

The False Allure of Settlement Pressure

Nicholas Almendares*

The threat of “blackmail” or “in terrorem” settlements have shaped the law, leading courts to conclude that if the plaintiff does not appear likely to win the case, then the litigation should be halted at an early stage. This Article questions the established logic of settlement pressure. After clarifying the concept and presenting the strongest case for it, I show that it cannot serve as the basis for wide-ranging civil procedure doctrines. Doing so has perverse results, such as privileging the defendant’s idiosyncratic tastes and helping corporate managers hide important facts from their shareholders. In addition, settlement pressure is not the serious problem that it has been characterized as: rather than being blackmail, it is more analogous to litigation insurance or hiring expensive attorneys. The doctrines based on settlement pressure, therefore, lack a sound justification, and settlement pressure is not a dire threat that the law must step in to counteract. Even in the context of class actions, the most favorable circumstances for settlement pressure arguments, a case where the plaintiffs seem unlikely to prevail should be allowed to proceed, provided it sets out a coherent, bona fide class claim. A number of prominent decisions, such as Wal-Mart Stores, Inc. v. Dukes, ultimately depend on settlement pressure, and therefore ought to be reconsidered.

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* Visiting Assistant Professor, Seton Hall University School of Law. I am indebted to Onnig Dombalagian, Adam Feibelman, David Katner, Ann Lipton, Shu-Yi Oei, Sally Brown Richardson, Steve Sheffrin, Ed Sherman, Ashika Singh, Jed Stiglitz, Charlie Sullivan, and all the participants at the Tulane Faculty Workshop for their helpful comments and critiques. All errors are entirely my own.

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INTRODUCTION

Settlement pressure, or the potential for plaintiffs to extort “blackmail”¹ or “*in terrorem*”² settlements from defendants, is an influential, yet ill-understood concept. The central idea is that the threat of a large verdict “pressures” the defendant into settling, regardless of whether they would win at trial. So, defendants end up paying out substantial settlements when they would, in all likelihood, prevail. Settlement, so the argument goes, short-circuits the usual litigation process, creating a potential windfall for plaintiffs even though their cases lack merit. Courts have responded to these concerns by instituting *preliminary merits inquiries*: they estimate the strength of the plaintiff’s case, and if it is too weak—that is, it appears too unlikely to prevail at trial—then the litigation is halted.

The most pervasive example of such a rule is the plausibility pleading regime established by *Twombly*³ and extended in *Iqbal*,⁴ which applies to all civil cases and relied on settlement pressure as a key rationale.⁵ The clearest example of doctrines informed by settlement pressure, though, and the focus of this Article, are found in class action jurisprudence. In order for a case to proceed as a class action, it must be authorized, or “certified,” by a court, indicating that the class has satisfied all the requirements set out in Rule 23 of the Federal Rules of Civil Procedure.⁶

1. This phrase is attributed to Henry Friendly. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973); see also Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003) (quoting Henry Friendly).

2. E.g., *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

3. *Twombly*, 550 U.S. at 545.

4. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

5. *Twombly*, 550 U.S. at 555–59.

6. The Federal Rules also, in effect, govern many state class actions, as the states have adopted rules that are nearly identical and look to federal precedent. See, e.g., *Wyeth, Inc. v. Blue Cross &*

As part of this analysis, courts routinely take the merits of the case into account, sparking an ongoing debate as to how much the ultimate disposition of a case should matter at the class certification stage.⁷ An especially clear example of how settlement pressure has shaped class action doctrine is *In re Rhone-Poulenc*,⁸ which changed the class action landscape.⁹ Seemingly ignoring the then-current Supreme Court precedent,¹⁰ Judge Posner's opinion held that "the plaintiffs' claims, despite their human appeal, lack legal merit"¹¹ and accordingly reversed the lower court's decision to certify the class.¹² As articulated in *Rhone-Poulenc*, the class certification decision now hinges on the persuasiveness of the claim on behalf of the class. More recently, the Supreme Court added a similar consideration of the merits to the basic Rule 23 class certification analysis. *Wal-Mart Stores, Inc. v. Dukes*¹³ not only endorsed heightened requirements for class certification, but concluded that a plaintiff's theory of the case must be judged reasonably persuasive for them to carry their Rule 23 burdens and be entitled to class certification.¹⁴ *Wal-Mart* thus implicitly extended decisions like *Rhone-Poulenc* and *Castano v. American Tobacco Co.* by applying a preliminary merits inquiry universally; all class actions must now meet this threshold.

Settlement pressure is essential to these preliminary merits inquiry doctrines and not only because courts¹⁵ and scholars¹⁶ explicitly rely on

Blue Shield of Ala., 42 So. 3d 1216, 1221 (Ala. 2010); *Medina v. Consecro Annuity Assurance Co.*, 121 P.3d 345, 348 (Colo. App. 2005); *Mattson v. Mont. Power Co.*, 291 P.3d 1209, 1213 (Mont. 2012).

7. See *infra* notes 39–50 and accompanying text (explaining that prior to the Court's decision in *Wal-Mart*, courts inconsistently considered a claim's merits when ruling on class certification).

8. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

9. Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 683 (2005).

10. See notes 41–44, *infra*, and accompanying text; Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1880 (2006).

11. *Rhone-Poulenc*, 51 F.3d at 1299.

12. *Id.* at 1304.

13. See generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

14. See Part I.B., *infra*.

15. For example, *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 350 (2011); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–85 (3d Cir. 1995); Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 187 (1998).

16. E.g., Sheila Birnbaum, *Class Certification—the Exception, Not the Rule*, 41 N.Y.L. SCH. L. REV. 347, 350–51 (1997); FRIENDLY, *supra* note 1, at 120; Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust*

it as a rationale. All else being equal, if the plaintiff's case is weak, meaning not that it is frivolous, but simply that it is unlikely to win at the end of the day, then this is a problem that largely solves itself: the plaintiffs will simply lose on the merits. The overriding consideration in that instance would be controlling litigation costs, something which preliminary merits inquiries are poorly equipped to do because estimating the strength of the case is itself very costly.¹⁷ The main justification for preliminary merits inquiries is settlement pressure.

As illustrated by landmark class action decisions like *Rhone-Poulenc* and *Wal-Mart*, settlement pressure has undoubtedly shaped the law. The idea also has intuitive appeal: if defendants really are being extorted, then the law should take steps to mitigate that effect. Naturally, courts should not be in the business of enabling blackmail. Yet, for all the rhetorical force settlement pressure can bring to bear, it creates an immediate puzzle. Settlement, in and of itself, is not considered problematic. Indeed, it is habitually encouraged and is often an efficient decision. Moreover, settlement is sensitive to the strength of the case; all else being equal a stronger case will settle for a higher value than a weaker one.¹⁸ In order for settlement pressure to make any sense, it must put the defendant at some sort of material disadvantage. This is necessary to distinguish settlement pressure from an extremely broad critique of either the institution of settlement itself, or, indeed, of the entire system of private law, either of which would call for an entirely different legal response than the present doctrines. Settlement pressure uses inherently normative language—pressure, extortion, blackmail, and so on—so some harm it inflicts must be identified. Otherwise, there is a large body of law committed to stymieing perfectly reasonable, sometimes even laudable, conduct at the expense of large groups of plaintiffs.

The best solution to this puzzle, which also explains why settlement pressure has figured so prominently into class action doctrine, is that its root cause is the defendant's risk aversion or something that induces analogous behavior. A risk averse defendant places more weight on the potential for heavy losses; for such a defendant, a small chance of very large damages is not balanced out by the correspondingly larger chance of winning the trial and not having to pay anything. A sufficiently risk averse decision maker would, for example, prefer a \$120 settlement to a

Review, 71 COLUM. L. REV. 1, 9 (1971); Kanner & Nagy, *supra* note 9, at 698–99; Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 490 (1996); Silver, *supra* note 1, at 1360 n.17.

17. *See infra* Part I.C.

18. *See infra* Part II.A.

ten percent chance of having to pay \$1000 in damages, even though the latter option entails an expected cost of only \$100. Risk aversion also explains why a defendant might regard a class action differently than a series of individual cases brought on behalf of class members. The class action aggregates those cases into a single trial, and while the actual value of the claims do not change—the class claims and the individual ones are worth the same overall—a risk averse defendant puts more weight on the single trial and is willing to pay more to resolve it.¹⁹ In this way a class action potentially pressures a risk averse defendant into settling, and at a premium. It is not just that defendants “may not wish to roll [the] dice”²⁰ on taking the case to trial, but that they will be willing to pay extra for the privilege of not doing so. The best way to understand these doctrines, then, is that this risk premium²¹ is what they endeavor to address through preliminary merits inquiries. Alternatively, there are other features of the defendant, such as how it is organized or its business model, that can lead it to behave as if it is risk averse, inducing the same behavior.

With a clearer, more complete picture of the underlying causes of settlement pressure, we can evaluate these preliminary merits inquiry doctrines. Despite their possible intuitive appeal, they rest upon misapprehensions of the legal and normative implications of settlement pressure. Upon examination, managing the defendant’s risk aversion or related incentives, which is ultimately what these doctrines do, is neither necessary nor socially beneficial. Doing so has the perverse result of enlisting courts to, *inter alia*: cater to the defendant’s idiosyncratic attitudes and preferences, enable corporate directors to better hide their activities from their own shareholders, thereby rewarding bad behavior, and conceal potentially vital information from the public. Naturally, none of these serve as good grounds to base sweeping procedural doctrine on.

Furthermore, the normative idea at the heart of the settlement pressure argument is flawed. Settlement pressure does not, in fact, inflict the sort of harm that has been ascribed to it. In cases where it affects the defendant’s decision-making, so that it is willing to pay the risk premium at settlement, it is not being extorted. The settlement the defendant chooses to pay is in its interests given what it deems valuable and

19. Risk aversion is explained in more detail in Part II., *infra*.

20. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

21. See W. Kip Viscusi, *Product Liability Litigation with Risk Aversion*, 17 J. LEGAL STUD. 101, 104 (1988) (developing an empirical formula to estimate a plaintiff’s risk by weighing the perceived probability of winning a case and receiving an award compared to the probability of losing a case).

important.²² From the defendant's perspective, the settlement is a reasonable "purchase." In short, it receives value for its money. Indeed, in these cases, the settlement functions as a form of litigation insurance and is similar to the decision to retain expensive legal counsel, decisions the law does not generally treat as suspect.

In addition, the preliminary merits inquiries themselves carry their own set of practical problems. The standard for these inquiries is inherently vague and subjective, making it difficult for courts to apply and impossible for them to do so consistently. The same case might be certified or not depending on the particular judge and their idiosyncrasies. Preliminary merits inquiries also risk stifling legal innovation as claims based on novel legal theories become particularly unlikely to go to trial, preventing them from advancing the law.

This set of doctrines, therefore, rests on a shaky foundation. It is hard to overestimate how influential the concept of settlement pressure has been, but we should reexamine its implications. I focus on class action doctrine in this Article for two reasons: one practical and one methodological. At a practical level, settlement pressure has had the strongest, most direct impact on this area of law. Methodologically, settlement pressure is most apparent in class actions; certifying a class exacerbates a defendant's risk aversion, which might warrant a legal response, especially since the class action procedure is responsible for increasing the defendant's risk aversion or similar tendencies. Moreover, if procedural rules based on settlement pressure bar a class action, but still leave open the possibility of individual litigation, at least in theory, the plaintiff could still have a way of adjudicating her rights,²³ mitigating the social costs of the doctrine. But, I show here that even if we construct the strongest case for settlement pressure, it cannot serve as a justification for broad ranging doctrine.

This Article contributes to the literature more generally by providing

22. An alternative approach would be to characterize the defendant's risk aversion as irrational, treating the settlement pressure that follows from it as a kind of mistake. Under that account, these doctrines would become a way of protecting the defendant from itself. For reasons described in Part II.A., that is not the approach taken in this Article. In addition, that approach seems to radically change the position of the courts in the course of class action litigation and raises the immediate question of why they only seek to safeguard the defendant's interests, even against itself, but do not adopt such a protective stance over the class members, who are almost always less sophisticated decision-makers.

23. This consideration was explicit in *Rhone-Poulenc*: "In most class actions—and those [are] the ones in which the rationale for the procedure is most compelling—individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation. That plainly is not the situation here." *Rhone-Poulenc*, 51 F.3d at 1299.

an in-depth understanding of both settlement pressure and risk aversion, including their causes and effects. It also entails a unique analysis of the Supreme Court's decision in *Wal-Mart*. Since it came down, *Wal-Mart* has been subjected to substantial criticism, the focus of which has been on the fact that it made class actions more difficult to pursue.²⁴ While this is undoubtedly true,²⁵ the conventional argument against *Wal-Mart* rests on an unproven premise: that more class actions are, all else being equal, a good thing. The stricter certification rule established by *Wal-Mart*, or, indeed, by all of the class action cases instituting preliminary merits inquiries in some form or another, could potentially be a needed corrective tool if class certification had been too freely granted.²⁶ None of this Article's observations about settlement pressure depend on a debatable claim about how stringent, overall, class certification should be. Finally, it bears noting that class action doctrine is poised to change considerably in the coming years. Justice Scalia was an especially influential voice in the Supreme Court's class action jurisprudence, authoring majority opinions in many of these cases, including *Wal-Mart*.²⁷ These decisions were almost uniformly decided by narrowly-divided courts, so the addition of Justice Gorsuch, as well as the impact of Justice Kennedy's recent replacement by Justice Kavanaugh, indicates that there is a good chance these doctrines will be

24. E.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 778–80 (2013); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011); Marcia L. McCormick, *Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711 (2013); George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 29 (2012); Joseph A. Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. 1343, 1350–51 (2014); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 479 (2011).

25. See Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After Wal-Mart v. Dukes*, 62 DEPAUL L. REV. 659, 662 (2013) (describing commonality prior to *Wal-Mart* as “one of the easiest class action thresholds to satisfy”); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits of Class Certification*, 79 GEO. WASH. L. REV. 324, 359 (2011) (noting that “plaintiffs who have broader discovery opportunities may develop support for certification that they would not have been able to provide under prior regimes”).

26. If this were the case then it would not be unreasonable to argue that the Court has overcorrected. The clear trend in the Supreme Court's recent class action jurisprudence has been more restrictive procedural rules. See *supra* note 24 (collecting scholarship and providing recent scholarship and case examples).

27. Justice Scalia wrote for the Court in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), and *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011); he dissented in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013).

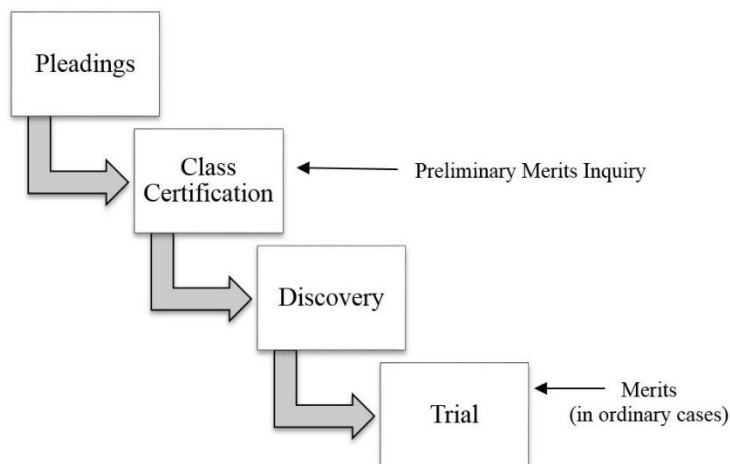
revisited.

