Rulemaking in the Age of *Twombly* and *Iqbal*

Lonny Hoffman[*]

In this Article I essentially am trying to answer one critical question: Faced with the controversy triggered by the Supreme Court's decisions in Bell Atlantic Co. v. Twombly *(2007) and* Ashcroft v. Iqbal *(2009), especially over access to the courts, why have judicial rulemakers not proposed rule reforms to address the concerns raised? This question is particularly puzzling when one realizes that over the last seventy-five years the rules committees have consistently rejected proposals to stiffen pleading requirements along lines similar to what the Court decreed in* Twombly *and* Iqbal. *It is as if Congress had repeatedly voted against amending a statute that had been on the books for years only to have the Court, through judicial interpretation, effectively rewrite the law as though it had been amended. While we reasonably might predict that at least some in Congress would call for a legislative response if this happened, more than five years after* Twombly *no proposals for rule reform have been forthcoming, and there is no momentum on the rules committees in favor of reform. Why? In this paper I argue that uncovering what has kept rulemakers in the past from acting permits us to interrogate whether those reasons can justify the same course in the future. Ultimately, I conclude that past justifications are no longer sufficient and that the case for immediate rule reform is strong. Beyond its immediate relevance to the unresolved pleading problem, the added perspective gained by examination of the rulemakers' deliberations can also deepen*

 George Butler Research Professor of Law, University of Houston Law Center. I thank Aaron Bruhl, Stephen Burbank, Kevin Clermont, Ed Cooper, Jonah Gelbach, Emery Lee, Thom Main, Rick Marcus, Arthur Miller, Lee Rosenthal, Alex Reinert, Adam Steinman, Howard Wasserman, and Tom Willging for providing comments on an earlier draft of this paper. I am also grateful for the assistance of the Harvard Law Library's Historical and Special Collections librarians in tracking down archival committee materials. Funding for this project was provided by the American Association for Justice Robert L. Habush Endowment and the University of Houston Law Foundation.

our understanding of the rulemaking process generally, providing new insights about how the process of making new rules and evaluating existing ones may be improved.

TABLE OF CONTENTS

INTRODUCTION

This Article examines the deliberations of federal judicial rulemakers, both before and after the Supreme Court's decision in *Bell Atlantic Co. v. Twombly*,[1] about the role of and standards for pleading in civil cases. *Twombly*, which upheld a trial judge's dismissal of price-fixing claims brought against several major telecommunications providers, suggested — albeit uncertainly — the Court's departure from the longstanding notice pleading doctrine it had established more than half a century ago.[2] Two years later, any remaining doubt was erased by the transsubstantive exclamation point the Court added in *Ashcroft v. Iqbal*.[3] After *Iqbal*, judges in all cases have authority to ignore any "conclusory" allegations made and then to dismiss those that remain if they strike the court as not "plausible" based on "judicial experience and common sense."[4] Arthur Miller, who has been involved in procedure long enough to know, has framed the historic significance of the decisions and the heavy responsibility they place on rulemakers:

> Given the dramatic changes and sharp debate precipitated by *Twombly* and *Iqbal*, the Federal Rules — indeed, federal civil practice in general — stand at a critical crossroads. It is incumbent upon the courts and rulemakers to consider the full range of important questions and policy choices that have surfaced not just in *Twombly* and *Iqbal*, but as a result of the overarching trend toward pretrial disposition.[5]

Rulemakers certainly have taken their work seriously. The Advisory Committee on Civil Rules, which has initial responsibility for reviewing and recommending changes to the rules of procedure for federal civil cases, and the Committee on Practice and Procedure (commonly known as the "Standing Committee"), the superintending body for all of the federal advisory rules committees, have had extensive discussions about the Court's cases. The committees have

---

[1] 550 U.S. 544 (2007).

[2] Lonny Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1222 (2008) [hereinafter *Burn Up*] (observing that *Twombly* "may or may not mark a fundamental change in where courts strike the balance between access and efficiency. It is still too early to say").

[3] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[4] *Id.* at 678-79.

[5] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 17 (2010).

commissioned detailed quantitative and qualitative empirical studies to try to measure *Twombly* and *Iqbal*'s effects. The Reporter to the Civil Rules Advisory Committee has prepared detailed legal memoranda for the members' consideration. Panels of experts have spoken by invitation at several committee meetings. Rulemakers even organized a major conference of leading judges, lawyers, and legal academics from around the country to address pleading and related pretrial issues. In short, rulemakers have devoted many resources and much time to examining *Twombly* and *Iqbal*, reflecting the commitment the committees bring to their work. Yet, after five years of deliberation and study, no proposals for rule reform have been forthcoming. In the face of such intense scrutiny and attention, why have rulemakers not proposed any rule amendments to address the Court's decisions? One of my main ambitions in this paper is to answer that question. It is an important question to try to answer for two reasons.

First, as a practical matter in this political climate rulemakers are the only ones who realistically may be expected to exercise their policy-making authority to remedy (or at least ameliorate) the Court's decisions. For a time, it seemed that *Twombly* and *Iqbal* might be reversed by legislation.[6] However, the bills that were introduced in Congress never gained much purchase (and, as of this writing, no measure is even pending). Partly, this was because lawmakers aligned with business interests against legislative reform. As significantly, the legislation was opposed by the Judicial Conference, which took the position that legislators should stand aside in favor of allowing the rules committees to decide what corrective measures are needed. With no realistic prospect of a legislative fix at least in the near term, the effort to understand why rulemakers have not yet proposed rule reform to address the Court's decisions has an immediate practical utility. Knowing what has kept rulemakers from acting in the past permits us to interrogate whether those reasons can justify the same course in the future. Beyond its immediate relevance to the committees' continuing deliberations regarding pleading, a descriptive account of the rules committees' post-*Twombly* discussions can also deepen our understanding of the rulemaking process generally. Close examination of the rulemakers' recent pleading deliberations offers

[6] *See, e.g.*, Open Access to the Courts Act of 2009, H.R. 4115, 111th Cong. (2009) (proposing lower pleading standard); Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009) (proposing a less stringent pleading standard).

larger lessons about how the process of making new rules and evaluating existing ones may be better understood and improved.[7]

I begin by examining the rulemakers' deliberations over pleading reform in the decades preceding *Twombly* and *Iqbal*. Pieces of the rulemakers' prior pleading deliberations have been considered before,[8] but no attempt has ever been made to look comprehensively at this history. Because of the transparency of the modern rulemaking process, volumes of source material on the rulemakers' deliberations are available going back for decades. The most significant of these are the minutes and thousands of pages of agenda materials for the committee meetings, most of which are publicly available through the Administrative Office of the U.S. Courts. The examination also relies on other original material, including correspondence and additional documents from the files of the committee's academic reporter (relating primarily to a proposal to alter pleading standards in the mid-1980s) that previously have not been examined. Drawing on all of these primary sources, Part I provides a more complete descriptive account than currently exists of the rules committees' deliberations before *Twombly*.

The value of gaining a more complete historical understanding becomes clear when one realizes that over the seventy-five years that the Federal Rules of Civil Procedure have been in place a key consistency about the rulemakers' prior discussions regarding pleading reform has been how resistant to change the rules committees have been. Indeed, few may realize that just before *Twombly* (and obviously without anticipating the Court's decision) another proposal to heighten pleading requirements was presented to the rulemakers. Once again, that proposal met strong resistance from the committee, as the committee opposed any rule change that would resurrect fact pleading.[9]

Having repeatedly declined over the years to alter the existing pleading rules, rulemakers suddenly faced a remarkable turn of events

---

[7] *Cf.* Lee H. Rosenthal, *The Summary Judgment Changes That Weren't*, 43 LOY. U. CHI. L.J. 471 (2012) (exploring proposed changes to Rule 56 that never went into effect in order to "see what they tell us about both summary judgment and the rulemaking process").

[8] *See, e.g.*, Edward H. Cooper, *King Arthur Confronts Twiqy Pleading*, 90 OR. L. REV. 955, 959-63 (2012) (discussion by current Reporter for Civil Rules Committee of some of the rulemakers' prior deliberations, with particular focus on deliberations in 1986–87 and 1993–95 time frames); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1751-52 & n.18 (1998) (briefly discussing 1986–87 deliberations by Civil Rules Committee).

[9] *See infra* text accompanying notes 54-71.

starting in the summer of 2007 when the Court appeared to rewrite the rules along lines very similar to those that rulemakers had consistently declined to follow in the past. It was as if Congress had repeatedly voted against amending a statute that had been on the books for years only to have the Court, through judicial interpretation, effectively rewrite the law as though it had been amended. While we might reasonably predict there would be at least some in Congress calling for a legislative response if this happened, five years after *Twombly* there is no momentum on the rules committees in favor of reform; instead, we observe only acquiescence in the Court's heightening of pleading requirements for all cases. Why?

Writing a history of the rulemakers' pleading deliberations that includes their deliberations in the recent past raises a host of challenging research issues, including concern that not enough time has passed for a reliable perspective to be gained. On the other hand, many successful efforts to chronicle current events can be drawn upon, and certain advantages even can be gained, such as accessibility to sources of information.[10] With these historiographical challenges and opportunities in mind, Part II argues that three dominant justifications for not proposing pleading rule reform have been advanced consistently in the rulemakers' post-*Twombly* deliberations. By way of brief preview, I describe these three as follows:

Wait and See. The first dominant theme, running from the rulemakers' first meeting after *Twombly* all the way through to the present day has been that it is too soon to consider rule reform. On this view, rulemakers are better served to wait for the post-*Iqbal* case law to develop (and the empirical evidence to be gathered, sifted and studied) before making any decisions about how to proceed. In relying on this first justification for not pursuing pleading rule reform, rulemakers have acted consistent with prior academic accounts of rulemaking as a slow and conservative process. The world may change a great deal in half a decade, but in rulemaking terms five years is not actually all that long.[11]

[10] *See generally* Renee C. Romano & Claire Bond Potter, *Just over Our* Shoulder, *in* DOING RECENT HISTORY: ON PRIVACY, COPYRIGHT, VIDEO GAMES, INSTITUTIONAL REVIEW BOARDS, ACTIVIST SCHOLARSHIP AND HISTORY THAT TALKS BACK 1 (Claire Bond Potter & Renee C. Romano eds., 2012) (arguing that "historians have been writing accounts of the recent past . . . since printed history acquired a modern audience"). For recent examples in the field of civil procedure see Rosenthal, *supra* note 7, at 471-72, and Cooper, *supra* note 8, at 956-57.

[11] *See* Rosenthal, *supra* note 7, at 480 (discussing rulemakers' decision to make a change to the summary judgment rule in 2007 and then to reverse that decision in 2010, and noting that three years "in rulemaking terms is a nanosecond").

Things are Not As Bad As They Seem a.k.a. In Judges We Trust. From rulemakers' earliest deliberations, a second, recurring justification for not pursuing rule reform has been that concerns about the new pleading doctrine (articulated mostly by legal academics) are likely to be overstated. With sanguine temperament, rulemakers have reasoned that lower courts can be relied upon to apply the new pleading doctrine responsibly. While prior academic accounts of rulemaking have recognized that rulemakers prefer rules that accord significant discretion to judges,[12] the confidence that the committees have expressed in judges post-*Twombly* has really meant something quite different. The view can be readily summarized: If judges can be trusted to apply the new pleading doctrine with Solomonic-wisdom, then rule reform may not be necessary, no matter how badly the Court may have bungled the doctrine or misinterpreted the rulemakers' prior intent.

Futility. The third primary theme of the rulemakers' pleading deliberations has been that of futility. Even if the Court's decisions need addressing, rulemakers have not been sure what they could do about it. There are two aspects to this perceived futility. One has been practical: how to come up with language that would effectively overrule the Court's decisions. In other words, is it really possible through rule reform to put the new pleading genie back in the bottle? Perhaps an even more insurmountable hurdle has been the concern that, because of its place in the Rules Enabling Act, the Court is in a position to reject any reforms of which it does not approve that are proposed by its advisory committees.

To be clear, I do not claim that these three reasons represent all of the committees' thinking. Quite obviously, they do not represent the views of every member. Moreover, the rulemaking process itself is necessarily dynamic and evolving. That said, my descriptive claim is that these three themes recur frequently enough in the rulemakers' deliberations that, collectively, they represent the major reasons why, five years after *Twombly*, no rule reform has been proposed.

Finally, having shown why rulemakers have not pursued pleading rule reform in the past, Part III looks to the future. In doing so, I pivot from descriptive to normative ambitions; one immediate, the other broader. My immediate concern is with the rulemakers' ongoing and unresolved pleading deliberations. In that connection, I will suggest a framework of considerations to which rulemakers can turn for assessing whether their past justifications can continue to support not

[12] *See, e.g.*, Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and the Common Law*, 63 NOTRE DAME L. REV. 693, 715, 718-19 (1988) (discussing a trend in procedural law to give more discretion to trial courts).

pursuing reform in the future. Ultimately, I conclude that the case for immediate rule reform is strong. My second aim is broader, reaching beyond the current pleading deliberations. I consider what larger lessons about the rulemaking process, its strengths and its limitations, are offered by rulemakers' recent pleading deliberations.

I. THE PAST: RULEMAKERS' PLEADING DELIBERATIONS BEFORE *TWOMBLY*

Long before *Twombly*, judicial rulemakers had many occasions to consider requests to alter existing pleading standards. Almost always, the proposals before the rules committees were to make pleading more rigorous. In every instance, however, the rulemaking committees rejected these entreaties. To be sure, the different committees before whom such proposals were made considered various reasons for and against not changing the standard. The historical evidence is clear, however, that rulemakers frequently wrestled with the underlying policy issues implicated by such proposals and concluded, time and again, that raising pleading requirements would be an unwarranted and unwelcome procedural change.

A. Rule 8's Adoption in 1938

An examination of the rules committees' pleading deliberations over the years requires that we go back to the moment of creation — to the initial adoption in 1938 of the Federal Rules of Civil Procedure. Simple, liberalized pleading was at the heart of this new procedural model, its "liberal ethos" evident in the rules' substantive design, which was meant to ensure that cases would be resolved on their merits.[13] More than any other person, Charles E. Clark was responsible for that design.[14] The story of their enactment, and of Clark's vision for the rules, has been told many times.[15] While it does not serve any purpose to repeat it at length, a couple of points about

[13] Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433 (1986) [hereinafter *The Revival*].

[14] Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80-81 (1989) (noting that "Charles Clark was perhaps the single most important figure in the drafting of the 1938 Federal Rules of Civil Procedure and one of the most active participants in the ultimately successful campaign for their adoption" and that "[a]lthough Clark's views were not held by all members of the Advisory Committee, his influence was considerable").

[15] The leading account of the events leading to adoption of the rules is Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1024-25 (1982).

Clark's views and the imprint he left on the rules that were adopted bear immediate relevance to our examination of the rulemakers' current pleading deliberations.

The first point to emphasize is that Charles Clark strongly disfavored pleading challenges.[16] In Clark's view, asking the plaintiff to make detailed allegations was not just pointless, but also wasteful. Lawyers end up battling over procedural technicalities unrelated to the case's underlying merits.[17] The new formulation of the basic pleading rule in 1938 required only that the pleader provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[18] The emphasis on "a short and plain statement" and use of the word "claim" were meant to move away from the then-existing requirement in a majority of states, which demanded that pleaders allege "facts" and a "cause of action." New York's Field Code was the archetype of this pre-1938 model: it required the complaint to contain a "plain and concise statement of the facts constituting a cause of action."[19] The meaning of these terms had proven problematic in practice. What are "facts" and how, for pleading purposes, are they different from statements of the law? What must one allege to make out a "cause of action" under these code pleading regimes? Moreover, before 1938, pleading's primary objective had been to frame the case within predetermined types and to narrow its scope. Lawyers who failed to comply with the requirements placed their clients at risk of dismissal for technical reasons unrelated to the merits of the case. Unlike code pleading's insistence that pleaders plead specific causes of action, Rule 8's comparatively minimalist approach fit Clark's vision of pleading's limited purpose: "The pleading stage of the trial," he previously had explained, "is used to develop the respective stories of the parties as to the past events out of which the lawsuit has grown."[20]

The second, related point to make about Clark's view of pleading is that it was shaped as much by a distaste for and lack of faith in technical rule requirements as a corresponding faith in judges to apply

---

[16] *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 963 (1987).

[17] *See generally* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 323 (2008) ("[E]arly twentieth century reformers believed that procedure should serve strictly as a means to the end of finding the facts and enforcing the substantive law accurately. This meant that all purely technical and formal aspects of code and common law procedure should be eliminated.").

[18] *See* Marcus, *The Revival*, *supra* note 13, at 433.

[19] 1851 N.Y. Laws ch. 479, § 142.

[20] Charles Clark & James William Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1298 (1935).

generalized rules responsibly.[21] Clark saw judges as exercising wide discretion in how they selected relevant facts and how they then interpreted and applied those facts in the context of each individual case that came before them. Clark recognized judicial discretion, and he trusted it. The linkage of these two ideas — distrust of technical requirements, with trust in judges to apply flexible, broadly-framed rules — was Clark's key for a successful procedural system: in short, uncomplicated rules applied by wise judges. As the leading historian on Clark's contributions to procedure has put it: "At the heart of Clark's procedural outlook was his support of non-defining (what we now call 'open-textured') procedural rules; a corollary was his belief that judges should be granted broad discretion to interpret those rules."[22]

There is a valuable contrast to be drawn between the past and the present. In 1938, Charles Clark trusted judicial discretion over reliance on technical recitations of pleading sufficiency. Fast-forward three quarters of a century and we find the Court, in *Twombly*, essentially turning Clark's original vision on its head. Doubting the ability of lower courts to manage cases effectively at the pretrial stage, the Court trusted a more technical pleading sufficiency standard more than it did faith in judges to manage cases sensibly.[23] Moreover, as we will see in Part II, Clark's original linkage of generalized pleading rules with judicial discretion has been strained even further by the seemingly similar faith expressed by rulemakers in judicial discretion to apply *Twombly* and *Iqbal* responsibly. Reposing confidence in judges to justify acceptance of the Court's re-technicalization of pleading would have greatly dismayed Clark. He believed that even with capable jurists, a procedural system that places its faith in rigorous pleading requirements cannot avoid wasteful and inequitable consequences. "All too often," he once observed, "judges and law professors alike condemn the technicalities of the procedural methods and then turn about and for lack of understanding achieve results

[21] Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, *in* JUDGE CHARLES EDWARD CLARK 116 (Peninah Petruck ed., 1991).

