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Brian T. Fitzpatrick

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## ESSAYS

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### TWOMBLY AND IQBAL RECONSIDERED

Brian T. Fitzpatrick \*

#### INTRODUCTION

Perhaps the most controversial decisions thus far from the United States Supreme Court under Chief Justice John Roberts may have been in the usually mundane area of civil procedure.<sup>1</sup> In a pair of decisions two years apart, *Bell Atlantic Corp. v. Twombly*<sup>2</sup> and *Ashcroft v. Iqbal*,<sup>3</sup> the Court made a jarring shift in its jurisprudence on what plaintiffs need to plead in their complaints in order to keep their suits from being dismissed at the very outset of litigation. These decisions have been described as “the most significant . . . in a decade for day-to-day litigation in the federal courts . . . .”<sup>4</sup> Indeed, the decisions are on

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\* Associate Professor of Law, Vanderbilt University Law School. J.D., 2000, Harvard Law School. I am grateful for helpful comments on a previous draft from John McGinnis, Richard Nagareda, and the participants in the Center for Business Law & Regulation Colloquium at Case Western Reserve University Law School. I am also grateful to Allison Davis, Alex Dickerson, Drew Dornier, and Sybil Dunlop for helpful research assistance.

1 See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival* 1 (Fla. Int'l Univ. Legal Studies Research Paper No. 11-17, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1914743](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914743) (“[W]e see a [Roberts] Court . . . engaged in an unexpected area—civil procedure . . .”).

2 550 U.S. 544 (2007).

3 129 S. Ct. 1937 (2009).

4 Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 (quoting Thomas C. Goldstein).

pace to become the most cited Supreme Court cases of all time.<sup>5</sup> And the scholarly criticism of the two cases has been withering.<sup>6</sup>

In particular, commentators believe the decisions will spark a revolution in federal court litigation, and they have criticized the decisions as gifts to the business community that were delivered by judicial fiat. According to commentators, the Court ignored, distinguished, or disavowed long-standing precedents in order to find new meaning in the text of a Federal Rule of Civil Procedure—Rule 8(a)—that reads today as it has since 1938. As far as these commentators are concerned, these decisions are nothing short of “conservative judicial activism.”<sup>7</sup>

Although I agree with some of this criticism, I think some of it is overstated. First, *Twombly* and *Iqbal* may not be nearly as revolutionary as first meets the eye; as a practical matter, lower federal courts long ago elevated pleading standards in the face of the exponential increases in discovery costs faced by corporate defendants. Second, charges of “judicial activism” in this context have a bit less salience than they do in the more typical contexts in which they are made—contexts in which the Court has usurped the authority of another branch of government—because the text the Court reinterpreted in these decisions was a Federal Rule of Civil Procedure, something that the Court itself promulgated and can change at any time. Finally, I think the Court’s motives in *Twombly* and *Iqbal*—to recalibrate plaintiffs’ discovery rights in light of the exponential increases in discovery costs that have developed in the years since the Federal Rules were first promulgated in 1938—were pure, even if its methods were not.

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5 See Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1337 n.4 (2010) (“*Twombly* has managed to induce an absolutely extraordinary 29,704 cases to cite it in its first thirty-seven months as law, as measured by a Westlaw KeyCite on July 2, 2010. It is on track to become the most-cited Supreme Court case of all time, unless it is surpassed by *Iqbal* itself, which has received 10,263 judicial citations in thirteen months.”).

6 See Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 959 (2010) (“Academic criticism of the *Twombly* decision was speedy and abundant.”).

7 Wayne Parsons, *The Conservative Judicial Activism Chronicles: Notice Pleading is No Longer the Law in Federal Court*, INJURYBOARD HONOLULU (July 28, 2009, 2:26 PM), <http://honolulu.injuryboard.com/defective-and-dangerous-products/news-alert-for-trial-attorneys-notice-pleading-is-no-longer-the-law-in-federal-court.aspx>; see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 555 (2010) (noting that many have criticized *Iqbal* as “judicial activism”); Goutam U. Jois, Pearson, *Iqbal*, and *Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 905 (2010); Wasserman, *supra* note 1, at 10–12.

In Part I of this Essay, I describe the Court's decisions in *Twombly* and *Iqbal* and how they represent a break in the Court's pleading jurisprudence. In Part II, I respond to the criticism of *Twombly* and *Iqbal* as revolutionary, conservative judicial activism. In Part III, I argue that, although the Court's motives in *Twombly* and *Iqbal* were pure, there may be better responses than elevated pleading standards to the challenges of discovery that only Congress can impose, such as fee-shifting rules.

## I. FROM "MERE NOTICE" TO "NOTICE PLUS PLAUSIBILITY" PLEADING

In order to state a claim under Federal Rule of Civil Procedure 8(a), a plaintiff's complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."<sup>8</sup> If the plaintiff's complaint does not meet this standard, then the court can dismiss the plaintiff's complaint on a motion by the defendant before the case proceeds any further.<sup>9</sup> If the plaintiff's complaint does meet the requirements of Rule 8(a), then the case can go forward, the plaintiff can take discovery of the defendant,<sup>10</sup> and the defendant usually cannot stop the case again until discovery is completed and a motion for summary judgment is filed.<sup>11</sup>

Until 2007, the Supreme Court had been consistent—and usually unanimous—in admonishing lower courts that Rule 8 did not require very much of plaintiffs. Indeed, the Federal Rules were *designed* to go easy on plaintiffs: one of the motivations behind their adoption in 1938 was to eradicate the treacherous technicalities of common law pleading and replace them with a "liberal" regime called "notice pleading."<sup>12</sup> Under this notice-pleading regime, plaintiffs were required only to plead enough to put the defendant on fair notice of what the plaintiff's claim was about<sup>13</sup>—i.e., just as many factual allega-

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8 FED. R. CIV. P. 8(a)(2).

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

10 See FED. R. CIV. P. 26–37.

11 See FED. R. CIV. P. 56.

12 See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 648; see also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573–74 (discussing the intent of the drafters of the Rules to depart from English common law pleading tradition); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824–25 (2010) (discussing how the Federal Rules of Civil Procedure of 1938 liberalized pleading requirements).

13 See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (3d ed. 2010) ("Thus, pleadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon . . . .").

tions as necessary to enable the defendant to file an answer to the complaint and prepare for discovery.<sup>14</sup>

The example complaints—known as the “forms”—that are appended to the Federal Rules demonstrate what the Rules themselves call the “brevity” of what they require.<sup>15</sup> Form 11, for example, a complaint for negligence, says little more than the defendant’s car hit the plaintiff in a particular location on a particular date.<sup>16</sup> Indeed, the entire nonjurisdictional content of the complaint could easily be reproduced in the previous footnote.

The Supreme Court followed the plaintiff-friendly design of Rule 8 for some seventy years after its adoption.<sup>17</sup> Indeed, under the Court’s precedents, plaintiffs usually had more to fear from pleading too much than from pleading too little. So long as the factual allegations in the plaintiff’s complaint gave the defendant enough information to file an answer *and a court could imagine some set of facts both consistent with the complaint as well as the legal elements of the plaintiff’s claims*, then the plaintiff’s case could move forward.<sup>18</sup> As the Court put it on one occasion, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”<sup>19</sup> Plaintiffs who pled more than necessary risked saying something that would render the complaint inconsistent with the legal elements of the claims. The best policy, then, was often to say as little as possible.<sup>20</sup>

The Court made it very clear over the years that the plaintiff’s complaint need not contain many factual allegations because the

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14 See *id.* § 1203 (noting that a complaint is sufficient if it “enable[s] the defendant to frame his answer”).

15 See FED. R. CIV. P. Form 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

16 See FED. R. CIV. P. App. 11 (“On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$ \_\_\_\_.”).

17 See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (unanimous); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (unanimous); *Conley v. Gibson*, 355 U.S. 41 (1957) (unanimous).

18 See *Conley*, 355 U.S. at 45–46 (“[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

19 *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

20 See, e.g., Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (noting that the standards were so lax a plaintiff affirmatively had to plead “himself out of court” (quoting *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992))).

pleading stage was not the time to develop the facts; the proper time for that, the Court said, was during discovery.<sup>21</sup> Moreover, the only purpose of the complaint, the Court said, was to put the defendant on notice.<sup>22</sup> If any more confirmation was needed of that, the Court added, just look at the brevity of the forms that append the Rules.<sup>23</sup> Indeed, the Court made it clear that the pleading stage was not the time to dismiss unmeritorious suits; the place for that, the Court said, was summary judgment.<sup>24</sup> As the Court put it unanimously only nine years ago, “Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. ‘Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.’”<sup>25</sup>

In recent decades, lower federal courts have had trouble with the laxity of the Court’s Rule 8 jurisprudence. I will have more to say about this below, but, for now, suffice it to say that, from time to time, lower federal courts tried to elevate the pleading requirements for what they thought were very sound policy reasons. Each time they did so, however, the Supreme Court reversed. Thus, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>26</sup> the Supreme Court *unanimously* turned back an effort by lower courts to heighten pleading standards in cases against government officials because of

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21 See *Swierkiewicz*, 534 U.S. at 512 (“This simplified notice pleading standard relies on liberal discovery rules . . . to define disputed facts and issues . . . .”); *Conley*, 355 U.S. at 47–48 (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is . . . [to] give the defendant fair notice . . . . Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” (footnotes omitted)).

22 See *Swierkiewicz*, 534 U.S. at 512 (declaring that all plaintiffs must do is “‘give the defendant fair notice . . . .’” (quoting *Conley*, 355 U.S. at 47)); *Conley*, 355 U.S. at 47 (“[A]ll the Rules require is . . . [to] give the defendant fair notice . . . .”).

23 See *Swierkiewicz*, 534 U.S. at 513 n.4 (“These requirements are exemplified by the Federal Rules of Civil Procedure Forms . . . .”); *Conley*, 355 U.S. at 47 (“The illustrative forms appended to the Rules plainly demonstrate this.”).

24 See *Swierkiewicz*, 534 U.S. at 514 (“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.”); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (“In the absence of . . . an amendment [to Rule 8], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”).

25 *Swierkiewicz*, 534 U.S. at 515 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

26 507 U.S. 163 (1993).

the burdens these suits imposed on state and local governments.<sup>27</sup> Similarly, in *Swierkiewicz v. Sorema N.A.*,<sup>28</sup> the Court *unanimously* turned back an effort by lower courts, for similar reasons, to heighten pleading standards in cases alleging employment discrimination.<sup>29</sup> Both times, the Court said, although there may be sound reasons to elevate pleading standards, the proper way to go about doing it is to revise the Federal Rules of Civil Procedure.<sup>30</sup>

It therefore came as something of a surprise when, in 2007, *Twombly* came down the way it did. In *Twombly*, the Court dismissed a nationwide class action complaint alleging that several telecommunications providers conspired both to protect themselves from each other and to exclude other competitors from their networks.<sup>31</sup> The antitrust laws required the plaintiffs to prove the providers had come to an agreement amongst themselves to do these things, and the plaintiffs dutifully alleged in the complaint that the providers had entered into such “agreements.”<sup>32</sup> The Court, however, said that allegation was not enough. The Court said that the plaintiffs needed either to allege which of the providers and their employees entered into the agreements, and when and where they did so,<sup>33</sup> or to allege some story that, “in light of common economic experience,” made the actions of the providers irrational in the absence of an agreement.<sup>34</sup>

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27 See *id.* at 168 (“We think 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.”).

28 534 U.S. 506 (2002).

29 See *id.* at 515 (“[T]he Federal Rules do not contain a heightened pleading standard for employment discrimination suits.”).

30 See *Swierkiewicz*, 534 U.S. at 514–15 (“Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, . . . [a] requirement for greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’” (quoting *Leatherman*, 507 U.S. at 168 (internal citation omitted))); *Leatherman*, 507 U.S. at 168 (“Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities . . . 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.”).

31 See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

32 See *id.* at 550.

33 See *id.* at 565 n.10 (“[T]he complaint here furnishes no clue as to which of the four [providers] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.”).

34 *Id.* at 546.

But what of the notion that, so long as there was some set of facts consistent with the complaint and the legal elements of the cause of action, the case could go forward? This was what the Court had called the “accepted rule” in 1957.<sup>35</sup> The Court was not shy about the jarring shift it was making: this “accepted rule”—“one of [the Court’s] earliest statements about pleading under the Federal Rules”<sup>36</sup>—was, the *Twombly* Court said, going into “retirement.”<sup>37</sup>

The Court said that it was no longer enough for a complaint to put the defendant on notice of the claims against it; rather, the allegations in the complaint now have to show that it is “plausible” that the plaintiff’s case will succeed.<sup>38</sup> For the complaint before it, the Court said it was “[a]sking for plausible grounds to infer an agreement” and a “reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>39</sup> Gone was “mere notice” pleading; enter “notice plus plausibility” pleading.

But what of the notions that discovery was the proper place to learn the facts of the case and that summary judgment after such discovery had closed—not the pleadings before such discovery had even begun—was the proper place to weed out meritorious claims? The Court backtracked here, too. Summary judgment was too late to weed out meritorious claims, the Court said, because discovery had become far too costly and burdensome to force defendants to endure it without at least some assurance that the endeavor had some merit to it.<sup>40</sup> The Court noted that discovery is “expensive”—indeed, that is a “potentially enormous expense”—and that it “take[s] up the time of a number of other people.”<sup>41</sup> The Court argued that this “threat of discovery expense will push cost-conscious defendants to settle even anemic cases,” and, as such, discovery “represent[s] an *in terrorem* increment of the settlement value” of a case.<sup>42</sup> In other words, although it may very well be true that discovery and not the pleadings is the place to learn the facts of case, the Court seemed to say that, in light of the burdens discovery imposes on defendants, plaintiffs are just plain out of luck if they do not know enough of the facts at the

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35 *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

36 *Twombly*, 550 U.S. at 563 n.8.

37 *Id.* at 563 (“[T]his famous observation has earned its retirement.”).

38 *Id.* at 556.

39 *Id.*

40 *See id.* at 557–59.

41 *Id.* at 558–59 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

42 *Id.*

outset of their cases to justify opening the defendant's files to learn more.

In these passages, the Court revealed that it was fundamentally transforming its understanding of the purpose of the pleadings in federal litigation. For seventy years, the purpose of the complaint had been merely to put the defendant on notice of the plaintiff's claims so the defendant could craft a responsive pleading and prepare for discovery.<sup>43</sup> In *Twombly*, the Court added a new purpose: to decide which cases are worthy of burdening defendants with discovery.<sup>44</sup> That is, *Twombly* transformed the pleadings stage of litigation into a place where judges are asked to regulate access to discovery.

It is an understatement to say that the *Twombly* decision has been very unpopular with scholars.<sup>45</sup> Some commentators had hoped that the Court's decision would be confined to the circumstances that led to its birth: antitrust cases, complex class actions, or cases with especially forbidding discovery burdens.<sup>46</sup> But, two years later, the Court made it clear in *Ashcroft v. Iqbal*<sup>47</sup> that this was not to be the case. The Court in *Iqbal* dismissed a civil rights claim alleging racial and religious discrimination against high-level government officials responsible for implementing the country's anti-terrorism policies.<sup>48</sup> The Court noted, as it had when it had turned back efforts by lower courts to elevate pleading standards in one or another type of case (e.g., *Leatherman* and *Swierkiewicz*), that the Federal Rules were supposed to be trans-substantive and apply to complex antitrust claims and less complex civil rights claims alike.<sup>49</sup> Thus, *Twombly*'s plausibility standard was to apply across the board.

In some ways, the Court's decision in *Iqbal* was even more difficult to square with its precedents than *Twombly*: the inadequate allegation that *Iqbal* had been targeted "on account" of his race and religion<sup>50</sup> was just like the adequate allegation that *Swierkiewicz* had lost his job "on account" of his age and national origin.<sup>51</sup> In any event, it is now

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43 See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 490 (2008).

44 See *id.* at 452, 490–93.

45 See Eichhorn, *supra* note 6, at 959.

46 See, e.g., *id.*; Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1305 (2010).

47 129 S. Ct. 1937 (2009).

48 See *id.* at 1943–44.

49 See *id.* at 1953 ("Our decision in *Twombly* . . . applies to antitrust and discrimination suits alike.").

50 *Id.* at 1951.

51 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509, 514 (2002). The one difference might be that *Swierkiewicz* also alleged that he was replaced by someone of a different

clear that the Court meant what it said in *Twombly*: no civil litigant in federal court can gain access to discovery without convincing a federal judge that it is plausible his or her claim will eventually succeed. That is, federal judges are now supposed to act as gatekeepers to discovery, and the plausible pleading standard is supposed to be their tool to do so.

## II. THE CRITICISM OF *TWOMBLY* AND *IQBAL*

*Twombly* and *Iqbal* are on pace to become the most cited Supreme Court cases of all time.<sup>52</sup> Many commentators believe that the *Twombly* and *Iqbal* decisions are revolutionary, and the scholarly assessment of the revolution has been harsh.<sup>53</sup> Although several aspects of the decisions have been attacked, I wish to focus here on two strands of criticism in particular. First, critics have attacked the decisions for bringing about their revolutionary change through judicial fiat rather than through amendments to the Federal Rules of Civil Procedure. Second, critics have characterized the decisions as a gift to corporate defendants that will place undue obstacles in the path of plaintiffs with legitimate claims. In short, commentators have accused the Court of what some have called “conservative judicial activism.”<sup>54</sup>

As I explain below, although I agree with some of this criticism, I think some of it is overstated. First, although it is true that the Court’s decisions in *Twombly* and *Iqbal* constitute radical changes in the Court’s own pleading jurisprudence, it is far less clear that the decisions will change much of anything about contemporary federal litigation. As commentators have noted for sometime, as a practical matter, lower federal courts *long ago* elevated pleading standards in the face of the exponential increases in discovery costs faced by corporate defendants.<sup>55</sup> On one view, then, all the Supreme Court did in *Twombly* and *Iqbal* was catch up to what lower courts had been doing for some time.

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age and national origin, *see id.* at 508, whereas *Iqbal* did not allege that his mistreatment did not befall persons of a different race and religion. Perhaps a claim for discrimination moves from the implausible to the plausible when it is alleged that persons outside the allegedly targeted group were treated differently.

<sup>52</sup> See Clermont, *supra* note 5, at 1337 n.4.

<sup>53</sup> See Eichhorn, *supra* note 6, at 959.

<sup>54</sup> See *supra* note 7 and accompanying text.

<sup>55</sup> See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) [hereinafter Fairman, *Notice Pleading*] (arguing that while notice pleading is supposed to be the law, many courts in fact require fact-based pleading); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) [hereinafter Fairman, *Heightened Pleading*] (same).

Second, although it might have been more thoughtful and transparent to respond to the changed circumstances of the increased nuisance value of discovery by amending rather than reinterpreting Rule 8(a), claims of “judicial activism” in this context ring a bit more hollow than they do in other contexts. Unlike the U.S. Code and the U.S. Constitution, which are promulgated by the other branches of government, the Federal Rules of Civil Procedure are promulgated by the Supreme Court itself. This is not the stuff of the democracy-threatening judicial activism that so often excites people.

Finally, I am much more sympathetic than most commentators to the Court’s desire to recalibrate plaintiffs’ discovery rights in light of the exponential increases in discovery costs in recent years. The Federal Rules of Civil Procedure were promulgated in 1938, and, needless to say, things are much different today than they were then.<sup>56</sup> It is not surprising that the relative rights of plaintiffs and defendants would need a readjustment in light of these changes. As I explain, however, elevated pleading standards may not be the best way to make this readjustment. As some scholars have begun to contend, fee-shifting rules may be better tailored to regulating access to discovery.

#### A. *Will Twombly and Iqbal Cause a Revolution?*

As I noted above, it is hard to see how the Court’s decisions in *Twombly* and *Iqbal* do not constitute jarring breaks with the Court’s own pleading jurisprudence. As a result, many commentators have declared that the decisions will have “revolutionary” implications for plaintiffs in federal court, both in how they plead their cases and in whether their cases will be allowed to go forward to discovery.<sup>57</sup> Kevin Clermont and Stephen Yeazell, for example, have said not only that the decisions are “revolutionary,”<sup>58</sup> but that they “destabilized the

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56 See generally Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647 (2011) (arguing that the distortions due to excesses in process are much different from those corrected in 1938).

57 See, e.g., Clermont & Yeazell, *supra* note 12; Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1108 (2010); see also Richard Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 77 (2007); Hartnett, *supra* note 46; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527–40 (2010); Spencer, *supra* note 43; Steinman, *supra* note 46, at 1293, 1295, 1310; Matthew A. Josephson, Note, *Some Things Are Better Left Said: Pleading Practice After Bell Atlantic v. Twombly*, 42 GA. L. REV. 867 (2008).

58 Clermont & Yeazell, *supra* note 12, at 839; *accord id.* at 823, 847.

entire system of civil litigation.”<sup>59</sup> They contend the decisions “will impact the 270,000 civil cases filed annually in the federal courts.”<sup>60</sup> Likewise, Adam Steinman has said the decisions created a “crisis” that has the “potential to upend civil litigation as we know it.”<sup>61</sup> As Howard Wasserman has noted, “the assumption underlying the flood of scholarship that followed *Iqbal* and *Twombly* was that the cases worked a major, dramatic change in pleading law.”<sup>62</sup>

I think these sorts of declarations exaggerate the effects the decisions may have in the federal system. Although *Twombly* and *Iqbal* mark a profound shift in the Supreme Court’s own understanding of the pleading rules, the decisions may be less revolutionary to lower federal courts. Despite the Supreme Court’s best efforts prior to *Twombly*, these lower federal courts have been using heightened pleading standards for some time.

The best explication of the dissonance between the Supreme Court’s prior pleading jurisprudence and the practice among lower federal courts is a pair of articles written almost a decade ago by Christopher Fairman.<sup>63</sup> In these articles, Professor Fairman demonstrated, in great detail, that “[n]otwithstanding its foundations in the Federal Rules and repeated Supreme Court imprimatur, notice pleading is a myth.”<sup>64</sup> He found:

To be sure, federal courts recite the mantra of notice pleading with amazing regularity. However, their rhetoric does not match the reality of federal pleading practice. Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine.<sup>65</sup>

Why did lower courts turn their back on the notice-pleading regime? First and foremost, Professor Fairman concluded, it was to protect defendants from “abusive discovery”<sup>66</sup>—the exact same reason why the Supreme Court finally raised pleading standards itself in *Twombly* and *Iqbal*. Professor Fairman’s case study of the lower federal courts has been confirmed by more rigorous empirical studies: even

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59 *Id.* at 823.

60 *Id.* at 831.

61 Steinman, *supra* note 46, at 1293, 1295.

62 Wasserman, *supra* note 1, at 17.

63 *See supra* note 55.

64 Fairman, *Notice Pleading*, *supra* note 55, at 988.

65 *Id.* (footnote omitted).

66 *Id.* at 1060.

before *Twombly*, federal district courts granted almost half of all motions to dismiss.<sup>67</sup>

Thus, on one view, all the Supreme Court did in *Twombly* and *Iqbal* was *catch up* to what lower courts had been doing for some time. It is true that the Court's new verbal formulation of "plausibility" is not identical to the formulations that lower courts had been using.<sup>68</sup> Nonetheless, the effect should be the same: to continue to empower judges to boot cases because they are skeptical of the merits. If this view is correct, then the decisions may have little practical effect in the lower courts. Indeed, the earliest empirical studies suggest that this in fact the case.<sup>69</sup>

On this point, it should be noted that a very similar phenomenon was discovered after the Supreme Court's trio of cases in 1986 making it easier for federal judges to dismiss cases on summary judgment.<sup>70</sup> Commentators then, like now, thought the decisions were revolutionary, unwarranted, and a gift to corporate defendants.<sup>71</sup> Although

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67 See Hatamyar, *supra* note 7, at 556 (finding that in the years before *Twombly* forty-six percent of motions to dismiss were granted).

68 See Fairman, *Notice Pleading*, *supra* note 55, at 998–1010.

69 See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *Iqbal*, Federal Judicial Center Report to the Judicial Conference Advisory Committee on Civil Rules vii (2011) (finding "a general increase from 2006 to 2010 in the rate of filing of motions to dismiss," but "no increase in the rate of grants of motions to dismiss without leave to amend" or "in the rate at which a grant of a motion to dismiss terminated the case"); Hatamyar, *supra* note 7, at 596–600 (finding that there has been no increase in grants of motion to dismiss without leave to amend since *Twombly*, but there has been an increase in grants of motion to dismiss with leave to amend); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (finding that "despite sweeping language and the 'retirement' of fifty-year-old language," *Twombly* "appears to have had almost no substantive impact," with the possible exception of civil rights cases).

70 See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (easing the standard for summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (same); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (same).

71 See John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problem Under Rule 56*, 6 REV. LITIG. 227, 248 (1987) (arguing that the *Celotex* trio "teaches at least abstractly that the moving defendant has no initial burden to produce affirmative evidence, [thus] there is ample room for aggressive application of the decision against plaintiffs"); Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 214–15 (1988) ("[T]he three decisions basically mean that summary judgment will be easier for defendant/movants to obtain."); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 42 (1988) (arguing that the

some of these criticisms may have had merit, empirical studies found that, like here, the 1986 cases had very little effect on lower court decisions. Lower courts had begun more freely dismissing cases on summary judgment well before the Supreme Court saw the wisdom in doing so.<sup>72</sup>

It is not altogether surprising that lower courts see these sorts of nuts-and-bolts questions of civil litigation differently than the Supreme Court. Lower courts face docket pressures that the Supreme Court does not face,<sup>73</sup> and, as such, they have a greater incentive to dismiss implausible cases than the Supreme Court does. In addition, lower court judges tend to be closer to the realities of modern legal practice than Supreme Court Justices.<sup>74</sup> Not only are lower court judges removed from practice by fewer years than Supreme Court Justices—when Chief Justice Roberts joined in 2005, he became the only member of the Court to have practiced civil litigation since the 1970s<sup>75</sup>—but federal district court judges deal with the hassles of dis-

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*Celotex* trio “is bound to lead to many summary judgments improvidently granted in favor of defendants”).

72 See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 906 (2007) (noting “few changes in summary judgment activity after the Supreme Court trilogy”).

73 In 2010, 282,307 civil cases and 77,287 criminal cases were filed in United States District Courts. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbls. C & D (2010). In 2008, Federal District Court Judges were each assigned an average of 394 civil and 105 criminal cases. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl. 4.1 (2010), <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table401.pdf> (civil); *id.* tbl. 5.1, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table501.pdf> (criminal). By contrast, in the October 2009 term, although 8,159 cases were placed on the Supreme Court’s docket, only 76 writs of certiorari were granted. See *October Term 2009*, JOURNAL OF THE SUPREME COURT OF THE UNITED STATES II (2010).

74 See Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 148–49 (2006) (arguing that Supreme Court Justices exhibit “heedlessness [to the] consequences of the[ir] doctrines for the real world of litigation,” and that, as a remedy, presidents should “appoint more district court judges to . . . the Supreme Court”).

75 According to the Biographies of the Federal Judiciary, Justice Stevens had last been in private practice in 1970, Justice O’Connor in 1965, Justice Scalia in 1967, Justice Kennedy in 1975, and Justice Souter in 1968. See *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Feb. 25, 2012). In addition to their time in private practice, Justice Scalia was a federal government lawyer until 1977, and Justices O’Connor and Souter were state government lawyers until 1969 and 1978, respectively. *Id.* Justices Thomas, Ginsburg, and Breyer never spent any time in private practice. Justice Thomas served a few years as a state government lawyer (until 1977) and an in-house counsel (until

covery and trial on a daily basis. As such, they understand, at least to some extent, the burdens it entails on parties. Supreme Court Justices, by contrast, do not deal with such hassles. Although they might have remembered such hassles had they been elevated from the ranks of the district courts, when Justice Sotomayor joined in 2009, she became the only member of the Court who had served as a trial judge.<sup>76</sup> Thus, it is not surprising that federal litigation reforms are fashioned in the lower courts and only later ratified by the Supreme Court. In other words, there is reason to believe that *Twombly* and *Iqbal* may be less revolutionary than first meets the eye.<sup>77</sup>

*B. Are Twombly and Iqbal Examples of Conservative Judicial Activism?*

Commentators have been the most critical of the way in which the Supreme Court reset pleading standards in *Twombly* and *Iqbal*. According to commentators, the Court ignored, distinguished, or disavowed long-standing precedents, in order to find new meaning in the text of a Federal Rule of Civil Procedure that reads today as it has since 1938.<sup>78</sup> These commentators believe that the changes set forth in *Twombly* and *Iqbal* should have come about, if at all, through the federal rulemaking mechanism rather than by judicial fiat.<sup>79</sup>

In light of these sentiments, it is not surprising that a number of commentators have characterized the Court's decisions as "judicial activism."<sup>80</sup> Moreover, because the decisions are widely understood to benefit corporate defendants and impair the plaintiffs who sue

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1979); Justice Ginsburg spent many years as a public interest lawyer (until 1980); and Justice Breyer dabbled in federal government legal jobs of an advisory nature in the 1960s and 1970s. *Id.* None of them had served as a trial judge. *Id.* Although the Justices do hire younger lawyers as law clerks, they are usually freshly out of law school and have never practiced law at all. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Even commentators critical of the Court's decisions have begun to concede this point. See Clermont, *supra* note 5, at 1365 ("[I]n the years before *Twombly-Iqbal* many pleaders were including tremendous detail, and many observers attributed this practice to the encouragement, if not requirement, of the lower courts. To some extent, notice pleading was already gone."); Spencer, *supra* note 43, at 432 ("[T]he Court's move [in *Twombly*] is consistent with long-held sentiment among the lower federal courts.");

<sup>78</sup> See, e.g., Stephen B. Burbank, *Summary Judgment, Pleading and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189 (2010); Clermont, *supra* note 5, at 1337; Epstein, *supra* note 57, at 77; Hartnett, *supra* note 46, at 476; Schneider, *supra* note 57, at 527–40; Spencer, *supra* note 43; Josephson, *supra* note 56, at 869.

<sup>79</sup> See *supra* note 78 and accompanying text.

<sup>80</sup> Hatamyar, *supra* note 7, at 555 (noting that many have criticized *Iqbal* as "judicial activism"); Jois, *supra* note 7, at 905.

them,<sup>81</sup> many have characterized the decisions as an example of what has come to be known as “conservative judicial activism.”<sup>82</sup> As Professor Steinman has noted, many scholars view the decisions as only the most recent examples of the “tendency of the federal judiciary (and the Supreme Court in particular) to favor defendants, especially corporate and business interests, in civil litigation.”<sup>83</sup> Professors Clermont and Yeazell concur: “[m]any observers . . . see the same old right/left story: the conservatives seek to protect rich or powerful defendants . . . .”<sup>84</sup> As does Professor Wasserman: “[the] cases have the potential to be framed . . . in political terms as the Court’s conservative majority protecting big business, in keeping with their broader political and ideological preferences.”<sup>85</sup>

Although this phrase “judicial activism” is thrown around a great deal, it has no well-accepted definition.<sup>86</sup> One meaning of the phrase that is sometimes invoked—the disregard of precedent<sup>87</sup>—could fairly apply to the Court’s decisions in *Twombly* and *Iqbal*. Nonetheless, when commentators, public officials, and the media become most exercised about “judicial activism,” it is not usually because the judicial branch has in some way recast its own understanding of the law, but, rather because it has usurped the legal authority of another branch of government—typically a branch more democratically accountable than the judicial branch.<sup>88</sup> Thus, it is when a court

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81 See Steinman, *supra* note 46, at 1351 (“[A]ccess to discovery may present a zero-sum game. Stricter pleading standards help defendants at the expense of plaintiffs, and more lenient pleading standards help plaintiffs at the expense of defendants.”).

82 Parsons, *supra* note 7. As Ernie Young has observed, “[i]t is very much in vogue these days to accuse the [Supreme] Court of ‘conservative judicial activism.’” Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139 (2002).

83 Steinman, *supra* note 46, at 1325.

84 Clermont & Yeazell, *supra* note 12, at 850.

85 Wasserman, *supra* note 1, at 10–13 (further noting that, although “the pure attitudinal model does not work in the main run of procedure cases,” it does “reveal itself in the most fundamental procedure cases,” including *Iqbal*).

86 See Young, *supra* note 82, at 1145–60 (listing several common usages of the phrase).

87 See *id.* at 1149–51.

88 See, e.g., Keenan D. Kmiec, *The Origin and Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441, 1464–65 (2004) (“[T]he Court is engaging in judicial activism when it reaches beyond the clear mandates of the Constitution to restrict the handiwork of other government branches.”); see also Lino A. Graglia, *It’s Not Constitutionalism, It’s Judicial Activism*, 19 HARV. J.L. & PUB. POL’Y 293, 296 (1996) (“By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing

strikes down a piece of legislation<sup>89</sup> or interprets a democratically-enacted text (like a statute or a constitutional provision) in light of what the court itself thinks is “good,” “just,” or “right,”<sup>90</sup> that people tend to get worked up about “judicial activism.”

It is hard to make a case that *Twombly* and *Iqbal* constitute this sort of judicial activism. As noted above, the basis of the Court’s ruling was Federal Rule of Civil Procedure 8(a). Although, as I also noted above, a good case can be made that the Court essentially rewrote Rule 8 in these decisions, unlike a statute or a constitutional provision, the Court did not usurp the authority of another branch in doing so. Unlike statutes and constitutional provisions, the Federal Rules of Civil Procedure are *written by the judicial branch*; indeed, they are *promulgated by the Supreme Court itself*.<sup>91</sup> As such, and with one relatively minor caveat,<sup>92</sup> it is difficult to make a case that the Court has usurped the authority of another branch: the law the Court has been accused of rewriting is a law that the Court *itself* wrote and that the Court *itself* could change at any time.

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policy choices by other government officials or institutions that the Constitution does not clearly prohibit.”).

89 See Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 939 (2007) (“[Commentators] have dubbed the Rehnquist Court the most activist in history because of the number of federal statutes it struck down—more than three dozen federal laws in the past ten years.”).

90 Kmiec, *supra* note 88, at 1473 (“While canons of interpretation have long been criticized as unhelpful or conclusory, the failure to use the ‘tools’ of the trade appropriately—or not at all—can be labeled ‘judicial activism.’”); see also Diarmuid F. O’Scannlain, *On Judicial Activism*, OPEN SPACES Q., Feb. 29, 2004, at 23 (“Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective.”).

91 See 28 U.S.C. § 2072 (2006) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . in the United States district courts . . .”).

92 The Rules Enabling Act requires a seven month waiting period after the Supreme Court promulgates any new Federal Rule of Civil Procedure, allowing time for Congress and the President to enact a law blocking the Rule before it takes effect. See 28 U.S.C. § 2074. To the extent *Twombly* and *Iqbal* rewrote Rule 8(a), Congress and the President did not enjoy the benefit of this window. Nonetheless, nothing prevents the political branches from overruling *Twombly* and *Iqbal* now; thus, to the extent *Twombly* and *Iqbal* usurped some power of the political branches, it was a relatively minor one: the power to overrule a change before (rather than merely after) the change takes effect.

It is true, of course, that, although there is nothing in the U.S. Code that requires the Supreme Court to do so,<sup>93</sup> the Court typically rewrites the Federal Rules through the process prescribed by the Judicial Conference of the United States, which involves advisory committees, public comments, and the like.<sup>94</sup> It is also no doubt true that, as Professors Clermont and Yeazell have noted, this process adds value by helping to ensure that any changes take place only after careful deliberation.<sup>95</sup> Nonetheless, in light of the judicial nature of the Federal Rules, the most that I think one can say about *Twombly* and *Iqbal* is that the Court usurped the typical—though, again, not obligatory—domain of the lower federal court judges who make up the Judicial Conference. Although this cannot be dismissed blithely, it is not really the stuff of the democracy-threatening judicial activism that usually captures our attention. In other words, in *Twombly* and *Iqbal*, the judicial branch did not step on anyone's toes but its own.

### C. Was It Time To Do Something About Discovery?

As noted above, almost everyone interprets *Twombly* and *Iqbal* as a boon for corporate defendants and an albatross for the plaintiffs who sue them. Many of these commentators believe the Court's concerns over the costs and burdens borne by defendants during discovery are overblown, or, even if not overblown, nonetheless insufficient reason to take liberal access to discovery away from plaintiffs.<sup>96</sup> As Professor

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93 See 28 U.S.C. §2073(e) ("Failure to comply with this section [authorizing the Judicial Conference to prescribe procedures for considering changes to the Rules] does not invalidate a rule prescribed under Section 2072 . . .").

94 See 28 U.S.C. §2073(a)-(d) (requiring the Judicial Conference to create committees to consider changes to the rules and to prescribe procedures for considering those changes); see also ADMIN. OFFICE OF THE CTS., THE FEDERAL RULES OF PRACTICE AND PROCEDURE (2010), available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx> (describing the procedures created by the Judicial Conference); Wasserman, *supra* note 1, at 13 ("Formally, the Court is charged by statute with promulgating rules of procedure . . . . Practically, however, the process is controlled by the Standing Committee of the Judicial Conference and the Civil Rules Advisory Committee . . . .").

95 Clermont & Yeazell, *supra* note 12, at 847 (noting that "this process now guarantees that notice, comment, and a good deal of consultation among bench and bar will precede significant . . . procedural change" and thereby it "head[s] off ill-considered quick fixes").

96 See, e.g., Burbank, *supra* note 78; Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 17 (2008); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 52 (2010); Eichhorn, *supra* note 6; Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMPLOYEE RTS. & EMP. POL'Y J. 253, 282-83; Muhammad Umair Khan, *Tortured*

Steinman has noted, the conventional view is that the decisions will have “destructive policy consequences”<sup>97</sup> and, as Benjamin Spencer has put it, will retard rather than expand “access to justice.”<sup>98</sup>

On this point, I must dissent. I find it hard to be unsympathetic with the concerns over discovery costs that lead the Court to reorient its understanding of the pleadings in *Twombly* and *Iqbal*. Although the available data on this question has never been very good,<sup>99</sup> it does not take an economist to tell us that discovery is expensive, and that it has become vastly more so since the Federal Rules were adopted in 1938, since *Conley* was decided in 1957, and even perhaps since *Swierkiwicz* was decided in 2002.<sup>100</sup>

There are many reasons why discovery costs have escalated over the decades, but there are two in particular that are worth mentioning here. First, corporations are bigger today than they were in the past; they span nations rather than just cities or states.<sup>101</sup> Thus it is more expensive for corporate defendants to find and gather from their operations all information relevant to a piece of litigation. Corporations are more complex than they used to be; asking all their employees questions and opening all their employees’ files is an increasingly costly endeavor.

Second, changes in technology have permitted more people to create, distribute, and store more documents than ever before. First

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*Pleadings: The Historical Development and Recent Fall of the Liberal Pleadings Standard*, 3 ALB. GOV’T L. REV. 460, 488–500 (2010); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 81 (2010); Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 LITIGATION, No. 3, 2009, at 1–2; Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 484 (2010); Spencer, *supra* note 43; A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 157 (2008); Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245 (2010).

97 Steinman, *supra* note 46, at 1296.

98 Spencer, *supra* note 43, at 479.

99 See Clermont & Yeazell, *supra* note 12, at 848 (“Although some of these data are easily available, others exist only in difficult-to-access forms, some do not exist, and some will never exist.”).

100 See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY 5 (2008).

101 See, e.g., *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1335 (E.D.N.Y. 1981) (“[I]t was not until after World War II that the phenomenon of the multinational enterprise, as we now know it, became a major factor in the world scene.” (citing P. BUCKLEY & M. CASSON, *THE FUTURE OF THE MULTINATIONAL ENTERPRISE* 1 (1976))).

photocopiers, and now computers, permit hundreds or thousands of people to receive copies of the same document. Innovations in data storage now place almost no limit on how much of it can be retained by corporations and their employees.<sup>102</sup> These technological advances have significantly increased the discoverable material defendants possess.<sup>103</sup> The expense of producing computer files and reviewing them for relevancy, confidentiality, privilege, etc. (often referred to as “e-discovery”) has been a continuing source of concern among corporate defendants.<sup>104</sup> Indeed, some commentators estimate that “more than ninety percent of discoverable information is [now] generated and stored electronically.”<sup>105</sup>

As such, it is not difficult to find cases these days where the cost of producing requested discovery comes to *millions* of dollars.<sup>106</sup> As

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102 See *Data, Data Everywhere*, THE ECONOMIST (Feb. 25, 2010).

103 See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 100, at 5 (“Over 99% of the world’s information is now generated electronically . . . . World-wide, [p]robably close to 100 billion e-mails are sent daily,’ with the average employee sending and receiving more than 135 e-mails each day. And every day, the world generates five billion instant messages. . . . The quantity of electronic information is growing exponentially; one report shows that new stored information increases about 30% annually.” (internal citations omitted)).

104 See *id.* (“Verizon, a company at the forefront of e-discovery issues, has collected data on the costs of e-discovery and internally benchmarked the costs of processing, reviewing, culling and producing 1 GB of data at between \$5,000 and \$7,000 (assuming precise keyword searches have been employed). If a ‘midsize’ case produces 500 GB of data, this means organizations should expect to spend \$2.5 to \$3.5 million on the processing, review and production of ESI [electronically stored information].”). These concerns have led to minor changes in the discovery provisions of the Federal Rules in recent years. See, e.g., FED. R. CIV. P. 26(b)(2)(B) (creating a discovery exemption for ESI not “reasonably accessible because of undue burden or cost” and giving courts the ability, under certain circumstances, to shift the cost of producing ESI to the party requesting information); FED. R. CIV. P. 26(f)(3) (requiring parties to meet and confer specifically on e-discovery issues early in the litigation); FED. R. CIV. P. 34(b) (permitting the requesting party to designate the form or forms in which it wants ESI produced); FED. R. CIV. P. 37(f) (creating a safe harbor to prevent sanctions against a party who fails to produce ESI lost as a result of routine, good-faith operation of an electronic information system).

105 Schwartz & Appel, *supra* note 57, at 1141.

106 See, e.g., *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 3446761, at \*1 (D.N.J. Oct. 20, 2009) (noting that it would have cost over \$1 million to search emails on the backup tapes maintained by the defendant); *Quinby v. WestLB AG*, 245 F.R.D. 94, 99–101 (S.D.N.Y. 2006) (stating the total cost of email discovery as almost \$2.3 million); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557–58 (W.D. Tenn. 2003) (estimating the cost of privilege review at between \$16.5 million and \$70 million); *Rowe Entm’t, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002) (noting that it would cost almost \$10 million to search emails on the electronic back-up tapes maintained by one of the defendants); *Linnen v. A.H. Rob-*

some commentators have noted, “it is not infrequent for . . . 500 billion typewritten pages . . . to be at issue in large civil litigation,” and the cost of merely collecting such documents “can be in the millions of dollars.”<sup>107</sup> It is even more expensive to review the documents once they are collected:<sup>108</sup> “assuming it takes a skilled attorney using available technology an average rate of one hour to review one hundred documents, it would take him or her five years to review one million documents working 2,000 hours per year.”<sup>109</sup> It was not so long ago that anyone who worked in a large law firm regularly witnessed legions of associates spending countless evenings buried in hundreds of boxes of documents that had to be reviewed for relevancy and privilege. Although today the boxes have largely been replaced with compact discs or USB drives, the number of billable hours remains the same. One large company that has studied its litigation expenses estimates that it costs between \$2.5 and \$3.5 million to cull, review, and produce documents in a case with a “midsize” amount of electronic data (which it characterized as 500 gigabytes, or approximately fifty million pages).<sup>110</sup> Although technology has also made it easier and cheaper to search through all of this information, it is hard to believe that the additional savings amount to anything close to the additional expenses.

Some commentators believe that discovery of this sort is rare, and that, in the vast majority of cases, discovery is an insignificant burden.<sup>111</sup> There are a handful of studies over the years that are consis-

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ins Co., Inc., 10 Mass. L. Rptr. 189, at \*4 (Mass. Supp. 1999) (estimating the cost of restoring back-up tapes at somewhere between \$850,000 and \$1.4 million).

107 Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J. L. & TECH. 1, 4 (2007).

108 See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 100, at 20 (estimating that the overwhelming majority of e-discovery costs are incurred at that the “attorney review stage”).

109 Mazza et al., *supra* note 107, at 4–5.

110 See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 100, at 5.

111 See, e.g., Amelia F. Burtoughs, *Mythed it Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75 (2001); Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 639 (2010) (criticizing *Twombly* because “empirical research demonstrate[s] that discovery abuse leading to excessive pretrial costs was not a problem in the vast majority of cases filed in the federal courts”); Lonny S. 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, 1238 (2008) (“Even if discovery costs are not significant in most litigation—they are not, as the best available empirical evidence shows—*Twombly* invites defendants to try to say they are.” (footnote omitted)); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684 (1998).

tent with this belief,<sup>112</sup> but I am skeptical of them. To begin with, almost all of these studies are quite old—all of them but one are over thirteen years old—and the world of discovery, especially the electronic world, has changed a great deal in the meantime. Moreover, even the most recent study—a 2009 survey of lawyers by the Federal Judicial Center<sup>113</sup>—has its limitations. The study found that, in the median federal civil case that went to discovery, defendants spent only \$20,000 in total litigation costs, with twenty-seven percent of those costs spent on discovery.<sup>114</sup>

This total litigation figure strikes me as far too low to be even remotely realistic. The figure is only \$5000 greater than the figure the Federal Judicial Center found in its 1997 survey of lawyers, and, at that time, defendants stated that fifty percent of their costs had been incurred in discovery.<sup>115</sup> Thus, if the Federal Judicial Center's studies are to be believed, in the median civil case, the amount of money defendants spent on discovery *declined* from \$7500 in 1997 (half of \$15,000) to \$5400 in 2009 (twenty-seven percent of \$20,000)! I know of no one who believes that discovery has become a *less* expensive enterprise since the advent of e-discovery.

Nonetheless, even assuming these figures are accurate, I am not sure they demonstrate that discovery is not expensive these days. To begin with, the vast majority of cases in federal court end in settlement,<sup>116</sup> and, as the Court in *Twombly* noted, discovery costs affect settlement dynamics.<sup>117</sup> In particular, because defendants bear their own discovery costs, they have every incentive to settle cases in order to *avoid* paying such costs.<sup>118</sup> Thus, the crucial piece of information in many cases is not what defendants *actually paid* in discovery, but what they *would have paid had they not settled*, and this information was not (and probably could not have been) collected in the 2009 Federal

112 See Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998) (reviewing the empirical studies of discovery from 1968 to 1997).

113 See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY (2009).

114 See *id.* at 37.

115 See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 548 (1998).

116 See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–63 (2004) (indicating that the number of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002).

117 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557–58 (2006).

118 See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 403 (2004).

Judicial Center study. Moreover, even if it is true that the typical case in federal court costs defendants only \$20,000 to litigate, then it suggests that it is unlikely that the typical case will even be affected by *Twombly* and *Iqbal*. It hardly seems worthwhile to pay a lawyer several hundred dollars an hour to file a motion to dismiss if the entire case can be litigated for such a paltry sum. Rather, *Twombly* and *Iqbal* are likely to make a difference—again, to the extent, in practice, they make much of a difference at all—only in cases where discovery is expensive.

The fact that discovery is expensive does not mean, of course, that discovery is bad and should be curtailed. The problem, as the Court noted in *Twombly*, is that discovery expenses can be converted into a tax on corporations that plaintiffs are free to collect anytime they file a lawsuit regardless of whether the lawsuit has any merit.<sup>119</sup> That is, because it is rational for defendants to settle cases in order to avoid litigation costs, when plaintiffs do gain access to discovery, it can add thousands or millions of dollars to the settlement values of their cases. In a pre-*Twombly* world, where judges did not (or at least were not supposed to) try to assess the merits of a plaintiff's case before proceeding to discovery, cases with little or no merit (e.g., cases that might have traditionally been weeded out at summary judgment) might therefore still generate thousands or millions of dollars in a pre-trial settlement. It is not difficult to understand why it saps social welfare and constitutes poor public policy to force defendants to pay large sums to settle cases with no merit (and to thereby encourage additional filings of such cases).<sup>120</sup> Forcing corporations to settle such

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119 *Bell Atlantic Corp.*, 550 U.S. at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even the most anemic cases before reaching those proceedings.”).

120 See, e.g., Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1851–52 (2004) (“The civil justice system is rife with situations in which the difference in cost between filing and ousting meritless claims or defenses makes the nuisance-value strategy profitable. The resulting settlements decrease social welfare by vexing and taxing the victimized party, encouraging the misallocation of legal resources, and diminishing public confidence in the civil liability system.”); Levine, *supra* note 71, at 203 (“[D]isposing of worthless claims at the pretrial stage . . . saves the parties, as well as the judicial system . . . time and money . . . . It also prevents parties from pursuing meritless settlement claims by exposing the insufficiency of the claim at an early stage, thus sparing the other party the threat of expensive litigation that might otherwise force settlement.” (footnote omitted)); Steinman, *supra* note 46, at 1311 (“If pleading standards are too lenient, plaintiffs without meritorious claims could force innocent defendants to endure the costs of discovery and, perhaps, extract a nuisance settlement from a defendant who would rather pay the plaintiff to make the case go away. The need to avoid this situation is a commonly asserted policy justification for stricter pleading

cases is akin to placing a tax on the activities of corporations for no legitimate social purpose.<sup>121</sup>

In 1938, when this discovery tax was relatively trivial, it may have made sense to set the balance of power between plaintiffs and defendants in favor of easy access to discovery for plaintiffs. But things are different now, and the balance struck in 1938 may not be a sensible balance today. I therefore have a hard time finding fault with the Court for taking account of the changed circumstances and trying to adjust the balance accordingly. Of course, as I said, it may have been more thoughtful and transparent to make this adjustment through the rulemaking process rather than through adjudication. Nonetheless, I think the Court's motives were pure even if its methods were not.

### III. ARE THERE BETTER RESPONSES TO THE INCREASED EXPENSE OF DISCOVERY?

This is not to say, however, that the regulatory mechanism the Court selected to tighten the spigot on discovery—pleading standards—is the best one. Pleading standards empower judges who have neither the information nor the incentives to make wise decisions about which cases are worthy of discovery.<sup>122</sup> Making wise decisions about discovery requires some assessment of how much discovery is going to cost defendants and how much value plaintiffs might reap from it;<sup>123</sup> at the outset of a case, judges know almost nothing about

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standards." (footnote omitted)); *id.* at 1352 ("Discovery costs are a serious and legitimate concern.").

121 See e.g., *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at \*3-4 (D. Mass. Aug. 22, 2006) (describing settlements to avoid nuisance costs as a "tax" that has no benefit to anyone other than those to whom it is paid); see also Kozel & Rosenberg, *supra* note 120.

122 See Nagareda, *supra* note 56, at 682 ("[T]he present-day prescription for judicial regulation of the pretrial phase faces an important practical challenge. In one way or another, the regulator must inform its decision making . . . . Extension of this third-party regulatory approach to pleading at the outset of litigation . . . does not bring with it great latitude for informing the regulator. Rather, the cost that would be imposed via discovery in order to inform the regulator is thought to be the very problem to be avoided." (footnote omitted)).

123 Exactly how the costs and benefits should be weighed is open to debate. As Bruce Hay has demonstrated, it may enhance social welfare in some cases to permit discovery that is more costly to the defendant than it is beneficial to the plaintiff's case. See Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481 (1994).

either of these things.<sup>124</sup> In addition, judges at the trial level face tremendous docket pressures.<sup>125</sup> If they permit a case to go forward to discovery, they are not only imposing costs on defendants, they are imposing costs on themselves: dismissed cases are cleared from their dockets once and maybe for all. Moreover, pleading standards are an all-or-nothing regulatory mechanism: either a case passes the standard and goes forward to discovery, or a case fails the standard and the plaintiff sees no discovery at all. Because the Federal Rules of Civil Procedure are understood to be trans-substantive, pleading standards cannot be tailored to the costs and benefits of a particular case. Indeed, once a case goes forward to discovery, pleading standards do nothing to mitigate the nuisance value of discovery. Because parties are permitted to make discovery requests of each other, yet each party pays its own expenses to comply with those requests, how much each party pays is largely determined by their opponents. Needless to say, this creates terrible incentives to run up discovery costs: the more you request of your opponent, the more expensive your opponent's litigation costs become, and the more your opponent is willing to pay you in a settlement to avoid them.<sup>126</sup> Pleading standards do nothing to curtail such incentives. Because pleading standards are all-or-nothing, once they are surpassed, plaintiffs are entitled to the "all."

For all these reasons, scholars have begun to ask whether a better approach to regulating access to discovery may be fee-shifting rules where plaintiffs are asked to pay some or all of defendants' discovery costs.<sup>127</sup> Although limited fee-shifting is currently possible under the Rules,<sup>128</sup> these commentators envision something much more com-

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124 See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989) (arguing that judges "cannot . . . know the expected productivity of a given [discovery] request, . . . cannot measure the costs and benefits to the requester, and so cannot isolate impositional requests").

125 See *supra* note 73 and accompanying text.

126 See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 435–36 (1994) [hereinafter Cooter & Rubinfeld, *Economic Model*]; Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L. J. 61 (1995) [hereinafter Cooter & Rubinfeld, *New Discovery*]; Easterbrook, *supra* note 124; Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 602 (2001); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

127 See, e.g., Nagareda, *supra* note 56, at 684–87; Redish & McNamara, *supra* note 126.

128 See, e.g., FED. R. CIV. P. 26(b)(2)(B) (permitting courts to "specify conditions for the discovery"—e.g., fee shifting—when electronically stored information is "not reasonably accessible because of undue burden or cost").

prehensive. Fee-shifting rules are attractive because they take the decision to pursue discovery away from judges and give it to plaintiffs who would have every reason to weigh carefully the expected costs and benefits as they would be paying the costs for those benefits.<sup>129</sup> Not only does this render more accurate the decision whether to pursue discovery at all, but it also corrects the incentives plaintiffs have to run up discovery costs once discovery has begun.<sup>130</sup> If plaintiffs internalize the costs of the discovery they request, they will be careful to request only discovery for which they expect the benefits of the discovery to their cases to outweigh the costs of the discovery.

But fee-shifting is not a panacea. If the shifting goes both ways (i.e., defendants must pay plaintiffs' fees sometimes, too), then there are theoretical models—and even some empirical evidence—predicting that fee shifting may make litigation more rather than less expensive.<sup>131</sup> Moreover, even if the fee shifting goes only one way (i.e., only plaintiffs must pay defendants' fees and not vice versa), fee-shifting can create a moral hazard on the defendants' side: if plaintiffs are paying for defendants' discovery costs, what incentive do defendants have to keep these costs down?<sup>132</sup> In addition, fee-shifting can price out of court plaintiffs with fewer resources at their disposal. Finally, the private cost-benefit calculation to incur discovery expenses may not always line up with the social cost-benefit calculation.<sup>133</sup> Despite these weaknesses, it is quite possible that fee shifting brings us closer to an optimal discovery regime than the all-or-nothing approach offered by pleading standards. This may be especially true for one-way rules that target discovery costs in particular. For example, plaintiffs might be asked to pay only the defendants' discovery-related fees and expenses if they lose their cases, or they might be asked to pay the

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129 See Nagaredga, *supra* note 56, at 684 ("A more fulsome approach would remove . . . the pressure on the role of the court itself as third-party regulator. Here, the idea would be to make it unnecessary for the court either to estimate the marginal costs and benefits of discovery, or to do much the same under the rubric of identifying whether the case is of the public-information variety. A form of what one might call first-party regulation, in short, might substitute for third-party regulation. Specifically, the law might provide for the shifting of discovery costs post-pleading and pre-summary judgment . . .").

130 See, e.g., Cooter & Rubinfeld, *Economic Model*, *supra* note 126; Cooter & Rubinfeld, *New Discovery*, *supra* note 126; Redish, *supra* note 126; Redish & McNamara, *supra* note 126.

131 See Avery W. Katz & Chris William Sanchirico, *Fee Shifting in Litigation: Survey and Assessment* 6–9, 30–31 (Univ. of Pa. Inst. for Law & Econ., Research Paper no. 10-30, 2010), available at <http://ssrn.com/abstract=1714089>.

132 See Nagareda, *supra* note 56, at 686.

133 See *supra* note 123.

defendants' fees and expenses only if they lose their cases on summary judgment. Rules of this sort have already found their way into so-called "tort reform" proposals for state courts.<sup>134</sup>

I do not mean to suggest by this discussion that the Supreme Court should be faulted for taking the pleading-standard path in *Twombly* and *Iqbal*. The Court can only change that which is within its purview; it would no doubt take an Act of Congress to institute a pervasive fee-shifting regime for discovery costs. As such, the Court's decisions in *Twombly* and *Iqbal* may simply be the first word in a long dialogue on how best to respond to new litigation realities.<sup>135</sup>

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134 See, e.g., *More TN Tort Reform May Make the 'Loser Pay'*, TENNESSEAN (Feb. 20, 2012, 3:01 AM), <http://www.tennessean.com/article/20120220/NEWS0201/302200020/More-TN-tort-reform-may-make-loser-pay-> (discussing a bill in Tennessee that "would require a party who loses a motion to dismiss to pay the litigation costs of the opposing party").

135 Indeed, a bill was introduced in Congress to overturn the Court's decisions in *Twombly* and *Iqbal* and return to the "mere notice" pleading regime. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).