclusory, and (2) the conduct identified in the complaint could be easily explained as the result of sensible independent business judgments by each defendant, without the need to posit a conspiracy.⁷¹

The Court not only agreed dismissal was appropriate, but, in the process, it also rejected a literal reading of *Conley*’s broad “no set of facts” test, holding instead that the complaint had failed to allege facts giving rise to a “plausible” inference of conspiracy, since the facts alleged were equally consistent with conspiracy or innocent behavior.⁷² *Twombly* was immediately condemned, even by its supporters, as a “vague,”⁷³ “less than pellucid,”⁷⁴ “not entirely consistent,”⁷⁵ even

65. 355 U.S. 41 (1957).

66. *Id.* at 45–46.

67. See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 72 (2007) (noting that lower court dissatisfaction with traditional pleading standards had led to an “extensive and confusing body of case law . . . as to when a case can be dismissed on the strength of the record as it stands before any discovery begins”); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (reviewing lower court practice in the 1980s and 1990s and concluding that while “federal courts recite the mantra of notice pleading with amazing regularity[,] . . . their rhetoric does not match the reality of federal pleading practice”).

68. 550 U.S. 544 (2007).

69. *Id.* at 549–50.

70. *Id.*

71. *Id.* at 552.

72. *Id.* at 556–63, 570.

73. Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1110 (2010) (conceding that *Twombly* and *Iqbal*’s “plausibility” standard is “admittedly vague”).

74. *Robbins v. Oklahoma ex rel. Dep’t of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (“We are not the first to acknowledge that [*Twombly*’s] new formulation is less than pellucid.”).

75. *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007) (noting *Twombly* “contains

“incoherent”⁷⁶ opinion that provided lower courts with virtually no guidance about the content of federal pleading standards. And the criticism is just. Rather than defining what “plausibility” requires outside the special context of antitrust pleading, *Twombly* explained the plausibility requirement by piling on additional opaque abstractions: plausible claims are those that are non-“speculative,”⁷⁷ and even if the facts seem “improbable,”⁷⁸ they must demonstrate a “reasonably founded hope that the [discovery] process will reveal relevant evidence” to support a claim.⁷⁹

To the extent the Court offered a meta-explanation of the decision, its statements cut in different directions. On one hand, the Court suggested the decision was motivated by concerns about expensive discovery in complex cases.⁸⁰ But at the same time, the Court denied it was establishing a heightened pleading standard for cases involving expensive discovery.⁸¹ The Court also claimed its opinion was consistent with prior opinions rejecting lower court efforts to require fact-pleading,⁸² such as *Swierkiewicz v. Sorema N.A.*,⁸³ even though the employment discrimination complaint in *Swierkiewicz* states the claim in broad, conclusory terms. And it affirmed the validity of Form 11, which provides a model example of notice pleading in a hypothetical tort case arising from a car accident.⁸⁴ Yet, in Form 11, a key legal conclusion—that the defendant “negligently” collided with plaintiff—lacks any supporting factual allegations. Even so, the Court refused to explain how the model complaint can be distinguished from the antitrust complaint filed in *Twombly*, in which factual allegations supporting another legal conclusion—“conspiracy”—were required.

The Court’s subsequent attempts to clarify the decision—*Erickson v. Pardus*⁸⁵ and *Ashcroft v. Iqbal*⁸⁶—failed to do so. *Erickson* cited *Twombly* in support of “rejecting any requirement of factual detail in a lawsuit by a prisoner alleging cruel and unusual punishment.”⁸⁷ *Iqbal*, in turn, granted certiorari to review the Second Circuit’s decision affirming denial of a motion to dismiss in a *Bivens* suit by a former “war on terror” detainee.⁸⁸ *Iqbal* alleged that two high-ranking Bush administration officials, Attorney General John Ashcroft and FBI Director Robert

several, not entirely consistent, signals”).

76. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 867–70 (2010) (arguing that *Iqbal*’s two-step analytical framework is “incoherent”).

77. *Twombly*, 550 U.S. at 555.

78. *Id.* at 556.

79. *Id.* at 559 (alteration in original) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotations omitted).

80. *See id.* at 557–58.

81. *See id.* at 569 n.14.

82. *See id.* at 569–70.

83. 534 U.S. 506 (2002).

84. *See Twombly*, 550 U.S. at 565 n.10.

85. 551 U.S. 89 (2007) (per curiam).

86. 129 S. Ct. 1937 (2009).

87. Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW.COM (Aug. 13, 2007), <http://writ.news.findlaw.com/dorf/20070813.html> (emphasis omitted).

88. *Iqbal*, 129 S. Ct. at 1939.

Mueller, had orchestrated a detention policy, in the wake of September 11, 2001 (9/11), designed to discriminate against Muslim Arabs on the basis of religion and race.⁸⁹ The Court reversed, holding the complaint failed to plead facts supporting the allegations that administration officials' post-9/11 actions were motivated by "discriminatory animus."⁹⁰

In some ways, *Iqbal* is broader than *Twombly*. The Court clarified two unsettled questions. First, it rejected claims by some commentators that *Twombly* was antitrust-specific.⁹¹ Second, it also appeared to reject characterizations of *Twombly* as a case in which the plaintiff had "pleaded herself out of court"—that is, had waived the protection of conclusory allegations by pleading supporting facts, exposing herself to dismissal if a court were to find that the alleged facts did not support the elements of the claim.⁹²

The Court did make more of an effort in *Iqbal* than it had in its extremely murky *Twombly* opinion to articulate the appearance of a test for adequate pleading, by describing a "two-pronged" inquiry.⁹³ First, a court "can choose to begin" resolving a motion to dismiss by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."⁹⁴ Second, the court should assume the truth of the remaining "well-pleaded factual allegations . . . and then determine whether they plausibly give rise to an entitlement to relief."⁹⁵

Even so, *Iqbal* left a great deal undecided. It did not address how *Swierkiewicz* or the conclusory model complaint in Form 11 can be squared with the Court's decisions in *Twombly* and *Iqbal*; indeed, it did not mention *Swierkiewicz* or Form 11 at all. *Iqbal*'s discussion of plausibility remains self-consciously opaque. Rather than providing guidelines for assessing plausibility, *Iqbal* unhelpfully held that courts, when determining whether factual allegations rise to the level of a "plausible" claim, must exercise "context-specific" judgment, in light of "judicial experience and common sense."⁹⁶ Some language in *Iqbal*, moreover, suggested the Court was motivated by entirely case-specific concerns that litigation against government officials in the national security realm wastes "valuable time and resources that might otherwise be directed to the proper execution of the work of the Government" in an "unprecedented" national security "emergency."⁹⁷

The Court also failed to explain how to distinguish conclusory from non-conclusory allegations of elements of a claim. As Justice Souter noted in dissent,

89. *Id.* at 1944.

90. *See id.* at 1952.

91. *See id.* at 1953.

92. *See id.* at 1950.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1953 ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources The costs of diversion are only magnified when Government officials are charged with responding to . . . 'a national and international security emergency unprecedented in the history of the American Republic.'" (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabrane, J., concurring))).

the Court's treatment of some allegations (that "Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to'" the alleged discrimination)⁹⁸ but not others (that Ashcroft and Mueller "approved" the "'policy of holding post-September-11th detainees in highly restrictive conditions'" as conclusory was mystifying.⁹⁹

On the face of the opinion, it's even surprisingly unclear whether the *Iqbal* "two-pronged" test is always required. The Court did not say that a district court *must* refuse to credit conclusory allegations; it says that a court "can choose to begin" analyzing a motion to dismiss by disregarding conclusory allegations.¹⁰⁰ If given its plain meaning, that discretion-enabling language—which has never appeared in any of the Court's pleading decisions—suggests the possibility that, in some unspecified contexts, lower courts can ignore the *Twombly/Iqbal* "two-pronged" pleading test, and allow complaints containing even "conclusory" allegations to survive a motion to dismiss, much as many circuits allow lower courts, in their discretion, to deny summary judgment even when it is warranted on the record.¹⁰¹

Perhaps the Court had *pro se* complaints in mind. Lower courts have traditionally construed such complaints liberally, and *Iqbal*'s language arguably opens the way for courts to continue to do so. Or perhaps the Court's use of permissive rather than mandatory language is inadvertent. Nonetheless, the language fits with the tenor of the opinion, which emphasizes judicial flexibility and discretion.

Not surprisingly, in the wake of *Twombly* and *Iqbal*, commentators are divided about the meaning of the decisions. Some—mostly defense counsel and opponents of the decisions hoping to raise the alarum in advance of a legislative pushback—claim the two decisions herald a radical, defendant-friendly transformation of federal pleading practice, which effectively moves a "burden of proof" akin to summary judgment to the pleading stage across the board.¹⁰²

Others are more circumspect, suggesting that the decisions—beyond rejecting a rule-like formulation of notice pleading standards, which many lower courts never took literally to begin with—may do little to alter pre-*Twombly* lower court

98. *Id.* at 1961 (Souter, J., dissenting) (quoting *id.* at 1951 (majority opinion)).

99. *Id.* at 1961 (Souter, J., dissenting) (quoting Compl. ¶ 69, App. to Pet. for Cert. 168a).

100. *Id.* at 1950 (majority opinion).

101. See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 94 (2002) ("[T]he trilogy, perhaps through the use of imprecise language, has created confusion as to a judge's ability to deny an otherwise appropriate summary judgment motion.").

102. For a particularly overheated, pejorative version of this claim, see Ian Millhiser, *The Biggest Supreme Court Case You've Never Heard Of*, WONK ROOM (July 26, 2009, 12:00 PM), <http://wonkroom.thinkprogress.org/2009/07/26/iqbal>. For a nuanced analysis which nonetheless argues that after *Twombly*, pleading and summary judgment standards are linked, see Epstein, *supra* note 67; Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217 (2008).

pleading practice.¹⁰³ Before the Court's decisions, many cases required plaintiffs to do no more than clearly identify, in rudimentary terms, the "event," "transaction," or "occurrence" precipitating the suit.¹⁰⁴ Adam Steinman, in turn, has argued for a "transactional" interpretation of *Twombly* and *Iqbal*'s "conclusoriness" concept.¹⁰⁵ Under this approach, allegations are non-conclusory if they identify—even in a very general, rudimentary way—the event or transaction giving rise to the claim.¹⁰⁶

For example, under longstanding antitrust doctrine, bare proof defendants have consciously engaged in parallel conduct is not enough to trigger liability.¹⁰⁷ Steinman claims, in turn, that the problem with the plaintiff's antitrust complaint in *Twombly* was *not* that the complaint had pleaded the existence of an agreement in bare terms.¹⁰⁸ It was that plaintiffs had written the complaint in a way that obscured whether it was alleging that a "real-world" agreement had occurred independently of the defendants' parallel actions.¹⁰⁹ Steinman suggests that plaintiffs might have properly pleaded their claim through some simple rephrasing and editing: for example, they could have placed the allegation of a conspiracy before, rather than after, the allegation of parallel conduct and rephrased it in a way that clarified the parallel conduct derived from the agreement, not the "other way around"—something that would have been easy to do.¹¹⁰

In that case, Steinman argues, the allegations of conspiracy would have provided an adequate "transactional narrative," one consistent with the elements of an

103. See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) ("The only aspect of prior case law that *Twombly* and *Iqbal* set aside was a misunderstood fifty-year-old phrase whose real meaning was never called into question.").

104. See Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 607–09 (2006); see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (3d ed. 2004) ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon . . .").

105. See Steinman, *supra* note 103, at 1298.

106. *Id.* at 1343 (characterizing his interpretation as consistent with a "transactional approach" that "would require the complaint to identify the real-world events that give rise to liability").

107. See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

108. See Steinman, *supra* note 103, at 1343 (noting that "it would be a mistake to construe [the *Twombly* and *Iqbal* pleading] standard [to] requir[e] extensive details about the acts or events that are alleged to have occurred"); *id.* at 1345–46 (arguing that under the best reading of *Twombly* and *Iqbal*, the complaint must provide a plain transactional narrative of what happened, even if the narrative includes "cursory" allegations of key events).

109. *Id.* at 1338 (arguing that the placement of the conspiracy allegations in the plaintiffs' complaint "raise[d] questions about whether the alleged 'contract, combination or conspiracy' is grounded in any real-world acts or events" independent of the parallel conduct).

110. *Id.* (arguing that the *Twombly* complaint miscarried because it "place[d] the conspiracy allegation after the parallel conduct allegations" and "phrase[d] the allegation in a way that suggest[ed] that the conspiracy derive[d] from the parallel conduct, rather than the other way around").

antitrust claim, and the complaint would be “non-conclusory,” obviating the need to assess whether the remaining allegations suggested an agreement had plausibly occurred.¹¹¹ In effect, under this reading, the flaw with the complaint was with the way it was drafted. And, as Steinman concedes, under his transactional interpretation, *Twombly* and *Iqbal* turn out to preserve the plaintiff-friendly orientation of the traditional notice pleading regime.¹¹²

Other more ad hoc but lenient interpretations of the cases are possible. One can imagine an approach to plausibility that demands less factual specificity in cases that are not exceptionally “complex,” as the sprawling nationwide antitrust class action in *Twombly* was, or in cases that do not present concerns about the time and resources of high-level government officials responding to an unprecedented national security crisis, as in *Iqbal*. This view has been taken by a number of lower courts.¹¹³

In the end, then, after the dust has settled, *Twombly* and *Iqbal* have replaced a broad, principled approach to notice pleading with an extremely murky standard that provides minimal guidance about how or even when to apply the standard beyond the specific, and fairly unusual, facts of either case. Whatever else may be said about them, one thing is clear: both decisions leave substantial room for variation among lower courts about the degree of factual specificity demanded.

B. The Celotex Trilogy, *Twombly*, and Minimalism

Jonathan Molot calls the pattern reflected in the Court’s summary judgment and pleading cases—in which the Court announces a wide rule and then, later, converts it into a murky standard in the face of changing circumstances—“backward-looking” minimalism.¹¹⁴ Because minimalism offers the leading normative defense of opaque decision making, minimalist literature, in turn, might seem a natural place to mine justifications for these decisions.

111. *Id.* at 1339 (“Had the complaint provided such an ‘independent allegation of actual agreement,’ it would have been accepted as true without regard to its ‘plausibility.’”).

112. *Id.* at 1356 n.354 (noting that Steinman’s reading of *Twombly* and *Iqbal* “would preserve the fairly lenient pre-*Twombly* pleading regime”).

113. This appears to be the view of *Twombly* taken by a leading treatise. *See, e.g.,* JEFFREY A. PARNES SUPPLEMENTS & JERRY E. SMITH, 2-8 MOORE’S FEDERAL PRACTICE § 8.04[1][d] (3d ed. 2010) (“While simple claims might establish ‘plausibility’ under the *Twombly* standard using relatively broad, simple allegations, more complex claims will call for more complex allegations in order to establish ‘plausibility.’”); *see also* Robbins v. Oklahoma ex rel. Dep’t of Human Servs., 519 F.3d 1242, 1246 (10th Cir. 2008) (noting that the degree of factual specificity required depends on context; a simple negligence action may require little factual specificity, while complex cases involving massive discovery may require greater specificity to ensure the notice necessary to adequately respond to the complaint and prepare a defense); Steinman, *supra* note 103, at 1326 (“An alternative narrative—to the extent one is necessary—would emphasize the precise facts of *Twombly* and *Iqbal* rather than a broader doctrinal agenda. Indeed, *Twombly* and *Iqbal* were each rather exceptional cases.” (internal citation omitted)).

114. Molot, *supra* note 17, at 1804.

Unfortunately, while *Celotex*, *Twombly*, and *Iqbal* share some minimalist features, they don't fit the standard normative case for minimalist decision making. They are cases in search of a justification.

Below, I develop these points. After clarifying some terminology in Part I.B.1, Part I.B.2 turns to explain, first, the sense in which *Celotex* or *Twombly* are "minimalist," and second, why standard academic defenses of minimalist opinion writing do not lend support to the Court's decisions. In the process, Part I.B.2 sets up the question that anchors the rest of the Article: If standard normative justifications for minimalist opinions can't explain these decisions, what can?

1. Minimalism: Descriptive and Normative

The word "minimalism" is used in two different senses: a descriptive sense and a normative sense. In this Article, I use the term primarily in its former sense.¹¹⁵

115. Others have made similar distinctions. *E.g.*, Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1955 (2005) (noting that Sunstein's account of minimalism has "descriptive and prescriptive components"). Sunstein, however, has a tendency to conflate descriptive and normative minimalism, talking at times as though only decisions that leave things undecided in a normatively justifiable way are, in fact, "minimalist." *See, e.g.*, Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 125 n.14 (2005) [hereinafter Sunstein, *Testing Minimalism*] ("[A] decision to the effect that people have a constitutional right . . . to avoid 'undue burdens' on their medical choices," while "leav[ing] many issues undecided," should "not be treated as minimalist," presumably because the decision threatens ambitious inroads on democratic decision making.). At other times, however, Sunstein is more careful to distinguish between descriptive minimalism and the normative case for deciding questions in a minimalist way; and, on balance, he seems to take the view that it is coherent to classify a decision as minimalist as a descriptive matter even if a court is using minimalism poorly or irresponsibly. *See, e.g.*, Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 *passim* (2001) [hereinafter Sunstein, *Order Without Law*] (analyzing *Bush v. Gore*, 531 U.S. 98 (2000), as a minimalist decision, because it provided little in the way of explanation for the outcome, while criticizing the court for using minimalism irresponsibly); Sunstein, *Testing Minimalism*, *supra*, at 128 ("I have not argued, and I do not believe, that minimalism is generally or always the right path.").

Even if Sunstein is occasionally hard to pin down on what exactly he means by "minimalism," the term has taken on a life of its own. The term, as a descriptive label, is routinely applied by other scholars to a variety of decisions exhibiting opaque opinion writing that provides future courts with little guidance as well as to the theorists who celebrate such decisions. *See, e.g.*, Molot, *supra* note 17, at 1775–81 (noting that the term "minimalism" lumps together "a variety of scholars whose views diverge as often as they converge," including not only Sunstein but also Michael Seidman and Michael Dorf, who share an interest in cases that "postpon[e] resolution, or leav[e] matters unresolved, rather than [in cases that resolve] disputes based on principle in the manner that [Herbert] Wechsler envisioned"); *see also* Ronald Dworkin, *Looking for Cass Sunstein*, N.Y. REV. BOOKS, Apr. 30, 2009, available at <http://www.nybooks.com/articles/archives/2009/apr/30/looking-for-cass-sunstein> (characterizing *Lochner* as a minimalist decision because it did not provide much guidance about its approach to due process scrutiny beyond the case at hand). Accordingly, even though my use of minimalism here may not accord with the speaker's meaning, as reflected in Sunstein's sometime-use of the term, it fits well within the range of

Used as a descriptive label, “minimalism” is not a synonym for “innocuous”—it refers to a deliberately opaque style of opinion writing which “postpon[es] resolution . . . leaving matters unresolved, rather than . . . resolving disputes based on principle.”¹¹⁶ Cass Sunstein, who coined the term, divides minimalist decisions into two types: those that do not clearly telegraph their import beyond their facts, which he calls “narrow,” and those that do not announce a deep, rich account of the underlying law, which he calls “shallow.”¹¹⁷

Decisions that exhibit these features can stir controversy, strike down legislation, create confusion in lower courts, and invite litigation. Indeed, Sunstein treats cases like *Griswold v. Connecticut*,¹¹⁸ *United States v. Lopez*,¹¹⁹ *Bush v. Gore*,¹²⁰ and *Romer v. Evans*¹²¹—cases that did all three—as “insistently minimalist.”¹²²

Romer, for example, struck down a Colorado constitutional amendment, adopted by state referendum, that denied homosexuals status as a “protected” class for “claim[s] of discrimination.”¹²³ The Court eschewed analyzing the case through the lens of heightened equal protection scrutiny applicable to discrimination based on race or gender, holding, instead, that the amendment failed rational basis scrutiny because it reflected constitutionally unacceptable “animus” toward same-sex couples.¹²⁴ But the Court failed to identify “[w]hat precisely [constitutionally impermissible] ‘animus’” is.¹²⁵ On this point, the Court’s reasoning was opaque, puzzling.¹²⁶ Offering virtually no explanation of the concept, the Court “impose[d] unusually few constraints on its own interpretation,”¹²⁷ leaving its meaning to “the future.”¹²⁸ At the same time, *Romer* pointedly ignored *Bowers v. Hardwick*,¹²⁹ a prior precedent upholding a Georgia statute criminalizing sodomy, which seemed to recognize that states *can* express disapproval toward (and indeed criminalize) same-sex relationships.¹³⁰ “An important aspect of the Court’s minimalism—indeed, subminimalism—consists in its failure to” explain the concept of

its conventional semantic meaning.