This Article is divided into three parts. Part I describes the current state of preliminary merits inquiry doctrines in class actions and explains how the *Wal-Mart* decision fits into in this context. Part II contains the main analysis of settlement pressure and its implications. Part III turns to the practical issues with preliminary merits inquiries and briefly describes how courts should approach class certification.

I. CLASS CERTIFICATION AND THE MERITS

A. Preliminary Merits Inquiries

The initial step in a modern class action is class certification.²⁸ A preliminary merits inquiry sets some threshold for the class plaintiffs' probability of success, and if the court determines that the plaintiffs' claim falls below that threshold—if it is, in the court's estimation, too unlikely to succeed on the merits—then the class cannot be certified. The distinctive element of a preliminary merits inquiry is its timing; it examines the case's merits at a very early stage in the litigation, as summarized in the figure below. Indeed, class certification is really where the class action begins; it is the stage that marks a class action as that type of aggregate litigation.



Rhone-Poulenc, the landmark case that set out the preliminary merits inquiry structure,²⁹ was an unusual class action because thirteen

28. FED. R. CIV. P. 23(a).

29. For ease of exposition, I am setting aside the unusual procedural posture of *Rhone-Poulenc*. It does not affect preliminary merits inquiries or settlement pressure and has been rendered irrelevant by subsequent amendments to Rule 23.

individual suits based on the same events and causes of action had already been decided, with the defendants winning twelve of them.³⁰ Judge Posner, writing for the Seventh Circuit panel, chose to treat this as a representative sample, implying that the plaintiffs only had about an eight percent chance of succeeding in their class action,³¹ leading the Court of Appeals to remark: “A notable feature of this case, and one that has not been remarked upon or encountered, so far as we are aware, in previous cases, is the demonstrated great likelihood that the plaintiffs’ claims, despite their human appeal, lack legal merit.”³² This probability of success was deemed too low, and the class action could not proceed. The ideas articulated in *Rhone-Poulenc* have not been confined to instances where there is a clear pattern of individual “test cases” to draw on. In fact, *Rhone-Poulenc* changed the class action landscape,³³ and its reasoning has been adopted broadly.³⁴ The decision spells out the basic logic of settlement pressure: if the defendants settle, then the weakness of the class plaintiffs’ case will not be addressed in the usual course of litigation; consequently, it should be taken into account at the earlier class certification stage.³⁵

The reason that an appeal [from a final judgment] will come too late to provide effective relief for these defendants is the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them. . . .

....

. . . They will be under intense pressure to settle. . . If they settle, the class certification—the ruling that will have forced them to settle—will never be reviewed.³⁶

The Seventh Circuit also noted that the plaintiffs had a viable option

30. *In re Rhone Poulenc Rorer Inc.*, 51 F.3d 1293, 1296 (7th Cir. 1995).

31. *Id.* at 1299.

32. The first is a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials.

Id. I return to this topic in Part II.E.

33. Kanner & Nagy, *supra* note 9, at 683.

34. *E.g.*, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001), *as amended* (Oct. 16, 2001); *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194, 198 (D.P.R. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

35. Note that this is not quite right. Current law allows for immediate appeal of a class certification decision. *See* FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.”).

36. *Rhone-Poulenc*, 51 F.3d at 1297–98.

in pursuing their claims individually, framing that possibility in a positive light due to worries about settlement pressure.³⁷ A more recent opinion by the Third Circuit framed the issue more generally, noting that “the potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.”³⁸

Rhone-Poulenc thus stands for the proposition that, because of settlement pressure, class actions that look unlikely to ultimately succeed should not be allowed to proceed.³⁹ This rule touches on the fraught question of how the merits figure into class certification. Until the Supreme Court decided *Wal-Mart*, lower courts faced two competing precedents.⁴⁰ *Eisen v. Carlisle & Jacqueline*⁴¹ had been interpreted to hold that that courts could not examine the merits in deciding class certification; courts should instead provisionally accept the substantive allegations made by the plaintiffs as true for the purposes of determining whether the Rule 23 burdens had been met.⁴² A court following *Eisen* would, with that provisional assumption in place, then check whether the class was sufficiently numerous and the claims sufficiently uniform to warrant class treatment,⁴³ an approach that resembles the way pleadings were traditionally considered.⁴⁴ *General Telephone Co. v. Falcon*,⁴⁵ on the other hand, held that a class action “may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied.”⁴⁶ Lower courts thus found themselves in the position of having to balance these two contradictory instructions: *Eisen* seemed to mandate accepting plaintiffs’ allegations at face value, while

37. *Id.* at 1300.

38. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (internal quotations and citations omitted) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n.8 (2001)).

39. *Rhone-Poulenc*, 51 F.3d at 1299.

40. *See generally* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

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

42. *E.g.*, *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403, 419 (S.D. Tex. 1999) (“In evaluating a motion for class certification, . . . the court does not have the authority to conduct a preliminary inquiry into the merits of the case, and hence the substantive allegations contained in the complaint are accepted as true.” (citing *Eisen*, 417 U.S. at 177–78)); *Kallus v. Gen. Host Corp.*, No. B-87-160, 1988 WL 124074, at *3 (D. Conn. June 30, 1988) (holding that at the class certification stage, “the Court need not inquire into the merits of the case, but need only examine the plaintiffs’ allegations” (citing *Eisen*, 417 U.S. at 177)).

43. *See* FED. R. CIV. P. 23(a)(1)–(3) (enumerating categories of claims that qualify for class certification).

44. *See infra*, Part III.B.

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

46. *Id.* at 161 (emphasis added).

Falcon required a court to conduct a thorough investigation.⁴⁷ By the 2000s, the Courts of Appeals had generally sided with *Falcon*; Rule 23's requirements had to be proven, regardless of whether doing so happened to overlap with the plaintiffs' case on the merits.⁴⁸ *Wal-Mart* also endorsed this position, relegating the *Eisen* position described above to "purest dictum,"⁴⁹ a stance the Supreme Court later reiterated.⁵⁰

What this Article calls a preliminary merits inquiry—such as the success threshold in *Rhone-Poulenc*—differs from the rigorous analysis in *Falcon*. To satisfy their burdens under *Falcon*, the class plaintiffs must prove that all of Rule 23's requirements have been met.⁵¹ This finding is not a preliminary estimate. It is a conclusion by the court. The court determines, for example, that the class is sufficiently numerous and that the named plaintiffs will adequately represent the class as a whole. If these requirements happen to overlap with the elements of the case, though, the burdens are not relaxed.⁵² This overlap frequently occurs in Rule 23(b)(3) cases, which are those where class action plaintiffs primarily seek damages⁵³ and have additional procedural requirements. In such cases, plaintiffs must show that the common questions of law and fact "predominate" over issues that would only affect individual claimants,⁵⁴ so plaintiffs must demonstrate that they can prove each element of their case without relying on extensive individual investigations. Crucially, though, they do not need to actually prove those elements themselves at this stage; the predominance inquiry instead centers on the nature of the proof the plaintiffs propose to marshal during the trial, not the quality or persuasiveness of that proof. As one of the most detailed judicial treatments of class certification explained:

47. *E.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008), *as amended* (Jan. 16, 2009); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 29 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2007); *Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 211 F.R.D. 228, 231 (S.D.N.Y. 2002); 7A CHARLES ALAN WRIGHT ET. AL., *FEDERAL PRACTICE AND PROCEDURE* § 1785 (3d ed. 2018).

48. *Initial Pub. Offerings*, 471 F.3d 24; *see especially id.* at 38–39 (collecting cases). *See also Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 307; *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

49. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6 (2011).

50. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 502 (2013); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013).

51. *E.g.*, *Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 311–12.

52. *E.g.*, *id.* at 307 ("[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.")

53. *E.g.*, *Wal-Mart Stores, Inc.*, 564 U.S. at 362–63.

54. *FED. R. CIV. P.* 23(b)(3).

Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. . . .

. . . .

Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.⁵⁵

A preliminary merits inquiry is just the opposite: it checks whether the plaintiffs will be able to prove the elements of their claim. The issue in *Rhone-Poulenc* was not *how* the plaintiffs would prove their case, but *whether* they could do so.⁵⁶ A preliminary merits inquiry, unlike the considerations that separate *Eisen* and *Falcon*, estimates the strength of the plaintiffs' case, not the means by which they will be conducting it.

B. *Wal-Mart's Pervasive Merits Inquiry*

Although less explicit than *Rhone-Poulenc*,⁵⁷ the Supreme Court adopted a pervasive form of preliminary merits inquiry in *Wal-Mart*. This decision has especially sweeping ramifications not only by virtue of being rendered by the Supreme Court, but also because it affects all class actions. The central issue⁵⁸ in *Wal-Mart* was Rule 23(a)'s commonality requirement that there must be "questions of law or fact common to the class."⁵⁹ The class's main allegation was that Wal-Mart's pay and

55. *Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 311–12 (citations omitted).

56. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

57. *Rhone-Poulenc* itself is far from clear, however. Nagareda, *supra* note 10, at 1879.

58. The Court also unanimously ruled the claims for backpay could not be certified under Rule 23(b)(2), which was a major change from the common practice. *See, e.g.*, *United States v. City of New York*, 276 F.R.D. 22, 33 (E.D.N.Y. 2011) (exclaiming that *Wal-Mart* had "reduced to rubble more than forty years of precedent . . . which had long held that backpay is recoverable in employment discrimination class actions certified under Rule 23(b)(2)"). While important, especially for employment law, this change to class action doctrine is not the focus of this Article.

59. "The crux of this case is commonality." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Commonality and typicality—that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"—"tend to merge." *Id.* at 345, 349 n.5. Those requirements tend to merge with adequacy of representation, at least in part, as well. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157–58, 157 n.13 (1982). There is a clear logic to this: if the class claims are all common, then any member of the class will, perforce, have claims typical of the class. Moreover, that representative can be then trusted to look after the interests of the class as a whole as they will be identical to her own interests. The Supreme Court in *Wal-Mart* took care to focus on commonality, *Wal-Mart Stores, Inc.*, 564 U.S. at 349 n.5., and it is on that requirement that the doctrinal changes were made.

promotion decisions discriminated against female employees.⁶⁰ A quirk of Wal-Mart's corporate practices—which ultimately led to the class being denied certification—was that it granted broad discretion to local managers; these choices were essentially delegated to them.⁶¹ The plaintiffs alleged that these subjective, unstructured decisions were made against a set of background conditions that systematically led to discrimination, and that those background conditions were the product of Wal-Mart's actions.⁶² The most pointed version of the plaintiffs' theory of the case was that Wal-Mart cultivated a distinctive corporate culture and that one of the tenets of this corporate culture was gender bias, such as an inclination against placing women in high positions within the company.⁶³ Alternatively, the plaintiffs alleged that Wal-Mart turned over personnel decisions to an overwhelmingly male managerial staff and implicit prejudices took over in a predictable way because the company authorized managers to use arbitrary and subjective criteria⁶⁴ and that the few objective standards that existed disproportionately disadvantaged women.⁶⁵ Either theory alleges a causal connection between actions taken by Wal-Mart's leadership—propagation of a particular corporate culture or using unstructured criteria for employment decisions—and a discriminatory effect.

To support their case, plaintiffs presented evidence of the various efforts Wal-Mart made to foster a corporate culture, including mandatory orientation for all employees and frequent meetings on “culture topics.”⁶⁶ Culture also played an important role in Wal-Mart's management training.⁶⁷ Plaintiffs offered additional testimony from a sociological expert, Bielby, on this point⁶⁸ and statistical findings that Wal-Mart

60. *Wal-Mart Stores, Inc.*, 564 U.S. at 342.

61. *Id.*

62. *Id.* at 344–45.

63. “The plaintiffs’ evidence, including class members’ tales of their own experiences, suggests that gender bias suffused Wal-Mart’s company culture.” *Id.* at 371 (Ginsberg, J., concurring in part and dissenting in part).

64. *Id.*

65. *Id.* See also *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 148 (N.D. Cal. 2004) (further explaining promotions policies and selection subjectivity), *aff’d sub nom. Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *opinion withdrawn and superseded on denial of reh’g*, 509 F.3d 1168 (9th Cir. 2007), *on reh’gen banc sub nom. Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev’d*, 564 U.S. 338 (2011).

66. *Id.* at 151.

67. *Id.*

68. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d at 601–03 (9th Cir. 2010), *rev’d*, 564 U.S. 338 (2011).

treated women differently than men in terms of wages and promotion.⁶⁹ On the basis of this evidence the district court concluded that “[t]here is no genuine dispute that Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture.”⁷⁰

Justice Scalia, writing for the Court, held that this evidence could not meet the plaintiffs’ Rule 23 burdens because it did not show to what extent this corporate culture *actually controlled* employment decisions at Wal-Mart.⁷¹ That is, plaintiffs had not proven the alleged causal connection between the company’s corporate culture and discriminatory behavior.⁷² As Justice Scalia explained for the Court:

Bielby’s testimony does nothing to advance respondents’ [plaintiffs below] case. Whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say.⁷³

The majority opinion in *Wal-Mart* thus ties proving the causal connection that is needed for the plaintiffs’ case in chief to their “theory of commonality.”⁷⁴ With the corporate culture at Wal-Mart discounted, the plaintiffs’ main theory of the case falls apart. Even if they could convincingly establish that Wal-Mart systematically treated female employees differently, that would not suffice because they could not identify any particular wrongdoing by the defendant that caused the disparity.⁷⁵ Without corporate culture or some implicit policy or practice like it, all that remains is Wal-Mart’s delegation of employment decisions to local managers, which does not, the Court held, constitute a common practice throughout the company.⁷⁶ So, the plaintiffs could not satisfy the commonality requirements as *Wal-Mart* conceives of them.

Unlike *Rhone-Poulenc*, *Wal-Mart* did not directly refer to the case’s merits, or lack thereof. But, if the plaintiffs had established this causal

69. *Id.* at 604–10.

70. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. at 151.

71. *Id.*

72. *Id.*

73. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354–55 (internal quotation marks and modifications omitted).

74. *Id.* at 354.

75. “[M]erely proving that the discretionary system has produced a racial or sexual disparity *is not enough*. The plaintiff must begin by identifying the specific employment practice that is challenged. That is all the more necessary when a class of plaintiffs is sought to be certified.” *Wal-Mart Stores, Inc.*, 564 U.S. at 357 (internal quotation marks and modifications omitted) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988)).

