William & Mary Law Review

Volume 65 (2023-2024)
Issue 2

Article 4

11-2023

The Summary Judgment Revolution that Wasn't

Jonathan Remy Nash

D. Daniel Sokol

THE SUMMARY JUDGMENT REVOLUTION THAT WASN'T

JONATHAN REMY NASH* & D. DANIEL SOKOL**

ABSTRACT

The U.S. Supreme Court decided a trilogy of cases on summary judgment in 1986. Questions remain as to how much effect these cases have had on judicial decision-making in terms of wins and losses for plaintiffs. Shifts in wins, losses, and what cases get to decisions on the merits impact access to justice. We assemble novel datasets to examine this question empirically in three areas of law that are more likely to respond to shifts in the standard for summary judgment: antitrust, securities regulation, and civil rights. We find that the Supreme Court's decisions had a statistically significant effect in antitrust, an ambiguous effect in civil rights cases, and no

* Robert Howell Hall Professor of Law, Emory University School of Law; Director of the Emory Center on Federalism and Intersystemic Governance.

** Carolyn Craig Franklin Chair in Law, Professor of Law and Business, University of Southern California Gould School of Law and Marshall School of Business, and Senior Advisor at White & Case LLP.

For helpful discussions and suggestions, we are grateful to Thomas Arthur, Albert Choi, Kathleen Claussen, Shahar Dillbary, Griffin Edwards, Jonah Gelbach, Nicholas Georgakopoulos, Andrew Hammond, Tonja Jacobi, Matthew Jennejohn, Daniel Klerman, Bryan Lammon, Kay Levine, Christopher Leslie, Jeffrey Macher, Merritt McAlister, Cherie Metcalf, Peter Molk, James Park, Clare Pastore, Menesh Patel, Alexander Platt, Nicolas Riquelme, Matthew Sag, Laura Phillips Sawyer, David Schwartz, Megan Stevenson, Sean Sullivan, Eric Talley, Dane Thorley, Paul Victor, Alexander Volokh, Abraham Wickelgren; and participants in the Emory-University of Georgia Workshop (including in particular the suggestions of Elizabeth Burch, who served as commentator on the paper), the Civil Procedure Workshop, the University of Michigan-University of Southern California-University of Virginia Law & Economics Workshop, the Midwestern Law & Economics Association annual meeting, the Conference on Empirical Legal Studies (including in particular the suggestions of Adam Pritchard, who served as discussant for the paper), the Midwest Political Science Association annual meeting, the Queen's University Law & Economics Workshop, the Emory Law School Colloquium Series Workshop, the University of Florida Early-Stage Faculty Colloquium, and the Society for Institutional and Organizational Economics annual meeting.

effect in securities regulation. We also find that, in the trilogy's wake, antitrust appellate cases were far more likely to cite trilogy cases—particularly the one trilogy case that was an antitrust case—than appellate cases in the other areas. This suggests that the lone trilogy case that arose in antitrust had an effect on decision making in that field, but that the trilogy had a limited effect across other substantive areas of law. This finding differs from Twombly *and* Iqbal *where an antitrust decision ultimately reshaped the entire body of law across doctrines around motions to dismiss.*

TABLE OF CONTENTS

INTRODUCTION

In 1986, the Supreme Court decided a trilogy of cases on summary judgment that are foundational to the topic: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *Anderson v. Liberty Lobby, Inc.*, and *Celotex Corp. v. Catrett*.[1] At the time, the common wisdom was that these cases revolutionized federal civil procedure practice by making summary judgment much more readily available, which would predominantly benefit defendants.[2] That common wisdom has largely persisted over the years.[3] However, the limited empirical evidence on the subject tells a different story. A large study by researchers from the Federal Judicial Center found the trilogy to have had no effect at all on win rates by defendants.[4] A few other studies found effects resulting from the trilogy, but only limited ones.[5]

The question is not merely an academic one because the summary judgment "trilogy"—as the three cases are collectively known—may have been an attempt by the Supreme Court to fundamentally change procedural law across areas of law. If the attempt to change summary judgment doctrine was successful, then federal courts would have been less hospitable to various categories of plaintiffs, including those in antitrust, securities, and civil rights. These sorts of effects matter for purposes of substantive justice in civil rights cases, and economic justice in cases involving securities fraud or price-fixing cartels that overcharge for products such as chocolate and pharmaceuticals.

In this Article, we undertake an empirical analysis of the extent to which the summary judgment trilogy affected the practice of

---

1. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The decision in *Matsushita* (focusing on what claim could raise an issue of material fact for trial) was handed down on March 26, 1986; the decisions in both *Anderson* (addressing that a summary judgment motion must consider, and apply, the relevant standards of proof) and *Celotex* (analyzing standards of parties seeking, and opposing, summary judgment) were handed down on June 25, 1986.

2. *See infra* note 40 and accompanying text.

3. *See infra* note 121 and accompanying text.

4. *See infra* notes 43-44 and accompanying text.

5. *See infra* notes 41, 46 and accompanying text.

granting summary judgment by federal courts. Specifically, we look at summary judgment win rates before and after the trilogy, and at citations to the trilogy cases in the wake of the Supreme Court's 1986 decisions.[6]

Our examination of win rates provides us with a window into the effectiveness of attempts to render procedural rules more efficient by reducing the number of non-meritorious cases, in accordance with the prior literature on win-loss rates as a measurement of change or variation in the legal system.[7] While a few others have examined the effect of the trilogy on summary judgment win rates, our unique focus is on three areas of law—antitrust, securities regulation, and civil rights—in which the effects should be pronounced because of the availability of fee shifting or damage multipliers.[8] Because the areas of law that we focus on are ones that might involve more aggressiveness by plaintiffs, more specialized analysis across these areas might reveal shifts in procedural impact that a broader and more general analysis might have missed. To be sure, each of these distinct areas may also have particular procedural approaches that differ throughout the life cycle of a case. However, taken together, our results in these three substantive areas may point to some departures from views in the legal academy that the trilogy either had a major impact in summary judgment practice across the board, or relatively no impact at all.[9]

In the end, the results we find vary based upon subject area. We find no evidence of the trilogy influencing summary judgment decision-making in securities regulation, and mixed evidence at best of such an effect in civil rights cases. In contrast, we find that the

---

6. We gathered our data using searches on Westlaw. *See infra* notes 125-28 and accompanying text. We recognize that empirical studies of more recent shifts in the law have examined docket data and cases unavailable on electronic databases such as Westlaw and Lexis. The period we study makes such analysis impossible.

7. *See* Jonah B. Gelbach, *The Reduced Form of Litigation Models and the Plaintiff's Win Rate*, 61 J.L. & ECON. 125 (2018); Joel Waldfogel, *The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995). *But see* Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371 (2019) (questioning whether win-loss rates alone can quantify the effect of procedural rules on reducing non-meritorious claims).

8. *See infra* notes 41-46 and accompanying text.

9. *See infra* notes 40, 121-22 and accompanying text.

trilogy *did* have a strong statistically significant effect on decision making in antitrust cases heard at both the district court and court of appeals levels.

Our examination of citation practices confirms that post-trilogy antitrust cases differed substantially from cases arising under the other subject-matter areas studied. Court of appeals antitrust opinions cited one of the trilogy cases—*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, itself an antitrust case—more than the other two cases.[10] In contrast, appellate opinions in civil rights and securities cited *Matsushita* far less frequently. As for the other cases, neither *Anderson* nor *Celotex* focused on antitrust, civil rights, or securities.[11]

The analysis herein contributes to two different literatures. First, the Article contributes to the federal courts and civil procedure literatures.[12] We find that the summary judgment trilogy did *not* have a pronounced effect on summary judgment practice across the substantive areas of law that we studied. The trilogy's impact was not trans-substantive; rather, it was confined to specific areas of law and especially to antitrust.

Second, our Article contributes to the empirical legal studies literature.[13] There are, as noted above, a few prior studies that examine changes in summary judgment, which we document in Part II. Our results differ from, and are more nuanced than, the prior studies.

Further, our results provide an empirical counterpoint to other empirical studies about the effect of two Supreme Court cases decided two decades after the trilogy cases.[14] Those cases are *Bell Atlantic Corp. v. Twombly* (an antitrust case like *Matsushita* that

---

10. 475 U.S. 574, 585-86 (1986).

11. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244-45 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986).

12. *E.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003); Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561 (2012).

13. *See infra* notes 41-46 and accompanying text.

14. The Supreme Court handed down *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 556 (2009) on May 21, 2007 and May 18, 2009 respectively.

questioned the plausibility of an alleged conspiracy) and *Ashcroft v. Iqbal*, both of which sought to revolutionize practice involving a different procedural device called the motion to dismiss for failure to state a claim.[15] While the empirics are mixed, it seems that *Twombly* and *Iqbal*—often referred to collectively as "*Twiqbal*"—had a larger, and broader, impact on motions to dismiss than the trilogy had on summary judgment.[16] Our analysis helps to explain why the same antitrust issue regarding conspiracy, which led to a *Twiqbal* shift in motions to dismiss, did not lead to a similar general shift in summary judgment motions. That is, *Matsushita*, unlike *Twombly*, lacked an *Iqbal*-equivalent case.

Based on our empirical analysis, we surmise that, while *Iqbal* reinforced *Twombly* and emphasized its breadth, the trilogy cases did not reinforce one another. Unlike *Twiqbal*, each trilogy case had a distinct holding involving different aspects of summary judgment, rather than a singular case that made one holding trans-substantive across all doctrinal areas.[17]

This Article proceeds as follows. Part I begins with a general overview of summary judgment, and then discusses the summary judgment trilogy. It turns to the three areas on which we focus—antitrust, securities regulation, and federal civil rights law—and our reasons for doing so. Part II describes the relevance of our research question to a fundamental area of scholarly inquiry: the trans-substantivity of procedural law. Part III presents our empirical analysis, with Section A discussing win rates, and Section B addressing citation rates. Part IV discusses, and puts in context, our results.