116. Molot, *supra* note 17, at 1781.

117. SUNSTEIN, ONE CASE AT A TIME, *supra* note 13, at 10–14.

118. 381 U.S. 479 (1965).

119. 514 U.S. 549 (1995).

120. 531 U.S. 98 (2000).

121. 517 U.S. 620 (1996).

122. Sunstein, *Leaving Things Undecided*, *supra* note 12, at 100; *see also* Sunstein, *Order Without Law*, *supra* note 115, at 758 (characterizing *Bush v. Gore* as minimalist).

123. COLO. CONST. art. II, § 30b, *held unconstitutional by* *Romer v. Evans*, 517 U.S. 620 (1996).

124. *Romer*, 517 U.S. at 632.

125. Sunstein, *Leaving Things Undecided*, *supra* note 12, at 60 (noting that the difficulty lies in identifying “[w]hat precisely . . . ‘animus’” is).

126. *Id.* at 9 (“The Court’s puzzling and opaque opinion is not satisfying from the theoretical point of view . . .”).

127. *Id.* at 64.

128. *Id.* at 27 (“The ultimate meaning of *Romer v. Evans* . . . —[a] possible one-way ticket[], [a] possible seminal case[]—will depend on the future.”).

129. 478 U.S. 186 (1986).

130. Sunstein, *Leaving Things Undecided*, *supra* note 12, at 64–65.

impermissible animus or “say anything about how *Romer* and *Hardwick* fit together.”¹³¹

Similarly, *Griswold*, which unexpectedly recognized a free-floating constitutional right to sexual privacy, is minimalist because the Court “did not adopt a theoretically ambitious understanding of privacy or offer a great deal of guidance about the scope of the right.”¹³² *United States v. Lopez*,¹³³ which shocked commentators by striking down legislation under the Commerce Clause for the first time in decades, was minimalist because it “turned on a set of factors, not on a broadly applicable rule, and it gave no deep account of federalism.”¹³⁴ *Bush v. Gore*,¹³⁵ handed down like a “bolt from the blue,”¹³⁶ was minimalist because it “decide[d] the case at hand, without making many commitments for the future,” and indeed was subminimalist, in the sense that the Court “said less than is required to justify the . . . outcome.”¹³⁷

Minimalism is also used in a “normative” sense, that is, as a label for a cluster of well-worn claims about the advantages of narrow and shallow decisions and the academics who make these claims. In particular, as Jonathan Molot notes, normative minimalists “focus on the risk of judicial overreaching and the need to prevent, or at least reduce, judicial intrusions upon the political process.”¹³⁸ By leaving things undecided when reviewing the constitutionality of political branch acts, these minimalists contend, courts muddy the larger import of their decisions, putting the most divisive, far-reaching questions to one side and allowing them to continue to be worked out democratically.

Normative minimalists typically link these claims with an optimistic view of democratic deliberation. Democratic debate, they say, is a catalyst for social consensus about contested questions of political justice. Sunstein, for example, believes that, under the right conditions, an inclusive process of deliberation in which people with many different views participate distances people from their biases, allowing them to reach agreement about difficult political questions.¹³⁹ As a

131. *Id.* at 65.

132. Sunstein, *Second Amendment Minimalism*, *supra* note 12, at 267. To be sure, Sunstein does argue that *Griswold*, even if it was unexpected in light of prior precedent, conformed the law to popular expectations about the scope of the right to privacy. *See id.* at 261–62. The same, however, cannot plausibly be claimed about *United States v. Lopez*, 514 U.S. 549 (1995). Moreover, Sunstein clearly treats *Griswold*’s conformity with popular expectations as a normative defense of the decision, and not as a definitional characteristic of “decisional minimalism.” *See* Sunstein, *Second Amendment Minimalism*, *supra* note 12, at 261 (suggesting that, while *Griswold* itself offered only a shallow explanation of the decision, and therefore qualifies as “minimalist” in a decisional sense, a deeper normative account of the outcome in *Griswold* would draw on the fact that the law in question violated settled public expectations about the scope of sexual privacy).

133. *Lopez*, 514 U.S. at 549.

134. Sunstein, *Leaving Things Undecided*, *supra* note 12, at 23.

135. 531 U.S. 98 (2000).

136. Sunstein, *Order Without Law*, *supra* note 115, at 765.

137. *Id.* at 757.

138. Molot, *supra* note 17, at 1777.

139. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548–49 (1988).

result, he celebrates narrow and shallow decisions in public law contexts most of all. There, by “saying no more than necessary to justify an outcome, and leaving as much as possible undecided,” courts “promote more democracy,” and therefore “more deliberation,” creating space for democratic consensus building about contested public law questions—be it same-sex equality in *Romer*, federal power in *Lopez*, or sexual privacy in *Griswold*.¹⁴⁰

2. *Celotex*, *Twombly*, and Minimalism: Points of Descriptive Comparison and Normative Contrast

The field of descriptively minimalist decisions is broad. Descriptive minimalism is a relative, not an absolute, concept, and many decisions have descriptively minimalist—or what I will, going forward, call just plain “minimalist”—features. The *Celotex* trilogy, *Twombly*, and *Iqbal* fit comfortably in that field. Like *Romer*, *Griswold*, *Lopez*, and *Bush v. Gore*, they deploy “conclusory,” “opaque” tests with imprecise context—“plausibility” or *Matsushita*’s “metaphysical doubt” test—that provide little guidance for the future and impose “unusually few constraints on [their] . . . interpretation.”¹⁴¹

To be sure, all of these decisions could have been narrower and shallower still. In *Twombly*, the Court might have ruled even more narrowly, by expressly confining its opinion to the antitrust context. The *Celotex* trilogy and *Iqbal* are wider than *Twombly* in the sense that they self-consciously announce general tests that will apply in many cases, but are also shallow, because the tests announced (plausibility, *Matsushita*’s “metaphysical doubt” standard) have extremely fuzzy content and so are susceptible of both permissive and restrictive interpretations beyond their facts.

But the same can be said of other minimalist decisions. *Romer*, too, is wider than other imaginable decisions (for example, a decision demanding legislative findings supporting the government’s proffered interest in freeing up resources for combating other forms of discrimination). *Lopez*, too, self-consciously announces a general framework for analyzing Commerce Clause cases, although its framework is susceptible of both narrow and broad applications. As is almost invariably true of descriptively minimalist decisions, the *Celotex* trilogy, *Twombly*, and *Iqbal*, like *Romer* or *Lopez*, are not maximally narrow or shallow, but tend toward the narrow and shallow end of the continuum.

Some might object that decisions are not minimalist because they do not “restrain” lower courts—rather, they blur limits on trial judges inclined to use summary judgment and motions to dismiss aggressively. But minimalism is not synonymous with “restraint.”¹⁴² What qualifies decisions like *Griswold* or *Lopez* or, for that matter, *Twombly* as minimalist is not that they restrain judicial “power” to

140. SUNSTEIN, ONE CASE AT A TIME, *supra* note 13, at 3–4.

141. See Sunstein, *Leaving Things Undecided*, *supra* note 12, at 27, 64 (describing *Romer* in similar terms); see also *supra* notes 126–28 and accompanying text.

142. See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 44 (2005) [hereinafter SUNSTEIN, RADICALS IN ROBES] (“[B]ecause of their defining creed,” Sunstein notes, minimalists “are not systematic believers in restraint.”).

“take action,” but rather that they “postpon[e] resolution” of important questions, “leaving matters unresolved, rather than . . . resolving disputes” based on wide, deep, and easily generalizable principles.¹⁴³

Iqbal, *Twombly*, and the *Celotex* trilogy do not, however, fit the paradigmatic *normative* case for minimalism. First, the procedural cases reviewed above are not democracy reinforcing in the way that is characteristic of nearly every decision celebrated by those who defend minimalism. Their effect is entirely intrabranched: By rejecting a broad and deep account of summary judgment and pleading, the decisions reduce appellate intrusions on lower court discretion, rather than “judicial intrusions upon the political process.”¹⁴⁴

Second, and relatedly, while minimalist constitutional decisions are defended as way stations to eventual convergence around shared legal principles, reached through democratic deliberation,¹⁴⁵ the decisions above can’t plausibly be defended that way. Indeed, the twenty-five-year experience with *Celotex* suggests that minimalist procedural decisions entrench—indefinitely—heterogeneous procedural practices in lower courts.

The point is vividly illustrated by the Federal Judicial Center (FJC) study examining summary judgment practice between 1975 and 2000, which provides a decent picture of the trilogy’s effects on summary judgment filing and disposition rates across the federal system.¹⁴⁶

The data, drawn from 15,000 docket sheets in randomly sampled terminated cases in six district courts, are in some ways surprising, given the rhetoric surrounding the trilogy. After controlling for differences in filing rates across circuits and for changes over time in the types of cases filed, the FJC found that “the likelihood that a case contained one or more motions for summary judgment increased *before* the Supreme Court trilogy, from approximately 12 percent in 1975 to 17 percent in 1986, and has remained fairly steady at approximately 19 percent since that time.”¹⁴⁷ Even more surprising, between 1975 and 2000, “no statistically significant changes over time were found in the outcome of defendants’ or

143. Molot, *supra* note 17, at 1781. It is also true that the *Celotex* trilogy, *Twombly*, and *Iqbal* involve standards that are applied very frequently—indeed, they count as some of the most frequently cited Supreme Court cases of all time. See Hoffman, *supra* note 102, at 1222. But, the fact that a decision presents frequent opportunities for its application does not bar assigning it the minimalist label, as a descriptive matter. Like *Bush v. Gore*’s announcement of a requirement of equal treatment of votes, the *Celotex* trilogy, *Twombly*, and *Iqbal* announce standards (in *Matsushita*, the “metaphysical doubt” standard for satisfying the nonmoving party’s summary judgment burden, and in *Twombly* and *Iqbal*, plausibility pleading) whose potential field of application “extends well beyond the context” of the case at hand. Sunstein, *Order Without Law*, *supra* note 115, at 770. Yet, each of these decisions—because they do not clearly forecast the implications of that standard beyond the cases at hand—remain descriptively minimalist.

144. See, e.g., Molot, *supra* note 17, at 1777 (noting that minimalists characteristically focus on decisions that “prevent, or at least reduce, judicial intrusions upon the political process”).

145. See *supra* notes 139–40 and accompanying text.

146. See Cecil et al., *supra* note 14, at 861.

147. *Id.* at 861 (emphasis in original).

plaintiffs' summary judgment motions, again after controlling for differences across courts and types of cases."¹⁴⁸

Even so, the FJC also found something that some find alarming: before and after the trilogy, summary judgment filing and disposition rates varied significantly from circuit to circuit and between types of cases, a finding that replicates those of previous studies.¹⁴⁹ To take one example drawn from parallel data collected by Stephen Burbank, the summary judgment termination rate in the District of Columbia (22%) was nearly five times the highest rate in the Eastern District of Pennsylvania (4.7%) over the same four-year period.¹⁵⁰

Thus, while the FJC study offers surprisingly little support for claims that the trilogy radically changed federal summary judgment practice, it does underscore that the *Celotex* trilogy embraced, and even entrenched, the preexisting heterogeneity of summary judgment practice among lower courts. In effect, rather than promoting uniform lower court practice, the Court's fuzzy interpretation of summary judgment standards provides cover for disparate, often conflicting approaches to summary judgment practice across district courts.

While solid empirical work on pre-*Twombly* filing and disposition rates for motions to dismiss is, to date, lacking, anecdotal evidence is suggestive of the same pattern: Even as far back as the mid-1980s, when the Court decided the *Celotex* trilogy, commentators complained that trial courts in some jurisdictions were using motions to dismiss in disparate, inconsistent ways—some adhering to the traditional reluctance to demand factual specificity in initial pleadings, others demanding more stringent factual allegations in support of claims.¹⁵¹ Those complaints only increased in the years preceding *Twombly*.¹⁵² The FJC's

148. *Id.* at 862; *see also id.* at 896. Indeed, despite anecdotal claims that *Celotex* prompted a significant increase in summary judgment in civil rights cases, the authors found “no evidence that the likelihood of a summary judgment motion or termination by summary judgment has increased” in civil rights case since 1986. *Id.* at 905–06. To be sure, caution is appropriate when assessing the take-away value of the FJC's study. For example, because the FJC study codes the substantive nature of the decisions included in the study in broadly defined categories (tort, contract, civil rights), it does not shed light on the effect of summary judgment at a microlevel (i.e., in products liability actions or Title VII cases). *See id.* at 904 (“Future studies should examine separately product liability cases . . . to determine if the pattern of findings is consistent across all types of torts cases.”).

149. *See id.* at 883–86 (discussing “great variation across courts and across types of cases”); *see also* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 593 (2004) (noting data, as of 2004, that suggest “substantial variability” in rates of summary judgment across different parts of the country).

150. *See* Burbank, *supra* note 149, at 593.

151. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 180 (1985) (noting a trend in some circuits toward requiring more factual specificity in complaints).

152. *See* Fairman, *supra* note 67, at 988 (“[In 2003,] federal courts recite the mantra of notice pleading with amazing regularity. However, their rhetoric does not match the reality of federal pleading practice. Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine.”); *see also* Epstein, *supra* note 67, at 72 (“Notwithstanding the liberal pleading requirements of the Federal Rules, an extensive and confusing body of case law has

preliminary study of post-*Iqbal* dismissal rates, in turn, finds that, while it is too early to make confident predictions about the impact of *Twombly* or *Iqbal*, “[o]verall” the evidence so far “does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints” among lower courts.¹⁵³

The upshot is that what was true of *Celotex* appears true of *Twombly* and *Iqbal*: the Supreme Court’s decisions intervene against a set stage of heterogeneous lower court practice and, to date, all that may be confidently said about *Twombly* and *Iqbal* is that they, like the *Celotex* trilogy before them, provide formal cover for that heterogeneity.¹⁵⁴

In the end, then, the standard normative case for minimalism, with its emphasis on democracy reinforcement and consensus building, can’t justify these decisions. What can?

II. PLURALISM AND MINIMALISM

As the last Part underscored, developing a plausible defense of *Celotex* and *Twombly* requires stepping beyond the usual justifications offered for opaque, minimalist decisions and developing a new way of defending these kinds of cases. The next two Parts develop that defense. Part II.A begins with some ground clearing, reviewing the link between the standard defense of minimalist decisions

developed as to when a case can be dismissed on the strength of the record as it stands before any discovery begins.”).

153. Memorandum from Andrea Kuperman to Civil Rules Comm. and Standing Rules Comm. Concerning the “Application of Pleading Standards Post-*Ashcroft v. Iqbal*,” at 2–3 (Nov. 25, 2009), available at <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20Nov30.pdf>. In addition, Joseph Grundfest and Adam Pritchard’s study of judicial application of the Private Securities Litigation Reform Act’s ambiguous pleading standards throughout the 1990s only reinforces the likelihood that lower courts will apply *Twombly* and *Iqbal* in inconsistent ways. See Grundfest & Pritchard, *supra* note 16, at 667–75 (detailing the array of inconsistent approaches both across and within circuits and noting a trend toward “intermediate” interpretations).

154. There are, moreover, good structural reasons for questioning strong claims that *Twombly* or *Iqbal* will have a radical effect on the evolution of future lower court practice. Most trial court decisions, including grants of partial summary judgment and partial motions to dismiss, are not immediately appealable—and the pervasiveness of settlement means many of these decisions are never appealed. Intermediate appellate courts, moreover, affirm trial court decisions at an incredibly high rate. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 150–52 (2002) (finding an 80% affirmance rate in civil appeals). And the Supreme Court, which takes only about eighty appeals each year, has a dramatically limited capacity to police the innumerable summary judgment or Rule 12(b)(6) dispositions made daily throughout the federal court system. The upshot is that trial courts, as a practical matter, have long had wide discretion to decide even pivotal motions, like summary judgment motions or motions to dismiss, with relatively light appellate oversight. The structure of appellate review, in short, ensures that predictions about the influence of ambiguous high court decisions like *Celotex* or *Twombly* are hazardous, at best. See Burbank, *supra* note 149, at 620–21 (“Lower federal courts do not require a Supreme Court decision to get what they need out of a Federal Rule, and, particularly given the Court’s declining appetite for work, they may not feel they can wait. . . . The law of action does not wait for the law in books.” (citation omitted)).

and the controversial civic republican commitments of minimalism's leading defender, Sunstein.

Fuzzy, minimalist procedural decisions, I argue in Part II.B, reflect a set of commitments at odds with the republican emphasis in most defenses of minimalism: pluralism. Part II.B.1 reviews the basic commitments that define pluralism. Parts II.B.2 and II.B.3 explain that, under the right circumstances, pluralists believe courts should adopt interpretations of ambiguous statutes that compromise between contending interests. In Part II.B.4, I turn to explain why, in some cases, the only way a court can compromise is through a minimalist decision—one that leaves much about the meaning of an ambiguous statute undecided. Part II.B.5 pulls many strands together, before returning to examine the *Celotex* trilogy, *Twombly*, and *Iqbal*, by summarizing the pluralist case for opaque, minimalist decisions.

A. Minimalism as Strategic Republicanism

Sunstein's account of minimalism is famously undertheorized¹⁵⁵—and self-consciously so. Minimalism, he says, is premised on a degree of skepticism about the utility of ambitious theorizing and on pessimistic epistemic claims about the abilities of judges. Many legal debates about high theory, he argues, are “hopelessly sterile—conceptualistic, terminological, interminable.”¹⁵⁶ Worse still, “[j]udges are not . . . trained as philosophers, and judges who make theoretically ambitious arguments may well make mistakes that are quite costly.”¹⁵⁷ The upshot, Sunstein argues, is that constitutional theory should embrace, rather than challenge, lawyers' traditional skepticism about theory—counseling instead a spirit of judicial humility, which is “not too sure that it is right.”¹⁵⁸

Even so, it's hard to take Sunstein completely at his word, as his own account of minimalism reflects his distinctive commitment to civic republicanism. Civic republicans believe that the political process should serve the “common good.”¹⁵⁹ As a result, they believe that distribution of entitlements should be undertaken according to “neutral” principles—meaning that entitlements should be distributed based on general, public-regarding reasons that exclude factional considerations like religion or political affiliation.¹⁶⁰ Those principles, moreover, must reflect “agreement” reached “among political equals.”¹⁶¹ In other words, republicans seek to ground a distribution of entitlements based on criteria that are broad, deep, and

155. See, e.g., Siegel, *supra* note 115, at 1957 (“Professor Sunstein is, in fact, notoriously ambiguous about what he means by ‘minimalism.’”).

156. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 13, at 252–53.

157. *Id.* at 256.

158. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 142, at 35 (quoting *LEARNED HAND, THE SPIRIT OF LIBERTY* 190 (Irving Dilliard ed., 1954)).

159. Sunstein, *Republican Revival*, *supra* note 18, at 1554 (“[R]epublican approaches posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process.”).

160. *Id.* at 1568.

161. *Id.* at 1554 (noting that republicans define “substantively correct outcomes” as those that satisfy “the ultimate criterion of agreement among political equals”).

reflect wide social consensus about the “common good” reached through participatory means.

