

FOREWORD

IN HONOR OF STEPHEN BURBANK
BEYOND THE FOREST AND THE TREES

*Diane P. Wood**

TABLE OF CONTENTS

I.WHY PROCEDURE? 1992
II.PROCEDURES WITH SUBSTANTIVE IMPACT 1997

It is a great honor and a great pleasure to have the opportunity to say a few words about one of the most consequential scholars of civil procedure and the federal courts in the country. No one can do justice to the breadth of Professor Burbank’s more than forty-year span of work, and I know better than to try. A remarkable group of scholars and practitioners has gathered for this *festschrift*, and I will leave it to them to highlight his particular contributions to different aspects of the law.

What I would like to do is to invite all of us to step back and look at the big picture—the forest, if you like. Steve has often done just this, while never losing sight of each individual tree and its potential importance. I am reminded of the 19th century British scholar, Sir Henry James Sumner Maine, who commented on the intertwining of substance and procedure in a way that may be familiar to you. But here is the longer version, in Maine’s words:

So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted

* Circuit Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago.

This Symposium was a collaboration between the University of Pennsylvania Law Review and the University of Pennsylvania Journal of Constitutional Law.

in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.¹

My only quarrel with that sentiment is that this interdependence of substance and procedure is not confined to the medieval Royal Courts, and it is not just “early lawyers” who view law through the “envelope of its technical forms.” For better or for worse, the insight still holds, though today the point has been made in a different way, by Professors Burbank and Tobias Wolff: “in ‘procedure’ lurks power to alter or mask substantive results.”²

I. WHY PROCEDURE?

Compelling as that proposition is, it is not one that is immediately obvious to newcomers to the law, or maybe even some old hands. Why, after all, would anyone want to study court procedure? Who goes to law school dreaming of becoming the leading guru on Federal Rule of Civil Procedure 23, or who fantasizes about picking apart the intricacies of different kinds of dismissals governed by Rule 41? And *who* thought he or she would stay up late at night trying to decide what a “short and plain statement of the claim,” as described in Rule 8, really is? No one I know. And there are plenty of lawyers today who still don’t see the thrill in procedure, though I suspect that they have not read anything that Professor Burbank has written.

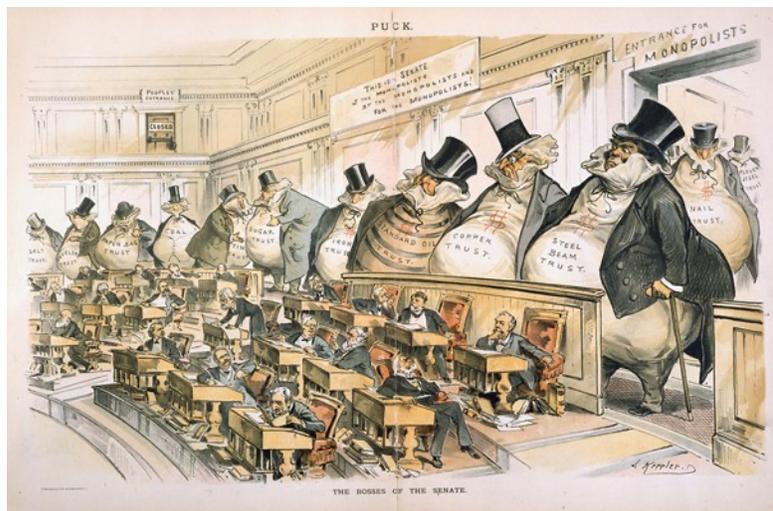
Grander notions of constitutional law dominate the thinking of most law students: What does it mean to assure equal protection of the law? How effective is that constitutional guarantee (and for whom)? Is the right to freedom of speech endless, or does it bump into some limits (“fire” in a crowded theater, defamation, or tweets about unfounded conspiracy theories, perhaps)? Is the fact that the death penalty was widely used in 1791 enough conclusively to settle the debate on whether it is *now* one of those “cruel and unusual” punishments banned by the Eighth Amendment, and if not, why? Why are some parts of the Constitution effectively unenforceable through the courts—such as Article IV, section 4’s command to the United States to “guarantee to every State in this Union, a Republican Form of

1 HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (London, John Murray 1883).

2 See Stephen B. Burbank and Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 30 (2010).

Government”)? Perhaps recent events will inspire a rethinking of the decision to understand that last one as non-justiciable—we shall see.

Or take statutes. Would you rather explore the Sherman Act (a particular favorite of mine), or the Voting Rights Act of 1965, or the Clean Air Act, or the Endangered Species Act, or would you prefer to lose yourself in the Hydra-headed monster known as discovery of electronically stored information? Did the Rules Enabling Act ever inspire anything like the famous cartoon illustrating the overweening influence the big “trusts” had in Congress (showing huge fat representatives of each of the trusts, looming over small and cowering Senators)?³ Not that I know of.