---

15. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. For empirical studies of how *Twombly* and *Iqbal* influenced civil procedure, see authorities cited in David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 n.7 (2013).

16. *E.g.*, Engstrom, *supra* note 15 (discussing the cases collectively as *Twiqbal*).

17. The nature of the empirics is different for post-*Twiqbal* cases than for summary judgment trilogy cases largely because of the availability of dockets and opinions from the 2000s that are not available in as rich and complete a way as those from the 1980s. *See supra* note 6.

I. SUMMARY JUDGMENT

Summary judgment was introduced under the original Federal Rules of Civil Procedure that were adopted in 1938.[18] The practice lacked any close precedent under the common law.[19] The *Federal Practice and Procedure* treatise describes summary judgment as originating under English practice in the middle of the nineteenth century.[20] By the early part of the twentieth century, some states had incorporated summary judgment into their panoply of procedural devices.[21] But summary judgment was only available in federal court in diversity cases, and then only when the Conformity Act incorporated the procedures of a state that had recognized summary judgment.[22]

The summary judgment ushered in by the new federal rules in 1938 was limited in scope.[23] Subsequent rule amendments and—importantly, as we shall see—judicial decisions expanded the doctrine's scope.[24]

On the rule amendment front, a 1948 amendment to Rule 56 allowed the plaintiff to file for summary judgment before the defendant filed an answer, and allowed a grant of summary judgment where nothing was in dispute except the scope of damages.[25] A 1963 amendment allowed courts to consider answers to interrogatories

---

18. *See, e.g.*, Brooke D. Coleman, *The* Celotex *Initial Burden Standard and an Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 298 (2008) ("The summary judgment rule was an integral part of the 1938 rule package.").

19. *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 148-58 (2007) (explicating the differences between common law procedural devices and summary judgment); Coleman, *supra* note 18, at 299.

20. *See* 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2711 (4th ed. 2023).

21. *See* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929) ("[T]he summary judgment procedure has become an important feature of the most modern practice systems.").

22. WRIGHT ET AL., *supra* note 20, § 2711. The 1872 Conformity Act provided that civil cases in federal district court follow the procedural rules of the local state court as much as possible, which would include summary judgement rules. *See* 20 CHARLES A. WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 64 (2d ed. 2022).

23. *See* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 168-71 (2011).

24. *See id.*

25. *See* WRIGHT ET AL., *supra* note 20, § 2711.

when deciding summary judgment motions, and precluded the party opposing summary judgment from resting on the pleadings when the movant has submitted affidavits or other evidence.[26] Subsequent amendments made stylistic changes, altered the motion-related time periods, and conformed the rule to court practices.[27]

A. The Trilogy

It is safe to say that the greatest expression regarding summary judgment practice at the level of the Supreme Court resulted from the trilogy the Supreme Court decided in 1986. First, in March of 1986, the Supreme Court decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[28] In a 5-to-4 decision, the Court held that an inherently implausible claim of monopolistic behavior was insufficient to raise a genuine issue of material fact for trial and thus could not survive a motion for summary judgment.[29]

Then, on the same day in late June 1986, the Court handed down two more decisions—*Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett*.[30] In *Anderson*, the Court emphasized that a court faced with a summary judgment motion must consider and apply the relevant burdens of proof.[31]

In *Celotex*, the Court relied upon the language of Rule 56 to clarify the burdens of parties seeking, and opposing, summary judgment.[32] In an opinion by Justice Rehnquist, the Court explained that:

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file,

26. *See id.*

27. *See id.*

28. 475 U.S. 574 (1986). *Matsushita* was handed down on March 26, 1986.

29. *See id.* at 596-98.

30. 477 U.S. 242 (1986); 477 U.S. 317 (1986). Both *Anderson* and *Celotex* were handed down on June 25, 1986.

31. *See Anderson*, 477 U.S. at 257 (where a claim would be subject to the "clear and convincing" standard at trial, that standard applies in consideration of a summary judgment motion as well).

32. 477 U.S. at 322.

> together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.[33]

But, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment ... is satisfied."[34] In short,

> the plain language of Rule 56[ ] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[35]

The Court summarized its message to the lower courts thus: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'"[36]

Following the trilogy, the purchase of summary judgment seems clear: it allows a case to be definitively resolved (or substantially narrowed) at the end of discovery (or sometimes even after substantial discovery has occurred), that is, before the start of trial.[37] Its availability should make trials less common, and should prompt pretrial settlements.[38] Of course, summary judgment's effects may

---

33. *Id.* at 323.

34. *Id.*

35. *Id.* at 322.

36. *Id.* at 327 (quoting FED. R. CIV. P. 1).

37. *See* Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 662 (2011) (footnote omitted) ("[T]he Supreme Court's 'trilogy' of decisions from 1986 ... put firmly into place the present-day framework for summary judgment upon the conclusion of discovery as a whole or, at least, in relevant part.").

38. *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) ("Changes in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials. To be sure, this is likely far too simplistic an answer to so complex an inquiry. There are probably a number of other contributing factors, including increased pressures to settle due to changing economic considerations and the availability and use of alternative dispute resolution mechanisms like arbitration and mediation. But developments in the law of summary judgment that correspond temporally to the dramatic decline in federal trials strongly

be a boon to some and a detriment to others. Moreover, it is the freedom that summary judgment affords courts to resolve claims before trial that has prompted some commentators—perhaps most prominently Professor Suja Thomas—to argue that the practice is inconsistent with the Seventh Amendment's preservation of the right to a jury trial.[39]

Many commentators were quick to declare that the trilogy had effected a substantial doctrinal shift.[40] Perhaps owing to the more recent emergence of empirical legal studies, the few studies that examined the actual effect of the summary trilogy did not arrive until the new century. The first such study was by Professor Stephen Burbank in 2004, who found that dismissal rates rose post-trilogy.[41] However, he examined only one district court (Eastern District of Pennsylvania) and only over the period of 2000 to 2003.[42] A study by researchers at the Federal Judicial Center in 2007 examined samples of docket sheets from six federal districts (excluding prisoner, social security, and benefit repayment cases) that examined a 25-year period (1970-2000).[43] The findings drew into question whether the trilogy of summary judgment cases had much of an impact at all.[44] They "found few changes in summary judgment activity after the Supreme Court trilogy."[45] In 2014, Theodore

---

suggest a causal connection."); *cf.* Issacharoff & Loewenstein, *supra* note 12, at 100-02 (explaining that the increased availability of summary judgment will result in a decrease in settlements following unsuccessful summary judgment motions).

39. *See* Thomas, *supra* note 19, at 158-60.

40. *See, e.g.*, Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 198 (2014) (footnotes omitted) ("Almost the entire academic community, including not only those who criticized the Court's summary judgment trilogy as an unwarranted expansion of the device, but also those who saw the trilogy as a helpful clarification of doctrine, expected the decisions to have an impact."); Remarks of Suja A. Thomas, *Keynote: Before and After the Summary Judgment Trilogy*, 43 LOY. U. CHI. L.J. 499, 501 (2012) (citing Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998)) ("The trilogy of summary judgment cases is often said to have had a profound effect on the use of summary judgment.").

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

42. *See id.* at 616.

43. *See* Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 874-75, 876 n.46, 881 n.60 (2007).

44. *See id.* at 906.

45. *Id.*

Eisenberg and Kevin Clermont augmented the Federal Judicial Center study with a measure of defendants' relative advantage over plaintiffs over time, and concluded that "the parties' relative positions shifted after the 1986 trilogy to the plaintiffs' disadvantage."[46]

In this Article, we fill more of the continuing gap in the literature by empirically testing whether the trilogy had an effect on summary judgment decision-making. Our study differs from the Federal Judicial Center study in that: (1) we do not restrict ourselves to particular federal districts; (2) we examine judicial decision-making at the appellate level in addition to the trial level; (3) we focus on particular areas of law where, because of damage multipliers and/or fee-shifting and legal doctrine, one would expect many marginal cases to be brought and for summary judgment to play a large litigative role such as antitrust, securities regulation, and civil rights; and (4) we examine all decided cases in these areas rather than a sample of cases.

B. Specific Areas of Law

Empirical work to better elucidate shifts in case law due to decisions in both antitrust and securities law has existed for some time.[47] Some of the work focuses on substantive doctrinal changes while other work focuses on procedural changes. We also examine civil rights-related cases as such cases have increased over time relative to other cases.[48] In each of these three areas, there is a damage multiplier, attorney fee-shifting, or both.[49] This raises the

---

46. *See* Eisenberg & Clermont, *supra* note 40, at 194-98, 200.

47. *See, e.g.*, E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 (1986); Stephen J. Choi & A. C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27 (2016); Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489 (2006).

48. *See, e.g.*, Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1221-26 (2015).

49. *See supra* notes 46-48.

possibility of more aggressive lawyers pursuing such suits. A shift in summary judgment might impact these cases more by removing some of the outlier cases that are more likely to be non-meritorious.

The motivation for these cases has been different across antitrust law, securities law, and federal civil rights law, but there are some resemblances. In both antitrust law and securities law, class actions play an important role.[50] Yet, in both fields there have been efforts to reduce the importance of the role of class actions.[51] We believe that this may impact how courts have framed summary judgement, in part as a reaction, and indeed hostility, to class actions.

The effects of class actions are mixed in the scholarly community. Some scholars have argued that class actions are inefficient or undemocratic.[52] Others argue the opposite, which is that class actions are a plus to the litigation system as it creates more deterrence against substantive wrongdoing and/or that it has a basis in democratic legitimacy.[53] Both antitrust and securities law have

---

50. *See infra* notes 56 (antitrust), 88-100 (securities regulation).

