Pound Civil Justice Institute
2010 Forum for State Appellate Court Judges

Back to the Future: Pleading Again in the Age of Dickens?

PLEADING, ACCESS TO JUSTICE, AND THE DISTRIBUTION OF POWER

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Executive Summary

Professor Burbank begins his paper with the arresting statement that "civil procedure is . . . too important to be left to the judiciary." He explains that this is so because the development and implementation of procedure implicates numerous other aspects of the civil justice system, including access to the courts, compensation for civil wrongs, enforcement of public policy, litigation's role in democracy, and "the role of democracy in litigation."

In part II, Professor Burbank outlines the historical background of the present controversy over the United States Supreme Court's decisions in Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*, which are the foci of this year's Forum. He summarizes the development of the 1938 Federal Rules of Civil Procedure, with an emphasis on the simplicity and flexibility their drafters sought to achieve, to the end that litigants' cases would be decided on their merits, not on technicalities. In the new system, clarification of the issues and development of proofs would be accomplished through discovery and summary judgment, and cases without merit would be winnowed only after the parties had had a fair opportunity for inquiry and advocacy. The resulting "notice pleading" regime was not universally accepted by the judiciary, and*

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occasional attempts were made to force federal procedure back into the code fact-pleading mold, but notice pleading was ratified repeatedly by the United States Supreme Court—as recently as 2002.

Part III reviews Twombly *and* Iqbal*, in which the Supreme Court "retired" its former standard that complaints would not be dismissed unless a pleader could prove "no set of facts" which would entitle the pleader to relief, added a requirement that litigants must allege sufficient facts to make their claims "plausible," and disqualified from consideration for that purpose allegations found to be "conclusory."*

In part IV, Professor Burbank addresses what he considers the most serious consequences of the Twombly *and* Iqbal *decisions: their illegitimate redistribution of power in the civil justice system. He argues that power has been altered: (1) between the Supreme Court and Congress, through the Court's circumvention of the system of federal court rulemaking established by Congress through the Rules Enabling Act; (2) between judges and juries, by remitting important questions that should be decided at trial to the "experience and common sense" of judges, which will likely further reduce the number of federal trials; (3) between plaintiffs and defendants, by substantially reducing the chances of success for plaintiffs in certain types of litigation (notably civil rights cases); and (4) between the "haves" and the "have-nots," by making it harder to achieve success for "litigants who must rely on the contingent fee, pro-plaintiff fee-shifting, and other means of financing litigation," because they lack "the resources and alternative access to information" that their litigation opponents enjoy.*

Professor Burbank concludes that the change in the power dynamic is the real significance of of Twombly, Iqbal, *and other recent decisions of the Supreme Court in the area of civil procedure—a trend he characterizes as "a brazen power grab" that may succeed if Congress fails to take action to reverse it.*

I. Introduction

Recent decisions of the United States Supreme Court demonstrate why, just as civil procedure is too important to be left to proceduralists,[1] it is also too important to be left to the judiciary. *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft* v. *Iqbal* [3] involve the legal standards for assessing the adequacy of complaints to withstand motions to dismiss in federal civil actions. Although at one level concerned with technical requirements of pleading—the process by which, at the beginning of a case, parties disclose their claims and defenses to each other and the court—at another level, these cases raise important questions about access to court, compensation for injury, the enforcement of public law, the role of litigation in democracy and the role of democracy in litigation.

[1] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 877 (1987).
[2] 550 U.S. 544 (2007).
[3] 129 S. Ct. 1937 (2009).

Rules regarding the particularization and persuasiveness of a complaint's allegations implicate the ability of putative plaintiffs to pursue adjudication of disputes on the merits (i.e., to withstand a motion to dismiss), including their ability to discover relevant information from defendants in order to prove their allegations at trial (or to defeat a motion for summary judgment). They thus also implicate the ability of those who have been injured to use litigation in order to secure compensation, and the ability of government to use private litigation for that purpose (i.e., in place of social insurance) and for the enforcement of social norms (i.e., in place of administrative enforcement).

From the perspective of those who may be sued, pleading requirements implicate the ease with which they can be haled into court and forced to incur direct and opportunity costs in defending against, or settling, what may be meritless claims. Finally, from the (self-interested) perspective of the judiciary, pleading requirements implicate the volume of civil litigation and the types of litigation activity that filed cases exhibit, both of which affect the allocation of resources by court systems that in this country are chronically underfunded.

Twombly and *Iqbal* are at root concerned with power and its distribution: first, between the Supreme Court and Congress; second, between judge and jury; third, between plaintiffs and defendants, and finally, between haves and have-nots.

II. Pleading in Historical Perspective

The Rules Enabling Act was enacted in 1934.[4] In 1935 the Supreme Court appointed an Advisory Committee to draft the rules that would implement this delegation of Congressional power to make prospective, legislation-like rules. The original Advisory Committee interpreted the Enabling Act's reference to "general rules" as requiring not just rules that would be applicable in all district courts but also rules that would be applicable in every type of civil action (trans-substantive). The latter interpretation added a practical imperative to the Advisory Committee's preference for rules, including pleading rules, that were simple and flexible in the tradition of equity (ignoring that equity procedure had itself often led to technicality and complexity in pleading and otherwise). On the matter of pleading, the committee was in part reacting to the existence in many states of pleading rules—applicable in federal courts in those states—that required the plaintiff to state facts supporting each element of the legal basis or cause of action relied on. Those who drafted the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions—among "facts," "conclusions," and "evidence"—that they thought were arbitrary or metaphysical. As Edgar Tolman, who bore major responsibility for explaining the proposed new Federal Rules to Congress, put it in his 1938 House testimony:

> I want you now to consider this provision in Rule 8, as to what you have to put into your paper. You used to have the requirement that a complaint must allege the "facts" constituting the "cause of action." I can show you thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to

