

# Note

## Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation

*Nathan R. Sellers\**

### I. INTRODUCTION

The Federal Rules of Civil Procedure (“Rules”)<sup>1</sup> govern procedure in the federal courts from the moment a lawsuit is filed until its final disposition, and they affect every stage of the litigation process.<sup>2</sup> The Rules govern pleading,<sup>3</sup> discovery,<sup>4</sup> depositions,<sup>5</sup> summary judgment,<sup>6</sup>

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1. Where this Note refers to other types of rules promulgated by the Supreme Court, it will do so by explicit reference.

2. See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . .”).

3. Rule 8 establishes the general requirements for pleading. FED. R. CIV. P. 8. In this Note, “pleading” refers to the initial written filing submitted to a court by a plaintiff to initiate a civil case, setting forth the plaintiff’s claims and allegations. BLACK’S LAW DICTIONARY 1191 (8th ed. 2004) [hereinafter BLACK’S LAW] (citing FED. R. CIV. P. 8(a)).

Generally speaking, pleadings have two functions. First, they permit the elimination from consideration of contentions that have no legal significance.

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The second purpose of modern pleading is to guide the parties and the court in the conduct of cases. A litigant cannot prepare for trial unless she has been informed adequately of the opponent’s contentions. Equally vital is notice to the court.

JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.2, at 254 (4th ed. 2005).

4. Rule 26 governs the scope of discovery. FED. R. CIV. P. 26; see also *infra* note 116 and accompanying text (explaining pretrial discovery and Rule 26).

5. Rule 27 governs depositions. FED. R. CIV. P. 27. “A deposition is a witness’s out-of-court testimony that is reduced to writing . . . for later use in court or for discovery purposes.” BLACK’S LAW, *supra* note 3, at 472.

6. Rule 56 establishes the standard for summary judgment. FED. R. CIV. P. 56. Summary judgment is a procedural device that allows for the disposition of a controversy before trial, BLACK’S LAW, *supra* note 3, at 1476, and generally occurs after the parties have engaged in

trials,<sup>7</sup> and post-trial proceedings.<sup>8</sup> As a result, meticulous care must be taken in drafting changes to the Rules,<sup>9</sup> and in recognition of this fact, Congress created the formal rulemaking process to identify, define, and implement Rules changes.<sup>10</sup>

The formal rulemaking process is a statutorily-authorized procedure for drafting and amending the Rules.<sup>11</sup> It requires approval from both the judicial and legislative branches of the Federal Government and gains legitimacy from its methodical nature and transparency.<sup>12</sup> The formal rulemaking process is exemplified by four key features: (1) public input from a diverse set of constituencies including judges, attorneys, legal publications, law schools, professors, and bar associations;<sup>13</sup> (2) ability to make systematic changes to the Rules, to consider a variety of alternatives, to amend more than one Rule at a time, and to attach Explanatory Notes<sup>14</sup> to clarify text and highlight the intended objectives of an amendment;<sup>15</sup> (3) approval of proposed

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discovery, *see, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468 (1992) (“After several years of detailed discovery, the defendants moved for summary judgment.”).

7. Rules 38 through 53 govern civil trials. FED. R. CIV. P. 38–53.

8. *See*, for example, Rule 59, which describes the grounds for granting a new trial or altering or amending a judgment. FED. R. CIV. P. 59.

9. “The pervasive and substantial impact of the [R]ules on the practice of law in the federal courts demands exacting and meticulous care in drafting [R]ule changes.” James C. Duff, Admin. Office of the U.S. Courts, *Summary for the Bench and Bar* (Oct. 2010), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx> [hereinafter Duff, *Summary*].

10. *See infra* Part II.A.2 (describing the formal rulemaking process).

11. Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006) (authorizing a procedure for establishing procedural and evidentiary rules in federal courts).

12. *See infra* Part II.A (explaining that both the Court and Congress must sign off on formal changes to the Rules, and describing the transparent and inclusive nature of the formal rulemaking process).

13. Duff, *Summary*, *supra* note 9. *See generally infra* Part II.A.2 (describing the inclusive nature of the formal rulemaking process).

14. *See* 28 U.S.C. § 2073(d) (authorizing the use of explanatory notes).

15. *See infra* Part IV.B (describing the advantages of these features to the formal rulemaking process).

changes by multiple administrative bodies within the judicial branch;<sup>16</sup> and (4) review and approval from a democratically-elected Congress.<sup>17</sup>

Almost all major changes to the Rules are made through this formal process: formal amendment proposals are generally drafted and reviewed by subsidiary bodies within the judicial branch, affirmed by the U.S. Supreme Court for promulgation, and then transmitted to Congress for legislative approval.<sup>18</sup> On occasion, however, the Supreme Court will issue an opinion that so dramatically alters the prevailing meaning of a Rule that it effectively amends the Rule, thus circumventing the formal rulemaking process.<sup>19</sup> When the Court issues a judicial opinion that effectively amends a Rule, the process lacks the multiple layers of debate, revision, and legislative approval that underscore the legitimacy of the formal rulemaking process.<sup>20</sup> Moreover, none of the key features of the formal rulemaking process are achieved through judicial amendment of a Rule.<sup>21</sup> Finally, separation of powers principles deny the Court such discretion.<sup>22</sup>

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16. See *infra* Part II.A.2 (noting the various administrative bodies involved in the formal rulemaking process); *infra* Part IV.B (describing the advantages of a process that requires approval from multiple bodies). Professor Catherine Struve breaks this list into five important features: (1) the requirement of approval by multiple bodies; (2) the representation—within the decision-making structure—of several different constituencies; (3) the opportunity for public notice and comment; (4) the use of explanatory Notes to inform the consideration of a proposed amendment; and (5) the report-and-wait period for congressional review. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002).