51. *See* Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1010 (2008) (identifying court hostility to class actions in antitrust); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 96-107 (2007) (noting the hurdles that class action plaintiffs face in antitrust); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1534-35 (2006); Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1477-98 (2004) (providing a literature review that suggests that class action claims tend to be welfare reducing); James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979 (1996) ("[E]mpirical results show that most securities-fraud class actions are, in fact, frivolous.").

52. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) (noting that class actions create agency costs because "the entrepreneurial attorney [may] serve her own interest at the expense of the client"); *see* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEG. F. 71, 79 (2003); *see also* Martin H. Redish, *The Liberal Case Against the Modern Class Action*, 73 VAND. L. REV. 1127, 1135 (2020).

53. BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019); Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, *in* THE CLASS ACTION EFFECT 181, 186-87 (Catherine Piché ed., 2018); *see* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106-08 (2006); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1940 (2007) ("As for the focus on the consumer, securities, and antitrust cases, the drafters of Rule 23 assumed that groups of plaintiffs, assisted by lawyers attracted by fees, would enable federal judges to enforce federal regulations aimed

particular doctrinal issues that may impact the use of summary judgment as a tool against class actions. In the following sections, we work through both commonalities and differences across these areas of law.

1. Antitrust

Antitrust exists to remedy anti-competitive behavior either by a single firm or by multiple firms.[54] The primary statute for antitrust is the Sherman Act, although other statutes also play a role.[55] In the antitrust system, private antitrust cases play a significant role in generating the majority of antitrust enforcement.[56] Class actions are the largest percentage of antitrust cases.[57]

The shift in antitrust procedure for summary judgement in 1986 occurred at roughly the same time as an overall shift to an economics-based approach in substantive antitrust case law.[58] Antitrust law employs presumptions to evaluate conduct and allocate burdens of proof and production.[59] Courts rely on various considerations to decide what kinds of evidence are relevant to evaluating business conduct, for example, in recognizing a conclusive presumption of illegality for certain agreements.[60] Relevant factors in creating presumptions have included the courts' own experience with the practice in question, learning from economics, and perceptions of the institutional competencies of judges and juries to undertake certain inquiries.[61] For behavior that involves agreements among competitors beyond naked collusion, antitrust began to loosen its prohibitions from per se illegality to a rule of reason

---

at corporate misbehavior.").

54. *See, e.g.*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking,* 14 J. ECON. PERSPS. 43 (2000) (providing a historical overview).

55. *See id.* at 46.

56. On public versus private antitrust enforcement, see, for example, D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 691-96 (2012) (providing a review of the interplay).

57. Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L.J. 1315, 1317-18 (2022).

58. *See* Kovacic & Shapiro, *supra* note 54, at 52-55.

59. *See* 23A JOHN J. DVORSKE, STEPHANIE A. GIGGETTS, NOAH J. GORDON, MICHELE HUGHES & ELIZABETH WILLIAMS, FEDERAL PROCEDURE, LAWYERS EDITION § 54:380 (2023).

60. *Id.*

61. *See* Kovacic & Shapiro, *supra* note 54, at 52-55.

approach that weighs both the pro- and anti-competitive effects.[62] This shift began at roughly the same time that antitrust procedural rules more generally began to shift in the late 1970s.

This shift in substance began in 1977 with *Continental T.V., Inc. v. GTE Sylvania Inc.*, a case involving non-territorial restrictions.[63] Justice White's concurring opinion in *Continental T.V.* characterized the Court's "view[ing] the Sherman Act as directed solely to economic efficiency."[64] This economic approach to antitrust law is critically important in understanding the Court's shift in *Matsushita* to focus on the effects of an "inefficient" summary judgment rule that was overly lenient in terms of the types of claims that a jury could hear.

Yet, procedural antitrust shifted at the same time substantive antitrust shifted. The same year, the Court decided an important antitrust procedure case, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* There, the Supreme Court unanimously established the requirement that a plaintiff seeking damages for an antitrust offense show that it had suffered "antitrust injury"—harm relating to a reduction in competition.[65] As the Court presented the facts in *Brunswick*, the effect of the challenged merger had been to enable failing bowling alleys to remain in business via acquisition by Brunswick Corp.[66] Consumers likely benefitted.

The *Brunswick* plaintiffs were rivals to the distressed enterprises. As Justice Thurgood Marshall's opinion recounted, "the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares."[67] The plaintiffs' measure of damages was profits assuming that their rivals exited the market minus profits with the rivals continuing in business.[68] The Supreme Court reversed the decision of the court of appeals that had allowed the plaintiff to proceed with its claim for damages.[69] Justice Marshall's opinion for the Court

62. *See* DVORSKE ET AL., *supra* note 59.
63. 433 U.S. 36 (1977).
64. *Id.* at 69 (White, J., concurring).
65. 429 U.S. 477, 484 (1977).
66. *Id.* at 488.
67. *Id.*
68. *Id.* at 489-91.
69. *Id.*

warned that upholding the lower court's decision would make all merger-related disruptions in the market actionable in damages "regardless of whether those dislocations have anything to do with the reason the merger was condemned."[70]

Both substantive cases and procedural cases set the stage for a shift in *Matsushita* as to the Court's view on the efficiency of procedural rules for antitrust. It was a change in a substantive antitrust case, *Monsanto Co. v. Spray-Rite Serv. Corp.*, that created the basis for the dicta that *Matsushita* would use.[71] This suggests a melding of economic approach to both substantive and procedural antitrust was not accidental. In *Matsushita*, the Court stated:

> [I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.... To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.[72]

This language created an opportunity specifically for a procedural question, which Professor Andrew Gavil previously noted: "[W]hat kind and how much evidence is sufficient to 'exclude the possibility' of independent action by a 'preponderance of the evidence,' the civil proof standard?"[73] *Matsushita* would answer this question specifically in the context of summary judgment and import the essence of this language from *Monsanto*.[74]

Matsushita was a doctrinal departure in antitrust. From a historical perspective, summary judgment was not always hostile to

---

70. *Id.* at 487.

71. 465 U.S. 752, 764 (1984).

72. 475 U.S. at 587-88.

73. Andrew I. Gavil, *Thirty Years On: The Past Influence and Continued Significance of* Matsushita, 82 ANTITRUST L.J. 1, 3 (2018).

74. *Monsanto*, 465 U.S. at 764 ("There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently," and the plaintiff must "present direct or circumstantial evidence that reasonably tends to prove that the" defendant and its distributors intentionally coordinated to produce an unlawful result).

plaintiffs in antitrust.[75] The prior pre-*Matsushita* antitrust summary judgment controlling case focused on its limited justification that it "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."[76] This prior inquiry, which predated antitrust's shift to a primary role for economic analysis, was highly subjective as it focused on the likely veracity of witnesses rather than on objective (economics-based) analysis of the factual record.[77] This hostility of complex antitrust cases being disposed of in summary judgment was echoed by the leading civil procedural treatise at that time.[78]

The doctrinal shift in *Matsushita* showed that antitrust cases could be dismissed much like less complicated areas of law.[79] Antitrust had been seen as less in need for summary judgment because of the complexity of cases, which created demand for facts to be played out.[80] The turn toward economic analysis in *Matsushita* was a gradual process and part of a shift toward greater use of the rule of reason. In the pre-modern period of antitrust, the *Topco* Court in 1972 asserted that "courts are of limited utility in examining difficult economic problems."[81] This "limited utility" changed as courts, including the Supreme Court, learned to grapple with complex antitrust cases under the rule of reason.[82]

In contrast to prior courts, the *Matsushita* Court explained, "courts should not permit factfinders to infer conspiracies when

---

75. Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 92 (2018).

76. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962).

77. Hovenkamp, *supra* note 75, at 92.

78. *See* WRIGHT ET AL., *supra* note 20, § 2732.1 (noting that antitrust cases "are by their very nature poorly suited for disposition by summary judgment").

79. Edward J. Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 509 (2009) (*Matsushita* "completely ignored its earlier *Poller* decision" and thereby "exorcized the homily that antitrust conspiracy claims were questionable candidates from summary judgment").

80. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.").

81. United States v. Topco Assocs., 405 U.S. 596, 609 (1972).

82. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760-64 (1984); Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979).

such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct."[83] This focus on the importance of economic analysis had been building in substantive antitrust cases for nearly a decade. *Matsushita* overall made this shift as much procedural as it had become substantive.[84]

Summary judgment in antitrust cases is highly important because of the likelihood that a case otherwise will reach a jury. Specifically, the availability of treble damages in antitrust cases increases the stakes of reaching the jury. Professor Stephen Calkins, in undertaking an analysis of procedural and substantive antitrust claims involving four high volume district courts declared, "some courts want to prevent finders of fact from deciding high-stakes cases."[85] "Courts appear more willing to grant defense motions for summary relief when the costs of erroneous plaintiff verdicts are relatively high."[86] Courts therefore use the recalibrating tendency of procedural hurdles to keep certain decisions from juries because of the concern of trebled damages.[87] Discussions of the potential for false positives of mistaken prosecution for cases that would make it past summary judgment as the Supreme Court moved to a rule of reason analysis, as well as concern of the potential costs of litigation motivated the change in summary judgment standards.[88]

2. Securities Regulation

Securities laws serve to encourage disclosure of information to allow for the well-functioning of securities markets in terms of properly pricing securities.[89] Like antitrust law, securities law also has both public and private enforcement aspects. However, government

83. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593 (1986).

84. Gavil, *supra* note 73, at 9 ("*Matsushita*'s 'economic plausibility' aggressively invited parties and courts to increase their reliance on economic analysis, and economists, in pursuit of greater accuracy in antitrust decision-making.").