[4] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. For the Act's origins and the work of the original Advisory Committee, *see* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

> whether a pleading contained a "cause of action"; and of whether certain allegations were allegations of "fact" or were "conclusions of law" or were merely "evidentiary" as distinguished from "ultimate" facts. In these rules there is no requirement that the pleader must plead a technically perfect "cause of action" or that he must allege "facts" or "ultimate facts." [Rule 8 prescribes] the essential thing, reduced to its narrowest possible requirement, "a short and plain statement of the claim showing that the pleader is entitled to relief."[5]

They also believed that pleading was a poor means to expose the facts underlying a legal dispute, a role that could better be played by discovery. Again, Tolman explained:

> One important consideration should be emphasized as to the method by which, under these rules, the opponents may be adequately advised as to the real matter in controversy. The simplified pleadings provided for . . . which give a general view of the controversy are supplemented by the provisions for depositions, discovery and pretrial practice . . . which enable each side by the examination of witnesses, documents, and other evidence, to ascertain in advance of the trial, precise knowledge as to the nature of the case.[6]

In addition, vast changes in social and economic life since the mid-nineteenth century had made it harder for many of those suffering injuries to know exactly what the facts were. This was another reason the Advisory Committee determined to reduce the role of pleading in the new procedural system it was fashioning for the twentieth-century federal courts. The members were also aware that Congress had in the past sought to promote private enforcement of public law (as in the antitrust statutes) and that the New Deal Congress was enacting an unprecedented number of regulatory statutes. Knowing that new legal bases of relief were being developed as a result of federal legislation, the committee wanted to escape the confinement of fact pleading and of the other dominant system at the time—common law procedure. They repeatedly emphasized that the procedures they had drafted should help insure that cases were decided on the merits rather than on the pleadings.

For all of these reasons, the original Advisory Committee decided to provide in Rule 8 that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings and motions are required." The Rule only required the plaintiff to supply in the complaint "a short and plain statement of the claim showing that the [plaintiff was] entitled to relief." Neither the term "cause of action" nor "facts" was used. Moreover, in Rule 9 the committee made clear both that the Federal Rules required particularized allegations only of fraud or mistake, and that no such requirement applied with respect to "malice, intent, knowledge and other conditions of a person's mind."

The committee attached forms to the rules showing how very little was required of plaintiffs—just enough that (1) the defendant could answer the complaint and the case could

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[5] *Rules of Civil Procedure for the District Courts of the United States: Hearings Before the H. Comm. on the Judiciary*, 75th Cong. 94 (1938) (statement of Edgar B. Tolman, Secretary of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court).

[6] *Id.* at 98.

proceed to the next step—discovery—and (2) in the event of other litigation involving the same parties and subject matter, the law of res judicata (claim preclusion) could be applied. Thus, the only allegation regarding liability in Restyled Form 11 ("Complaint for Negligence") is: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff." In discussing its original (pre-restyling) version (Form 9) at an Institute for members of the bar that was held in October 1938, after the Federal Rules became effective, Dean Charles Clark, the Committee's Reporter, observed:

> [A]n allegation which says simply that the defendant did injure the plaintiff through his negligence is too general and would not stand, for really that tells you no differentiating features about the case whatsoever, except the very broad word "negligence"; while on the other hand . . . the statement of the act in question in a general way, and with a characterization that it is negligent, is sufficient. That is the allegation in this form (Form 9). Here, instead of saying defendant's negligence caused the injury, you say that defendant negligently drove his automobile against the plaintiff, who was then crossing the street, and you have then the case isolated from every other type of case of the same character, really from every other case, as a pedestrian or collision case. *At the pleading stage, in advance of the evidence, before the parties know how the case is going to shape up, that is all, in all fairness, you can require.*[7]

The Federal Rules of 1938 provided access to a highway that might attract and could accommodate a great deal of private litigation, including litigation enforcing public law. In the years following 1938, a number of Supreme Court decisions, including *Hickman v. Taylor*[8] in 1947 and a 1957 case called *Conley v. Gibson*,[9] embraced the concept of "notice pleading," permitting plaintiffs to allege very little in their complaints, and that in general terms. Decided shortly after some federal judges urged an amendment to Rule 8 in order to reintroduce fact pleading, and soundly rejecting that approach, *Conley* was repeatedly cited with favor by the Supreme Court and lower federal courts.

Eventually, however, aspects of the 1938 system, including notice pleading and the restrictive view of summary judgment that initially prevailed, assumed a different complexion when combined with other litigation-empowering devices such as broad discovery (further unleashed by amendment to the Federal Rules in 1970), statutory incentives to litigate (e.g., a host of new federal statutes with pro-plaintiff fee-shifting provisions), the modern class action (created by amendments to the Federal Rules in 1966), and an increasingly entrepreneurial bar (assisted by decisions striking down anti-competitive regulations like the traditional ban on

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[7] AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF SYMPOSIUM AT NEW YORK CITY 241 (1938) (emphasis added). *See also id.* at 308 ("What these rules do emphasize with respect to the contents of a pleading (as the forms in the Appendix show) is that any plain telling of the story that shows that the pleader is entitled to relief upon the grounds he states is sufficient to bring the pleader's cause into court. That the statement or averment includes a conclusion of law is no ground for a motion to strike or for a motion to make definite, merely because the statement or averment embodies a conclusion which might be elaborated by a more particularized detailing of the facts.") (George Donworth). *See also infra* note 32 (relationship between Rule 12(b)(6) and Rule 12(e)).

[8] 329 U.S. 495, 501 (1947).