76. *Id.* at 358.

connection between Wal-Mart's corporate culture and discriminatory hiring practices, then they would have essentially proven their case. They would have identified the defendant's actions (fostering this corporate culture) and shown that it caused the alleged harm (biased hiring practices). Taken at face value, the *Wal-Mart* plaintiffs make out what looks like a perfectly viable class claim. The corporate culture argument might be weak since the connection between corporate culture and hiring decisions across the company may be difficult to prove, as Justice Scalia remarked, but it raises common questions of law and fact central to the litigation⁷⁷ because Wal-Mart, by all accounts, has a single, uniform corporate culture.⁷⁸ The shift in class action doctrine put in place by *Wal-Mart* has been summarized as: "[I]t was not enough for plaintiffs to pose the question of whether there was a pattern or practice of discrimination to satisfy commonality. Now plaintiffs must know the answer."⁷⁹

The Supreme Court seemed to demand that the *Wal-Mart* plaintiffs persuasively establish not only that the company had a corporate culture, but that the corporate culture had the consequences they alleged. Indeed, the existence of a corporate culture, of some form, at Wal-Mart did not appear to be in doubt.⁸⁰ A uniform corporate culture that did not demonstrably affect employment decisions, and in the right way, however, would not suffice for class certification. In this way, *Wal-Mart* instituted an inquiry into the merits of the claim at the class certification stage as part of Rule 23's commonality requirement.⁸¹ Had Bielby been

77. The *Wal-Mart* Court also held that only common questions "central to the validity of each one of the claims," *id.* at 350, or that "drive the resolution" of class claims can establish commonality. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). See also *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 (7th Cir. 2012) ("This unofficial policy is the common answer that potentially drives the resolution of this litigation." (citing *Wal-Mart Stores, Inc.*, 564 U.S. at 349–51)), *cert. granted, judgment vacated*, 569 U.S. 901 (2013). Earlier cases varied in their approach to this issue. For example, after noting that commonality is construed permissively, *Hanlon v. Chrysler Corp.* stated that "[a]ll questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). On the other hand, *Sprague v. General Motors Corp.* explained that "[w]hat we are looking for is a common issue the resolution of which will advance the litigation," a standard similar to, if still somewhat looser than the one adopted by the Supreme Court in *Wal-Mart*. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

78. See *supra* notes 63–70.

79. Malveaux, *supra* note 24, at 38.

80. See *supra* note 71 and accompanying text (articulating the Court's finding that there was "no genuine dispute" that Wal-Mart had a strong corporate culture).

81. George Rutherglen wonders whether the *Wal-Mart* plaintiffs would have succeeded had

able to, for example, show that a substantial amount of employment decisions were determined by the discriminatory corporate culture, then the case in chief would have been over; all else being equal, the plaintiffs would have won.

Class actions after *Wal-Mart* bear out this doctrinal shift, requiring the plaintiffs' theory of the case to be plausible—namely, that there be a reasonably clear connection between the defendant's actions and the alleged harm. An illustrative example⁸² of the post-*Wal-Mart* standard is *M.D. v. Perry*,⁸³ a complex class action on behalf of children in long-term foster care programs run by the State of Texas. The plaintiffs made a number of allegations, but their central claim was that the state failed to employ enough caseworkers to ensure the class members' safety.⁸⁴ Upon first examination, commonality in this case should be straightforward to establish. Unlike *Wal-Mart*, the *M.D. v. Perry* plaintiffs referenced an official policy or practice by the defendants.⁸⁵ The state clearly determined the number of caseworkers and their workload, and there was no evidence that these decisions were delegated to the discretion of local supervisors as in *Wal-Mart*.⁸⁶ The Fifth Circuit held, however, that *Wal-Mart* required more,⁸⁷ including a "rigorous analysis" of the "elements and defenses for establishing any of the proposed class claims" that examined the "requisite proof for each of the proposed class claims in order to ensure that differences among the class members do not preclude commonality."⁸⁸ This formulation sounds similar to predominance, though, again, that would only entail looking at the sort of proof involved in the case. It would also be fairly easy to show that the foster children could prove their claim on a class-wide basis: the theory of the case strongly resembled class action prisoner litigation, and all

they submitted stronger evidence, noting that "[r]equiring such evidence, however, approaches ever more closely a full-fledged examination of the merits." Rutherglen, *supra* note 24, at 29. He argues that this would be barred under *Eisen*, but *Wal-Mart*'s complete dismissal of that case casts some doubts on its continued effects. *Id.*

82. Another example is *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

83. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 835 (5th Cir. 2012).

84. *Id.*

85. *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 39–40 (S.D. Tex. 2013).

86. *Id.*

87. *M.D. ex rel. Stukenberg*, 675 F.3d at 839. See also Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1001 (2005) ("The consensus view among courts and commentators is that the critical determination in deciding whether to certify claims for class action treatment is whether the factual and legal questions that unite class members are relatively more significant than the questions that divide them.")

88. *M.D. ex rel. Stukenberg*, 675 F.3d at 842–44.

class members were subject to the state's policies. On remand, the district court scrutinized the class claims and the evidence presented in support of them, concluding that the number of caseworkers available was connected to the alleged harm and certifying the class.⁸⁹ The analysis necessary for class certification extended far beyond the *type* of proof that plaintiffs intended to present to prove their case, instead looking into the *extent* or *quality* of that proof.

The post *Wal-Mart* case law reveals a standard for class actions akin to the plausibility pleading rules instituted by *Twombly* and *Iqbal*.⁹⁰ *Twombly*, itself a class action case, modified the notice pleading regime so that a viable complaint must contain “enough facts to state a claim to relief that is plausible on its face.”⁹¹ *Iqbal* extended this standard to all civil cases and elaborated on the ways courts should go about enforcing it, defining a case as “plausible” when the pleading shows that there is a reasonable possibility of relief.⁹² Judges are supposed to rely on their experience and common sense to make this assessment.⁹³ Crucial to both *Twombly* and *Iqbal* was whether a different, innocent explanation for the defendant's actions existed. The existence of “an obvious alternative explanation” in both cases rendered the respective plaintiffs' claims implausible.⁹⁴ This reasoning closely parallels the Supreme Court's treatment of commonality in *Wal-Mart*.⁹⁵ The *Twombly/Iqbal* standard is not, however, identical to the new commonality standard. Notably, courts must “probe behind the pleadings”⁹⁶ to determine whether class plaintiffs

89. *M.D. ex rel. Stukenberg*, 294 F.R.D. at 39–46. See also *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015), *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161, 1165–66 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2835 (2015), and *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 854–55 (6th Cir. 2013) for further examples of this approach taken to commonality after *Wal-Mart*.

90. Others have noted this similarity. See, e.g., McCormick, *supra* note 24, at 716 (“Although it did not cite *Twombly* or *Iqbal*, the majority seemed to draw very heavily upon the notion of plausibility in analyzing whether the evidence demonstrated commonality.”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 319 n.125 (2013) (suggesting a similarity between the *Wal-Mart* holding and the plausibility standard derived from *Twombly* and *Iqbal*).

91. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

92. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). See also *id.* at 681 (noting that the plaintiff's allegations were too conclusory for them to be entitled to a presumption of truth).

93. *Id.* at 689.

94. *Iqbal*, 556 U.S. at 681–83; *Twombly*, 550 U.S. at 567–68.

95. The *Wal-Mart* Court explained: “[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011).

96. *Id.* at 350.

have carried their Rule 23 burdens while plausibility pleading examines just those documents. Yet, the doctrines share a common thread: if the claims do not appear sufficiently likely to prevail on the merits, then they cannot go forward on procedural grounds.

Justice Ginsburg dissented in *Wal-Mart*, faulting the majority for conflating the related, but far more demanding, predominance requirement from Rule 23(b)(3)⁹⁷ and Rule 23(a)'s commonality one.⁹⁸ As noted above, analyzing predominance often touches on the merits. Establishing predominance requires essentially presenting a blueprint for the case; plaintiffs will have to sketch how they will prove each element of the cause of action and how doing so does not resort to extensive individual inquiries or evidence. The majority in *Wal-Mart* demanded something more. Bielby's testimony, of course, did not entail any individual inquiries.⁹⁹ The defect the Supreme Court identified with his testimony was what it actually proved—or failed to prove—not the nature of the evidence.¹⁰⁰ That is fundamentally different from predominance analysis. Predominance is essentially a question of methodology: how do plaintiffs purport to prove their case, and can it be done on a class-wide basis? *Wal-Mart* looked at the substance and persuasiveness of the evidence. For this reason, the decision makes the merits relevant to class certification in a way they were not before.¹⁰¹

The preliminary merits inquiry that *Wal-Mart* instituted is especially pervasive. As one of Rule 23(a)'s threshold requirements, commonality is something that all federal, and many state,¹⁰² class actions must satisfy. Cases like *Rhone-Poulenc* can be distinguished due to their size and the potential damages entailed: if the single court and jury considering the class action does not “hold the fate of an industry in the palm of its

97. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997).

98. *Wal-Mart Stores, Inc.*, 564 U.S. at 374–76 (Ginsburg, J., concurring in part and dissenting in part).

99. *See id.* at 353–55 (summarizing Bielby's testimony).

100. *Id.* at 354 (“Bielby's testimony does nothing to advance [the class's] case.”).

101. Compare the cases cited above to *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009), which is one of the most detailed and rigorous treatments of Rule 23 prior to *Wal-Mart*. *See also* Rutherglen, *supra* note 24, at 29 (comparing and contrasting *Wal-Mart* and *AT&T Mobility* and the effect they have on class action claims); Malveaux, *supra* note 24, at 37 (positing that “[b]y redefining class certification requirements . . . the Court compromises employees' access to justice”); Miller, *supra* note 90, at 319 n.125 (speculating that *Wal-Mart* has created a plausibility threshold akin to *Twombly*); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 476–78 (2013) (explaining that *Wal-Mart* created a “threshold skepticism” that courts must practice as to the case's merits when faced with a class action certification decision).

102. *See supra* note 6.

hand,”¹⁰³ then *Rhone-Poulenc*’s logic may not apply.¹⁰⁴ Along the same lines, the Supreme Court remarked that the *Wal-Mart* litigation presented them “with one of the most expansive class actions ever.”¹⁰⁵ That case also relied on specific employment discrimination precedents,¹⁰⁶ so there was some indication that *Wal-Mart* could be similarly cabined.¹⁰⁷ Despite the suggestions of some courts¹⁰⁸ and commentators,¹⁰⁹ however, the new commonality requirements have been applied broadly, regardless of the size of the case or the substantive law involved.¹¹⁰ In addition, the Court appeared to moderate its position in *Amgen Inc. v. Connecticut Retirement Plans*,¹¹¹ which held that Rule 23 only authorized inquiries into the merits to the extent that they are relevant to determining whether class certification requirements have been met.¹¹² But, that does not

103. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). *See also, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (“In what may be the largest class action ever attempted in federal court, the district court in this case embarked ‘on a road certainly less traveled, if ever taken at all,’ and entered a class certification order.” (citations omitted)).

104. *See, e.g.*, *Barnes v. Air Line Pilots Ass’n, Int’l*, 310 F.R.D. 551, 562 (N.D. Ill. 2015) (distinguishing *Rhone-Poulenc* because the defendant does not face an “existential threat”); *In re Teletronics Pacing Sys., Inc.*, 168 F.R.D. 203, 210 (S.D. Ohio 1996) (distinguishing *Rhone-Poulenc* because “in this case a single jury may determine the fate of a single company, but surely will never hold an entire industry in its hands”), *on reconsideration*, 172 F.R.D. 271 (S.D. Ohio 1997); *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 36 (Cal. 2000), *as modified* (Aug. 9, 2000) (holding that the “concerns aired in *Rhone-Poulenc* and *Castano* are not implicated here” in part because the case “does not involve potentially ruinous liability”); *Garrard Cty. Bd. of Educ. v. Jackson*, 12 S.W.3d 686, 690 (Ky. 2000) (opining that *Rhone-Poulenc* was distinguishable because the defendant was not required to choose between a trial with potentially ruinous liability and settling “on more equitable terms”).

105. *Wal-Mart Stores, Inc.*, 564 U.S. at 342.

106. The Court leaned heavily on *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

107. *See Seiner, supra* note 24, at 1345–46 (noting an argument could be made to confine the *Wal-Mart* decision to only cases against large employers).

108. *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 (7th Cir. 2012), *cert. granted, judgment vacated*, 569 U.S. 901 (2013); *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 171–72 (S.D.N.Y. 2011).

109. *See generally Seiner, supra* note 24.

110. *Parsons v. Ryan*, 754 F.3d 657, 683 (9th Cir. 2014) (state prisoners alleging unsafe conditions and deficient care); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 835 (5th Cir. 2012); *Jones v. Gusman*, 296 F.R.D. 416, 465–66 (E.D. La. 2013) (detainees suing law enforcement for conditions); *Lane v. Kitzhaber*, 283 F.R.D. 587, 596 (D. Or. 2012) (alleging violations of the Americans with Disabilities Act); *Dvorin v. Chesapeake Expl., L.L.C.*, No. 3:12-CV-3728-G, 2013 WL 6003433, at *5 (N.D. Tex. Nov. 13, 2013) (royalty payments from oil and gas leases).

111. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013).

112. “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.* at 466.

speak to the merits analysis that *Wal-Mart* wove into Rule 23 itself. *Amgen* has not yet curbed *Wal-Mart's* impact or stopped courts from engaging in the rigorous claims dissection described above.¹¹³ At present, a direct consideration of the merits of the case is a part of class certification.

C. Litigation Costs

Before turning to settlement pressure and its implications, it is worth discussing the other leading rationale for preliminary merits inquiries. Litigation costs have been a consistent concern and have motivated various procedural proposals.¹¹⁴ They are also at the root of one early account of settlement pressure, where the threat of protracted, costly litigation induces a defendant to settle.¹¹⁵ Discovery, especially class action discovery, which proceeds “on a gargantuan scale,” was deemed the primary source of these costs.¹¹⁶ Discovery costs loom especially large when nearly all the relevant information is in the defendant’s hands, such as in antitrust or merger suits.¹¹⁷ As a general matter, it is not clear how restricting class actions serves to alleviate litigation costs. While class litigation is complex and costly, it is almost assuredly more efficient than hundreds of rounds of individual litigation¹¹⁸ on very similar sets of facts.¹¹⁹ If the comparison being made is between a class action and no litigation, then the class action clearly carries a greater administrative burden, but avoiding the burden would be at the expense of potentially abandoning the plaintiffs’ legal rights. It is similarly not obvious how

113. In addition to *M.D. ex rel. Stukenberg*, 675 F.3d 832, see *Brown v. Nucor Corp.*, 785 F.3d 895, 904 (4th Cir. 2015), analyzing previous similar cases’ success, and *Jacobsen v. Allstate Insurance Co.*, 310 P.3d 452, 462 (Mont. 2013), noting a more rigorous approach taken when analyzing claims. See also *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1187 (N.D. Cal. 2013) (summarizing recent developments in this area of law).

114. E.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 76 (2007); William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003).

115. Handler, *supra* note 16, at 8–9.

116. *Id.* at 7.

117. Wagener, *supra* note 114, at 1902. See also, e.g., *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976); Janet Cooper Alexander, *Do the Merits Matter: A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 549–50 (1991); Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 283 (2004).

118. Although, the costs for the individual cases would be spread out among different courts.

119. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (explaining how class action litigation enables courts to adjudicate many claims from multiple parties at once).

class actions per se increase or exacerbate discovery costs. An individual claim based on the same theory would force the defendant to produce much of the same materials. Consider, for example, if an individual plaintiff in *Wal-Mart* sued on the basis of the same corporate culture theory that the class put forward. She would still need to depose the leadership, investigate the company's efforts to maintain a uniform corporate culture, and so on. The scope of the discovery would probably be smaller—information about neighboring stores might not be relevant—but both the individual case and the class litigation would require much of the same production, especially with regard to centralized decision-making at the company.

To the extent that discovery costs are a particular problem in class actions, preliminary merits inquiries do little to address them.¹²⁰ Since “Rule 23 does not set forth a mere pleading standard”¹²¹ plaintiffs will need evidence to show that they have satisfied its requirements. Accordingly, courts typically authorize discovery before ruling on class certification.¹²² This discovery is limited to things relevant to class certification, but as merits become more relevant to the class certification issue, those limits disappear; the discovery necessary for class certification now resembles full discovery. Consequently, a large portion of discovery costs, the main litigation costs, must still be borne. The gains in terms of litigation costs from preliminary merits inquiries are therefore modest at best. These doctrines do not relieve discovery costs, they

120. *Rhone-Poulenc* was in the unusual, fortuitous position where the preliminary merits inquiry had in essence already been performed by the individual cases that preceded the class action. Once the court chose to treat them as a representative sample, there was little additional discovery required for the preliminary merits inquiry.

121. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

122. *E.g.*, *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 21 (2d Cir. 2003); *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001); *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) (“[I]n most cases, ‘a certain amount of discovery is essential in order to determine the class action issue and the proper scope of the class action.’” (quoting *Pittman v. E.I. duPont de Nemours & Co.*, 552 F.2d 149, 150 (5th Cir. 1977) (citation omitted)); *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977); *Doctor v. Seaboard Coast Line R.R. Co.*, 540 F.2d 699, 707 (4th Cir. 1976); *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (“The propriety of a class action cannot be determined in some cases without discovery”); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) (“[T]he practice employed in the overwhelming majority of class actions is to resolve class certification only after an appropriate period of discovery.”) (collecting cases); *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991); WRIGHT ET AL., *supra* note 47, § 1785.3. *See also* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1278 n.103 (2002) (noting that preliminary merits review, even if not related to a specific Rule 23 requirement, could prevent class action abuse courts that have inquired into the merits usually do so after some opportunity for discovery).

simply push them forward in time.

II. SETTLEMENT PRESSURE AND ITS IMPLICATIONS

A. Understanding Settlement Pressure

Since litigation costs cannot justify preliminary merits inquiries, settlement pressure serves as their key justification. Without settlement pressure, there is no compelling reason for an overarching class action doctrine that institutes an early assessment of the merits. If the case has little merit, then the plaintiffs are, by definition, likely to lose, and the weakness of the case has not caused any substantial harm to the defendant aside from litigation costs, which these doctrines do little to mitigate. Claims that are truly baseless or frivolous should be distinguished from ones that are merely unlikely to succeed (e.g., the evidence is difficult to gather or the legal theory is novel), and can be better addressed directly by tools like Rule 11 sanctions.¹²³ Courts have consistently relied upon this consideration in making class certification decisions.¹²⁴ The Supreme Court is no exception,¹²⁵ although *Wal-Mart* did not explicitly rely on settlement pressure. Justice Scalia, the author of the *Wal-Mart* majority opinion, has cited it both before and after that decision.¹²⁶

123. Rule 11 requires that the claims be “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” FED. R. CIV. P. 11(b)(2). In contrast to there being a low probability of the plaintiffs prevailing at trial, a frivolous claim is considered one “where it is patently clear that a claim has *absolutely no chance of success* under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated.” *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (emphasis added); *accord* *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986). See generally 5A WRIGHT ET AL., *supra* note 47, § 1336.

124. *E.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted).

125. *E.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). See also *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (describing settlement pressure concerns as more appropriately addressed to Congress and listing some of the legislative responses); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 473–76 (2013) (considering the merits of a securities fraud class action in a class certification appeal).

126. *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 350 (2011) (majority opinion by Scalia, J.); *Amgen*, 568 U.S. at 485 (Scalia, J., dissenting). *But see* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (reasoning that allowing multiple claims to be litigated together is valid because it only alters how the claims are processed). See also *Halliburton Co.*, 134 S. Ct. at 2424 n.7 (2014) (Thomas, J., concurring in judgment) (joined by

For all the importance that has been put on the concept of settlement pressure, the reasoning behind it remains somewhat unclear. The core of the argument is that certifying the class puts significant pressure on a defendant to settle regardless of the merits of the claim. Since the case settles, so the argument goes, the weakness of the plaintiffs' case will not matter—they will benefit regardless of the merits, or lack thereof, of their case.

This Part unpacks the idea of settlement pressure in order to determine what its legal and normative implications actually are. There are several, sometimes mutually exclusive, accounts of the phenomenon.¹²⁷ The one discussed here is the soundest way to think about it. This Article's treatment of settlement pressure is not unique, although the implications drawn from it are.¹²⁸ To analyze settlement pressure, it is useful to consider the expected value of a claim, which is calculated by multiplying the value of the claim by the probability that the plaintiff wins. For example, the expected value of a \$100 wager if a fair coin turns up heads is \$50 (\$100 multiplied by $\frac{1}{2}$). If there are 1,000 class members, each of whom have an identical claim for \$100,000 in damages, then the value of their claim is \$100 million (1,000 multiplied by \$100,000), and the expected value of the claim is \$100 million multiplied by the probability that the plaintiffs win their suit. For ease of exposition, I treat this probability as public information—both sides have the same, correct estimation of their chances. This is somewhat unrealistic, but introducing complications like private information does not change things in any way that is critical to this discussion. In actuality, the defendant is likely to have superior information about the likely disposition of the trial as it has a better understanding of its own conduct (at least until discovery is completed).¹²⁹ A preliminary merits inquiry by a court would, ideally,

Scalia, J.) (stating that “[t]he absence of postcertification rebuttal is likely attributable in part to the substantial *in terrorem* settlement pressures brought to bear by certification.”).

127. See Silver, *supra* note 1, at 1361 (explaining that there are four versions of the “blackmail thesis” that each systematically differ).

128. For a different, though not mutually exclusive, treatment of some of these issues, see Nagareda, *supra* note 10, at 1882, 1888.

129. Studies that give the plaintiff private information relevant to the litigation tend to focus on the value of the plaintiffs' claim. See, e.g., Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988). See also Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 5 (1990) (noting that “a defendant can draw inferences about the plaintiff's private information from the fact that the plaintiff is willing to bear the cost of filing suit”); David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 4–5 (1985) (discussing the economic advantage to settling even frivolous claims for defendants to prevent trial costs, even when the defendant knows they will likely prevail should they defend). Warren F.

reveal this probability to everyone involved.¹³⁰

Settlement, though, does not in and of itself justify a preliminary merits inquiry, or any doctrinal innovation for that matter. Settlement is not inherently problematic. Indeed, courts habitually encourage it: "Over the past five decades, first state and then federal judges have embraced active promotion of settlement as a major component of the judicial role."¹³¹ Furthermore, settlement is sensitive to the strength of the plaintiffs' case, just like a trial. While the case is not tested before a court of law, the parties' settlement negotiations directly depend on their chances at trial. Those negotiations are a form of bargaining in the shadow of the law; if they break down and the parties cannot come to an agreement, then there will be a trial, and then its expected results, in turn, affect the negotiations.¹³² If certifying the class leads the defendant to simply settle for something like the expected value of the claim,¹³³ the defendant has not suffered any material harm. For settlement pressure to make sense, it needs something more.

The main difference between a class action and a series of individual suits by class members is that the class action decides all the cases at once. It turns the dispute into a single, all or nothing affair.¹³⁴ So, while the class action vehicle does not automatically change the expected value of the suit, the "variance in outcomes" can increase considerably.¹³⁵ To illustrate, consider an example inspired by *Rhone-Poulenc* where plaintiffs have only an 8 percent chance of succeeding. With a large

Schwartz & C. Frederick Beckner III, *Toward a Theory of the "Meritorious Case": Legal Uncertainty as a Social Choice Problem*, 6 GEO. MASON L. REV. 801, 820 (1998).

130. Tangentially, this suggests that if defendants believe their case is strong, and they have something like documents to back it up, they could improve their bargaining position by presenting this information to the other party (perhaps with the court as an intermediary), sending what would be verifiable signals.

131. Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994). See also Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1474-75 (1994) (analyzing how judges "extol the virtues of settlement . . . to end disputes").

132. See generally Robert Cooter et. al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUDS. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

133. The actual value of a settlement would be sensitive to the relative bargaining power of the plaintiffs and defendants. This would still be a function of the claims' value. Including considerations of bargaining power or a more extensive model of settlement negotiations does not alter the main arguments here.

134. The class action also decides the rights of absent class members.

135. Nagareda, *supra* note 10, at 1882. Richard Nagareda refers to this as the "amplification effect" of class actions. *Id.* at 1881.

number of individual cases, the defendant will win most of them, lose a few, and be liable for, overall, the expected value of the claims. Using the numbers above, that would yield a series of cases with an expected value of \$8 million (1,000 cases valued at \$100,000 each multiplied by 8 percent). Deciding all the claims at once, though, means that while there is a 92 percent chance that the defendant wins outright and has to pay nothing, there is an 8 percent chance that it has to pay the entire \$100 million in damages, something that was virtually impossible if the plaintiffs each brought their cases individually.¹³⁶ That being said, the expected value of both scenarios is identical because the class action does not change any of the burdens at trial.¹³⁷ In fact, if we take litigation costs into consideration, it is likely that the defendant's expected costs associated with the class action are smaller.

Litigation costs aside, a risk neutral defendant would treat these two scenarios identically. The expected value is the same, so such a defendant would be perfectly indifferent between aggregating the cases and dealing with them individually.¹³⁸ But, a *risk averse* defendant would place more weight on the potential for heavy losses. Hence, the pressure to settle stemming from class actions. The 8 percent chance of \$100 million in damages is not, for a risk averse actor, balanced out by the 92 percent chance of paying \$0 the way it is for a risk neutral one. Any pressure to settle is created by the defendant's risk aversion—or, as explained below, something that functions like risk aversion.

Risk aversion explains how settlement pressure could be a problem that warrants a solution. It could lead defendants to “overpay.” If the defendant is more worried about suffering large losses, then it will be willing to pay correspondingly more to avoid it.¹³⁹ A risk averse defendant will thus be disposed to settle the example class action for more

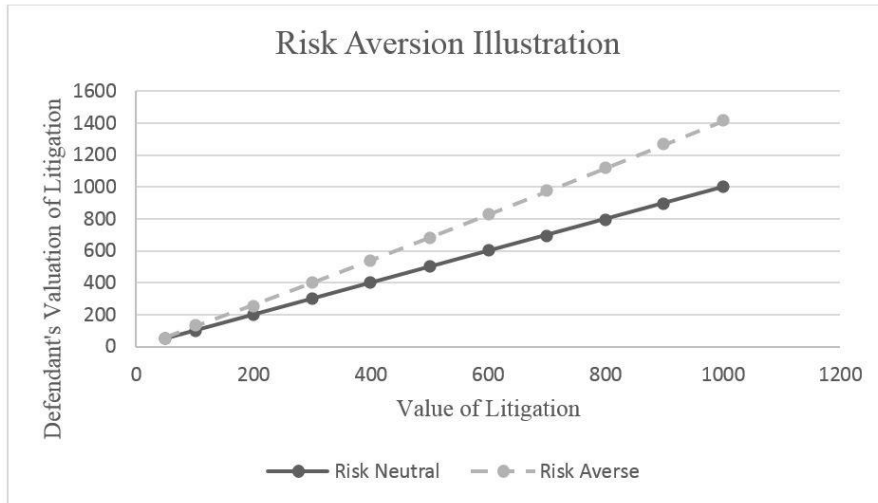
136. The probability of being held fully liable in 1000 cases of individual litigation each with an 8 percent chance of the plaintiff prevailing is essentially zero.

137. There are more complicated cases where we could allow the plaintiffs' probability of winning to vary. For example, the existence of the class claims alone might be seen as evidence that there is a genuine claim. If numerous members of a small community all have a very rare disease, that could be evidence that there is some unnatural cause to it, lending credence to their lawsuit against a local polluter. In that instance, though, the plaintiffs' case is not weak at all, in fact, it looks fairly strong. Furthermore, the class action itself is not important at all to this evidence: a series of individual cases would have the same effect, following the logic of the Condorcet Jury Theorem.

138. This follows straightforwardly from the definition of being risk neutral.

139. This feature of risk aversion is traditionally captured through a concave utility function (a graphical representation of how the agent values things). Because the utility function is concave, the magnitude of the loss increases as its size increases. The risk aversion illustration figure captures the same idea, although with a different presentation than the traditional concave utility function.

than the \$8 million expected value; it might be willing to settle for \$10 or \$20 million. The difference between this amount and the expected value of the claim is the defendant's risk premium. It also represents the difference between the same set of claims being aggregated into class action and being litigated individually. The difference between the way risk neutral and risk averse defendants consider this risk is depicted in the figure below, and the difference between the two lines illustrates the risk premium. The main intuition is that a risk averse defendant treats a large loss as greater than its "objective" value; it looms larger for that type of defendant than for a risk neutral one.



At times, the traditional settlement pressure argument seems to take issue with the defendant paying anything at all in a settlement when the plaintiffs are unlikely to prevail at trial.¹⁴⁰ So, an \$8 million settlement in the stylized example above would be treated as problematic, even extortionate. But, this reasoning cannot support the doctrine that has developed around settlement pressure. Settlement pressure has been relied on to justify limits on when a class action can proceed. If the standard for class certification, sensitive to settlement pressure concerns, blocks the class action, then the plaintiffs are still free to pursue their claims individually (and in this example their claims are sizable enough that it might be worth doing so). In that situation, the defendant still faces \$8 million in expected liability and is still perfectly willing to settle the claims individually for what will, at the end of the day, total that amount.

140. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995); Bone & Evans, *supra* note 122, at 1255.

Therefore, a rule that denies class certification in this case does not protect the defendant from liability; it faces the same expected liability regardless of whether the claim is certified.¹⁴¹ There is, in expectation, some payout, whether through settling all these individual cases or taking some or all of them to trial.¹⁴² For the settlement pressure argument to make sense, something like risk aversion and a risk premium must be present. Otherwise, the doctrines are, at best, superfluous. This understanding of the doctrine also fits with the emphasis that cases like *Rhone-Poulenc* put on the increase in variance caused by deciding the entire aggregate dispute in a single trial as well as their approval for individual, decentralized trials.¹⁴³ It is the strongest account of settlement pressure in the class action context.

One other way that class actions can affect the value of a dispute is at once more obvious and less doctrinally important. Class actions can increase the number of claims involved, shifting the litigation from involving just those plaintiffs that happened to have filed suit to the class as a whole. This difference was noted in *Rhone-Poulenc*: Only about 300 individual suits had been filed while the class was estimated to include thousands.¹⁴⁴ This “addition effect” of class actions is not independently considered a cause for concern, though.¹⁴⁵ If all these suits have merit, then they should be heard; the plaintiffs have a legal right that they can potentially have vindicated. The Supreme Court has said as much:

[Defendant’s] aggregate liability, however, does not depend on whether the suit proceeds as a class action. Each of the 1,000-plus members of the putative class could (as [defendant] acknowledges) bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on [defendant’s] or the plaintiffs’ legal rights.¹⁴⁶

The reasons that these suits would not be litigated without a class

141. The only difference would be with negative value claims, which would not be brought except without some mechanism like class actions. I consider these types of cases below.

142. Unsurprisingly, when it comes to settlement, defendants wholeheartedly embrace class action mechanisms as a means of settling all claims at once.

143. *Rhone-Poulenc*, 51 F.3d at 1299–300; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996); *Marascalco v. Int’l Computerized Orthokeratology Soc’y Inc.*, 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998). See also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 374 (2005) (explaining arguments economists have asserted regarding class action litigation and its inefficiencies).

144. *Rhone-Poulenc*, 51 F.3d at 1298.

145. This phrase is from Nagareda. Nagareda, *supra* note 10, at 1881. See also *id.* at 1882.

146. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010).

action—typically litigation costs or ignorance—are not deliberate legal or normative choices. They are distortions of the underlying legal or regulatory system—that is, problems to be solved.¹⁴⁷ In an ideal litigation system these distortions would not exist, and class actions are actually a means to counteract some of them—notably litigation costs.¹⁴⁸ The fact that class actions can potentially increase the number of claims involved, without more, does not justify doctrines that restrict their scope or availability.