85. Stephen J. Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1138 (1986).

86. *Id.*

87. *Id.* at 1140.

88. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977); Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 122 (1986); Ill. Brick Co. v. Illinois, 431 U.S. 720, 730-31 (1977).

89. James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345, 347 (2010).

enforcement by the Securities and Exchange Commission (SEC) was anemic until the 1990s when the Remedies Act gave the SEC more power in its enforcement actions.[90]

Securities law class actions arose in the 1970s and with the rise of the law firm of Milberg Weiss LLP.[91] Class actions would be formed, in part to achieve settlement.[92] If a case could survive summary judgment, it meant an increase in the financial payoff of settlement for the plaintiff class. Such motivations encouraged many lawsuits to be filed as soon as there was a drop on the price of a stock.[93] The critique of such cases is that they were both meritless[94] and led to settlements that did not represent the true economic value of such claims.[95]

As a tool of primarily private enforcement, securities law class actions and damages are different than their common law predecessors.[96] Courts understood the rise of class actions in securities law almost immediately as potentially different from other sorts of cases, noting that it "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[97] Given this understanding, the lack of an *Iqbal* moment in summary judgment as between antitrust and other areas of law, particularly securities law, seems odd.

One issue that impacts the rise of securities class actions that an analysis of the shift in the summary judgment standard must consider is the change that *Basic v. Levinson* brought on regarding

---

90. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990); Urška Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 26 (2015).

91. *See* JOHN COFFEE, ENTREPRENEURIAL LITIGATION 75-76 (2015). The firm was previously known as Milberg Weiss Bershad & Shulman LLP, and today is known simply as Milberg LLP.

92. *Id.*

93. Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 442 (1994).

94. Bohn & Choi, *supra* note 51, at 905.

95. Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1534 (1996); Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 635 (1985).

96. Alexander, *supra* note 95, at 1488 ("Securities class action litigation today has little in common with suits over the common law torts of fraud and misrepresentation from which the compensatory remedy was derived.").

97. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975).

10(b)(5) litigation.[98] This issue is different from the types of issues that emerge in the antitrust context.

In antitrust cases, the parties are often fighting about essentially conceptual issues—for example, the plaintiff believes the relevant market is X, whereas the defendant believes the relevant market is Y. One can further assume that they will often be willing to stipulate facts, such as if the relevant market is X, then the defendant's market share is 35 percent, whereas if it is Y, then the defendant's market share is 14 percent. This makes it at least plausible to resolve issues by summary judgment.

In securities fraud cases, by contrast, a central issue is often scienter (knowledge that conduct is unlawful).[99] No defendant will stipulate that it knew its statement was false, nor will any plaintiff stipulate that the defendant did not know the statement was false. The issue will either be resolved on the pleadings or at trial. One of the primary goals of the Private Securities Litigation Reform Act (PSLRA), enacted in 1995, was to make it easier to resolve scienter on the pleadings in weak cases (just as *Matsushita* in practice made it easier to resolve weak cases on a motion for summary judgment).[100]

For quite some time, there has been a push to limit private rights of action in securities law.[101] The PSLRA changed the procedural hurdles in an earlier stage: the motion to dismiss. It required that plaintiffs plead fraud with particularity.[102] It also created a stay to discovery while a motion to dismiss was pending.[103] Such a change would not have been needed if cases were being filtered in summary judgment due to a change in the trilogy of cases.

---

98. 485 U.S. 224, 240-41 (1988); *see, e.g.*, Jonathan R. Macey, *Fraud on the Market Theory: Some Preliminary Issues*, 74 CORNELL L. REV. 923, 925-26 (1989) (providing early analysis).

99. Donald C. Langevoort, *Reflections on Scienter (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1, 14-15 (2006) (describing scienter).

100. Pub. L. No. 104-67, 109 Stat. 737 (1995); *In re* Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999).

101. *See, e.g.*, Alexander, *supra* note 95, at 1514-17; Amanda Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1357 (2008).

102. 109 Stat. 737, 747.

103. There seems to have been some screening of non-meritorious cases. *See* Stephen J. Choi, Karen K. Nelson & A. C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 64 (2009) (finding a screening effect).

The motivation behind the PSLRA was to change securities law because of a concern that class actions, as then structured, created a deleterious effect to the U.S. economy.[104] This congressional response after the trilogy suggests that the trilogy did not have an effect in securities law at the level of summary judgment. However, it might instead signal that securities class actions are different from antitrust class actions.

3. Federal Civil Rights

Statutes allowing individuals (and entities) to sue for violation of federal law by state actors—today housed most prominently in 42 U.S.C. § 1983—date back to the post-Civil War period.[105] These statutes lay largely unused until the Supreme Court liberalized civil rights lawsuits in its 1961 decision in *Monroe v. Pape*.[106] With the emergence of the civil rights movement, the ensuing years provided fertile ground for a large growth in civil rights litigation.

While Congress has statutorily authorized lawsuits against *state officials* for violations of rights under federal law, it has not done so for actions against *federal officials*. Rather, such actions are authorized as a matter of federal common law. The Court first hinted—without deciding—that such lawsuits might be possible in its 1946 decision in *Bell v. Hood*.[107] But it was not until 1971 that the Court formally endorsed such actions in *Bivens v. Six Unknown Named Agents*.[108] Today such actions are called *Bivens* actions, after the Supreme Court case that recognized their validity. In recent

104. H.R. REP. NO. 104-369, at 31-32, *as reprinted in* 1995 U.S.C.C.A.N. at 730-31; Novak v. Kasaks, 216 F.3d 300, 306 (2d Cir. 2000) ("Legislators were apparently motivated in large part by a perceived need to deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries."). *But see* Hillary A. Sale, *Heightened Pleadings and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 562-65 (1998) (suggesting that the PSLRA chilled meritorious claims); James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 509-15 (1997); Lynn A. Stout, *Commentary, Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711, 714-15 (1996).

105. *See, e.g.*, Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1497 (1989).

106. 365 U.S. 167, 170, 191-92 (1961).

107. *See* 327 U.S. 678, 684-85 (1946).

108. 403 U.S. 388, 397 (1971).

decades—in particular, after the period we study here—the Court has signaled a strong unwillingness to extend *Bivens* actions to new settings.[109]

Congress in 1976 saw fit to empower federal district courts to award prevailing parties their attorneys' fees in § 1983 (and certain other statutory civil rights) actions.[110] Note, however, that no such authorization for reversing attorneys' fees exists for *Bivens* actions.[111] The availability of attorneys' fees removed a disincentive against putative plaintiffs pursuing § 1983 claims in court.[112] At the same time, reversing attorneys' fees may result in some less meritorious lawsuits being filed.[113]

Civil rights cases (whether against state or federal officials) are unique in that a large class of summary judgment *denials* are immediately appealable. A defendant official will often assert

---

109. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) ("[W]e have consistently refused to extend *Bivens* liability to any new context or new category of defendants."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)) ("[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity."); Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020) ("[I]f we have reason to pause before applying *Bivens* in a new context or to a new class of defendants[,] [then] we reject [the proposed expansion].").

110. *See* 42 U.S.C. § 1988. Through the early 1970s, many lower federal courts assumed they had common law authority to reverse attorneys' fees in some federal actions. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 92-93, 97 (1991). The Supreme Court reined in that authority with its 1975 decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 247-71 (1975). Seemingly in response, Congress enacted § 1988 the next year. *See W. Va. Univ. Hosps.*, 499 U.S. at 97; *id.* at 108 (Stevens, J., dissenting). *But cf. id.* at 97-101 (holding that, notwithstanding any causal relationship between *Alyeska* and the enactment of § 1988, § 1988 did not restore the legal regime to its pre-*Alyeska* status).

111. *See, e.g.*, Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 811 n.6 (2010).

112. *See, e.g.*, *W. Va. Univ. Hosps.*, 499 U.S. at 102-03 (Marshall, J., dissenting); Reinert, *supra* note 111, at 849; *cf.* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 745-46, 760 (1988) (so hypothesizing, but finding "scant evidence exists to support a filing increase attributable to the fees act").

113. *See, e.g.*, Reinert, *supra* note 111, at 849 (providing data on *Bivens* actions showing that "the presence of an attorney is associated with greater success," but also acknowledging that the advisability of fee-shifting nevertheless remained somewhat ambiguous since "it may be that attorneys already take the better *Bivens* cases, and this is why counseled cases are more successful"); *cf.* Schwab & Eisenberg, *supra* note 112, at 747, 760-61 (hypothesizing that fee-shifting would encourage the filing of more higher-quality cases and thus increase plaintiff win rates, but instead finding that "[t]he evidence more strongly suggests that the fees act may have lowered settlement rates and lowered the percentage of court judgments favorable to plaintiffs").

qualified immunity from suit.[114] The grant of immunity will terminate the plaintiff's claim against that defendant and be appealable (depending upon the status of other claims against other defendants).[115] Ordinary rules of finality would preclude appeal of a denial of qualified immunity.[116] However, in its 1985 decision in *Mitchell v. Forsyth*, the Supreme Court held that, insofar as a posttrial holding that in fact the defendant was immune is too late to validate the defendant's immunity from suit, the *denial* of immunity will *also* be immediately appealable.[117]

Given the importance of summary judgment to determining assertions of immunity, a shift in the availability of summary judgment was valuable to defendants in civil rights suits. Especially given the immediate appealability of summary judgment denials, that shift likely would substantially reduce the number of civil rights cases that actually proceed to trial—whether because an appellate court would enforce the laxer standard for summary judgment, or because trial courts (aware of the likelihood of immediate review) would take summary judgment motions for immunity more seriously.

---

114. Qualified immunity shields government officials from liability for civil damages to the extent that their conduct does not violate clearly established constitutional or statutory rights. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

115. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009).