[22] *Id.*

[23] *Bell Atl. Co. v. Twombly*, 550 U.S. 544, 546, 559 (2007) ("It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process given the common lament that the success of judicial supervision in checking discovery abuse has been modest . . . . [I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . . .").

more technical than any experienced student of the history of procedure would think of even suggesting."[24]

B. Pleading Debates in the 1950s

Rule 8's adoption in 1938 did not end debate over what should be required of pleaders and the role of pleading in the federal rules' scheme. Most are familiar with the Supreme Court's 1957 landmark decision in *Conley v. Gibson*,[25] which decreed that the primary function of pleading is to give notice of what the pleader intends to prove later in the case. What is less well known is that *Conley* reflected the Court's decision to choose sides in a debate that had been going on since 1938 between rulemakers and opponents over the relaxed pleading standard rulemakers had crafted in Rule 8. Aided by then-Hastings Law Professor O.L. McCaskill, one of Clark's most vocal critics on the subject of pleading, judges and lawyers in California led a charge over the next decade or so to try to get the rulemakers to change the liberal pleading rule.[26] The tempest grew when the Ninth Circuit's Judicial Conference passed a resolution in 1952 that Rule 8 should be amended to bring into the rule express language requiring that the pleader allege "the facts constituting a cause of action."[27] Though the "cause of action" versus statement of the "claim" framing suggests a theoretical divide, it is clear that the Ninth Circuit's resolution was also driven by the very practical concern that the current rule was encouraging unwelcome legal practices. A report prepared by a committee of judges and lawyers for the Ninth Circuit Conference reads like a modern day critique of lax pleading under *Conley v. Gibson*. "The initiation of unfounded lawsuits is encouraged" by the current rule, the report lamented.[28] If Rule 8 were amended to require lawyers to plead facts "warranting relief upon some legal theory" then

---

[24] Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 304 (1938); *see also id.* (remarking that even "a brilliant court may show a general impatience with procedural delays and faults only to make some of the strangest of procedural rulings"). *See generally* Subrin, *supra* note 21, at 138-43 (noting that Clark believed "[w]asteful and unfair consequences flowed from trying to articulate and enforce procedural lines").

[25] 355 U.S. 41 (1957).

[26] *Claim or Cause of Act: A discussion on the need for amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 262-65 (discussing Professor McCaskill's involvement); *id.* at 271-74 (transcript of McCaskill's remarks to Ninth Circuit Judicial Conference).

[27] *Id.* at 253 (providing full text of resolution).

[28] *Id.* at 255.

> many a suit which has no justification in legal theory may never be brought, or, if attempted, may be banished from the court's docket at an early stage. The requirement that a complaint state facts sufficient to constitute a cause of action challenges plaintiff's counsel at the outset to scrutinize his facts *in the light of the law*-a challenge wholly lacking under the present "notice pleading" requirements of Rule 8.[29]

The report continued, again repeating a modern theme, that the laxness of Rule 8 also "unnecessarily augments the burden of discovery."[30]

The Ninth Circuit's resolution was transmitted to the Advisory Committee on Civil Rules, marking the first occasion rulemakers were formally asked to make the entry requirements to federal court more rigorous. The advisory committee first took up the proposal to amend Rule 8 at its March 1954 meeting. Chairman Mitchell began the meeting by noting that "the whole of the bar of the Ninth Circuit was hammering" at us and "jumping on our neck" that Rule 8 be amended.[31] After some discussion, however, the advisory committee was not convinced that a rule change was warranted.[32] To explain why they were not recommending any amendments to Rule 8, the committee decided that a note should be included following the rule explaining why no changes had been made to it. Several drafts of the note were prepared in advance of the March 1954 committee meeting (a collective effort by numerous committee members, including Chairman Mitchell, Clark, Senator George Wharton Pepper, Monte Lemann and John Pryor).[33] In the final version that was transmitted to the Supreme Court in October 1955, the committee explained that the note was being appended "in answer to various criticisms and suggestions for amendment" of Rule 8.[34] The committee disputed the claimed criticism that the rule does not require "the averment of any information as to what has actually happened," but its more central response to the Ninth Circuit's criticism was that the rules

---

[29] *Id.* (emphasis in original).

[30] *Id.*

[31] RULES FOR CIVIL PROCEDURE ADVISORY COMM., MINUTES 9-10 (Mar. 1954), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-1954-min-Vol1.pdf.

[32] *Id.* at 15.

[33] *Id.* at 9-13.

[34] RULES FOR CIVIL PROCEDURE ADVISORY COMM., 1955 REPORT, *reprinted in* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1201 n.11 (3d ed. 2012).

> are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.[35]

The committee further pointed out that there had not been any evidence presented to it to show that rule reform was needed. As the committee put it, the reported cases "indicate that it has worked satisfactorily and has advanced the administration of justice in the district courts" and, indeed, has been "adopted verbatim" by numerous other states.[36] This confirmed the committee's view, according to the proposed note, that no rule change was justified on policy grounds.[37]

The committee tendered its proposed note to the Supreme Court in October 1955, along with the general report they prepared that contained a number of proposed amendments to other rules. For reasons that remain obscure, the Supreme Court adopted neither the note nor any of the recommended rule changes in the general report.[38] Nevertheless, the committee's adamant opposition to amending Rule 8 was clear, and that, along with the passing of Professor McCaskill (he died in early 1953), took most of the steam out of the opposition.[39] All of this history has been eclipsed by the Court's decision in *Conley*, but it helps make clear that the ruling in that case reflected the choice that rulemakers had made favoring a liberal and nontechnical interpretation of Rule 8 in what had been a long-running debate about pleading.[40]

---

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] WRIGHT & MILLER, *supra* note 34, §§ 1201, 1216 (discussing history of Advisory Committee 1955 Report).

[39] *See* RULES FOR CIVIL PROCEDURE ADVISORY COMM., MINUTES 78 (Mar. 1955), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-1955-min-Vol1.pdf (comment of Judge Sam Driver that opposition to Rule 8 was "largely inspired and sparked by Professor McCaskill and it died down considerably with his death").

[40] Richard L. Marcus, *Confessions of a Federal 'Bureaucrat': The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 108 (2007) [hereinafter *Confessions*] ("*Conley v. Gibson* scotched a rebellion among some lower courts against the relaxed pleading of the Federal Rules.").

C. Deliberations Through the 1980s

Rulemakers did not consider the role of pleading and the appropriate standard for pleading sufficiency again until the late 1980s. Through most of the 1960s and 1970s, their focus was primarily on discovery, not pleading. Although the 1938 rules expanded discovery privileges in federal court, over time rulemakers began expanding permissible discovery even further, such as the change they promulgated in the mid-1940s that made discovery of documents easier to obtain.[41] The clearest indication that the rulemakers' focus at this time was primarily on discovery, not pleading, comes from the discovery rule revisions which rulemakers first began considering in 1963 and which were ultimately enacted in 1970. This was rulemakers' first effort since 1938, at least by their own account, to undertake "a comprehensive review" of the discovery rules.[42] At the time, rulemakers recognized that there was "widespread acceptance" of discovery "as an essential part of litigation," but they were also aware of concerns about discovery practices and abuses.[43] Indeed, it was these concerns that led the committee to ask Professor Maurice Rosenberg of Columbia Law School to try to gather empirical information — to conduct a "field survey" of discovery practices — to help guide the committee's deliberations.[44] The results of the Columbia Survey, as it became known, were subsequently cited by rulemakers in support of its proposed amendments in 1970. We see reflected in the rulemakers' statement accompanying the proposed amendments a willingness to consider criticisms of broad discovery, but, ultimately, the committee's rejection of the concerns as unfounded:

---

[41] *See* FED. R. CIV. P. 26(a), 26(b), 33 34; RULES FOR CIVIL PROCEDURE ADVISORY COMM., 1946 Amendment, *reprinted in* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 26, 33, 34 hist. app. (3d ed. 1997) (discussing amendments made in 1946, including elimination in Rule 26(a) of leave of court requirement (with one narrow exception retained) for taking of a deposition; expanding scope of examination in Rule 26(b) by providing that "[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence"; and revising Rules 33 and 34, inter alia, to make clear that the expanded scope of discovery under Rule 26 applies also to interrogatories and requests for documents).

[42] *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487 (1970).

[43] *Id.* at 489.

[44] *Id.*

> The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.[45]

The 1970 amendments went into effect, expanding discovery opportunities and, thereby, marking the "apogee of the liberal ethos of discovery," as Richard Marcus has said.[46] Tightening pleading requirements did not fit anywhere within this spirit.

Over time, the expanded opportunities for discovery, combined with important new legislative and judicial grants of substantive rights, led to calls to curtail discovery.[47] However, as a further sign of the times, the American Bar Association — the most prominent group calling for reform — focused all of their substantive attention on the discovery rules; the pleading rules were rarely mentioned and never the subject of suggested reform proposals.[48]

For their part, rulemakers were skeptical during this period of criticisms being made of the existing rules and calls for discovery rule reform. Eventually, in 1979, they did propose some changes to alleviate perceived concerns about discovery costs and abuse, though they were far more modest than critics hoped for.[49] The Supreme Court promulgated these changes in 1980 (over the objections of three

---

[45] *Id.* at 489-90.

[46] Richard L. Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 304 (2008).

[47] *See* Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747 (1998) [hereinafter *Discovery Containment*] (providing a more detailed discussion of the history of discovery amendments, criticisms, and proposals for reform during this period).

[48] *See, e.g.*, Section of Litigation, American Bar Association, *Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, app. at 152 (Dec. 1977) (focusing concerns on costs and abuse of discovery, with no substantive discussion or recommendations with regard to pleading made); *see also* Section of Litigation, American Bar Association, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 141 (Nov. 1980) (focusing entirely on discovery rule reform, with pleading not mentioned at all, except for passing reference that "[d]iscovery, like pleading, is too easily abused"). *See generally* Marcus, *Discovery Containment*, *supra* note 47, at 754 (discussing discovery rules).

[49] *See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323, 332 (1979).

justices). Rumblings continued to be heard that the adopted changes were inadequate to combat perceived discovery problems and rulemakers came back, about a year later, to propose more far reaching amendments. These additional proposed changes ultimately went into effect in 1983. More than anything, however, the battles over discovery during this period reflect how far pleading had drifted from center stage. Even as critics railed against excessive cost and unnecessary delays in civil litigation, pleading remained a rarely-discussed subject; however, it should be noted that the 1983 amendments to Rule 11 arguably were intended, at least indirectly, to require that pleaders include more factual information in their complaints.[50] That one possible exception aside, no formal suggestion to alter existing pleading standards was put before the rules committees until 1986 when three seemingly unrelated proposals were brought before rulemakers.

The first two were considered together at the Civil Rules Committee's April 1986 meeting. Both proposed changes to Rule 9(b), though they were very different recommendations. One was a proposal by Judge Forrester that would have added civil RICO allegations to the particularized pleading list of Rule 9(b). The second pleading proposal the committee considered, prompted by an article by Professor Jeff Sovern, was to do away with Rule 9(b) entirely. The sparse minutes do not provide a sense of how the committee's discussion of the two conflicting proposals went — perhaps they canceled each other out. The minutes reflect only that the committee decided to take no action on either proposal.[51]

The third and most interesting proposal about pleading was actually considered by the committee in connection with suggestions for reform of the summary judgment rule, though the two proposals originated from different sources and at different times. The source of the latter was Judge William Schwarzer, a federal district court judge who previously wrote about the need for revisions to the summary judgment rule. In April 1986, just in advance of the committee's initial deliberations on his suggestions for Rule 56 reform, Professor Kevin Clermont wrote to the committee's reporter, Paul Carrington. Clermont suggested that the committee consider "folding" into a revamped summary judgment rule all pleading challenges currently

[50] F. JAMES & G. HAZARD, CIVIL PROCEDURE § 3.11, at 154-55 (3d ed. 1985); Stephen Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1948-54 (1989).

[51] RULES OF CIVIL PROCEDURE ADVISORY COMM., MINUTES 2 (Apr. 1986), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1986-min.pdf.

brought under Rule 12(b)(6), 12(c), and the 12(f) motion to strike an insufficient defense.[52] Clermont's primary point was that pleading motions had "outlived their usefulness in an era of notice pleading." He suggested it would reduce wasteful pleading objections if the rules were revised so that summary judgment was the only vehicle for making sufficiency challenges. Under Clermont's proposal, a defendant could still ask for a more definite statement when the pleading was too vague to frame a response, but an objection that the claim was legally insufficient would have to be brought under Rule 56.

At its April meeting, the committee deliberated but took no action on Schwarzer's summary judgment recommendations. Clermont's proposal was not before them at this time. In late June, before any progress could be made on the Clermont proposal, the Supreme Court handed down three summary judgment decisions.[53] Over time, the trilogy's collective effect came to be understood as a signal to the bench and bar of the Court's support for more robust use of summary judgment. For rulemakers, the immediate effect of the decisions was to reveal that they had moved somewhat prematurely at their April meeting; at a minimum, the new decisions would now also have to be taken into account as they contemplated reforms to Rule 56.

In August 1986, Carrington had worked up a memorandum for the committee that expanded on the committee's prior summary judgment discussion back in April. It also included a draft proposal for the committee's consideration that largely tracked Clermont's suggestion to do away with most pleading motions.[54] Clermont's cause was aided by the recent publication of an article by Professor Richard Marcus in the Columbia Law Review that chronicled what he described as a "revival" of fact pleading practice.[55] On August 16, Clermont wrote to Carrington again to reference the evidence Marcus had marshaled that courts were demanding fact pleading as a way of dismissing certain disfavored claims at the pleading stage. Clermont argued that doing away with these pleading motions was justified not only because they were

[52] Letter from Kevin Clermont, Professor of Law, Cornell Law School to Paul Carrington, Reporter, to Civil Rules Advisory Committee (Apr. 1, 1986) (copy on file with author).

[53] Celotex Corp. v. Catrett, 477 U.S. 317, 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 574 (1986). Incidentally, Clermont's original letter was sent on April 1, the same day the Court heard argument in *Celotex v. Catrett*.

[54] Draft Memorandum from Paul Carrington, Reporter, to Civil Rules Advisory Committee, (Aug. 3, 1986) (copy on file with author).

[55] Marcus, *The Revival*, *supra* note 13, at 433.

unproductive, but also because "decisions that really turn on the merits should be made by suitable procedures, namely those of Rule 56."[56]

The committee first took up Clermont's proposal at its February 1987 meeting. In a memorandum he prepared in advance of the committee's deliberations, Carrington summarized the arguments for and against the proposal. His memo suggested that he was sympathetic to it, but at the end he advised that it might be prudent to table any reform in favor of asking the Federal Judicial Center to provide the committee with a better sense of what was going on with Rule 12(b)(6) dismissal practices.[57]

The committee's deliberations on the proposal continued into its June 1987 meeting, at the end of which rulemakers decided to ask the FJC to gather additional data. In the meantime, Carrington was asked to prepare a revised draft of the proposed rule changes, which he circulated in advance of the November 1988 meeting.[58] The new draft still reflected Rule 12(b)(6)'s abolition, but, for reasons that are not clear, retained the Rule 12(c) motion for judgment on the pleadings.[59]

Meanwhile, at the committee's behest, the FJC's Tom Willging led a study that looked at a sample of cases that terminated in 1988 in two judicial districts. The study found that pleading dismissal motions were filed in approximately 13% of all cases brought in those districts and led to final disposition in just 3% of the cases.[60] Surprising expectations, these results actually indicated that pleading challenges were not on the rise, as Marcus's work seemed to suggest, at least when compared with the most recent previous data that had been collected by the FJC. That earlier study, of a sample of cases terminated in 1975, found that pleading dismissal motions were filed in roughly 15%-19% of cases, disposing of 6% of all cases examined.[61]

---

[56] Letter from Kevin Clermont, Professor of Law, Cornell Law School, to Paul Carrington, Reporter, Civil Rules Advisory Committee (Aug. 16, 1986) (copy on file with author).

[57] RULES OF CIVIL PROCEDURE ADVISORY COMM., AGENDA MATERIALS 140 (Feb. 1987) (copy on file with author).

[58] RULES OF CIVIL PROCEDURE ADVISORY COMM., MINUTES 5 (June 1987), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV06-1987-min.pdf.

[59] No reference to the Rule 12 proposal can be found in the November 1988 meeting minutes, but the author of the FJC study subsequently described the chronology. *See* THOMAS E. WILLGING, FED. JUD. CTR., USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS 1 (1989), *available at* http://www.fjc.gov/library/fjc_catalog.nsf (noting brief discussion of proposal to abrogate Rule 12(b)(6) at November 1988 Civil Rules meeting).

[60] *Id.* at 3.

[61] PAUL R.J. CONNOLLY & PATRICIA A. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980), *available at* http://www.fjc.gov/public/pdf.nsf/

After reviewing Willging's study and further deliberation on Clermont's proposal, the advisory committee decided not to act on it. We know this, however, only from the absence of any proposed amendments coming from the committee. No mention of the committee's discussion of the proposal to abolish the Rule 12 motions can be found in the minutes, so we can only speculate about why the committee chose not to pursue it. We do know that by early 1989 the proposal met opposition from some of the bar.[62] For his part, Willging believed that the committee concluded that the disposition rate findings were small, but sizeable enough to suggest dismissal motions still served a valuable purpose.[63] That is possible, though the more influential findings may have related not to the disposition rate of motions, but to the decline in the filing rate from the former study. That the observed filing rate appeared to be slightly lower than what it had been in the earlier study did not match at least one of the concerns — that pleading dismissal challenges were on the rise — that had been raised about the rule. Additionally, we should not forget that Clermont's proposal was made just after the committee had already decided to consider reforms to the summary judgment rule and just before the Court announced the summary judgment trilogy. The committee's focus, thus, was heavily on summary judgment, and the changes contemplated for that rule were both very time-consuming and controversial. The best evidence of this, of course, is that the proposed amendments to Rule 56 were not adopted (indeed, not until 2010 was the summary judgment rule substantially amended).[64]

One might also profitably compare where the committee began to where it ended up because it gives a real sense of how slow and cautious rule reform often is. In mid-1986, rulemakers began considering major reform possibilities (abolition of most pleading challenges and the possibility of an overhaul of several rules relating to

lookup/jcclpmot.pdf/$file/jcclpmot.pdf.

[62] *See* REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION ON PROPOSED AMENDMENTS TO RULE 12(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE 5 (Feb. 1989) [hereinafter NYSBA REPORT], *available at* http://www.nysba.org/Content/ContentFolders4/CommercialandFederalLitigationSection/ComFedReports/ProposedAmendmentstoRule12b.pdf.

[63] Thomas E. Willging, *Past and Present Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1145 (2002) [hereinafter *Past and Present*] (describing rulemakers' 1987 deliberations over the proposal to abolish Rule 12 and, with reference to decline in the disposition rate from the 1980 study to the 1988 study, noting that "[t]hough not a large percentage of the cases, the number of cases was sufficient to persuade the Committee that Rule 12(b)(6) continued to serve a useful purpose").

[64] *See* Rosenthal, *supra* note 7, at *passim*.

summary judgment, with an eye toward integration of the whole). By June 1989, the committees were still moving forward on possible amendments to Rule 56 (along with discussion about integrating the other rules more cohesively) but at this point had dropped Clermont's proposal to reform Rule 12.[65] One year later, Rule 56 was also off the table.[66] Eventually, in 1991, the Court settled on the promulgation of less monumental changes (it renominated Rule 50 motions for directed verdict and for judgment notwithstanding the verdict as motions "for judgment as a matter of law"). In retrospect, perhaps things would have worked out differently if the Rule 12 proposal had been made at another time; perhaps the outcome would have been different if it had not been tethered to the more substantial changes to the summary judgment rule that were being considered. In law reform, as in life, timing can be everything.