All that being said, settlement pressure, even on the detailed account presented here, does not automatically necessitate a doctrine where class certification is conditioned on the merits of the case. Settlement pressure affects any risk averse class action defendant, regardless of the plaintiffs' likelihood of success. The aggregating quality of class actions occurs whether the plaintiffs have a 5 percent or 95 percent chance of winning. The argument for instituting a merits threshold in light of settlement pressure has not been entirely spelled out by courts, though Richard Nagareda explains it as a kind of Hippocratic Oath to limit the potential harms that are thought to be inherent in aggregating claims.¹⁴⁹ In order to mitigate the problems of defendants "overpaying" in a class action settlement, the preliminary merits inquiry constrains class actions when they seem most controversial—when the plaintiffs' case looks especially weak. The doctrines do nothing to stop settlement pressure or the risk premium as a general matter, but it addresses the cases that might be considered the most egregious. The settlement pressure argument can thus be reframed as: Class actions have the potential to extract, via settlement, more from the defendant than would have been the case if the litigation proceeded individual by individual, and preliminary merits inquiries are based on the proposition that this is most worrisome, and therefore worthy of judicial intervention, when the plaintiffs' chances of actually winning are small.

To summarize, the strongest case for some form of preliminary merits inquiry in class actions is based on settlement pressure. The weak cases that these doctrines weed out could be dealt with at trial or with dispositive motions, and the litigation costs savings from these early inquiries are minimal. So, the problem that these doctrines seek to solve must be that the cases never reach the stages where the merits are usually assessed—they settle before then. That alone, however, is not a sufficient

147. Nagareda, *supra* note 10, at 1883–84.

148. *See also supra* Part I.C.

149. Nagareda, *supra* note 10, at 1893–94.

rationale because settlement itself is both encouraged and takes the strength of the case into account. The defendants must therefore suffer some disadvantage once they are facing a certified class rather than an equivalent series of individual lawsuits. Otherwise, these doctrines serve no purpose. The risk premium described above supplies the answer.

It bears noting that while the above discussion has been in terms of monetary damages; all the foregoing applies to cases where the primary issue is injunctive relief, such as in a Rule 23(b)(2) action.¹⁵⁰ In those cases, the premium would lead to a more plaintiff-friendly injunction ordered. The focus on class actions involving money is simply because it is easier and more intuitive to compare monetary values, but the reasoning applies broadly.

B. The Implications of Risk Aversion

As explained above, the existence of settlement pressure depends on risk aversion. Or, alternatively, some feature of the defendant that leads it to act as if it were risk averse (for my purposes these are equivalent). It explains why a defendant would treat a class action differently than a series of individual cases worth the same: to a risk averse defendant, the aggregate litigation is more costly, a consideration that would lead it to settle for a greater amount than it would otherwise. Thus, risk averse behavior can explain the distinct harm a defendant suffers through a class action; it potentially ends up paying the premium described above. Our assessment of doctrines that depend on settlement pressure, therefore, depends on the normative appeal of crafting doctrines in response to the defendant's risk aversion. In other words, is it a good idea to design class action doctrine in response to the defendant's risk aversion (or similar behavior)?

Risk aversion describes a kind of behavior, or, more precisely, a way of valuing alternatives.¹⁵¹ Unlike some scholarship on class actions, this Article takes the existence of risk aversion on the part of defendants as given. There are, however, some good reasons to be skeptical about how widespread and important the phenomenon is.¹⁵² Charles Silver critiques settlement pressure on this point, calling for further empirical study of the

150. Although Robert Bone and David Evans argue for a less demanding preliminary merits inquiry when injunctive relief is involved. Bone & Evans, *supra* note 122, at 1307.

151. The term risk aversion is used in this Article to describe the valuing system and behavior described in the previous section. It designates a certain kind of utility function. Other writers have used the term in a somewhat more limited way, referring only to cognitive distortions based on someone's preferences over risk. See Silver, *supra* note 1, at 1411.

152. See *infra* notes 154–158 and accompanying text.

issue before it can provide a suitable basis for class action doctrine.¹⁵³ Additional empirical research might not, in and of itself, resolve this question, though. Suppose that studies showed that risk aversion only affects 10 percent of defendants. So, in the clear majority of cases, risk aversion, and through it, settlement pressure, has no significant effect. Yet, that small subset of cases might affect millions of people, entire industries, or sweeping government policies, all of which might justify making law sensitive to the possibility of risk aversion. Indeed, it is not outlandish to conclude that if a single case or defendant is substantially impacted by risk aversion, then that should be taken into account. In short, even if risk aversion is uncommon, that conclusion alone would probably not be enough to answer the critical legal questions.

For these reasons, I adopt a more theoretical approach here. Once risk aversion and its analogues are examined more closely, it becomes clear that there is no compelling reason to design class action procedure around it. Whether risk aversion and settlement pressure are common or not, these tactics do not warrant the place they currently occupy in the law.

Risk aversion can be understood as a preference, in the sense that term is used in economics and social science, where it represents an ordering of states of affairs and drives decision-making. The defendant's risk aversion thus describes its taste for risk, or more accurately its preference for decreasing risk. It is conceptually the same as a consumer's preference for vanilla ice cream or brand loyalty. Someone with these preferences values the preferred flavor or brand more than the alternatives, all else being equal, and will act accordingly. They will, for example, pay a premium. Someone with a strong brand preference for Alfa Romeo's cars will pay more for such a car, holding constant its quality and other characteristics.

Although numerous studies have found evidence of risk aversion,¹⁵⁴ there are several considerations that make it difficult to generalize these findings to the class action context. Defendants in class actions are frequently corporations since it is unusual for a single individual's actions to have a broad enough impact to warrant aggregate litigation. In reality, then, class action defendants have advantages like limited liability, not to mention access to the bankruptcy system, which might lead them to act differently than ordinary people would in the same circumstances. Such

153. Silver, *supra* note 1, at 1408–29.

154. E.g., Kay-Yut Chen & Charles R. Plott, *Nonlinear Behavior in Sealed Bid First Price Auctions*, 25 GAMES & ECON. BEHAV. 34, 34–78 (1998); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263, 268 (1979); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 137 (1996).

mechanisms are not included in experimental treatments analyzing risk aversion. A subject might behave entirely differently if she was only risking some small fraction of her personal endowment, a possible analogue to limited liability. Furthermore, economists have pointed out that we should expect risk aversion to vary depending on both the amount of wealth the decision maker possesses¹⁵⁵ and the amount at stake.¹⁵⁶ Matthew Rabin has argued that the risk attitudes involved when there are modest stakes profoundly differ from those when the stakes are large.¹⁵⁷ The way individuals behave with small sums at stake (such as in the typical laboratory experiment) may be fundamentally different from the way large corporations react to a lawsuit valued at millions or billions of dollars.

Setting aside these concerns and assuming that risk aversion both affects class action defendants and plays a prominent role in their decision-making,¹⁵⁸ there are problems with designing class certification rules around it. One potential issue with taking risk aversion into account is that it can initially appear to involve a sort of mistake—the defendant is placing weight and value on something in excess of its “objective” value. So, class action doctrine is being designed in response to the defendant’s irrational behavior. Adopting that perspective entails a strong value judgment, though, privileging this objective value over the actor’s own preferences, which may be unwarranted. Moreover, legal rules are often sensitive to mistakes or irrationalities. Bright-line rules are useful, in part, because they create clear, simple guidelines, which are easier to follow given common limitations on time, energy, and training. Opt in and opt out default rules for class actions are similarly sensitive to cognitive failings.

In addition, not all accounts of risk aversion look like irrationality. While the simplest, and most common, way to think about risk aversion is as a psychological attitude, sometimes circumstances lead to risk averse behavior. Suppose that the defendant is a company with modest capital reserves. This could cause it to view a single large verdict differently from a series of smaller ones spread out over time, leading it

155. See generally Lars Tyge Nielsen, *Monotone Risk Aversion*, 25 *ECON. THEORY* 203 (2005).

156. Matthew Rabin, *Risk Aversion and Expected-Utility Theory: A Calibration Theorem*, 68 *ECONOMETRICA* 1281, 1281–83 (2000).

157. *Id.*

158. But see Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 *NOTRE DAME L. REV.* 1377, 1403 n.51 (2000) (arguing that critics overstate the impact of class actions on defendants’ decision-making because many corporate defendants are designed to withstand the ramifications of a class action lawsuit).

to be risk averse.¹⁵⁹ The same could be true if the company has limited lines of credit, if the large verdict could disrupt its operations, and so forth. In these scenarios, the defendant would treat the single class action verdict differently than numerous individual ones, even though the expected value is the same. But, the defendant is behaving purely “rationally.”¹⁶⁰ It may even be socially optimal for it to be risk averse: doing so may keep its workers employed and allow it to continue operating. What these scenarios and the attitude- or taste-based account of risk aversion share in common is that they are all idiosyncratic; they all depend on specific elements of the defendant.

There are two main difficulties with making class action doctrine sensitive to defendants’ risk aversion. The first is an issue of fairness. Risk aversion has at least as much of an effect on the decision-making of class action plaintiffs as it does on defendants.¹⁶¹ Trials are risky for class plaintiffs, as well. If they lose, they receive nothing, and they may be in dire circumstances.¹⁶² Moreover, all the evidence available that supports the existence of risk aversion applies to plaintiffs more clearly than it does defendants: plaintiffs are typically natural persons with unexceptional wealth endowments. If risk aversion warrants a preliminary merits inquiry, then the natural next question is why the defendant’s attitudes toward risk matter so much, but the plaintiffs’ attitudes play no role in determining the class certification standard. To the extent that doctrine should take into account the defendant’s attitudes in this regard, it should consider those of the other party, too.

The second problem with basing class action doctrine on the defendant’s attitudes toward risk is more fundamental: it entails crafting procedural rules directly in response to the defendant’s preferences. Defendants have a number of preferences relating to the litigation, the most obvious being avoiding any liability. What makes their feelings toward risk—which are simply preferences like any other¹⁶³—different from their feelings toward paying plaintiffs? Similarly, what distinguishes the requirements for class certification from other procedural rules¹⁶⁴ that impact the result of the litigation? If the

159. One way to look at this is that the company has an induced preference toward risk aversion rather than a primitive preference in that regard.

160. If the managers of the business have interests that diverge from the shareholders or other critical stakeholders, then that would be agent-based risk aversion, discussed below.

161. *E.g.*, Rachlinski, *supra* note 154, at 127–28.

162. Silver, *supra* note 1, at 1416 (noting that plaintiffs with large personal injury claims settle cheaply).

163. Or, potentially, preferences induced by other circumstances, as described above.

164. The line between substance and procedure is, admittedly, a fuzzy one. *See* Sampson v.

requirements for class certification are designed to take into account the defendant's likely¹⁶⁵ preferences, then there is no clear, principled way to distinguish them from other litigation rules that equally affect the results of the litigation, like allocation of burdens of proof. Accepting this account of settlement pressure, which at bottom stems from defendant attitudes, has potentially radical results. The same argument justifies a host of prodefendant doctrines as it would accord with their typical preferences, and there is no good way to compartmentalize its implications. For example, defendants would surely prefer a rule that treated their experts as much more credible than those speaking on behalf of the plaintiffs. The settlement pressure argument thus proves too much.

C. Alternative Explanations

So far, I have explained how settlement pressure, the key justification for preliminary merits inquiries, is based on defendants' preferences, possibly induced, toward risk. Defendants' differential treatment of a single large case as opposed to numerous small ones must be at the root of settlement pressure; it creates the problem, the "pressure," to settle that courts seek to counteract or mitigate through preliminary merits inquiries. There are also other possibilities that will lead the defendant to act *as if* it were risk averse. I describe two of these here; the characteristic they share in common is that the class action is a higher profile case than had the plaintiffs filed individual cases, and the fact that the class action is more likely to be noticed creates an additional cost to the defendant, functioning like the risk premium in the basic risk aversion scenario detailed above.

1. Agency-Focused Account

This risk aversion-like behavior is caused by the structure of the defendant and divergent interests within it, which create a principal-agent problem.¹⁶⁶ The shareholders (the principal) have interests that differ, to

Channell, 110 F.2d 754, 754 (1st Cir. 1940).

165. The qualification is necessary here because courts, commentators, and this Article are all making generalizations about these preferences. That is, we are not talking about any specific defendant's attitudes toward risks, but rather their attitudes as a group. Proving such attitudes in the course of litigation would be difficult, if not impossible, and would invite defendants to strategically plead risk aversion. Alternatively, they could arrange their affairs so as to make themselves appear risk averse, which raises the same issues as the agency-focused account discussed below.

166. For a more detailed definition of principal-agent problems than the one sketched in the text, see Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 *ECONOMETRICA* 7 (1983), and Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 *ANN. REV. POL. SCI.* 203, 222–23 (2005).

some degree, from those of the managers (the agent) who make the day-to-day decisions at the company.¹⁶⁷ Principal-agent problems are common in the case of corporate defendants and are also present in government entities¹⁶⁸ as well as any defendant where nominal authority and authority to act are separated.¹⁶⁹ While managers' incentives overlap substantially with shareholders—they both share an interest in the profitability and survival of the company—they are not necessarily identical. Managers are usually much more sensitive to the risk that the company goes bankrupt; their jobs depend on the company's continued survival, while shareholders are usually diversified by holding small investments in many corporations.¹⁷⁰ The shareholders' risks are limited by their investments, so they might be much more comfortable with an all-or-nothing gamble at a trial than the managers are.¹⁷¹ The fact that they are only risking a small economic investment might also lead other considerations to dominate shareholder decision-making. For instance, shareholders may prefer their companies to avoid acting in reprehensible ways. Winning at a trial could be a useful way to vindicate the corporation's reputation for shareholders who face little personal cost and can move their investments to another company. In addition, trials actually offer shareholders a powerful tool for monitoring their agents, so they might prefer them in a number of cases where the managers would not.

Related to this last observation, there is an informational aspect to the agency-focused account. Agents typically have better access to information than do their principals. In the corporate context, managers will know vastly more about the company's daily activities than the rank and file shareholders do. This includes the company's actions that give rise to potential liability: corporations retain counsel, while the typical shareholder has neither the energy nor the expertise to judge the legal consequences of the corporation's actions. Indeed, monitoring the agent

167. Divergent interests are one of the necessary ingredients of a principal-agent problem. For example, see Miller, *supra* note 166, at 205–06.

168. See Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL'Y 239, 255–72 (2012) (describing various principal-agent problems involving elected officials and administrative agencies).

169. See Miller, *supra* note 166. See also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 8–10 (1991) for an introduction and informal, firm-specific discussion.

170. See, e.g., EASTERBROOK & FISCHER, *supra* note 169, at 11.

171. In this way the agency-focused account incorporates the element of the risk aversion one: the agents are risk averse, and would guide the defendant to act accordingly, namely by settling and at a premium. The principals, on the other hand, with much less at stake, are not all that risk averse, and are willing to go to trial.

is one of the central challenges facing any principal.¹⁷² A single settlement, which is much smaller than the value of the aggregate class litigation, is likely to escape the shareholders' notice. Relatively small settlements might easily just be treated as part of the corporation's operating costs. A major lawsuit for millions, if not billions,¹⁷³ of dollars is more likely to be reported on.¹⁷⁴ If the shareholders do not spot the lawsuits, then they cannot hold the managers accountable for them. As a hypothetical, suppose the managers adopt a risky business strategy, such as using a contract that probably violates consumer protection laws.¹⁷⁵ The managers might be eager to settle a class action, and with it all potential claims, even paying a premium to do so, if it means that they will be able to conceal how their decisions lost the company money and escape sanctions (i.e., potentially being fired).