116. *See* 472 U.S. 511, 553 (1985).

117. *See id.* at 526-27; Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 103-04 (2016). Prior to *Mitchell v. Forsyth*, some circuits had approved of jurisdiction over such interlocutory appeals, while others had not. The Supreme Court explained:

> The First, Eighth, and District of Columbia Circuits have held such orders appealable ... while the Fifth and Seventh Circuits have joined the Third Circuit in holding that the courts of appeals lack jurisdiction over interlocutory appeals of qualified immunity rulings .... The Fourth Circuit has held that a district court's denial of qualified immunity is not appealable when the plaintiff's action involves claims for injunctive relief that will have to be adjudicated regardless of the resolution of any damages claims.

Forsyth, 472 U.S. at 519 n.5.

II. THE TRILOGY AND TRANS-SUBSTANTIVE APPLICABILITY OF PROCEDURAL LAW

While scholars have spilled considerable ink questioning the premise that procedure should be trans-substantive, the notion of trans-substantive procedure remains the dominant understanding.[118] Indeed, except to the extent they indicate otherwise,[119] the Federal Rules of Civil Procedure recite their applicability across substantive areas.[120]

Yet despite this dominant understanding of extant law, there are important examples of procedural exceptionalism, even in the face of what might otherwise seem to be governing Supreme Court precedent. For example, the U.S. Court of Appeals for the Federal Circuit has, on several occasions, professed the view that special procedural rules and standards apply in patent cases only to have those assertions reversed by the Supreme Court.[121]

---

118. *See, e.g.*, Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1653 (2017) ("[F]ormally equal U.S. civil procedure is transsubstantive because most procedural rules apply across all different types of substantive legal claims."); Ramon Feldbrin, *Procedural Categories*, 52 LOY. U. CHI. L.J. 707, 714 (2021) ("Civil procedure is generally considered transsubstantive, for example, because most of its rules govern all civil litigation, regardless of claim type."). For discussion of the history and rise of trans-substantive civil procedure, see David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 375-401 (2010); Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 292-93 (2008); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526-27 (1986).

119. *See, e.g.*, FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

120. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.").

121. *See, e.g.*, MercExchange, LLC v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005) ("We therefore see no reason to depart from the general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."), *rev'd*, 547 U.S. 388, 394 (2006) ("[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards."); Medimmune, Inc. v. Genentech, Inc., 427 F.3d 958, 964 (Fed. Cir. 2005) (upholding an exception to jurisdiction under the Declaratory Judgment Act based on "the inequity" that arises "when the patent owner, having contracted away its right to sue, is in continuing risk of attack on the patent whenever the licensee chooses ... while the licensee can preserve its license and royalty rate if the attack fails"), *rev'd*, 549 U.S. 118, 126-37 (2007) (rejecting this argument as out of line with general Supreme Court and lower

Questions regarding the scope of trans-substantivity have at times arisen in the wake of Supreme Court procedural decisions. For example, after the Court's 2007 decision in *Bell Atlantic v. Twombly*, some commentators and courts believed that the holding—that trial courts should dismiss for failure to state a claim complaints that were facially implausible—applied uniquely in antitrust cases and (if beyond that) in cases brought under analogously complex statutory regimes.[122] It took the Court's 2009 decision in *Ashcroft v. Iqbal* to make clear *Twombly*'s scope beyond antitrust law.[123]

---

federal court precedent); Teva Pharm. USA, Inc. v. Sandoz, Inc., 723 F.3d 1363, 1368 (Fed. Cir. 2013) (holding that a district court's conclusion that a patent claim is indefinite "is a question of law that we review de novo"), *rev'd*, 574 U.S. 31, 324-28 (2015) (holding that Rule 52(a) of the Federal Rules of Civil Procedure applies and requires appellate review of factual finding underlying claim construction only for clear error). *See* Timothy R. Holbrook, *Explaining the Supreme Court's Interest in Patent Law*, 3 IP THEORY 62, 70-71 (2013) (noting the Court's efforts "to bring patent law back into the legal tapestry, rejecting any form of patent exceptionalism"); Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1818 (2013) (footnotes omitted) (describing the Supreme Court as having "rejected patent law exceptionalism in cases addressing declaratory judgment standing, remedies for patent infringement, and review of administrative agencies"); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1427 (2016). The question of whether the Supreme Court cases had a trans-substantive effect remains a subject of debate. *See* Matthew Sag & Pamela Samuelson, *Discovering* eBay*'s Impact on Copyright Injunctions Through Empirical Evidence*, 64 WM. & MARY L. REV. 1149, 1149 (2023) (refuting with empirical evidence the "widely held view" that judges have resisted applying *eBay* in copyright cases).

122. 550 U.S. 544, 570 (2007) (requiring that to survive a motion to dismiss for failure to state a claim, a complaint must allege "enough facts to state a claim to relief that is plausible on its face"); *see, e.g.*, Brian T. Fitzpatrick, Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1628 (2012) ("Some commentators had hoped that the [*Twombly*] Court's decision would be confined to the circumstances that led to its birth: antitrust cases, complex class actions, or cases with especially forbidding discovery burdens."); CBT Flint Partners, LLC v. Goodmail Sys., Inc., 529 F. Supp. 2d 1376, 1379 (N.D. Ga. 2007) ("*Twombly* did not radically alter the elementary rules of civil procedure that have governed litigation in the federal courts for the past seventy years."). *But see* Charles B. Goodwin, Bell Atlantic v. Twombly*: A New Definition of Notice Pleading for Federal Courts*, 79 OKLA. B.J. 519, 522 (2008); ATSI Comm'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007) ("We have declined to read *Twombly*[ ] ... as relating only to antitrust cases.").

123. *See Iqbal*, 556 U.S. at 684; Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 474 (2010) (footnote omitted) ("[H]opes of limiting *Twombly* were dashed by the Supreme Court's decision in *Ashcroft v. Iqbal*, which held that the *Twombly* framework applies to all civil actions."); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 40 (2010) (questioning the wisdom of, but still accepting, the extension).

It is notable that the summary judgment trilogy did not give rise to widespread suggestions of limited applicability. The civil procedure academic community seems to have taken the three cases as a whole.[124] Commentators either thought the trilogy would have a large impact or would not.[125] From these perspectives, it seems that there was no need for an *Iqbal*-like response to the trilogy because the trilogy, unlike *Twombly*, was already widely understood to apply trans-substantively.

On the other hand, a minority of commentators *did* think some components of the trilogy would have a large impact in some subject matter areas but not others: in particular, some commentators identified *Matsushita* as more likely to have had a large impact in some areas but not others.[126] On this account, the absence of any *Iqbal*-like follow-up to the trilogy—and in particular to *Matsushita*—tended to confirm a relatively narrow substantive reach.[127]

The dispute over the trans-substantivity of the trilogy is another opportunity for targeted empirical examination to shed light. Our study fills this gap.[128]

---

124. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 12, at 84.

125. *See, e.g.*, James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1569-70 (1996); Issacharoff & Loewenstein, *supra* note 12, at 79 ("The summary judgment trilogy fundamentally altered Rule 56.").

126. *See, e.g.*, William W. Schwarzer & Alan Hirsch, *Summary Judgment After* Eastman Kodak, 45 HASTINGS L.J. 1, 6-7 (1993) (footnote omitted) ("*Matsushita*, ... rather than making a statement about implausible inferences in summary judgment motions generally, rests on a specific point of antitrust law: plaintiffs cannot prevail if their case requires inferring a price-fixing conspiracy from normal business activity (specifically, price cutting) that, standing alone, is consistent with lawful competition."); Thomas M. Jorde & Mark A. Lemley, *Summary Judgment in Antitrust Cases: Understanding* Monsanto *and* Matsushita, 36 ANTITRUST BULL. 271, 273 n.6 (1991) (arguing for specific, not broad, application of *Matsushita*). Note that these writings came at least half a decade after the trilogy, and postdate the period that we study.

127. Not only did the Court fail to supply a *Twombly*-like follow-up to *Matsushita*, but language in a subsequent antitrust case tended instead to confirm *Matsushita*'s limited reach: the Court introduced the 1992 case of Eastman Kodak Co. v. Image Technical Services, Inc. as "yet another case that concerns the standard for summary judgment in an antitrust controversy." 504 U.S. 451, 454 (1992).

128. Writing in 2003, Professor Arthur Miller observed that "increased use of summary judgment has become marked in certain substantive law areas." *See* Miller, *supra* note 12, at 1052. But Professor Miller was not writing contemporaneously, and in support of his assertions, he cites secondary authorities (mostly treatises), not empirical studies. *See id.* at 1052-54 nn.375-81.

III. EMPIRICAL ANALYSIS

This Part presents our empirical analysis. Section A looks at win rates, while Section B examines appellate court citation practices.

A. Win Rates

We set out to gather data on federal court treatment of summary judgment motions in three areas of law: antitrust; civil rights actions under 42 U.S.C. § 1983 (and allied provisions) and *Bivens*; and securities regulation.[129] We chose these areas of law because one might think *a priori* that they would be highly susceptible to a change in the standard for determining whether to grant summary judgment. In all three areas, we have gathered, and are gathering, cases decided between 1982 and 1990 (inclusive). The data thus include cases decided before, and after, the issuance of the trilogy of the Supreme Court's summary judgment opinions.

Some argue that *Twiqbal*'s effects were not significant generally because changes were already underway in lower courts.[130] Might the same have been true regarding summary judgment? For this reason, we identify 1986 as a structural break; we review cases five years before and five years after the trilogy. If the trilogy simply ratified existing changes at the lower court level, then the empirical analysis would show that the trilogy did not change the impact of summary judgment.