In any event, looking back on this episode twenty-five years later, what is most striking is how little it resembles the modern debate over pleading after *Twombly* and *Iqbal*. Back then, Clermont's proposal took for granted that a Rule 12 pleading challenge could only be directed at the legal sufficiency of claims asserted,[67] and that was certainly how it was received by the committee.[68] Even opponents of the proposal never argued that the factual sufficiency of allegations could be tested at the pleading stage.[69] Perhaps the most important point to make, then, is that whatever reason(s) led rulemakers not to revise Rule 12, their decision certainly cannot be read as an endorsement of the kind of pleading challenge that *Twombly* and *Iqbal* contemplate. As the available evidence amply reflects, the idea that a defendant might challenge at the pleading stage the sufficiency of factual allegations would not have fit contemporary understanding of Rule 12's primary purpose.

---

[65] Memorandum from Hon. John Grady to Hon. Joseph Weis of recommended rule revisions by Civil Rules Committee (June 12, 1989) (copy on file with author).

[66] Memoradum from Hon. John Grady to Hon. Joseph Weis of recommended rule revisions by Civil Rules Committee (June 19, 1990) (copy on file with author).

[67] *See supra* text accompanying note 56.

[68] *See, e.g.*, Draft Memorandum from Paul Carrington, Reporter, to Civil Rules Advisory Committee (Aug. 3, 1986) (copy on file with author) (noting that Rules 12 and 56 "were substantially redundant" and that "the difference between the two being that the Rule 12 motion was limited in its address, raising only issues of legal sufficiency of the pleadings").

[69] *See, e.g.*, NYSBA REPORT, *supra* note 62, at 1 (noting that "[u]nder the proposed changes, a challenge to the legal sufficiency of a complaint could be made only after an answer has been filed").

D. Leatherman *(1993) Prompts New Pleading Proposals*

Over the next few years there were no formal proposals regarding pleading on the rulemakers' agenda. Nevertheless, the subject of pleading arose repeatedly as part of a larger discussion by rulemakers who were debating potential amendments to the discovery rules. This included a proposal then being considered by rulemakers to require mandatory disclosures of certain information and documents at the outset of a case.[70]

What really brought pleading back to rulemakers' agenda was the Court's decision in February 1993 in *Leatherman v. Tarrant County Narcotics, Intelligence and Coordination Unit*.[71] The *Leatherman* case concerned a municipal employer's liability for not training its police adequately. The Fifth Circuit upheld a dismissal based on circuit law that imposed a "heightened pleading" requirement of "factual detail and particularity" for § 1983 claims against municipalities. The Supreme Court reversed, ruling that "it is impossible 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."[72] Rule 9(b) only required particularity for fraud or mistake allegations, not for allegations of municipal liability under § 1983. As a matter of rule construction, the express direction for heightened pleading only for these kinds of allegations requires the Court to assume all others not mentioned were not meant to be included: *Expressio unius est exclusio alterius*.[73] What most caught the attention of rulemakers, however, were the opinion's closing lines:

> Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.[74]

---

[70] *See, e.g.*, RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 1 (Nov. 1991), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1991-min.pdf (discussing disclosure requirements); RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 15-16 (June 1990), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV06-1990-min.pdf (same); RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 8-9 (Nov. 1989), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-1989-min.pdf (same).

[71] Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 163 (1993).

[72] *Id.* at 168.

[73] *Id.*

[74] *Id.*

The observation was taken as an invitation by the rules committees to consider heightened pleading, and it did not take rulemakers long to act on the invitation.

At its next meeting in May 1993, the committee discussed the possibility of making a rule change, perhaps to Rule 8 or to Rule 12(e), to give judges discretion to impose "more detailed pleading" on a case-by-case basis.[75] It was suggested that it may be desirable for pleading challenges to be used as a kind of "preliminary screening in a wide variety of lawsuits" and that "a return to some practice akin to the bill of particulars [previously in Rule 12(e)] may have real value."[76] However, even as rulemakers discussed the possibility of heightening pleading standards, concern was immediately expressed that it would not be a desirable change. The discussion recognized that "[d]irect imposition of more demanding standards at the initial pleading stage might shift the burden of specific contention to a point in the litigation that is too early to be useful."[77] Moreover, the idea that standards might be raised only for specific kinds of cases was particularly disfavored.[78] Discussion at the May 1993 meeting ended without any formal vote taken on whether to raise standards, but with little momentum in favor of change. "[T]he conclusion may be that the time has not yet come for any action," the minutes reflect.[79] Pleading was kept on the agenda with acknowledgement that various approaches for more particularized pleading were appropriate for "further study."[80]

Indeed, the committee returned to pleading at its next meeting in October 1993, and a lengthy discussion again ensued over whether heightened pleading requirements should be imposed by rule. The discussion did not shy away from the underlying policy issues implicated by a potential change in the pleading requirements. What is clear from the minutes is that when confronted with the proposal to heighten requirements for specific kinds of cases, the committee strongly opposed doing so. The minutes reflect that "virtually all committee members" who spoke were opposed to expanding categories of cases subject to Rule 9's particularity requirement.[81]

---

[75] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 17 (May 1993), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1993-min.pdf.

[76] *Id.* at 17-18.

[77] *Id.* at 17.

[78] *Id.*

[79] *Id.* at 18.

[80] *Id.*

[81] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 8 (Oct. 1993), *available at*

Additionally, the observation was made that "[t]here is a real risk that imposing specific pleading requirements for specific legal theories will be seen as a substantive decision that these theories are disfavored."[82] Some members expressed support, however, for doing so on a transsubstantive basis. It was noted that before *Leatherman*, individual courts had heightened pleading requirements in particular kinds of cases, but that they have done so "without any explicit articulation or justification."[83]

That remark led rulemakers to a broad discussion of the "general values of notice pleading," and, in that connection, several members expressed the view that notice pleading "should not be encouraged."[84] Others opined that there was widespread agreement among the plaintiff and defense bars that the federal procedural system "is broke."[85] Tighter pleading standards could help reduce discovery costs and promote "more economical disposition of litigation."[86] This discussion led members to note that the committee had been willing to amend and tinker with the discovery rules. "Perhaps the time has come," the minutes reflect, "to recognize that notice pleading is not so firmly enshrined as to be beyond reconsideration.[87]

As soon as the suggestion was made, however, it was clear that there was much opposition to reinvigorating pleading. Discovery was the process by which parties "can get an early grasp of a case" and so "[f]unctionally it is like heightened pleading."[88] It was noted further that previous reforms, including especially those to Rule 16, were designed to encourage greater judicial involvement/control of the discovery process. Judges then are able to ask parties to describe their cases more precisely, not as a predicate demand for a pleading dismissal, but for managing discovery needs and expenses. The observation was also made that several proposed reforms rulemakers had recently been considering would also achieve the same ends as heightened pleading. The then-proposed pretrial conference of the lawyers (the meet-and-confer requirement) in Rule 26(f) was cited, the purpose of which will be to generate a "productive, informal, and inexpensive exchange of information about the real nature of the

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-1993-min.pdf.

[82] *Id.*

[83] *Id.* at 5.

[84] *Id.*

[85] *Id.* at 6.

[86] *Id.*

[87] *Id.*

[88] *Id.*

case." It was also pointed out that summary judgment was a better tool because the ruling comes after full opportunity for discovery has been provided.

The costs of heightening pleading were also cited as a serious concern: more motion practice (primarily by defendants who it was said most often control the available evidence on which allegations are to be based), and more delay (leading to greater litigation expenses). More problems may result, it was suggested, from "over-stated, over-long pleadings than from 'terse' ones."[89] Particular concern was voiced about not negatively impacting litigation that serves public policy purposes, such as antitrust, securities and other kinds of cases. The need to ensure access to discovery was emphasized if any changes were made to the pleading standard. Ultimately, the committee decided not to propose any amendments that would require heightened pleading.

Through the rest of the decade, rulemakers discussed pleading only indirectly, usually in connection with discussions about further discovery rule reform.[90] When Congress was considering passage of (what was eventually enacted as) the Private Securities Litigation Reform Act in 1995 — legislation that included a heightened pleading requirement for securities cases — the informal suggestion was again made to the rules committee that heightened pleading should be reconsidered. That suggestion immediately met the response, however, that the committee had previously considered the question after *Leatherman* and decided not to act.[91] Most of the discussion during this time period dealt centrally with discovery, however, with pleading mentioned either only in passing or not at all.[92] During this

[89] *Id.*

[90] *See, e.g.*, FED R. CIV. P. 26(a)(1) advisory committee's notes, 1993 Amendment (authorizing mandatory disclosure of information relevant to disputed facts that was "alleged with particularity").

[91] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 17 (Apr. 1995), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1995-min.pdf.

[92] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 3 (Apr. 1999) (discussing proposed Y2K legislation which contained heightened pleading requirement, and noting that the committee "has been reluctant to adopt heightened pleading requirements for specific substantive areas"), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1999.pdf; RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 11-12 (Nov. 1998) (discussing recent FJC study on discovery and making no references to pleading), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV1198.pdf; RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 12-14 (Mar. 1998) (voting to amend Rule 26 and making only a brief mention of connection between pleading and discovery), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/

time, no formal proposals for amending the pleading rules appeared on the rulemakers' agenda.

E. From 2000-2006

With the dawn of the next decade, pleading briefly returned to the rulemakers' agenda. Known as the Simplified Procedure Project, the proposal would have required more from pleaders, and provided them less through discovery, in "small-stakes" cases.[93] The rationale for focusing reform efforts on small-stakes cases was met with considerable skepticism from other committee members, however, and after hearing lengthy discussion from the invited panelists about programs in their local districts for reducing costs and delays, the committee wrapped up its discussion of the Simplified Procedure Project without making any decisions on how to proceed. Pleading remained off the rulemakers' agenda for the next four years, but when it did return the committee would have its most extensive discussions about pleading since Rule 8 was adopted in 1938.

Judge Lee Rosenthal took over as chair of the Civil Rules Advisory Committee in October 2003. Over the next four years, she presided over several major projects, including adoption of the electronic discovery amendments and the "restyling" of all of the Federal Rules of Civil Procedure. In 2007, she became chair of the Rules of Practice and Procedure Committee (the "Standing Committee"), where she led several other major rule reforms.

Minutes/CV03-1998-min.pdf; RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES (Oct. 1997) (primarily reporting on recently held conference at Boston College regarding the discovery rules; minutes reflect on a single reference to pleadings at end of meeting, noting the observation made that "the vague notice pleadings authorized by Rule 8 are hopelessly at odds with the need to define and refine the issues for trial" but noting no further committee deliberation on the subject), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-97.htm; RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES (Mar. 1997) (describing discovery subcommittee's report on feedback received at January 1997 conference; making no references to pleading), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv3-97.htm; RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES (Oct. 1996) (discussing primarily discovery and noting again interrelationship between pleading and discovery), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv10-1796.htm; RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES (Nov. 1995) (briefly referring to pleading in connection with discussion of proposal from American College of Trial Lawyers to limit scope of authorized discovery under Rule 26(b)(1)), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-cv11.htm; *id.* at 2-5.

[93] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 22 (Oct. 2000), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-2000-min.pdf.

While leading the Civil Rules committee, Judge Rosenthal brought pleading back onto the rulemakers' agenda. She had grand ambitions. In October 2005, with rulemakers having completed most of their work relating to restyling, she suggested that "the time has come" for a comprehensive check-up on two of the foundational components of the rules: notice pleading and summary judgment. As she put it, this was an opportunity to reflect broadly on "how courts decide cases, and the ways in which parties and lawyers litigate."[94] The chair keenly realized, however, the daunting task she was taking on: "It must be recognized that notice pleading is a sensitive topic. To take on the topic is to invite charges that the purpose is to raise barriers, to limit access to court for disfavored types of litigation. That is not the purpose. But the topic is one to be approached with great care, if at all."[95]

Of the two major potential projects, summary judgment was taken up first, with discussion focusing on possible questions and issues that may be appropriate for the committee to address. After a lengthy discussion on Rule 56, the focus turned to notice pleading. Describing it as "one of the fundamental long-range characteristics of the Civil Rules that merits periodic evaluation to determine how well the present system serves the goals articulated in Rule 1," Rosenthal challenged the committee to consider this question: "Do we continue to have the best approach toward accomplishing the just, speedy, and inexpensive determination of litigation?"[96] In remarks that would foreshadow the *Twombly* Court's description of the changed nature of modern litigation, Rosenthal observed that "[t]he 1938 rules focused on individual litigation in a setting that provided a very different mix of cases than we know now. Changes in the nature of litigation may justify reexamination of the basic system."[97]

Turning to how the notice pleading standard has actually operated, she noted that the lower courts have appeared to continue to insist on heightened pleading in some cases, notwithstanding the Supreme Court's express directives to the contrary.[98] Perhaps, Rosenthal observed, lower courts may realize something that the Supreme Court does not: "that bare minimum notice pleading may not be the best answer for all cases" and that it "may be appropriate to ask greater

[94] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 5-6 (Oct. 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf.

[95] *Id.* at 30.

[96] *Id.* at 29-30.

[97] *Id.* at 30.

[98] *Id.* (internal citations omitted).

detail in some cases."[99] At the same time, she noted that for rulemakers to set forth specific pleading rules for different kinds of cases may be seen as problematic and may raise Rules Enabling Act concerns.

In the committee discussion that then followed, there was little support for changes to the pleading rule. A number of members seemed to oppose change, not because they disfavored higher pleading requirement, but because they thought that lower courts were already raising standards, as needed, on an ad hoc basis. If lower courts were already doing what a revised rule would do, one member observed, then it would be better to not complicate matters with a rule change.[100]

Others, however, were initially cool on the idea of raising standards at all. It was noted that "even a modest change" (such as one draft in the agenda materials that would require "a short and plain statement of the claim in sufficient detail to show that the pleader is entitled to relief") "would excite vigorous and possibly disturbing reactions."[101] Better "to keep the pleading barriers low and reinvigorate summary judgment," a member observed.[102] Additionally, it was said that unanticipated problems must be taken into account whenever reform is being considered. "The law of unintended consequences is real."[103]

Still others questioned the need for reform. Pro se litigation may be uniquely problematic, one member said, but "there are few real problems in cases with lawyers." It was separately noted that for lots of routine litigation (auto accident, slip-and-fall and small business cases), notice pleading "may work well."[104] As for complex cases, those complaints were already not short and plain; they are "long and fancy," going far beyond providing just notice of the claim.[105] One judge member added: "A direct attack on notice pleading will start a long battle. It is not clear that there is a problem. There are better things to do."[106] It was also pointed out that lawyers in civil rights cases would disfavor a heightened pleading rule on the ground that "they cannot realistically uncover needed evidence without discovery,"

[99] *Id.*
[100] *Id.*
[101] *Id.* at 31.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 33.
[105] *Id.*
[106] *Id.* at 34.

pointing to a frequent concern that would be subsequently expressed after *Twombly* and *Iqbal* were decided.[107]

With many voicing concerns about amending Rule 8, some support was expressed for a "less sweeping" approach that would attempt to expand the usefulness of Rule 12(e).[108] It was noted that Rule 12(e) principally is invoked when the allegations are not understandable, but, as the agenda materials that were circulated in advance of the meeting described, there was a brief time (from 1938-1946) when the rule also had what was known as a bill of particulars practice. It may be possible, the materials noted, to revise Rule 12(e) so that it could be used to give judges discretion to demand greater detail to determine whether the plaintiff has adequately alleged a claim. This added flexibility would not be appropriate for every case, the agenda material noted, but could be in some instances, such as official immunity cases.

The committee's discussion, thus far, had been rather wide-ranging, but when committee members were finally asked whether there were any pleading reform proposals worth pursuing the minutes indicate that a consensus emerged at that point against any effort to revise Rule 8 to require greater fact pleading particularity.[109] There was some support expressed for the idea of reinvigorating Rule 12(e), but others questioned even that suggestion. "To what end?" one member queried. Another voiced concern about adding another layer of delay into the system. Revising Rule 12(e) "would lead to a routine presentation of three motions before trial: a 12(e) motion for a more definite statement, followed by a motion to dismiss, followed by a motion for summary judgment . . . ."[110]

The idea of commissioning the FJC to study pleading practices was broached. Tom Willging, the FJC representative in attendance, noted several possibilities, but cautioned that surveys of judges would be unlikely to produce useful information.[111] A member cautioned that the committee should know "whether there are identifiable problems" before insisting on this expenditure of the FJC's limited resources.[112] With their diverse experiences and viewpoints, the committee members "[had] not identified any clear problems" (with the exception of pro se cases, which "present separate issues"), suggesting it was unlikely that further research would uncover other problems

[107] *Id.* at 33.
[108] *Id.* at 34.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 35.

with notice pleading not previously observed.[113] Another member, attempting to summarize the committee's discussion thus far, commented that most seemed to recognize that the FJC's help should only be sought if there was sufficient interest in pursuing a pleading reform project, but that the level of committee interest in doing so appeared, at best, to be "cool, not frozen."[114] This comment seemed to capture the sense of where things stood at the end of 2005: there was, at best, only modest interest among some committee members for pursuing some form of pleading rule reform.

A year later, at the October 2006 meeting of the Civil Rules Advisory Committee, pleading remained on the agenda, but the principal focus was limited to whether expanding Rule 12(e) was an idea worth pursuing. Even that narrower, "less sweeping" reform effort garnered little support. Concern was again expressed that revising the rule was unnecessary and that it would end up being used by lawyers as a further delay tactic. The October 2006 meeting ended with no real plan to move forward on any pleading reform proposal. That was the committee's last discussion of pleading before the Court handed down *Twombly* in the early summer of 2007.

II. THE PRESENT: RULEMAKERS' POST-*TWOMBLY* DELIBERATIONS

As we have seen, a common denominator running through the deliberations of the rules committees that have considered pleading rule reform has been a refusal to heighten pleading standards. Certainly, the different committees before whom this question was posed cited different reasons for declining to change the rules. Just as clearly, however, rulemakers repeatedly expressed the view that more rigorous pleading requirements were unwarranted and would be unsound as a matter of policy. Even the committee that in the mid-1980s declined to do away with pleading challenges did not do so because it favored stricter pleading; and it certainly was not endorsing use of the rule to challenge the factual sufficiency of allegations made. Had the Court not decided *Twombly*, rulemakers might have ultimately pursued pleading rule reform, perhaps by giving judges more discretion under Rule 12(e) to require detailed allegations on a case-by-case basis. Yet, as the rulemakers' deliberations just before *Twombly* reflect, as late as 2005-06, even though some individual members may have favored raising pleading requirements, there was no widespread support on the committees for doing so (certainly not

[113] *Id.*

[114] *Id.*

for all cases). Even the more modest idea of adopting a reform that would not apply transsubstantively generated considerable concern that changes should not be pursued absent evidence of a problem warranting the rulemakers' attention.