Like the induced risk aversion detailed above, the agency-focused account can be thought of as "purely rational." Also like the risk aversion described above, it is not an appealing basis for doctrine. The defendant's behavior, namely treating the class action differently than individual litigation, is a product of the interaction between the principal and the agent within it—it is a product of the way the defendant organizes itself and its affairs. The causes of this risk aversion-like behavior are therefore within the defendant's control, and it is not at all clear why the law should

172. See, e.g., Almendares, *supra* note 168, at 255–59 and cites therein (providing an example of Congress's different techniques for monitoring bureaucracy). See also Scott Ashworth & Ethan Bueno de Mesquita, Professors at the Harris School of Public Policy at the University of Chicago, Address at the Priorat Workshop on Theoretical Political Science: Multitask, Accountability, and Institutional Design (2013); Ethan Bueno de Mesquita & Dimitri Landa, Address at the Priorat Workshop on Theoretical Political Science: Does Clarifying Responsibility Always Improve Policy? (2013).

173. Posner estimated the potential liability in *Rhone-Poulenc* at \$25 billion, spread over multiple drug companies. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

174. E.g., Glenn Collins, *Tobacco Sees Way to Block a Big Lawsuit By Consumers*, N.Y. TIMES (Mar. 20, 1995), <https://www.nytimes.com/1995/03/20/business/tobacco-sees-way-to-block-a-big-lawsuit-by-consumers.html> (citing *Rhone-Polenc* and having implications for the *Castano* class action); David Cay Johnston, *Drug Companies Take Step Toward Settling Hemophiliacs' AIDS Lawsuits*, N.Y. TIMES (May 30, 1996), <https://www.nytimes.com/1996/05/30/us/drug-companies-take-step-toward-settling-hemophiliacs-aids-lawsuits.html>; Barry Meier, *Offer to Hemophiliacs with H.I.V. is Set*, N.Y. TIMES (Apr. 19, 1996), <https://www.nytimes.com/1996/04/19/business/offer-to-hemophiliacs-with-hiv-is-set.html>. For websites dedicated to informing consumers on class action lawsuits, see generally TOP CLASS ACTIONS, <https://topclassactions.com/> (last visited Dec. 3, 2018) and BIG CLASS ACTION, <https://www.bigclassaction.com/> (last visited Dec. 3, 2018).

175. E.g., *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 336 (2011) (regarding mandatory arbitration clauses that required plaintiffs to bring claims individually, not as a class); *Schnall v. AT&T Wireless Servs., Inc.*, 259 P.3d 129, 131 (Wash. 2011) (en banc) (explaining plaintiffs' assertion that AT&T misled consumers by billing them for charges not included in the advertised rates).

grant the defendant a windfall just because it chose to structure itself this way, fully aware of the potential risks. Moreover, the defendant is already reaping the benefits of the arrangement. A lax monitoring regime—which could create the circumstances where a defendant treats class actions differently—spares the principal resources. Also, to the extent the agent takes actions contrary to the principal's interests, the principal has not put the effort into monitoring or managing its agent. Doing so entails costs,¹⁷⁶ costs that the principal has simply opted not to take on. In these cases, then, courts are stepping in to halt some class actions even though the principal chose to adopt this risky arrangement and already reaped its benefits. Moreover, barring extreme cases that amount to unconscionability, the law generally permits parties to engage in risky contracts,¹⁷⁷ so it is not obvious why courts should step in and, in effect, modify these agreements.

The law can play a role in mitigating principal-agent problems.¹⁷⁸ Disclosure rules, for example, make it easier for shareholders to supervise their agents.¹⁷⁹ Requiring administrative agencies to issue environmental impact statements serves a similar function, informing stakeholders of the effects of a proposed regulation.¹⁸⁰ General civil procedure rules are an ill-suited tool to deal with issues of this sort, however. They apply broadly, without taking into account the nuances of the defendant's corporate form, the way it rewards its agents, or the specific issue area.¹⁸¹ More importantly, even if we accept that using civil procedure to address

176. See George W. Downs & David M. Roche, *Conflict, Agency, and Gambling for Resurrection: The Principal-Agent Problem Goes to War*, 38 AM. J. POL. SCI. 362, 373–74 (1994) (noting that costs often establish a set of punishments for poor outcomes or removing deterrent to future agents who might be tempted to act contrary to principal's interests); Miller, *supra* note 166, at 205–06 (providing features of a principal-agency model where principal chooses not to monitor agent); *but see* REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 3–4 (3d. ed. 2009).

177. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996). It is the presence of unknown or hidden risks that raises concerns. See generally Alex Y. Seita, *Uncertainty and Contract Law*, 46 U. PITT. L. REV. 75 (1984).

178. See KRAAKMAN ET AL., *supra* note 176, at 2–3 (exploring corporate law's role in minimizing principal-agent problems).

179. See *id.* at 38–39 (providing examples of how disclosure allows principals to supervise agents).

180. Almendares, *supra* note 168, at 257–58.

181. Note this is not the same as the procedural rules being transsubstantive. Taking into account how the defendant is organized, the nature of its employment contracts with the corporate leadership, and so on would be a much more detailed, specific endeavor than applying different procedural rules depending on the cause of action. This Article, however, treats the class certification rules, especially commonality as currently envisioned by the Supreme Court, as transsubstantive.

principal-agent problems is desirable, a preliminary merits inquiry actually has the opposite effect: raising the standards for class certification helps *enable* that principal-agent problem. The managers do not even have to attempt to quickly and quietly settle the class claim. The court ends up doing that work for them, making it that much less likely that the shareholders will be alerted to potential wrongdoing. The results are just the opposite of disclosure rules and similar legal tools that attempt to alleviate principal-agent problems.¹⁸² Courts, obviously, should not be in the business of helping conceal misbehavior by corporate managers or other agents. Preliminary merits inquiries also create perverse incentives here: courts would be stepping in when the defendant itself should be attending to its own principal-agent problems. The law would effectively be subsidizing those defendants that did not bother to manage their own agents. Those defendants that do make the effort are not granted the same benefit. Indeed, in a competitive market, the courts' decision to adopt preliminary merits inquiries could drive the more responsible firms out of business because the latter will be bearing the costs of monitoring their agents. So, the preliminary merits inquiry actually rewards bad behavior on two levels: it helps agents conceal important information from their principals, exacerbating principal-agent problems, and it subsidizes principals that cannot be troubled to discipline their own agents.

2. Publicity-Focused Account

Like the agency-focused account, this behavior is a byproduct of the defendant's strategic considerations. It resembles the information element of the agency-focused account but substitutes the general public in place of the principal that the agent wants to conceal the class action litigation from. Naturally, the general public does not usually scrutinize various companies' activities; it has considerably less information, and less incentive to gather information, about any given company than its shareholders do. The defendant may be willing to pay in order to settle

182. Like risk aversion, principal-agent problems exist on the plaintiffs' side of the litigation as well. While the plaintiffs' attitudes toward risk have not played the prominent role in class action cases that defendants' attitudes have, the principal-agent problems that class plaintiffs face have received substantial attention from courts and commentators. *E.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852–53 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–628 (1997); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1177 (5th Cir. 1978); Alexander, *supra* note 117, at 535–36; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 737 (2013) (citing S. REP. NO. 109-14, at 14–20 (2005)).

the class action that is a higher profile case so as to keep the public uninformed about its actions. This leads the defendant to act as if it were risk averse, treating the more visible class litigation differently from individual cases that have the same total expected value. The defendant in this scenario displays the same characteristics as a risk averse one, though the root cause is different. In essence, negative press can create an additional cost associated with class action litigation.

Working to conceal class action litigation from the public clashes with the longstanding tradition of public access to judicial proceedings.¹⁸³ This access serves two primary goals. First, it ensures fairness in the exercise of justice: “[O]ne of the important means of assuring a fair trial is that the process be open to neutral observers.”¹⁸⁴ Second, it promotes trust in the justice system.¹⁸⁵ The Supreme Court has recognized a constitutional right to observe criminal trials and some pretrial proceedings,¹⁸⁶ and while it has not definitively identified an analogous constitutional right with regards to civil trials,¹⁸⁷ other courts have.¹⁸⁸ There is also a common law right to access the workings of the judiciary,¹⁸⁹ and similar rights are often expanded by statute.¹⁹⁰

Public access to court proceedings is not limitless,¹⁹¹ and there has been a lively debate about its boundaries.¹⁹² Information produced in the

183. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 428 (1991) (“By longstanding tradition, the American public is free to view the daily activities of the courts through an expansive window that reveals both our civil and criminal justice systems.”).

184. *Press-Enter. Co. v. Super. Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 7 (1986); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 n.7 (1978) (collecting cases); see also *Cowley v. Pulsifer*, 137 Mass. 392, 393–94 (1884) (noting that public court reports and proceedings are important for public good).

185. *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 606 (1982) (and cites therein); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980) (plurality opinion).

186. *Richmond Newspapers*, 448 U.S. at 580; see also *Globe Newspaper Co.*, 457 U.S. at 611 (O’Connor, J., concurring) (stating that the *Richmond Newspapers* Court concluded the First Amendment protects right of press and public to attend criminal trials); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068 (3d Cir. 1984) (explaining that the First Amendment guarantees a right to access to criminal trials).

187. *Publicker Indus.*, 733 F.2d at 1067–68.

188. *E.g.*, *id.* at 1070; *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983).

189. *Nixon*, 435 U.S. at 597.

190. See Miller, *supra* note 183, at 441–45 (providing examples of state legislation expanding the common law right to access judicial proceedings).

191. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984); *Nixon*, 435 U.S. at 598.

192. See, e.g., Miller, *supra* note 183, at 428, 436–45 (describing the debate); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information*

course of pretrial discovery has frequently been considered outside the scope of this right.¹⁹³ There is also some dispute over what constitutes a judicial record and therefore what information is available to the public.¹⁹⁴ A dispositive motion and the documents that justify it are an easy case and clearly qualify as a judicial record, but other examples less central to determining the outcome of a case divide courts.¹⁹⁵ These disagreements have little to do with the publicity-based account here, though. In this context, what the defendant would want to conceal from the public is the very existence of the lawsuit, which is central to the litigation and does not fall within the recognized exceptions to public access to proceedings, which include discovery, settlement negotiations, classified government information, trade secrets, and attorney-client communication.¹⁹⁶ Even those that support limits on public access to judicial proceedings would make the complaint and verdict public.¹⁹⁷ While settlements happen outside the public view¹⁹⁸—a fact that is variously lamented,¹⁹⁹ accepted as necessary,²⁰⁰ and defended²⁰¹—the very fact that there has been a settlement, or a lawsuit in the first place, is public. Furthermore, as with principal-agent problems, if there is a good reason to avoid publicizing some aspects of a particular case,²⁰²

Generated Through Litigation, 81 CHI.-KENT L. REV. 375 (2006); Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers As Lawmakers*, 46 ARIZ. L. REV. 733 (2004); Giles T. Cohen, Comment, *Protective Orders, Property Interests and Prior Restraints: Can the Courts Prevent Media Nonparties from Publishing Court-Protected Discovery Materials?*, 144 U. PA. L. REV. 2463 (1996); R. Bryan Morrison, Note, *To Seal or Not to Seal? That Is Still the Question: Arkansas Best Corp. v. General Electric Capital Corp.*, 49 ARK. L. REV. 325 (1996).

193. *E.g.*, *Mokhiber v. Davis*, 537 A.2d 1100, 1108 (D.C. Cir. 1988); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6 (1st Cir. 1986); *Rhinehart*, 467 U.S. at 20.

194. Laurie Kraty Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 374–78 (1999).

195. See Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 47 (1983) (examining situations where the public's interest in viewing litigation documents would be "outweighed by other interests," specifically, the litigants' interest in confidentiality where a document is produced for in camera review).

196. See generally Miller, *supra* note 183.

197. *E.g.*, *id.* at 479 ("[O]nce an action is commenced, the complaint and all subsequent pleadings, filings, and court proceedings are open, and the public and the press can therefore obtain more information . . . as the litigation progresses."); Dore, *supra* note 194, at 383.

198. *E.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995).

199. *Id.*

200. Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 484–85.

201. Miller, *supra* note 183, at 484–85.

202. See, *e.g.*, *id.* at 470 (noting that businesses fear disclosure of proprietary and unsubstantiated information during pre-trial proceedings).

modifying class certification doctrine is an odd, problematic way of achieving that goal. It can be managed in a far better, more nuanced, way through a gag order.²⁰³

Preliminary merits inquiries are a very blunt tool to address these potential issues. It is certainly possible that the existence of a class action can impose costs on the defendant. The larger scale of the class action will often make a case of that sort more newsworthy.²⁰⁴ Furthermore, it may be especially troubling for defendants to suffer these costs when the plaintiffs' case is weak. These considerations must be balanced against values like public access to the courts and information generally, though, so we need especially good reasons to conceal the existence of a class action from the public. Rules barring truly frivolous²⁰⁵ or implausible²⁰⁶ claims would seem to be adequate safeguards.

Overall, there are competing values that a blanket preliminary merits inquiry doctrine fails to take into account. To illustrate, we can consider two scenarios. In one case there is a class action based on an old contract or business practice that the defendant no longer uses.²⁰⁷ In that case, the defendant might suffer serious publicity costs, so a rule curtailing them appears attractive; it may seem overly harsh to risk bankrupting the defendant over such an issue, especially if they have already stopped the suspect practice. On the other hand, suppose the litigation is based on a product that causes harm to some people who use it, like the allegation that faulty ignition switches in some General Motors models caused accidents, which were made especially dangerous because the same failing also caused the airbags not to function.²⁰⁸ A highly-publicized class action would presumably harm a defendant like General Motors, but keeping this information from the public can cause widespread serious harm as well, robbing them of the opportunity to take precautions,

203. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986) (court issued protective order due to increasing and "potentially harmful" publicity of the case). See Katie Eccles, Note, *The Agent Orange Case: A Flawed Interpretation of the Federal Rules of Civil Procedure Granting Pretrial Access to Discovery*, 42 STAN. L. REV. 1577, 1615–16 (1990) (discussing instances where the public should presumptively have access to the settlement negotiations and proceedings).

204. Although hundreds of lawsuits stemming from the same events or filed against the same defendant could itself be newsworthy.

205. See *supra* note 123.

206. See Part III, *infra*.

207. For example, the FTC's case against Countrywide Home Loans. See, e.g., *FTC Returns Nearly \$108 Million to 450,000 Homeowners Overcharged by Countrywide for Loan Servicing Fees*, FED. TRADE COMM'N (July 20, 2011), <https://www.ftc.gov/news-events/press-releases/2011/07/ftc-returns-nearly-108-million-450000-homeowners-overcharged>.

208. E.g., *In re Gen. Motors L.L.C. Ignition Switch Litig.*, 154 F. Supp. 3d 30, 33 (S.D.N.Y. 2015).

investigate the issue, and so on. These publicity concerns, therefore, cannot form a solid foundation for preliminary merits inquiries as currently applied. The doctrine is simply far too broad and blunt.

D. Putting Settlement Pressure in Perspective

Looking at the root causes of settlement pressure shows that it cannot play its crucial role of justifying preliminary merits inquiries. The law and procedural rules no less, should not privilege one party's preferences, exacerbate principal-agent problems, or help conceal the existence of litigation from the public. In order for settlement pressure to play the role it has in class action cases, these goals must be worth achieving, and procedural rules instituted by the courts²⁰⁹ must be the right way to go about doing so. Settlement pressure is frequently characterized as extortion or blackmail. So characterized, it is easy to see why courts would feel compelled to counteract it. Despite the rhetorical force of this characterization, settlement, even at a premium, more closely resembles litigation insurance. Courts have been concerned that defendants will overpay in a settlement.²¹⁰ Continuing with the stylized example from Part II.A., suppose that the parties reach a settlement where the defendant agrees to pay \$12 million while the expected value of the suit is only \$80 million. This is a substantial markup, and the difference between the "objective" expected value is the result of the defendant's risk aversion or something similar. While this leads the defendant to pay more money than it would otherwise, crucially, the defendant in this example *received value for its money*.