---

129. We gathered data using the appropriate databases on Westlaw and searched for cases decided from 1982 through 1990. For all searches, we looked for references to the term "summary judgment" or to Rule 56 of the Federal Rules of Civil Procedure. Each case was then reviewed to ensure that in fact the case involved resolution of a summary judgment motion. For antitrust cases, we searched the antitrust database (for district court and courts of appeals cases, as appropriate). For civil rights cases, we used (in addition to references to summary judgment or Rule 56) the search '((42 pre/2 1983) Bivens)' in the civil rights database (for district court and courts of appeals cases, as appropriate). For securities regulation cases, we used (in addition to references to summary judgment or Rule 56) the search '(17 +2 C.F.R. +2 10b-5) 10b-5' in the securities database (for district court and courts of appeals cases, as appropriate).

130. *See* Fitzpatrick, *supra* note 122, at 1622 (arguing that lower courts were creating heightened pleading standards before *Twiqbal*).

We coded as separate observations (even if they were resolved in a single opinion) each motion for summary judgment lodged by plaintiff(s) as opposed to defendant(s).[131] For each observation, we coded whether the court denied (at least in part) the motion for summary judgment.[132]

We assembled six datasets: three datasets on district court decisions from the three areas of law and three datasets on court of appeals decisions from the three areas of law. Table 1 summarizes the number of summary judgment motions in each dataset.

Table 1. Description of Datasets

Dataset	Number of Observations
District court antitrust cases, 1982-1990	1,079
District court civil rights cases, 1982-1990	449
District court securities regulation cases, 1982-1990	611
Court of appeals antitrust cases, 1982-1990	486
Court of appeals civil rights cases, 1982-1990	226
Court of appeals securities regulation cases, 1982-1990	124

In examining the various datasets, we compare the rate at which summary judgment motions were denied at least in part (for the district court at the trial level and for the courts of appeals in the

131. Some opinions included (1) determinations of summary judgment motions with respect to claims not falling under the subject matter area of the dataset, and (2) determinations of claims on motions other than for summary judgment. We did not include either of these types of motions in the datasets.

132. We also coded each observation for whether the court denied *in full* each summary judgment motion. We concluded that this metric is less meaningful because a motion may raise a combination of different arguments lodged by multiple parties against multiple claims. It thus is possible that, even after the trilogy, a court might deny *fewer aspects* of a summary judgment motion, but still not deny the motion *in full*. We therefore concluded that the better metric is whether courts saw fit to deny at least in part, and not in full, summary judgment motions.

wake of appellate opinions) before and after the Supreme Court handed down the *Anderson* and *Celotex* cases.[133] If indeed the trilogy had an effect on win rates, then we would expect to see a *decrease* in the rate at which summary judgment was denied after the trilogy was decided.

We begin with our antitrust datasets. Table 2 reflects the correlation between whether a district court decided the summary judgment motion after the Supreme Court handed down the *Anderson* and *Celotex* cases, and whether the motion was denied (at least in part). Table 3 does the same for the court of appeals.

If in fact the summary judgment trilogy (or any of its component cases) had an impact, one would expect to find a drop—after the trilogy—in the rate at which courts deny summary judgment. At the district court level, Table 2 shows just that: district courts denied 47.97 percent of summary judgment motions before the trilogy, and 37.58 percent of summary judgment motions after trilogy. This means that district courts were 65.3 percent less likely to deny (at least in part) summary judgment motions in antitrust cases after the trilogy than before it. The difference is significant at the 1 percent level. The odds of denial were 0.922:1 in pre-trilogy cases, and 0.602:1 in post-trilogy cases. The odds ratio (0.922/0.602) indicates that summary judgment denial was approximately 1.532 times more likely in district court antitrust cases pre-trilogy than post-trilogy.

133. The Supreme Court handed down the decisions in *Anderson* and *Celotex* on the same day: June 25, 1986. The Court handed down *Matsushita* three months earlier, on March 26, 1986. Using the *Matsushita* decision as the dividing line for antitrust cases produced substantially similar results to those presented in the text.

Table 2. Correlation Between Whether a District Court Decided a Summary Judgment Motion in an Antitrust Case After the Supreme Court Handed Down the *Anderson* and *Celotex* Decisions, and Whether the Motion Was Denied (at Least in Part)

		Whether the Summary Judgment Motion Was Denied (at Least in Part)		
		No	**Yes**	**Total**
Whether the Summary Judgment Motion Was Decided After the Court's Decisions in *Anderson* and *Celotex*	**No**	308 (52.03)	284 (47.97)	592 (100.00)
	Yes	304 (62.42)	183 (37.58)	487 (100.00)
	Total	612 (56.72)	467 (43.28)	1,079 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.001.***
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 3 reveals a similar result for the court of appeals, with appellate opinions resulting in denials of 37.65 percent of summary judgment motions before the trilogy, and 24.57 percent afterward. Appellate court treatment was 53.9 percent less likely to result in at least a partial denial of summary judgment in antitrust cases after the trilogy than before it. Again, the difference is significant at the 1 percent level. The odds of denial were 0.604:1 in pre-trilogy cases, and 0.328:1 in post-trilogy cases. The odds ratio (0.604/0.328) indicates that summary judgment denial was approximately 1.841 times more likely in court of appeals antitrust cases pre-trilogy than post-trilogy.

Table 3. Correlation Between Whether a Court of Appeals Decided an Appeal of a Summary Judgment Motion in an Antitrust Case After the Supreme Court Handed Down the *Anderson* and *Celotex* Decisions, and Whether the Decision Resulted in the Denial of the Motion (at Least in Part)

		Whether the Summary Judgment Motion Was Denied (at Least in Part)		
		No	**Yes**	**Total**
Whether the Summary Judgment Motion Was Decided After the Court's Decisions in *Anderson* and *Celotex*	**No**	159 (62.35)	96 (37.65)	255 (100.00)
	Yes	174 (75.32)	57 (24.68)	231 (100.00)
	Total	333 (68.52)	153 (31.48)	486 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.002.***
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

The data for civil rights cases reveal a similar, if more muted, picture. As reflected in Table 4, there is (as one would expect) a reduction in the rate at which district courts denied summary judgment post-trilogy, but the reduction is nowhere near as pronounced as in the context of antitrust, and the difference is not statistically significant.

Table 4. Correlation Between Whether a District Court Decided a Summary Judgment Motion in a Civil Rights Case After the Supreme Court Handed Down the *Anderson* and *Celotex* Decisions, and Whether the Motion Was Denied (at Least in Part)

		Whether the Summary Judgment Motion Was Denied (at Least in Part)		
		No	**Yes**	**Total**
Whether the Summary Judgment Motion Was Decided After the Court's Decisions in *Anderson* and *Celotex*	**No**	121 (59.31)	83 (40.69)	204 (100.00)
	Yes	162 (66.12)	83 (33.88)	245 (100.00)
	Total	283 (63.03)	166 (36.97)	449 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.137.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 5 shows the rate at which the courts of appeals resolved civil rights appeals by denying summary judgment motions decreased with statistical significance—much as in the setting of antitrust appeals—after the Supreme Court's decisions in *Anderson* and *Celotex*. The odds of denial were 0.686:1 in pre-trilogy cases and 0.512:1 in post-trilogy cases. The odds ratio (0.686/0.512) indicates that summary judgment denial was approximately 1.340 times more likely in court of appeals antitrust cases pre-trilogy than post-trilogy.

Note, however, that the setting of civil rights is the only one where certain defendants can appeal certain *denials* of summary judgment—specifically, government officials can appeal denials of summary judgment based on qualified immunity.[134] The data thus may reflect an increase after the trilogy in such defendants seeking appellate review of summary judgment denials, with the courts of appeals not validating many of these appeals. In any event, this

134. *See supra* notes 110-13 and accompanying text.

result is surely *not* consistent with the effect that one would have expected from the trilogy.

Table 5. Correlation Between Whether a Court of Appeals Decided an Appeal of a Summary Judgment Motion in a Civil Rights Case After the Supreme Court Handed Down the *Anderson* and *Celotex* Decisions, and Whether the Decision Resulted in the Denial of the Motion (at Least in Part)

		Whether the Summary Judgment Motion Was Denied (at Least in Part)		
		No	**Yes**	**Total**
Whether the Summary Judgment Motion Was Decided After the Court's Decisions in *Anderson* and *Celotex*	**No**	40 (63.49)	23 (36.51)	63 (100.00)
	Yes	126 (77.30)	37 (22.70)	163 (100.00)
	Total	166 (73.45)	60 (26.55)	226 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.035.**
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

The data tell a different story for summary judgment motions in securities regulation cases. Here, as Tables 6 and 7 reflect for district court and court of appeals cases, respectively, there was no statistically significant difference in the rate at which summary judgments were denied before and after the Supreme Court's *Anderson* and *Celotex* decisions were handed down. Indeed, the denial rates for securities regulation were virtually unchanged.