Institutions that facilitate publically accountable “dialogue and deliberation” do the best at producing consensus about neutral principles, for two reasons: (1) dialogue and deliberation distance people from their parochial biases;¹⁶² and (2) public accountability ensures that deliberation will not be corrupted by powerful interest groups.¹⁶³ Together, republicans think, deliberation and accountability ensure a distribution of entitlements based on truly neutral, public-regarding reasons. Accordingly, civic republicans seek to expand opportunities for democratic debate about what justice requires and, relatedly, to regulate that debate to ensure it approaches, as closely as possible, an inclusive, deliberative ideal.¹⁶⁴

Sunstein’s republican commitments explain, in turn, the characteristic points of emphasis in his defense of minimalism: democracy reinforcement and consensus building. By avoiding resolving “fundamental questions” about constitutional rights, courts ensure those questions will continue to be worked out in democratic fora at the state and federal levels, where democracy can, in turn, foster wide agreement about how to resolve contested public law questions.¹⁶⁵ In effect, minimalism ensures courts are partners in the republican project.

B. Minimalism for Pluralists

There is no gainsaying the importance of Sunstein’s account of minimalism. Even so, the success of Sunstein’s account has had a perverse effect, by blinding subsequent commentators to the value of “leaving things undecided” in cases that do not fit the tidy model of Sunstein’s minimalism—that is, in cases where doing so is not democracy reinforcing and can’t plausibly be defended as a strategy for promoting social consensus about principles of justice. Commentators, in effect, often act as though leaving things undecided has normative value only if doing so jibes with Sunstein’s distinctive normative commitments.

In fact, there is a plausible case to be made for judicial decisions with minimalist features outside the standard democracy-reinforcing context in which minimalism

162. *Id.* at 1548–49 (explaining that deliberation allows “political actors to achieve a measure of critical distance from prevailing desires and practices, subjecting these desires and practices to scrutiny and review”).

163. *See id.* at 1584 (noting that republicans prefer that decisions be made by those “who are politically accountable and highly visible”).

164. *Id.* at 1549 (explaining that republicans “may well attempt to insulate political actors from private pressure; and they may also favor judicial review designed to promote political deliberation and perhaps to invalidate laws when deliberation has not occurred”). Sunstein, in particular, has emphasized the possibility that democratic deliberation can not only forge broad consensus, but even identify “correct” moral principles. His argument, which I will not belabor here, turns on the epistemic virtues of “many minds”; under conditions that correspond to the Condorcet Jury Theorem, “many minds” can be predicted to reach correct results—a prediction Sunstein thinks is as applicable to normative questions as it is to empirical facts about the world. *See generally* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 94–121 (2009).

165. *See* Sunstein, *Leaving Things Undecided*, *supra* note 12, at 21.

has been developed. That case, however, requires appreciating minimalism from a normative vantage point that Sunstein recognizes as the primary antagonist of republicanism: pluralism.¹⁶⁶

Below, I turn to unpack the pluralist case for minimalist decisions. The argument proceeds in several steps. After reviewing the basic commitments that define pluralism, Part II.B.1 explains why these commitments lead many pluralists to favor a contractarian approach to interpretation. Part II.B.2 then shows that, given certain plausible assumptions, contractarianism supports two complementary interpretative default rules: First, courts should interpret ambiguous statutes to reflect whatever preferences are enactable. Second, when no group is capable of enacting its preferences, courts should, instead, interpret ambiguous statutes in a way that compromises, or trims, between competing preferences.

Part II.B.3 takes a short detour to explain why contractarian theory also supports applying these default rules dynamically, in a way that is sensitive to changes over time in interest groups' power to enact their preferences.

Together, these three Parts sketch a distinctively pluralist approach to statutory interpretation, one that favors adopting compromise, or trimming, interpretations when an interpretive question becomes very divisive—too divisive to be resolved legislatively. And with this approach firmly in view, Part II.B.4 concludes by showing why, under the right conditions, the approach supports a form of judicial minimalism.

1. Pluralism

Where republicans believe in the existence of a “common good,” pluralists are moral skeptics who think “any statement about the common good reduces to a statement about the speaker’s personal tastes and preferences.”¹⁶⁷ And where republicans are optimists about the possibility of achieving social consensus, pluralists are pessimists. They think disagreement is inevitable. In the pluralist view, as Thomas Merrill says, “individuals and groups have divergent interests and values that are . . . exogenously determined, in the sense that they are not much

166. See Sunstein, *Republican Revival*, *supra* note 18, at 1554, 1544 (contrasting republicanism, which “reject[s] ethical relativism and skepticism,” and “posit[s] the existence of a common good,” with pluralism, which views the notion of a common good as “mystical or tyrannical” and is, accordingly, “indifferent among preferences”).

167. Merrill, *supra* note 17, at 629. Merrill distinguishes between different kinds of pluralists; here, I am using the term “pluralist” to refer to the group that Merrill calls “pessimistic” or “skeptical” judicial pluralists. *See id.* at 626–29.

Some pluralists, moreover, are skeptical about “thick” conceptions of the common good, but believe in a discernable “thin” conception of the common good, defined as an ethic of equal respect or tolerance for diverse values. *See, e.g.,* BERLIN, *supra* note 24, at 216–17 (in the face of conflict between ambitious theories, the only humane ideal is pluralism, defined as the refusal to “deprive men, in the name of some remote, or incoherent, ideal, of much that they have found to be indispensable to their life”); Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21 (Nancy L. Rosenblum ed., 1989). For further discussion, *see infra* notes 192–93 and accompanying text.

influenced by participation in the political process.”¹⁶⁸ For them, there is only a raw, never-ending struggle between contending interest groups.

While republicans think democratic deliberation fosters consensus, in the pluralist view, democratic institutions are a vehicle for compromise, not consensus building. As Merrill says, pluralists think “modern democratic institutions . . . aggregate or sum these private interests and values” and the “aggregating or summing process will tend to produce a public policy based on compromise that does not necessarily reflect a coherent conception of the common good.”¹⁶⁹

But republicans and pluralists nonetheless have some affinities: like republicans, judicial pluralists are skeptical of claims that courts should select interpretations of statutes that conform to judges’ assessment of good policy. Their reasons, however, differ. Republicans are skeptical of activist judges, because they think judges are less likely to identify outcomes consistent with the common good than legislatures. Pluralists, by contrast, see courts as little different from legislators—they, too, have exogenously determined values, and judicial “policy” decisions, in turn, reduce to expressions of whatever preferences a judge happens to hold.¹⁷⁰ Worse, judicial pluralists think judicial policy making is much more likely to reflect a narrow set of preferences than legislative policy making.¹⁷¹ Since the judicial pluralist thinks judges are even more likely than legislatures or executives to reach results that accord with a narrow range of preferences, “a [judicial] pluralist is unlikely to prefer judicial policymaking.”¹⁷²

Instead, their moral skepticism, pessimistic views about the inevitability of disagreement, and distaste for judicial activism lead pluralists to think judges should show equal respect to contending interest groups.¹⁷³ A common pluralist theory of “equal respect” is, in turn, contractarian—that is, it posits that courts show equal respect to interest groups by interpreting statutes using default rules to which interest groups would, hypothetically, consent, in advance.¹⁷⁴

Contractarianism, in turn, can lead pluralists to embrace a role for *judicial* compromise in the face of controversial interpretive choices. The next Part turns to explain why.

168. Merrill, *supra* note 17, at 626.

169. *Id.*

170. *See id.* at 628, 646.

171. *See id.* at 629.

172. *Id.* (“Since the judicial pluralist sees little reason why the collective action problems in litigation are less significant than those in the legislative process, and little reason to believe that multi-member appellate courts are less susceptible to cycling and agenda manipulation than legislatures, such a pluralist is unlikely to prefer judicial policymaking to legislative and executive policymaking.” (citations omitted)).

173. *See* ELHAUGE, *supra* note 18, at 25 (stating that “reasonable disagreements about what is just and desirable” necessitate a political (and judicial) system that shows “equal respect to all persons”); *cf.* Merrill, *supra* note 17, at 639–40 (making the related point that pluralists try to reach results that maximize “[t]he net sum of winners over losers”).

174. *See* Merrill, *supra* note 17, at 642–43 (noting that pluralists think courts should act as “bargain-enforcing faithful agent[s]” for the interest groups that form the legislative polity); *see also infra* notes 175–82 and accompanying text (discussing the contractarian approach to selecting default interpretive rules advocated by a leading academic pluralist, Einer Elhauge).

2. Two Pluralist Models of Judicial Neutrality

A common way to show equal respect to interest groups is to adopt interpretive default rules to which interest groups would, hypothetically, agree, in advance.¹⁷⁵ This contractarian approach, in turn, leads to two different, but complementary, default rules. First, courts should interpret ambiguous statutes¹⁷⁶ to reflect preferences that are enactable through the political process. Second, in highly controversial cases where it's very likely no interpretation is enactable, courts should switch to trimming, or moderating between, the preferences of competing interest groups.

Einer Elhauge, a leading pluralist, is a powerful advocate for the first default rule. Judges, he argues, should interpret statutes in light of enactable preferences. In other words, where several interpretations of a statute are possible, courts should survey pre- and post-enactment legislative history and agency interpretations to determine which of the interpretations most likely could be enacted by both houses of Congress and signed by the President, and then select that interpretation.¹⁷⁷

This default rule can be justified from contractarian premises, as Elhauge acknowledges. Democratic political processes, he says, do a reasonable, if imperfect, job of “accurately and equally weigh[ing] our different conceptions” of the good,¹⁷⁸ while judicial policy making reflects a particularly narrow set of preferences that “violate[s] individual conceptions of the good more often.”¹⁷⁹ Interpreting ambiguous statutes in a way that reflects enactable preferences, accordingly, is less likely to offend interest group preferences, on average, and is therefore the decision rule to which interest groups would all, plausibly, agree if they had a chance to bargain over the decision rules that courts apply.¹⁸⁰

At times, indeed, Elhauge goes farther. He suggests that interest group consent is not hypothetical, but real. Interest groups, after all, have created our legislative system and exhibit continuing willingness to submit to preferences that are strong

175. Contractarian theories of equal respect are particularly prevalent in literature on political justice. For an overview, see Scott Gordon, *The New Contractarians*, 84 J. POL. ECON. 573 (1976) (critically surveying Rawls, Nozick, and James Buchanan).

176. I am using “ambiguous” here in a colloquial way, rather than the technical sense in which the term is used in modern language theory: that is, I use it to mean that the statute’s text is either susceptible to multiple interpretations (what language theorists call “ambiguity”) or enacts a principle that is susceptible of borderline cases in application (what language theorists call “vagueness”). For a discussion of technical distinction between ambiguity and vagueness, see generally Lawrence B. Solum, *Legal Theory Lexicon 051: Vagueness and Ambiguity*, LEGAL THEORY LEXICON (Aug. 2, 2010), http://lsolum.typepad.com/legal_theory_lexicon/2006/08/legal_theory_le.html. For further discussion of the limitation of my argument to textual ambiguity or vagueness, see *infra* note 190 and accompanying text.

177. ELHAUGE, *supra* note 18, at 23–38.

178. *Id.* at 24.

179. *Id.* at 25.

180. See *id.* at 24 (suggesting his default rule rests on “consequentialist grounds: if everyone accepts this social compact, the expected good consequences outweigh the bad for each of us”); *cf. id.* at 25 (“An interpreter who insists her conception of the good must take precedence breaches the fundamental social contract.”).

enough to gain enactment through it. As a result, interpreting statutes in ways that are enactable satisfies conditions of legitimacy to which interest groups would not only hypothetically consent, but to which they, in fact, *do* consent on an ongoing basis.¹⁸¹

Often, though, an ambiguous statute is ambiguous precisely because no interpretation of the statute is enactable. Unable to come to agreement, interest groups enact a vague statute, punting the question about its meaning to courts. Where ambiguity is the product of a legislative deadlock, Elhauge suggests courts should fall back on various supplemental default rules designed to reach approximations of some subset, or second-best set, of enactable preferences—either those of governmental subunits, localities, or “the old political processes” that nominated federal judges.¹⁸² My claim here, however, is that contractarian theory supports a different interpretive approach entirely: where ambiguity is the product of a legislative stalemate, courts should, instead, choose interpretations that trim between competing preferences.¹⁸³

Justifying this claim requires saying more about the reasons why interest groups would, plausibly, agree in advance to abide by results that are capable of enactment. Ours is a supermajority system. And the signal features of that system—supermajority voting rules like the filibuster, checks and balances, bicameralism, and federalism—make it difficult for any interest group to enact their preferences.

The most plausible reason interest groups might insist on these roadblocks is because they are averse to uncertainty and therefore focus on controlling uncertainty about their fortunes in the future. Studies of people’s decisions under uncertainty suggest that a “general preference to act on more information rather than less, on known risks rather than under uncertainty, is widespread and dependable.”¹⁸⁴ And in the constitutional moment when interest groups consider framework rules, groups face significant uncertainty. Even if they are dominant now, they don’t know whether they will be dominant in the future. And, in any event, they may be “less confident in their interests over a more extended time horizon” because their preference may change in light of unforeseen contingencies or as a result of “preference drift.”¹⁸⁵

181. See *id.* at 29–31 (noting that interpreting statutes to reflect enactable preferences legitimates interpretation because it accords with the “accepted . . . set of reasons” that we, collectively, think “justify compelled obedience” to statutory commands—namely, that those commands reflect preferences that are able to surmount “legislative obstacles (like the concurrence of separate legislative houses and an executive)”).

182. *Id.* at 227–40.

183. This is not Elhauge’s view but, for reasons I suggest below, is offered as a friendly amendment, or addition, to Elhauge’s framework, flowing from shared pluralist and contractarian premises.

184. S.L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY* 374 (1989).

185. Kenneth A. Shepsle, *Old Questions and New Answers About Institutions: The Riker Objection Revisited*, in *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* 1031, 1037 (Barry R. Weingast & Donald A. Wittman eds., 2006) (stating that in a “constitutional moment,” in which decision makers structure institutions and framework rules for governing them, deliberators may structure rules with a focus on limiting the risk of future losses rather than

Maximin, in turn, “may emerge from the aversion of contractors to uncertainty, independently of their attitudes to risk,” because maximin guarantees a certain minimum payoff and limits uncertainty to the degree of “positive deviations from the certain minimum.”¹⁸⁶ Interest groups acting consistently with maximin will, in turn, prefer framework rules that limit the risk of disastrous losses for *all* groups, in order to insure against uncertainty about what their position, and preferences, will be in the future. Supermajority rules like the filibuster, checks and balances, and various forms of federalism provide this protection. Together these rules force dominant groups to compromise with minority groups, ensuring minorities get some of what they want, or leave space for different groups to go their own way and enact their disfavored preferences *somewhere*.

And it is plausible to think that interest groups that prefer these restraints would also sometimes prefer that, in the face of a legislative *deadlock*, courts interpret *ambiguous* statutes in a way that trims between competing interests. They may not prefer such a rule when it is clear which preferences are enactable in a supermajority system. In that case, so long as courts interpret statutes in a way that reflects preferences that are enactable, courts provide as much protection for minority preferences as the legislative system that interest groups design allows. But it is especially plausible to think that interest groups would prefer that courts trim between competing interests when it is very unlikely that any group can enact its preferences—or deeply uncertain that any can. In that case, groups exhibiting

maximizing current gains because, while “[d]eliberators often know their own endowments, and thus their own interests, and sometimes even those of relevant others[,] . . . they may be less confident in their interests over a more extended time horizon owing to preference drift, unforeseen contingencies, and even foreseen contingencies that arise stochastically but have not yet been realized”).

186. HURLEY, *supra* note 184, at 377. Maximin is often explained (and criticized) as a decision rule appropriate only in cases where extreme risk aversion is warranted. However, it is not necessary to posit extraordinarily grave risks and a high degree of risk aversion in order to justify maximin. “[M]aximin may emerge from the aversion of contractors to uncertainty, independently of their attitudes to risk,” because choosers exhibiting aversion to uncertainty “will not simply treat ignorance of probabilities as a warrant for assigning equal probabilities to alternatives.” *Id.* at 376–77. Even so, the plausibility of maximin only increases where the choice not only involves uncertainty, but where the “stakes are important,” implicating both aversion to uncertainty and to the risk of losses. *See* Daniel Ellsberg, *Risk, Ambiguity, and the Savage Axioms*, 75 Q. J. ECON. 643, 663 (1961) (noting that where the “stakes are important” and the probability of distributions resulting from the choice is uncertain, it is reasonable for actors to exhibit uncertainty aversion by preferring bets based on payoffs that are “relatively *insensitive*” to uncertainty (emphasis in original)).

For further discussion of the possibility rationality of maximin in the face of uncertainty, see JON ELSTER, *EXPLAINING TECHNICAL CHANGE: A CASE STUDY IN THE PHILOSOPHY OF SCIENCE* 185–207 (1983); R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* 278–82 (Dover Publ’ns, Inc. 1989) (1957); Kenneth J. Arrow & Leonid Hurwicz, *An Optimality Criterion for Decision-Making Under Ignorance*, in *UNCERTAINTY AND EXPECTATIONS IN ECONOMICS: ESSAYS IN HONOUR OF G.L.S. SHACKLE* 1 (C.F. Carter & J.L. Ford eds., 1972); C.Y. Cyrus Chu & Wen-Fang Liu, *A Dynamic Characterization of Rawls’s Maximin Principle: Theory and Implications*, 12 CONST. POL. ECON. 255, 268 (2001) (modeling maximin as a response to uncertainty, rather than risk, aversion); Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 882 (2006).

maximin preferences and aversion to uncertainty would hardly agree to allow courts to short circuit a legislative process designed for their mutual protection by siding with one set of preferences and imposing it across the board.¹⁸⁷ They would prefer, instead, that courts adopt compromise interpretations that give each some of what it values.

It bears emphasizing that the claim here rests on a hypothesis about what interest groups would agree to in a hypothetical constitutional moment. It does not rest on the content of any actual agreement. But it is a realistic hypothesis, based on assumptions that track “widespread and dependable” empirical findings that show that uncertainty aversion is a common feature of human decision making¹⁸⁸ and that help explain the durability of the institutions we have. While more can be said to defend the claim advanced above,¹⁸⁹ a contractarian case that rests on a realistic

187. See, e.g., GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 30 (1985) (noting that uncertainty would lead groups to reject random selection of one person as the “dictator” of the good for everyone). Indeed, in large stakes cases, where it is unclear which group is dominant, even interest groups that *are* dominant would prefer a decision that trims between group preferences, rather than taking a gamble on courts’ unpredictable attempts to assess which interpretations are enactable.

188. HURLEY, *supra* note 184, at 374.

189. A starting point would be with the work of James Buchanan and David Gauthier. James Buchanan, with Gordon Tullock and Geoffrey Brennan, made the seminal contractarian argument for supermajoritarianism, and other constitutional restraints, based on assumptions of interest group decisions made behind a “veil of uncertainty.” See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); see also BRENNAN & BUCHANAN, *supra* note 187, at 30 (“Faced with genuine uncertainty about how his position will be affected by the operation of a particular rule, the individual is led by his self-interest calculus to concentrate on choice options that eliminate or minimize prospects for potentially disastrous results.”). Buchanan assumes that interest groups are risk neutral but are led by uncertainty and the circumstances of constitutional choice to behave “as if” they were risk averse; he calls them “quasi-risk averse[s].” *Id.* at 55. For an overview, see DAVID REISMAN, *THE POLITICAL ECONOMY OF JAMES BUCHANAN* 123–35 (1990).