[9] 355 U.S. 41 (1957).

advertising). As the federal litigation highway became congested, the federal judiciary responded to the perceived docket crisis (which was exacerbated by inadequate resources) by turning to one approach after another—from managerial judging, to sanctions, to summary judgment, to heightened pleading. Although different in many respects, these approaches share the quest for greater definition and the ability it affords courts to make rational judgments as to whether a case should be permitted to proceed.[10]

Apparently persuaded that an invigorated summary judgment procedure—already embraced by many lower federal courts starting in the 1970's and blessed by the Supreme Court in the mid-1980's—was not a sufficient response to contemporary litigation ills, a number of lower federal courts performed a similar operation on the pleading rules. Notwithstanding the Supreme Court's embrace of notice pleading and the listing of only a few matters requiring greater factual specificity in Federal Rule 9(b), some courts determined that certain types of cases should be subject to heightened pleading requirements. In its *Swierkiewicz* and *Leatherman* decisions, one a civil rights case and the other an employment discrimination case, the Supreme Court twice within a decade rejected such judge-made rules as inconsistent with the Federal Rules and with the principle that Federal Rules can be changed only through the Enabling Act process or by statute.[11] Apparently the message was lost on, or simply unacceptable to, some lower federal courts, as the technique persisted even after *Swierkiewicz.*[12] By this time it bordered on lawlessness.

During the period when the Supreme Court was warning the district and appeals courts that notice pleading was still the law, efforts were again made (as they were prior to *Conley*) to persuade the Advisory Committee on Civil Rules to propose amendments that would implement some form of fact pleading on a trans-substantive basis. On each occasion the Advisory Committee determined not to proceed. Because such amendments would obviously and directly implicate access to court and the enforcement of substantive rights, rulemaking in the area would attract intense interest group activity (on both sides) and would lead to intense controversy in Congress.

III. History Be Damned

The stage is now set for a consideration of the two decisions that are at the center of current controversy. In order to understand and appreciate the significance of *Twombly* and *Iqbal*, however, it is helpful to recall that shortly after *Twombly*, the Court decided *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*[13] In that case the Court interpreted provisions in the Private Securities Litigation Reform Act of 1995 ("PSLRA") that superseded Federal Rules 8 and 9 in securities fraud cases by requiring not only factual particularity but a prescribed level of persuasiveness. The statutory language in question provides that "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving

[10] *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting from Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 618-26 (2004).
[11] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993). *See also* Crawford-El v. Britton, 523 U.S. 574 (1998).
[12] *See, e.g.,* Perry v. Southeastern Boll Weevil Erad. Fund, Inc., 154 Fed. Appx. 467, 472 (6th Cir. 2005); Danley v. Allen, 540 F.3d 1298, 1313-14 (11th Cir. 2008).
[13] 551 U.S. 308 (2007).

rise to a strong inference that the defendant acted with the required state of mind [scienter]."[14] The *Tellabs* Court's interpretation of "strong inference" was that "an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference."[15]

Seeking to apply the Supreme Court's decision in *Tellabs* on remand to the court of appeals, Judge Posner observed that "[t]o judges raised on notice pleading, the idea of drawing a 'strong inference' from factual allegations is mysterious."[16] In doing so, he aptly described the sense of cognitive dissonance currently afflicting those who practice, or are otherwise concerned with, pleading in the federal courts. For, pleading's new—or more precisely renewed[17]—prominence in the procedural landscape is hardly confined to cases brought under the PSLRA.

A. *Twombly*

In *Twombly*, the Court reinstated the dismissal under Rule 12(b)(6) of an antitrust conspiracy complaint brought under § 1 of the Sherman Act against the regional telecommunications service providers that remained after the breakup of AT&T. In reversing a panel of the Second Circuit, the Court "retired" the language in *Conley v. Gibson* that "a complaint should not be dismissed ... unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief."[18] Agreeing, however, with *Conley* that a complaint must give "fair notice of what the . . . claim is and the grounds upon which it rests,"[19] the Court interpreted the latter as requiring that its "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]"[20] The Court then held that for a § 1 Sherman Act claim these standards "require[d] a claim with enough factual matter (taken as true) to suggest that an agreement was made."[21] Disregarding direct allegations of conspiracy as conclusory, the Court held that the plaintiffs' claims were not plausible because they rested on "parallel conduct and not on any independent allegation of actual agreement among [defendants]."[22]

After *Twombly* came down, it was suggested that the ambiguity of the Court's opinion was strategic, empowering the lower courts to vary requirements to withstand a motion to dismiss depending on perceived differences in procedural (i.e., discovery) demands and/or substantive contexts, with the Court retaining the power to police egregious excesses while preserving deniability.[23] An alternative account is simply that the Court's goal of changing the Federal

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[14] 15 U.S.C. § 78u-4(b)(2) (2006).
[15] *Tellabs*, 551 U.S. at 324.
[16] Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 705 (7th Cir. 2008).
[17] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 573-74 (2007) (Stevens, J., dissenting) (discussing notice pleading as a response to "[t]he English experience with Byzantine special pleading-rules" and the Field Code's requirement of pleading "'facts' rather than 'conclusions'").
[18] 355 U.S. at 45-46; *see Twombly*, 550 U.S. at 563 ("[T]his famous observation has earned its retirement").
[19] *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).
[20] *Id.*
[21] *Id.* at 556.
[22] *Id.* at 564.
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> More probably, *Twombly* is an exercise in strategic ambiguity that empowers the lower federal courts to tighten pleading requirements in cases or categories of cases that augur similar discovery burdens (or are otherwise disfavored), while preserving deniability in the Court through the use of

Rules outside of the Enabling Act process without admitting that it was doing so understandably yielded a confusing opinion.[24]

In any event, it now appears that two of the justices who joined the Court's opinion in *Twombly*, including the author of that opinion, believed that the interpretation of the Federal Rules in that case represented a relatively minor reorientation, appropriate for the specific substantive context and other cases in which the federal courts strictly police the inferences that are permissible under the substantive law and/or for cases portending massive discovery. For these justices, in other words, *Twombly* did not represent a change in pleading standards that could fundamentally alter the role of litigation in American society.[25] Their belief was understandable but, at least in retrospect, naïve.