Table 6. Correlation Between Whether a District Court Decided a Summary Judgment Motion in a Securities Regulation Case After the Supreme Court Handed Down the *Anderson* and *Celotex* Decisions, and Whether the Motion Was Denied (at Least in Part)

		Whether the Summary Judgment Motion Was Denied (at Least in Part)		
		No	**Yes**	**Total**
Whether the Summary Judgment Motion Was Decided After the Court's Decisions in *Anderson* and *Celotex*	**No**	93 (42.08)	128 (57.92)	221 (100.00)
	Yes	179 (45.90)	211 (54.10)	390 (100.00)
	Total	272 (44.52)	339 (55.48)	611 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.362.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 7. Correlation Between Whether a Court of Appeals Decided an Appeal of a Summary Judgment Motion in a Securities Regulation Case After the Supreme Court Handed Down the *Anderson* and *Celotex* Decisions, and Whether the Decision Resulted in the Denial of the Motion (at Least in Part)

		Whether the Summary Judgment Motion Was Denied (at Least in Part)		
		No	**Yes**	**Total**
Whether the Summary Judgment Motion Was Decided After the Court's Decisions in *Anderson* and *Celotex*	**No**	24 (57.14)	18 (42.86)	42 (100.00)
	Yes	50 (60.24)	33 (39.76)	83 (100.00)
	Total	74 (59.20)	51 (40.80)	125 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is 0.739.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

We considered as an alternative explanation the possibility that ideological voting explains what we have observed: perhaps the influx of Reagan appointees, many presumably with a predisposition toward adhering to the plain language of Rule 56, over the course of the 1980s contributed to the observed decrease in summary judgment denials. But the data do not support this alternative proposition. There was no statistically significant difference between the rate at which unanimous panels consisting of a majority of judges appointed by Republican Presidents, and unanimous panels consisting of a majority of judges appointed by Democratic Presidents, produced summary judgment denials. That result holds if we restrict our examination to the pre- and post-trilogy time periods.[135]

135. The *p*-value from a chi-squared test was 0.535 for the period before the trilogy, 0.709 for the period after the trilogy, and 0.286 overall.

B. Citation Rates

We next looked at the rate at which post-trilogy court of appeals opinions in each subject-matter area cite to the trilogy cases. To do this, we looked for citations in majority opinions handed down after June 25, 1986, in the three appellate case databases.[136]

Table 8 presents data on how often opinions in each subject area cite to at least one of the trilogy cases. Antitrust opinions generated the most citations—in terms of both absolute total and percentage—of the three areas. The difference in citation rates is statistically significant at the 1 percent level.

Table 8. Appellate Opinion Citation of at Least One of the Trilogy Cases

Subject Area	Total Cases	Number (Percentage) of Cases Citing at Least One Trilogy Case
Antitrust	229	112 (48.91)
Civil Rights	161	33 (20.50)
Securities Regulation	83	32 (38.55)
Total	473	177 (37.42)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is less than 0.000.***.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 9 presents data on how many of the trilogy opinions (zero, one, two, or all three) each opinion cites, by subject area. Of the three subject matter areas antitrust cases were least likely to cite

136. The data include twenty-five cases handed down after *Matsushita* but before *Celotex* and *Anderson*; of those, four opinions—all in antitrust cases—cited *Matsushita*. We did not include these opinions/citations in our dataset since there was, during this period, only one Supreme Court case to which an opinion *could* cite.

to none of the trilogy cases. And, while civil rights and securities regulation opinions cite all three cases at a negligible rate, antitrust opinions cited all three cases with some frequency. The difference in citation rate is statistically significant at the 1 percent level.[137]

Table 9. Number of Trilogy Cases to Which Each Appellate Opinion Cites, by Subject Area

Subject Area	Number of Trilogy Cases Cited				Total
	0	1	2	3	
Antitrust	117 (51.09)	60 (26.20)	23 (10.04)	29 (12.66)	229 (100.00)
Civil Rights	128 (79.50)	23 (14.29)	9 (5.59)	1 (0.62)	161 (100.00)
Securities Regulation	51 (61.45)	20 (24.10)	10 (12.05)	2 (2.41)	83 (100.00)
Total	296 (62.58)	103 (21.78)	42 (8.88)	32 (6.77)	473 (100.00)

Note: Row percentages are reported in parentheses. The *p*-value from a chi-squared test is less than 0.000.***.
Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 10 presents data on how frequently opinions in each subject matter cited to each of the three trilogy cases. Antitrust cases cite all three trilogy cases with great frequency, but they cite *Matsushita* the most, while the civil rights and securities regulation opinions barely cite that case at all. As noted at the bottom of the table, the differences in citation rate across subject areas are significant at the 1 percent level for both *Matsushita* and *Anderson*, and at the 5 percent level for *Celotex*.

137. The expected frequency in all cells was sufficiently large to justify use of the chi-squared test.

Table 10. Appellate Opinion Citation of Each Trilogy Case, by Subject Area

Subject Area	Total Cases	Number (Percentage) of Cases Citing *Matsushita*	Number (Percentage) of Cases Citing *Celotex*	Number (Percentage) of Cases Citing *Anderson*
Antitrust	229	82 (35.81)	56 (24.45)	55 (24.02)
Civil Rights	161	3 (1.86)	23 (14.29)	18 (11.18)
Securities Regulation	83	8 (9.64)	18 (21.69)	20 (24.10)
Total	473	93 (19.66)	97 (20.51)	93 (19.66)
***p*-value from chi-squared test**		< 0.001***	0.048**	0.004***

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

Table 11 presents similar data, but limited to appellate opinions that cite at least one trilogy case. Here, only the difference in citation rate of *Matsushita* is significant (at the 1 percent level). By far, the vast majority of citations to *Matsushita* came in antitrust cases.

Table 11. Appellate Opinion Citation of Each Trilogy Case (Limited to Cases Citing at Least One Trilogy Case), by Subject Area

Subject Area	Total Cases	Number (Percentage) of Cases Citing *Matsushita*	Number (Percentage) of Cases Citing *Celotex*	Number (Percentage) of Cases Citing *Anderson*
Antitrust	112	82 (73.21)	56 (50.00)	55 (49.11)
Civil Rights	33	3 (9.09)	23 (69.70)	18 (54.55)
Securities Regulation	32	8 (25.00)	18 (56.25)	20 (62.50)
Total	177	93 (52.54)	97 (54.80)	93 (51.38)
***p*-value from chi-squared test**		< 0.001***	0.134	0.395

Key: * represents significance at the 10% level, ** represents significance at the 5% level, and *** represents significance at the 1% level.

III. DISCUSSION OF RESULTS

To make sense of our results, it is important to recognize two broad cleavages in our data. As Table 12 summarizes, antitrust regulation and civil rights resemble one another in terms of the win rate data (though the results on the securities regulation front are stronger). Yet in terms of citations, the civil rights cases bear a far stronger resemblance to the securities regulation cases, that is, antitrust appellate opinions are most likely to cite a trilogy case, while civil rights are least likely to do so. And, while antitrust appellate opinions cite (of all the trilogy cases) *Matsushita* the most often, the *Matsushita* opinion is the trilogy case cited *least* frequently by civil rights and securities regulation appellate opinions.[138]

138. It could be that court of appeals decisions were citing more recent decisions that cite the Supreme Court's trilogy decisions, rather than to the trilogy decisions themselves. But this phenomenon would develop over time; the period we examine is relatively soon after the

Table 12. Summary of Results

Area of Law	Statistically Significant Post-Trilogy Reduction in Decrease in Summary Judgment Denials at District Court Level?	Statistically Significant Post-Trilogy Reduction in Decrease in Summary Judgment Denials at Court of Appeals Level?	Percentage of Cases Citing No Trilogy Case	Most-Cited Trilogy Case	Least-Cited Trilogy Case
Antitrust	Yes	Yes	51.09	*Matsushita*	*Anderson*
Civil Rights	No	Yes	79.50	*Celotex*	*Matsushita*
Securities Regulation	No	No	61.45	*Anderson*	*Matsushita*

The citation data suggest that something other than the trilogy itself may be driving the decrease in summary judgment denials in civil rights cases. And, indeed, there is an event in the mid-1980s other than the trilogy that impacted civil rights cases specifically—the Supreme Court's 1985 decision in *Mitchell v. Forsyth* that authorized interlocutory appeals of summary judgment denials of qualified immunity.[139] Consistent with the notion that the introduction of interlocutory appeals had an effect in the civil rights context, we observe that, while the number of civil rights *district court* summary judgment decisions increased only slightly post-trilogy (from 204 to 245, an increase of 20.1 percent), the number of civil

Court decided the trilogy. Moreover, one would expect court of appeals decisions to cite to a trilogy case—and later court of appeals decisions to cite back to those court of appeals decisions—more quickly when the trilogy case is itself cited more frequently. This would suggest, if anything, that our findings may understate the extent to which antitrust opinions relied upon *Matsushita*'s reasoning and civil rights and securities regulation opinions relied upon the reasoning of *Celotex* and *Anderson*.

139. *See supra* notes 112-13 and accompanying text. Note that, while the trilogy cases themselves would have had a substantive impact on cases pending on appeal, the Court's decision in *Mitchell v. Forsyth* would have had a more delayed impact, since it simply opened the door for litigants to file interlocutory appeals that (at least in some circuits) they could not have filed before.

rights *court of appeals* summary judgment decisions more than doubled post-trilogy (from 63 to 163, an increase of 158.7 percent).[140]

Note, moreover, that there is reason to doubt whether the trilogy would have had a large substantive impact in civil rights cases. In a 1986 opinion handed down before the trilogy cases (but not long after *Mitchell v. Forsyth*), the Supreme Court, perhaps anticipating *Matsushita*, observed that the existing substantive standard for qualified immunity in civil rights cases announced in *Harlow v. Fitzgerald* was "specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal."[141]

In sum, we think that the civil rights data reflect the impact of the authorization of interlocutory appeals. Thus, while the win rate data between antitrust and civil rights cases bear some resemblance, we think this other factor confounds the comparison. On the other hand, the divergence between antitrust and securities regulation cases is clear and striking.

When we consider how our results stack up with earlier studies, the results we found are mixed. Consistent with the findings of the Federal Judicial Center study, we found no evidence of the trilogy influencing summary judgment decision-making in securities regulation.[142] The results in the civil rights cases are mixed. In contrast, we found that the trilogy *did* have a strong statistically significant effect on decision-making in antitrust cases, at both the district court and court of appeals levels.