David Gauthier also “judges social structures permissible” if they would be chosen through a hypothetical “social agreement . . . based on rational negotiation among fully informed, determinate individuals.” Peter Vallentyne, *Gauthier’s Three Projects*, in *CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER’S MORALS BY AGREEMENT* 1, 3–4 (Peter Vallentyne ed., 1991); see also DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986). According to Gauthier, rational agents would choose options according to the “minimax relative concession” principle—that is, they would choose options that “minimize[] the maximum relative concession that anyone makes.” Vallentyne, *supra*, at 8 (emphasis omitted); see also GAUTHIER, *supra*, at 14–16. The approach sketched below, which assumes that interest groups would, in the face of ambiguity and a legislative deadlock, prefer interpretations that limit inequality in their respective dissatisfaction, see *infra* notes 206–08 and accompanying text, has obvious affinities to that principle.

Nonetheless, the approach sketched here departs from both Buchanan and Gauthier in various ways. For example, Gauthier does not assume any aversion to risk or uncertainty; his argument for the minimax relative concession principle is based instead on formal claims about the conditions for rational compliance with agreements. See GAUTHIER, *supra*, at 14–

appraisal of human decision making and on assumptions that provide a plausible justification for existing institutions has much working in its favor.¹⁹⁰

Nonetheless, for those unconvinced by contractarian theories, there is another, less fictive way of understanding claims that courts should minimize inequality of dissatisfaction among interest groups. Used as a principle of public decision making, a contractarian theory in which contracting parties are assumed to decide according to maximin allows a decision maker to allocate opportunities for gains to one group only if others would agree to award those opportunities, given their (hypothesized) interest in ensuring a minimum security level for their own interests. In effect, this model requires the decision maker to treat risks of losses and opportunities for gains as things held in common, allowing each group an opportunity for gains at the price of sharing a roughly equal portion of the risk of loss from a decision with other parties.¹⁹¹

As such, the hypothetical contract models a widely held intuition about political justice: public decisions must reflect “the value of mutual respect, which limits the grounds on which we may call on the collective power of the state to force those who do not share our convictions to submit” to our preferences.¹⁹² Pluralists who

16, 154–56. And, unlike Buchanan, I assume groups in a constitutional moment would choose conservatively, given uncertainty, not “quasi-risk,” aversion. Finally, unlike Buchanan, I take as a starting point the idea that contractarianism can properly inform judicial decision making. See James M. Buchanan, *Contractarian Political Economy and Constitutional Interpretation*, 78 AM. ECON. REV. 135, 137 (1988) (arguing that courts must make “truth judgments” rather than “compromise[] among interests”).

190. It also bears emphasizing that the argument here applies only in cases of statutory ambiguity. The argument assumes we are acting in the field of discretion left to courts by constitutional restraints. And where an enacting authority has promulgated a set of clear instructions, courts are constitutionally obligated to abide by those instructions. See, e.g., John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1680 (2001) (“[E]quitableness interpretation may have fit well within English and state constitutional systems that blurred legislative and judicial powers, [but] it fits poorly within a Constitution that clearly demarcates those powers, while also prescribing a distinct and elaborate mechanism for enacting laws.”). Even aside from constitutional restraints, though, the conception of ex ante interest group agreement developed here independently favors limiting trimming interpretations to instances of true statutory ambiguity. A roving judicial power to displace the command of clear statutes would undermine the protections of the supermajority process that we are assuming maximin-driven interest groups favor. It is only when a statute is silent or ambiguous—where no interpretation has actually made it through the supermajority process—that those groups might agree to a trimming approach to interpretation, since a judicial effort (however imperfect) to trim between preferences is on average much more likely to mimic the protections of a supermajority system, by limiting each group’s exposure to worst-case outcomes, than the imposition of whatever preferences happen to be favored by a small coterie of Supreme Court Justices.

191. See John Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141, 144–45 (1974) (noting that a contractual theory of fairness in which contractors are assumed to decide according to maximin models an aspiration of free and equal personality, in which a natural distribution of advantages is viewed as a “collective asset” that must be equally shared, subject to the difference principle).

192. THOMAS NAGEL, *Rawls and Liberalism*, in CONCEALMENT AND EXPOSURE 87, 98 (2002).

think courts should trim between interest group preferences are, in other words, not necessarily the moral skeptics they claim to be. Their claims are consistent with a thin theory of judicial morality, which posits an ethic of reciprocity among competing, equally matched interests embodied in a reluctance to impose uniquely tragic costs on deeply held viewpoints competing for judicial recognition. Under that ethic, where no set of interests is capable of enactment, courts cannot short circuit the legislative process by siding with one set of contending interests over another. They should, instead, act in a neutral fashion that guarantees each an opportunity to achieve some of what it values.¹⁹³

Not all pluralists will accept all of the preceding claims. But, given shared first principles—that courts should interpret statutes using default rules that interest groups might agree to—these are claims that many pluralists *might* accept.

The upshot: many pluralists favor showing interest groups equal respect. And they think, in turn, that ethic requires courts to interpret ambiguous statutes using default rules to which interest groups consent. Given a certain set of plausible assumptions—that, in a constitutional moment, groups would exhibit maximin preferences given uncertainty about their future endowments and preferences—a strong contractarian case can be made, not only for interpreting statutes in a way that accords with preferences capable of enactment in our supermajority system, but for adopting interpretations that trim between competing interests when an interpretive question is so divisive that no interpretation can be enacted.¹⁹⁴

193. See BERLIN, *supra* note 24, at 92 (asserting that in the face of reasonable pluralism, a just response is to create “more room for the attainment of . . . personal ends” for all concerned parties, if necessary through “logically untidy, flexible and even ambiguous compromise”).

194. The foregoing argument, incidentally, may pose a false contrast between trimming interpretations and interpretations that reflect preferences that can be enacted. When no group is dominant, each group can achieve some of its preferences only by entering into a compromise deal with other groups. Agreement among equally powerful groups, in turn, is possible only when a compromise position gives each some of what it wants. As a result, trimming interpretations capture the essential feature of a deal groups might reach among themselves.

Below, I unpack the case for ambiguous interpretation as a form of trimming. Compromises between equally matched interest groups will often take the form of “logically untidy, flexible and . . . ambiguous” statutory language. BERLIN, *supra* note 24, at 92. And, as Joseph Grundfest and Adam Pritchard have shown, when interest groups are equally matched in the legislative process, they may actually prefer that courts *interpret* that language in an “ambiguous” way—that is, by interpreting the statute to enact a fuzzy standard that can be expected to yield inconsistent interpretations of the statute among lower courts. When courts do so, “[l]egislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible.” Grundfest & Pritchard, *supra* note 16, at 628. Indeed, the prospect that courts will adopt varying interpretations of the statute may, as a result, be particularly essential to the legislative deal. *Id.* at 629 (“If the judiciary can predictably ascribe a consistent meaning to a record that legislators intend to be ambiguous, then ambiguity’s value as a tool of compromise is lost.”).

As a result, there is less of a gap between a rule that courts should trim and a focus on enactable preferences than appears at first glance. In any case where it is likely *no* group

Finally, these claims are also consistent with a widely held intuition: that courts, in the face of divisive debates, should show reciprocity to deeply held interests competing for judicial recognition.

3. Pluralism and Dynamic Statutory Interpretation

Pluralist approaches to statutory interpretation are dynamic, rather than static. Elhauge, for example, argues that courts should dynamically interpret ambiguous statutes to reflect today's enactable preferences because all enacting interest group coalitions would uniformly "prefer a general default rule that tracks the enactable preferences of the current polity."¹⁹⁵ He explains:

Generally, an enacting polity's preferences will be weaker regarding future events than . . . events during its time in governance. Part of the reason for this is the standard tendency of individuals to discount future events Most important, only some of those holding the enacting polity preferences will still be around when the future interpretation occurs. . . . Even without any change in the identity of officials or voters, their political views are likely to change over time, in part because their life situations will change¹⁹⁶

The upshot is that "the enacting polity would generally prefer influence over current interpretation of past statutes more than influence over future interpretation of its statutes."¹⁹⁷

The same logic carries over to trimming interpretations. If, after all, the tradeoff between the enacting polity's preferences and those of the current polity "looks decisively favorable to the current polity" with respect to enactable preferences,¹⁹⁸ the same tradeoff should favor the groups in the current polity when deciding whether to trim between competing interests.

For example, imagine a statute enacted in 1938.¹⁹⁹ It may be that the enacting polity had a clear preference for a particular interpretation of that statute. What if that interpretation is so controversial and divisive in the 2009 polity that it could not be enacted, and, in addition, no competing interpretation could be enacted either? What if, given changed circumstances, choice about how to apply the statute involves the risk of grave losses for many different interest groups with a stake in its application in 2009, risks each of these groups would prefer to limit or avoid?

is dominant enough to enact its preferred interpretation, and the stakes are important, an "ambiguous" interpretation is the only "interpretation" of the statute that is likely enactable. And it is the interpretation that the different groups that form the audience for the statute would want the judiciary to choose. *Id.* at 639 ("[I]f Congress decides that it must compromise and employ ambiguous, standards-based language in order to enact a piece of legislation, then the courts must agree to interpret the statute ambiguously in order for Congress to achieve its desired result.").

195. ELHAUGE, *supra* note 18, at 45.

196. *Id.* at 44.

197. *Id.*

198. *Id.* at 45.

199. This is the year, of course, that the Federal Rules of Civil Procedure were adopted.

Here, both the 1938 and the 2009 polity gain more from a rule that respects the interests of current groups over original enacting groups. It is easy to see that the 2009 polity gains if courts adopt a current preferences default rule. Consider, though, the 1938 polity. A rule that insists on applying 1938 preferences in 2009 means that 1938 interest groups capable of enacting their preferences reap tenuous gains from distant future applications of the statute. But that benefit comes at the expense of a serious risk of grave losses when the enacting preferences of pre-1938 polities are applied in the face of debates that are deeply divisive in 1938. Both polities, then, gain much more when courts adopt general default rules that respect their preferences for limiting losses, by trimming in deeply divisive, large-stakes cases where there is no current majority preference.²⁰⁰

4. Pluralism and Minimalism

The argument so far: When a statute is ambiguous, it's sometimes very clear, based on post-enactment legislative history or recent agency or executive interpretations, that only one of several competing interpretations is currently enactable.²⁰¹ In that case, courts should dynamically interpret statutes in a way that minimizes the dissatisfaction of those with enactable preferences.

Sometimes, though, it may be obvious that interest groups are so evenly matched, and an issue is so divisive, that no interpretation of the statute can be enacted. Or, alternatively, it may be obvious that an older interpretation has become so controversial that it cannot *currently* be enacted. In either case, courts should switch focus and dynamically interpret statutes in a way that “trims” between competing interests.

The case for trimming, as we have seen, is contractarian. Sometimes, in turn, the contractarian model sketched above leads to the conclusion that courts should not only interpret statutes in a way that trims between interests, but should do so through ambiguous, or minimalist, interpretations. This section explains why.

a. Trimming

Trimming interpretations Solomonically split the difference between two sides. Trimmers, in turn, choose to trim for different reasons. As Cass Sunstein says, some “are unsure how to proceed . . . [and] choose to trim, with the thought that the truth probably lies in between [extremes].”²⁰² Other trimmers, though, are

200. This point is consistent with the Supreme Court's current approach to stare decisis. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring) (noting that the stare decisis of prior precedent is diminished “when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases”); see also Merrill, *supra* note 17, at 646 (pointing out that because stare decisis is a “judicial creation” that is “supported by values that inhere in the idea of the rule of law, such as predictability . . . and the protection of reliance interests,” pluralists, who are “skeptical about the objectivity of concepts of the public good,” place a relatively low value on stare decisis).

201. ELHAUGE, *supra* note 18, at 72–111.

202. Sunstein, *Trimming*, *supra* note 16, at 1065.

motivated not by doubt, but by an ethic of “civic respect” that demands “minimiz[ing] the harm to losers.”²⁰³

Pluralists are variants of this second type of trimmer, but with a distinct emphasis: pluralist trimmers trim in a way that respects *interest group* preferences. Their trimming, as we have seen, flows from contractarian premises. It assumes interest groups, given uncertainty about their future preferences, would agree, in advance, only on institutional framework rules that satisfy maximin—in other words, that limit the risk of terrible losses for all groups. And when no interpretation of an ambiguous statute can secure enactment, interest groups with these preferences should prefer a default rule that directs courts to adopt compromise interpretations.

A compromise capable of satisfying these groups’ maximin preferences would, in turn, do two things: it would limit gross inequalities in interest groups’ dissatisfaction,²⁰⁴ and it would also guarantee each group a minimum security level for its preferences. Pluralist trimmers, accordingly, try to find compromise interpretations that do both.

Sunstein characterizes “trimming” and minimalist interpretations as distinct approaches to interpretation. While trimmers and minimalists, he says, are “jurisprudential cousins[,] . . . [m]inimalists celebrate the virtues of not deciding; trimmers want to decide.”²⁰⁵ In reality, though, the difference between the two is not so stark. Minimalist interpretations can also trim. By leaving much about the meaning of a statute undecided, a minimalist appellate interpretation can create space for lower courts to adopt a blend of different interpretations, yielding an average statutory result that trims between competing interest group preferences.

Below, I show this sort of trimming minimalism is consistent with the contractarian model described above under two conditions: First, there is no determinate interpretation that can reliably split the difference between interest group preferences. Second, the costs of legal uncertainty pale in comparison to the worst case costs of a clear rule for various interest groups. I will take both points in order.

b. Trimming Minimalism

First, sometimes—although not always—a minimalist decision is the *only* way to trim between contending interests. Consider the following scenarios.

Two Group Zero-Sum Competitions. Consider a statute that has two interpretations: restrained and broad. Imagine there are only two interest groups, one whose preferences would be maximized by the narrow interpretation and one whose preferences would be maximized by the broad interpretation.

Here a court has two potential trimming strategies. First, it might adopt a minimalist decision, yielding a mix of lower court interpretations, some restrained,

203. *See id.* at 1080.

204. This claim is also consistent with David Gauthier’s minimax relative concession principle. *See* GAUTHIER, *supra* note 189, at 14–16.

205. Sunstein, *Trimming*, *supra* note 16, at 1080.

some broad. Under a mix of interpretations, the losing group loses less than if one interpretation were chosen across the board. Second, it might pick a determinate intermediate interpretation that splits the difference between the interests of the two groups.

If a determinate, difference-splitting interpretation is available, courts should choose it. However, in cases where a statutory standard will be applied by many subsequent interpreters against a background of complex facts and changing conditions, it may be impossible—or at least exceedingly difficult—for judges with limited time and bounded cognitive capacities to identify a precise, well-delineated interpretation that balances the interests of either side. In that case, it will be easier, instead, to adopt a fuzzy standard that triggers a variety of approaches to the problem in lower courts. Doing so may not split the difference between the expectations of either group as perfectly as a precise intermediate rule, but may come as close as practicable to doing so.

Multi-Group Conflicts with Severe Uncertainty. Consider another variation. This time, assume that there are three interest groups, and three interpretations of a statute: restrained, moderate, and broad. Assume, further, that two of the interest groups—A and B—face severe uncertainty about which interpretation will result in the best outcomes. Moreover, each interpretation poses a plausible risk of a disastrous outcome from the standpoint of their preferences, which we will assign a value of 20. Assume, as well, that when one of the interpretations results in a disastrous outcome, the other, alternative interpretations will not.

The third interest group C, by contrast, assesses the interpretations under conditions of knowledge, rather than uncertainty. C knows that the restrained interpretation is best, the moderate interpretation will result in 10 increments of dissatisfaction, and the broad interpretation, 20 increments of dissatisfaction.

We have assumed that interest groups exhibit maximin preferences in the face of uncertainty. If so, A and B would prefer a fuzzy interpretation that results in a mix of lower court interpretations.²⁰⁶ When a decision maker is faced with choices involving unknown risks, a sensible maximin strategy is to mix bets. So long as the bets are offsetting, a mix of bets hedges against the hard-to-quantify risk of loss threatened by any one bet.²⁰⁷

206. Ascribing maximin preferences to these groups reflects an assumption, supported by a steady stream of empirical evidence, that people are reliably averse to uncertainty and therefore do “not simply treat ignorance of probabilities as a warrant for assigning equal probabilities to alternatives.” HURLEY, *supra* note 184, at 376.

207. See, e.g., LUCE & RAIFFA, *supra* note 186, at 73 (“[I]t may be sensible to use a mixed strategy as a hedge against extremely unfavorable situations”); see also Itzhak Gilboa & David Schmeidler, *Maxmin Expected Utility with Non-Unique Prior*, 18 J. MATHEMATICAL ECON. 141 (1989) (developing a related model of choice under uncertainty based on maximin expected utility); David Schmeidler, *Subjective Probability and Expected Utility Without Additivity*, 57 ECONOMETRICA 571 *passim* (1989) (constructing a model in which, in the face of uncertainty aversion, an individual who is acting consistently with a model of Choquet expected utility, a special case of maximin expected utility, and who is indifferent between bets with uncertain payoffs, prefers an equal mixture of ambiguous bets in order to smooth expected utility); Uzi Segal, *The Ellsberg Paradox and Risk Aversion: An*

For example, imagine an urn with 100 balls, composed of an unknown mixture of red or black balls. If given a choice between placing a bet that pays \$100 if a red ball is pulled from an urn, or placing a bet that pays \$100 if a black ball is pulled from the urn, a decision maker acting consistently with maximin would value each choice the same: each risks the same worst-case scenario, receiving nothing. That same bettor, however, would prefer placing two bets—a bet that pays \$50 if red is pulled and a bet that pays \$50 if black is pulled—since if she makes two bets, she is guaranteed \$50.

With the value of hedging in mind, consider, now, our hypothetical choice between three interpretations: restrained, moderate, and broad.

	Restrained_____	Moderate_____	Broad
A	0/10/20	0/10/20	0/10/20
B	0/10/20	0/10/20	0/10/20
C	0	10	20

Assume A and B know that one interpretation will result in 0 increments of dissatisfaction, another 10 increments, and the third 20 increments. A and B, facing uncertainty about whether any interpretation will result in the worst-case scenario, would, acting consistently with maximin preferences, value any single interpretation, applied across the board, equivalently with its worst case outcome: 20.²⁰⁸ But they will value an ambiguous interpretation that results in a roughly equal mix of different lower court interpretations consistent with an expected worst-case outcome of $1/3(20) + 1/3(10) + 1/3(0)$, or 10. If, by contrast, we could predict that 70% of lower courts would select the broad interpretation, and 30% would split between restrained and moderate ones, A and B would face an expected worst-case dissatisfaction of $.7(20) + .15(10)$, or 15.5. Either way, A and B would prefer courts to adopt an ambiguous minimalist interpretation that results in a mix of lower court approaches.

Anticipated Utility Approach (UCLA Dep't of Econ., Working Paper No. 362, 1986), available at <http://www.econ.ucla.edu/workingpapers/wp362.pdf> (modeling uncertainty aversion based on an anticipated utility model); *id.* at 28–29 (“As ambiguous lotteries appear to be riskier than clear lotteries, it is natural to expect that a decision maker with a higher degree of risk aversion is willing to pay less to participate in a certain ambiguous lottery.”).

For discussion of ambiguous statutory standards as a “mixed strategy,” see Grundfest & Pritchard, *supra* note 16, at 639–40 (“Statutes that are rules-based, precise, and unambiguous are expressed as pure strategies in the interactive-interpretive equilibrium between legislatures and courts. . . . Statutes that are standards-based and adopted as a consequence of a compromise rooted in ambiguity are expressed as mixed equilibria. Once enacted, these statutes should give rise to a range of potentially inconsistent interpretations that reflect the ambiguity intended by the legislative bargain.”).

208. LUCE & RAIFFA, *supra* note 186, at 278 (noting that decision makers exhibiting maximin preferences value an act according to the “worst state for that act, and the ‘optimal choice’ is the one with the best worst state”).

Under a moderate interpretation, C does worse than its preferred (restrained) interpretation but better than its worst-case (broad) interpretation. But it also does better than its worst-case interpretation under a minimalist standard. C would value an ambiguous interpretation that results in a roughly equal mix of different lower court interpretations consistent with an expected worst-case outcome of $1/3(20) + 1/3(10) + 1/3(0)$, or 10—the same as a moderate interpretation. If, by contrast, we could predict that 70% of lower courts would select the broad interpretation, and 30% would split between restrained and moderate ones, C would face an expected worst-case dissatisfaction of $.7(20) + .15(10)$, or 15.5—worse than a moderate interpretation but still better than a broad one.

Trimming, in turn, requires selecting an interpretation that limits the harm to losers while giving each group some of what they value. And, here, picking any interpretation across the board is no way to trim: it imposes an unacceptably uncertain risk of bad outcomes for A and B, which they value the same as the absolute worst available outcome.

A minimalist interpretation, here, is the only way to trim. Only a minimalist standard, and the resulting mix of lower court interpretations, can limit the risk of terrible outcomes for A and B. And while a moderate interpretation gives C some of what it wants, so does a mix of lower court interpretations. Sometimes, indeed, that mix may improve on the moderate interpretation; sometimes it may do worse. But, regardless, a mix ensures C some minimum security level for its preferences, too.

Under a minimalist interpretation, then, no group guarantees everything they want by forcing the others to assume risks they view as intolerable. Instead, a minimalist interpretation achieves just what pluralist trimming demands: It limits inequality in dissatisfaction for each group, while ensuring each group a minimum security level for its preferences. It models the essential feature of any fair deal among equals.

Three Group Conflicts Without Uncertainty. Minimalism is not always the best trimming strategy. In a case involving just two groups, a determinate intermediate interpretation (when one is available) is an effective trimming strategy. Each gets some of what it wants—and equal shares, at that. And in general, concerns for planning and uncertainty should lead courts to pick determinate interpretations, so long as they do at least as good a job of minimizing inequality of dissatisfaction as a minimalist interpretation.

This will be true in a number of cases in which there is a determinate intermediate interpretation. Consider a final scenario, where group A prefers a restrained interpretation, group B prefers the moderate interpretation, and group C prefers the broad interpretation. Each interpretation is separated by 10 units of dissatisfaction.²⁰⁹

209. This example is a variation of a scenario provided by Einer Elhauge, which he uses to demonstrate why picking moderate interpretations may minimize enactable preference dissatisfaction in cases where each interpretation has a positive chance of being enacted, but less than even odds of enactment. See ELHAUGE, *supra* note 18, at 136.

Restrained	_____	Moderate	_____	Broad
A	10	B	10	C

If the moderate interpretation is chosen, A and C will face dissatisfaction of 10, and B will face dissatisfaction of 0. By contrast, if a fuzzy interpretation is chosen that results in a roughly equal mix of the three decisions, A and C will face dissatisfaction of $1/3(0) + 1/3(10) + 1/3(20)$, or 10. B will face expected dissatisfaction of $1/3(0) + 1/3(10) + 1/3(10)$, or 7. As a result, no group is worse off, and B is better off, if courts pick the moderate interpretation.

Indeed, the point holds in all kinds of cases in which there are many interpretations and many contending groups, each of which is secure in its preferences. In these cases, picking an intermediate interpretation over extremes will always do just as good a job at trimming as a minimalist standard. All things equal, in such cases, intermediate interpretations are to be preferred.

The bottom line then: Minimalism is not always a sensible trimming strategy. It only is in *some* cases, specifically, those where a fuzzy standard that triggers a mix of lower court interpretations is the only way to limit inequality in dissatisfaction *and* there is no alternative determinate interpretation that does an equally competent job at trimming. Those instances include: (1) cases where an interpretation poses a zero-sum tradeoff between two competing interest groups, and courts cannot easily identify an intermediate rule that splits the difference between their interests; and (2) cases where an interpretive choice poses an uncertain risk of grave losses for interest groups no matter how the choice is resolved.

c. Planning and the Limits of Minimalism

Is there anything to be said against fuzzy, minimalist judgments? “A great deal, in law as in ordinary life,” argues Sunstein.²¹⁰ “[A]n especially important problem comes from the need for planning. . . . With respect to many things, it is more important for people to know what the law is than for the law to have any particular content.”²¹¹

Our focus has been on what default, interpretive approach interest groups, given their uncertainty about their future preferences, would prefer *ex ante*, that is, behind a veil about what their preferences will be in the future. And in some cases, concerns about uncertainty will sometimes lead interest groups to categorically reject minimalism in advance. When planning is much more important than the content of the law, minimalist decisions will increase, not decrease, the dissatisfaction of all groups with a stake in the interpretation. For that reason, interest groups will not prefer minimalism when courts decide the content of substantive rights in a wide swath of everyday tort, contract, or regulatory law, where the need for advance planning is at a premium.

210. SUNSTEIN, ONE CASE AT A TIME, *supra* note 13, at 54.

211. *Id.* at 55.

In some cases, though, the costs of legal uncertainty entailed by a minimalist decision pale in comparison to the “worst case” costs of adopting a clear rule. In those cases, if they exhibit maximin preferences, interest groups will, *ex ante*, prefer minimalist decisions—although only in contexts where that is the only viable trimming strategy.

Consider the scenarios just discussed. In zero-sum competitions, where the costs of judicial adoption of their opponent’s preferred interpretation greatly outstrip the costs of legal uncertainty, and there is no determinate difference-splitting interpretation, interest groups exhibiting maximin preferences will prefer an uncertain rule that results in a mix of lower court interpretations to an *ad hoc* judicial choice among competing interpretations of the statute across the board.

Similarly, in cases where an interpretive choice imposes the risk of grave and uncertain losses for several groups if a single rule is chosen, groups acting consistently with maximin will prefer an uncertain rule that results in a mix of lower court approaches, hedging against the risk of terrible outcomes. They will disfavor a clear rule, which threatens them with the uncertain prospect of losing everything that matters to them.

This is true even if some groups might, in particular cases, turn out to have a clear preference for one interpretation—like C in the example of this sort of problem from the last section. Remember, our focus is on what approach groups would prefer *ex ante*. While, at the point of judicial decision, C will not do as well under a minimalist standard as it would if its preferred (restrained) interpretation is chosen, when default rules are chosen *ex ante*, C does not know its own future preferences. Assuming C adopts an appropriately conservative maximin response to that uncertainty, C will prefer that courts adopt a default interpretive approach that limits the risks of worst-case outcomes for all groups with a stake in interpretive choices. And, in this particular kind of case, a minimalist standard is the only way to do so. Assuming that the cost of an unclear legal rule pales in comparison to worst-case outcomes avoided by a minimalist standard, C, like other groups, will therefore prefer that courts default to minimalism.

Planning and certainty, then, are important limiting concerns for the use of minimalism as a trimming strategy. But when interest groups exhibit maximin preferences, and the worst outcome of a clear rule far outstrips the costs of an unclear rule, no interest groups have a vested interest in legal certainty. In that case, pluralists are willing to “pay uncertainty’s price”²¹² to the same degree as interest groups they commit to respect.²¹³

5. The Pluralist Case for Minimalism: A Summary

We are in a position to sum up: Many pluralists think courts must interpret ambiguous statutes to conform with enactable preferences so long as there is

212. Cf. SUNSTEIN, *RADICALS IN ROBES*, *supra* note 142, at 29.

213. See, e.g., Merrill, *supra* note 17, at 646 (noting that, for pluralists, concerns about certainty and planning reflect yet another set of contestable preferences, and pluralists, given their skepticism about the “objectivity” of preferences, give them only as much weight as interest groups themselves do).

significant chance that one of several competing interpretations is enactable.²¹⁴ But the focus should shift to trimming between competing interests when an interpretive choice is so controversial that no interpretation is enactable.²¹⁵

Opaque, minimalist decisions that “leave things undecided” appeal to pluralists as a trimming strategy under the following conditions: The worst-case scenario of a clear interpretation for various groups is much worse than the costs of uncertainty created by an unclear rule, and the interpretive choice involves either (1) a zero-sum trade-off between the interests of two groups, where there is no determinate “difference splitting” interpretation of a statute; or (2) uncertain risks of serious harm for many different groups no matter how the interpretive question is resolved.²¹⁶

In those cases, minimalism has broad, flexible appeal as a trimming strategy—indeed, in those cases, minimalist interpretations are the *only* way to trim. Assuming they exhibit maximin preferences, all groups would agree, in advance, that courts should adopt such interpretations in these contexts.

The class of cases in which fuzzy, minimalist decisions make sense for pluralists is not terribly large. It excludes a broad swath of garden-variety substantive law, where the need for planning is far more important to all competing groups than any other consideration. It excludes contexts where a current majority is clearly able to enact a particular interpretation of a statute. Even outside those contexts, the circumstances where pluralist uses of minimalism are sensible are relatively narrow: Many interpretive problems, for example, do not implicate zero-sum conflicts between just two interest groups. And in contexts that do, there is often a determinate interpretation that splits the difference between those groups, obviating the need for a minimalist interpretation. Similarly, relatively few interpretive settings involve such severe uncertainty about the outcome of the choice that many groups would face an uncertain prospect of severe harm if *any* interpretation were adopted.

Even so, there are some interpretive problems that fall within the core. As the next Part explains, interpretation of summary judgment and pleading standards are, at least plausibly, such problems.

III. PROCEDURE’S MINIMALISM

We are now in a position to return to the *Celotex* trilogy, *Twombly*, and *Iqbal* and analyze the cases through a pluralist lens. Below, Part III.A begins by recounting the domination of modern procedural rule making by interest-group conflict. Parts III.B.1 and III.B.2, in turn, unpack the case for opaque, minimalist interpretations of summary judgment and pleading standards, in light of that conflict. Part III.C considers some final objections.

214. See *supra* notes 175–82 and accompanying text.

215. See *supra* notes 182–90 and accompanying text.

216. See *supra* notes 207–09 and accompanying text.

A. Procedural Interest Groups

Some readers may resist the notion that procedure implicates interest group conflict in the same way that substantive statutes do. While federal rules are approved by the Supreme Court, rule making within the judicial branch is, for all intents and purposes, controlled by the Civil Rules Advisory Committee, composed of representatives of the practicing bar, the judiciary, and the academy.²¹⁷ And, in the early decades after the creation of the federal rule-making system, the Committee's work was undertaken without significant public interest or input.²¹⁸ In theory, its output reflected the dispassionate technocratic expertise of the organized bar, free from the paralyzing interest group conflict that characterizes legislative and administrative decision making.²¹⁹

However, that's no longer true, if it ever was. Growing skepticism about the ideological neutrality of the rule-making process led, in the 1970s and 1980s, to legislative changes in the federal rule-making process—including the creation of public notice and comment procedures, public hearings on proposed rule changes, and open advisory committee meetings.²²⁰ These changes opened the door to “intense” interest group pressure on rule makers.²²¹

“In contrast to . . . nineteenth and early twentieth century [rule makers and reformers],” modern interest groups with a stake in procedural design “sharply disagree about what, if anything, is wrong with the system and what should be done about it.”²²² The result is a rule-making process characterized by pervasive interest group conflict.²²³

217. See, e.g., Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1664–71 (1995) (reviewing changes to the rule-making process accomplished by Congress in 1988).

218. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 899 (1999) [hereinafter Bone, *Process of Making Process*].

219. *Id.* (describing the early rule-making process as premised on a technocratic view of rule making, based on the “reasoned deliberation by legal experts familiar with litigation practice,” free from “interest [group] accommodation”).

220. *Id.* at 901–04 (describing changes in the 1970s and 1980s in the rule-making process, stemming from a progressive loss in “confidence in the efficacy and legitimacy of the traditional court rulemaking model”).

221. Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 84 (1997) (characterizing the politics of modern rule making as “intense,” given the “enormous” stakes “for competing interest groups”); see also Bone, *Process of Making Process*, *supra* note 218, at 903 (“Since 1973, various interest groups—plaintiffs’ bar, defendants’ bar, civil rights groups, and corporate groups—have become more active (some would say aggressive) at all stages of rulemaking”); *id.* at 924 (discussing rule makers’ incentives to make “concessions to powerful interest groups”).

222. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 326 (2008) [hereinafter Bone, *Making Effective Rules*].

223. *Id.* at 327 (rule making characterized by “sharply conflicting interests and no generally accepted normative standard to resolve the conflict”); Bone, *Procedural Discretion*, *supra* note 26, at 1974 (“[I]n recent years, rulemakers themselves are divided or

Some of that conflict—between the trial bar and corporate defendants—is endemic to procedural rule making. What’s distinctive about modern interest group conflict in the rule-making process is the degree to which it also involves clashes between normative views of procedural justice. “Sensing the demise of judicial activism, social reformists have shifted strategy to the rulemaking process.”²²⁴ As a result, debates over procedural design increasingly intersect with intense debates about policy decisions with deep substantive implications, including questions about the just “distributional consequences of procedural rules . . . and the importance of litigation as a tool to empower disenfranchised groups.”²²⁵ Conflict over these issues, more than any others, is the source of modern rule making’s highly contentious character.²²⁶

Others may argue that the case for minimalist interpretations doesn’t apply to procedural interpretation. The contractarian case for minimalism, as we have seen, rests on the idea that interest groups would, *ex ante*, select default rules consistent with maximin, given uncertainty about their future endowments and preferences. Ascribing this conservative decision-making strategy to interest groups is plausible, given their continuing acceptance of supermajority rules and other severe restraints on federal law making: adopting those restraints, after all, is also consistent with maximin.

Yet, Congress has delegated rule making to the judicial branch.²²⁷ As a result, procedural rule making has been exempted from Congress’s cumbersome supermajority process. Congress can veto rules, but it does not play its usual role in enacting them.²²⁸ Because a rule takes effect if Congress doesn’t act, it can’t be bottled up in the House or Senate Judiciary Committees or filibustered in the Senate. Is it really, then, plausible to assume procedural interest groups share a conservative, maximin-oriented approach to rule making?

Yes. In practice, the rule-making system is characterized by as much, if not more, inertia than the legislative process. Over the last thirty years, rule makers have produced few changes of major import.²²⁹ And that’s by design: Through more aggressive exercise of its veto power, and changes in rule-making procedures designed to increase legislative oversight and open the door to interest group pressure, Congress, spurred on by interest groups in the 1980s, worked a sea change in the rule-making process, turning it into a system that “more closely resembles a legislative process with broad public participation and interest group compromise than the process of principled deliberation it was originally conceived to be.”²³⁰ In the face of intense interest group pressure and fearful of a complete

face strongly conflicting interest group pressures.”).

224. Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801 (1991).

225. Bone, *Making Effective Rules*, *supra* note 222, at 325.

226. Bone, *Process of Making Process*, *supra* note 218, at 915–17.

227. 28 U.S.C. § 2071 (2006).

228. 28 U.S.C. § 2074 (2006).

229. See Robert G. Bone, “To Encourage Settlement”: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1612 (2008) (“The politicization of rulemaking has made it very difficult to revise the FRCP . . . because conflicting interest group pressures tend to create Advisory Committee stalemate.”).

230. Bone, *Process of Making Process*, *supra* note 218, at 954.

congressional override of the rule-making process, rule makers have, in turn, adopted an ethos of “accommodation of competing interest groups” characterized by an insistence on interest group consensus.²³¹ The result is a stalemate: the output of the modern rule-making process consists of “highly general rules that leave most of the difficult normative questions to the discretion of” later decision makers—namely, “trial judges in individual cases.”²³²

In effect, the rule-making process—with its emphasis on interest group accommodation and consensus—shares the signal feature of a supermajority legislative system: it’s difficult to get things done without unusually wide agreement. Interest groups were instrumental in creating the modern rule-making system. A plausible explanation for their continuing acceptance of this institutional state of affairs—and the rule-making stasis that it produces—is that they, too, are averse to uncertainty about their future fortunes in a more dynamic system and instead prefer, consistent with maximin, institutional arrangements that, in the absence of wide consensus, guarantee each group some of what it wants. Here, as in the statutory arena, the same preferences would lead interest groups, *ex ante*, to prefer compromise interpretations that trim between competing interests in the face of divisive debates where there is no consensus position.²³³

The upshot: Judges interpreting ambiguous procedures must resolve procedural ambiguity against a backdrop of intense interest group conflict. The nature of conflict in that system presents, in turn, a hospitable climate for pluralist use of minimalism: it involves divisive conflicts over the interpretation of ambiguous procedural rules between interest groups unable to impose their preferences through a rule-making process built on an ethos of consensus and compromise.

B. Trimming Between Procedural Interest Group Preferences

Of course, the pluralist case for minimalism as a trimming strategy is at its height in two contexts: zero-sum competitions between two groups and cases in which an interpretive choice imposes an uncertain risk of important losses for several groups. In the procedural contexts addressed by the *Celotex* trilogy, *Twombly*, and *Iqbal*, interest group conflict takes both forms. Trial lawyers and corporate defendants are locked in a zero-sum competition for procedural gain, while a choice among formulations of summary judgment and pleading rules involves important, uncertain risks for adherents of different accounts of procedural justice.

Below, I unpack the pluralist virtues of ambiguous, minimalist formulations of summary judgment and pleading standards given conflict between both types of interest groups.

231. *Id.* at 902; *see also* Bone, *Making Effective Rules*, *supra* note 222, at 327 (“Faced with sharply conflicting interests . . . the Advisory Committee often seeks consensus among competing interest groups.”).

232. Bone, *Making Effective Rules*, *supra* note 222, at 327.

233. *See supra* notes 183–90 and accompanying text.

1. Trial Lawyers and Corporate Defendants

Plaintiffs' lawyers and a class of large, repeat-player corporations perceive themselves to be locked in what amounts to a zero-sum competition for procedural advantage.²³⁴ And studies of repeat-player litigants in the federal system seem to suggest their perceptions are well founded. Based on a survey of federal civil filings between 1970 and 2000, Gillian Hadfield found that in 2000, "organizations [we]re defendants in more than 80% of all federal civil litigation [excepting prisoner litigation, forfeiture, overpayment recovery, and student loan cases]"—a 20% increase since 1970.²³⁵ Terence Dunworth and Joel Rogers make similar findings for large corporate defendants (what they term the class of "Fortune 2000" firms)²³⁶ over the twenty year period starting in 1971. During that period, Fortune 2000 firms appeared as defendants in 74% of cases.²³⁷

Dunworth and Rogers's study is the only comprehensive study, to date, of multi-decade trends in corporate party status in specific substantive categories of cases. While they do not provide information on the frequency of corporate party status in all substantive categories of cases,²³⁸ they do provide a snapshot of patterns of party

234. See, e.g., Howard Wasserman, *Discovery, Burdens, Risks, and Iqbal*, PRAWFSBLAWG (June 2, 2009), <http://prawfsblawg.blogs.com/prawfsblawg/2009/06/discovery-defaults-and-iqbal.html> ("Seventy years ago, parties were largely interchangeable. A person or business entity was as likely to be a defendant as a plaintiff. So big business saw less of a need to push a defense-favorable view of the procedural rules, because a business might find itself as a plaintiff enjoying the benefits of notice pleading. There is far less interchangeability today—corporations and government are almost always defendants (and repeat defendants at that) who know they will almost exclusively enjoy benefits from a defense-favorable pleading regime.").

235. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1298 (2005). After adjusting her data to offset the undercounting of suits in which organizational parties are not identified as the first named party, Hadfield estimates that 90% of all [non-prisoner, non-student loan] suits involve an organization as at least one party-defendant, while the percentage of suits involving individuals, but not organizations, as plaintiffs, remains stable at about 70% of all nonprisoner, non-student loan civil litigation. *Id.* at 1301.

236. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 518 (1996) (defining the "Fortune 2000" as the 2000 firms listed by Fortune as belonging to either the 500 largest industrial or 500 largest service firms between 1971 and 1987).

237. *Id.* at 540. Dunworth and Rogers found that Fortune 2000 party status in federal litigation remained constant between 1971 and 1991 in tort and contract cases, but the incidence in which these firms appeared as defendants in civil rights and labor cases increased from 72% to 93% over the same period. *Id.* at 542.

238. Dunworth and Rogers lump all non-tort (with "tort" narrowly defined to encompass personal injury and product liability suits) and non-contract cases into a catch-all category of "other causes of action," and, in this category, only break out figures for "civil rights/labor" litigation. *Id.* at 541. The remaining category of non-civil rights statutory actions encompasses a vast swath of litigation—everything from constitutional challenges to statutes; to Administrative Procedure Act challenges to federal rule making; to FOIA requests, federal tax litigation, social security benefit disputes, Interstate Commerce

appearance in some: product liability, personal injury, and civil rights (mostly employment discrimination and labor).

In these categories, which comprised half of the litigation in which Fortune 2000 firms appeared between 1971 and 1991,²³⁹ Fortune 2000 firms appeared as defendants in 94.4% of personal injury and product liability actions and 90.3% of all civil rights and labor actions in which they appeared.²⁴⁰ The only category of litigation in which Dunworth and Rogers found a rough parity between Fortune 2000 firms' appearance as plaintiffs and defendants were commercial contractual disputes, which comprised 30% of the litigation in which Fortune 2000 defendants were involved between 1971 and 1991.²⁴¹ In these suits, Fortune 2000 entities were more likely to appear as plaintiffs in non-insurance-related contract disputes.²⁴² Since Dunworth and Rogers published their findings, civil rights cases, excluding labor suits, have experienced the biggest percentage growth in any category of litigation, while contract suits have experienced a declining share (by about one-third) of federal litigation.²⁴³ In the remaining category of suits—actions involving

Commission rate challenges, and a vast number of other statutory litigation in which nuances in pleading and summary judgment are relatively unimportant; to securities litigation, environmental litigation, consumer fraud suits, civil RICO, and intellectual property and trademark litigation, where nuanced differences in those standards are important. *See, e.g., id.* at 565–67 (describing case-coding). As a result, this category provides relatively little information about corporate party-alignment in those contexts, outside tort (narrowly defined), contract, and civil rights, where battles over pleading and summary judgment are likely to matter.

239. *Id.* at 541 (torts, including product liability and personal injury, accounted for 38% of litigation in which Fortune 2000 firms appeared, while “civil rights/labor” actions accounted for 12.4% of litigation in which Fortune 2000 firms appeared, between 1971 and 1991).

240. *Id.*

241. *See id.*; *see also* Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 586 (“There was a swelling total of contract cases until 1990; in the early 1990s several years of substantial declines reduced the volume of contract cases by about one third; this was followed by a period of little change from year to year.”). Dunworth and Rogers find that filing trends for cases in which Fortune 2000 firms were involved track general filing trends. Dunworth & Rogers, *supra* note 236, at 547–48. However, they also found that the “swelling total of contract cases” in the 1980s, noted by Galanter, was not mirrored in activity among F2000 firms, which were involved in significantly *less* non-insurance contract litigation than the general population of litigants during that decade. Dunworth & Rogers, *supra* note 236, at 548. Dunworth and Rogers also note there was also an anomalous “hump” in F2000 non-insurance contract litigation over a few years in the early 1970s that was not reflected in the general population’s contract litigation. *Id.*

242. *See* Dunworth & Rogers, *supra* note 236, at 541 (noting that F2000 parties appeared as defendants in 50.2% of contract cases and as plaintiffs in 49.8% of contract cases; F2000 firms, largely insurers, appeared as defendants in 67.1% of insurance contract disputes, while F2000 firms appeared as defendants in 42.5% of non-insurance contract disputes).

243. *See* Hadfield, *supra* note 235, at 1289–90 (“Where growth has been the greatest in percentage terms has been in terms of new rights created by Congress. Civil rights cases—which include employment, accommodation, welfare, and other cases—have, of course, increased dramatically since 1970 with the passage of new civil rights statutes and the

federal statutory litigation—Fortune 2000 firms appeared as defendants nearly 60% of the time between 1971 and 1991, although the trend in the late 1980s was toward parity in defendant and plaintiff appearances.²⁴⁴ Disparities in Fortune 2000's firms' participation as plaintiffs and defendants persist, by the way, when Dunworth and Rogers's data are adjusted to exclude the large proportion of Fortune 2000 litigation they studied involving a small group of mega-litigants (mostly asbestos companies and large insurers).²⁴⁵

expansion of remedies and access to the courts (through attorney fee and expanded damages provisions).”).

Dunworth and Rogers found that in the 1980s, non-insurance contract litigation by Fortune 2000 litigants actually lagged trends for other litigants. Dunworth & Rogers, *supra* note 236, at 548. They find a smaller increase in “civil rights and labor” cases between 1971 and 1991. *See id.* at 536. The difference reflects, in part, the fact that Hadfield looks only at employment discrimination and accommodation discrimination cases, while Dunworth and Rogers lump labor disputes, including Employee Retirement Income Security Act (ERISA) and National Labor Relations Act cases, into the same category as discrimination cases. The latter set of cases, excluding ERISA suits, has experienced a less rapid increase over the last thirty years. *See Hadfield, supra* note 235, at 1288 (showing that the class of employment suits—meaning suits involving federal labor law, excluding ERISA—has stayed essentially flat between 1970 and 2000). The difference also reflects the fact that employment discrimination suits experienced a massive increase post-1990, which is not captured in Dunworth and Rogers's data set, which ends in 1991. *See id.*

244. Dunworth & Rogers, *supra* note 236, at 540 (noting that Fortune 2000 firms appeared as defendants in 58.7% of statutory and real property cases, excluding civil rights and labor suits, where they appeared almost predominately as defendants); *see id.* at 543 fig.9 (showing that Fortune 2000 defense-side appearances in these cases fell off in the late 1980s, reaching rough parity with plaintiff defenses by 1991).

245. For example, the categories of suits that were much more likely to involve these “mega litigants” were asbestos products liability litigation and insurance contract litigation. But Fortune 2000 appearances in non-asbestos-related tort, civil rights, and labor litigation (where Fortune 2000 corporations almost exclusively participate as defendants) continued to outnumber their appearance in non-insurance contract litigation (where they are more likely to appear as plaintiffs) by a two to one margin. *See, e.g., id.* at 541 tbl.7 (appearances in non-asbestos products liability, other torts, and civil rights/labor cases, numbered about 198,000, while appearances in non-insurance contract litigation were about 96,000). When the small group of mega-Fortune 2000 litigants are excluded from non-asbestos tort litigation, non-insurance contract litigation, and civil rights suits, other Fortune 2000 litigants still appeared in these suits more often than in non-insurance contract litigation, by a roughly three to two margin (these lower-volume Fortune 2000 litigants participated in nearly 90,000 of the former cases, and less than 60,000 of the later). *See, e.g., id.* at 546 tbl.8 (figures are derived from taking total cases commenced in each category, calculating (1) the number involving of Fortune 2000 firms based on the percentage of all cases involving Fortune 2000 litigants in these categories, then subtracting (2) the number of these suits involving “mega-litigants” based on the percentage of total suits involving those parties). Since their study, the volume of civil rights litigation has dramatically increased, while contract litigation has fallen off by one-third, meaning that the disparity between defense- and plaintiff-side participation may be even greater for these litigants today. *See supra* text accompanying notes 241, 243.

Dunworth and Rogers argue that their number undercuts claims of a “business[] litigation explosion.” Dunworth & Rogers, *supra* note 236, at 560. They also emphasize their findings, particularly with respect to contract litigation, undercut overblown claims that large institutional parties almost exclusively appear as defendants. *Id.* at 561. Even so, their

The data are suggestive. Based on these numbers, average Fortune 2000 corporations were likely to reap a net advantage from plaintiff-friendly formulations of procedural rules in the steadily declining category of commercial contract cases, where they appeared as plaintiffs more often than as defendants. Those gains were offset by a disadvantage incurred in the more numerous categories of non-contract litigation, where Fortune 2000 firms were more likely to appear as a defendant.

Not surprisingly, then, the plaintiffs' bar and large corporate litigants are reliable antagonists in the rule-making process, which increasingly resembles a zero-sum competition between these two groups. The plaintiffs' bar, naturally, favors plaintiff-friendly formulations of procedural rules. Corporate defendants—supported by allied advocacy groups like the United States Chamber of Commerce—support formulations that raise barriers to court access and make it easier to terminate litigation earlier and in defendants' favor.²⁴⁶ Stasis in the rule-making process over the last forty years suggests neither side is able to secure enactment of its preferences.

If we were to assume the interests of the trial bar and large corporate defendants were the only interests at stake in procedural rule making, the case for minimalist interpretations of these standards would be straightforward. Fuzzy standards yield a range of lower court applications of the standard, some more plaintiff-friendly and some defense-friendly, ensuring neither side loses everything that is important to it.

Of course, if there were a determinate "intermediate" interpretation of pleading or summary judgment standards, one that reliably split the difference between plaintiffs and defendants, a minimalist interpretation would be unnecessary. But, given the incredibly broad welter of cases, claims, pleadings, and evidence to which either standard is applied, it's impossible to specify in advance ground rules that, in operation, trim between the interests of either side.

Skeptical readers will be quick to object that the interests of the trial bar and large corporate defendants are not the only interests at stake in procedural rule making. And they are right. Outside the narrow confines of corporate boardrooms and plaintiffs' firms, most observers care most about the way that the procedural system distributes *error*—implicating conflicting visions of procedural justice. And, today, as procedure has become a battleground for debates over social policy, a major component of modern interest group conflict involves a clash among competing ideological groups about how to design a *just* procedural system.²⁴⁷

figures do underscore that Fortune 2000 firms are *more* likely to appear as defendants than plaintiffs on average, and therefore can expect to gain more, on average, from defendant-friendly procedural reform. Even Dunworth and Rogers appear to concede as much. *See id.* at 562 (noting that "even if [many companies] themselves have never been subject to costly [mega] litigation" they nonetheless have some incentives to favor defendant-friendly reforms).

246. *See, e.g.,* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, available at http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?_r=1 (discussing the business lobby's litigation reform efforts); *see also* Wasserman, *supra* note 234 (noting that "corporations and government are almost always defendants (and repeat defendants at that) who know they will almost exclusively enjoy benefits from a defense-favorable" procedural regime).

247. *See supra* notes 224–26 and accompanying text.

Even if no organized “interest groups” in the usual “K Street” sense take “procedural justice” as their lobbying polestar, many participants in the rule-making process—academics, broad-minded judges and practitioners, civil rights organizations and other ideological groups—care deeply about procedural justice. To show respect for competing preferences in the rule-making process, pluralists must take these larger interests into account.

2. Conflicts About Procedural Justice

When the focus switches to clash among competing theories of procedural justice, however, the case for minimalism remains just as strong.

As we have seen, minimalism is an effective trimming strategy when an interpretive choice poses uncertain risks of important losses for many groups no matter how the choice is resolved.²⁴⁸ And a choice among formulations of pleading and summary judgment presents just this sort of situation: given severe uncertainty about the effect of different formulations of pleading or summary judgment rules, any formulation creates an uncertain risk of grave losses for adherents of different theories of procedural justice.

Below, I start by reviewing the three major views about procedural justice implicated by a choice between pleading and summary judgment, elaborate on the conflict and uncertainty that choice among formulations of these standards entails for those who hold these views, and end by reviewing why minimalism furthers pluralist aims in the face of this conflict.

a. Procedural Justice

Procedural designers must confront how to manage, and allocate, the risk of error—that is, the risk that deserving plaintiffs fail to recover their losses or innocent defendants pay plaintiffs for losses they did not cause. Theories about procedural justice provide an account about how to distribute that risk.²⁴⁹ There are, in turn, three commonly held ideas about procedural justice.

Welfare Utilitarianism. One camp, wealth-maximizing utilitarians, is indifferent to the distribution of error among parties, focusing, instead, on minimizing the total administrative and error cost of litigation in aggregate.²⁵⁰ Thus, this camp would be

248. See *supra* notes 207–08 and accompanying text.

249. John Rawls distinguishes between two accounts of procedural justice: (1) “perfect” procedural justice, and (2) “imperfect” procedural justice. JOHN RAWLS, A THEORY OF JUSTICE 74–75 (rev. ed. 1999). In cases of perfect procedural justice, there is an “independent criterion” of a just outcome, “defined separately from and prior to the procedure which is to be followed,” as well as procedures that are “sure to give the desired outcome.” *Id.* at 74. In cases of imperfect procedural justice, by contrast, procedures are measured by an independent criterion for a just outcome, but procedures cannot guarantee that outcome. *Id.* Accounts of imperfect justice discuss how to distribute the risk of error. For an excellent systematic treatment of procedural justice, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

250. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV.

indifferent between regimes that distribute the risk of error entirely to plaintiffs, and those that spread an equal amount of error evenly among plaintiffs and defendants, but cost the same.

Strict Egalitarianism. Where two rules result in roughly equal amounts of error, others care about how error is distributed. One common view of “fair” error distribution is that, all else equal, rules should spread the risk of error evenly among all classes of litigants. If two practices would result in an equal amount of error, but one distributes that error equally among classes of litigants, and the other does not, adherents of this view would prefer the former practice.²⁵¹ And, unlike welfare utilitarians, strict egalitarians are willing to assume more administrative costs in order to ensure fair error distribution.²⁵²

Liberal Egalitarianism. By contrast, liberal egalitarians are more willing to tolerate an unequal distribution of error if doing so provides insurance against error for the least well off. On this view, a practice, either in isolation or in conjunction with other practices, that imposes a larger risk of unjust outcomes on corporate defendants might be perfectly defensible, if doing so is the price of ensuring that less powerful parties are immunized from the untoward consequences of procedural error.²⁵³

Of course, rich analysis of each theory would reveal nuances and crosscurrents far beyond the scope of this Article. The point here, however, is that most people tend to sort into three different, readily recognizable views about how error can be distributed.²⁵⁴

961, 1195 (2001); *see also* Solum, *supra* note 249, at 254 (discussing utilitarian theories of procedural justice).

251. *See* Solum, *supra* note 249, at 257 (“In the civil context, the baseline notion seems to be that the risks of error should be distributed equally. Neither plaintiffs nor defendants should enjoy an advantage in any particular category of cases.”).

252. *See* Kaplow & Shavell, *supra* note 250, at 1329 (“[N]otions of fairness appear to be insensitive to administrative costs. Indeed, some would regard selecting rules on the basis of differences in administrative costs as the antithesis of choosing rules on grounds of fairness.”).

253. Various accounts of procedural fairness that emphasize the importance of giving the disadvantaged their “day in court”—defined broadly to include generous access to discovery and trial, regardless of the effect of that generosity on the distribution of error toward corporate defendants—reflect this view. For an overview, *see* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 130, 133 (2004) (“There is no canonical definition of Legal Liberalism, but we know it when we see it. Its tacit indicia include predispositions in favor of plaintiffs in tort and civil rights cases, defendants in criminal cases, consumers in commercial cases, and workers in employment cases. . . . Legal Liberalism sees law as fundamentally concerned with the needs of the wounded and vulnerable.”).

254. Indeed, it is fair to say that most people, even if they have strongly held intuitions favoring one of these various approaches, have fuzzy justificatory theories. This is even true of academic legal theorists, whose accounts of procedural justice, unfortunately, tend to be “thin” rather than “thick.” Solum, *supra* note 249, at 183. Constructing an account of procedural justice is notoriously challenging, particularly for those who ascribe to a non-

b. Conflict and Uncertainty About Summary Judgment and Pleading

Below I begin by focusing on a controversial but widely held account of the error-distribution effects of summary judgment and pleading rules, elaborate on the disagreement about assumptions underpinning that account, and then discuss how that account and its competitors fare according to different views about procedural justice. The discussion is necessarily grossly simplified—the point, here, is not to mount a rigorous defense of a particular view of the dynamics of summary judgment or pleading, which would each occupy an entire stand-alone article, but to sketch the deep empirical and moral uncertainty about how to structure summary judgment and pleading rules.

i. Summary Judgment

Confidence in jury accuracy has broken down. Some critics of juries make the simple, if crude, claim that juries are, on average, biased against defendants. However, the evidence for systematic jury bias is thin; at most, studies suggest juries vary more widely around the median in their assessment of complex, high-stakes cases.²⁵⁵

Some argue, in turn, that the volatility of jury awards affects defendants, particularly institutional defendants, in an indirect way as the effects of jury unreliability ripple through the procedural system. For example, many claim defendants are more risk averse than plaintiffs, particularly in low probability suits.²⁵⁶ If true, even the small threat of a very large jury verdict, particularly in

consequentialist “fairness” account of procedural justice, because first-order accounts of “just” outcomes simply do not determine what to do when the practical realities of implementation lead to injustice. If someone commits a battery, but a pleading practice results in the dismissal of the case leaving the plaintiff without redress, corrective justice tells us an unjust result has occurred because the moral equilibrium has not been restored. See Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 513 (2003) [hereinafter Bone, *Agreeing to Fair Process*]. Yet, corrective justice has nothing to say about how miscarriages of corrective justice should be distributed, system-wide, among wronged plaintiffs and innocent defendants. See *id.* The point here, in any event, is not to mount a defense of any particular view of procedural justice, but to note that what procedural justice requires is a matter of great dispute and uncertainty, about which people tend to sort into three readily identifiable camps.

255. See, e.g., Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004) (presenting evidence of jury unpredictability in punitive damage cases); David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000) (finding that jury deliberation tends to push jury awards to positions that are more extreme than the assessment of individual jurors).

256. See, e.g., Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000) (developing a theory of frivolous litigation based on prospect theory’s prediction that defendants will be risk averse with respect to low probability losses, while plaintiffs will be risk preferring in the same context). As Charles Silver notes, assumptions of defendants’ risk aversion is a prevalent, if often unstated, assumption behind most claims that defendants are coerced to pay in *terrorem* settlements. See Charles Silver,

class cases, may lead defendants to settle weak class claims for more than they are objectively worth. As Chris Guthrie puts it, "Because trial is more attractive to plaintiffs than defendants, plaintiffs are likely to demand more, and defendants are likely to offer more, than the expected value of plaintiffs' claims."²⁵⁷

This account is often coupled with an optimistic story about the effect of expanded use of summary judgment. By increasing the risk that low-probability cases will be tossed before trial, expanding the availability of summary judgment reduces the risk large defendants will face a volatile jury in very weak cases, reducing the tendency of those defendants to settle for more than the value of the claim. At the same time, on this view, even moderately low-probability suits can survive even the most aggressive possible interpretations of federal summary judgment standards. As a result, expanding the availability of summary judgment will reduce defendants' incentives to settle in excess of the value of very weak claims, without creating an offsetting risk of erroneous summary judgment in meritorious suits.²⁵⁸

These claims are far from universally accepted. Some suggest "that the problems with juries are greatly exaggerated,"²⁵⁹ while others dispute claims that

"We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1373–76, 1421 n.271 (2003). Guthrie's theory, however, also posits that the risk profiles of plaintiffs and defendants switch as the expected value of the claim increases, which, if true, complicates the picture considerably. See *infra* note 260 and accompanying text. Judge Frank Easterbrook makes a slightly different claim: corporate managers' interests diverge from those of investors and bondholders because managers have a vested interest in the solvency of the corporation, on which their jobs depend. See *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); see also J.B. Heaton, *Settlement Pressure*, 25 INT'L REV. L. & ECON. 264 (2005) (developing a similar claim).

257. Guthrie, *supra* note 256, at 169; see also Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853–54 (2004) (noting, albeit criticizing, the view that the "[c]lass action . . . exacerbat[es] the nuisance-value settlement problem . . . to the systematic disadvantage of defendants").

258. In addition, by aggregating claims, class certification magnifies the risks of jury volatility, as one erratically unfavorable jury award in an aggregated suit can be disastrous for a defendant. As an example, imagine that 1000 claims worth \$100 each go trial, and each claim has a 50% chance of victory. If all 1000 cases go to trial separately, the defendant faces an expected liability of \$500,000. The chance of being found liable in every case is, however, a practical impossibility; over a series of one thousand trials, the actual result is not likely to deviate from the expected result. Now imagine a scenario in which there is one aggregate trial of all 1000 claims before a single jury, which will find the defendant liable to all class members 50% of the time. In this case, the expected value of the claim is the same, but now, defendants face two possible outcomes—either no liability or liability to the tune of \$1,000,000. As a result, a jury trial of a large class action imposes a far greater risk of variance than that posed by seriatim litigation. And, if juries are volatile and sometimes award amounts well in excess of the expected value of the claim, the worst-case scenario of class litigation will exceed \$1,000,000, perhaps by a wide margin. This example is a variation on one provided by Charles Silver. See Silver, *supra* note 256, at 1370.

259. Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 689 n.429 (2001). For a defense of the civil jury, see Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993).

defendants are risk averse.²⁶⁰ If juries are not volatile and defendants are not risk averse, then defendants have no reason to settle in excess of the value of claims.²⁶¹ Others add that, whatever problems plague jury decision making, wider availability of summary judgment carries its own costs. Some claim it skews the risk of error toward plaintiffs. The theory is that judges have powerful incentives to clear their dockets and therefore, if given the opportunity, will systematically decide summary judgment in defendants' favor, even in cases where juries would have come out the other way.²⁶² Some, in addition, argue that the expense of expanded summary judgment has been understated, and that factoring in its real expense suggests summary judgment is not cost justified.²⁶³

Which account is true is unknown. Jury decision making is not well understood.²⁶⁴ Empirical study of settlements and frivolous litigation is notoriously difficult, in part because empiricists lack a settled definition of frivolous litigation, benchmarks for identifying low-expected-value suits, or ways of randomizing case samples with respect to merit.²⁶⁵ In addition, many settlements are unreported, and their terms are often confidential.²⁶⁶ We know little about the actual risk profile of

260. See, e.g., Silver, *supra* note 256, at 1409–16 (summarizing literature and concluding that the argument for corporate risk aversion “has not been made persuasively”). J.B. Heaton also claims that, even assuming corporate managers are risk averse, risk aversion would lead managers to settle only moderately low-probability cases; managers, nonetheless, prefer trial in very low probability cases. Heaton, *supra* note 256, at 270. If that is true, beefed-up summary judgment standards may not eliminate most moderately low probability cases (assuming such cases are supported by evidence, but evidence juries are not likely to believe); if so, summary judgment may not have any effect on defendants' propensity to settle in excess of the suit's expected value. Finally, Chris Guthrie notes that the risk profile of plaintiffs and defendants may switch as the claims increase in merit—giving defendants leverage to compel settlements for less than expected value of claims in suits with a higher expected value. See Guthrie, *supra* note 256, at 215. If so, the error risks imposed on defendants may be offset by compensating risks imposed on plaintiffs. See *id.* at 215–16.

261. See, e.g., Silver, *supra* note 256, at 1409–16.

262. See John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 542 (2007) (developing this argument).

263. See *id.* at 547.

264. See, e.g., Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 863–64 (2002) (noting that jury decision making is “enigmatic” and “poorly understood” and surveying difficulties with empirical study of the jury).

265. Guthrie, *supra* note 256, at 214 (“[E]mpirical data on the frivolous litigation ‘problem’ is unavailable.”); see also Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 527–28 (1997) [hereinafter Bone, *Modeling Frivolous Suits*] (making a similar point and noting “the many obstacles to reliable empirical work,” including problems defining and identifying frivolous litigation).

266. See, e.g., Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664 (2001) (“Given the prevalence of settlements today, it is surprising how little we know about them. . . . [G]iven that so many settlements are confidential, it is surprising that we know anything about them at all.”).

corporate defendants.²⁶⁷ As a result, we don't know the extent to which settlements exceed the expected value of suits. In the absence of hard data on all of these variables, the debate about the effect of jury decision making has, notoriously, centered around anecdotes.²⁶⁸

How would those with differing views of procedural justice assess these accounts? Much depends on which story is credited. Let's start with the pessimistic account of jury decision making. First, assuming at least a reasonable possibility that poor litigants are more likely to appear as plaintiffs than as defendants, liberal egalitarians will not mind that jury volatility has an unequal effect on large institutional defendants, as the unequal systemic effects of jury volatility increase the bargaining power of less powerful parties. Thus, all else being equal, if juries and judges commit the same frequency and magnitude of error on average, but the greater volatility in the size of jury awards place plaintiffs in a better bargaining position against corporate defendants, liberal egalitarians would favor strict limits on the availability of summary judgment, because limiting its availability improves the bargaining position of the least well off.

Strict egalitarians, by contrast, will be concerned by jury volatility because it pressures a class of repeat-player litigants who appear more often as defendants (large corporations and other large institutional parties) to settle claims in excess of their value. If jury volatility imposes an unequal risk of error on a discrete, identifiable class of defendants, while expanded use of summary judgment distributes errors more evenly across plaintiffs and defendants, strict egalitarians would favor making summary judgment more readily available.

Welfare utilitarians, finally, will assess the risks that volatile juries impose on defendants in light of the litigation costs of more robust use of summary judgment. Assuming those costs are not excessive relative to the gains summary judgment achieves in error reduction—a widely held, if contested, assumption²⁶⁹—utilitarians would favor the regime in which summary judgment is more widely available.

This class of views shifts if the opposite assumptions are credited. If juries are not volatile, defendants are not risk averse, summary judgment is incredibly expensive, and beefed-up summary judgment imposes outsized risks on plaintiffs, all theories should converge around limits on summary judgment.

In our world—where no one knows either the direction or magnitude of error occasioned by juries or the effect and costs of expanded use of summary judgment—liberal egalitarians will always prefer tight limits on summary judgment. Strict egalitarians and welfare utilitarians, by contrast, face an uncertain prospect of serious losses if either a strict or lax approach to summary judgment were adopted wholesale, depending on which account turns out to be true.

267. See, e.g., Silver, *supra* note 256, at 1409–16 (noting the dearth of empirical evidence on corporate managers' actual risk profiles).

268. Kozel & Rosenberg, *supra* note 257, at 1851 n.3 (claiming that “there is a paucity of empirical research substantiating [the] extent” of the problem with nuisance-value settlements).

269. E.g., Bronsteen, *supra* note 262, *passim* (noting the assumption is widely held, but contesting it).

ii. Pleading

Even if summary judgment is widely available, it may not cure the unequal distribution of error risks if the discovery phase of litigation that precedes use of summary judgment entails independent error distribution problems that summary judgment cannot cure. Here, again, there is a pessimistic story and an optimistic story about the effects of the discovery phase on the distribution of error in civil litigation.

According to the pessimistic account, jury volatility is only one source of settlement pressure and a minor source at that. The asymmetric costs of discovery and the sequence of class certification play a larger role. First, discovery is expensive. Defendants, particularly institutional defendants, it is claimed, bear most of that expense because it is “cheaper to propound discovery requests, particularly document requests and interrogatories, than to respond to them.”²⁷⁰ Plaintiffs, in turn, “control the discovery agenda”—“[i]f they choose to propound discovery requests, defendants are obliged to respond . . . but when, how and whether to review the responses are decisions entirely within plaintiffs’ control.”²⁷¹ And, finally, large institutional defendants simply have more raw information—and, therefore, are more vulnerable to the imposition of discovery search costs. As Frank Easterbrook puts it,

Large litigants have files—warehouses full of files. The adversary can demand that they be searched, at great cost; the adversary can notice the depositions of 20 corporate officers. . . . [I]n a fight between the big and the small, the big are more likely to be the targets of impositional discovery requests; in a fight between the rich and the poor, money flows in one direction only, no matter who is in the right.²⁷²

270. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 548 (1991). Alexander’s focus is on securities fraud litigation, but, as Frank Easterbrook notes, the problem with asymmetric costs of discovery is a general one in cases involving large institutional defendants. See *infra* note 272 and accompanying text.

271. Alexander, *supra* note 270, at 549.

272. Frank H. Easterbrook, Commentary, *Discovery as Abuse*, 69 B.U. L. REV. 635, 643 (1989). Of course, this account is greatly simplified. In the first sophisticated asymmetric cost model of frivolous litigation, proposed by David Rosenberg and Steven Shavell, plaintiffs file suit when the cost of filing is less than the cost to the defendant of responding. See D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT’L REV. L. & ECON. 3, 4 (1985). Rosenberg and Shavell’s model was criticized because the defendant’s initial cost of responding to a complaint is often small; defendants are unlikely to settle to avoid that cost; and, once the defendant responds, she can then impose additional litigation costs on the plaintiff. Later, slightly more nuanced asymmetric cost models of frivolous litigation suggested that, even if the initial cost of responding to a complaint is small, defendants may nonetheless settle to avoid the later cost of litigation assuming plaintiffs can credibly threaten to impose substantial costs on a defendant over time by sinking costs in stages. See, e.g., Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996) (proposing an

In addition, class certification invariably takes place before discovery on the merits is completed and, therefore, before a meaningful opportunity to use summary judgment.²⁷³ When certification is granted, corporations accrue additional, often substantial, dead weight costs on their ability to tap capital markets during the ensuing merits discovery.²⁷⁴ Moreover, because certification so markedly increases the variance of potential outcomes at trial, risk-averse defendants may want to avoid even a very small chance a suit certified as a class action will survive summary judgment.²⁷⁵

To avoid these costs, defendants, according to this account, settle low probability suits before the completion of merits discovery (thereby foregoing the opportunity for summary judgment) and, in turn, pay a premium, above the expected value of the suit, to do so.²⁷⁶

Of course, as with the debate over summary judgment, the basic account that underpins this conflict, though widely accepted,²⁷⁷ is vigorously contested. Data on the frequency of frivolous litigation are undeveloped.²⁷⁸ Some models of frivolous litigation suggest incentives to file nuisance-value suits do not strictly correlate with discovery cost, but rather tend to cluster around different types of claims based on additional factors, including asymmetries in the information available to plaintiffs and defendants about the merits of the suit.²⁷⁹ Evidence can be found to both support and contradict the claim that discovery is overly expensive—but no studies tell us much about the cost of litigation relative to the expected value of the suit, and what studies have been undertaken measure the incidence and volume of discovery requests but do not attempt to measure “the time and expense required

alternative to the Rosenberg/Shavell model); Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988) (criticizing the Rosenberg/Shavell model). For my purposes, however, the key point is that many accounts of frivolous litigation assume defendants are willing to settle to avoid significant litigation costs.

273. This is partly because Rule 23 urges certification earlier rather than later in the suit, partly because the merits are only incidentally relevant to class certification, and partly, as a pragmatic matter, because it is difficult to design a full-throated discovery plan until certification has been resolved, as the terms of certification determine how a claim will be proven.

274. See, e.g., Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); Heaton, *supra* note 256, at 272 (“[A] credible commitment to a policy of hedging catastrophic outcomes [through settlement] may . . . allow the firm to lower its borrowing costs and the severity of its bond covenants.”).

275. See *supra* note 258 and accompanying text.

276. For an influential account along these lines, with a focus on securities litigation, see generally Alexander, *supra* note 270.

277. Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 920 (2009) [hereinafter Bone, *Regulation of Court Access*] (noting the discovery-cost account of nuisance-value settlements is widely accepted).

278. See *supra* note 265.

279. See, e.g., Bone, *Modeling Frivolous Suits*, *supra* note 265, *passim*; Bone, *Regulation of Court Access*, *supra* note 277, at 920 (“[Concerns about the cost of discovery] explain[] only part of the meritless suit problem, and probably not a very substantial part at that. There is strong reason to believe that informational asymmetry is a much more important cause.”).

either to propound discovery or to respond to it.”²⁸⁰ Finally, as with summary judgment, claims about defendants’ risk aversion are contested.²⁸¹ In the end, then, as with summary judgment, the debate, lacking conclusive hard data, is driven by modeling and anecdotes.

If the pessimistic story is credited, summary judgment cannot cure the error-distribution risks of discovery or class certification. However, motions to dismiss for failure to state a claim, which precede both merits discovery and class certification, can cure error-distribution risks by allowing a court to toss low probability suits before either discovery or class certification takes place.

To see this, consider a pair of extremely simplified hypothetical pleading regimes (in which amounts at stake are kept small for simplicity’s sake). The first is a Type 1 error regime—in it, suits can never be dismissed for failure to allege facts supporting any allegations. As a result, it generates error, but—putting aside trial courts’ errors in interpretation of the law—only results in false positives, or Type 1 errors (i.e., errors that result when an unmeritorious case is sent on to discovery). This regime reflects one possible interpretation of Rule 8—an interpretation carved out by the traditional *Conley v. Gibson* rule, which effectively let suits regardless of merits into discovery, yielding only Type 1 errors.

In this regime, all lawsuits are for \$100, 60% of lawsuits are meritorious, and meritorious suits always recover the full amount of compensatory damages. In the unmeritorious cases, however, defendants also always lose motions to dismiss and invariably settle to avoid discovery costs. In these cases, defendants settle for \$30.

280. Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 796 (1998) (surveying academic studies of discovery costs and cataloguing gaps in research). In addition, theories that care about the equal distribution of risk should be sensitive to the distribution of risk at a systemic level, not simply at the pleading stage. See, e.g., Bone, *Agreeing to Fair Process*, *supra* note 254, at 534. And, in the real world, plaintiffs who do not suffer a risk of error at the pleading stage may suffer a heightened compensating risk of error in other, subsequent stages of litigation. A prime source of potential error is class certification. First, many claim that collusive settlements between defendants and plaintiffs’ attorneys in meritorious suits are pervasive and result in settlements that shortchange class members but yield hefty fees for class attorneys and peace for corporate defendants. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Litigation*, 54 U. CHI. L. REV. 877, 883–89 (1987). Second, in the last ten years, circuit courts have increasingly imposed a “hard look” approach on class certification. See Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. (forthcoming 2011) (manuscript at 29), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568127 (discussing shift among circuits in favor of requiring affirmative proof that class certification standards have been satisfied). Erroneous class certification decisions, in turn, impose their own distinct error costs: the inability to certify claims as a litigation class can doom otherwise meritorious claims that are too expensive to litigate separately or, alternatively, can spawn a subpar class settlement if claims that cannot be litigated as a class but can be certified under marginally more liberal standards for settlement class certification. Unfortunately, empirical data on rates of class certification error are virtually nonexistent, a function of the difficulty in formulating an objective measure of accurate certification decisions and class settlement values.

281. See *supra* note 260 and accompanying text.

All meritorious suits result in \$60 in total litigation costs, accounting for aggregate attorney time (by plaintiffs' and defendants' lawyers) spent in pre-trial investigation, motion practice, and discovery; court time spent administering litigation and appeals; and opportunity costs for courts and litigants associated with time lost that could be spent on other litigation or more productive private endeavors. Settled unmeritorious suits result in \$35 in total litigation costs.

The second regime is a "mixed error" regime, which produces both Type 1 errors and Type 2 errors. The latter type of error results when a motion to dismiss yields a false negative (i.e., a meritorious claim is dismissed). This regime corresponds to various robust "heightened pleading" interpretations of *Twombly* or *Iqbal*, which rigorously screen complaints based on their factual specificity, resulting in a mix of Type 1 and Type 2 errors. In this regime, then, 60% of suits are meritorious; 40% are unmeritorious. Plaintiffs and defendants face the same schedule of recoveries or losses as in the earlier example. Administrative costs remain the same. Here, though, 40% of suits are dismissed. Error, finally, is random with respect to party status: 20% of suits result in a Type 1 error, and 20% of suits involve a Type 2 error.

Here, adherents of different theories of procedural justice will divide over the merits of the two regimes:

- On a welfare utilitarian account of procedural justice, the second regime is preferable. For every ten suits in each regime, the sum of expected error and administrative costs in the two regimes are unequal (on average, \$620 in the first ($[4 \times \$30 \text{ in error costs}] + [6 \times \$60 \text{ in administrative costs}] + [4 \times \$35 \text{ in administrative costs}]$) and \$570 in the second ($[2 \times \$0] + [2 \times \$30 \text{ in error costs}] + [2 \times \$100 \text{ in error costs}] + [4 \times \$60 \text{ in administrative costs}] + [2 \times \$35 \text{ in administrative costs}]$), in a way that favors the mixed regime. Assuming plaintiffs tend to be poorer and defendants richer, a liberal egalitarian will favor the very liberal "Type 1 error" regime, which provides more insurance for the least well-off.
- By contrast, an adherent of a strict egalitarian theory of procedural justice would prefer the "mixed error" regime. Because, in both regimes, the expected error rate is the same—40% of suits result in an outcome that does not restore the moral equilibrium—neither is superior along the dimension of accuracy. But the second regime is obviously superior to the first along the dimension of error distribution, as it distributes the risk of error equally among plaintiffs and defendants. The difference in magnitude of losses to plaintiffs and defendants in each regime is immaterial, assuming—as most fairness theorists do—that parties' interests in justice are incommensurable: only the frequency and distribution of error in a corrective justice sense (that is, failure to restore the moral equilibrium) matters.²⁸²

282. One can, incidentally, also imagine a variety of subtle variations on each theory that might lead adherents to disagree amongst themselves about the merits of each regime.

Once again, though, if optimistic assumptions are credited, the alignment shifts. Liberal egalitarians continue to favor a Type 1 error pleading regime. But now other adherents of justice will favor a Type 1 error regime, too. For example, if discovery is not expensive or coercive, or if defendants are not risk averse, claims that survive a motion to dismiss will either be terminated through a dispositive ruling or settled at their fair value later, after discovery. In that case, a “mixed” approach to pleading will result in less accuracy. And it will shift the risk of error disproportionately to plaintiffs. In that event, strict egalitarians would favor strict limits on motions to dismiss.

In the foregoing example, moderate adjustments downward in the cost of litigation saved by increased early dismissal, or the magnitude of in terrorem settlement premiums paid by defendants, would result in a higher sum of administrative costs and error costs in the mixed regime than in the Type 1 regime, making a Type 1 regime the winner for welfare utilitarians as well.

Our world, finally, is a world of deep uncertainty about the frequency of frivolous litigation, the magnitude of discovery costs relative to the expected value of suits, the effect of those costs on defendants’ propensity to settle unmeritorious claims, and the effect of more aggressive formulations of federal pleading standards. In our world, liberal egalitarians nonetheless have every reason to favor limiting motions to dismiss. But strict egalitarians and welfare utilitarians face an uncertain prospect of severe normative harm if either a strict or lax approach to motions to dismiss is adopted, depending which account of the underlying facts on the ground turns out to be true.

c. Reciprocity Through Hedging

As we have seen, very liberal pleading rules and summary judgment rules are a win-win for liberal egalitarians, no matter how the underlying empirical uncertainty about error distribution effects is resolved. But when adherents of strict egalitarian or welfare utilitarian theories of justice must choose between permissive and restrictive formulations of summary judgment or pleading, they confront enormous uncertainty. They can identify the possible outcomes of the choice—the chosen standard may distribute risk equally (the best case scenario from a strict egalitarian standpoint) or result in an extreme distribution of the risk of error against particular class of litigants (the worst case scenario from a similar normative standpoint)—but have no idea which outcome is more likely under any given formulation.

As a result, a choice of pleading and summary judgment standards is a classic example of the kind of “multi-group conflict in the face of severe uncertainty” discussed in the last Part. The wholesale adoption of very liberal pleading and summary judgment standards gives an enormous windfall to liberal egalitarians. But, assuming groups are averse to uncertainty and exhibit maximin preferences, very liberal pleading standards also create an intolerably uncertain risk of very bad outcomes for efficiency-minded welfare utilitarians and for strict egalitarians.

Opaque formulations of summary judgment and pleading standards—like the “metaphysical doubt” standard in the *Celotex* trilogy, or “plausibility” in *Twombly*—in turn, can trim between the competing claims of these different visions. By articulating summary judgment and pleading standards in an ambiguous way, the Supreme Court creates space for some lower courts to continue applying

pleading and summary judgment standards quite liberally, giving liberal egalitarians some of what they want. But, that ambiguity also creates space for other courts to take less liberal approaches. On the reasonable assumption that different approaches offset each other—if a less liberal approach produces good results from the standpoint of strict egalitarians and welfare utilitarians, a liberal approach is likely to produce bad results, and vice versa—mixing things up hedges against an intolerably uncertain risk of very bad outcomes that the wholesale adoption of very liberal pleading standards (and other determinate formulations) threatens for either theory.²⁸³

For example, depending on which empirical account sketched earlier is true, strict egalitarians face grave systematic error if a very liberal pleading regime is adopted wholesale, or if an equally strict but opposite approach to pleading—say, one requiring plaintiffs to allege evidentiary facts akin to a summary-judgment type showing, as some have interpreted *Iqbal* to require—is enacted. A fuzzy, minimalist pleading standard, in turn, may not produce an equal distribution of error across classes of litigants, but diverse approaches, cutting in different directions, hedge against the unknown risk of extreme inequality in error distribution threatened if any particular approach were adopted system-wide.

The same point holds for welfare utilitarians. On one set of assumptions, a less liberal pleading regime will minimize the sum of error and administrative costs more than a very liberal pleading rule. On another account, a very liberal pleading rule will minimize that sum. For welfare utilitarians, like strict egalitarians, a plausible maximin solution is to mix things up—which, here, as for other views of procedural justice, may not result in the best outcome, but hedges against risk of the worst, by averaging the costs associated with either a lax or a strict approach to pleading.

In this context, then, a partisan liberal egalitarian would not flinch at imposing a very liberal pleading regime. But a pluralist would favor minimalism. Under a minimalist standard, no adherent of any theory is guaranteed everything they want. But a minimalist standard guarantees a rough-and-ready form of equality between theories. It gives liberal egalitarians some of what they want, while hedging against

283. The same point is also applicable to a decision maker undecided about the merits of a welfare utilitarian, strict egalitarian, or liberal egalitarian account of imperfect procedural justice—and, given the fuzziness of the justificatory theories for each account, there are likely a large number of people who are in exactly this position. If an undecided decision maker interprets, say, pleading standards after the fashion of a permissive Type 1 error regime, but later decides that the strict egalitarian account of procedural justice is correct, he faces a risk of extreme moral error if the pessimistic account of error distribution threatened by discovery sketched above turns out to be true. Interpreting the standard in a minimalist way, with the expectation that lower courts will adopt different, inconsistent interpretations, hedges against that risk. If, by contrast, the decision maker interprets pleading standards in a fuzzy, indeterminate way, and later decides the liberal egalitarian account of imperfect procedural justice is correct, diverse lower court decision making also hedges against the risk of an extreme distribution of error toward less-well-off plaintiffs. (And, in addition, minimalist interpretations of pleading standards are easier to distinguish and reverse, in areas where the risk to the least-well-off plaintiffs is greatest, than a precedent imposing a bright-line rule.)

the intolerably uncertain risk of very bad outcomes that a wholesale adoption of very liberal pleading standards poses for strict egalitarians and welfare utilitarians.²⁸⁴ And it mimics the essential terms of any fair deal among equals: no group guarantees everything it wants by forcing the others to assume all the risks.²⁸⁵

C. Some Final Objections Considered

A standard objection to the foregoing case for minimalist summary judgment and pleading standards focuses on the value of legal clarity.²⁸⁶ Minimalist interpretations of these standards obviously create confusion about legal standards, and that has its costs: lawyers must spend more time debating the meaning of these decisions in ever lengthier briefs, while judges must spend more time in already crowded dockets writing opinions interpreting them.

The objection is strongest if it takes the form of what Adrian Vermeule calls an “all else equal” argument.²⁸⁷ Although, he says, “[t]he possible effects of various courses of action . . . [that] will indeed come to pass often lie well beyond the limits of human calculation,” decision makers need not “retreat into paralysis.”²⁸⁸ “Rather, they eliminate imponderables from both sides of the scales and focus instead on the variables that can be grasped,” all else equal.²⁸⁹ Here, determinate

284. For examples of “hedging” arguments in other legal contexts, see, for example, Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1594 (2007) (arguing that in the context of questions about the propriety of appointing lay justices, “it would be best to mix things up a bit, hedging our bets with at least a minimum of professional diversity”); Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 66 (2009) (arguing that in the face of uncertainty about which approach to interpreting the Constitution is best, and given the prevalence of disagreement about interpretive theories, a “methodologically diverse judiciary is, plausibly, the best way to minimize the risk” of “wholesale adoption of one approach and wholesale rejection of its competitors”).

285. To be sure, the case for interpreting a procedural rule to minimize inequality in expected dissatisfaction comes into its own when no interest group is capable of enacting its preferences. Were we to think that liberal egalitarians have the muscle to enact their preferred interpretation through the rule-making process, courts, as faithful agents of the legislative polity, have a duty to choose interpretations that hold out a reasonable chance of minimizing the dissatisfaction of the dominant coalition. Here, though, given stasis in the rule-making process and the widely shared perception that this stasis is the result of a stalemate between differing interests in the procedural polity, it is reasonable to think no group has the muscle to enact its preferences. It is especially reasonable to think that liberal egalitarians lack that muscle, given their inability to secure an override, through the rule-making process, of the *Celotex* trilogy or to address, through the rule-making process, the widespread, two decade-long lower court nonacquiescence to the *Conley* standard.

286. See, e.g., Sunstein, *Testing Minimalism*, *supra* note 115, at 128 (noting that complaints about uncertainty are a common critique of minimalism).

287. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 123–26 (2000).

288. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 174 (2006).

289. *Id.*

pleading and summary judgment standards carry the imponderable risk of severe error or litigation costs. But, all else equal, minimalist interpretations will certainly result in more decision costs. As a result, the argument would go, we should assume away the imponderable risks and pick clear interpretations of pleading or summary judgment standards.

For pluralists, given the assumptions grounding this Article, this argument is not compelling. An all-else-equal argument depends on the key assumption that decision makers are untroubled by uncertainty. By contrast, decision makers who are averse to uncertainty “will not simply treat ignorance of probabilities as a warrant for assigning equal probabilities to alternatives.”²⁹⁰ Rather, the rational choice for choosers exhibiting a significant degree of uncertainty aversion is maximin, which guarantees a “certain minimum” payoff.²⁹¹ Indeed, uncertainty-averse decision makers are, by definition, willing to pay a premium to avoid participating in a lottery with unknown odds of a bad outcome.²⁹²

The assumption underpinning the preceding argument for minimalism is that interest groups are averse to uncertainty and therefore will not treat the speculative costs and benefits of clear rules as though they “cancel out.” Rather, in the face of uncertainty about the effect of adopting a clear rule, they compare competing approaches based on maximin and pick the approach that eliminates the worst-case outcome.²⁹³ For *either* strict egalitarians or welfare utilitarians, whatever decision costs are incurred by abandoning the clarity of an across-the-board formulation of summary judgment and pleading standards are swamped by the grave “worst case” error or litigation costs avoided by adopting a minimalist standard. To avoid those costs, uncertainty-averse decision makers will, accordingly, be willing to pay minimalism’s comparatively modest price tag.

The assumption that interest groups are averse to uncertainty is consistent with the case for adopting trimming interpretations in the first place, which assumes that interest groups will select default rules based on maximin, driven by aversion to uncertainty about their future endowments and preferences. It is consistent with experimental evidence: “a general preference to act on more information rather than less, on known risks rather than under uncertainty, is [a] widespread and dependable” feature of human decision making and “experimental results are remarkably robust” on this point.²⁹⁴

And, again, the structure of the modern rule-making process only underscores the plausibility of ascribing these preferences to procedural interest groups. The modern rule-making process, as we have seen, is designed to promote “accommodation of competing interest groups” through consensus and compromise, by opening the door to “intense” interest group pressure on rule makers.²⁹⁵ And, in the face of severe disagreement among interest groups, the rule-

290. HURLEY, *supra* note 184, at 376.

291. *Id.* at 377 (noting maximin guarantees a “certain minimum—the only surprises will be bonuses, not penalties”).

292. See Ellsberg, *supra* note 186, at 663 (finding that people are willing to pay a premium to insure against unknown odds).

293. See *supra* notes 186–87 and accompanying text.

294. HURLEY, *supra* note 184, at 374.

295. Bone, *Making Effective Rules*, *supra* note 222, at 327 (“Faced with sharply

making process, for decades, has yielded a stalemate, with a resulting output that consists of “highly general rules that leave most of the difficult normative questions to the discretion of” later decision makers—namely, “trial judges in individual cases.”²⁹⁶ Variation across district courts has been the inevitable, predictable result.²⁹⁷ The most straightforward explanation for interest groups’ continuing acceptance of the institutional arrangements that produce this deadlock is that they are uncertain about their fortunes in a more dynamic, proactive rule-making system, and averse to that uncertainty. If so, they will be just as averse to the unknown risk of bad consequences entailed by determinate formulations of summary judgment and pleading rules.

It’s also important to stress that the assumption that interest groups are averse to uncertainty isn’t inconsistent with earlier claims that litigants in the procedural arena may, or may *not*, be averse to *risk*. Risk-averse people avoid bets that present known, or quantifiable, odds of a terrible loss.²⁹⁸ Uncertainty-averse people avoid bets where the odds are *unknown*. Uncertainty aversion, in turn, operates “independently of . . . attitudes to risk.”²⁹⁹ A risk-preferring professional gambler, for example, may be willing to take a risky bet with known odds of a bad outcome, but unwilling to place a bet with *unknown* odds.³⁰⁰

It is, in turn, uncertainty about litigants’ *risk* tolerance, and many other variables, that helps drive the case for minimalism. In litigation, sophisticated, repeat-player defendants may know the range of possible outcomes of litigation, and feel confident about the odds of those outcomes. If, however, they are risk averse, they may want to avoid, say, jury trial if they think juries threaten a known risk, even a small one, of an unusually large judgment. The claim here is that welfare utilitarians and strict egalitarians will prefer a mix of approaches to summary judgment or pleading in light of the *uncertainty* about litigants’ actual taste for risk—and in light of uncertainty about the many, many other important variables that also affect the distribution of litigation error.³⁰¹

One final variation on the decision-costs objection is most compelling. Before the Supreme Court decided either the *Celotex* trilogy or *Twombly* and *Iqbal*, lower courts *already* varied in their interpretation of summary judgment and pleading standards. Against that baseline, an objection based on decision costs seems more powerful. The Supreme Court’s decisions impose significant short-term costs as lower courts and lawyers puzzle over the meaning of the cases. But those decisions

conflicting interests . . . the Advisory Committee often seeks consensus among competing interest groups.”).

296. *Id.*; see *supra* notes 219–32 and accompanying text.

297. See *supra* notes 146–53 and accompanying text.

298. See generally Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 131–35 (1999) (discussing risk aversion).

299. HURLEY, *supra* note 184, at 377.

300. See *id.* at 376 (“[S]omeone who is risk prone, such as a gambler, may precisely like taking known risks and the element of gamesmanship, of trying to beat the odds, it involves, which he may find altogether lacking in situations of uncertainty.”).

301. Remember, too, that interest groups’ general preference, *ex ante*, for trimming interpretations in cases like this is also derived from assumptions about their aversion to uncertainty, not risk—in that case, uncertainty about their future endowments and preferences. See *supra* notes 184–85 and accompanying text.

reap marginal gains for pluralists, given that lower courts *already* exhibited a mix of lax and strict approaches to either standard. To be sure, *Twombly* and *Iqbal* may result in a somewhat different mix of those approaches. But, as we have seen, any significant mix of lower court approaches to pleading will do a reasonable job at trimming between interest group preferences. As a result, *Twombly* and *Iqbal* do not obviously improve on the pre-*Twombly* status quo, from a pluralist standpoint. What's the point, then, of the Court's decisions? Wouldn't it have been better for the Court to conserve on new decision and transition costs by leaving well enough alone—by, say, denying certiorari in *Celotex* or *Twombly*?

Here, though, pluralists might respond in three ways. First, the objection is faithless to the Supreme Court's role in the federal hierarchy. It envisions the "Supreme" Court's acquiescence in lower courts' refusals to comply with the Court's own prior precedents, which commanded adherence to bright-line, and very liberal, formulations of summary judgment and pleading standards—liberal formulations which, if actually enforced against lower courts, would benefit only some competing interest groups, while imposing an unacceptably uncertain risk of severe losses on others. Fidelity to its institutional role requires the Court to enforce those precedents—and therefore embrace an antipluralist role—or reformulate them in a way that creates precedential space for heterogeneous lower court practice.

Second, in any event, prior to *Celotex* or *Twombly*, the Court, at best, *passively* acquiesced in the variation in lower court approaches through its unwillingness to enforce its prior precedent against rebellious lower courts. For those pluralists who view the ethic of mutual respect as a moral imperative,³⁰² there is all the difference in the world between a Court that timidly tolerates a pattern of lower court decisions that, in practice, shows equal respect to different preferences, and a Court that embraces that pattern actively and affirmatively.

Finally, to the extent this objection is intended as an argument in support of certain legislative proposals to *overturn Twombly* and *Iqbal*, it is especially unconvincing. Various legislative proposals percolating through Congress attempt to restore the pre-*Twombly* and *Iqbal* status quo.³⁰³ For example, a proposal by Stephen Burbank would restore the law of pleading as it existed on May 20, 2007, the day before *Twombly* was decided.³⁰⁴ Of course, even conceding, for the sake of argument, equivalence between the pre-*Twombly* status quo and *Twombly* from a pluralist standpoint, a legislative effort to restore the pre-*Twombly* status quo will impose yet another new wave of decision and transition costs on the legal system. The proposed bills, after all, raise their own interpretive problems. For example, Burbank's proposed statutory language does not clearly restore all lower court pleading precedents that pre-date *Twombly*. It restores those "consistent with" pre-

302. See *supra* notes 192–93 and accompanying text.

303. See, e.g., *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the Comm. on the Judiciary*, 111th Cong. 7 app. A (2009) (statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School).

304. *Id.* (providing that motions to dismiss and other judgments based on the pleadings "shall be in accordance with interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower courts in decisions consistent with such interpretations, that existed on May 20, 2007").

Twombly Supreme Court pleading precedent.³⁰⁵ Because rebellious lower courts attempted to justify their heightened approaches to pleading based on often-disingenuous readings of pre-*Twombly* Supreme Court precedent, or even ignored that precedent entirely, Burbank's proposal will inevitably spawn new threshold litigation over which pre-*Twombly* lower court precedents Congress thinks lower courts should follow.

Here, then, an all-else-equal argument cuts in favor of, not against, *Twombly* and *Iqbal*: faced with legislative proposals that are not any *more* attractive than *Twombly* and *Iqbal* from a pluralist standpoint, pluralists should, all else equal, favor avoiding a whole new wave of decision and transition costs by sticking with the new, post-*Twombly* status quo.

CONCLUSION

Cases like the *Celotex* trilogy and *Twombly* are widely viewed as terrible mistakes. At a minimum, no one—neither critics nor apologists—defends the vagueness of the standards adopted in either case. But given some plausible assumptions, there is a robust *pluralist* case that can be made for the *Celotex* trilogy or *Twombly*, which emphasizes, and celebrates, their opacity—and the disagreement among lower courts that follows in their wake.

Pluralists of the stripe I have focused on in this Article think that in the face of a legislative stalemate, courts should trim between the claims of different interest groups competing for judicial recognition. My focus has been on “interest groups” broadly conceived—including not just the trial bar or corporate lobby, but rule makers and interested observers who view procedural reform through the prism of competing visions of procedural justice. The argument, at all levels, assumes that each group shares a common trait: they are averse to uncertainty and, in the face of uncertain risks of terrible losses, exhibit maximin preferences.

On those assumptions, the wholesale adoption of very liberal pleading and summary judgment standards gives an enormous windfall to liberal egalitarians, who see procedure through the prism of protection for the least well off. But very liberal pleading or summary judgment standards also create an intolerably uncertain risk of very bad outcomes for efficiency-minded welfare utilitarians and for strict egalitarians who abhor imposing a disproportionate risk of error on any group of litigants, including corporate defendants.

Opaque formulations of summary judgment and pleading standards—like the “metaphysical doubt” standard in the *Celotex* trilogy, or “plausibility” in *Twombly*—trim between the competing claims of these different visions. By embracing a degree of legal uncertainty, the Supreme Court creates space for some lower courts to continue applying pleading and summary judgment standards quite liberally, giving liberal egalitarians some of what they want. But, that uncertainty also creates space for other courts to take less liberal approaches, which in turn hedges against the intolerably uncertain risk of very bad outcomes that the wholesale adoption of very liberal standards (and other determinate formulations) threatens for adherents of competing visions of procedural justice.

305. *See id.*

This is a *possible* basis for defending these decisions. Even if the various assumptions underpinning the argument are accepted, is this a normative case that anyone *would* want to accept? At one level, the simple answer is: of course. There are pluralist judges who embrace uncertainty for pluralist ends—Hand, who counseled leaving especially contentious legal problems to be “worked out without authoritative solution,”³⁰⁶ or Rehnquist, the “ultrapluralist” who refused to impose a “general methodology across the board” in the face of deeply divisive issues.³⁰⁷

But if the question is taken more broadly to mean, “is this a vision *many* would accept?,” pluralists have to concede their claims are, and are likely to remain, deeply controversial—and for reasons that are easy to understand. The pluralist case for minimalism embraces “inconsistency in principle” and therefore lacks what Ronald Dworkin calls “integrity.”³⁰⁸ A pluralist Court must seem to “endorse principles to justify part of what [lower courts] ha[ve] done” that it must seem to “reject to justify the rest.”³⁰⁹

In this, pluralist uses of minimalism go farther than even traditional democracy-reinforcing justifications for minimalism, which are also pilloried as unprincipled. Democracy-reinforcing accounts hold out democratic deliberation as a *deus ex machina*, which will transmogrify current disagreement into a democratically achieved consensus—to which judges can then safely conform the law. In the pluralist view, there is no such comforting story to tell; conflict and disagreement are always with us, and, sometimes, in the face of it, neutral-minded courts have no choice but to create and live, indefinitely, with legal uncertainty, for the sake of a Solomonic, essentially political, compromise.

Many are deeply wedded to a role for principles and integrity in legal decision making, and “trying to get someone to believe something whether he wants to believe it or not,” as Robert Nozick says, “is not . . . a nice way to behave.”³¹⁰ I will not try—but I will give pluralists the last word.

The key question for pluralists is “integrity to what”? Pluralists *do* claim integrity to a principle—the principle of mutual respect for contending interests. Moreover, they can reasonably claim that our law-making system is organized *around* that principle. Supermajority systems, after all, are deeply pluralistic—designed to hedge against losses for competing interest groups with conflicting preferences, by promoting compromise that gives each group some of what it wants, in the face of intractable disagreement on matters of principle, often at the price of clarity in the law.³¹¹ Our modern procedural rule-making system, which is also designed to promote compromise between conflicting interests, replicates that emphasis.³¹²

306. HAND, *supra* note 15, at 15.

307. ROSEN, *supra* note 24, at 90.

308. RONALD DWORKIN, LAW'S EMPIRE 184 (1986).

309. *Id.*

310. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 13 (1981). I am indebted to Louis Michael Seidman's article *Public Principle and Private Choice*, which puts Nozick to similar use, for pointing out this passage. See Seidman, *supra* note 25, at 1008–09.

311. See *supra* notes 182–87 and accompanying text.

312. See *supra* notes 219–32 and accompanying text.

When, in turn, no group is able to enact its preferences, appellate courts that side with one group over others in the course of interpreting ambiguous statutes, or procedural rules, short-circuit the protections that system affords each group. Justifying a judicial choice to do so based on “integrity” seems, in turn, misplaced. Courts that impose one set of preferences, in the face of intractable disagreement, may show *partisan* “integrity.” But, they do so at the price of sacrificing their *institutional* integrity as honest brokers in a system built on accommodating—and compromising between—different versions of the good.