What, then, is the allure of such civil procedure staples as the Rules of Decision Act⁴ and the Rules Enabling Act⁵? I have always thought that a non-lawyer, or indeed anyone but a civil procedure buff, would regard the Rules of Decision Act as a tautology: “The laws of the several states, except where [federal law] otherwise provide[s], shall be regarded as rules of decision in civil actions in the courts of the United States, *in cases where they apply*.”⁶ Which cases would those be? The statute is now, and always has been, silent about that critical point. That is regrettable for a country that

³ Joseph Keppler, *The Bosses of the Senate*, PUCK, Jan. 23, 1889, at 362.

⁴ 28 U.S.C. § 1652 (2018).

⁵ *Id.* §§ 2071–2077.

⁶ *Id.* § 1652 (emphasis added).

decided immediately to have two parallel sets of courts—state and federal—with largely overlapping subject-matter jurisdiction.

And, as Professor Burbank has pointed out more than once, the Rules Enabling Act also has its Delphic qualities. After stating that the Supreme Court “shall have the power”⁷ to prescribe rules for cases in the lower courts—thereby bypassing the question whether it had that power all along, or if it had only those powers conferred by Congress—the Rules of Decision Act says that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”⁸ It is difficult to take that language literally, as our experience with the “outcome-determinative” approach of *Guaranty Trust v. York* illustrated so well.⁹ Every procedural rule has the potential of “abridging, enlarging, or modifying” a substantive right. And that fact hints at the answer to the question with which we started: why procedure?

Disputes will arise, no matter the size of the society. And for millennia, people have tried to establish peaceful methods of dispute resolution. The Code of Hammurabi (the best-known of the cuneiform group) dates from approximately B.C.E. 1,750.¹⁰ And Codes existed even before that: around 2,400 B.C.E., there is evidence of a Code of Urukagina, named for a man who was king in some city-states of ancient Mesopotamia.¹¹ Laws are also referred to in cuneiform scripts in a number of ancient kingdoms—for example, Sumeria, Babylon, Assyria—dating back to the period between 2,800 and 1,200 B.C.E.¹² In ancient Ur, one finds the Code of Ur-namma dating from around 2,100 B.C.E; it is the earliest extant legal text and can be seen today in Istanbul at the Archeological Museums.¹³

Fast forward about 4,000 years, and we come to the formative years of what became the United States. From those early civilizations forward, it had been clear that a society needs to do more than simply enact laws. It has to have a way of enforcing them. And the English tradition inherited by the

⁷ *Id.* § 2072(a).

⁸ *Id.* § 2072(b).

⁹ 326 U.S. 99 (1945). See *Hanna v. Plumer*, 380 U.S. 460, 466–67 (1965) (“‘Outcome-determination’ analysis was never intended to serve as a talisman.” (citing *Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 537 (1958))); see also Diane P. Wood, *Back to the Basics of Erie*, 18 LEWIS & CLARK L. REV. 673, 682–87 (2014).

¹⁰ See Raymond Westbrook, *The Character of Ancient Near Eastern Law*, in 1 A HISTORY OF ANCIENT NEAR EASTERN LAW 1, 8 (Raymond Westbrook ed., 2003).

¹¹ See Clause Wilke, *Mesopotamia: Early Dynastic and Sargonic Periods*, in 1 A HISTORY OF ANCIENT NEAR EASTERN LAW, *supra* note 10, at 141–43.

¹² See Westbrook, *supra* note 10, at 8–10.

¹³ *Id.* at 8; see also Samuel Noah Kramer, *The Oldest Laws*, 188 SCIENTIFIC AM. 26, 26 (1953).

colonists had such a system: the common law courts and the courts of equity. Roman law and its offshoots were the other major alternative in Europe at the time; but, setting to one side the compelling scholarship of Richard Helmholz (showing how the canon law influenced the common law, and how the canon law itself was related to Roman law),¹⁴ the colonies for the most part paid Roman law little heed.

Instead, the colonies modeled their courts on the local and royal courts they had known in England. But entry to the royal courts, and later the colonial courts, was strictly regulated. A layperson could not just go to the king's court and complain that his neighbor was trespassing on his land; or that he was promised a young horse but the seller delivered an old, broken-down nag; or that his taxes were too high. Only a trained lawyer would have the necessary command of Latin for the "writs" describing the type of case and indicating which court should hear it; and only a trained lawyer was competent in the clumsy "law French" that was spoken in English courts until just after the Restoration in 1688.¹⁵ In short, in order to bring substantive rights to life, or to obtain effective redress from either another private party or the State, a mastery of court procedure was essential.