Textual analysis tends to confirm that antitrust summary judgment cases were substantively different from securities regulation

---

140. *See supra* tbls. 4, 5. In contrast, the number of antitrust district court *and* appellate court summary judgments each declined modestly (district court decisions dropped from 592 to 487, a decrease of 17.7 percent and court of appeals decisions dropped from 255 to 231, a decrease of 9.4 percent, *see supra* tbls. 2, 3), and the number of securities regulation district court *and* appellate court summary judgments each rose (district court decisions increased from 221 to 390, an increase of 76.5 percent, and court of appeals decisions rose from 42 to 83, an increase of 97.6 percent, *see supra* tbls. 6, 7). To be sure, while the number of appellate opinions is not necessarily proportional to the number of summary judgment motions and appeals, we think it likely that there is at least some direct relationship between the two.

141. Malley v. Briggs, 475 U.S. 335, 341 (1986) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

142. *See* Cecil et al., *supra* note 43, at 874-75, 876 n.46, 881 n.60.

and civil rights cases.[143] We mined appellate cases for the most frequently used terms in majority opinions across the three areas. We found no difference in any of the three areas between the words courts tended to use depending on whether summary judgment was denied or not. But the words that emerged in antitrust cases tend to indicate that many of these cases center upon collusion and conspiracy. This suggests that *Matsushita* did what it was intended to do in antitrust cases—arrest the flow of private antitrust collusion cases.

Our results are counterintuitive. On the standard account that the summary judgment trilogy effected trans-substantive change on summary judgment practice, one might have expected uniform change—or at least change of some sort—in all three subject areas we studied. One also could imagine that the trilogy had no effect in any area. Finally, one could imagine that the trilogy had effects on the margins in areas where lawyers and litigants have incentives to bring less meritorious claims.[144] On this account, one might have expected to see results in both antitrust and securities regulation cases, but not civil rights cases. After all, antitrust and securities regulation cases share core similarities. Both generally turn on showings of loss causation (called "antitrust injury" in antitrust law), the use of economic analysis as more central to case law development, and both offer the prospect of large damages (whether by virtue of court award or settlement) that in part motivates class actions as a significant part of dockets, such that one might expect experienced and skilled lawyers to undertake these cases for

143. For recent work on textual analysis and machine learning, see generally Jonathan Clarke, Hailiang Chen, Ding Du & Yu Jeffrey Hu, *Fake News, Investor Attention, and Market Reaction*, 32 INFO. SYS. RSCH. 35 (2021) (demonstrating that one can identify fake news from linguistic features of article); Tarek A. Hassan, Stephan Hollander, Laurence van Lent & Ahmed Tahoun, *Firm-Level Political Risk: Measurement and Effects*, 134 Q.J. ECON. 2135 (2019) (showing tools from computational linguistics can be used to measure political risks); David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1 (2019) (using text-analysis techniques to investigate constitutional discourse outside courts).

144. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974) (describing how one-shot litigants are driven more by winning their cases, while repeat players are more likely to act rationally with respect to a large playing field of numerous cases).

plaintiffs.[145] Yet we find that the trilogy had an effect in antitrust but not securities regulation.

What, then, can explain our disparate results? On reflection, the results make sense if one considers three aspects of the trilogy. First, taken at face value, of the trilogy cases, only *Matsushita*'s holding seems designed to result in fewer summary judgment denials (and more summary judgment grants). Second, one of the trilogy of cases—*Matsushita*—was an antitrust case. Third, the subsequent trilogy cases—*Anderson* and *Celotex*—did not extend *Matsushita* beyond the moorings of antitrust law (as *Iqbal* did with respect to *Twombly*). Rather, each trilogy case offered its own unique contribution to the law of summary judgment.[146] Our results, then, are consistent with the notion that *Matsushita*—which introduced the concept of plausibility (a theme the Court subsequently deployed in *Twombly* and *Iqbal*)—had a pronounced effect in antitrust cases, while the trilogy as a whole had little effect on summary judgment decision-making writ large.[147]

In short, unlike *Twiqbal*, the antitrust decision in *Matsushita* did not seem to influence civil procedure more generally. This Article is the first step toward reaching an understanding of the paradox of why antitrust became generalizable at one inflection point of procedure but not another even though both *Twombly* and *Matsushita* propounded exactly the same idea regarding plausibility of claims.[148]

We think it is important, without detracting from the weight of our findings, to acknowledge that our study is subject to several limitations. First, there is selection bias, in terms of the cases that are brought and the cases in which summary judgment motions are lodged.[149] The Priest-Klein model suggests that the cases that go to trial and that are decided by courts may be different from other types of cases.[150] This may be due, for example, to risk tolerance or

145. *See* Choi & Thompson, *supra* note 47, at 1493, 1499 (describing these phenomena in securities cases); Sokol, *supra* note 56, at 691, 697, 729 (discussing these phenomena in antitrust cases).

146. *See supra* notes 28-36 and accompanying text.

147. *See* Thomas, *supra* note 40, at 506.

148. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 560 (2007).

149. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998).

150. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J.

information asymmetries.[151] In particular, perhaps the trilogy of summary judgment cases adjusted the incentives such that litigants and lawyers brought summary judgment motions in cases such that the relative success rate remained the same. This explanation is consistent with our results in civil rights and securities cases, but not antitrust cases.

Moreover, selection bias should also affect the set of cases in which parties losing a summary judgment motion seek to appeal. Yet our results show a statistically significant change in summary judgment success rate after appeals in antitrust cases.

Such limitations should not change the fact that win-loss counts do matter.[152] Decided cases change the nature of both litigation and business planning because they identify data points that represent risk of certain types of outcomes based on facts of a case that may be similar to potential future cases.

Second, there are publication selection effects. For one thing, many opinions—especially district court opinions—are not published. And, while electronic case archives such as Westlaw and Lexis today include many unpublished opinions, that was much less the case in the 1980s. For another thing, the fact that summary judgment denials are not appealable makes it far easier to draft very brief opinions denying summary judgment—or even simply to deny summary judgment on the oral record without any written opinion.[153] For both these reasons, our datasets may omit a number of summary judgment determinations.[154]

LEGAL STUD. 1 (1984).

151. *See id.*; Keith N. Hylton, *An Asymmetric-Information Model of Litigation*, 22 INT'L REV. L. & ECON. 153, 169 (2002); Waldfogel, *supra* note 7, at 229; Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 493 (1996).

152. *See* Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 214 (2014) ("[P]laintiff trial win rates can provide useful information about the law.").

153. *See* Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113 (2012).

154. Overall, it is possible to conclude that the important decisions are ones that are more likely to have been made in writing and published, while shorter and more perfunctory decisions were less likely to have been published. *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 593 (2020). We speculate that the rate at which summary judgment dispositions were published would have increased after the trilogy, since courts might have felt a greater need to engage the trilogy of Supreme Court decisions, and thus prepare longer decisions. Still, that does not necessarily mean that the rate at which summary judgment *grants* (or

Still, our results from two areas—securities regulation and civil rights—are broadly consistent with the results of the Federal Judicial Center study that relied upon docket sheet entries. This provides reason to give credence to our results. And with respect to district judges' incentive to deny summary judgment without written opinion, in one of the categories of cases we studied—civil rights cases—interlocutory appeal of summary judgment denials (with respect to qualified immunity) *is* allowed, and yet we still found no statistically significant impact by the trilogy on district court summary judgment decision-making.[155]

Finally, we think it critical that we found a distinction between the effects of the trilogy in antitrust, as compared to securities, cases. Civil rights cases will typically involve government counsel and counsel for the non-governmental party who may not be particularly sophisticated (including some parties proceeding *pro se*). Moreover, plaintiffs in civil rights cases are likely not to be wealthy and not to be repeat litigation players. Given all of this, we might expect, then as now, that civil rights cases would be less likely to generate written decisions on summary judgment decisions (to the extent that cases reach that stage in the first place).[156]

In contrast to civil rights cases stand antitrust and securities litigation cases. The latter two groups of cases are likely to feature high stakes, experienced and sophisticated lawyers, and repeat-player litigants. All of this should make judges much more likely to provide written dispositions of summary judgment motions, and indeed to publish those decisions.

In short, we think that whatever selection effects were prevalent during the period we studied would have applied more or less equally to antitrust and securities regulation cases. This suggests that our finding that the summary judgment trilogy had an impact

---

denials) were published *changed after the trilogy*. It is possible that judges felt the need to engage the trilogy, and thus a greater push to publish decisions, regardless of the outcome of the decision.

155. As a robustness check, we have conducted machine-learning analysis of the appellate court opinions in our databases. That analysis confirms that antitrust cases focused on collusion and conspiracy cases. This tends to confirm that *Matsushita* did what it was intended to do in antitrust cases: stem the flow of collusion cases by private plaintiffs.

156. *See* McAlister, *supra* note 154, at 542-61.

in antitrust, but not securities, cases is not an artifact of selection bias.

CONCLUSION

In this Article, we have presented the results of a study of the impact of the trilogy of summary judgment cases from 1980-1992, using the year of the trilogy cases (1986) as our structural break. We focused our inquiry on three substantive areas of law in which we hypothesize that summary judgment would have a greater effect—antitrust, securities regulation, and civil rights. In contrast to the broader empirical literature on summary judgment, we found that summary judgment had a large effect on win-loss ratios in antitrust, an effect on civil rights appellate cases, and no effect in securities regulation cases. Empirical analysis of appellate court citation practices reveals that antitrust cases relied much more heavily on the *Matsushita* case (itself an antitrust case) than did civil rights or securities regulation cases. The empirical evidence thus strongly suggests that the trilogy cases had a differential impact across subject areas. This stands in contrast to *Twombly* and *Iqbal* in which a shift in Supreme Court jurisprudence had a more significant role in reshaping civil procedure beyond merely antitrust law.