B. *Iqbal*

The *Iqbal* case involved claims brought by a citizen of Pakistan whom federal officials arrested after the 9/11 attacks and who was detained at the (federal) Metropolitan Detention Center in Brooklyn, New York, pending trial on charges of fraud in connection with identification documents (to which he ultimately pleaded guilty, leading to his removal to Pakistan). The complaint alleged that Iqbal's seven-month confinement in highly restrictive conditions resulted from unlawful racial and religious discrimination. It also alleged that a number of lower-level F.B.I. and Bureau of Prisons officials and employees were liable for such violations of his rights as use of excessive force, unreasonable and unnecessary strip and body-cavity searches and denial of medical care while in detention. Finally, Iqbal asserted that Robert Mueller, the Director of the F.B.I., and John Ashcroft, the Attorney General of the United States, adopted and/or approved policies and directives pursuant to which he was confined in such restrictive conditions, policies and directives that purposefully discriminated on the basis of religion and race.[26]

In affirming the district court's decision denying motions to dismiss four counts against Mueller and Ashcroft, Judge Newman for a panel of the Second Circuit sought to apply

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its discretionary docket to correct perceived excesses (as in Erickson).

Editorial, *The Devil in the Details*, 91 JUDICATURE 52 (2007). The author was Chair of the Editorial Committee of the American Judicature Society at the time this editorial was published. The reference is to Erickson v. Pardus, 551 U.S. 89 (2007), a case decided a few weeks after *Twombly* (without argument and per curiam) in which the Court reversed the Tenth Circuit's affirmance of a judgment dismissing a prisoner's complaint under Rule 12(b)(6). For reasons why *Erickson* did not provide much comfort to those concerned that *Twombly* was generally applicable (not confined to antitrust cases), see Editorial, *supra.*

[24] Compare, *e.g.*, Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) (the Court's "task is to apply the text, not to improve upon it"); Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999) ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and … we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right'.").

[25] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) (Souter, J., dissenting); *id* at 1961 (Breyer, J. dissenting).

[26] *See* Iqbal v. Hasty, 490 F.3d 143, 147-49, 165, 174-76 (2d Cir. 2007), *rev'd*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

Twombly, which had been decided less than two months earlier. He concluded:

> [T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the plaintiff alleges satisfies the plausibility standard [of *Twombly*] without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.[27]

The Supreme Court granted the Solicitor General's petition for a writ of certiorari. In its brief, the Government argued that, in furtherance of the policies underlying the defense of official immunity, the Court should require that complaints against high-level government officials contain "'specific, nonconclusory factual allegations' that establish . . . cognizable injury."[28]

In light of a slow trickle of ever more troubling information about how the previous administration fought the war on terrorism—despite an approach to governmental secrecy that would have made Ceauşescu proud[29]—the Court should have affirmed the Second Circuit and allowed *Iqbal* to proceed to discovery, even if "limited and tightly controlled."[30] Alternatively, the Court should have forthrightly required fact pleading as a matter of substantive federal common law, that is, as a necessary protection for the judge-made defense of official immunity.[31] After all, there could be no question of inadequate notice in *Iqbal* even if that were a relevant question under Rule 12(b)(6) (as opposed to Rule 12(e) (motion for a more definite statement)).[32] Moreover, Judge Newman's careful analysis of the complaint as pleaded with

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[27] *Id.* at 175-76; *see also id.* at 166.

[28] Brief for Petitioners at 15, Ashcroft v. Iqbal, No. 07-1015 (U.S. Aug. 29, 2008) (quoting Crawford-El v. Britton, 523 U.S. 574, 598 (1998)); *see id.* at 28.

[29] "Under Romanian law, anything that is not a 'State secret' is a 'Service secret'—in other words, everything is secret." Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F. 2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring).

[30] *Iqbal*, 490 F.3d at 158.

[31] *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 555-56, 558.

[32] *See Iqbal*, 490 F.3d at 166 ("And like the Form 9 complaint approved in *Bell Atlantic*, Iqbal's complaint informs all of the defendants of the time frame and place of the alleged violations"). The Second Circuit did, however, note generally that "in order to survive a motion to dismiss under the plausibility standard of [*Twombly*], a conclusory allegation concerning some elements of a plaintiff's claim might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. See Fed. R. Civ. P. 12(e)." *Id.* at 158.

Responding to a contention that the complaint in Form 9 [now 11] "would be insufficient in any court of law," Dean Clark observed:

> Now, as to what the law is generally in this country, I have studied it a good deal on this very point, and I think one must hesitate to make too definite pronouncements. My impression is that very few courts would hold such a general statement wholly invalid; that is, would hold that it did not state a cause of action. I am quite sure that a great many of the leading courts would say that the only possible objection is lack of detail, and the only question would be whether it would be subject to a motion to make more definite and certain.

AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT CLEVELAND, OHIO 222, 223 (1938).

respect to the defendants of interest—the Attorney General and the Director of the FBI—made it difficult to hold that a general plausibility test under Rule 12(b)(6) had not been met. To so hold, indeed, seemingly would advance the view, absurd on its face, that the Federal Rules impose on plaintiffs generally a more demanding standard to survive a motion to dismiss than does the PSLRA on plaintiffs in securities fraud cases.[33] The Government denied that it was calling for the imposition of a heightened fact pleading requirement in cases against high-level government officials who are entitled to the immunity defense,[34] as well it might because the Court has made it impossible for the judiciary openly to impose such a requirement other than through the Rules Enabling Act process. Comments at the oral argument suggested, however, that the Court might accept the Second Circuit's view of *Twombly* as prescribing a flexible "plausibility standard," but take a different view of the appropriate contextual plausibility judgment than did the lower courts in *Iqbal*.[35] And that is what the Court did, changing the (judge-made) law of official immunity, disregarding direct allegations of intentional discrimination as conclusory, and deeming inferences of such motivation for the actions taken implausible when compared to other accounts they could imagine.