In that respect, nothing has changed up to the present day. Tribunals of all kinds—federal courts, state courts, arbitral tribunals—need certain basic information before they can move ahead with a grievance that has been laid on their doorstep (usually electronically, these days). The initial paper the court receives—call it a complaint—must serve a few critical functions: (1) it has to tell the court and the other party what the case is about from a factual standpoint; (2) it has to explain why the plaintiff chose *this* court as opposed to another, and justify that choice; and (3) it has to let the court know what kind of remedy the plaintiff is seeking. How easy or hard it is to make that

¹⁴ See generally RICHARD H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* (1987); RICHARD H. HELMHOLZ, *CANON LAW AND ENGLISH COMMON LAW* (1983).

¹⁵ The Concise Oxford Companion to the English Language has a fascinating list of words showing that law French never really left the legal profession: Many archaic French usages continue in the legal usage of England, such as: *amerce, implead, malfeasance, tort*. French word order is preserved in *attorney general, court martial, fee simple, malice aforethought*. The names of most legal roles in English are French in origin, such as: *attorney, bailiff, coroner, judge, jury, plaintiff*. The same is the case with the names of many crimes (such as: *arson, felony, libel, perjury, slander, trespass*) and of legal actions, processes, and institutions (such as *bail, bill, decree, evidence, fine, forfeit, gaol/jail, penalty, pillory, plea, prison, punishment, ransom, sentence, suit, summons, verdict*). Tom McArthur, *Law French*, *CONCISE OXFORD COMPANION TO THE ENGLISH LANGUAGE* (June 11, 2018), <https://www.encyclopedia.com/social-sciences-and-law/law/law/law-french> [<https://perma.cc/9ZHS-A5XA>].

initial showing will determine how secure the status quo is. If the plaintiff cannot get through the door, then the status quo will remain unchanged, and whatever losses or wrongs might have taken place will stay where they lie. That is true in a federal court whether the reason the plaintiff is turned away stems from her inability to satisfy the criteria of Article III (that is, considerations such as standing, ripeness, and mootness), or if (in a diversity case) she cannot satisfy the amount in controversy imposed by statute,¹⁶ or if she fails to furnish enough detail in her complaint, or if her complaint is so prolix that the court cannot make heads or tails out of it. All of those barriers, it bears underscoring, are procedural in nature.

And that is just the beginning of the procedural hurdles that a litigant must clear. The federal courts have embraced judicial management,¹⁷ and so cases are scripted from cradle to grave. If the litigant wants to obtain information relevant to the claims or defenses in the case, he or she must turn to the discovery rules.¹⁸ Those rules dictate both the ways in which information may be sought and the interactions among the judge, the other party (and its lawyers), and one's own lawyer. Other rules dictate preparation for pre-trial conferences.¹⁹ There are rules of evidence that govern both the pre-trial and trial stages, and there are rules for post-trial motions.²⁰ If the litigant is among the 30% or so of parties in the district court who are unrepresented,²¹ the system is strained to the limit. A thousand and one procedural missteps are not only possible, but common. Often those missteps are prejudicial, and they are sometimes fatal. This is so even though the Supreme Court has instructed the lower courts to take it easy on *pro se* litigants, if possible.²² Naturally, courts are not authorized to relieve *pro se*

¹⁶ 28 U.S.C. § 1332(a) (2018).

¹⁷ See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

¹⁸ See FED. R. CIV. P. 26–37.

¹⁹ See FED. R. CIV. P. 16.

²⁰ See FED. R. CIV. P. 50, 59–60.

²¹ See Mark D. Gough and Emily S. Taylor Poppe, *(Un)changing Rates of Pro Se Litigation in Federal Court*, 45 LAW & SOC. INQUIRY 567, 574 (2020). The numbers are even worse at the court of appeals level: at the Seventh Circuit, something in the neighborhood of 60% of litigants are unrepresented. See *IDB Appeals 2008–present*, FED. JUD. CTR. (June 30, 2021), <https://www.fjc.gov/research/idb/interactive/21/IDB-appeals-since-2008> [https://perma.cc/2YYQ-5254].

²² See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (“The handwritten *pro se* document is to be liberally construed.”); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding a *pro se* complaint to “less stringent standards than formal pleadings drafted by lawyers”).

parties from statutory deadlines and mandatory rules, but there is plenty of play in the joints that can be used to accommodate the non-lawyer.

So again, why procedure? The answer should be plain: if you believe in the Rule of Law; if you like to get things done; if you are committed to a government that treats all the people subject to its jurisdiction in an evenhanded manner; and if you appreciate both the complexities and challenges of the federal system that we have, then procedure is for you. It is the skeleton that supports all the rest of our laws. It is our procedural system that reifies the substantive rules that regulate primary conduct. It makes those rules come alive, or it consigns them to a corner. Indeed, once you finish reading Professor Burbank's work, you are likely to reject the idea that one can sensibly separate procedure from substance. Think of a bedsheet: without both the warp (the threads that run lengthwise) and the woof (the threads that run horizontally) all you would have is a gigantic bundle of thread. Only when the two are woven together does one end up with a sheet. Our legal system is the same: while it is possible for some purposes to distinguish between procedure and substance, we have nothing until they are properly put together.

II. PROCEDURES WITH SUBSTANTIVE IMPACT

Some concrete examples of procedures with particularly notable substantive effects will drive this point home. Let's return to the language of the Rules Enabling Act. Recall that it allows the Supreme Court to prescribe "general rules of practice and procedure,"²³ provided that those rules do not "abridge, enlarge, or modify any substantive right."²⁴ It turns out that this is an impossible task if those general rules of procedure, which are intended to be transsubstantive in their operation, are to do any more than prescribe the font in which a brief must be written, or dictate where on the page the number should appear. And this problem exists no matter what the source of law on which the claim rests may be—federal, state, tribal, statutory, or common law.

Examples of this abound, but we might as well begin at the beginning, with the complaint. Since 1938, federal complaints have been governed by Federal Rule of Civil Procedure 8. Before that time, however, federal courts were

²³ 28 U.S.C. § 2072(a).

²⁴ *Id.* § 2072(b).

instructed to follow the procedural rules of the states,²⁵ and the states built on their English antecedents. Before significant reforms on both sides of the Atlantic in the 19th century, whenever someone wanted to initiate a case, the would-be litigant had to find the correct writ (the correct Form of Action) and assert exactly what that writ required. If the lawyer picked a writ of debt or detinue, but the court thought that the claims sounded in trespass, the case was lost.

In time this was thought to be unduly harsh. In 1848, New York introduced the Field Code, which, while not a resounding success, at least meant well. It required a complaint to contain some identifying information, and then “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended,” and finally, a demand for relief.²⁶ Unfortunately, no one could figure out exactly how much needed to be provided in order fully to describe the cause of action, and so people erred on the side of detail. That dashed hopes for brevity and simplicity, even though the code system was still enough better than the old forms of action that more than twenty states eventually adopted variants of it.²⁷

The Federal Rules of Civil Procedure tried to solve the problem of prolixity by adopting a system of *notice* pleading, in place of a system that demanded that the entire “cause of action” (whatever that was) be pleaded. Thus, we have Rule 8, which requires only three things: (1) a statement of the grounds for the court’s jurisdiction, (2) “a short and plain statement of the claim showing that the pleader is entitled to relief,” and (3) a demand for relief.²⁸ The language has remained largely unchanged since it was written (with the exception of some stylistic tweaks in 2007). The drafters of the original rules illustrated just how simple they expected pleading to be in the Forms (since abrogated) that they appended to the rules.²⁹ Bare-bones does not begin to describe some of those Forms.

²⁵ Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872) (requiring that “the practice, pleadings and forms and modes of proceeding . . . in the circuit and district courts . . . shall conform, as near as may be” to those of “the courts of record of the State within which such circuit or district courts are held”).

²⁶ Act of Apr. 12, 1848, ch. 379, § 120, 1848 N.Y. Laws 497, 521.

²⁷ See Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 10 n.14 (1989).

²⁸ FED. R. CIV. P. 8.

²⁹ See FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment; *Federal Rules of Civil Procedure with Forms*, U.S. COURTS 100–35 (Dec. 1, 2014), <https://www.uscourts.gov/sites/default/files/Rules%20of%20Civil%20Procedure>. [<https://perma.cc/78GG-EPBH>].

Is Rule 8 a procedural rule? Sure—it deals with the content of the papers that must be filed with the court to initiate a lawsuit. Is it, as the Rules Enabling Act puts it, capable of “abridg[ing], enlarg[ing], or modifying” any substantive rights? Sure—as compared with the common-law system or the code system, it enlarges a party’s ability to lodge a case in court and have her dispute resolved. A plaintiff has only to alert the defendant to the nature of the dispute, with enough detail to permit the defendant to respond. Gone, the drafters of Rule 8 hoped, would be the days of exhaustively digging up every pertinent fact (lest one be missed); gone would be the risk of losing a case because a critical fact was exclusively in the possession of the adverse party. The advent of Rule 8 thus meant that certain substantive rights were moved from the category of “theoretical but non-cognizable in court” to “sufficient to move forward.”

Rule 8 also illustrates another point that has been at the center of Professor Burbank’s scholarship: that these Janus-like rules, with one procedural face and one substantive face, come from various sources. The Field Code’s rules about pleading came directly from the New York State Legislature. Some federal pleading rules—notably those that govern private securities litigation, for instance³⁰—come directly from statutes passed by Congress. On a grander scale, the Federal Rules of Evidence as a whole were initially enacted by Congress,³¹ even though they are now handled through the general rule-making process.³² The Federal Rules of Civil Procedure, along with the Criminal, Appellate, Bankruptcy, and Evidence Rules, usually are adopted only after an exhaustive study by the relevant Advisory Committee, which sends them to the Standing Committee on Rules of Practice and Procedure. They next come before the Judicial Conference of the United States, which recommends them to the Supreme Court. The Supreme Court transmits the rules it wishes to enact to Congress by May 1; the rule or rules finally take effect on December 1, unless Congress chooses otherwise.³³ Finally, as Professor Burbank repeatedly has pointed out, rules come about both through authoritative Supreme Court interpretations of

³⁰ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in sections of title 15 of the U.S. Code).

³¹ See Act of Jan. 2, 1975, Pub. L. 93–595, 88 Stat. 1926.

³² See 28 U.S.C. § 2072(a), amended by Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4648–49 (1988).

³³ See 28 U.S.C. §§ 2073–74.

existing rules or statutes and through direct creation of federal common law.³⁴

Until Professor Burbank highlighted this last method, it was flying below the radar. Yet it is quite important, both if one is interested in influencing rule development, and if one is concerned about separation of powers at the federal level. Only Congress has the authority to legislate substantive rules, and it must stay within the confines of its Article I powers. Indeed, one of the Supreme Court's major points in the *Erie Railroad* decision was that the creation of general federal common law in diversity cases was a constitutionally doubtful enterprise.³⁵ That suggests that, to the extent the Court is crafting rules, it needs to stay comfortably on the procedural side of our imaginary line separating substance from procedure.

Or at least that is what the books would tell you. What, then, was the Supreme Court doing when it decided *Bell Atlantic Corp. v. Twombly*³⁶ and *Ashcroft v. Iqbal*?³⁷ Was it reining in an unduly expansive interpretation of Rule 8 that had been launched in *Conley v. Gibson*³⁸ and had run out of control? Or was it deliberately raising the bar for all plaintiffs in civil suits in federal court, therefore constricting the ability to enforce legal rights and, by so doing, diminishing those rights? A closer look at the Court's rationale suggests the answer to that question.

Twombly, recall, was a case arising under section 1 of the Sherman Act, which requires an agreement between the defendants for liability.³⁹ The plaintiffs alleged that the regional Bell operating companies (which had been split off from the old AT&T in an antitrust consent decree) had conspired to exclude upstart new companies from the market, and thereby perpetuate their monopoly (and at the same time evade the restrictions in the consent decree, which was known as the Modified Final Judgment).⁴⁰ The district court thought that the plaintiffs had failed to indicate in their complaint that there was an illegal agreement; instead, all it saw was innocuous conscious parallelism.⁴¹ But what is a plaintiff to do, if it is trying to bring a case based

34 See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1603–14 (2014).

35 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

36 550 U.S. 554 (2007).

37 556 U.S. 662 (2009).

38 355 U.S. 41 (1957).

39 550 U.S. at 548; 15 U.S.C. § 1 (2018).

40 *Twombly*, 550 U.S. at 549–51.

41 *Id.* at 552.

on an illicit agreement? Antitrust is not the only area where this problem arises. The Supreme Court confronted a similar issue, though with a markedly different result, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*.⁴² There the Court had to decide whether there was some heightened pleading standard for civil rights cases brought against municipalities.⁴³ It answered with a resounding “no.”⁴⁴ “[I]t is impossible,” Chief Justice Rehnquist wrote for a unanimous Court, “to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules.”⁴⁵ Additional detail may be demanded only if the case falls within the ambit of Federal Rule of Civil Procedure 9(b), and even Rule 9(b) permits general allegations about malice, intent, knowledge, and state of mind.⁴⁶

In *Twombly*, the Court paid little heed to the distinction between the standards of Rule 8 and Rule 9(b). Instead, it adopted a brand-new standard for federal court complaints. In language that has made me want, more than once, to tear my hair out, the Court gave us the classic “on the one hand, on the other hand” set of instructions. On the one hand, “detailed factual allegations” are not necessary, the complaint must only give the defendant “fair notice” of what the case is about, and the plaintiff is not required to show that success is probable.⁴⁷ But on the other hand, “more than labels and conclusions” is necessary, and “a formulaic recitation of the elements of a cause of action” will not do.⁴⁸ In some unspecified way, “[f]actual allegations must be enough to raise a right to relief above the speculative level.”⁴⁹ The Court’s key word was “plausible,” as opposed to probable (too much) or possible (too little). And, as we all know, the Court doubled down on this standard in *Iqbal*, making it clear that the *Twombly* understanding of Rule 8 was, as is typical for Federal Rules, transsubstantive.⁵⁰

To a lower court judge, it is exceedingly difficult to take a plausibility standard at face value. For one thing, when a judge is asked to decide

42 507 U.S. 163 (1993).

43 *Id.* at 164.

44 *Id.*

45 *Id.* at 168.

46 *See id.*; FED. R. CIV. P. 9(b) (“Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”).

47 550 U.S. at 555–56.

48 *Id.* at 555.

49 *Id.*

50 *Iqbal*, 556 U.S. at 678–80.

whether a complaint fails to state a claim upon which relief can be granted,⁵¹ the judge must accept the factual account set out in the complaint (including inferences that fairly can be drawn) and eschew anything smacking of a credibility determination. Yet what does the word “plausible” mean? According to the Cambridge Dictionary, it means “seeming likely to be true, or able to be believed.”⁵² Merriam-Webster offers this as the third definition of the word: “appearing worthy of belief.”⁵³ It would be a serious matter indeed if the Rules of Civil Procedure are now asking judges to pass on the believability of complaints, in the face of the Seventh Amendment’s preservation of the right to trial by jury and the ironclad rule that credibility questions are for the jury. So our hapless district court judges have had to set aside one of the most obvious meanings of the word “plausible” and search for something else.

In a couple of opinions, I have made a stab at making sense of all this. I began with the interesting fact that the Supreme Court itself, just two weeks after it handed down *Twombly*, issued a *per curiam* decision in a *pleading case*: *Erickson v. Pardus*.⁵⁴ *Erickson* (which the Court has reaffirmed several times) held that under Rule 8 “[s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”⁵⁵ I took the Court at its word: whatever else *Twombly* had done, it did not displace the philosophy of notice pleading. My first effort at synthesizing the new regime occurred in a case called *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*.⁵⁶ That opinion summarized the state of play as follows: “Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.”⁵⁷ Admittedly, that statement does not explain why the clear allegations of collusion in *Twombly* did not suffice. But the problem in *Twombly* was one familiar to antitrust lawyers: if one describes only behavior that firms would adopt individually,

51 See FED. R. CIV. P. 12(b)(6).

52 See *Plausible*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/plausible> [<https://perma.cc/KF8G-4XXD>].

53 See *Plausible*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/plausible> [<https://perma.cc/XC4S-RFXS>].

54 551 U.S. 89 (2007).

55 *Id.* at 93 (quoting *Twombly*, 550 U.S. at 555).

56 499 F.3d 663 (7th Cir. 2007).

57 *Id.* at 667.

where is the agreement? Showing why agreement was one valid way to look at the facts, rather than simple conscious parallelism or less, was necessary to give the defendants some notice of what they had done wrong.

The Seventh Circuit returned to this problem in a case that came before our “University of Chicago” panel: Richard A. Posner, Frank H. Easterbrook, and me. The case was *Swanson v. Citibank, N.A.*⁵⁸ It was a suit brought by a pro se plaintiff who believed that she had been the victim of racial discrimination in the extension of credit—specifically, a home equity loan.⁵⁹ The district court had dismissed it, citing *Twombly* and *Iqbal*, and so the question before the court of appeals was whether she had managed to allege enough to move forward.⁶⁰ Then-Chief Judge Easterbrook and I thought that she had done so; Judge Posner disagreed with us. Swanson had given the details of the loan she wanted, to whom she spoke at the bank, what the person said to her, the bank’s preliminary approval of the loan, and then the bank’s denial of the loan after an appraiser valued her home far below what she thought it was worth.⁶¹ She had even gone out and commissioned an independent appraisal, to support the allegation that she was qualified for the loan.⁶²

The majority began with the now-famous idea that, no more than Congress, the Supreme Court does not hide elephants in mouseholes—in other words, that it “was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes.”⁶³ Instead, we thought, the Court was calling for more “careful attention” to

several key questions: what, exactly, does it take to give the opposing party “fair notice”; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the court?⁶⁴

It was in this light, we said, that the Court’s insistence on plausibility had to be understood:

⁵⁸ 614 F.3d 400 (7th Cir. 2010).

⁵⁹ *Id.* at 402.

⁶⁰ *Id.* at 403.

⁶¹ *Id.* at 403, 405.

⁶² *Id.* at 403.

⁶³ *Id.* at 404.

⁶⁴ *Id.*

“Plausibility” in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, [confirming that] “the plausibility standard is not akin to a probability requirement.” As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff’s inferences seem more compelling than the opposing inferences.⁶⁵

Judge Posner, as I noted, did not see it that way. Perhaps influenced by our then-recent experience in *Tellabs*, where competing inferences must be stacked up, or perhaps simply understanding *Twombly* and *Iqbal* to call for tighter screening, he would have affirmed the decision of the district court.⁶⁶

There is much that one can say about the impact that *Twombly* and *Iqbal* have had. In one way, it would be hard to overstate. Westlaw tells us that *Twombly* has been cited 558,436 times, and *Iqbal* is not far behind, with 447,008 citations. But I’ll leave you with just one observation: there can be no doubt that the Supreme Court took these steps in order to restrict access to the courts. It frankly admitted that it hoped to make it more difficult for cases to move beyond the pleading stage, because the costs of litigation, and especially discovery, were swirling beyond control. Listen to what it said:

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*,⁶⁷ when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “a largely groundless claim” be allowed to “take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” . . . Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, . . . but quite another to forget that proceeding to antitrust discovery can be expensive And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries”; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.⁶⁸

⁶⁵ *Id.* The opinion went on to point out that the Supreme Court did endorse a comparison of inferences for cases brought under the Private Securities Litigation Reform Act of 1995 in the case of *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323–24 (2007). *Id.*

⁶⁶ *Id.* at 407 (Posner, J., dissenting).

⁶⁷ 544 U.S. 336 (2005).

⁶⁸ 550 U.S. at 557–59 (citations omitted).

If this is not a substantive agenda, it is hard to know what would be. An “anemic” case—whatever that means (20% chance of success? 35% chance? 5% chance?)—or a “largely” groundless claim, may have some merit. But if conclusive proof of that merit is hidden deep in the defendant’s files, the plaintiff is out of luck. In the *Twombly* and *Iqbal* decisions, the Court straightforwardly redefined what it means to set forth a “short, plain statement” of a claim “*showing*” that the pleader is entitled to relief.

If pleading were the only area that posed these challenges, perhaps we could live with it. But other examples are easy to gather. Another example which, if possible, raises even more difficult issues than those we saw with Rule 8, comes from the field of class actions. I am speaking here exclusively of the class action regime that began with the 1966 amendments to Rule 23, about which Professor Burbank (once again) has written extensively.⁶⁹ The structure of the rule is familiar: it allows a self-nominated representative to bring a collective action in federal court if that volunteer can satisfy the prerequisites set out in Rule 23(a) and is bringing an action that falls within one of the three categories of Rule 23(b). (I set to one side here the possibility of defendant classes, or defendant joinder, which pose somewhat different problems.) The Rule 23 class action is not, of course, the only type of aggregate litigation possible. Several other options exist, depending on how broadly one wishes to define “aggregate litigation”: (1) joinder of each individual party under Rule 20(a)(1); (2) having an organization⁷⁰ such as one’s labor union,⁷¹ or the Sierra Club,⁷² or the League of Women Voters,⁷³ or the Washington State Apple Advertising Commission,⁷⁴ sue on behalf of its members (think of these as pre-formed classes); or (3) opt-in collective

⁶⁹ See, e.g., Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495 (2017); Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1 (2018).

⁷⁰ Standing to sue is often an issue in these cases. See generally Ryan Baasch, *Reorganizing Organizational Standing*, 103 VA. L. REV. ONLINE 18 (2017). But, as the Supreme Court confirmed in *Hunt v. Washington State Apple Advertising Commission*, an association will have standing to sue on behalf of its members if the members themselves have suffered the type of immediate injury that supports standing. 432 U.S. 333, 342 (1977).

⁷¹ See, e.g., *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–57 (1996) (union suit against employer for violation of Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102(a)).

⁷² See *Sierra Club v. Trump*, 963 F.3d 874, 883–84 (9th Cir. 2020).

⁷³ See *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 466–67 (6th Cir. 2008).

⁷⁴ See *Hunt*, 432 U.S. at 342.

actions such as the one made available in the Fair Labor Standards Act.⁷⁵ Rule 23 class actions hold the promise of enabling people with common claims, based on common facts, to pool their resources and vindicate their rights.

Rule 23(b) recognizes three different types of class actions: those involving limited funds or indivisible obligations (the (b)(1) action); those involving injunctive relief that will benefit all members of the class (the (b)(2) action); and those involving nothing more than a question of law or fact that predominates over any individual issues and for which the class mechanism offers a superior method of adjudication (the (b)(3) action). My focus is on the (b)(3) action, not because there is nothing interesting to say about the other two, but because it best illustrates the slippery nature of the distinction between substance and procedure. The question is simple: how should one characterize a mechanism that transforms one person's claim for \$50 (maybe an overcharge on a rental car contract) into a million such claims, adding up to \$50,000,000 and cognizable in federal court under the Class Action Fairness Act? These are classic "negative value" claims, standing alone: it costs \$402 today just to file a civil action in a federal district court.⁷⁶ A vanishingly small number of people will be so determined to pursue litigation that they will start out in the hole and just dig deeper. So our rental car company has little to nothing to fear from any individual. It is the class action device that transforms this matter from a nothing into potentially huge liability.

The Supreme Court has taken a formalistic approach to these matters in the related area of class arbitration waivers. Hoping to avoid the nightmare ballooning of potential liability I just sketched out, companies sometimes slip into the fine print language indicating that the consumer agrees that all claims will be submitted to arbitration and that she waives the right to seek class arbitration. Just such a provision was inserted into the contract at issue in *AT&T Mobility LLC v. Concepcion*, which the Supreme Court decided in 2011.⁷⁷ That case involved the compatibility of a California law that permitted class-action waivers to be branded unconscionable and unenforceable in consumer contracts of adhesion with the Federal Arbitration Act.⁷⁸ The California

⁷⁵ See 29 U.S.C. § 216; see also *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

⁷⁶ See, e.g., *Fee Schedule*, S. DIST. OF ILL., <https://www.ilsd.uscourts.gov/AttyFeeSchedule.aspx> [<https://perma.cc/3SHE-Y9XT>].

⁷⁷ 563 U.S. 333 (2011).

⁷⁸ *Id.* at 336.

Supreme Court expressly recognized that forcing people into individual litigation was tantamount to a substantive rule allowing consumer rip-offs:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” Under these circumstances, such waivers are unconscionable under California law and should not be enforced.⁷⁹

The U.S. Supreme Court was not bothered by that possibility. Interestingly, it did not deny that such “small-dollar claims . . . might . . . slip through” the cracks in the legal system.⁸⁰ That’s just the way the cookie crumbles. (For what it was worth, the Court added that the particular arbitration system AT&T Mobility offered did seem to the Court to be user-friendly.⁸¹)

The Court returned to this topic in *American Express Co. v. Italian Colors Restaurant*.⁸² It drew an interesting line between provisions in an arbitration agreement that effectively barred the *right to pursue* a statutory remedy—things such as punitively high filing and administrative fees—and the expense of *pursuing* relief, which it brushed aside.⁸³ No matter that in the latter category one might find the expense of hiring expert witnesses, or the expense of pursuing discovery of electronically stored information, or the expense of pulling together a properly supported summary judgment motion. The Court saw no difference between requiring a single litigant to bear those costs and permitting a group to share them.

There is no reason to believe that this line of analysis would be any different for a Rule 23 class action than it was for class arbitration. At least when it comes to certifying classes for litigation, rather than for settlement, the Supreme Court has tightened the screws on Rule 23. It has called for more pre-certification discovery and work and stressed, quoting the late Professor Richard Nagareda, that “[w]hat matters to class certification . . . is not the raising of common questions . . . but, rather, the capacity of a class-

⁷⁹ *Id.* at 340 (quoting *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005)).

⁸⁰ *Id.* at 351.

⁸¹ *Id.* at 351–52.

⁸² 570 U.S. 228 (2013).

⁸³ *Id.* at 236.

wide proceeding to generate common *answers* apt to drive the resolution of the litigation.”⁸⁴ Class actions, the Court cautions, must be viewed as “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”⁸⁵

Perhaps you think that class actions are an essential part of our procedural toolbox, or perhaps you are a skeptic. Maybe you like settlement classes that buy the defendant “global peace,” but you aren’t so sure about litigation classes. Maybe you are attracted to other forms of aggregate litigation, in the interest of efficiency, or consistency of result, or access to courts. Wherever you stand on these issues, it is hard to argue that you are weighing only a “housekeeping” matter of procedure. This is as substantive as a statute of limitations that cuts off a potentially meritorious lawsuit, or a decision about capacity to sue, or an entitlement to attorney’s fees or cost-shifting. That is the message that Professor Burbank has driven home, in article after article, and he makes a powerful case for his position.

Whether or not you agree with him, there are important institutional consequences. Either way, you must ask who should be crafting these rules: Congress? The Supreme Court through the Rules Enabling Act? The Supreme Court in the guise of interpreting statutes or rules? You would not expect the Supreme Court to issue a new statute of limitations that replaced an earlier one enacted by Congress or a state legislature, although in the absence of any governing statute, the Court has sometimes used its common-law powers to announce that the federal courts will borrow the limitations period from an analogous state statute.⁸⁶ You would not expect the Supreme Court to insert an amount-in-controversy requirement conditioning relief under a federal or state statute to damages in excess of a certain floor. Would you be willing to allow the Court to abrogate the American Rule for attorney’s fees—under which the default is that each side bears its own fees—and switch to European-style fee-shifting? I doubt it; that too would be a change in our “procedural” system that easily could be said to “abridge, enlarge, or modify” substantive rights.

⁸⁴ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Adequate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

⁸⁵ Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013); Dukes, 564 U.S. at 348.

⁸⁶ See e.g., Wilson v. Garcia, 471 U.S. 261, 280 (1985); see also Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369, 377–78 (2004) (noting the Court’s prior practice of adopting local time limitations “as federal law if it [was] not inconsistent with federal law or policy to do so”).

In the end, Professor Burbank's laser focus on both individual rules—our trees—and the broader institutional forces at work around them—our forest—has stripped away much of the mythology about the formal rules-making process and shown the complex interaction between many of the rules and the reality of the court system in this country. It is an immense contribution, and one with wide-ranging implications for how rules governing the maintenance and pursuit of lawsuits should be understood. No one is more deserving of the *estschrift* that the *Penn Law Review* has organized in his honor, and I feel privileged to be able to take part. Now, Professor Burbank, it's time to get back to work and tell us how best to move forward.