Then the Court decided *Twombly* and everything changed, at least from the rulemakers' perspective. Like a bull in a china closet, the Court came crashing in and said, in effect, to rulemakers: *Out of my way. Can't you see that modern litigation is totally different from what it was in 1938? Why haven't you done something by now*? Leaving to one side whether the Court was in fact paying attention to the rulemakers' deliberations,[115] it is clear that the Court's sudden interjection irreversibly changed the trajectory of the committees' prior deliberations about pleading.

One familiar with the rulemakers' repeated refusal before *Twombly* to alter pleading standards reasonably might have predicted that the path the Court chose would have troubled rulemakers. Plausibility pleading may be *sui generis*, but the basic logic of the Court's decision — that stiffening pleading standards was a necessary means of dealing with the twin problems of exorbitant discovery costs and abusive tactics the Court perceived to exist (though without reference to any reliable empirical evidence[116]) — was quite familiar to rulemakers. As we have seen, they had rejected similar logic on numerous prior occasions.

Certainly, some rulemakers were initially skeptical of the *Twombly* decision, but that skepticism never has been enough to create sufficient momentum to generate a rule change proposal to countermand the Court's decisions. The question is why: Why have rulemakers, who have consistently rejected proposals to heighten pleading standards, effectively acquiesced in the Court's common law heightening of pleading standards for all cases? The answer to this

[115] *Hearing on Whether the Supreme Court has Limited Americans' Access to Court Before the S. Comm. on the Judiciary*, 110th Cong. 14 (2009) (statement of Stephen B. Burbank, Professor of Law), *available at* www.judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf ("The justices likely knew through the Chief Justice that changing pleading requirements through the Enabling Act process had been considered and abandoned as political dynamite on more than one occasion, including in the recent past.").

[116] *See generally* Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUS. L. REV. 545, 580-83 (2011) [hereinafter *The Case Against*] (summarizing evidence against claims regarding systemic discovery costs and abuse); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012) (discussing the high costs and delays of civil litigation).

question reveals a great deal about the rulemakers' take on the pleading problem (in particular) and about limitations inherent in the existing rulemaking process (more generally).

A. Committees Meetings 2007

At the Civil Rules Committee's November 2007 meeting, its first since the *Twombly* decision was announced about six months earlier, the primary subjects were the two rule amendments on which the committee had been working for several prior meetings: the rules governing expert trial witness disclosure and discovery; and proposed changes to Rule 56, the summary judgment rule. Expanding on the set agenda, however, the Chair introduced discussion of the *Twombly* decision with the observation that the case had already "generated great excitement about federal pleading standards."[117] That then precipitated a vibrant, if generalized, conversation about the case and its potential import.

Notably, what one does not see in the committee's deliberations at this meeting is a lengthy discussion of the policy issues inherent in the Court's decision. Certainly, there were some views offered. It was observed that, while it was still not clear how the Court had changed the pleading doctrine, this "does not imply that changes are unwelcome."[118] Lower courts had long required great pleading particularity in the face of "massive pretrial and trial burdens," when faced with dubious substantive claims and "when appropriate to protect particular interests that limit the underlying claim," with defamation cases cited as one example.[119] "License to do more openly what courts have been doing all along may prove welcome," it was suggested.[120] On the other hand, a number of voices were heard expressing concern, including that the Court's articulation of plausibility pleading was "completely subjective" and that any heightened pleading standard must take into account imbalances in access to information.[121] Courts should not expect a party without adequate information to make allegations that it could only make after an opportunity for discovery is permitted, several members observed.

---

[117] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 31 (Nov. 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2007-min.pdf.

[118] *Id.* at 32.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 34.

Yet, it would mischaracterize the committee's deliberations to suggest that they principally focused on these underlying policy questions. Instead, the main thrust of the committee's discussion concerned reasons why the committee should not consider the possibility of pleading rule reform in the aftermath of the Court's decision. Two main points were repeatedly emphasized. The first, not surprisingly, was that it was far too early to evaluate what the lasting effects of the decision might be.[122] At this meeting members of the committee were debating — as was the rest of the legal profession — whether the Court intended *Twombly* to apply only to antitrust cases or, perhaps only slightly more broadly, only to complex cases involving especially heavy discovery burdens.[123]

As the discussion wore on, however, initial uncertainty about the case gave way to a greater sense of confidence that concerns about *Twombly* (which were already being articulated by legal academics and others outside of the committee) were excessive. Some committee members were inclined to think the decision would be limited in its application.[124] Several observed that the large number of *Twombly* citations may not reflect increased Rule 12(b)(6) motion filing rates at all.[125] Another judge member predicted that: "*Conley v. Gibson* has been the mandatory citation on motions to dismiss. Now it will be *Twombly*."[126] *Twombly* may simply become the new "boilerplate citation" previously seen with citations to *Conley*.[127] The view was also expressed that the *Twombly* case would have no effect in circumstances where the practice already was to file a more detailed complaint than *Conley* required.[128] The example of the Racketeer Influenced and Corrupt Organizations Act (RICO) case statements was given.[129] Another member observed that "good lawyers have been filing pretty detailed complaints for many years" and that "[i]t seems likely that the *Twombly* decision will have little or no impact in most cases brought by careful lawyers."[130]

Looking back, it is striking how different the rulemakers' deliberations at this first meeting were after *Twombly*, as compared

[122] *Id.* at 33.
[123] *Id.* at 32-33.
[124] *Id.* at 33.
[125] *Id.* at 35.
[126] *Id.* at 33.
[127] *Id.*
[128] *Id.* at 34.
[129] *Id.*
[130] *Id.*

with their thinking just prior to 2007. Before *Twombly*, rulemakers rejected changing the existing pleading standard largely because a sufficient number of them thought such a change unwarranted. At this first meeting after *Twombly*, what one primarily sees from the minutes is not policy deliberation: instead, the primary themes are initial caution about jumping to early conclusions followed by a greater willingness to push caution aside in favor of a more confident prediction that the case likely would not amount to much of a change in practice. As we will see, this confidence that things would not turn out as badly as critics feared would continue to grow, becoming a dominant theme in the rulemakers' deliberations.

B. Committee Meetings 2008

Two months later, at the January 2008 meeting of the Standing Committee, pleading was also a main topic of discussion. Agenda materials for the meeting included a memorandum regarding *Twombly* prepared by the reporter for Civil Rules Committee.[131] One of the reporter's key observations in the preliminary memorandum he prepared was that it was too early to know the case's impact and, thus, too early to begin thinking about rule amendments. The reporter also cautioned, however, that if the Court's opinion creates too much disuniformity in lower courts, it may be necessary to think about rule reform "down the road."[132]

There was discussion among members about whether the Civil Rules Committee should be tasked with considering changes to the pleading rules. The discussion tracked many of the initial suggestions outlined by the Civil Rules Committee's reporter in his memorandum to the committee. These initial suggestions spanned the gamut, from expanding the categories in Rule 9 — the one provision in the federal rules that specifically calls for heightened pleading — to reconsidering the motion for more definite statement in Rule 12(e), to the suggestion that some modest revision to Rule 8 might be offered up as a pretext for adding a brief, pointed remark in the Advisory Committee Note after Rule 8, something to the effect of "and we really mean it."[133]

---

[131] RULES OF CIVIL PROCEDURE ADVISING COMM., AGENDA MATERIALS 544 (Jan. 2008), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2001-01.pdf (referring to the memorandum by Edward Cooper, *Initial Observations on* Twombly (Nov. 5, 2007)).

[132] *Id.*

[133] *Id.* at 475.

Judge Anthony Scirica (a former chair of the Standing Committee) and three lawyers (Elizabeth Cabraser, Greg Joseph, and David Bernick) were invited to offer their views to the Standing Committee on the *Twombly* case.[134] Professor Stephen Burbank moderated the panel.[135] Several of the speakers expressed the view that *Twombly* was already having a major impact and that the case was inconsistent with the established norm of notice pleading of the last fifty years.[136] Several noted that the decision did not seem to be applied by courts only in antitrust cases, though several felt that it was not being applied to "simple" cases.[137] Others directly questioned the decision itself.[138] Rules Enabling Act issues were raised, as was concern about access to court, especially in circumstances when the aggrieved party lacks access to information.[139] It was also observed that the burden on judges was considerable to make subjective merit determinations at the case's outset.[140] Several on the panel lamented the subjectivity that the Court's "plausibility" analysis permitted.[141] In this connection, Elizabeth Cabraser criticized the Court's decision for making the Rule 12(b)(6) motion such an early, critical moment in the litigation; what she called "a single defining event at the outset of a case when the court must decide whether to allow the case to proceed."[142] Agreeing in part, but not fully, with some of the criticisms voiced, Judge Scirica expressed the view that *Twombly* was an improvement over the overly broad *Conley v. Gibson* that seemed to require judges "to speculate about unspecified and undisclosed facts."[143]

Despite the concerns articulated by the panel, several members of the Standing Committee urged caution about reading too much into the effect of the Court's decision. Although one committee member expressed not being "convinced that waiting is the best course of action,"[144] the majority view was that it was premature to think about drafting proposed amendments.[145] A member suggested that the Civil

[134] RULES OF PRACTICE AND PROCEDURE COMM., MINUTES 2, 37 (Jan. 2008), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-2008-min.pdf.

[135] *Id.* at 37.

[136] *Id.* at 37-38.

[137] *Id.*

[138] *Id.* at 40.

[139] *Id.* at 40-42.

[140] *Id.* at 41.

[141] *Id.* at 39-42.

[142] *Id.* at 42.

[143] *Id.* at 38.

[144] *Id.* at 43.

[145] *Id.*

Rules Committee should continue monitoring the case law and thinking about possible rule reforms so that it could be prepared to act if that should be deemed necessary in the future.[146] In all, the minutes of the January 2008 Standing Committee meeting suggest the committee took a cautious approach, but one that recognized the possible need for rule reform to address problems that *Twombly* may eventually be shown to have precipitated; in effect "laying the groundwork for potential future amendments," as the Chair of the Standing Committee put it.[147]

The case for continued deferment by the rules committees was made stronger when the Court granted certiorari in *Iqbal* on June 16, 2008. When the Civil Rules Committee met again in November, the "uncertainty" that the *Twombly* decision had created in the lower courts was again recognized. Nevertheless, the prevailing view on the committee was that any rulemaking effort to be taken up, if at all, should await the Court's decision in *Iqbal*, which might clarify the scope of *Twombly*'s reach or otherwise further elaborate on the pleading standard the Court had articulated.[148]

C. Committee Meetings 2009

The subjects of pleading and discovery were again discussed during a lengthy panel discussion at a Standing Committee meeting in January 2009.[149] At the meeting, the committee listened to a panel discussion of a draft report on the civil justice system prepared by the American College of Trial Lawyers' Task Force on Discovery and the Institute for the Advancement of the American Legal System (IAALS). The panel debated some of the ideas in the draft report, including the recommendation to move to a fact-based pleading model.[150] Discussion of the draft report's recommendations prompted significant

[146] *Id.*

[147] *Id.* at 44.

[148] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 17 (Nov. 2008), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2008-min.pdf; *see also* RULES OF CIVIL PROCEDURE ADVISING COMM., AGENDA MATERIALS 179 (Nov. 2008) ("A salient reason for deferring action is that the Supreme Court has granted certiorari to review . . . *Ashcroft v. Iqbal*. The opinion . . . may weigh heavily in determining whether there is any urgency about considering rules amendments."), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2008-11.pdf.

[149] RULES OF PRACTICE AND PROCEDURE COMM., MINUTES 37 (Jan. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-2009.pdf.

[150] *Id.* at 37-38.

dissent from several other panel members. The Reporter for the Civil Rules Committee observed that the kind of significant changes being proposed by IAALS and the College to the "basic components of the rules" — pleading, discovery, and summary judgment — "may have consequences that are profoundly political." Perhaps, he suggested, these sorts of reforms would be better left to legislative process.[151]

Although pleading remained on the rulemakers' agenda, most of the big developments with regard to pleading were taking place outside of the committee meetings. *Iqbal* was decided in May 2009, erasing doubt that the Court intended its pleading doctrine makeover to apply to all cases. Separately, the Civil Rules Committee continued making plans for the major conference the committee would host at Duke Law School on May 10-11, 2010.[152] The conference would address not just the Court's pleading decisions, but "the state of civil litigation" more generally.[153]

At the Civil Rules Committee's Fall 2009 meeting, *Iqbal* was a major topic of discussion. In advance of the meeting, the reporter prepared a memorandum to the committee that addressed the Court's most recent decision. In it he pointed out that the committee's deliberate, go slow approach so far had been vindicated in light of Court's recent decision in *Iqbal*.[154] "Any attempt to rush toward revised pleading rules in the aftermath of the *Twombly* decision would have been caught up short by the *Iqbal* decision, unless by chance the effort had fully anticipated the decision."[155] As importantly, he noted that rulemakers would probably want to continue to defer any course of action decisions until after the Duke Conference in the spring. Though emphasizing the need for continued patience and study, the reporter's memorandum for the committee nevertheless then sketched some possible approaches available for the committee to pursue, should it decide to act.

Two points later made in the Reporter's memorandum stand out and bear particular attention. After laying out possible reform options for the committee to consider, the reporter also noted another challenge the committee faced in thinking about pleading rule reform. Beyond the challenge of trying to figure out what the Court had meant and

---

[151] *Id.* at 34.

[152] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 10 (Feb. 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV02-2009-min.pdf.

[153] RULES OF CIVIL PROCEDURE ADVISING COMM., AGENDA MATERIALS 27 (Oct. 2009) [hereinafter OCT. 2009 AGENDA MATERIALS], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2009-10.pdf.

[154] *Id.* at 364.

[155] *Id.*

what the impact of its new pleading doctrine had been, the reporter also pointed out that each one of these potential reform ideas he laid out had its own difficulties. "Devising an improved version of notice pleading has not seemed easy in the past, and does not seem obviously easy now," he noted.[156] This is one of the earliest iterations of one aspect of the futility problem that rulemakers would come to recognize as a major impediment to rule reform: it would not be easy coming up with language that would effectively countermand (or enshrine) the Court's decisions.

Separately, the Reporter observed that rulemakers should continue to keep in mind that rule reform may not be necessary because "it is possible — and to be hoped — that lower courts, inspired or prodded by the *Iqbal* opinion, will develop pleading practice under an unrevised Rule 8(a)(2) in ways just as effective as might occur under revised rule language."[157] He continued on this theme, suggesting that it may turn out that the better course of action is to simply allow the dust to settle and that judges would figure out on their own, without any further rule amendment, how to sensibly and fairly apply the decisions. He observed:

> There may be some value in reflecting on experience with adjusting to an advisory Sentencing Guidelines regime after the *Booker* decision. Lower courts, with occasional review of particular issues by the Supreme Court, seem to be working out a process that has held back any burning desire for legislative revision. So it may be with *Iqbal*.[158]

At the meeting the chair echoed the reporter's observations. "Developments over the near term," the chair noted, "may show outcomes similar to the aftermath of the *Booker* decision that converted the Sentencing Guidelines from a mandatory to an advisory role."[159]

The notion that trust in lower courts to manage the new doctrine may be preferable to rule reform to address *Twombly* and *Iqbal* is an idea that built on similar inchoate sentiments initially expressed back at the Fall 2007 Civil Rules Committee meeting. Moreover, the theme of judicial confidence was also reflected in the committee's discussion

---

[156] *Id.* at 365.

[157] *Id.* at 361.

[158] *Id.*

[159] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 8 (Oct. 2009) [hereinafter OCT. 2009 MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-2009-min.pdf.

of an initial version of a memorandum by Andrea Kuperman (then a clerk for the chair of the Standing Committee and later to be dubbed "the most famous law clerk in the world"[160]) tracking cases post-*Twombly* and *Iqbal*. Though her project was understood still to be in its preliminary stages, she was asked at the meeting to summarize her findings to date. One of her main observations to the Committee was that while it was too soon to form definitive conclusions — especially as to *Iqbal* — her reading of the cases so far suggested that they did "not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints."[161] For many on the rules committees, her case law study was read as additional confirmation that the Court's decisions are not proving to be as problematic as critics anticipated because lower courts seems to be handling *Twombly* and *Iqbal* appropriately.

There still was great uncertainty as to what effect *Twombly* and now *Iqbal* were having in the lower courts though.[162] The need for more empirical information was emphasized again, with the same admonition repeated by several members that it would be wise to continue to proceed cautiously. One comment typifies the sentiment: "[A]ny hasty response in the Enabling Act process or in Congress might miss the mark."[163] However, even as these acknowledgements of the uncertainty still surrounding the Court's decisions were made, the more dominant theme in the discussion was the more confident sense that *Twombly* and *Iqbal* were not all that concerning. One judge member observed that "95% of his docket involves 'small cases'" and that "*Iqbal* is seldom cited," echoing earlier comments that the decisions were perhaps primarily being applied with any force in complex litigation.[164] Similarly, it was noted that *Iqbal* makes a difference only in supporting dismissal of truly fanciful complaints of a sort that courts might have felt obliged to string along under truly minimal notice-pleading standards.[165] It was also observed that "'[w]e long ago moved beyond notice pleading,'" even to "'overpleading'" and

[160] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 2 (Mar. 2010) [hereinafter MAR. 2010 MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV03-2010-min.pdf.

[161] RULES OF CIVIL PROCEDURE ADVISING COMM., OCT. 2009 AGENDA MATERIALS, *supra* note 153, at *Kuperman Memorandum* 2.

[162] RULES OF CIVIL PROCEDURE ADVISING COMM., OCT. 2009 MINUTES, *supra* note 159, at 8-9.

[163] *Id.* at 9.

[164] *Id.* at 13.

[165] *Id.*

that, as a result, "'*Iqbal* is not likely to make much difference.'"[166] Another committee member remarked that he had had experience with several *Iqbal* motions already and that the case "doesn't seem to make much difference."[167] A judge member commented that the only time he had cited to *Twombly* and *Iqbal* had been in denying the motion to dismiss, continuing the theme that the cases were having a modest impact, at most.[168]

D. Committee Meetings 2010

Early deliberations, up to and just beyond the release of the *Iqbal* decision, reflect the uncertainty felt by Rules Committees about effects of both *Twombly* and *Iqbal* and what, if anything, to do in response to the decisions. Equally notable, however, are the simultaneous sentiments of confidence that were initially expressed, even in these earlier deliberations, that the decisions would not turn out to be all that problematic. By the beginning of 2010, such expressions of confidence in the lower courts to manage *Twombly* and *Iqbal* grew even stronger.

At the January 2010 meeting of the Standing Committee, the chair began by noting the bills that had been in Congress.[169] She observed that the Kuperman memo had been made available to Congress to show that the proposed legislation may be an overreaction to the Court's decisions.[170] As the chair put it, the memo documents that "courts have responded very responsibly in applying the two decisions."[171] Similarly, in his report to the Standing Committee, the chair of the Civil Rules Committee noted that, though his committee was monitoring the situation, they had detected few problems with the decisions.[172] He pointed to Administrative Office data that had been collected, which did not show any increase in dismissal rates (it would later become evident that the AO data was a compilation of information on all motions coded as "motion to dismiss" and thus was not specific to pleading dismissal challenges).[173] Additionally,

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] RULES OF PRACTICE AND PROCEDURE COMM., MINUTES 4-8 (Jan. 2010) [hereinafter JAN. 2010 MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-2010-min.pdf.

[170] *Id.* at 7.

[171] *Id.*

[172] *Id.* at 16.

[173] *Id.* at 15.

referencing the Kuperman memorandum, the Civil Rules Committee chair noted that "[f]ew decisions state explicitly that a particular case would have survived a motion to dismiss under *Conley v. Gibson*, but not under *Iqbal*.[174] It was possible that "through the normal development of the common law, the courts will retain those elements of *Twombly* that work well in practice and modify those that do not. Accordingly, decisional law, including future Supreme Court decisions, may produce a pleading system that works very well in practice."[175] Where problems may exist, they tend to be in informational imbalance circumstances, the Civil Rules Chair observed, and he and other judges could address any problems resulting from such imbalances by permitting limited discovery and leave to amend.[176]

A contrasting view was offered by Professor Robert Bone of the University of Texas School of Law, who was an invited speaker at the January meeting.[177] Bone had previously published a paper largely approving of what he called *Twombly*'s "thin" screening of allegations.[178] However, in his remarks to the committee he distinguished between *Twombly*'s approach and the "thick" screening authorized by *Iqbal*.[179] Tracking an argument he would develop further in later writing,[180] Bone suggested to the committee that where *Twombly* authorized only the filtering of meritless claims, *Iqbal*'s thick screening model inappropriately tries to screen both merely weak claims, as well as meritless ones. His ultimate recommendation was that the committee should consider departing from the principle of transsubstantivity so that cases of different kinds would be treated differently.[181] He mentioned civil rights cases and complex litigation, in particular, as warranting special treatment.[182] Near the end of his remarks he responded preemptively to what he anticipated he would hear about judges being able to manage the pleading doctrine

[174] *Id.*

[175] *Id.*

[176] *Id.* at 16.

[177] *Id.* at 17.

[178] Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 910-15 (2009) [hereinafter *Pleading*].

[179] RULES OF PRACTICE AND PROCEDURE COMM., JAN. 2010 MINUTES, *supra* note 169, at 17.

[180] Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 849-50 (2010) [hereinafter *Plausibility*].

[181] RULES OF PRACTICE AND PROCEDURE COMM., JAN. 2010 MINUTES, *supra* note 169, at 19.

[182] *Id.*

adequately.[183] "The ultimate metric for judging whether a pleading standard is working well," he suggested, "is whether case outcomes are fair and appropriate, not whether the judges and lawyers are pleased."[184]

There were mixed reactions to his comments at the meeting. A few members expressed worry about the impact the cases were having on judicial access, but the majority of comments saw far less reason to be concerned.[185] For instance, one judge member remarked that "there did not appear to have been much change since *Twombly* and *Iqbal,* except that the civil process may well turn out to be more candid."[186] Disagreeing with Bone's suggestion that the time to move from transsubstantivity may be upon us, a member observed that "[i]nstead of mandating different types of pleadings for different cases, the transsubstantive rules — which now incorporate an overarching plausibility standard — can be applied effectively by the courts in different types of cases."[187] "The bottom line," said the same member, "is that even though plaintiffs may be concerned about *Twombly* and *Iqbal*, they are really not going to suffer."[188] Going further, another judge member observed that the stricter pleading doctrine was a welcome development because "a number of federal civil cases, especially *pro se* cases, are clearly without merit and do not state a federal claim." (emphasis added).[189] Several of the lawyer members of the committee chimed in to say that in their view *Twombly* and *Iqbal* had not altered law practice meaningfully.[190] As one succinctly put his opinion, "the two Supreme Court decisions have not made a change in the law."[191]

Two months later, in March, the Civil Rules Committee met again and had a lengthy discussion of pleading standards, beginning with the committee chair's reiteration of the now oft-recurring theme of confidence in judges to apply *Twombly* and *Iqbal* responsibly. Noting Kuperman's continuing review of the lower court decisions, the chair opined that her work "suggests that the courts of appeals are sanding down the rough edges that inevitably emerge as district courts respond

[183] *Id.* at 18.
[184] *Id.*
[185] *Id.* at 19-22.
[186] *Id.* at 20.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 21.
[190] *Id.*
[191] *Id.*

in the immediate aftermath of ambiguous opinions."[192] The chair noted further that she continued to hold view that cases are working out whatever problems *Twombly* and *Iqbal* may cause by their ambiguous language.[193] By contrast, he said, the "train of articles" coming from academia critical of the decisions continued.[194] Later comments made in the discussion echoed the same sentiment. Academic interest in pleading, it was felt, is now "getting out of hand. There is little correlation between the anguish in much of the writing and what courts are actually doing."[195] The chair added that "[t]he Supreme Court itself may be sending further signals" that *Twombly* and *Iqbal* were not meant to be revolutionary decisions, making reference to an obscure *per curiam* opinion in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), in which the Court, citing to *Leatherman*, noted that because the case arises from a motion to dismiss "we accept as true the factual allegations in the City's second amended complaint."[196] In sum, the chair concluded:

> We do not yet know whether there is a problem, nor what the problem is if indeed there is a problem. It may be that future work should be directed not so much at pleading standards as at developing means of enabling discovery to support sufficient pleading in cases in which plaintiffs with potentially good claims cannot frame an adequate complaint because defendants (or perhaps others) control the necessary information.[197]

Following his remarks, the chair of the Standing Committee discussed the current legislation pending before Congress to reverse *Twombly* and *Iqbal*, emphasizing that the Judicial Conference had not been involved in the political process surrounding the legislation.[198] Speaking of the Kuperman memorandum, and of some of the empirical survey work that had been completed, the Standing Committee chair added that "[t]here is no apparent information that would support a need for immediate action. The district courts that

---

[192] *Id.* at 10.

[193] RULES OF CIVIL PROCEDURE ADVISING COMM., MAR. 2010 MINUTES, *supra* note 160, at 10.

[194] *Id.*

[195] *Id.* at 13.

[196] *Id.* at 10 (quoting Hemi Grp. v. City of New York, 130 S. Ct. 983, 986-87 (2010)).

[197] *Id.* at 10-11.

[198] *See id.* at 11.

read the *Iqbal* decision more aggressively are being reversed."[199] She also emphasized, however, that the Rules Committees were continuing to gather information "in a disciplined and thorough way" and "are prepared to offer rule changes if good reason appears."[200]

In May, the Civil Rules Committee hosted the much-anticipated 2010 Conference on Civil Litigation at Duke.[201] More than seventy judges, lawyers, and law professors spoke on scheduled panels addressing the state of civil litigation. Another 200 invited participants of diverse viewpoints were also there, supplementing the panel discussion with public comments. New empirical studies were presented by several different entities.[202] Though one cannot adequately summarize the two days of panel discussions, it is instructive to point out that the message received by rulemakers seems to be that there was a diversity of viewpoints on most of the subjects that were covered at the conference, pleading included. In the report prepared for the Chief Justice of the United States Supreme Court by the Civil Rules Committee and Standing Committee, this diversity of views was emphasized.[203] Some, it was noted, favored an immediate legislative response to *Twombly* and *Iqbal*, even if only as a stopgap measure until the rules committees could study the matter further.[204] Others, however, thought rule reform was not necessary because "the common-law process of case-law interpretation has smoothed out some of the statements in, and responded to the concerns raised by, *Twombly* and *Iqbal*, and will continue to do so."[205] Still others would prefer embracing the new pleading standard and, perhaps, even going further.[206] Different possible rule reforms were briefly outlined, with an assurance that the committees would be actively considering all available options.[207]

In an earlier, separate report prepared to the chair of the Standing Committee, the chair of the Civil Rules Committee acknowledged the same diversity of viewpoints about the Court's pleading decisions

---

[199] *Id.*

[200] *Id.* at 12.

[201] *See* John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 537 (2010).

[202] *Id.* at 539-40.

[203] JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULE OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 2 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf.

[204] *Id.* at 6.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 7.

expressed at the Conference, but went on to emphasize that "several thoughtful voices" expressed the view that "practice is already settling down in patterns that reflect very little change in pleading standards."[208] Yes, it is too early to draw definitive conclusions, he wrote, but citing the ongoing summary of the case law in the Kuperman memorandum, the Chair further remarked that "it does not seem that any dramatic changes have occurred."[209] If pleading standards have been raised in some cases, there "seem to be few decisions dismissing complaints that might well have survived under earlier approaches to 'notice' pleading."[210] The "evolutionary processes of judicial refinement are moving rapidly," but seem to be "working well."[211] Still, recognizing that the Civil Rules Committee should continue its "active study" of lower court application of the *Twombly* and *Iqbal* decisions,[212] he concluded that the "forceful expression of vigorously contested views [regarding pleading standards] at the conference will be most useful as the work carries on."[213]

Yet, six months later, at the November 2010 meeting of the Civil Rules Committee, its first since the Duke conference, the watchword was not "active study" of pleading standards, but, once again, caution.[214] No proposals for action were included as part of the agenda for the meeting. Instead, the value of having lower courts continue to apply the decisions was reiterated.[215] "[I]t is important to allow time for lower courts to work through the *Twombly* and *Iqbal* invitation to reconsider pleading practices as they existed on May 20, 2007."[216] This was the predominant theme of discussions in November: the virtue of continuing to wait for the case law to develop in the lower courts, while the committee awaited the results of the FJC's new study of motions to dismiss after *Iqbal*.[217] This deliberative, cautious approach was contrasted with the criticisms still being articulated by the

[208] Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 4 (May 17, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf.

[209] *Id.* at 2.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.* at 4.

[214] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 25 (Nov. 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf.

[215] *Id.* at 23.

[216] *Id.*

[217] *Id.* at 25.

academic community. "All law professors know what *Twombly* and *Iqbal* mean. Mere mortals do not."[218]

E. Committee Meetings 2011-12

The theme of deliberate study and cautious optimism that the lower courts were managing the *Twombly* and *Iqbal* doctrine sensibly was continued at the January 2011 meeting of the Standing Committee. Pleading was not the main topic of discussion at the January meeting, but in his written report to the Standing Committee, the chair of the Civil Rules Committee observed that pleading standards remained under "active consideration."[219] "Active consideration," however, "does not imply a plan for imminent rules proposals," the report read.[220] Rather, "it is better to wait patiently while lower courts work through the ways in which pleading practice should be adjusted to meet the concerns expressed by the Supreme Court."[221] Letting the case law develop may be preferable to rule changes because the common law "may well produce better results than could be achieved by attempting to formulate and express revised standards in rule language."[222] "Absent some external shock," the report continued, "the Advisory Committee prefers to examine developing practice carefully for some time to come."[223] The Rules Committee, it concluded, was choosing to follow a path of "vigilant delay."[224]

In his oral report to committee, the chair of the Civil Rules Committee noted that he had observed two years earlier that "a common-law process would develop following *Twombly* and *Iqbal* and that the federal courts would take a context-specific and nuanced approach to pleading requirements."[225] Citing Kuperman's memo, the chair commented that this "was in fact happening" and his prior prediction "had clearly been confirmed."[226] The academic reporter

---

[218] *Id.* at 22.

[219] Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 9 (Dec. 6, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2010.pdf.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 9-10.

[225] RULES OF PRACTICE AND PROCEDURE COMM., MINUTES 25 (Jan. 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-2011-min.pdf.

[226] *Id.*

offered a different take on the case law in his written report to the committee, however. While many will find the Kuperman memo compilation of lower court decisions "reassuring," the Reporter noted, "even scores of appellate opinions can[not] provide clear evidence of what is happening in law offices and in the district courts."[227]

The April 2011 meeting of the Civil Rules Committee produced the most confidence expressed thus far that the Court's decisions were being managed well by the lower courts and that, as a result, there was no urgent need for rule reform.[228] One of the keys to this added confidence was that the FJC presented the preliminary findings from its March 2011 study of motions to dismiss for failure to state a claim, which, broadly summarized, failed to detect any major effects from *Twombly* and *Iqbal*.[229] I discuss the FJC study in greater detail in Part III, below.

The preliminary findings from the FJC's study were not the only source of comfort for those on the committee not inclined to favor amendments to the pleading rules in response to *Twombly* and *Iqbal*. Two decisions by the Supreme Court, announced just a couple of weeks before the April meeting of the Civil Rules Committee, were also cited as evidence that some of the sweeping proclamations made in *Twombly* and *Iqbal* were unintended.[230] Additionally, the practical problem of finding a way to counteract the Court's decisions, previously raised at an earlier meeting, was again raised and discussed at greater length at this April meeting. That is, even assuming rulemakers ultimately decided in favor of rule reform, the challenge was in finding an effective antidote to *Twombly* and *Iqbal*. The proposal in one legislative draft to roll back pleading standards to what they were the day before *Twombly* was criticized for failing to take "account for the fact that there was no easily stated or uniform [pleading] practice" before *Twombly*.[231] Moreover, directing courts by rule to "disregard" *Twombly* and *Iqbal* "would encounter the challenge

[227] Memorandum from Hon. Mark R. Kravitz, *supra* note 219, at 108.

[228] Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 53 (May 2, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2011-06.pdf.

[229] *Id.* at 52-53.

[230] RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 18 (Apr. 2011) [hereinafter APR. 2011 MINUTES] (citing *Switzer v. Skinner*, 131 S.Ct. 1289 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309 (2011)), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/Civil-Minutes-2011-04.pdf.

[231] *Id.* at 30.

of persuading lower courts that Supreme Court implementation of the new rule would not be affected by the concerns that led to the *Twombly* and *Iqbal* decisions."[232] Other approaches were similarly questioned. Sentiments expressed in reference to one particular reform idea captured the fundamental difficulty thought to exist with any rule reform effort: "It could prove difficult to find words capturing [our] purpose."[233]

Beyond the practical problem of coming up with adequate language, another committee member raised the separate concern that the Court stood in the way of any reform ideas the committee might pursue and ultimately propose. "[I]s there any reason to suppose the Supreme Court would adopt a rule that reduces pleading standards below the level set by the *Twombly* and *Iqbal* decisions[?]" a member queried.[234] Other members answered that the Court might be receptive to some ideas, particularly if the rule changes were "[i]ndirect,"[235] but the political challenge of getting Supreme Court approval for a rule change that would overturn its own recent decisions remained unresolved.

At the June 2011 meeting of the Standing Committee, the view that rule reform may not be necessary because the lower courts were responsibly handling the new pleading doctrine was again emphasized prominently by rulemakers. The report of the Civil Rules Committee to the Standing Committee began by noting that the Kuperman memorandum, now surpassing five hundred pages in length, shows that "what once seemed a shifting target may be stabilizing," suggesting that "not much has changed in actual practice."[236] Additionally, *Skinner* and *Matrixx*, though they "do not clearly reset the rhetoric of the *Twombly* and *Iqbal* decisions" nevertheless "do reinforce the belief that context matters" and that "[h]ow much fact is required to support a reasonable inference of liability varies with context, and in many types of action can be rather scant."[237] Finally, the FJC 2011 *Iqbal* study was cited as confirmation that lower courts were managing the new pleading doctrine responsibly.[238] While recognizing the limits of empirical study of the impact of *Twombly* and

[232] *Id.*

[233] *Id.*

[234] *Id.* at 31.

[235] *Id.*

[236] Memorandum from Hon. Mark R. Kravitz, *supra* note 228, at 53.

[237] *Id.*

[238] *Id.* (stating the study: "Suggest[s] there is no urgent need for immediate action on pleading standards. The courts are still sorting things out.").

Iqbal,[239] it was suggested that the FJC study nevertheless underscores that "there is no urgent need for immediate action on pleading standards."[240] In short, there is "reason to hope that the common-law process of responding to and refining the Supreme Court's invitation to reconsider pleading practices will arrive at good practices."[241] After briefly cataloguing some of the various possibilities for rule reform that the Civil Rules Committee has discussed over the last four years, the Report to the Standing Committee concluded:

> For all of these intriguing possibilities, the approach to pleading practice remains what it has been since 2007. The Committee will closely monitor developing practice, it will encourage and heed further rigorous empirical work, and it will listen carefully to the voices of bench, bar, and academy. Procedural ferment is exciting, but it does not justify an excited response.[242]

The Standing Committee adjourned its June meeting without any specific direction to the Civil Rules Advisory Committee to proceed differently.

A year later, little had changed.[243] As the Report by the Civil Rules Advisory Committee to the Standing Committee at its June 2012 meeting put it: "The committee continues to pay close attention to evolving pleading practices. The development of pleading practices over the first five years following the decision in [*Twombly*] continues along paths that do not suggest an urgent need for response. Much remains to be learned about what pleading standards will be when practices are better settled."[244] The Report noted that the FJC is

---

[239] *Id.* (noting that "[o]ther questions elude the capacities of even the most careful docket studies").

[240] *Id.*

[241] *Id.*

[242] *Id.* at 54.

[243] *See, e.g.*, RULES OF CIVIL PROCEDURE ADVISING COMM., MINUTES 28-29 (Nov. 2011) (hearing report from FJC summarizing the findings from its recently-completed follow up study of dismissal motions which tracked cases in which a motion to dismiss was initially granted with leave to amend), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf. At the committee's invitation, at the November 2011 Civil Rules meeting, I summarized concerns I had raised regarding the FJC's March 2011 study. *See* Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7-31 (2011) [hereinafter *An Assessment*].

[244] *See* RULES OF PRACTICE AND PROCEDURE ADVISING COMM., AGENDA MATERIALS 60 (Jan. 2012), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2012-06_Revised.pdf#pagemode=bookmarks.

continuing to gather empirical data, including reference to a newly-developed research proposal to look at all dispositive motion practice. The limits of empirical study were also acknowledged with the observation that empirical study "can inform, but cannot direct, the critical value judgments that must be made."[245] Referencing the committee's discussion of various possible avenues for rule reform, the Report concluded: "Foundations are available to support prompt development when the time comes to decide whether to move toward revised rules or to accept the wisdom generated by the common-law process of responding to the Supreme Court's prompting in thousands, even tens of thousands, of cases."[246]

That brings us to the present day, which looks not very different from the way it did right after *Twombly* was decided. Pleading remains on the agenda, but neither the Civil Rules nor Standing Committee has any plans to move forward on specific reform proposals. Slow and steady is the pace, as it has been. The current view of the rules committees is that there is no urgent need for rule reform; perhaps, no need at all.

III. THE FUTURE: ASSESSING RULEMAKERS' PLEADING DELIBERATIONS, ASSESSING THE RULEMAKING PROCESS

As we have seen, over the last five years rulemakers consistently have expressed three dominant justifications for not pursuing pleading rule reform. The first dominant view has been the wait-and-see approach: that they are better served to wait for the case law to develop, and the empirical evidence to be gathered and examined, before making any decisions about how to proceed. This first justification for not moving forward on any specific reform proposals has been enabled by a second: namely, by the rulemakers' belief that the lower court case law has developed in such a way as to suggest no urgent need for a response. The lack of perceived urgency reflects the strong sense among those on the rules committees, a majority of whose members are judges, that the lower courts are adapting to the Court's changed pleading doctrine. Finally, the third principal justification that has been offered for not moving forward has been that even if the Court's decisions need addressing, rulemakers are unsure what they could do about it. One perceived challenge has been coming up with rule language that would effectively overrule the decisions. The other concern has been that the Court may reject any

[245] *Id.*

[246] *Id.*

rule reforms that are proposed, rendering the committees' work moot. Having gained a sense of how rulemakers' pleading deliberations have gone, this final part of the paper turns from the descriptive to the normative: I ask whether the justifications of the past can continue to support not pursuing pleading reform in the future. How do we go about answering this question?

Certainly, assessment must include consideration of the existing base of empirical knowledge because, in justifying why they have not contemplated any reform proposals, rulemakers have made assumptions that can be evaluated against the available evidence. Rulemakers say, for instance, that it would not be prudent to think about rule reform until additional research is collected, but what do we already know about how the Court's cases have been received and what additional information do rulemakers hope to find? After five years and all of the efforts that have been made to measure *Twombly* and *Iqbal*'s effects, the rulemakers' continued insistence that more still needs to be done before they can possibly consider rule revisions has the exasperating feel of a parent's repeated answer to his child's begging for a new puppy: *Not yet — I need to think about it some more*.[247] Rulemakers have said that they are prepared to act "when the time comes," but it is not clear how rulemakers will know when that time has arrived.

The exercise of evaluating the prior justifications for not pursuing pleading rule reform serves two primary purposes. One goal is immediate: to evaluate whether the justifications that have been offered in the past for not pursuing rule reform remain valid reasons for not doing so in the future. The second goal, broader in scope, is to consider what lessons about the rulemaking process, generally, can be drawn from the rulemakers' post-*Twombly* pleading deliberations.

A. What We Know

Numerous efforts have been made to measure *Twombly* and *Iqbal*'s effects.[248] The various studies and surveys have attempted to measure

[247] *Cf.* Marcus, *Confessions*, *supra* note 40, at 114 (noting that "the call to empiricism is regularly used as a club against any rule change" and that "it often happens that the opponents of change urge that it should be deferred pending further study and research").

[248] For summaries of the existing empirical research, see Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2324-32 (2012), and SCOTT DODSON, SLAMMING THE FEDERAL COURTHOUSE DOORS? NEW PLEADING IN THE TWENTY-FIRST CENTURY (forthcoming 2013) (manuscript at 74-89) (on file with author).

the direct effects of the Court's decisions on pleading dismissal practice, including whether they have changed how frequently pleading dismissals are sought or led courts to decide pleading dismissal motions differently than they did before *Twombly*. Researchers have also tried to quantify whether the Court's decisions have had indirect effects, including whether they have deterred the filing of new cases, had an effect on the kinds of cases being filed, altered pleading practices, or influenced settlement outcomes. I focus most of my remarks on the FJC's empirical work, which was conducted at the behest of the Civil Rules Committee by the Federal Judicial Center and has been the most comprehensive work thus far.[249] However, if rulemakers look closely at the findings that have been gathered, they will discover that, although there are some sharp disagreements (mostly relating to how findings should be interpreted), there is a great deal that is not in dispute.

1. Frequency of Filing of Pleading Dismissal Motions

The place to start is with what we know about the effect *Twombly* and *Iqbal* are having on the frequency with which motions to dismiss are filed. It turns out that the evidence on this point is clear and not in dispute: the effect has been quite substantial.[250] Defendants sought dismissal 50% more often after *Iqbal* across all case categories the FJC examined. Looking at individual case categories even more starkly conveys the differences. The largest percentage increases in how frequently defendants sought dismissal at the pleading stage after *Iqbal* were in Other (60%) and Torts (78%), which were the two largest case categories. Other, the largest case category, was more than twice as large as any other.[251] The results of these straightforward comparisons

[249] *See generally* JOE S. CECIL ET AL., FED. JUD. CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Mar. 2011) [hereinafter FJC MARCH 2011 STUDY], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf (highlighting 12(b)(6) motions in twenty-three federal district courts in 2006 and 2010); JOE S. CECIL ET AL., FED. JUD. CTR., UPDATE ON RESOLUTION OF RULE 12(b)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Nov. 2011) [hereinafter FJC NOVEMBER 2011 STUDY], *available at* http://fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf (following up on March 2011 FJC study and reaching similar conclusions).

[250] FJC MARCH 2011 STUDY, *supra* note 249 at 9-10 & tbl. 2.

[251] *Id.* at 9 tbl. 1 (reporting *Iqbal* period case filings as follows: Other: 20,202; Torts: 9,947; Contract: 9,139; Civil Rights: 4,976; Financial Instrument: 4,790; and Employment Discrimination: 3,871). Other included many statutory causes of action,

were confirmed after regression analysis: In the post-*Iqbal* period, the FJC reported that a plaintiff is twice as likely to face as motion to dismiss as compared with the period before *Twombly*.[252]

The FJC's findings are broadly consistent with survey results from late-2009 of attorneys in NELA. NELA lawyers who had filed an employment discrimination case since *Twombly* (about two-thirds of them had) were asked whether *Twombly* or *Iqbal* had affected their practice. Among that group, almost three quarters indicated that they have had to respond to additional motions to dismiss that they believe would not have been filed prior to *Twombly* and *Iqbal*.[253]

That dismissal motions are being filed more frequently is a significant change in dismissal practice. In a moment, I'll discuss how one scholar has used this observed change in party behavior, along with other selection effects related to the change in pleading standards, to demonstrate that a sizeable percentage of cases have been negatively impacted by the Court's decisions. For present purposes, it is enough to note that whatever else they have or have not done, the Court's decisions have incentivized defendants to seek dismissal much more often than they did before *Twombly*, which has changed how complaints are prepared and added more burdens on parties and courts at the pleading stage.[254]

2. Outcomes of Motions to Dismiss

As far as outcomes of motions are concerned, the FJC's research also is quite clear that there were more orders granting dismissal after *Iqbal*, both with and without leave to amend (far outstripping the

including ERISA, antitrust, copyright, patent, trademark, FLSA, LMRA, other labor claims, Civil RICO, environmental claims, and a number of others statutory claims. *Id.* at 40.

[252] *Id.* at 9-10 & tbl. 2.

[253] EMERY G. LEE & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RIGHTS 11-12 (Mar. 2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf.

[254] That *Twombly* and *Iqbal* have led plaintiffs to feel compelled to include more factual detail in their complaints is borne out by another more recent survey (conducted by the FJC) of plaintiff's lawyers and those who represent both plaintiffs and defendants. The survey found that half of the lawyers who responded reported that their pleading practices had changed as a result of the court's decisions. Among this group, more than 90% reported that they included more factual detail in their complaints. *See* EMERY LEE, EARLY STAGES OF LITIGATION ATTORNEY SURVEY: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 18 (Mar. 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/leeearly.pdf/$file/leeearly.pdf.

more modest increase in case filings over the same time period the FJC studied). Equally clear, the FJC found that the probability was higher after *Iqbal* in every case category examined that a motion to dismiss would be granted with leave to amend.[255] Disagreement primarily arises, at least as far as the FJC's work is concerned, with how to interpret the data. The FJC concluded that looking at the simple differences in grant rates was insufficient because other factors may explain the differences observed — factors other than *Twombly* and *Iqbal*, that is. The factors the researchers thought might be unrelated to the Court's decisions were: (i) different dismissal practices among different courts; (ii) variations based on case type; and (iii) whether the order responded to an amended complaint. When the researchers tried to control for these three factors, what they found was that there was no "statistically significant" increase in the likelihood that a motion to dismiss would be granted after *Iqbal* (except for financial instrument cases, which they treated as an outlier).[256]

Over the years, the FJC's empirical work has been very influential with rulemakers, and with good reason. The researchers have a long, demonstrated history of research excellence. For my own part, I have repeatedly cited to and praised the work of the Center — and that of the lead author of the *Iqbal* study, in particular — as the most authoritative and reliable empirical research that exists on numerous litigation-related subjects.[257] With all of that said, I have previously argued that the study confuses readers into thinking that it demonstrated the Court's decisions had no impact on dismissal practice.[258] Rather than repeating all of the points I previously raised, I'll draw attention to two primary issues.

One major concern about the FJC's study has to do with the three variables the researchers used in their regressions. The results of their

---

[255] FJC MARCH 2011 STUDY, *supra* note 249, at 14 tbl. 4.

[256] FJC NOVEMBER 2011 STUDY, *supra* note 249, at 4.

[257] *See, e.g.*, Hoffman, *Burn Up*, *supra* note 2, at 1220, 1259 (citing Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 (2007)); Hoffman, *The Case Against*, *supra* note 116, at 581 (describing EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009) as "the most recent and comprehensive study of civil discovery in the federal courts"); Memorandum from Joe Cecil, Project Director, Federal Judicial Center & George Cort, Project Director, Federal Judicial Center, to the Hon. Michael Baylson, Senior Federal Judge, U.S. District Court for the Eastern District of Pennsylvania (Apr. 12, 2007) (revised June 15, 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (estimating all summary judgment activity in fiscal year 2006).

[258] Hoffman, *The Case Against*, *supra* note 116, at *passim*.

models reveal valuable information only if these variables really are independent of *Twombly* and *Iqbal*'s effects; yet, it is not clear that they all are. Consider, for instance, the variable *court*. At first blush, the idea of controlling for the court that granted the motion makes sense: if a judicial district showed an above-average propensity to grant dismissal in the pre-*Twombly* period then we need to control for this. Otherwise, we might blame the Court's decisions for the higher overall grant rate observed when that really could have been caused by a greater number of motions filed in those districts after *Iqbal*. However, given how few orders the researchers counted in the brief pre-*Twombly* time period that was studied, it is not certain that the districts identified as naturally more trigger-happy really should be so characterized.[259] If we looked at many more orders, over a much longer period of time, we might discover that the grant rate in these districts was within the national average.

A different problem exists with regard to the idea that it was appropriate to control for the presence of an amended complaint. The researchers' thinking was that it was necessary to take into account whether the motion was in response to an amended complaint because courts were already more likely before *Twombly* to grant a dismissal motion brought in response to a complaint that had been previously amended. However, we need to consider that there might have been more motions seeking dismissal of amended complaints because of the Court's cases. That could have happened if defendants filed motions in circumstances when they previously would not have. It also could have happened if plaintiffs elected to amend their complaints after *Iqbal* when they would not have done so before. The problem, in other words, is that it is hard to separate cause and effect. Without getting further into the weeds, the basic point can be easily summarized: if the variables the researchers identified as independent are not so independent after all, then the statistical models they used are unintentionally, but mistakenly, leading us to believe that the observed changes in dismissal outcomes were not attributable to *Twombly* and *Iqbal*.

A second major concern has to do with the researchers' critical characterization that there was no "statistically significant" increase in

[259] Among the five districts identified as having higher than average dismissal rates, none had more than a hundred total orders. The two highest were the Northern District of California (100) and the Middle District of Florida (84). The remaining three had far fewer: Eastern District of New York (35); Eastern District of California (33); Southern District of New York (16). CECIL ET AL., FJC MARCH 2011 STUDY, *supra* note 249 at 15, 35.

the likelihood that a motion to dismiss would be granted after *Iqbal* (except for financial instrument cases). As I previously argued, "[r]ather than summarily announcing that the detected effects were not statistically significant, the researchers should have aided transparency and understanding by explicitly discussing how to interpret the study's results."[260] By not doing so, the study may have led some readers to think that the researchers proved the Court's decisions had no impact on dismissal practices.[261] Of course, the study proved no such thing, as its lead author has acknowledged.[262]

Ultimately, however, all of this business about confounding effects, independent variables and multivariate regressions may matter less than it seems. The notion of trying to measure the cases' impact by looking at changes in the overall grant rate may be fundamentally problematic. Kevin Clermont and Steven Yeazell have already pointed out that because pure *Twombly/Iqbal* motions will constitute only a small percentage of all motions to dismiss for failure to state a claim, non-*Twombly/Iqbal* motions will mask the effects of the cases.[263] Finally, the ambition of comparing differences in the grant rate over different pleading regimes is probably an incomplete way of thinking about *Twombly* and *Iqbal*'s effects, as we are about to see.

3. Beyond Changes in Outcomes: Other Measured Effects

The FJC studies, like all of the earlier empirical studies, looked primarily at differences in grant rates of dismissal motions, comparing the *Conley* era to the new *Twombly/Iqbal* regime. However, in a recently-published paper in the *Yale Law Journal*, Jonah Gelbach argues that because both plaintiffs and defendants may make choices after *Twombly* and *Iqbal* that they would not have made before, grant rate comparisons do not provide an adequate measure of the cases' impacts.[264] Indeed, a focus only on differences in the grant rate may mask effects that the cases are having. For instance, if defendants seek

[260] Hoffman, *An Assessment*, *supra* note 243 at 8.

[261] *Id.* at 7, 17-27.

[262] Joe S. Cecil, Of Waves and Water: A Response to Comments on the FJC Study Motions to Dismiss for Failure to State a Claim after Iqbal 10-11 (Mar. 19, 2012 draft) (unpublished manuscript) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026103 ("We never claimed to have 'proved *Twombly* and *Iqbal* were not responsible for the higher number and rate of dismissals," (quoting *id.* at 17)).

[263] Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1366 n.140 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 839 n.66 (2010).

[264] Gelbach, *supra* note 248, at 2298, 2310-14.

and obtain dismissals when they would not have even sought them before, then these would be effects for which we would want to account. Gelbach demonstrates how this could happen even if the overall grant rate across the different pleading regimes remained the same.[265] The main point Gelbach makes is that a full measure of *Twombly* and *Iqbal*'s effects must take into account not just differences across pleading regimes in how judges decide dismissal motions, but also in how parties behave.[266]

With party selection effects squarely in mind, Gelbach constructs a richer model of party behavior with regard to *Twombly* and *Iqbal* than previously has been attempted. Taking the lessons from his theoretical model as the starting point, he uses the actual data from the FJC's two studies to calculate a *lower bound* on the percentage of cases *negatively affected* by *Twombly* and *Iqbal*, among those cases that had Rule 12(b)(6) motions filed within the post-*Iqbal* period the FJC studied. I have highlighted these two phrases to try to make his empirical analysis accessible in summary form. What Gelbach has done is to estimate, based on his review of the FJC's data, a lowest possible percentage of cases that are being negatively affected by the Court's decisions. By negatively affected, Gelbach means one or more claims were actually dismissed at the pleading stage after *Iqbal* that, under the *Conley*-era pleading standard, would have reached discovery (or that would have settled in anticipation of the case reaching discovery).

Gelbach's analysis focuses on the share of cases in which the defendant prevailed as to at least one claim, meaning that a Rule 12(b)(6) motion either was granted: (i) without leave to amend; or (ii) with leave to amend, but the plaintiff did not amend her complaint. This is the same approach taken by the FJC in its updated November 2011 study.[267] Working with this set of cases, Gelbach is able to estimate *Twombly* and *Iqbal*'s effects, and this is what he finds: Among cases in which the defendants prevailed at least as to one claim in the FJC's post-*Iqbal* data, *Twombly* and *Iqbal* negatively affected at least two out of every five cases in the Other, Torts, and Contracts categories (those three case categories represented roughly three-

[265] *Id.* at 2311.

[266] *Id.*

[267] CECIL ET AL., FJC NOVEMBER 2011 STUDY, *supra* note 249, at 3 ("We identified cases in which the movant prevailed as those in which the court granted the last motion to dismiss in whole or in part and no opportunity to amend the complaint remained. This included all cases in which the motion was granted with leave to amend, but no amended complaint was submitted during the time allowed.").

quarters of all cases the FJC examined).[268] For employment discrimination and civil rights cases, his comparable estimate is that plaintiffs were negatively affected in at least one out of every four such cases. As Gelbach notes: "These would be substantial effects in their own right, and the fact that they are lower bounds tells us that the full effects may be even greater."[269]

Gelbach's work does not purport to tell us whether these results should be lauded or lamented. It is at least theoretically possible that every one of these negatively affected claims after *Iqbal* were meritless claims we should be pleased were thrown out (however, as I discuss below, there are many reasons to have little confidence in our ability to consistently filter for merit at the pleading stage). What makes Gelbach's contribution so valuable is that he demonstrates that the Court's decisions have had an impact on a sizeable percentage of cases, regardless of what the data show with regard to simple changes in the grant rate.

B. Beyond Empirical Proof: Assessing the Normative Case for Plausibility Pleading

Empirical findings about *Twombly* and *Iqbal*'s effects can meaningfully inform decision-making, but only when rulemakers have formed normative judgments about the policy questions that the Court's new doctrine implicates. As one of the leading scholars on rulemaking has emphasized: "There is no way to evaluate empirical data, regardless of how extensive and detailed it is, without a clear understanding of what the data is supposed to test. [E]ffective procedural reform must be based on a coherent normative account of civil procedure that is capable of attracting broad-based support."[270]

Procedural rules can be normatively evaluated by the ease/difficulty of their administration, as well as by the substantive consequences they may produce, and decisions have to be made about how much relative weight to give to these two, sometimes-competing, metrics.[271]

---

[268] Gelbach, *supra* note 248 at 2344-45, app. A tbl. 3.

[269] *Id.* at 2338.

[270] Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1156 (2006).

[271] Bone, *Plausibility*, *supra* note 180, at 879 n.141; Bone, *Pleading*, *supra* note 178, at 900-15 ("Broadly speaking, there are two different normative approaches to analyzing procedural issues: process-based and outcome-based. A process-based approach evaluates a procedural rule by how it treats litigants independent of its consequences for outcome quality, while an outcome-based approach evaluates a rule by its effect on the quality of litigation outcomes.").

For instance, consider the waiver rule in Rule 12(h)(1), which governs least-favored defenses, such as personal jurisdiction challenges. Essentially, rulemakers have made a policy choice in this rule that, while accuracy (a substantive goal) might matter a great deal in other contexts, it is outweighed by the process burdens that are associated with allowing litigants unlimited opportunities to raise challenges to the court's judicial authority. Contrast that with Rule 12(h)(3), and one can see the exact opposite weighting of the same two values: here, accuracy as to the court's subject matter jurisdiction is regarded so highly that it trumps the administrative difficulties associated with allowing unlimited opportunities to make certain that the court has authority to act (or have acted).

1. Evaluating *Twombly/Iqbal*'s Administration

Mention was previously made of some of the administrative difficulties that flow from the increased incidence of Rule 12(b)(6) filings after *Iqbal*.[272] Another administrative difficulty associated with plausibility pleading is the indeterminacy of the new doctrine. One may concede that the prior Rule 12(b)(6) practice accorded wide discretion to trial courts (and thus also produced non-uniform, indeterminate results) and still conclude that the *Twombly* and *Iqbal* two-step involves novel doctrinal applications that create great instability in the legal decision-making.[273] Moreover, as Professor Burbank has pointed out, the Court's decisions both represent and further incentivize "lawlessness" and an unhealthy process results.[274]

[272] *See supra* text accompanying notes 262-263.

[273] *See* Alex Reinert, *Pleading As Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 22 (2012) ("[A]nother distinct reason that interpreting *Iqbal* has posed significant difficulty is because the Court has, without clear acknowledgment, abandoned the historical understanding of the words 'conclusory' and 'plausible.' Thus, it is not simply that the Court has ushered in a new pleading regime, but that the Court has done so without coming up with a new way of describing what purpose pleading is serving.").

[274] Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 408 (2011) ("[B]efore *Twombly* and *Iqbal* some lower federal courts ignored the Supreme Court's repeated reminders about the proper process for amending Federal Rules by requiring more rigorous pleading in a broad ranges of cases. Now the Court, in *Twombly* and *Iqbal*, has rewarded that lawlessness with its own acts of lawlessness, sidestepping the carefully crafted and democracy-enhancing Enabling Act process. Can it be a surprise that we have heard repeatedly that some lower courts are ignoring *Iqbal* — lawlessness cubed?").

Additionally, in evaluating the ease/difficulty of administering the new pleading doctrine, rulemakers may also wish to consider that the Court's decisions may have changed the kinds of motions being filed and granted. Before *Twombly*, courts granted dismissals in cases where the claims were legally insufficient, so the primary concern is with factual insufficiency dismissals.[275] To be sure, the distinction between factual and legal sufficiency will often be fuzzy (which no doubt provided cover to some lower courts to grant dismissals that stretched beyond permissible limits set by the Court pre-*Twombly*).[276] Although there is some qualitative empirical work to suggest that more factual sufficiency challenges are being brought after *Iqbal*,[277] measuring these sorts of more granular differences in dismissal practices and outcomes is both time-intensive and not easily reducible to objective measures. Further empirical work on these questions may or may not resolve uncertainties. What we can say is that it would constitute a significant change in dismissal practice if *Twombly* and *Iqbal* have substantially increased how often defendants seek, and courts grant, dismissals of claims for being factually insufficient. Ultimately, as rulemakers tally up the administrative burdens, they must weigh those against the substantive outcomes that may result from keeping the Court's decisions in place.[278]

2. Evaluating *Twombly/Iqbal*'s Substantive Outcomes

When it comes to thinking about substantive consequences, rulemakers will have to consider what Robert Bone has described as the "error costs" of a procedural rule. One kind of error cost involves

[275] DODSON, *supra* note 248, at 79 ("[T]he key distinction between Old Pleading and New Pleading — the basic change in pleading standards—is one of *factual* sufficiency. Legal sufficiency standards remain unchanged.").

[276] *Id.* at 85 ("[S]ome courts were, pre-*Twombly*, stretching the legal-insufficiency standard to reach certain claims, perhaps questionably so, and [the] New Pleading now gives those courts cover to do lawfully what they had been trying to do under Old Pleading.").

[277] *Id.* (finding higher rates of factual sufficiency review post-*Iqbal*).

[278] Miller, *supra* note 5, at 69 ("The savings achieved by early termination may not offset the increased costs likely to be incurred as a result of more extensive preinstitution activities and fact-based pleading, the increased number of dismissal and summary judgment motions, and, potentially, the increased number of appeals from judgments following early terminations."); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 164 (2010) ("Strict pleading can be justified only by cost-benefit balancing of the cost of meritless litigation, the difficulties for plaintiffs in accessing essential pre-filing information, the impact of litigation expenses on government actors, and considerations of the moral component of the rights to be litigated.").

assessing the likelihood that *Twombly* and *Iqbal* are causing unintended and undesirable consequences, along with deciding how much we should care that this may be happening.[279] The other, related concern is evaluating whether the Court's new pleading doctrine is a reliable means of identifying and filtering out non-meritorious claims.

a. Assessing the Likelihood of Unwanted Outcomes

One concern for which rulemakers must account is the likelihood that the Court's strict pleading regime is deterring meritorious claims from being filed. The problem, however, is that empirical research cannot easily measure the deterrent effect. It has been suggested that we might evaluate the cases' deterrent effect by looking at the total number of lawsuits filed.[280] That approach, however, does not seem likely to shed much light on the problem because so many different variables influence the case filing rate.[281] In a recent paper that responds, *inter alia*, to a prior assessment I made of the FJC's *Iqbal* study, Joe Cecil notes that data on federal court filings showing recent increases in certain case categories are not consistent with the deterrence concern, but he readily acknowledges that case filing rates are a poor proxy for measuring the deterrent effect.[282]

A second concern that rulemakers need to keep foremost in mind is that empirical study of Rule 12(b)(6) activity also cannot tell us how often cases are being dismissed at the pleading stage that, if allowed to proceed to discovery, would have resulted in production of evidence to support a meritorious claim. This possibility could arise any time that the plaintiff lacks access to proof of wrongdoing that is solely in the defendant's (or a third party's) possession.[283] Forced to guess, judges sometimes guess wrong and end up dismissing meritorious claims.

---

[279] Bone, *Plausibility*, *supra* note 180, at 879 n.141 ("Two factors influence the magnitude of expected error costs: the probability of error and the cost of error."). *See generally* Bone, *Pleading*, *supra* note 178, at 910-15 (providing an explanation of outcome-based approaches to evaluating error costs).

[280] *See, e.g.*, William Hubbard, *The Problem of Measuring Legal Change, with Application to* Bell Atlantic. v. Twombly (Univ. of Chi. Law & Econ., Olin Working Paper No. 575, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883831 (discussing prior studies which looked at the number of filed lawsuits to measure deterrent effect).

[281] DODSON, *supra* note 248, at 88-89.

[282] Cecil, *supra* note 262, at 18-19 (noting that the data on federal court filings "do not prove that cases are not being deterred from filing in federal court" but also noting that the findings "offer no support to those who believe that such deterrence is taking place").

[283] *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119,

Although it remains difficult to determine how often the Court's decisions have either deterred the filing or lead to the early dismissal of meritorious claims, earlier empirical studies of securities and employment discrimination cases provide powerful reasons to be concerned that the Court's decisions are discouraging the filing or leading to the wrongful dismissal of meritorious claims.[284] The danger that *Iqbal* may be screening out meritorious cases was one of the key concerns Professor Bone raised —referring to its "thick" screening effect — when he spoke to rulemakers in January 2010.[285] Additionally, Steve Burbank has pointed out that plausibility pleading leads courts to carve up allegations and that the tendency to carve out isolated factual or legal allegations makes it more likely meritorious claims will fail the new pleading test and be wrongly dismissed.[286] Rulemakers may be particularly troubled by the Court's failure to take into account informational asymmetries, a failing that strongly suggest the current doctrine is filtering not for merit, but based on access to information, as Alex Reinert has argued.[287]

In thinking about the possibility that *Twombly* and *Iqbal* are a threat to meritorious cases, rulemakers must also decide how concerned they should be that this is happening; and it surely is not just a numbers game.[288] Even if policymakers might be willing to live with the risk that some small number of meritorious private party cases are being wrongfully dismissed if many more nonmeritorious ones are being properly weeded out, certain kinds of litigation — particularly private enforcement of public rights — may appropriately trigger concern

158-59 (2011).

[284] *See, e.g.*, Stephen J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (concluding that 1995 securities statute has likely deterred a substantial quantum of meritorious cases from being filed); Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 37 (2009) (suggesting that the 1995 securities statute had a screening effect); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009) (concluding that "results in federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts").

[285] *See* Bone, *Plausibility*, *supra* note 180, at 879 ("[S]trict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery."); *supra* text accompanying notes 179-186.

[286] *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 553 n.84 (2009).

[287] Reinert, *supra* note 273, at 29.

[288] *See* Bone, *Plausibility*, *supra* note 180, at 879 n.141.

even if the absolute incidence is anticipated to be quite small. In the risk tolerance calculus, these kinds of cases should be heavily weighted.[289]

b. Assessing Whether the Court's Decisions Successfully Filter Non-Meritorious Claims

Beyond thinking about unwanted substantive consequences, rulemakers must also consider that the Court's strict pleading regime may not be doing what it is supposed to be doing: filtering out the nonmeritorious cases. Just as we cannot easily measure how many meritorious cases are being turned away, measuring how effective the Court's new pleading doctrine is at filtering nonmeritorious claims is also problematic. Certainly, the Court failed to cite any evidence in support of its assertion that higher pleading standards would help courts filter out what it repeatedly called "groundless" cases. There is good academic research, however, which suggests that judges are unlikely to be good at making correct evaluations at the pleading stage of which cases deserve to proceed forward and which do not.

A recently published study by a mixed group of research psychologists, law professors, and one federal district court judge addressed how attitudes and stereotypes affect factual decision-making in the courtroom.[290] Drawing on extensive social psychological research, the authors consider what the likely effect is of asking judges, as *Twombly* and *Iqbal* do, to apply their judicial experience and common sense to decide a pleading dismissal challenge. They note that how we understand facts and draw conclusions from those facts are greatly influenced by the relation between "categorical" and "individuating" information.[291] More simply, we form opinions about the facts alleged by one plaintiff based on views we already had, in general, about similar people; and when more specific — more "individuating" information is not available — we are influenced even more by our general views. Moreover, although we may be aware of —

[289] *Id.* at 879 ("If constitutional rights protect important moral interests, then the harm from failing to vindicate a valid constitutional claim must be measured in moral terms too. This means that the cost side of the policy balance includes moral harms, and moral harms must be accorded great weight.").

[290] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126-27 (2012).

[291] *Id.* at 1160 (citing Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009)).

and want to resist — our tendency to draw conclusions about the individual from our general pre-existing views, the research suggests that doing so requires more than just a matter of will and good intention. Try as we might to rely on individual-specific information, numerous psychological studies show that we can be easily fooled by what is called "the illusion of individuating information . . ."[292]

The prior psychological research directly raises concerns about the new plausibility pleading doctrine because *Twombly* and *Iqbal* authorize judges to decide if the facts alleged are sufficient based on just enough information to lead courts to believe they are not being influenced by general stereotypes or pre-existing views. Kang et al.'s discussion of the psychological studies echoes previous concerns raised by academic critics.[293] While there is risk that some meritorious cases will be thrown out at summary judgment, that risk is lessened by the opportunity for discovery the rule provides. This is why under the traditional pleading doctrine there has always been a strong presumption for crediting allegations in a pleading as factually sufficient. By definition, a factual sufficiency review undertaken at the pleading stage usually places the judge in the more difficult position of having to decide based on information that is limited, but can appear — even to the most well intended of jurists — to be more than it is.

Even if policymakers conclude that the new pleading doctrine has a decent chance of catching undesirable cases, they must also decide how serious to take the problem that the new pleading doctrine is addressed to cure. They can insist that proponents of *Twombly* and *Iqbal* demonstrate that there are lots of undesirable cases that are not already being caught by other procedural tools and are, instead, causing the defending parties in those cases to incur unwarranted discovery costs. If proponents of stricter pleading fail to make this showing, then rulemakers might well decide that the game is not worth the candle.

To sum up: in working toward a normative assessment of plausibility pleading, the first step is measuring administrative

---

[292] Kang et al., *supra*, note 290, at 1161 (citing John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22-23 (1983); Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994)).

[293] *See* Miller, *supra* note 5, at 51 (describing the new doctrine as "judicial decision-making without a meaningful record" and noting that "[t]he absence of the focusing effect of a developed record is likely to magnify the subjective aspects of the judge's thinking about the motion"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432, 481 (2008).

burdens of leaving *Twombly* and *Iqbal* in place. On this front there are numerous reasons for rulemakers to be concerned about the process-based difficulties to the widespread utilization of plausibility pleading. In theory, these heavy administrative burdens could be justified if the doctrine promised substantively positive outcomes, but, as we have seen, the likelihood is low that plausibility pleading effectively and accurately filters meritorious from nonmeritorious cases. That leaves rulemakers with some policy balancing to do: weighing the possibility of one kind of error (that the wrong cases may be getting thrown out) against another (that meritless cases are getting through existing procedural hurdles, triggering unjustified discovery burdens). As they consider the relative probabilities that these two kinds of error may be occurring, it is worth keeping in mind that there are considerable reasons to be alarmed by the former. As for the latter possibility, rulemakers reasonably may be troubled by the Court's bald assertion that trial judges are unable to manage cases[294] to the extent that it suggests a profound lack of understanding of what trial courts do with the tools available to them.[295]

[294] *See supra* text accompanying note 25.

[295] On this latter point, the transcript of the oral argument in *Iqbal* is revealing and worth quoting at some length:

> JUSTICE BREYER: How does -- how does this work in an ordinary case? I should know the answer to this, but I don't. It's a very elementary question. Jones sues the president of Coca-Cola. His claim is the president personally put a mouse in the bottle. Now, he has no reason for thinking that. Then his lawyer says: Okay, I'm now going to take seven depositions of the president of Coca-Cola. . . . Where in the rules does it say he can go to the judge and say, judge -- his lawyer will say -- my client has nothing to do with this; there's no basis for it; don't make him answer the depositions, please?
>
> . . .
>
> GENERAL GARRE: It -- says that, as this Court interpreted it, in Rule 8 of the rules . . .
>
> JUSTICE BREYER: In Rule 8? . . . I thought Rule 8 was [a motion] for a more definite statement. . . . [W]hat allows the judge to stop this deposition?
>
> GENERAL GARRE: Rule 8 does, as interpreted --
>
> JUSTICE BREYER: Where?
>
> GENERAL GARRE: in *Bell Atlantic*, because that is not a plausible entitlement of a claim to relief --
>
> . . .
>
> JUSTICE BREYER: I'm sorry, I just don't have the answer to my question. . . . I want to know where the judge has the power to control

C. Larger Lessons Twombly/Iqbal *Offer About Rulemakers' Use and Evaluation of Empirical Evidence*

As I have argued, rulemakers need to be able to evaluate the existing empirical evidence to evaluate whether their first two justifications for not pursuing rule reform — (1) that it is too soon to act; and (2) in

> discovery in the rules. That's -- I should know that. I can't remember my civil procedure course. Probably, it was taught on day 4.
>
> GENERAL GARRE: Well, Rule 26 governs discovery, Justice Breyer.
>
> JUSTICE BREYER: Well, I see that. It says a person has a right to go and get discovery. It doesn't say they only control it under certain provisions which don't seem to me to apply to the truly absurd discovery. There must be some power a judge has.
>
> . . .
>
> JUSTICE GINSBURG: How about Rule 11 to take care of Justice Breyer's problem? The judge would say to the lawyer: . . . I'm going to read the Riot Act to you if it turns out that this is a frivolous petition.
>
> GENERAL GARRE: Sure. That's one protection, Justice Ginsburg.
>
> . . .
>
> CHIEF JUSTICE ROBERTS: Reading the Riot Act to the lawyer is protection against the Attorney General and the Director of the FBI after they're hauled in for discovery or subjected to depositions and the judge finds out . . . that there wasn't in fact a sufficient basis for it, and that -- that will show them, if they get read the Riot Act by a judge?
>
> GENERAL GARRE: It's certainly not adequate protection, Mr. Chief Justice.
>
> JUSTICE GINSBURG: I was responding to Justice Breyer's Coca-Cola president. I think Rule 11 would work quite well to answer that.
>
> . . .
>
> JUSTICE KENNEDY: I do have the same lingering . . . concerns or questions as Justice Breyer. It's hard for me to believe we had to wait for *Twombly* in order to have this, and it seems to me Rule 11 is not applicable here because it simply works after the fact. . . .
>
> [discussion continues several minutes later, during argument by counsel for *Iqbal*]
>
> JUSTICE BREYER: I have the number of the rule I want. . . . Rule 26([b])(2) . . . [the Court's official transcript records Justice Breyer as saying that Rule 26(e)(2) is the rule he wants, but it seems almost certain that he said (b)(2), which is the provision that does address his question. Rule 26(e)(2), which deals with the obligation to supplement expert testimony, is inapposite].
>
> Transcript of Oral Argument at *passim*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015) (emphasis added).

any event, there is no rush because judges are probably managing the doctrine responsibly — remain valid reasons today for not changing course. Before we consider the third and final justification that rulemakers have advanced for not proposing rule changes, there is a larger lesson the *Twombly* and *Iqbal* experience illuminates about the appropriate use by rulemakers of empirical evidence that is worth exploring. Like a yard sign that declares its owner's support of *Better Schools for All!*, the use of empirical research to inform policy-making decisions is an uncontroversial proposition today.[296] The meaningful question is how the goal is best accomplished.

For most of their history, the rules committees have rarely relied on empirical evidence to inform their deliberations.[297] In 1988 Judge John Grady initiated the first use of FJC work and Judges Pointer (from 1990-1993) and Higginbotham (1994-1996) continued the practice. Then, when Judge David Levi became Chair of the Civil Rules Advisory Committee in 2000, the committee made an even greater commitment to use of empirical findings, a tradition that Judge Rosenthal furthered when she led the Civil Rules and Standing Committees (2003-2011).[298]

The rulemakers' recent pleading deliberations show that empirical data can be vitally useful to rulemakers, but only if they are adequately equipped to manage the gathering of empirical research and to understand the results they receive. It is vital that rulemakers become better acquainted with empirical research because the committees do not possess adequate background training in statistics. As my earlier assessment of the FJC's *Iqbal* study should make plain, the danger is very real that, without adequate explanation, rulemakers will misunderstand the results they have been given.

As the rules committees' designated research arm, the FJC needs to be constantly vigilant about making comprehensible to rulemakers the empirical findings they present to them. Of course, this is not to absolve others who do (or comment on) empirical work that they know will be relevant to rulemakers; every researcher must strive to convey information in an accurate and accessible way. Ultimately, however, the responsibility lies with rulemakers to make it a priority

---

[296] *See* Marcus, *Confessions*, *supra* note 40, at 113 (noting that "it is difficult to question the utility of empirical information").

[297] Willging, *Past and Present*, *supra* note 63, at 1121-22.

[298] For a list of all past chairs and members of the rules committees, see *Past Members of the Rules Committee*, UNITED STATES COURTS, http://www.uscourts.gov/RulesAndPolicies/rules/archives/past-committee-members.aspx (last visited Jan. 13, 2013).

to become better educated about understanding statistics, methodology, and results. The FJC can only be effective at educating rulemakers if the committees recognize the importance of being better educated and set aside time for that to happen. The committees also have to be willing to accept the results of the empirical research, even if they conflict with prior expectations.[299]

Just as the committees must learn how to evaluate results after they have come in, rulemakers also need to work with researchers at the front end about study objectives, data collection, and methodological considerations. Rulemakers need to understand the various options, including the time and resource commitments involved with each and, especially, which are more likely to yield meaningful results. Of course, on a number of occasions in the past rulemakers have worked closely with the FJC on research objectives and design, particularly when the committee has had a more developed idea of where it has wanted to head. However, because reliance on empirical research was not a common practice for most of the rulemakers' history, it is to be expected that rulemakers and researchers are still working out the contours of the relationship. A related collaborative need is for careful prospective thinking about when to call upon the limited resources of the FJC. One of the most experienced FJC researchers has noted that "[n]o explicit criteria have been developed for distinguishing rulemaking proposals that need careful study and those that do not."[300]

Having said that front-end collaboration between the committees and the FJC on study objectives and design is important, it is also necessary to recognize the tension that exists between the values of collaboration and the researchers' independence. Certainly, the FJC must make sure that its research is responsive to committee inquiries; at the same time, researchers must be careful not to put themselves in the position of feeling that they must give the committees the answers they want to hear.[301]

---

[299] As Tom Willging notes, the challenge of equipping rulemakers with enough knowledge to assess the available evidence to make informed decisions is further complicated by existing term limits that rule committee chairs and members serve. Willging, *Past and Present*, *supra* note 63, at 1189-90. Thus, greater efforts to train rulemakers to understand empirical results probably ought to be accompanied by extended term limits.

[300] *Id.* at 1196.

[301] *See id.* at 1192 (noting prior instances in which more specific guidance was provided by rulemakers to the FJC for its research and noting that in such instances, "[g]iven this degree of coordination, it is not surprising that many, but certainly not all, of the research findings fit into the rulemaking plan").

A commitment from rulemakers to become better educated in statistics and a positive working relationship between rulemakers and researchers are both critical because committee members need to understand the policy choices that are being made when any empirical enterprise is undertaken. I previously have argued that the FJC's decision in its *Iqbal* study to use a conventional level of statistical significance meant that it was primarily measuring only the likelihood of a false positive error: that is, the possibility that the Court's decisions were responsible for the higher dismissal rates when, in fact, they were not. Rulemakers should know that the conventional level carries with it an implicit (but not obvious) policy judgment that the highest concern should be to avoid thinking there was an effect when, in fact, there was not. The cost of worrying so much about this type of error is that it makes it more likely that policymakers will make a different, but arguably equally worrisome, mistake. In the context of pleading, this means thinking the Court's decisions are having no effect when, in fact, they are. It is certainly possible that rulemakers might decide, given longstanding concerns about the effect that heightened pleading has on access to justice, that they are better advised to err on the side of assuming the cases are responsible for the observed changes in the grant rate. They might decide to do so even if that means there would be a higher chance that too much is read into the Court's decisions.

Whatever decision they make, rulemakers should know in advance that they are making it. Both kinds of errors matter, and it is essential for rulemakers to comprehend the policy issues that are at stake before charging the FJC with gathering empirical data. This is not easy. The best way to educate committee members about these issues is in the context of reporting and interpreting specific results, but the natural inclination is merely to follow conventional standards and not to go too deeply into the minutiae of those standards. Yet, with a better appreciation for these policy choices, rulemakers can better decide for themselves where to set the significance level to try to strike the right balance between the two types of error, taking into consideration the costs of both types, given the particular issue(s) under examination.

D. Addressing Futility

1. Finding Effective Reform Options

Finally, even if rulemakers conclude that the Court's decisions are unsound on policy grounds, a last hurdle rulemakers have cited as blocking the path to reform is that they may not be in a position to

undo what the Court has done. As noted, one perceived challenge has been to find rule language that would effectively overrule the decisions. The Reporter for the Civil Rules Committee has laid out a number of different options that rulemakers could pursue. He has noted, however, that it is unrealistic to believe that words alone ever could satisfactorily guide practical application, particularly when it comes to pleading and the endless variability of case types.[302] Consider, for instance, the idea of attempting to restore by rule pleading practices as they were just before *Twombly*, as some of the previously proposed bills in Congress would have done. Notwithstanding repeated admonishments by the Court against departures from *Conley*'s liberal pleading standard, there continued to be variations among the lower courts, with efforts by some to stiffen the pleading test (at least as to several different kinds of cases).[303] Then there is the additional problem that even if the Court would consent to a rule change to reverse its own decisions, it could continue to insist on reading any new rule with the same underlying policy concerns that led it to endorse plausibility pleading.[304] The Reporter's careful work makes clear that finding an option, with the right language, to effectively countermand the Court's decisions clearly will be a major challenge.

This is not the place to summarize all of the possible reform options. I certainly recognize that none of the potential reform options is perfect. I also agree that pleading rule reform is not a panacea to be pursued exclusively. That is why I am wholly supportive of a recent initiative that rulemakers have undertaken to improve the quality of judicial education as to pretrial case management (including but not limited to teaching judges how to approach and manage pleading dismissal motions). However, this sort of informal effort is best regarded as a supplement to, not a substitute for, formal rule revision. Regardless of the form that rule revision takes, some express rule change is essential, above all, for the signaling effect it would create. Without a clear signal from rules committees that they are moving away from the kind of factual sufficiency review that *Twombly* and *Iqbal* authorize, we can have little confidence that efforts to educate

[302] Cooper, *supra* note 8, at 979 ("The idea that a few words in a pleading rule can cover all negligence claims with precision, dispensing with any need for elaboration in application, is doomed to fail. Multiplying this simple example across the full range of claims that may be brought to a federal court shows the need for flexible generality in the pleading rules.").

[303] *Id.* at 977.

[304] *Id.*

judges about applying the new doctrine will be sufficient. If plausibility pleading is left in place, the danger is that we will be left with the sort of Gresham's Law of which Charles Clark warned, whereby "the bad, or harsh, procedural decisions drive out the good, so that in time a rule becomes entirely obscured by its interpretive barnacles."[305]

For this same reason, it is as important for rulemakers to recognize the danger of making changes that would send the wrong signal. On several prior occasions since 2007, rulemakers have discussed the forms in the back of the rulebook, suggesting that it may be time to get out of the forms business.[306] The counsel of those who have recognized that abrogation of forms now could send the wrong message should be heeded.[307] Whatever the deficiencies of the forms may be, this is the wrong time to think about eliminating them from the rulebook.

2. Getting Past the Court

Last, we come to the other aspect of the futility problem: that the Court, by virtue of its position in the Rules Enabling Act process, could block any reforms proposed by its advisory committees. This, again, raises an important challenge that rulemakers must consider as they continue to deliberate about pleading rule reform. The Court's potential role as spoiler of pleading rule reform is important to consider because it suggests a larger structural question about the rulemaking process that reaches beyond the current pleading debates: Are rulemakers ever well situated to consider rule reform to address a decision by the Supreme Court when that decision is not about a

[305] Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 (1950). If reminding is necessary, Rick Marcus chose to lead with this "Gresham's Law" quote from Clark when he first exposed the problem of lower court departures from the longstanding *Conley* standard. Marcus, *The Revival*, *supra* note 13, at 433.

[306] *See, e.g.*, RULES OF CIVIL PROCEDURE ADVISORY COMM., APR. 2011 MINUTES, *supra* note 230, at 32 (discussing the use of forms in pleadings); RULES OF CIVIL PROCEDURE ADVISORY COMM., OCT. 2009 MINUTES, *supra* note 159, at 14-17 (discussing Rule 84 forms).

[307] RULES OF CIVIL PROCEDURE ADVISORY COMM., OCT. 2009 MINUTES, *supra* note 159, at 16. A member also commented that publication of a proposal to no longer include pleading forms in rules "would generate a perception that the Forms were being abrogated because the pleading forms, sufficient under notice pleading as it had been understood up to 2007, no longer suffice under *Twombly* and *Iqbal*." *Id.* (emphasis added).

narrow rule interpretation but, instead, is premised on larger policy preferences that the Court's interpretation expressly favors?

On occasion, rulemakers have proposed rule changes to codify prior Supreme Court decisions. An example is the 1997 amendments to Federal Rule of Evidence 801 to reflect the Court's decision in *Bourjaily v. U.S.*[308] There are other examples when rulemakers have suggested rule changes to resolve uncertainties caused by a prior Supreme Court decision. One illustration of this is the 1993 amendments to Rule 3(c) of the appellate rules, which clarified ambiguities raised by *Torres v. Oakland Scavenger*.[309] On a few prior occasions, rulemakers have proposed rule amendments to reverse a Supreme Court decision. None of them, however, approximate the circumstances facing rulemakers today. Consider, for instance, one of the best known examples. In 1991, rulemakers proposed changes to Rule 15(c) to directly reverse the Supreme Court's interpretation of the rule five years earlier in *Schiavone v. Fortune*.[310] However, that rule change can best be described, not as responsive to a prior ruling that adopted a contrary policy position, but as a minor, technical fix in the rules to overcome the Court's (arguably) literal reading of the rule that did not mesh with the rulemakers' intent.

As compared with these prior instances, then, the rulemakers' challenge when it comes to thinking about pleading rule reform as a response to the decisions in *Twombly* and *Iqbal* is almost certainly as great as it has ever been. The closest analogue probably is to the rulemakers' deliberations after the Court handed down the summary judgment trilogy in 1986, and what that experience suggests is that it is indeed very difficult to generate momentum for rule reform when the purpose of the reform effort would be to reverse a prior decision by the Court that took sides on a major policy issue.[311] Perhaps the best answer to the concern that the Court may later veto a committee-proposed reform is that this should not stop rulemakers from trying. The Court has acknowledged that the pleading rules are for rulemakers to adjust as they see fit.[312] Rulemakers should take the

[308] *See* 483 U.S. 171, 183 (1987).

[309] *See generally* 487 U.S. 312 (1988) (pointing out ambiguities over terms such as "liberally construed," "liberally viewed," and "mere technicalities").

[310] *See generally* 477 U.S. 21 (1986) (interpreting the Rule 15(c) "relation back" doctrine).

[311] *See generally* Rosenthal, *supra* note 7 (discussing rulemakers' post-1986 summary judgment deliberations).

[312] *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the

Court at its word that they have primary authority for writing the pleading rules, until the Court shows otherwise. If, eventually, a majority of the Court does refuse to submit proposed changes to Congress, rulemakers will have to reconsider their options at that point. Such a decision by the Court, which has some but not much precedential support behind it, might itself spark a new push for a legislative solution.

Whether the Court will ultimately stand in the way of a proposed pleading rule change to reverse *Twombly* and *Iqbal* remains to be seen. The current debate over pleading suggests, however, the need for thinking about how a similar problem might be overcome in the future. Two possibilities suggest themselves. One is that when procedural reform is needed to reverse a major decision by the Court itself, Congress may be better situated than rulemakers to pursue reform efforts. However, because preserving the rulemakers' primary role in managing procedural reform may be seen as desirable, an alternative possibility is to rethink the Court's role in the Rules Enabling Act process. There is some prior history here to draw upon, though the reasons that animated prior proposals to take the Court out of the REA process differ starkly from the reason that the current pleading problem suggests for doing so.

The earliest proponents of removing the Court from the process of submitting rules to Congress may have been two members of the Court itself, Justices Black and Douglas. In 1961, they initially dissented from the promulgation of changes to Rule 25 on the ground that major changes in legislative policy should be enacted by the legislative branch and approved by the executive, not effected through Court-promulgated rule changes.[313] In 1963, they more broadly expressed their objections to the Court's role in the REA process in their dissents from the promulgation of several amendments sent by the Court to Congress that year.[314] Black and Douglas recommended that the Court be taken out of the REA process so that ultimate responsibility fell on the Judicial Conference to tender the rules to Congress.[315] Black and Douglas thought that transfer of the Court's

legislative process."); *see also supra* text accompanying note 74.

[313] Statements of Justice Black and Justice Douglas filed with Order of Apr. 17, 1961, *reprinted in* 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE Civ. App. B (3d ed. 2012).

[314] *Amendments to Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 587, 617 (1963) (discussing the statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments).

[315] *Id.* at 620.

role of promulgating rules to the Judicial Conference would relieve the Court "of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid."[316]

Several years later, echoing similar prudential concerns, Howard Lesnick was an early academic proponent of taking away from the Court the task of submitting rules to Congress.[317] Thereafter, in 1983, Representative Robert Kastenmeier, Chairman of the House Judiciary's Subcommittee on Courts, proposed legislation that, *inter alia*, would have given the Judicial Conference ultimate authority for passing rules along to Congress. At least some of the motivation for the reform was said to be concern about the Court's workload,[318] but the foundational questions of good governance that Black and Douglas and, later, Lesnick, had raised, certainly also came into consideration as well.[319] The bill had many early adherents, including the Court itself.[320] Later

[316] *Id.*

[317] Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 583-84 (1975). *See generally* WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 79-117 (1981) (explaining reform proposals). More recently, Stephen Yeazell made a similar proposal, though his concern was also not with potential conflicts between rulemakers and the Court. Stephen Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 230 (1998). Instead, Yeazell was concerned that judges had gone from being rule-appliers to rule-writers. He worried that judge-dominated rules committees produce rules that give considerable discretion on judges. For Yeazell, there was nothing wrong with discretion-granting rules — only a problem with judges bestowing that discretion on themselves. In his view, this state of affairs contributed to negative public perceptions of the judiciary and to conflicts with Congress and the executive branch. Yeazell's two-fold solution was to: (1) insist that lawyers, not judges, serve on the advisory committees; and (2) take the Court (and the Judicial Conference) out of the rulemaking process.

[318] *See* Letter from Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, to Warren E. Burger, Chief Justice, United States Supreme Court (May 3, 1983), *reprinted in Rules Enabling Act: Hearing on H.R. 4144 Before the Subcomm. on Courts, Civil Liberties, and the Admin of Justice of the H. Comm. on the Judiciary*, 98th Cong. 186 (1983-1984) [hereinafter *1983–1984 Hearing*] ("As you know this Congress I have undertaken a number of initiatives to address the problems you have articulated with respect to the burgeoning workload of the Supreme Court. . . . In this vein it seems possible to suggest another statutory modification that could serve to ease the burden on the Court.").

[319] Letter from Jack Weinstein, Judge, United State District Court for the Eastern District of New York, to Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice (May 31, 1983), *reprinted in 1983–1984 Hearings*, *supra* note 318, at 196 (observing that the legislation would "unburden the Supreme Court, avoid the problem of that court passing on the constitutionality of its own work and place the power in a more representative and knowledgeable group").

[320] Letter from Warren E. Burger, Chief Justice, United States Supreme Court, to

opposition appeared, however, from the Conference of Chief Justices, which was concerned about the effect the federal precedent would set on state practices. Stephen Burbank and others raised additional concerns, including that rules promulgated by the Judicial Conference might not be treated with equal respect.[321] Thereafter, the Supreme Court rescinded its earlier support,[322] and the nascent idea of removing the Court from the REA process was abandoned.[323]

Reflected against this history, one of the most striking points to be made about *Twombly* and *Iqbal* is that they pose a concern not previously considered by these prior proposals: namely, that significant conflicts can arise between the Court and its advisory committees. Although the prior proposals were not animated by this concern, the current pleading problem makes it apparent that excising the Court from the process of transmitting rules to Congress could help reduce this potential tension between the Court and rulemakers. With the Judicial Conference directly responsible for tendering proposed rule changes to Congress, the advisory committees might feel less constrained to consider potential reforms when the need for reform has been triggered by a prior decision of the Court itself.

Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice (May 12, 1983), *reprinted in 1983–1984 Hearings*, *supra* note 318, at 195 ("The Members of the Court see no reason to oppose legislation to eliminate this Court from the rule-making process.").

[321] Letter from Stephen Burbank, Professor of Law, University of Pennsylvania Law School, to Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice (Jan. 13, 1984), *reprinted in 1983–1984 Hearings*, *supra* note 318, at 204-05.

[322] Letter from Warren E. Burger, Chief Justice, United States Supreme Court, to Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice (June 25, 1984), *reprinted in 1983–1984 Hearings*, *supra* note 318, at 195.

[323] *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1721-22 (2004) (describing legislative history). The following year, a revised bill was introduced that kept the Court as the titular head of the process but expressly empowered the Conference to make recommendations to it. *Rules Enabling Act of 1985: Hearing on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 4 (June 6, 1985). The legislation presumed deference to the Conference's recommendations would be the norm. That change, along with the other provisions in the 1985 bill, also failed, though the reforms directed at making the rulemaking process more open and transparent were eventually enacted into law three years later. *See* 28 U.S.C. § 2072 (1988).

CONCLUDING THOUGHTS

On a warm afternoon in Houston a couple of weeks after the Supreme Court announced its decision in *Twombly*, I had lunch with the then-chair of the Civil Rules Committee. As usual, our conversation was lively and far-ranging. Turning our attention to the Court's recent decision, we agreed it was an important one, even if only because Justice Souter's opinion raised many provocative questions (certainly more than it answered). Despite that common ground, there were other ways in which we differed. Acknowledging that it was too early to say, I worried that *Twombly* endorsed a more robust filtering of claims for merit at a stage too premature for the filtering to be reliable. She also wanted to reserve judgment, but, more sanguine, thought it unlikely that the decision would dramatically alter existing practices.

As our early conversation suggested, the questions the Court's decisions in *Twombly* and *Iqbal* raise go to the heart of the civil justice system: how to balance access to justice for those who claim they have been injured with the need for efficient handling of claims so that the system is fairly administered for all involved. That said, it is also clear today that general principles like access to justice and judicial efficiency are helpful frames of references to define the stakes involved, but that they are insufficient to shape specific policy options.

Over the last five years I have seen, firsthand, the dedication rulemakers bring to their work, as well as the daunting challenges that they face in trying to be good stewards of the federal court's procedural system. One of the things I hope I have conveyed in this paper is how great a challenge *Twombly* and *Iqbal* pose for rulemakers. At the end of this retrospective review, it is clear — at least to me — that there are no easy answers.

I am also hopeful that my effort to understand what has kept rulemakers from acting in the past will itself be understood as a productive exercise to enable us to interrogate whether those reasons can justify the same course in the future. Further, this exercise may be seen as shedding illuminating light on the rulemaking process more generally. It has revealed the rulemakers' need to be better equipped to utilize empirical research in their policy-making decisions. It also has shown the institutional need to confront structural impediments within the current Rules Enabling Act process when rulemakers are called upon to consider reform in response to a prior decision of the Supreme Court.

Rulemakers did not cause the current pleading problem, but they can have a critical role to play in its solution. As Arthur Miller has

passionately urged, the rulemaking process "has been a dynamic and creative one; now is the time for that spirit of innovation to come to the fore."[324] In considering the role they can play in the future, rulemakers may profitably reflect on the justifications they have previously offered for not pursuing rule reform. Whatever merit those justifications may have held in the past, rulemakers have the opportunity — and responsibility — to reconsider them as their deliberations on the pleading problem continue in the future.

[324] Miller, *supra* note 5, at 104.