Over the dissent of four justices—again, including the author of the Court's opinion in *Twombly* and another justice who joined that opinion—the Court in *Iqbal* inconsistently treated some of the complaint's assertions as factual allegations and others as conclusions. Most notably, the Court disregarded direct allegations of intentional discrimination, notwithstanding Rule 9(b)'s assurance that "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally."[36] That move enabled the Court, however breezily, to assess the plausibility of the inferential basis for the theory of the plaintiff's case.[37] Relying on "judicial experience and common sense,"[38] the Court found the complaint implausible. Because the Federal Rules are trans-substantive, the Court was constrained to make clear that its approach applies across the

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[33] I share the Second Circuit's view that the allegations that Ashcroft and Mueller were personally involved in the adoption and/or approval of the policies and directives challenged in *Iqbal* tell a story that is reasonable to believe. Note that the *Iqbal* complaint does not attempt to hold those individuals responsible for the quotidian abuses during confinement that it alleges in claims against lower-level officials and employees.

[34] *See, e.g.,* Transcript of Oral Argument at 11, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) [hereinafter *Iqbal* Transcript] (No. 07-1015) ("And we're not asking for a heightened pleading standard, Justice Ginsburg.") (Solicitor General Garre); Reply Brief for Petitioners at 12, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) ("Petitioners do not ask the Court to adopt any heightened pleading standard. Rather, their position is that the lower courts failed to follow this Court's decisions in this area and give a 'firm application' of the Federal Rules").

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> Well, I thought, and others may know better in connection to Bell Atlantic, but I thought in Bell Atlantic what we said is that there's a standard but it's affected by the context in which the allegations are made. That was a context of a particular type of antitrust violation and that affected how we would look at the complaint. And here because we're looking at litigation involving the Attorney General and the Director of the FBI in connection with their national security responsibilities, there ought to be greater rigor applied to our examination of the complaint.

Iqbal Transcript, *supra* note 35, at 36-37 (Chief Justice Roberts). *See id.* at 43 ("What you have to show is some facts, or at least what you have to allege are some facts, showing that they knew of a policy that was discriminatory based on ethnicity and country of origin.") (Chief Justice Roberts).

[36] FED. R. CIV. P. 9(b). *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

[37] *See Iqbal*, 129 S. Ct. at 1951-52. Note that, prior to dealing with the adequacy of the complaint, the Court changed the law of official immunity, making it even more difficult to impose liability on officials in supervisory positions. *See id.* at 1947-49.

[38] *Id.* at 1950.

board—that *Twombly* cannot be confined to its substantive context (antitrust) or according to some other criterion (e.g., cases with heavy discovery burdens).[39]

The architecture of *Iqbal's* mischief—undoubtedly a major source of regret for the author of the *Twombly* decision, who dissented in *Iqbal*—is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e). *Conley's* "no set of facts" language concerned the former question, not the latter, with the result that even if post-*Conley* courts were technically correct in invoking that language when denying 12(b)(6) motions to dismiss, the same courts could have granted Rule 12(e) motions for more definite statement (had defendants made them and had the complaints in fact provided inadequate notice). Although the *Twombly* Court "retired" the "no set of facts" language, it did not retire, but rather perpetuated and exacerbated, this mistake.

The Court's other errors were built on this rotten foundation. Thus, the power that the Court claimed to carve a complaint, accepting some allegations of fact as true while ignoring others ("threadbare allegations"), as well as mixed allegations of law and fact, as conclusory, was, from an originalist perspective, misguided. In *Twombly*, the Court ignored allegations of conspiracy; in *Iqbal*, notwithstanding Rule 9(b), it ignored allegations of discriminatory intent. The discretionary power of the judge to follow his or her personal preferences in assessing the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded. Yet, as I have discussed, an important reason why the drafters of the 1938 Federal Rules rejected fact pleading is that one person's "factual allegation" is another's "conclusion."

IV. *Twombly*, *Iqbal*, and the Redistribution of Power

It is too easy, however, to become lost in the trees of pleading doctrine when discussing these decisions. Their significance, which is difficult to overstate, can best be appreciated by considering how they have redistributed power.

A. Power as Between the Supreme Court and Congress

Although one occasionally hears careless talk about court rulemaking as a form of inherent judicial power, that claim is not tenable in the case of rulemaking by the Supreme Court for the conduct of proceedings in lower federal courts. Indeed, it is not apparent that federal supervisory court rulemaking can be squared with Article III of the Constitution, which helps to explain why the Court has always adhered to a theory of delegated legislative power.[40]

The instrument of delegation for the Federal Rules of Civil Procedure is the Rules Enabling Act of 1934, which as amended over the years authorizes and sets limits on the enterprise and prescribes the process to be used. Key process elements include the power of Congress to review, and if necessary to block, prospective policy choices reflected in proposed Federal Rules

[39] *See id.* at 1953.
[40] *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1679-89 (2004).

and amendments before they become effective, and since 1988, requirements designed to ensure broad public input, transparency and accountability before proposals reach the Supreme Court.[41]

Considered in the light of the Enabling Act, the question whether the Court in *Twombly* and *Iqbal* was engaged in interpretation or rule amendment is revealed not as a semantic quibble but rather as an inquiry going to both the formal legitimacy of those decisions and to their soundness as expressions of public policy.

The process leading to *Twombly* and *Iqbal*—adjudication under Article III—and hence the decisions themselves were *illegitimate* because they effected consequential changes to the Federal Rules of Civil Procedure without affording Congress the opportunity to review the new policy choices contained in those decisions before they became effective. They thus violated the requirements of the Enabling Act.[42] The process and hence the decisions were *inadequate* because adjudication did not give the Court, and the justices otherwise lacked, the information, experience, and breadth of perspectives that are necessary for wise prospective lawmaking about matters as fundamental as access to court and the private enforcement of public law.

Although the Court and some of its defenders would have us believe that *Twombly* and *Iqbal* constituted mere interpretations of Rules 8, 9 and 12 in the light of contemporary needs,[43] sufficiently continuous with precedent so as not to constitute changes to those Rules through judicial amendment, that is simply not (if you will excuse me) a plausible claim. Rather, in these cases the Court altered the nature of the Rule 12(b)(6) inquiry,[44] effectively conflating 12(b)(6) and 12(e) and thus rendering the latter irrelevant. In so doing, it changed the notice pleading system that the drafters of the original Federal Rules intended, that the Court, the Congress, and the public had been told in 1938 that the Federal Rules reflected, that the Court embraced as early as *Hickman v. Taylor* in 1947, that it resolutely re-embraced in *Conley*, and that it had referred to with approval in many decisions after *Conley*, including two, one in 1993 and the other in 2002, in which it reversed courts of appeals for imposing heightened fact pleading requirements in certain categories of cases without the authority of statute or the Federal Rules.[45]

The dubiety of the "judicial interpretation" argument is immediately suggested when one considers that, of the four Supreme Court decisions relating to pleading that proponents of this

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[41] *See id.* at 1695-1703.

[42] I do not think it was fortuitous that the Court proceeded by judicial decision rather than by remitting the issues to the Enabling Act process. The Chief Justice appoints all members of rulemaking committees and meets regularly with key participants. He was undoubtedly aware that the Civil Rules Committee had raised and abandoned the possibility of amending the pleading rules a number of times, including in the recent past. Moreover, one of the reasons for the committee's serial inaction—that any amendment tightening pleading would be politically controversial and thus likely to arouse strong opposition in Congress—can only have encouraged the Court to proceed as it did, particularly with a Democratic Congress.

[43] *See, e.g.,* Mark Herrmann & James M. Beck, *Opening Statement*, in Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf.

[44] Unlike Rule 56 (summary judgment), Rule 12(b)(6) was not intended to serve as a tool for separating wheat from chaff in the realm of facts. As noted above, the *Conley* Court's use of the "no set of facts" language was intended to address only those situations in which, no matter how compelling the facts alleged, the law did not provide relief. That is a far cry from the power to assess the plausibility of recovery under an accepted theory of relief.

[45] *See supra* note 11 and accompanying text.

view tend to cite, Justice Stevens authored the Court's opinions in two (*Associated General Contractors of California, Inc. v. California State Council of Carpenters,*[46] and *Crawford-El v. Britton*[47]). Having dissented in both *Twombly* and *Iqbal*, Justice Stevens would surely be surprised to learn that they were grounded in his prior opinions for the Court. He would doubtless have the same reaction to the notion that the (unanimous) decision in *Dura Pharmaceuticals, Inc. v. Broudo*,[48] or part III of *Papasan v. Allain*,[49] both of which he joined, were part of the stealth dismantling of *Conley* v. *Gibson* that this argument posits.

The *Twombly* Court formally and explicitly retired the "no set of facts" standard for dismissing a complaint for failure to state a claim under Rule 12(b)(6). Yet, research—starting with the early 1940's lower court cases cited by the Court in *Conley v. Gibson*—strongly suggests that this standard reflected the original understanding of Rule 8.[50] Moreover, whatever one thinks of the *Twombly* Court retrojecting the concept of "plausibility" as a means to police inferences in antitrust conspiracy cases to the motion to dismiss stage, none of the Court's prior decisions provides even a hint that in Rule 8's "showing" lurks the general plausibility requirement that the *Iqbal* Court announced. Worse, although the plausibility assessment in *Twombly* was rooted in years of directed verdict and summary judgment jurisprudence that policed inferences as a matter of substantive antitrust law, in *Iqbal* the Court was at sea, relying on "judicial experience and common sense" to make assessments about inferences that are not self-evidently grounded in either.

If all of this were not enough to undress the "judicial interpretation" fiction, because the claims of interest in *Iqbal* involved intentional discrimination and that was the focus of the plausibility inquiry, the Court felt compelled to gut Rule 9(b)'s permission to allege states of mind generally. The resulting interpretation is, as a matter of original understanding, demonstrably erroneous.

Twombly and *Iqbal* cannot be saved from the charge of judicial lawmaking (here, judicial amendment) by the insight that judicial interpretation and judicial lawmaking shade into each other or by appeals to the spurious analogy of the common law process. The Court itself has provided an objective standard for distinguishing the two when a Federal Rule promulgated under the Enabling Act is in question. Thus, in order to protect the Enabling Act process, that statute's limitations on rulemaking, and the power it accords Congress to review and, if necessary to block, prospective procedural policy choices, the Court has foreclosed from treatment as mere interpretation (or reinterpretation) giving meaning to a Federal Rule that is

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[46] 459 U.S. 519 (1`983).
[47] 523 U.S. 574 (1998).
[48] 544 U.S. 336 (2005).
[49] 478 U.S. 265, 283-92 (1986).
[50] Any doubt that the "no set of facts" language in *Conley* referred not to the factual specificity of the complaint but rather to the ability of a plaintiff, even a plaintiff alleging the most egregious facts, to recover under the governing substantive law, is dispelled by reading the three cases cited in support of "the accepted rule." *See id.* at 46 n.5. Although *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), is the most famous of the three, in part because it was authored by Judge Charles Clark, the Reporter of the original Federal Rules and the primary drafter of the pleading rules, and in part because of the lengths to which that court was willing to go in preserving from dismissal the pro se complaint of an Italian immigrant, it is not the most informative. For crystal clear doctrinal guidance concerning the meaning of *Conley's* "no set of facts" language, however, one should turn to the first case cited by the *Conley* Court, *Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302 (8th Cir. 1940).

different from the meaning the Court understood "upon its adoption."[51] One can only wonder at the spectacle of justices who deride a "living Constitution" enthusiastically embracing living Federal Rules. From this perspective, I favor "status quo ante" legislation that would bring back the Federal Rules in Exile, providing that the law governing dismissal or striking of pleadings, as well as judgment on the pleadings, be in accordance with the interpretations of the Federal Rules of Civil Procedure by the Supreme Court and the lower courts that existed on May 20, 2007 (the day before *Twombly* was decided).

Congress does not suffer from the deficits in democratic accountability of the Court's decisions in *Twombly* and *Iqbal*. Rather than itself running the risk of legislating pleading law on the basis of incomplete information and partial perspectives, however, Congress should insist on respect for the process it has prescribed in delegating legislative power to the Court to make prospective supervisory rules.

Legislation is appropriate now, however, to forestall the damage that the Court's decisions could do in the three to four years that it will take the Judicial Conference's rules committees properly to address the issues under the Enabling Act process. The risk of irreparable injury to those who cannot satisfy these decisions' new standards, as well as to policies underlying statutes that the enacting Congress intended to be enforced through private litigation, is sufficiently serious to require a return to the status quo existing before *Twombly* was decided. Any uncertainty and inconsistency created by such legislation could not in my view be as great as that which *Iqbal's* capricious complaint-parsing and privileging of "judicial experience and common sense" have already created.

Apart from the formal illegitimacy and patent inadequacy of the course pursued in *Twombly* and *Iqbal*, those decisions have undermined (by drastically altering) a key architectural element of the infrastructure for the private enforcement of public law upon which Congress may reasonably be deemed to have relied when passing numerous post-1938 statutes containing pro-plaintiff fee-shifting and/or multiple damages provisions (which are clear signals of the perceived importance of private enforcement). They have also undermined the right to trial by jury.

B. Power as Between Judge and Jury

In numerous decisions after *Conley v. Gibson*, the Court made clear that pleading practice is not the appropriate way to challenge the factual sufficiency of a complaint, which is a task for summary judgment. Summary judgment, which itself was put on steroids by lower federal courts as a means to deal with burgeoning dockets in the 1970's—a development that the Supreme Court blessed with its famous trilogy of summary judgment decisions in the mid-1980's—is in tension with the Seventh Amendment right to jury trial.[52]

Granting, however, that it is too late in the day to carry a formal constitutional argument against modern summary judgment jurisprudence, one would have thought that the federal judiciary would at least attempt to do no more harm. Or at least one might have so hoped in the

[51] *Ortiz* v. *Fibreboard Corp*., 527 U.S. at 861.
[52] *See* Burbank, *supra* note 10, 600-02, 620.

light of striking data that document the phenomenon known as The Vanishing Trial. Thus, over a forty-year period starting in the early 1960's federal terminations at or after trial declined from somewhat under 12% to somewhat under 2% of all terminations.[53]

With the advent of plausibility pleading, it would be surprising if the trial termination rate did not decline even further. Moreover, given the indeterminacy of the parsing exercise and the process of comparative inference assessment that *Twombly* and *Iqbal* prescribe, it would be surprising if the new pleading regime did not resemble contemporary summary judgment practice in yielding different rates of activity in different parts of the country and in different kinds of cases.[54]

Summary judgment involves assessments of factual sufficiency to support a jury finding after the opportunity for discovery. The policing of inferences central to plausibility pleading is undisciplined by a factual record. As unfair as that may be to plaintiffs lacking the resources necessary for extensive pre-filing investigation and/or access to information in the control of defendants, it is equally problematic from the perspective of the right to jury trial.

In *The Death of the American Trial*, Professor Robert Burns observes:

> Common sense very rarely confronts the level of detailed factual development that the trial provides. Every time the lawyer says, "Generally and for the most part . . .", the other lawyer is likely to say, "Yes, but not where . . . ." Each new case requires a genuine insight, what Peirce called an "abduction," that must seek out the intelligibility inherent in these particular facts.
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> . . .
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> Paradoxically, by giving particularity and empirical truth their due, the trial provides a strong critique of commonsense generalizations . . . . The trial provides a self-criticism of the overgeneralized "scripts" with which much of our common sense is stored.[55]

What the *Iqbal* Court called "judicial experience and common sense" is subject to no such critique and, again, it is not even subject to the potential discipline of a factual record. It is easy to see how Justice Souter could have been misled to retroject to the pleading stage well-developed substantive antitrust law limiting the inferences that juries are permitted to draw from evidence of parallel conduct. It is unfortunate that he was so naïve as not to recognize the potential for mischief of the tools he was bestowing on colleagues with different agendas, one of which may have been changing the balance of power between judge and jury across the board.

Employment discrimination cases are one category likely to suffer at the hands of district judges implementing a contextual plausibility regime. Systematic empirical evidence has long

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[53] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459, 533-34 (2004) (Table A-2).
[54] *See* Burbank, *supra* note 10, at 618.
[55] ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 33, 35 (2009).

demonstrated how poorly employment discrimination plaintiffs fare in federal court.[56] A recent Federal Judicial Center study reveals that employment discrimination cases terminate by summary judgment at rates far higher than other categories of cases.[57] One reason may be that we are witnessing in employment discrimination cases the results of what Professors Kahan, Hoffman and Braman call "cognitive illiberalism"[58] in their recent article on the dangers of summary adjudication exemplified by the Supreme Court's decision in *Scott* v. *Harris*.[59] The reason is that in employment discrimination cases one would expect "Americans [to] interpret th[e] facts against the background of competing subcommunity understandings of social reality,"[60] making them strong candidates for the operation of cognitive biases of the sort those authors document.

The *Iqbal* Court's reliance on "judicial experience and common sense" is, in certain types of cases, an invitation to "cognitive illiberalism" more worrisome than when summary judgment is involved. At least in the latter situation judicial subjectivity is disciplined by an evidentiary record created after discovery. No such constraint operates when a judge assesses the plausibility of a complaint in connection with a motion to dismiss. Judgments about the plausibility of a complaint are necessarily comparative.[61] They depend in that regard on a judge's background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual's cultural predispositions[62] as are judgments about adjudicative facts. Whether or not *Twombly* and *Iqbal* draw in question the compatibility of the motion to dismiss with the Seventh Amendment right to jury trial,[63] this perspective suggests a reason for judicial humility in addition to the consideration that plaintiffs confronting a motion to dismiss have had no access to formal discovery. Both plaintiffs and jurors in employment discrimination cases will often have "recognizable identity-defining characteristics" that might cause them to dissent from a view of plausibility grounded in a judge's cultural predispositions. [64]

C. Power as Between Plaintiffs and Defendants

If there were any doubt about the enormous perceived advantage that *Twombly* and *Iqbal* have given to defendants, it should be immediately allayed by awareness of the lobbying by the United States Chamber of Commerce to prevent legislation of the sort I have advocated (restoring the status quo ante until the Federal Rules are amended through the Enabling Act

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[56] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. LEG. STUD. 429 (2004); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 1 (2009).

[57] *See* Memorandum to Judge Michael Baylson from Joe Cecil and George Cort 17 (Aug. 13, 2008) (Table 12) (available from author).

[58] Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009). *See id.* at 896.

[59] 550 U.S. 372 (2007).

[60] Kahan et al., *supra* note 58, at 887.

[61] "The plausibility of an explanation depends on the plausibility of alternative explanations." Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 711 (7th Cir. 2008).

[62] *See* Elizabeth M Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUT. L. REV. 705, 767-71 (2007); Russell M. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

[63] *See* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

[64] *See* Kahan et al., *supra* note 58, at 898-99.

process). That advantage is also perhaps the least damning causal explanation for the legal talking points routinely spouted by the Court's defenders at the bar.

Behavior of this sort also tends to give the lie to one of the defenders' talking points, namely that it is too early to tell what the impact of the decisions will be. Although true from a strict social science perspective, there can be no doubt what effect those making the argument hope for and expect. Moreover, there is evidence of what reason tells us must be true: plaintiffs are faring worse under plausibility pleading than they did under notice pleading.[65]

Of course, the normative question is more interesting than the positive. That question is whether the nature of contemporary litigation is such as to justify giving defendants this kind of advantage at the pleading stage. A basic premise of my argument for legislation taking the status quo ante approach is that this question should be addressed through a process that is not only legitimate but better calculated to yield wise public policy than decisions in two cases by nine justices who lacked relevant personal experience, reliable empirical data (as opposed to cosmic anecdotes and economic theory undisciplined by facts) and adequately diverse perspectives on litigation and its roles in American society.

It is no surprise, I suppose, that in discussions and debates about these decisions, the anecdotes one hears from their defenders have to do only with the costs of litigation, not its benefits, or that there is no mention of the money that would be required to replace litigation as a means of securing compensation and enforcing important social norms. Imagine the reaction of the Chamber of Commerce if the proposal were to give the EEOC adequate resources to enforce Title VII. From this perspective, *Twombly* and *Iqbal* are part of the "zero enforcement" solution to the problem of big government, the "just say 'No'" decisions.

D. Power as Between Haves and Have-Nots[66]

A number of defenders of *Twombl*y and *Iqbal* have argued that the decisions are likely to have their biggest impact in complex litigation like the antitrust class action that led to the Court's decision in the former case. Indeed, this talking point may have originated at a time when it was not clear whether the Court intended its approach in *Twombly* for general application. There should never have been serious doubt on that question. Having chosen to pretend that it was merely interpreting Federal Rules, the Court was stuck with the costs of their foundational assumptions, one of which is that the rules are trans-substantive.[67]

Similarly, there cannot be serious doubt that the costs of *Twombly* and *Iqbal* will fall disproportionately, just as the costs of all other procedural belt-tightening exercises over the last 40 years have fallen disproportionately, not on litigants involved in the types of high stakes, complex cases for which the Federal Rules are fashioned, but rather on litigants who must rely on the contingent fee, pro-plaintiff fee-shifting, and other means of financing litigation. The costs

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[65] *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically*?, 59 AM. U. L. REV. 553 (2010).
[66] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 165 (1974).
[67] *See* Burbank, *supra* note 31.

of these decisions, in other words, will fall disproportionately on civil rights, including employment discrimination, plaintiffs who lack the resources and alternative access to information that those involved in the modal cases driving amendments to the Federal Rules typically possess. This has been the experience with summary judgment,[68] and early empirical data suggest that the pattern is repeating under the regime of plausibility pleading.[69] As to both, the differential impacts revealed by the data cry out for causal explanation. One possibility is the phenomenon of "cognitive illiberalism" discussed above. If there is a realistic danger that judges will privilege their cultural biases in connection with summary judgment motions in employment discrimination cases, how much greater must that danger be under a regime of plausibility pleading.

V. Conclusion

The perspective of power illuminates the Court's recent pleading decisions. It reminds us why generations of judges and procedural reformers have tried to obscure the power of procedure in talk about "adjective law" and the realists' insight that there is no bright line between procedure and substance. It helps to explain why the Court thought that it could get away with a brazen power grab, and, alas, it may help to explain the result if the Court is successful because Congress fails to act.

[68] *See supra* text accompanying note 57.

[69] *See* Hatamyar, *supra* note 65. *See also* Appendix B to my Senate Testimony, http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf, which provides a sample of many lower court cases suggesting or making explicit that complaints have been dismissed post-*Twombly* and *Iqbal* that would not have been dismissed previously,