17. See *infra* Part IV.A (explaining Congress's important role in the rulemaking process).

18. See *infra* Part II.A.2 (illustrating the multiple layers of the formal rulemaking process).

19. For clarity, this Note will use the term “formal amendment” to refer to official changes in the language of a Rule or the Rules, made through the formal rulemaking process. “Judicial amendment,” on the other hand, is what occurs when the Court issues an opinion that effectively amends a Rule because it significantly alters the established meaning of the Rule.

20. Generally, the only outside input received by the Supreme Court before rendering its decisions are the briefs of the parties to a dispute, oral arguments, and briefs from other interested parties, known as amici curiae. See BLACK'S LAW, *supra* note 3, at 93 (defining an amicus curiae as a party who is not involved in a lawsuit but submits a brief because it has a strong interest in the subject matter of a case); see also SUP. CT. R. 37 (establishing the rules for filing amicus briefs).

21. Supreme Court deliberations are private, so it is unknown how the Court reaches its conclusions in specific cases. WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 31 (1981). We do know, however, that the Court does not solicit comments from the public, and Court opinions are not subject to congressional review.

22. Congress has provided the Court with the power to promulgate the Rules through the Rules Enabling Act, but this authority is limited by statute, and Rule amendments are subject to final approval by Congress. See *infra* Part II.A.1 (explaining the Rules Enabling Act); *infra* Part IV.A (describing the Court's limited power to promulgate Rules, and explaining why the Court should not amend rules through judicial interpretation).

In two recent decisions, the Court disregarded the formal rulemaking process and amended the Rules from the bench. In *Bell Atlantic v. Twombly*<sup>23</sup> and *Ashcroft v. Iqbal*,<sup>24</sup> the Court ruled that in order to state a claim under Rule 8(a),<sup>25</sup> a plaintiff must plead enough facts to suggest plausible grounds for relief.<sup>26</sup> These decisions ignited a debate over pleading requirements<sup>27</sup> because they signaled a dramatic departure from precedent.<sup>28</sup> The Court did not—in fact, it could not—point to any formal amendment of Rule 8(a).<sup>29</sup> Instead, the Court sua sponte<sup>30</sup>

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23. 550 U.S. 544 (2007).

24. 129 S. Ct. 1937 (2009).

25. Rule 8(a):

Claim for Relief. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

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

26. *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 550 U.S. at 555–56.

27. For an explanation of pleading, see *supra* note 3. “Pleading requirements” refer to the level of pleading specificity required to survive a motion to dismiss. Although Rule 8(a) defines the general rules for pleading, see *supra* note 25, the sufficiency of a complaint is generally tested by a respondent's motion to dismiss the complaint for failure to state a claim under Rule 12(b)(6), see FED. R. CIV. P. 12(b)(6) (“[A] party may assert the following defenses by motion . . . : (6) failure to state a claim upon which relief can be granted . . .”).

28. A precedent is a “decided case that furnishes a basis for determining later cases involving similar facts or issues.” BLACK'S LAW, *supra* note 3, at 1214. The practice of following precedents derives from the Latin maxim *stare decisis et non quieta movera*. *Id.* at 1443. In the American justice system, horizontal stare decisis generally requires a court to follow its own precedents. Russell A. Hilton, Comment, *The Case for the Selective Disincorporation of the Establishment Clause: Is Everson a Super-Precedent?*, 56 EMORY L.J. 1701, 1727 (2007). The prevailing view is that the Court's holdings in *Twombly* and *Iqbal* are antithetical to both horizontal precedent and the language of the Rules. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008) (“In a startling move by the U.S. Supreme Court, the seventy-year-old liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) . . . .”); Neal R. Stoll & Shepard Goldfein, *Minimum Antitrust Pleading Standard Under ‘Twombly,’* N.Y. L.J., June 19, 2007, at 3 (“The Court's decision signifies a substantial change in the law . . . .”); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW (Aug. 13, 2007), <http://writ.news.findlaw.com/dorf/20070813.html> [hereinafter Dorf, *Wreaks Havoc*] (noting that, until *Twombly*, the Court had repeatedly held that it had no power to impose heightened pleading absent a change to the Rules or congressional action).

29. The text of Rule 8 has not been substantially altered since it was promulgated in 1938. See *infra* note 103 for the text of the original Rule 8. Although the language of Rule 8 was amended in 2007, the changes were intended to be stylistic only. FED. R. CIV. P. 8 advisory committee's note. Thus, any new reading that the Court gave to the Rule could not have been based on formal changes to its text.

30. “Sua sponte” is a Latin phrase that means “without prompting or suggestion.” BLACK'S LAW, *supra* note 3, at 1464. Neither the *Twombly* petitioners, nor any of the six amici curiae who filed briefs in support of them, asked the Court to impose a plausibility pleading standard.

gave an entirely new meaning to Rule 8 and declared that the meaning would apply to “all civil actions.”<sup>31</sup>

The Court has no statutory authority to amend the Rules through judicial opinion as it did in *Twombly* and *Iqbal*.<sup>32</sup> Moreover, the Court’s decisions eschewed important aspects of the formal rulemaking process that help to preserve the legitimacy and fairness of the Rules.<sup>33</sup> This Note posits that amendment of the Rules should be left to the formal rulemaking process and that in *Twombly* and *Iqbal* the Court overstepped its interpretive prerogative by amending the Rules through judicial interpretation.<sup>34</sup> If a case calls for it, the Court has the authority to interpret a Rule within the established meaning of the Rule’s language,<sup>35</sup> but the Court has no jurisdiction to effectively *amend* a Rule using this power.<sup>36</sup> The task of the Supreme Court is “to apply the text [of a Rule], not improve upon it.”<sup>37</sup>

The Court’s holdings in *Twombly* and *Iqbal* are especially troublesome because of the importance of pleading requirements within the general framework of civil procedure. Pleading is the first step toward eventual relief for a plaintiff who has allegedly been wronged

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*Twombly*, 550 U.S. at 579 (Stevens, J., dissenting).

31. *Iqbal*, 129 S. Ct. at 1953.

32. See *infra* Part II.A.1 (explaining that Congress has not given the Court jurisdiction to amend Rules without legislative approval).

33. See *infra* notes 85, 321–26, and accompanying text (describing the importance of inclusivity and transparency in the formal rulemaking process).

34. See *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (arguing that Congress established a formal rulemaking process for significant procedural changes and the Court should have respected that process); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal* 39 (Boston Univ. Sch. of Law, Working Paper No. 09-41, 2009) [hereinafter Bone, *Plausibility Pleading Revisited*], available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/BoneR090309ashcroftREV.pdf> (“Perhaps . . . *Iqbal*’s most serious mistake is to take on a task better left to other institutions.”).

35. There will, of course, be instances where the meaning of a Rule is not evident. The Court has the inherent authority to interpret Rules that are challenged in the course of litigation in lower federal courts. See *infra* note 134 and accompanying text (explaining that the Court is the final arbiter in litigation disputes involving the meaning of the Rules). In these instances, the Court should use appropriate interpretive guides to determine the Rule’s meaning. Struve, *supra* note 16, at 1102.

36. See, e.g., *Becker v. Montgomery*, 532 U.S. 757, 764 (2001) (reasoning that the Court has no power to extend the meaning of a Rule without a formal Rule amendment so ordering); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (concluding that changes to the meaning of a Rule should only be made through the formal rulemaking process). Even if the Court believes it could more effectively implement a Rule through broad interpretation, it is not free to pursue that objective through an “unnatural” textual interpretation that would essentially re-write the rule. See *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126 (1989).

37. *Pavelic*, 493 U.S. at 126.

and is a critically important stage in American litigation; if barred at pleading, a plaintiff has no access to the courthouse.<sup>38</sup> Access<sup>39</sup> is a politically and emotionally charged issue, and changes to the Rules that affect access should only be taken with the utmost caution and deliberation.<sup>40</sup> This Note will use the interrelated issues of pleading and court access to show why the Court's disregard of the formal rulemaking process in *Twombly* and *Iqbal* is especially troubling.

Much has already been written on *Twombly* and *Iqbal*. Some commentators have argued that the cases will have a disastrous effect on plaintiffs' ability to gain relief in federal courts.<sup>41</sup> Others have argued that while the Court's decisions bucked precedent, fears of their impact are overblown.<sup>42</sup> This Note does not weigh in on these debates. Instead, this Note contends that, given the importance of procedural rules in our legal framework and the established process for their amendment, the Court should not have amended the Rules through the common law procedure.<sup>43</sup>

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38. "Pleadings are considered the key to the courthouse door." John M. Wunderlich, Note, *Tellabs v. Makor Issues & Rights, Ltd.: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 616 (2008). If a defendant's Rule 12(b)(6) motion to dismiss is granted, *see supra* note 27 (explaining Rule 12(b)(6)), the plaintiff is prevented from proceeding, and is thus prevented from participating in discovery, *see infra* notes 109–17 and accompanying text (discussing pretrial discovery).

39. "Access means the opportunity to reach the merits of a legal claim." Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 264 (2009). Without a resolution on the merits, a plaintiff generally cannot receive the relief she desires.

40. *See infra* Part IV.D (arguing that Rule changes that affect court access should be made through the formal rulemaking process).

41. For a list of jurists and commentators arguing that plausibility pleading will effect a major change in pleading requirements, *see* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875 n.4 (2009) [hereinafter Bone, *Pleading Rules*]. *See also* Muhammad Umair Khan, *Tortured Pleadings: The Historical Development and Recent Fall of the Liberal Pleading Standards*, 3 ALB. GOV'T L. REV. 460, 488–90 (2010) (arguing that heightened pleading sounds a "[d]eath [k]nell to [c]ivil [r]ights [l]itigants").

42. *See generally* Bone, *Pleading Rules*, *supra* note 41 (arguing that *Twombly* represents only a modest departure from notice pleading).

43. In the past, little attention has been paid to the Court's interpretation of rules promulgated by the judicial branch. There has been some scholarly work done on the implications of the Court's interpretation of the Federal Rules of Evidence, but few scholars have addressed the interpretation of other sets of rules, such as the Federal Rules of Civil Procedure. *See, e.g.*, Struve, *supra* note 16, at 1100–01 & n.1–2 (noting the lack of scholarly work on the Federal Rules of Civil Procedure, and arguing that "interpretation of the Rules of Procedure presents issues distinct from those that arise with respect to the [Rules of Evidence]"). Those who have addressed the interpretation of the Rules have done so on a general level. Commentators have argued for both broad and narrow interpretive powers. *Compare id.* (concluding that Congress's delegation of rulemaking authority should constrain the Court's interpretation of the Rules), and Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy*,

In Part II, this Note will examine the background behind *Twombly* and *Iqbal*<sup>44</sup> by examining the Rules Enabling Act,<sup>45</sup> explaining the formal rulemaking process,<sup>46</sup> and providing a history of notice pleading and liberal discovery,<sup>47</sup> including the Court's prior decisions interpreting Rule 8(a).<sup>48</sup> Part III will then discuss the Court's opinions in *Twombly* and *Iqbal*.<sup>49</sup> In Part IV, this Note will provide an analysis of the two cases, focusing on the Court's overbroad 'interpretation' of Rule 8(a) and its refusal to acknowledge established precedent.<sup>50</sup> This Part asserts that the Court should have left major changes to pleading requirements to the formal rulemaking process, analyzes the negative impact of the Court's decisions, and proposes that the Court should not continue to amend the Rules outside of this process.<sup>51</sup> Part V offers a brief conclusion.<sup>52</sup>

## II. BACKGROUND

This Part provides a background of the Rules Enabling Act and the formal rulemaking process,<sup>53</sup> notice pleading,<sup>54</sup> and the Court's past cases dealing with pleading standards.<sup>55</sup>

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*and Procedural Efficacy*, 87 GEO. L.J. 887, 918–54 (1999) [hereinafter Bone, *Process of Making Process*] (proposing a new metric for judging the quality of procedural rules and advocating that formal rulemakers should have broad discretion to weigh competing interests), with Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (urging the Court to take a more activist role in interpretation), and Joseph P. Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720 (1988) ("In construing the Federal Rules, the courts are interpreting standards which the Supreme Court itself has promulgated. . . . As a result, the federal courts are fully justified in taking an expansive view of the Federal Rule under scrutiny."). Since the Court's decisions in *Twombly* and *Iqbal*, a number of commentators have argued, in passing, that the Court may have been better served to defer to the formal rulemaking process. Bone, *Pleading Rules*, *supra* note 41, at 935–36; Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2023 (2007) [hereinafter Bone, *Who Decides?*]; Spencer, *supra* note 28, at 452–54. These articles do not, however, provide an in-depth analysis of *why* this is so.

44. *See infra* Part II.

45. *See infra* Part II.A.1.

46. *See infra* Part II.A.2.

47. *See infra* Part II.B.

48. *See infra* Part II.C (discussing three of the Court's important Rule 8(a) decisions: *Conley*, *Leatherman*, and *Swierkiewicz*).

49. *See infra* Part III.

50. *See infra* Part IV.

51. *See infra* IV.

52. *See infra* Part V.

53. *See infra* Part II.A.

54. *See infra* Part II.B.

55. *See infra* Part II.C.

The Rules Enabling Act gives the Court limited power to disseminate new and amended Rules.<sup>56</sup> Yet, the Act raises separation of powers issues because Congress has not granted the Court authority to amend the Rules without congressional approval.<sup>57</sup> Congress also authorized the creation of bodies of procedural experts to assist the Court in their promulgation of Rules and created a formal rulemaking process that ensures new and amended Rules have been given thoughtful consideration.<sup>58</sup> Rather than giving the Court carte blanche to perform judicial amendment of the Rules, the Rules Enabling Act and the congressionally-established statutory framework signal that Rule amendments should only be made through the formal process.<sup>59</sup>

The formal rulemaking bodies are charged with maintaining the Rules,<sup>60</sup> which, since their inception, have been rooted in the liberal ideals of court access and resolution of cases on the merits.<sup>61</sup> A key element of this “liberal ethos” is notice pleading, which has been safeguarded by rulemakers since the Rules were first introduced in the 1930s.<sup>62</sup> This Part includes an exploration of notice pleading and its importance in the framework of federal court procedure.<sup>63</sup>

This Part concludes by showing that, until *Twombly*, the Court refused to alter notice pleading.<sup>64</sup> The Court repeatedly held that

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56. 28 U.S.C. § 2072(a) (2006) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . .”).

57. See *infra* Part II.A.1 (explaining how Congress retained for itself the final authority on approval of new or amended Rules).

58. See *infra* Part II.A.2 (outlining the formal rulemaking process and describing the subsidiary bodies within the judicial branch that assist the Court in the drafting of new and amended Rules).

59. See generally Struve, *supra* note 16 (arguing that the Rules Enabling Act and the formal rulemaking process counsel restraint in the interpretation of the Rules by the Court).

60. 28 U.S.C. § 2073(b) (charging the rulemaking bodies with responsibility for maintaining the Rules and promoting the interest of justice).

61. Professor Richard L. Marcus coined the term “liberal ethos” to explain the Rules drafters’ preference for disposition of cases based on the merits, by jury trial, after full disclosure through discovery. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986). There existed then—and there still exists, especially in liberal circles—a general sense that it would be immoral to create a court system that allowed “meritorious claims and defenses [to be] lost through technical errors of procedure.” FRIEDENTHAL ET AL., *supra* note 3, § 5.8, at 269–70; see also *infra* Part IV.D (positing that changes to the Rules that affect court access raise moral concerns and should therefore only be amended with the utmost care).

62. See *infra* note 102 (citing the rulemakers’ rejections of calls for heightened pleading).

63. See *infra* Part II.B.

64. See *infra* Part II.C.

changes to pleading requirements should be made, if at all, through the formal rulemaking process and not issued from the bench.<sup>65</sup>

*A. The Rules Enabling Act: A Limited Mandate to the Court*

The Constitution gives Congress the power to create and maintain lower courts in the federal judicial system and the authority to enact laws regulating the conduct of those courts.<sup>66</sup> In 1934, Congress ceded to the Supreme Court the authority to promulgate rules of procedure for the lower federal courts<sup>67</sup> but imposed limits on that power.<sup>68</sup> Congress maintained a legislative role in the process by inserting itself as the final decision maker before the Rules are formally amended.<sup>69</sup> Congress also established subsidiary bodies within the judicial branch to help the Court draft Rules, monitor the Rules' performance, and ensure that a new Rule or amendment does not become law unless it receives the support of several decision-making bodies.<sup>70</sup>

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65. See *infra* notes 151, 156, and accompanying text for a description of the Court's repeated deferrals to the formal rulemaking process.

66. U.S. CONST. art. I, § 8, cl. 9; see also *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (holding that the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, gives Congress the authority to regulate "the conduct of those courts and the means by which their judgments are enforced"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts . . .").

67. Rules Enabling Act, 28 U.S.C. § 2072(a) (2006). The Rules Enabling Act of June 19, 1934, Pub. L. No. 73-425, 48 Stat. 1064, was the result of over one century of attempts to reform federal civil procedure. Paul D. Carrington, "*Substance*" and "*Procedure*" in the Rules Enabling Act, 1989 DUKE L.J. 281, 299; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045-98 (1982) (recounting the push for the Rules Enabling Act between 1906 and 1934). The Act was a necessary step in the campaign for a uniform set of procedural rules for the district courts in the federal judicial system. Burbank, *supra*, at 1023-24.

68. See *infra* Parts II.A.1-2 (describing institutional limits created by Congress that collar the Court's ability to promulgate rules without input from subsidiary bodies and approval from Congress).

69. The Supreme Court must transmit any proposed Rules or amendments to Congress by May 1 of the year in which they are to go into effect, and Congress has five months to accept, amend, or veto any proposals. 28 U.S.C. § 2074.

70. See generally *id.* § 2073 (describing the role of the Judicial Conference and Standing Committee). The Judicial Conference was created by Congress in 1958 to provide the Court with professional advice and a variety of viewpoints. BROWN, *supra* note 21, at 71. The Judicial Conference is charged with the duty to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" in the lower courts and to recommend proposed Rules or amendments to the Supreme Court for promulgation. 28 U.S.C. § 331. Congress also allowed for the creation of subsidiary bodies, including the Standing and Advisory Committees, to assist the Judicial Conference in maintaining rules necessary to "promote the interest of justice." *Id.* § 2073(b).

### 1. Separation of Powers: Congress's Retention of Final Authorization of Rules Amendments

The Rules Enabling Act authorizes the Court to promulgate the Federal Rules of Civil Procedure: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . ." <sup>71</sup> This apparently broad grant of power to the Court is much more restricted <sup>72</sup> and takes a subservient role to

an express right of Congress to [delay, modify, or] veto proposed Rules, a concurrent right of Congress to enact its own procedural rules, a subsequent right of Congress to repeal Court Rules, and an ultimate right of Congress to rescind the Court's delegated procedural rulemaking authority. <sup>73</sup>

By establishing itself as the ultimate decision maker on Rule amendments, Congress sought to prevent the Court from promulgating rules of procedure that overrode the political will of the people. <sup>74</sup> Under separation of powers principles, the ultimate authority to establish procedural rules belongs to Congress, and the Court has no power to amend the Rules absent subsequent approval from Congress. <sup>75</sup>

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71. 28 U.S.C. § 2072(a).

72. It is significant that Congress must *give* the Court the authority to promulgate the Rules. While Congress undoubtedly has the power to establish uniform rules for the lower federal courts, *see supra* note 66, it appears that the Court does not have the inherent constitutional authority to do the same, *see* Shilpa Shah, Note, *An Application of Federal Rule of Civil Procedure 26(A)(1) to Section 1983 Actions: Does Rule 26(A)(1) Violate the Rules Enabling Act?*, 43 CLEV. ST. L. REV. 115, 129 (1995) ("Although the first sentence of the Rules Enabling Act seems to grant the Supreme Court unlimited discretion in promulgating rules which regulate practice in the federal courts, the Court's power is limited by congressional retention of the ability to reject rules which it does not favor.").

73. Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 689 (2002); *accord* Burbank, *supra* note 67, at 1117 n.463 (concluding that the Rules Enabling Act, in its earliest form, was not intended to deprive Congress of the power to regulate court procedure); *see also* 28 U.S.C. § 2074 (declaring that proposed Rules or amendments are enacted only with approval from Congress).

74. "Congress reserved to itself the policy decisions properly committed to the branch of the government that is responsive to the people . . ." Genetin, *supra* note 73, at 688.

75. For many years, Congress served as a rubber stamp for amendments to the Rules transmitted to it by the Court and refused to exercise its veto powers. *Id.* at 677. Since 1973, however, Congress has taken a more active role in rulemaking and has occasionally acted "to delay the implementation of proposed Rules, to disapprove certain proposed Rules, or to enact its own variations of Rules." Moore, *supra* note 43, at 1053. For example, the Private Securities Litigation Reform Act (PSLRA), enacted in 1995, contains a heightened pleading standard for securities fraud cases: "First, any plaintiff is required to state 'with particularity all facts on which [the belief that the defendant engaged in deceptive conduct] is formed'[]; and] [s]econd, the plaintiff must also 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" Kendall W. Hannon, Note, *Much Ado About*

Accordingly, the Court should also refrain from amending the Rules through judicial interpretation, a process that is decidedly devoid of legislative authorization.<sup>76</sup>

## 2. Emphasis on Transparency and Inclusivity in the Modern Rulemaking Process

Although the Rules Enabling Act empowers the Court to promulgate new Rules, in practice the Court only rarely participates in the formulation of new Rules or formal amendments.<sup>77</sup> Instead, the Court relies on the Judicial Conference<sup>78</sup> and the Standing and Advisory Committees to draft and review proposed Rules or amendments.<sup>79</sup> The

Twombly? *A Study on the Impact of Bell Atlantic v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1832 (2008) (citing 15 U.S.C. § 78u-4(b)(1-2) (2000)).

76. In 1988, Congress amended and modernized the Rules Enabling Act to clarify limitations on the Court's rulemaking power. Moore, *supra* note 43, at 1043–44 (citing H.R. REP. NO. 422, 99th Cong. 1st. Sess. 12 (1985)); *see also* Carrington, *supra* note 67, at 283 (noting that part of the impetus behind recent amendments to the Rules Enabling Act was the fear that an “expansive reading” of the original Act might allow Court rulings to override political decisions made by Congress relating to procedure). *But see infra* note 227 and accompanying text (outlining the argument that supports expansive judicial powers to interpret the Rules).

77. *See* Moore, *supra* note 43, at 1061 (explaining that while the Rules Enabling Act authorizes the Court to prescribe the Rules, subject to the acquiescence of Congress and other constraints, the Court has always relied upon a series of advisory committees to draft proposed rules for procedure and evidence).

78. “The Judicial Conference is the policy-making arm of the federal judiciary. It is composed of the chief judges of each court of appeals and one district judge designated from each circuit. The Chief Justice presides over the Conference.” John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 323 n.3 (2005) (citing 28 U.S.C. § 331 (2004)).

79. The Advisory and Standing Committees of the Judicial Conference were established in the late 1950s to decrease burdens on the Supreme Court in the rulemaking process and to ensure broader public participation. BROWN, *supra* note 21, at v–vi; *see also supra* note 70 (providing additional background on the Judicial Conference and the Standing and Advisory Committees). The following is a brief history of the Advisory Committee. The original Advisory Committee was appointed by the Court to prepare and submit to the Court a draft of a unified system of rules of civil procedure—what eventually became the Federal Rules of Civil Procedure. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE v (Nov. 1937), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV11-1937.pdf>. Before 1956, the Court directly supervised rulemaking by the Advisory Committee. BROWN, *supra* note 21, at 31. For unknown reasons, in 1956 Chief Justice Earl Warren discharged the Civil Rules Committee. Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 304 (2008). However, after Congress established the Judicial Conference in 1958, the Advisory Committee was shortly thereafter re-established as its subsidiary. Press Release, Supreme Court of the United States (Apr. 4, 1960), *available at* [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC\\_Press\\_Release.1960.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC_Press_Release.1960.pdf).

Currently, the Advisory Committee is made up of twelve members of the legal community, representing the federal judiciary, trial attorneys, law professors, state Chief Justices, and representatives from the Department of Justice. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 159–60

Court's reliance on subsidiary bodies is statutorily authorized, and it is generally thought that the Court depends on procedural experts in the rulemaking process<sup>80</sup> because of the need for constant evaluation of the Rules and the practical inability of the Court to engage in such review.<sup>81</sup>

Within the formal rulemaking process, the Advisory Committee on Federal Rules of Civil Procedure ("Advisory Committee" or "Committee") is the first step in the process toward an addition to, or formal amendment of, the Rules.<sup>82</sup> After the Advisory Committee considers a proposed Rule or amendment, the Committee publishes it for public comment.<sup>83</sup> More than 10,000 persons and organizations receive the published proposal, including judges, attorneys, legal publications, law schools, professors, and bar associations.<sup>84</sup> Congress requires this public participation in order to promote broad transparency and to increase the quality of the Rules.<sup>85</sup> After the public comment

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(2008).

80. See generally BROWN, *supra* note 21 (discussing the expert technical advice provided by the Judicial Conference and the Standing and Advisory Committees).

81. Moore, *supra* note 43, at 1061–62.

82. While the Advisory Committee often drafts new Rules or amendments, anyone can suggest a new rule and submit it for consideration to the Advisory Committee. Proposed changes to the Rules may be suggested, for example, by judges, clerks of court, lawyers, professors, government agencies, and other organizations. Duff, *Summary*, *supra* note 9. See generally *id.* for a comprehensive explanation of the federal rulemaking process.

83. The proposal must be approved by the Standing Committee before publication for public comment. *Id.*

Once an advisory committee votes initially to recommend an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposed amendment for public comment. In seeking publication the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

*Id.*; see also 28 U.S.C. § 2073(d) (2006) ("In making recommendations . . . the body making the recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.").

84. Duff, *Summary*, *supra* note 9.

85. In 1988, Congress passed legislation requiring that Advisory Committee meetings be open and that there be advance notice of what would be discussed. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. § 2073 (2006)). In the 1980s, the rulemaking process had come under fire for its lack of public input. See Struve, *supra* note 16, at 1108 (noting how critics focused on a number of perceived problems, including the absence of sufficient public input). Early versions of the Advisory Committee operated somewhat secretly and garnered little public attention; in the 1960s, the Advisory Committee was told to keep proposals secret until the Committee was ready to announce them. Marcus, *supra* note 79, at 305. By the 1970s, the era of secrecy was passing, and the 1988 legislation "buried it entirely." *Id.* at 306; see also Bone, *Process of Making Process*, *supra* note 43, at 903 (1999) (noting that congressional changes "opened the rulemaking process to broad public participation by requiring public hearings, open meetings, publicly available minutes, and longer periods for public commentary"); Moore, *supra* note 43, at 1039 (outlining changes to the rulemaking process, including Congress's "sunshine law" opening the

period, the Advisory Committee re-analyzes the proposed changes in light of any testimony or written comments that have been received.<sup>86</sup>

The Advisory Committee then transmits the proposed new or amended Rule to the Judicial Conference's Standing Committee.<sup>87</sup> The Standing Committee may then accept, reject, or modify the proposal.<sup>88</sup> Following approval by the Standing Committee, the proposed new or amended Rule is sent to the entire Judicial Conference for consideration and approval.<sup>89</sup> Finally, the Judicial Conference transmits the proposed Rule or amendment to the Court, which has seven months to review and either reject the proposal or transmit it to Congress for final approval or rejection.<sup>90</sup> In all, there are at least seven steps involved in the promulgation of any new Rule or amendment.<sup>91</sup>

The formal rulemaking process has not always been so complex,<sup>92</sup> but the recent trend has been to add additional gatekeepers<sup>93</sup> and make rulemaking more inclusive and transparent.<sup>94</sup> Congress opened up the rulemaking procedure to assure appreciation of minority views and full discussion and development of proposed changes to the Rules.<sup>95</sup>

rulemaking process to the general public). Before the new legislation was passed, some believed that the lack of broad public participation in the formal rulemaking process was adversely affecting the quality of the rules. BROWN, *supra* note 21, at 41 (citing *Hearing on H.R. 480 and H.R. 481 Before the H. Comm. on the Judiciary*, 86th Cong. 62, 71 (daily ed. Jan. 15, 1979) (remarks of Rep. Holtzman)).

86. "If revisions [after the initial public comment period] are sufficiently important, the [A]dvisory [C]ommittee will circulate a new draft and may make still further revisions based on new comments. It may also, if appropriate, schedule public hearings." BROWN, *supra* note 21, at 6.

87. Duff, *Summary*, *supra* note 9. The Judicial Conference's responsibilities as to Rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee." 28 U.S.C. § 2073(b).

88. Duff, *Summary*, *supra* note 9. "If the Standing Committee makes a modification that constitutes a substantial change from the recommendation of the advisory committee, the proposal will normally be returned to the [A]dvisory [C]ommittee with appropriate instructions." *Id.* In this case, another round of public comments may be appropriate. BROWN, *supra* note 21, at 6.

89. Duff, *Summary*, *supra* note 9.

90. *Id.* The Court must transmit proposed amendments to Congress by May 1 of the year in which the amendment is to take effect. *Id.* (citing 28 U.S.C. §§ 2074–2075 (2006)).

91. The seven steps are: (1) initial consideration by the Advisory Committee; (2) publication and public comment; (3) consideration of the public comments and final approval by the Advisory Committee; (4) approval by the Standing Committee; (5) Judicial Conference approval; (6) Supreme Court approval; and (7) congressional review. *Id.*

92. Under the original Rules Enabling Act of 1934 there were only two statutorily-prescribed rulemakers: the Court and Congress. Struve, *supra* note 16, at 1105.

93. See *supra* note 79 (explaining the history of the Standing and Advisory Committees).

94. See Marcus, *supra* note 79, at 305–06 (noting the Committee's transition from secrecy to transparency).

95. See 28 U.S.C. § 2073(d) (mandating that each meeting of the Judicial Conference,

Proposed legislation must “run the gauntlet” of the seven-step process, face criticism, and receive approval from numerous bodies before being transmitted to the Court and to Congress for final approval.<sup>96</sup>

*B. Notice Pleading, Liberal Discovery, and Calls for Reform*

The Rules Enabling Act authorized the establishment of a uniform set of procedural rules in all federal courts, and after its passage, the drafters of the Federal Rules of Civil Procedure embarked to establish those rules with one key goal in mind: resolution of cases on their merits.<sup>97</sup> The drafters hoped to avoid many of the problems experienced under both the English common law and the early American Field Code;<sup>98</sup> under those systems, many meritorious claims were denied due to technical pleading requirements.<sup>99</sup> The drafters’ objective was to ensure that plaintiffs with meritorious claims would not be barred from recovery because of procedural technicalities or the shortcomings of their attorneys.<sup>100</sup>

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Standing Committee, or Advisory Committee must be open to the public; minutes of every meeting must be maintained and made available to the public; and every meeting must be “preceded by sufficient notice to enable all interested persons to attend”).

96. See *supra* notes 82–91 and accompanying text (outlining the seven-step process); see also Rabiej, *supra* note 78, at 325 (explaining the thorough process involved in amending the class action provisions of Rule 23).

97. See *supra* note 61.

98. *The Supreme Court, 2006 Term: Leading Case: Federal Jurisdiction and Procedure—Civil Procedure—Pleading Standards*, 121 HARV. L. REV. 305, 311–12 (2007) [hereinafter *Leading Case*]; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573–74 (2007) (Stevens, J., dissenting) (recalling that the struggles with special pleading under English common law “made obvious” the appeal of a relaxed pleading standard). The Field Code had begun to replace common law procedure in America by the late 1800s. Emily Sherwin, *The Story of Conley: Precedent by Accident*, in *CIVIL PROCEDURE STORIES* 295, 297–98 (Kevin M. Clermont ed., 2d ed. 2008) (2004).

99. Many claims were dismissed at the pleading stage because they were inartfully drafted or because a lawyer made a technical mistake. See, e.g., DAVID MCCULLOUGH, *JOHN ADAMS* 45 (2001) (recounting the story of John Adams’s first case as a young attorney, which he lost because he failed to include a technical phrase required by law); see also Edward D. Cavanagh, Twombly, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 877–78 (2008) (contrasting notice pleading with the common law model and early state procedural codes). Much has been written about the history of American pleading. See, e.g., *Twombly*, 550 U.S. at 573–79 (Stevens, J., dissenting); Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 872–81 (2008); Sherwin, *supra* note 98, at 297.

100. “The requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer.” Charles E. Clark, *The Proposed Rules of Federal Procedure*, 22 A.B.A. J. 447, 450 (1936). Clark, who was a leading authority on pleading, Bone, *Pleading Rules*, *supra* note 41, at 891, served as Reporter of the Supreme Court’s Committee on the Rules of Civil Procedure from 1935 to 1956, Marcus, *supra* note 61, at 433 n.2. Clark was instrumental in drafting the Rules. Marcus, *supra* note 61, at 433

“Notice pleading” was a key component of the liberal paradigm envisioned by the Rules’ original drafters,<sup>101</sup> and for almost seventy years after the Rules were enacted, notice pleading was protected as the standard in federal courts.<sup>102</sup> Under notice pleading, all that is required of the plaintiff in a civil action is a “short and plain statement of the claim” showing that she is entitled to relief.<sup>103</sup> