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### Straw, Sand, and Sophistry

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## DEBATE

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### PLAUSIBLE DENIAL: SHOULD CONGRESS OVERRULE *TWOMBLY* AND *IQBAL*?

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In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the United States Supreme Court reinterpreted Rule 8 of the Federal Rules of Civil Procedure and announced a new standard by which pleadings for civil suits in federal district courts should be judged. The Court explicitly rejected the notion expressed fifty years earlier in *Conley v. Gibson* that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief” and imposed a “plausibility” standard that every federal pleading must meet.

In *Plausible Denial*, Mark Herrmann and James Beck debate with Professor Stephen Burbank whether this plausibility standard is a proper “recalibration” of the pleading rules or an illegitimate “innovation” and whether Congress would be wise to overrule it. In their Opening Statement, Herrmann and Beck argue that the drafters of the Federal Rules intentionally left Rule 8 ambiguous. The creation of new federal rights, liberalization of class action rules, and massive escalation of discovery costs warranted the retirement of the “no set of facts” language from the Court’s earlier interpretation of Rule 8. In their view, the new course set by the Supreme Court is the proper one.

In Rebuttal, Burbank asserts that the pleading standard imposed by *Twombly* and *Iqbal* finds no support in the views of the drafters of the Federal Rules. Moreover, because it circumvented the rulemaking procedures established by the Rules Enabling Act, the Court was not well positioned institutionally to evaluate the procedural costs and benefits of the new plausibility standard. Legislation to restore the status quo, he argues, is necessary to provide sufficient time to consider change in a thoughtful and deliberate way through the democratic processes of rulemaking and legislation.

## OPENING STATEMENT

*Pleading Standards After Iqbal*Mark Herrmann<sup>†</sup> & James M. Beck<sup>††</sup>

The Supreme Court recently clarified the standards for courts to assess complaints upon motions to dismiss. The Court recalibrated a pendulum that has been swinging for 100 years—and the new course is the proper one. The Supreme Court got this one right, and Congress should not trump the Court's decision.

When the Federal Rules of Civil Procedure were adopted in 1938, they changed existing rules for pleading claims. Beginning in 1915, the Federal Rules of Equity had required a complaint to give “a short and simple statement of the ultimate facts upon which the plaintiff asks relief.” FED. R. EQ. 25 (1912) (repealed 1937), *reprinted in* JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES* 158 (1912). So-called “Code pleading,” adopted in many states, required only a “statement of facts” to support a plaintiff's claim.

These standards gave rise to Federal Rule of Civil Procedure 8 in 1938. The Federal Rules unified law and equity. They also removed distinctions between “evidentiary” facts, “ultimate” facts, and “legal conclusions” in complaints. New Rule 8(a)(2) required plaintiffs to provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). It still does.

But what does that mean? Are those words inconsistent with the holdings in *Twombly* and *Iqbal* that Rule 8 requires sufficient factual allegations that, if accepted as true, “state a claim to relief that is plausible on its face”? *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

The obvious answer is “no.” Rule 8 was intentionally ambiguous. The primary draftsman of the 1938 Rules, Charles Clark, explained that “we made a generalized statement in the rules” and “to one judge” a short and plain statement of the claim “may require much more than it does to others.” AM. BAR ASS'N, *RULES OF CIVIL PROCE-*

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<sup>††</sup> Counsel, Dechert; Philadelphia, Pennsylvania. Messrs. Herrmann and Beck co-host the Drug and Device Law Blog, <http://druganddevicelaw.blogspot.com>. The views expressed in this Debate are those of the authors and not necessarily of their clients or firms.

DURE FOR THE DISTRICT COURTS OF THE UNITED STATES 220 (William W. Dawson ed. 1938). That generalized statement worked as expected. Some courts required more detailed pleadings than others. Compare, e.g., *Patten v. Dennis*, 134 F.2d 137, 138 (9th Cir. 1943) (holding that Rule 8 requires “a statement of facts showing (1) the jurisdiction of the court; (2) ownership of a right by plaintiff; (3) violation of that right by defendant; [and] (4) injury resulting to plaintiff by such violation”), with *Chicago & Nw. Ry. v. First Nat’l Bank of Waukegan*, 200 F.2d 383, 384 (7th Cir. 1952) (employing language later used in *Conley v. Gibson*, 355 U.S. 41 (1957)).

In 1955, the Advisory Committee rejected an amendment to Rule 8(a)(2) that would have required plaintiffs to state “facts constituting a cause of action.” See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 893 n.109 (2009). It did so not to endorse fact-free pleading, but rather because the Committee already viewed existing Rule 8(a)(2) as requiring “the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.” ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (1955), available at <http://www.uscourts.gov/rules/Reports/CV10-1955.pdf>.

In 1957, the Supreme Court weighed in, offering in *Conley v. Gibson*, 355 U.S. 41 (1957), an extremely liberal interpretation of Rule 8. *Conley* contained dictum that a complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45-46. This phrasing invited abuse, since hypothetical “set[s] of facts” not even pleaded could prevent dismissal. Taken literally, the *Conley* dictum could make it impossible for a defendant to win a motion to dismiss, thus rendering Federal Rule of Civil Procedure 12 a nullity.

Some courts declined to read *Conley* literally and continued to hold “that legal conclusions need not be accepted as true on 12(b)(6) motions” and “that pleaders are not entitled to unreasonable factual inferences.” Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010) (manuscript at 16), available at <http://ssrn.com/abstract=1452875>. They continued to dismiss complaints that plainly lacked merit.

Meanwhile, times continued to change. After 1957, Congress created many new statutory rights, see, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000 (2006)); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202,

81 Stat. 602 (codified as 29 U.S.C. § 621–34 (2006)), and the Supreme Court recognized others of constitutional dimension, *see, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Federal Rules also evolved. In 1966, Rule 23 was liberalized, hugely expanding class action litigation. *See, e.g.,* 1 ALBE CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1:1 (4th ed. 2002) (documenting the “explosion” in mass tort and class action litigation in last two decades). In 1970, “substantial changes” were made to the discovery rules that broadened discovery beyond anything that existed when *Conley* was decided—e.g., the “good cause” prerequisite to document production was eliminated. *See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487 (1970). The *Conley* Court could not have foreseen these changes nor possibly have contemplated electronic discovery and its deployment as a weapon of mass expense. *See* THE SEDONA CONFERENCE, *THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION* 17 (2d ed. 2007) (stating that unrestrained “transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation”).

An example from our own prior litigation experience is illustrative. In the 1990s, companies in the orthopedic bone-screw industry competed fiercely in the marketplace and regularly took each other to court over intellectual property issues. The industry’s products were used by physicians in standard-of-care spinal surgery.

When organized plaintiffs chose to attack this industry (and its physician customers), they tried to undercut the existing standard of care for surgery. They filed hundreds of complaints alleging: (1) that the entire industry joined a conspiracy to defraud physicians and (2) that the industry, all of the leading medical societies, and certain physicians conspired to defraud other physicians, thus misleading the entire medical profession.

Confronted with one such complaint—naming more than 100 defendants, including many individual physicians—Judge Milton Shadur dismissed it *sua sponte*. *Jarmasek v. AcroMed Corp.*, No. 95-7095, 1995 WL 733466, at \*2 (N.D. Ill. Dec. 8, 1995). In his words, some allegations would “seem very likely to be demonstrably false” and the inclusion of certain defendants—“particularly, though not exclusively, the individual defendants”—“would seem highly problematic.” *Id.*

But another judge, overseeing multidistrict litigation, first permitted the complaints to be amended and then allowed much of the amended complaints to survive motions to dismiss. *In re Orthopedic*

*Bone Screw Prods. Liab. Litig.*, No. MDL 1014, 1997 WL 186325, at \*17 (E.D. Pa. Apr. 16, 1997). Although the manufacturers and medical societies (e.g., the American Academy of Orthopedic Surgeons) argued that physicians' lectures at medical conferences constitute scientific speech fully protected by the First Amendment, the court found them to be only "commercial speech" because plaintiffs "characterize the seminars as 'Tupperware parties' and 'sales events.'" *Id.* at \*16.

The ruling inflicted significant collateral damage. Hundreds of pending lawsuits jeopardized some physicians' credit and ability to obtain mortgages. One physician defendant died, and his widow and young children had to fight to obtain their inheritance out of probate. And, of course, all the defendants suffered the financial and practical burdens inflicted by massive discovery arising from these fanciful allegations. Needless to say, none of those complaints ever came close to trial, and they were eventually dismissed on summary judgment. *See* James M. Beck & John A. Valentine, *Challenging the Viability of FDCA-Based Causes of Action in the Tort Context: The Orthopedic Bone Screw Experience*, 55 FOOD & DRUG L.J. 389, 410-11 (2000). But these allegations of nearly universal conspiracy—without any facts supporting the core conspiracy allegations—created millions of dollars of unnecessary legal expense.

This type of out-of-control litigation prompted the Supreme Court in *Twombly* to adjust the threshold pleading requirements for unleashing the legal process. *See* 550 U.S. at 558 ("A district court must insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." (internal quotation marks omitted)). The Court reminded the judiciary that Rule 8(a) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 555 n.3. Under *Twombly*, a complaint must contain the following:

- "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *id.* at 555;
- "[f]actual allegations . . . enough to raise a right to relief above the speculative level," *id.*;
- "enough fact to raise a reasonable expectation that discovery will reveal evidence of [liability]," *id.* at 556;
- "allegations plausibly suggesting (not merely consistent with) [liability]," *id.* at 557;
- "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory," *id.* at 562 (internal quotation marks omitted); and

- “enough facts to state a claim to relief that is plausible on its face,” *id.* at 570.

The liberal *Conley* “no set of facts” dictum had “earned its retirement” because too many courts had allowed “wholly conclusory statement[s] of claim” to survive “whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” *Id.* at 561-63 (second alteration in original).

Two years later, in *Iqbal*, the Court made clear that the adjusted pleadings standard applied to all complaints, not just to the antitrust claims involved in *Twombly*. In any context, “conclusory” allegations are “disentitle[d] . . . to the presumption of truth.” 129 S. Ct. at 1951.

We applaud this development.

First, *Twombly* and *Iqbal* are proper exercises of judicial power. One of the Supreme Court’s jobs is to interpret the Federal Rules. It is a reasonable choice to emphasize less that a complaint should be “short” and more that it must include a “showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2).

Second, *Twombly* and *Iqbal* are right on the law. The rules should require “plausible” allegations. Why should implausible litigation be allowed? Likewise, claims should have to pass a “more than speculative” test. Anything less simply invites expensive fishing expeditions. As for “labels,” “conclusions,” and “formulaic recitations”—the better-reasoned decisions did not credit them even under *Conley*. The rules are not designed to reward lazy lawyers whose primary litigation tool is the word processor. In short, there is nothing unreasonable about the pleading requirements that the Court articulated. We should celebrate that the Supreme Court has settled on a standard that permits only “plausible,” non-“speculative” claims with a “reasonable expectation” of success to inflict on defendants the enormous cost of discovery and the other collateral damages of litigation.

Third, *Twombly* and *Iqbal* are the right policy. All fair observers acknowledge the skyrocketing cost of discovery. Some argue that the nature of the judicial process guarantees that judges cannot control discovery costs once litigation has commenced. *See, e.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989) (“A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown.”). Every incentive exists for plaintiffs to abuse discovery because many defendants choose settlement when faced with its high cost. It is entirely proper to prevent plaintiffs who cannot

state even “plausible” claims from inflicting massive discovery costs on defendants—and on society.

Fourth, courts have no legitimate basis for favoring plaintiffs when interpreting pleading standards. A just system does not pick sides in advance, but instead establishes neutral rules. We reject the normative view that it is somehow “better” to let unmeritorious cases proceed than to risk that meritorious cases will be dismissed. Either way represents error, and neither error is inherently better than the other. Indeed, given the enormous transaction costs that litigation entails, Type II errors (false negatives) are probably preferable to Type I errors (false positives) from a purely economic perspective.

Finally, we are heartened by the recent statement of three justices:

[T]here is considerable force to the argument that a hearing in which the trial court [imposes the cost of class notice on a defendant, but] does not consider the underlying merits of the class-action suit is not consistent with due process because it is not sufficient, or appropriate, to protect the property interest at stake.

*DTD Enters., Inc. v. Wells*, No. 08-1407, 2009 WL 3255157, at \*1 (U.S. Oct. 13, 2009) (Kennedy, J., concurring in denial of certiorari). The same reasoning equally applies to all litigation costs.

Potentially meritorious claims by plaintiffs should not lightly be dismissed. But implausible claims, unsupported by facts, should be screened out to avoid inflicting massive costs on innocent parties with essentially no procedural protection at all.

Congress should endorse the recent decisions in *Twombly* and *Iqbal*; it should not undo them.



## REBUTTAL

*Time Out*<sup>\*</sup>Stephen B. Burbank<sup>†</sup>

The Supreme Court did not “clarify the standards for courts to assess complaints upon motions to dismiss” in its recent pleading decisions. It changed them. It did so, moreover, through a process that was illegitimate and inadequate given the statutory requirements of the Rules Enabling Act, 28 U.S.C. § 2072 (2006), the stakes, and the Court’s woeful lack of both information and experience regarding the important issues of public policy implicated. Those issues include, in addition to the costs of meritless litigation that Mr. Herrmann and Mr. Beck emphasize, access to court, the right to a jury trial, whether our society remains committed to private litigation as a means of securing compensation for injury and enforcing important social norms, and whether, if we retreated from that commitment, we would provide alternatives.

The drafters of the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions that they thought were arbitrary or metaphysical, too often cutting off adjudication on the merits. As Edgar Tolman, who bore major responsibility for explaining the proposed Federal Rules to Congress, put it, “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.’” *Rules of Civil Procedure for the District Courts of the United States: Hearings on H.R. 8892 Before the H. Comm. on the Judiciary, 75th Cong. 94 (1938)* [hereinafter *Hearings*]. 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. *See id.* at 98.

Notice pleading was an important architectural element of a private enforcement regime that was created by the federal judiciary pursuant to congressional delegation. Once entrenched through *Conley v. Gibson*, 355 U.S. 41 (1957), it became part of the background against which Congress legislated, creating many of the new statutory rights mentioned by Mr. Herrmann and Mr. Beck. What they do not

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mention is the significance that Congress may have accorded notice pleading—and the easy access it affords—when enacting statutes with pro-plaintiff fee-shifting provisions or multiple damages provisions, which are clear signals of congressional purpose to use private civil litigation as a means of enforcement.

The attempt to defend *Twombly* from criticism by arguing that one judicial interpretation merely replaced another is not persuasive. First, it is difficult to find *Twombly*'s (let alone *Iqbal*'s) standards in the relevant work of Charles Clark, the chief architect of the pleading rules, and it is difficult to separate his views from those of the Advisory Committee on which he served as Reporter. Second, as Tolman testified, the original Advisory Committee found “thousands of cases that have gone wrong on dialectical, psychological and technical argument as to whether . . . certain allegations were allegations of ‘fact’ or were ‘conclusions of law.’” *Hearings, supra*, at 94. Third, a generally applicable requirement of “plausibility” is unquestionably an innovation. Fourth, the Court has told us that “we are bound to follow [a Federal Rule] 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.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999). Clark’s pertinent statements about Rules 8 and 12 aside, if one insists on better evidence of the Court’s original understanding than *Conley*, there are (1) *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (“The new rules, however, restrict the pleadings to the task of . . . notice-giving . . .”); (2) Tolman’s 1938 testimony to Congress; and (3) explanations of the new Federal Rules by members of the Advisory Committee at educational events that were held for the practicing bar in 1938. See, e.g., AM. BAR ASS’N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 241, 308 (Edward H. Hammond ed., 1938).

Comparing the role that the drafters of the Federal Rules envisioned for pleading, and what they thought could fairly be demanded of plaintiffs filing complaints, with the new world celebrated by Mr. Herrmann and Mr. Beck leaves no doubt that the Court in *Twombly* and *Iqbal* ignored previous acknowledgments that it has “no power to rewrite the Rules by judicial interpretation.” *Harris v. Nelson*, 394 U.S. 286, 298 (1969). Nor should there be any mystery why the Court proceeded as it did.

Notwithstanding the Court’s embrace of notice pleading in *Hickman* and *Conley*, some lower federal courts determined that certain types of cases should be subject to heightened pleading requirements. In two decisions that Mr. Herrmann and Mr. Beck do not mention,

the Supreme Court rejected such judge-made rules as inconsistent with the Federal Rules and with the principle that the Federal Rules can be changed only through the Enabling Act process or by statute. 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). Yet, the technique persisted even after *Swierkiewicz*, and by this time it bordered on lawlessness.

During the same period efforts were made again (as they were prior to *Conley*) to secure amendments to the Federal Rules that would implement some form of fact pleading. Because such amendments would obviously and directly implicate access to court and the enforcement of substantive rights and rulemaking in the area would attract intense interest group activity (on both sides) and lead to intense controversy in Congress, the Advisory Committee (on a number of occasions) quickly determined not to proceed. See, e.g., Civil Rules Advisory Comm., Minutes: September 7-8, 2006, at 22-24, <http://www.uscourts.gov/rules/Minutes/CV09-2006-min.pdf>; *id.* at 22 (“There is no current disposition to recommend that notice pleading be abandoned or somehow redefined or tightened.”). The Chief Justice, who appoints all members of rulemaking committees and meets regularly with key participants, was almost surely aware of this history. Thus, when the Court (whose membership had changed since 2002) determined to make the break from notice pleading, the Article III process may have seemed all that was available.

In initiating change through its power to decide cases and controversies, however, the Court lacked the information and diverse perspectives that the rulemaking process affords. As a result, the Court was not well positioned institutionally to evaluate the procedural costs and benefits of tightening the pleading screws on plaintiffs in the isolated substantive law contexts involved in those cases. Acting under Article III, it was even less well positioned to estimate the procedural costs and benefits of a *general rule* of plausible pleading, let alone the broader social costs and benefits of such a rule.

Numerous policy questions presented by *Twombly* and *Iqbal* would have benefited from the fruits of empirical research. Consider as an example the *Twombly* Court’s discussion of the costs of discovery. Eschewing any reference to systematic as opposed to anecdotal data, the majority relied to a great extent on an article by Judge Easterbrook that is heavy on theory and light on facts. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989)). Not only was that article’s analy-

sis predicated on a law and economics model of “impositional discovery,” it was published in 1989, before substantial changes to the discovery rules in 1993, 2000, and 2006 that the *Twombly* Court did not mention. Moreover, empirical research aside, many of the policy questions implicated in *Twombly* and *Iqbal* would have benefited from a base of experience with federal trial court litigation broader than that possessed by the members of the Supreme Court, almost all of which predated Justice Stevens’s appointment in 1975.

Mr. Herrmann and Mr. Beck evidently have more federal litigation experience than the members of the Court. Unfortunately, however, (1) they use it as an excuse to pad their Opening Statement with anecdotes said to be representative of the “type of out-of-control litigation [that] prompted . . . *Twombly*,” and (2) they show no more interest in systematic data than did the Court in *Twombly*. Indeed, remarkably, they claim that “[a]ll fair observers acknowledge the skyrocketing cost of discovery.” In fact, empirical research on discovery conducted over thirty years has not demonstrated that it has been a problem in more than a small slice of litigation. Moreover, an October 2009 Federal Judicial Center survey of attorneys in recently closed civil cases hardly supports the story of ubiquitous abuse or “skyrocketing cost.” EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY 40 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) (finding that median estimates of discovery costs related to total litigation costs were lower than the median responses to the question of what the proper ratio is between the costs of discovery and litigation costs). At least, however, Mr. Herrmann and Mr. Beck’s Opening Statement confirms that the heart of the matter is discovery, not pleading.

It has been said that although it may be easy to lie with statistics, it is easier to lie without them. The process of adjudication permitted the Court to avoid some inconvenient truths that the Enabling Act process would have revealed and thereby to realign itself with business and business lawyers, just as Professor Robert Gordon predicted:

Careful studies demonstrate that the “litigation explosion” and “liability crisis” are largely myths and that most lawyers’ efforts go into representing businesses, not individuals; unfortunately, those studies have had no restraining effect on this epidemic of lawyers’ open expression of disdain for law. It may be, however, that business lawyers’ identification with law and the courts may rise again with the recent revival of business-friendly jurisprudence in the Supreme Court.

Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009) (footnotes omitted).

The Court did not know nearly enough to remake federal pleading law through the process of adjudication, which is one reason why Mr. Herrmann and Mr. Beck's blessing of the Court's decisions cannot be taken seriously. At the end of the day, a normative assessment of these decisions and the problems that they address should depend on a careful identification and comparison of the costs and benefits of the litigation system to which notice pleading—accompanied by the opportunity for broad discovery—contributed and the proposed replacement, as well as consideration of alternative institutional avenues of change. One need not reach the former steps, however, in order to conclude that *Twombly* and *Iqbal* were serious mistakes. For, as I have demonstrated, there are many reasons to deplore the use of litigation as opposed to rulemaking or legislation as the vehicle for change, whether one is concerned about the process that should be used before important public policy decisions are made or about democratic accountability.

Of course, no one knows nearly enough about the impact of *Twombly* and *Iqbal* to state with confidence that they have effected or will effect a radical change. Yet, there already are many decisions recognizing that complaints have been dismissed that would not have been dismissed previously and early empirical work suggests a disproportionately adverse impact on the usual victims of “procedural” reform—civil rights, including employment discrimination, plaintiffs. See *Has the Supreme Court Limited Americans' Access to Courts? Hearing Before the S. Comm. on the Judiciary*, 111th Cong. app. B (2009) (testimony of Stephen B. Burbank, Professor, University of Pennsylvania Law School), <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf> (collecting cases); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. (forthcoming 2010) (manuscript at 33-39), available at <http://ssrn.com/abstract=1487764>. Even apart from these concerns, however, Mr. Herrmann and Mr. Beck's Opening Statement provides ample reason to conclude that the risks of harm should not be countenanced while we wait for lawmaking that is legitimate and adequately informed. Thus, their question, “Why should implausible litigation be allowed?,” and their assertion that “courts have no legitimate basis for favoring plaintiffs when interpreting pleading standards” both suggest lamentable indifference to the Seventh Amendment, which assigns to juries, not judges, the role of applying “experience and common

sense” to disputed facts. There is a risk that judges assessing the plausibility of complaints will fail to recognize the influence of their cultural predispositions. Mr. Herrmann and Mr. Beck’s Opening Statement is awash in cultural predispositions, some of which are at odds with foundational assumptions of the Federal Rules, numerous federal statutes that have sought to enlist them in the enterprise of private enforcement of public law, and the constitutionally ordained allocation of power between judge and jury.

Because the Supreme Court’s recent pleading decisions are at odds with premises underlying the Federal Rules, with precedent, and with congressional expectations, and because those seeking access to the federal courts should not have to bear the risk of irreparable injury as a result of improvident Supreme Court decisions, legislation to restore the status quo is necessary and appropriate. Once such legislation is in place, it will be time to consider change in a thoughtful and deliberate way through the more democratic processes of rulemaking and legislation. As suggested, the focus of the inquiry should be discovery, not pleading.

## CLOSING STATEMENT

*In Praise Of Twombly*

Mark Herrmann &amp; James M. Beck

We thank Professor Burbank for his thoughtful critique of our Opening Statement.

Our overwhelming reaction to his critique is this: we have heard these arguments before. In the 1980s, the Supreme Court reinterpreted Rule 56 to make obtaining summary judgment easier. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986). Scholars attacked the Court for eschewing formal rulemaking and for violating the Seventh Amendment. *See, e.g., Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 163-65, 181-87 (1988) (claiming that the summary judgment trilogy violates the Rules Enabling Act and is unconstitutional). In the 1990s, the Court reinterpreted Federal Rule of Evidence 702 to limit expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-95 (1993). Again, the academy was outraged for the same reasons. *See, e.g., Michael H. Gottesman, From Barefoot to Daubert to Joiner: Triple Play or Double Error?*, 40 ARIZ. L. REV. 753, 760 (1998) (arguing that *Daubert* is unconstitutional). Now, in the 2000s, the Court has reinterpreted Rule 8 to raise the pleading bar, and here we go again. We are confident that, two decades hence, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 128 S. Ct. 1937 (2009), will be as accepted a part of the legal landscape as *Catrett* and *Daubert* are today.

We also have specific reactions to Professor Burbank's arguments, which we group into the following five general categories.

*First*, Professor Burbank suggests that *Twombly* and *Iqbal* did not clarify but rather changed the law, perhaps dramatically enough to undercut Congress's reliance on existing pleading standards when it enacted legislation in the 1960s and 1970s. No legislative history is offered, so the same speculation could apply to summary judgment or expert witness standards—Congress "may have" relied on them in its legislative process. Yet Congress has never overruled *Catrett* or *Daubert*, and the Supreme Court still follows them.

*Twombly* is no more "radical" than *Catrett* or *Daubert*. Rule 8(a) invites interpretation. As explained in our Opening Statement, Charles Clark, the primary draftsman of the 1938 Rules, said so. And the lower courts said so: for twenty years, they divided over Rule 8's meaning.

The 1957 *Conley* decision gave Rule 8 an extremely liberal interpretation, but even *Conley* did not end the ambiguity. Federal judges continued to adjust pleading standards in various types of cases, *see, e.g., Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985), and the Supreme Court responded as it saw fit. The Court sometimes rejected more stringent pleading requirements, *see, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and sometimes accepted them, *see e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). *Twombly* and *Iqbal* simply continue that conversation. The Republic has not fallen.

*Second*, Professor Burbank implies that, in *Twombly* and *Iqbal*, the Supreme Court may have acted beyond its authority. He claims that *Twombly* ignored earlier Court pronouncements that the Federal Rules can be “changed” only through the Rules Enabling Act process. Indeed, Professor Burbank accuses lower courts that interpret Rule 8 more strictly as “border[ing] on lawlessness.” By that standard, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), must be outright anarchy—reinterpreting the Rules of Decision Act and a core procedural doctrine far older than *Conley* with no Rules Committee or “empirical research” at all.

Moreover, *Twombly* was decided by a seven-to-two majority in the Supreme Court. If stricter pleading standards are “lawlessness,” our highest court has not gotten the memo. Rule 1 directs courts to interpret the Rules “to secure the just, speedy, and inexpensive determination of every action.” FED R. CIV. P. 1. The Supreme Court was well within that mandate to interpret Rule 8 to require a “plausible” claim before a plaintiff can unleash discovery on an opponent. Indeed, many (although not all) scholars recognize a more expansive Supreme Court role in interpreting the Federal Rules than when interpreting a statute. *See, e.g., Joseph P. Bauer, Schiavone: An Unfortunate Illustration of the Supreme Court’s Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720 (1988). *Twombly* and *Iqbal* fall comfortably within the Court’s authority.

The Supreme Court, of course, knows all about its earlier precedents and the Rules Enabling Act. *Twombly* discussed and distinguished *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), its most recent pleading decision. *Twombly*, 550 U.S. at 569-70. The distinction may or may not be persuasive, but the question presented in *Swierkiewicz* did not concern notice pleading but whether a discrimination plaintiff must “plead specific facts showing that at trial he can make out a prima facie case of discrimination.” Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010) (manuscript at 37



n.114), available at <http://ssrn.com/abstract=1452875>. The Court rejected that requirement, in part because the same prima facie requirement “does not apply in every employment discrimination case.” *Id.* Under the *Twombly* standard, the *Swierkiewicz* complaint probably stated a plausible employment discrimination claim: It pleaded “the events leading to [the plaintiff’s] termination,” the “relevant dates,” and “the ages and nationalities of at least some of the relevant persons involved,” *Swierkiewicz*, 534 U.S. at 514, and that the plaintiff was more qualified than the person who replaced him, *id.* at 508.

*Third*, Professor Burbank next asserts—and this takes our breath away—that discovery costs have not skyrocketed in recent years.

That position is belied by both common sense and experience and has little to support it. The authority proffered, a recent article in the *William & Mary Law Review*, cites nothing—empirical or otherwise—to support its assertions. And those assertions relate to numbers of lawsuits filed, not the amount of discovery taken. The Court in *Twombly* and *Iqbal* was rightly concerned with abusive discovery, not mere numbers of suits. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 558-60. Nor does the 2009 Federal Judicial Center (FJC) survey lend much comfort to those who criticize *Twombly*. For the cases included in the FJC’s sample, “the median cost, including attorney fees, was \$15,000 for plaintiffs and \$20,000 for defendants.” EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY 2 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

Attorney fees of fifteen to twenty thousand dollars a case—start to finish? There is not much need to worry about *Twombly* in those cases. Those price tags plainly do not reflect sophisticated motion practice. *Twombly*’s primary benefit will be in more complex cases, where the imperative to weed out implausible claims is stronger. Moreover, even in the FJC’s sample, attorneys in approximately a quarter of the cases believed that discovery costs were disproportionate to the client’s stake. LEE & WILLGING, *supra*, at 28. Were one to focus on the system’s problem children—class actions, mass torts, antitrust, and the like—we suspect that dissatisfaction would be far higher.

Experience also belies Professor Burbank’s argument. The electronic document depository in the *Enron Securities Litigation*, for example, contained “over 20 million documents (not pages—full documents).” DIANE M. SUMOSKI, ENRON: NAVIGATING THE CIVIL SIDE OF THE CORPORATE CASE OF THE CENTURY 6 (2007), available at [http://www.ccsb.com/pdf/Publications/Business%20Litigation/Navigating\\_](http://www.ccsb.com/pdf/Publications/Business%20Litigation/Navigating_)

the\_civil\_side.pdf. Although we have not researched it, we would wager a fair amount that all discovery in the entire federal court system did not total twenty million documents in 1957 when *Conley* was decided. There is a difference in kind between creating documents with manual typewriters and carbon paper and saving every iteration of every e-mail or spreadsheet found in the computers of a modern corporation. Academics never hear e-discovery vendors report that merely preserving and gathering a corporation's e-documents will cost three million dollars—*before* any privilege check or substantive review. We have heard those words personally and have read about other examples. See, e.g., Jonathan L. Frank & Julie Bédard, *Electronic Discovery in International Arbitration: Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough*, DISP. RESOL. J., Nov. 2007–Jan. 2008, at 62, 73 n.1 (giving several examples of multi-million dollar e-discovery bills); Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237, 239 (2009) (describing one defendant that spent “\$13.5 million reviewing and logging documents for relevancy and privilege in a single matter”).

As a matter of theory, courts are institutionally incapable of controlling discovery. “Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests.” *Twombly*, 550 U.S. at 560 n.6 (internal quotation marks omitted). As a matter of practice, since broad discovery began, discovery rules have been amended repeatedly (Rule 26 in 1980, 1983, 1987, 1993, 2000, and 2006) without noticeable success. Much time and effort have gone into “fixing” discovery, yet the consensus of the country's best trial lawyers is that it has not worked:

The discovery system is, in fact, broken. Discovery costs far too much and has become an end in itself. As one respondent noted: “The discovery rules in particular are impractical in that they promote full discovery as a value above almost everything else.” Electronic discovery, in particular, clearly needs a serious overhaul. It is described time and time again as a “morass.” Concerning electronic discovery, one respondent stated, “The new rules are a nightmare. The bigger the case, the more the abuse and the bigger the nightmare.”

INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008), *available at* [http://druganddevicelaw.net/ACTL\\_Discovery\\_Report.pdf](http://druganddevicelaw.net/ACTL_Discovery_Report.pdf).

Ideally, we could fix discovery. But that fix has eluded the best minds on the Rules Committee for well over a quarter century. Since the pursuit of perfection had obstructed the accomplishment of any-

thing good—or even attainable—for forty years, *Twombly* provided a good opportunity for the Court to try something else. If litigation costs, especially discovery, are to be effectively constrained, those limits must come at the pleadings stage. We have already tried everything else.

*Fourth*, Professor Burbank accuses us of “lamentable indifference to the Seventh Amendment.” But it does not offend the Constitution to weed out implausible claims before trial. Summary judgment was upheld against a Seventh Amendment challenge ninety years ago in an opinion by Justice Brandeis. *See Pease v. Rathbun-Jones Eng’g Co.*, 243 U.S. 273, 279 (1917). Directed verdict survived a similar challenge, again well before we were born. *Galloway v. United States*, 319 U.S. 372, 388-96 (1943). There’s nothing new here.

Thus, “many procedural devices developed since 1791 that have diminished the civil jury’s historic domain have been found not to be inconsistent with the Seventh Amendment.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (discussing collateral estoppel). “In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury’s judgment without violating the Seventh Amendment.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) (referencing *Daubert*, judgment as a matter of law, and summary judgment). Both courts and Congress have “power to prescribe what must be pleaded to state the claim.” *Id.* (discussing specific pleading of fraud). Historically, courts imposed pleading requirements far more onerous than mere “plausibility”—“code” pleading or worse—for 150 years before the Federal Rules were adopted. None violated the Seventh Amendment.

*Fifth*, Professor Burbank exudes great concern for plaintiffs, his so-called “victims.” But what of defendants? Why is it fair—or right as a matter of law, morality, or even “cultural predisposition”—to subject defendants to massive litigation and discovery costs on bare allegations, when those allegations are not even “plausible”? When courts fail to dismiss implausible complaints containing only “formulaic” and “speculative” allegations, defendants must spend money for no good reason; courts cannot focus on other, more legitimate cases; and society ultimately suffers the loss of these wasted resources.

The Supreme Court’s recent decisions in *Twombly* and *Iqbal* simply extend a debate over pleading standards that began long before the enactment of the Federal Rules in 1938. These decisions try to solve a problem—massively inflated discovery costs—that was not anticipated in 1938 (or 1957) and that has grown exponentially worse over time. Implausible litigation should not be allowed, period. Modern discov-

ery no longer allows us that luxury. The Supreme Court has taken an intelligent step toward trying to solve this problem, and Congress should not stand in its way.

## CLOSING STATEMENT

*Straws, Sand, and Sophistry*\*

Stephen B. Burbank

Lacking either a sound empirical or a sound normative basis for their position, Mr. Herrmann and Mr. Beck have resorted to the time-honored, but epistemically thread-bare, techniques of setting up and knocking down strawmen, throwing sand in the air, and constructing arguments that, although superficially plausible (as it were), are revealed as fallacious.

Mr. Herrmann and Mr. Beck say that they have “heard these arguments [regarding the illegitimacy and inadequacy of the process used by the Court] before.” Even if that were true, they have not heard them from the scholar who wrote the definitive history of the Rules Enabling Act and who was the principal adviser to the House of Representatives in connection with the 1988 amendments to that statute. Moreover, far from suggesting that the arguments lack merit, the phenomenon may reflect the fact that the Court, which (ironically) Mr. Herrmann and Mr. Beck say “knows all about . . . the Rules Enabling Act,” has been cavalier in its treatment of that statute, ignoring its legislative history, its primary purpose of allocating prospective lawmaking power between the Court and Congress, and, most important, its limitations on the Court’s own power. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

But the arguments I have made against *Twombly* and *Iqbal* are not the same as those others have made against previous judicial interpretations of Federal Rule of Evidence 702 or Rule 56. Unlike the 1938 Federal Rules, Federal Rule of Evidence 702 is a statute, rendering the Enabling Act irrelevant; I do not believe that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is unconstitutional, and I have not claimed that either *Twombly* or *Iqbal* is unconstitutional (although the latter in particular is in tension with the Seventh Amendment). As for summary judgment, “[i]t is not . . . a reproach that federal judges have responded to the costs and demands of contemporary litigation by dusting off Rule 56 and trying to make it serve some semblance of its originally intended function of separating the wheat from the chaff.” Stephen B. Burbank, *Vanishing Trials and*

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\* © Stephen B. Burbank 2009.

*Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 622-23 (2004). As my Rebuttal demonstrated, however, separating the wheat from the chaff was *not* the “originally intended function” of the pleading rules.

Mr. Herrmann and Mr. Beck are making a political prediction rather than a reasoned argument, a view confirmed by their smug assertion of confidence that “two decades hence, [*Twombly* and *Iqbal*] will be as accepted a part of the legal landscape as *Catrett* and *Daubert* are today.” Unfortunately, even as political prediction, their Closing Statement is impoverished. Witness their attempt to equate expert testimony with pleading rules among the background rules on which Congress may have relied when enacting statutes intended to be enforced through private civil litigation. Of course, Congress could not have relied on a Supreme Court interpretation of Federal Rule of Evidence 702 when “enact[ing] legislation in the 1960s and 1970s” because no such interpretation existed. To be sure, given the interest of the business community in preserving the fruits of its recent Supreme Court victories and the influence of lobbyists in Congress, securing a return to the status quo will not be easy. Let us not, however, confuse money with reason. And I had thought that smugness in politics went out of fashion on January 20, 2009.

Mr. Herrmann and Mr. Beck’s renewed attempt to normalize *Twombly* and *Iqbal* from an institutional perspective is as unconvincing as their first effort. They pretend that “interpretation” is a process capacious enough to accommodate (1) the abandonment of the system of notice pleading that Clark intended, that Congress and the bar were told in 1938 had been implemented in the Federal Rules, and that the Supreme Court embraced as early as 1947; (2) its replacement by a system of complaint-parsing that is hard to distinguish from that which the drafters of the Federal Rules explicitly rejected; and (3) a wholly new general requirement of “plausibility.” As a realist, I understand that the difference between interpretation and judge-made law is one of degree rather than kind, but here the degrees of separation approach one hundred and eighty.

Like law students misled by course materials that were designed to demonstrate how doctrine develops, Mr. Herrmann and Mr. Beck seem unaware of the significance of the fact that the only lower court decision they cite in aid of their normalization project, *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), predated both *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The “conversation” or “debate” they imagine between the Court and lower federal

courts was in fact akin to that between a parent and a serially wayward child. In that regard, the (unanimous) Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005), did not “accept” a requirement of fact pleading that had been imposed by a lower federal court. It used the occasion of litigation governed by the Private Securities Litigation Reform Act to contextualize the requirement that a complaint provide fair notice. *See id.* at 346. *Dura* may have facilitated part of the analysis in *Twombly*, but it is light years away from *Iqbal*.

In any event, the difference between the Supreme Court overruling one of its previous decisions, as it did in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)—Mr. Herrmann and Mr. Beck’s example—and the lower federal courts refusing to follow binding Supreme Court authority should be obvious. The latter behavior may properly be characterized as “bordering on lawlessness,” as I did in my Rebuttal. The former may properly be so characterized if the decision does not involve an interpretation of the Constitution and is inconsistent with a governing act of Congress such as, well, the Enabling Act. Of course, *Erie* was about much more than the Rules of Decision Act or a “core procedural doctrine;” the Court insisted that the Constitution required the result. *See id.* at 77-78. Moreover, even if constitutional interpretation and procedural lawmaking required comparable resort to empirical data, the *Erie* Court was explicit and recent scholarship has demonstrated that the Court’s extensive and continuous experience with the system of corporate diversity litigation was a major underlying cause of the decision in *Erie*. *See id.* at 74 (“Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social . . . .”); Edward A. Purcell, Jr., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 141-64 (2000) (documenting the *Erie*-opinion author’s “deep resentment of large national corporations and the unfair advantages they reaped from *Swift* and diversity jurisdiction” and “acute concern with the proliferation of elaborate litigation tactics that complicated the law and wasted social resources, tactics that *Swift* and diversity encouraged”).

Mr. Herrmann and Mr. Beck’s focus on the fact that “*Twombly* was decided by a seven-to-two majority” as evidence that “*Twombly* and *Iqbal* fall comfortably within the Court’s authority” provides one hint among many that their seemingly random citation practice—sometimes of *Twombly* alone and sometimes of both *Twombly* and *Iqbal*—is strategic. They do not address the fact that both Justice Souter, the author of *Twombly*, and Justice Breyer dissented in *Iqbal*. Nor do they cite the preeminent work on the Court’s proper role in “inter-

preting” the Federal Rules. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002). As Professor Struve’s article demonstrates, only a lawyer—and at that only a lawyer on a mission—could argue with a straight face that the Court’s recent pleading decisions did not “change a Rule.” See *id.* at 1135-36. Perhaps that is why, notwithstanding the *Swierkiewicz* Court’s insistence that the Enabling Act process is the only proper means for the judiciary to require fact pleading, *Swierkiewicz*, 534 U.S. at 515, the Third Circuit has taken the view that “because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). At the end of the day, one can only wonder at the spectacle of Justices who deride a “living Constitution” enthusiastically embracing living Federal Rules. From this perspective, the legislation I favor would bring back the “Federal Rules in Exile.”

Mr. Herrmann and Mr. Beck could have spared themselves anoxia if they were interested in responding to, rather than distorting, what I said in my Rebuttal. First, rather than “assert[ing] . . . that discovery costs have not skyrocketed in recent years” (the alleged assertion that “takes [their] breath away”), I noted the absence of systematic empirical evidence that discovery “has been a problem in more than a small slice of litigation.” Second, Mr. Herrmann’s and Mr. Beck’s “common sense and experience” is no more reassuring as a substitute for empirical data on discovery than is the Court’s resort to “judicial experience and common sense,” *Iqbal*, 129 S. Ct. at 1950, as a substitute for an evidentiary record when assessing whether a case should be allowed to proceed. Third, in dismissing the significance of a recent Federal Judicial Center (FJC) survey that, as I noted in my Rebuttal, “hardly supports the story of ubiquitous abuse or ‘skyrocketing costs’” (and thus also hardly supports their “common sense and experience”), Mr. Herrmann and Mr. Beck again reveal their cultural predispositions. In the process, they also nicely illustrate one of the dilemmas of transsubstantive rules: It may be that “*Twombly*’s primary benefit will be in more complex cases.” Why, however, should the usual victims of “procedural” reform—actual and putative civil rights, including employment discrimination, plaintiffs—have to suffer its primary costs? It may also be that “[t]he Republic has not fallen,” but the Court’s deplorable process illustrates how easy it is to claim a Republican form of government.

The “experience” Mr. Herrmann and Mr. Beck cite consists of a few more anecdotes. The Federal Rules were extensively amended in 2006 to address the problems of electronic discovery. I am unwilling



to conclude that those amendments have been unsuccessful merely on the say-so of those who have a large stake in portraying them as a failure or because of theoretical arguments that the Court also trotted out in *Twombly* and that predated those (and two other sets of discovery) amendments. How do Mr. Herrmann and Mr. Beck know that these recent discovery amendments have not had “noticeable success”? They do not know that, and neither do the rulemakers (particularly given the recent FJC survey). This, of course, is another reason to bury rather than to praise *Twombly* and *Iqbal* and to return to the status quo ante until (1) systematically collected data and a broader base of experience replace self-serving horror stories by elite lawyers and clients as a basis for calculating the costs of notice pleading, (2) there has been adequate attention to the benefits of notice pleading, and (3) the costs and benefits of notice pleading are compared with the costs and benefits of the proposed replacement. If the case for change can be made, the resulting rules amendments should attack the problem of discovery directly and in such a way as to minimize collateral damage to those whose cases are not part of that problem.

Finally, I harbor no doubt that this Court would reject a Seventh Amendment challenge to plausibility pleading. That by no means lessens my concern, or the concern that members of Congress should have, about the tension that exists between the role of the jury that our founders intended and the role of a judge directed to assess the plausibility of a complaint according to “judicial experience and common sense” without the benefit of a factual record. Fifty years ago between eleven and twelve percent of federal civil cases had a trial in open court. In recent years, between one and two percent of federal civil cases have terminated at or after trial. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 533 tbl.A-2 (2004). This is a staggering reduction in trials in less than half a century. I am concerned that *Twombly* and *Iqbal* may contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to a jury trial, and the emasculation of litigation as a means of enforcing civil law. I am particularly concerned because in rendering these decisions the Court evaded the statutorily mandated process that gives Congress the opportunity to review, and if necessary to block, prospective procedural policy choices before they become effective. Both the process used to reach these decisions and their foreseeable consequences undermine democratic values.

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