In these cases, the settlement, including the risk premium, functions as a form of insurance. The defendant is paying to guard against a low probability event that a class action verdict would be issued against it. The extra \$4 million in the above example is the fee this defendant is willing to pay to prevent the eight percent chance that they will be held liable for the entire class action. The "blackmail settlement" is simply another form of insurance, which is perfectly permissible under the law. Indeed, corporate defendants almost uniformly purchase litigation insurance.²¹¹ When agreeing to these settlements, the defendant is

209. As opposed to those instituted by the legislature, which has a freer hand in picking winners and losers.

210. *E.g.*, *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

211. *See, e.g.*, *Alexander*, *supra* note 117, at 550. *Alexander* notes that "[n]inety-four percent of public companies with more than 500 shareholders have directors' and officers' liability (D&O) insurance." *See also* *Silver*, *supra* note 1, at 1414. The existence of such insurance may also skew settlement values. At the time of the litigation the money an insurer would be obligated to pay does

responding to risk in a rational, strategic way. This decision, even taking the risk premium into account, is no different from any number of responses to the legal or regulatory environment. It is analogous to retaining an expensive law firm, or even to seek the advice of counsel. These are costs that the defendant may opt to bear in order to decrease the probability that it will pay a large verdict. Settlement works the same way. Arguments based on settlement pressure must explain what distinguishes settlement from these other expenses.

A perhaps natural response is that someone confronted by a gunman who demands “your money or your life” is also responding to risk in a rational, strategic way. The legal system, however, is not considered to be on par with an armed robber; this comparison assumes the conclusion.²¹² Plaintiffs have legal rights and are entitled to test them through the legal process. Private law does not have the wholesale illegitimacy of a gunman. If it did, settlement pressure and class actions would be a small part of a much larger problem. Moreover, large claims, ones that may frighten a defendant, are not presumptively forbidden by the law. Federal antitrust violations are awarded treble damages, massively increasing the defendant’s liability. Following this argument, antitrust claims should also be considered extortionate.

The class action vehicle naturally increases the chance of a single large judgment. In cases where the class claim is weak, it increases the possibility of a very large verdict from infinitesimal, the extremely low probability that the defendant loses every individual case, to whatever the chances are that the class plaintiffs might prevail. The expected value of the suit does not change, though. The slim chance that the defendant might face tremendous liability is balanced by the very likely possibility that it will be cleared of all liability. While it is true that the law creates the potential for a very large verdict that inflicts this expected cost on defendants, that is, of course, true for any sort of civil suit. Other legal rules such as strict liability similarly impose expected costs on defendants. Defendants can insure themselves against liability in those

not come out of the defendant’s pocket—the defendant has already paid the premiums—so it will be more generous as it does not effectively bear the entire cost. See Alexander, *supra* note 117, at 550 (stating that value of a case may be just as much a function of how much insurance coverage defendant purchased as it is a function of strength of legal argument); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114–15, 1150–58 (1990) (explaining that without tort litigation, liability insurance would decrease).

212. A full discussion distinguishing the law from outright extortion is outside the scope of this Article. A classic discussion is contained in H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012). Suffice to say, if the law and civil liability generally are nothing more than extortion, then settlement pressure is the least of the procedural issues.

cases, (or seek the advice of skilled lawyers before undertaking risky actions, etc.) and since settlement pressure functions as insurance, it should not be treated any differently. Litigation insurance may have its own drawbacks, such as blunting the deterrent effect of the tort system.²¹³ But, settlement pressure is not unique and should not be treated as the *bête noire* of civil procedure.

III. PRACTICAL IMPLICATIONS

The focus of this Article has been on the main justification for preliminary merits inquiries in class actions: settlement pressure. The soundest version of settlement pressure is that class certification creates an additional cost for the defendant. That is, the defendant is put in a worse position when the class is certified as opposed to the same claims brought individually against it. Settlement pressure, in turn, depends on the defendant's risk aversion or something that influences the defendant in the same way. A risk neutral defendant treats the class action no differently than the individual cases by class members. But, a risk averse defendant treats the possibility of a single large loss differently, giving it more weight.

Risk aversion, however, is not an adequate basis for class action doctrine. Instituting preliminary merits inquiries in response to it means crafting procedural rules around the defendant's idiosyncrasies, including its psychological quirks, capital reserves, business model, and access to credit. Indeed, the preliminary merits inquiries are responding to these particular qualities that defendants may or may not have with a comprehensive rule that lacks nuance. Furthermore, if we take the principle here seriously—for example, if we agree that these considerations should shape the rules for class certification—then it becomes hard to cabin. What makes the defendant's attitudes toward risk relevant *only* for class certification? Why do they not shape other elements of the trial? This argument proves too much, as it would justify a host of prodefendant doctrines simply on the basis that defendants would *prefer* them. It seems odd, at the very least, to rationalize sweeping doctrines on the grounds that they would benefit one side of the dispute. If the law in these cases should be sensitive to the defendant's attitudes toward risk, then it should equally take into account the plaintiffs' attitudes. There should be complementary doctrines responsive to the plaintiffs' risk aversion. In constructing the strongest case for preliminary merits inquiries, I explored alternative accounts that would have a similar

213. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 73 (1996).

effect. That is, even if the defendant is not, properly speaking, risk averse, it might still act as if it was. These alternative accounts also do not provide a sound justification for preliminary merits inquiries.

The central point of this Article is that settlement pressure is not a good reason for class action rules, where the concept has proven especially influential. Accordingly, the preliminary merits inquiries that are now part of the class certification process lack a compelling justification. This Part explores practical issues relevant to settlement pressure before concluding with a brief description of how courts should conduct class certification analysis in light of these observations.

A. Negative Value Claims

The forgoing discussion has set aside the issue of negative value claims, which are those where the litigation costs exceed any likely recovery. As one court colorfully stated: “[O]nly a lunatic or a fanatic sues for \$30.”²¹⁴ Negative value claims are especially important to class actions because class actions are the main means of pursuing them.²¹⁵ Negative value claims also alter the settlement pressure dynamic described previously. In an ordinary class action case, one where the class members might contemplate suing individually, the class certification decision does not change the expected value of the litigation one way or the other. The set of individual claims and the aggregated class claim are both worth the same. So, any settlement pressure had to come from risk aversion or analogous incentives. But, with negative value claims, the expected values differ as, for example, “[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits.”²¹⁶ The foregoing arguments therefore do not apply in a straightforward way to negative value claims. With a negative value claim, class certification determines whether or not the suit is viable.

In principle, it would be possible to develop a separate class certification rule for negative value claims. Rule 23 is written in general terms, and procedural rules are usually considered to apply equally to all suits. Yet, there is already something of a *de facto* special class certification rule for negative value claims. Courts consider whether the case could be pursued via individual litigation or not, typically as part of Rule 23(b)(3)'s requirement that a class action be a superior method of

214. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

215. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

216. *Carnegie*, 376 F.3d at 661.

adjudicating the controversy.²¹⁷ *Rhone-Poulenc* also noted it in considering whether that class action should be able to move forward.²¹⁸ Since the arguments in this Article do not apply in the same way to negative value claims, preliminary merits inquiries could be confined to those cases. But, this would be a complete reversal of the current practice. The fact that a class action involves negative value claims has consistently been thought a powerful reason in favor of certifying the class. “The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”²¹⁹ Or, as another court put the same idea: “Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate.”²²⁰ Negative value claims should be at least as easy to bring as other class actions; it should not be the other way around. Applying preliminary inquiries to them, and only them, would undermine the purposes behind Rule 23 and class actions.

Moreover, tightening class certification rules with regard to negative value claims would have to be balanced against the social importance of creating a system where such claims can be brought. Without something like class actions someone is free to inflict harm on others provided they make sure the harm is diffuse—so long as they harm a lot of people just a little bit, they would get away with it—and this state of affairs is not the product of a deliberate policy choice, just an unfortunate side effect of the practical costs of vindicating one’s rights through litigation. These considerations, as noted above, are one of the main reasons behind permitting class actions. Therefore, although the main arguments of this Article do not directly apply to negative value claim class actions, there are independent reasons against subjecting them to a preliminary merits inquiry.

217. *E.g.*, *Amchem Prods., Inc.*, 521 U.S. at 617; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 348 (N.D. Ohio 2001). *See also* *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 351–52 (2011) (holding the Federal Arbitration Act preempts California’s judicial rule regarding arbitration waivers in consumer contracts); *id.* at 365 (Breyer, J., dissenting) (stating the merits of class proceedings should not factor into the current decision); *Pyke v. Cuomo*, 209 F.R.D. 33, 46 (N.D.N.Y. 2002) (explaining that Rule 23(b)(3) is not limited to negative value claims).

218. *Rhone-Poulenc*, 51 F.3d at 1299.

219. *Mace*, 109 F.3d at 344; *see also Amchem Prods., Inc.*, 521 U.S. at 617 (quoting *Mace*, 109 F.3d at 344); *Rhone-Poulenc*, 51 F.3d at 1299.

220. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

B. Preliminary Merits Inquiries in Practice

So far, this Article has argued, in essence, that there are no “pros” in favor of such inquiries, they have no sound foundation; this Part describes some of the “cons.” In practice, preliminary merits inquiries, especially *Wal-Mart’s* redefinition of commonality, resemble the plausibility pleading standard put in place by *Twombly* and *Iqbal*,²²¹ and they inherit those cases’ shortcomings. Tangentially, since plausibility pleading is also based, in part, on settlement pressure considerations,²²² this Article may prompt us to reexamine it as well. Plausibility pleading has been criticized as being both vague and subjective.²²³ Under *Twombly* a complaint must include factual allegations that “raise a right [of] relief above the speculative level,”²²⁴ pleading enough facts “to state a claim to relief that is plausible on its face.”²²⁵ This standard is inherently ambiguous, and the Court’s later statements that the “plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully”²²⁶ do not do much to clarify it. As Judge Posner noted:

This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero percent likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote.²²⁷

There is somewhere along the spectrum from impossible to

221. See *supra* notes 90–96.

222. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 558–59 (2007).

223. Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After Twombly and Iqbal*, 44 CREIGHTON L. REV. 141, 145–46 (2010); Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 867 (2008); Miller, *supra* note 90, at 334–37; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6 (2009); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1313 (2010) (highlighting the problems with the plausibility pleading reading of *Twombly* and *Iqbal*); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1441 (2008); Colleen McNamara, Note, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of Ashcroft v. Iqbal*, 105 NW. U. L. REV. 401, 403 (2011).

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

225. *Id.* at 570.

226. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556).

227. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010); see also Spencer, *supra* note 223, at 6–11 (arguing for the need for a descriptive theory of pleading).

preponderance of the evidence where plausibility lies, although where exactly is unknown. Even Posner's invocation of a "moderately high likelihood"²²⁸ does little to clarify things: it reads as if it should be at least a fifty percent probability—something with less than that would not usually be thought of having a high likelihood at all—but by context it has to be less than preponderance of the evidence. The standard itself is vague, not to mention the difficulty of trying to actually determine, with the required degree of precision, the likelihood that the allegations are true. Furthermore, Justice Souter—the author of *Twombly*—argued that couching the plausibility standard in terms of probability that the plaintiffs' allegations are true represents a "fundamental misunderstanding of the enquiry that *Twombly* demands."²²⁹

Twombly does not require a court at the motion to dismiss stage to consider whether the factual allegations are probably true.

We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.²³⁰

Similar problems plague *Wal-Mart*. The Supreme Court required plaintiffs to prove the existence of a uniform, company-wide practice that affected enough employment decisions at Wal-Mart.²³¹ How many employment decisions—"whether 0.5 percent or 95 percent"—the plaintiffs would need to establish to satisfy Rule 23 was left undetermined.²³² Similarly, how much proof is needed, whether the claim is plausible, probable, or just possible, is also unclear, although mere possibility appears insufficient.²³³

In practice, courts that certify classes post-*Wal-Mart* seem to adopt a standard of high plausibility: if plaintiffs can establish the existence of

228. *In re Text Messaging*, 630 F.3d at 629.

229. *Iqbal*, 556 U.S. at 695–96 (Souter, J., dissenting).

230. *Id.* at 696 (citations omitted).

231. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011).

232. *Id.* at 354 (quoting Order Granting in Part and Denying in Part Plaintiffs' and Defendant's Motions to Strike Expert and Non-Expert Testimony, 222 F.R.D. 189, 192 (2004)).

233. *Wal-Mart's* majority opinion leaned heavily on *Falcon*, which requires in the absence of an explicit challenged practice (e.g., an employment test), "significant proof" that the defendant "operated under a general policy of discrimination." *Id.* at 349. Although this statement is made in a footnote and dicta. Neither case provides much guidance as to what this phrase means, other than to indicate that the respective plaintiffs failed to achieve significant proof. One of the dissents in the Ninth Circuit decision to certify the case in *Wal-Mart* also relied on *Falcon* but noted that the standard coming out of that case was unclear. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 632 (9th Cir. 2010) (Ikuta, J., dissenting), *rev'd*, 564 U.S. 338 (2011).

some policy or practice on the part of the defendants and make a credible argument as to how it connects with the alleged harm, then they can satisfy Rule 23.²³⁴ This highlights another similarity between *Wal-Mart* and plausibility pleading: the subjectivity of the respective standards. *Iqbal* instructs “the reviewing court to draw on its judicial experience and common sense”²³⁵ and to consider alternative, innocent explanations for the defendant’s conduct.²³⁶ The plausibility standard, thus, is inherently subjective as judicial experience varies from judge to judge.²³⁷ The class certification analogue to this standard fares better in this regard because the judge will typically have more information available. *Twombly* and *Iqbal* require judges to evaluate the case based entirely on the pleadings, a task to which those documents are not well suited.²³⁸ Class certification decisions, on the other hand, are made with the benefit of discovery.²³⁹ Still, a judge’s prior beliefs affect these assessments.²⁴⁰ In *Wal-Mart*, for example, Justice Scalia expressed skepticism that managers would discriminate based on sex if left to their own devices.²⁴¹ Unsurprisingly, the plaintiffs in that case faced a challenging burden of proof, and their evidence was “worlds away from” satisfying it. In *McReynolds v. Merrill Lynch*,²⁴² an employment discrimination case certified under the

234. *See In re Countrywide Fin. Corp. Mortg. Lending Practices Litig.*, 708 F.3d 704, 709 (6th Cir. 2013) (explaining two company-wide policies that gave rise to disparate impacts relating to earnings of African American employees); *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 898 (7th Cir. 2012) (holding that the plaintiffs could not be certified as a class as the policy it contested was not “company-wide”); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489 (7th Cir. 2012) (arguing that two company-wide policies “exacerbate[ed] racial discrimination” within the company to conform with the holding in *Wal-Mart*); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 26 (S.D. Tex. 2013) (stating that, for the purposes of finding commonality, “[i]t is not enough that class members suffer the same *type* of injury or have been subject to a violation of the same law. Rather, a plaintiff must identify a unified common policy, practice, or course of conduct that is the source of their alleged injury.” (citations omitted)).

235. *Iqbal*, 556 U.S. at 679 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2nd Cir. 2007)).

236. Miller, *supra* note 90, at 335.

237. *E.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840 (2010); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 92–93 (2010); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1734 (2013); Miller, *supra* note 90, at 335.

238. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

239. *See supra* note 122.

240. For a different analysis based on similar observations, see Spencer, *supra* note 101, at 482–83.

241. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011).

242. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 483 (7th Cir.

Wal-Mart standard,²⁴³ however, Judge Posner found the basic causal theory those plaintiffs presented more convincing, leading to class certification,²⁴⁴ a trend that can be seen in other post-*Wal-Mart* cases where plaintiffs have won on this issue.²⁴⁵

There are, therefore, two related problems with preliminary merits inquiries. Not only is the standard vague—*Rhone-Poulenc* indicates that a case where plaintiffs have a less than ten percent chance of winning “lacks legal merit,” but there is not much guidance beyond that—but because the assessment has to be made at an early stage of the case, it will be substantially influenced by their preconceptions and biases. If a judge has a prior belief that a kind of discrimination or other actionable behavior is unlikely, the plaintiffs will be less able to show that in this instance it actually occurred.

A subtle, but far-reaching practical ramification of preliminary merits inquiries is that they will stifle legal innovation. A class claim based on a novel legal theory will tend to face the sort of skepticism described above. Further, as an innovative kind of claim, it will lack clear supportive precedents, so it will appear unlikely to succeed, especially at an early stage of the litigation. Screening out such cases through Rule 23 means that they never get far enough to impact and potentially advance the law.²⁴⁶ It is through the development of those precedents that the law improves. Preventing novel claims from having a full hearing denies the law that resource for development. This side effect of preliminary merits inquiries, and of the settlement pressure logic that supports them, runs counter to other Supreme Court class action decisions that treat novel legal claims more generously.²⁴⁷ While it is true that settlement in general

2012).

243. *Id.* at 487–88.

244. *Id.* at 489–92.

245. See *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 116–17 (4th Cir. 2013) (remanding for further review an amended complaint alleging that “women suffer disparate impact as a direct result of [a] corporate-imposed pay preference for lateral hires”); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7, 61 (S.D. Tex. 2013) (stating that plaintiffs “satisfied their burdens at class certification . . . by identifying a unified policy or practice and connecting that policy to the alleged harm”); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 533 (N.D. Cal. 2012) (“Accordingly, consistent with *Dukes* and *McReynolds*, the Court concludes that along with Plaintiffs’ disparate treatment described above, Plaintiffs’ disparate impact claim also satisfies the commonality requirement.”); *Calibuso v. Bank of Am. Corp.*, 893 F. Supp. 2d 374, 390 (E.D.N.Y. 2012) (allowing plaintiffs’ motion for class certification regardless of the fact that a challenged policy allowed for discretion by defendants’ managers and supervisors).

246. See generally Vincy Fon & Francesco Parisi, *Litigation and the Evolution of Legal Remedies: A Dynamic Model*, 116 PUB. CHOICE 419 (2003); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

247. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988); *Phillips Petroleum Co. v. Shutts*, 472

can have this effect, it should not be exacerbated by doctrine. It is one thing for litigants to make these decisions, especially given the need for them to vigorously litigate claims, but quite another for the law itself to be doing it. In addition, since class actions by their nature affect many parties at once, the social costs of preemptively closing off these claims may be quite large.²⁴⁸

C. Commonality and the Distinct Challenge of Class Actions

The main focus of this Article has been to critique doctrines that make class certification depend on an estimation of the merits of the case. While these preliminary merits inquiries are unwarranted and carry difficulties of their own, that does not imply that class certification should be easily granted. A form of rigorous commonality analysis is an essential tool to address the distinct problem posed by class actions. This analysis should have very little to do with the merits. Class actions aggregate claims, which can potentially strengthen weaker claims by masking weakness. The plaintiffs could cherry-pick the best, most persuasive of the claims possessed by class members, presenting only them to the court and jury, and then on the basis of those particular claims win on behalf of the entire class.²⁴⁹ For example, suppose that in a case like *Wal-Mart* there was excellent evidence that one of the regional managers consistently made promotion decisions in a way that discriminated against female employees. If the class plaintiffs were able to rely solely on evidence relating to that manager—to build their case around her—then they would substantially increase their chances of winning and the value of their lawsuit. In this instance, the class action vehicle would have altered the expected value of the suit. There is a mirror reflection of plaintiff-based cherry-picking where defendants have various defenses against some individual claims by class members, and then amalgamate them together to create an artificially strong class-wide defense.²⁵⁰ This

U.S. 797, 824 (1985) (Stevens, J., concurring in part and dissenting in part). *But see Sun Oil Co.*, 486 U.S. at 749 (O'Connor, J., concurring in part and dissenting in part) (arguing that the majority's holding for a class action defendant did not give full faith and credit to the state laws at issue); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300–01 (7th Cir. 1995) (explaining the plaintiffs' novel "serendipity theory" of negligence and noting that different states' negligence jurisprudence will interpret that argument differently).

248. It is possible that the claim could still enter the law through subsequent individual litigation. That would depend on the nature of the claim at hand and would notably still exclude negative value ones. It would also exclude claims distinctly suited for class actions. The corporate culture argument in *Wal-Mart*, for instance, is unlikely to be relevant in an individual employment discrimination action.

249. Erbsen, *supra* note 87, at 1010–11; Nagareda, *supra* note 10, at 1890.

250. Erbsen, *supra* note 87, at 1012.

potential bootstrapping effect of class actions operates differently than settlement pressure and risk aversion. Those phenomena were based on idiosyncratic features of the defendant and how it structured its affairs, and, importantly, offered the defendant value when it apparently overpaid because of the class action. The defendant made these decisions rationally given its preferences and goals. By contrast, cherry-picking modifies the underlying probability that the plaintiffs will prevail, giving class members a windfall without any corresponding benefit to the defendant.

Rule 23's commonality requirement, that "there are questions of law or fact common to the class"²⁵¹ is capable of managing this problem. Courts could also rely on Rule 23's typicality requirement, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class,"²⁵² but that alone does not appear sufficient. Typicality can be vague—"[t]ypicality is a concept that sounds sensible but means little"²⁵³—and by its own terms it does not perfectly address the problem at hand. Typicality is instead designed, and best suited, to prevent differences between class representatives and the members of the class at large.²⁵⁴ In practice, this may matter little as "the commonality and typicality requirements of Rule 23(a) tend to merge"²⁵⁵ and courts frequently do not delineate between them.²⁵⁶ The two requirements are closely related: if all the issues of law and fact are common to the class members, then any class member selected will be "typical." They also blend with Rule 23(a)(4)'s adequacy of representation requirement for the same reason²⁵⁷: if the class members all share the same interests, then that helps any one of them serve as an adequate representative for the others, they all would conduct the litigation in the same manner.

Courts should therefore conduct a rigorous analysis of commonality,

251. FED. R. CIV. P. 23(a)(2).

252. FED. R. CIV. P. 23(a)(3).

253. Erbsen, *supra* note 87, at 1068. *See also* JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 729 (2d. ed. 1993) ("It is not entirely clear what the rulemakers intended to achieve with this requirement."); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 354 (noting the "amorphous" nature of the rule).

254. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 387 n.120 (1967) ("Clause (3) of subdivision (a) emphasizes that the representatives ought to be squarely aligned in interest with the represented group."); *but see* Erbsen, *supra* note 87, at 1068–69 ("Rule 23's requirement that class representatives be 'adequate' more effectively captures this desire to link the interests of class representatives and class members.").

255. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

256. Courts also often collapse Rule 23(b)(3)'s predominance requirement and 23(a)(2) because predominance is seen as a stricter form of commonality.

257. *Falcon*, 457 U.S. at 157–58, 157 n.13.

checking whether the class plaintiffs' claims depend on common legal or factual issues. As *Wal-Mart* pointed out, not any common questions will do, they must have a major impact on the litigation.²⁵⁸ This alone marked a substantial break with pre-*Wal-Mart* practice; prior to *Wal-Mart* commonality was sometimes treated as a minimal, not particularly demanding burden.²⁵⁹ The problem with preliminary merits inquiries is that they test the *persuasiveness* of the class claim as well, establishing some ill-defined threshold of likelihood that the claims would actually succeed in order for the class action to proceed. The requirements for class certification should be rigorously enforced, but courts should focus on the *coherence* of the case. The relevant questions are whether the theory of the case put forward by the class makes sense, and whether it is a claim on behalf of the entire class. The proper model is a conditional statement: if the plaintiffs' allegations are treated as true, then would all class members be entitled to relief? If a court answers this question affirmatively, and the plaintiffs' contentions are not outlandish, then plaintiffs should have carried their burden under Rule 23's commonality requirement.²⁶⁰

McReynolds and *M.D. v. Perry* are good examples.²⁶¹ In *McReynolds*, The Seventh Circuit carefully noted that it did not necessarily conclude that Merrill Lynch's seemingly innocent teaming and account distribution rules actually violated antidiscrimination laws,²⁶² as plaintiffs contended, but it still certified the class because the theory of the case made sense. On remand, the district court in *M.D. v. Perry* conducted a rigorous analysis, including extensive discovery,²⁶³ and certified some of the class claims.²⁶⁴ The central claim was that Texas failed to provide enough caseworkers to keep children in long-term foster care adequately safe. The court noted that despite significant amounts of evidence and hearings, there was still some doubt as to just how overworked caseworkers generally were as well as some question about

258. See *supra* note 77; see also *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909–10 (7th Cir. 2012) (distinguishing the case from *Wal-Mart* because of the impact the company's policy had on the plaintiffs as a whole), *cert. granted, judgment vacated*, 569 U.S. 901 (2013).

259. See, e.g., *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Lewis Tree Serv., Inc. v. Lucent Techs. Inc.*, 211 F.R.D. 228, 231 (S.D.N.Y. 2002); *WRIGHT ET AL.*, *supra* note 47, § 1763.

260. Class plaintiffs also, of course, have to satisfy the other requirements of Rule 23, including those contained in Rule 23(b), which have not been the focus of this Article.

261. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012); *M.D. ex rel. Stukenberg v. Perry*, 294 F.R.D. 7 (S.D. Tex. 2013).

262. *McReynolds*, 672 F.3d at 490.

263. *M.D. ex rel. Stukenberg*, 294 F.R.D. at 36.

264. *Id.* at 67.

the appropriate legal standard.²⁶⁵ Yet, there was an intuitive connection between the amount of time and energy a caseworker could devote to each of the children they were responsible for and that child's safety.²⁶⁶ This ruling did not depend on the situation being so bad that it violated the state's Fourteenth Amendment responsibilities,²⁶⁷ which was a matter for a later trial. But, the plaintiffs' theory was coherent and addressed the class as a whole, so it could be certified.

Answering these questions may sometimes touch upon the plaintiffs' factual allegations or the elements of their case. In these instances, courts should follow Justice Souter's advice regarding the plausibility pleading standard.²⁶⁸ If the plaintiffs' allegations are not outlandish, then the court should provisionally accept them as true. On this understanding, the corporate culture theory in *Wal-Mart* satisfies the commonality requirement. It might be novel, and extremely difficult to prove, that the company has a corporate culture with a particular content and that the corporate culture significantly influenced employment decisions, but those facts do not render it incoherent. If the plaintiffs' allegations were true, then class members as a whole would be entitled to relief. There might be good reasons to be skeptical that corporate cultures exist in such a strong form or exert such influence over individual decision makers, but that is a far cry from little green men or time travel—some expert testimony²⁶⁹ supporting the theory, showing that this could possibly be the case should suffice at the class certification stage.

The interpretation of commonality put forward here is probably less stringent than the one courts currently use post-*Wal-Mart*, although the comparison is not a straightforward one. The two approaches focus on

265. *Id.* at 39.

266. *Id.* at 42.

267. *Id.* at 44.

268. Which, it bears underscoring, was in a dissent. See *Ashcroft v. Iqbal*, 556 U.S. 662, 695–96 (2009) (Souter, J., dissenting).

269. The parties disputed whether Bielby's testimony qualified as expert testimony under the Rules of Evidence and *Daubert*. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354–55 (2011). This matter was not resolved in *Wal-Mart*, though if Bielby did not qualify as an expert then that should be taken into account at class certification. The Supreme Court has not yet definitely ruled as to whether *Daubert* applies to evidence at the class certification stage, although other courts have. *Id.* at 354; *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013); see also *Comcast Corp. v. Behrend*, 569 U.S. 27, 37–38 (2013) (holding a regression model developed by plaintiffs' expert witness could not be accepted as evidence that damages were susceptible to measurement across entire class due to the model's methodology). If the plaintiffs' case depends on expert testimony, courts should enforce some minimal threshold on that testimony—this is a way of ensuring that the claims are not outlandish—even if the expert's assessments may eventually be rebutted in the course of a trial on the merits.

different things, the nature and structure of the claim on the one hand and the evidence in favor of it on the other. There are certainly cases that would be certified under this standard that would not be under *Wal-Mart's* or any form of preliminary merits inquiry. However, whether a class certification standard is more or less permissive is not, in and of itself, a point for or against it. The standard described in this section focuses on an issue specific to class actions—the potential for cherry-picking—and does not rely on the dubious basis of settlement pressure. It also avoids the pitfalls of preliminary merits inquiries. The standard is less arbitrary since it does not rely so directly on judges' preconceptions and their capacity to construct alternative explanations for the situation. It is also less vague. While none of these standards are truly precise—plausibility, probability, and coherence are all ambiguous guidelines—coherence is a coarser, more basic requirement, which in this context is actually a virtue. Finding some dividing line between possible and plausible, one that is consistent across courts no less, is extremely difficult. There will undoubtedly be borderline cases on which courts may reasonably disagree, but the challenge of line drawing is less acute. Therefore, the coherence standard provides a better framework than *Wal-Mart's* revised version of commonality and preliminary merits inquiries more generally.

CONCLUSION

Settlement pressure has had a profound, wide-ranging effect on the law. Notably, it is the best justification for making class certification depend on the merits of the case. Without it, such preliminary merits inquiries are pointless—they seek to address a problem that will be resolved in due course. Settlement pressure does not, however, have the implications that have been ascribed to it. To the extent that defendants are actually “pressured” to settle, they are making decisions based on their own interests. They are not “overpaying” in any real sense; settlements in these instances represent blackmail or extortion no more than litigation insurance, portfolio diversification, hiring talented counsel, or brand loyalty. Furthermore, halting cases in response to settlement pressure has perverse results. It makes courts complicit in managers hiding business affairs from both their shareholders and the general public. Or, it entails the law simply placing defendant's interests above the plaintiffs' without any valid explanation.

Preliminary merits inquiries therefore have no place in class certification rulings. The estimate that plaintiffs have a slim chance of winning their suit should not mean that the class action cannot go

forward. Provided, that is, that they satisfy all the other requirements for class certification. The commonality requirement, in particular, which was so central to *Wal-Mart's* pervasive preliminary merits inquiry, should be carefully scrutinized. But, courts should focus on the structure of the class claim. If the case stands or falls based on common questions of law and fact, then it is a bona fide class claim, even if it seems unlikely that those questions will eventually be answered in the plaintiffs' favor. The standard for class actions I have proposed here does not rest on the troubled grounds of settlement pressure and helps resolve one of the special challenges posed by class action litigation.

Class actions represent the best case for the settlement pressure argument. But, as shown in this Article, settlement pressure is problematic even in this context. We should therefore be especially cautious about using it for legal rules in other kinds of cases. Settlement pressure cannot serve as the basis for broad-ranging procedural doctrines.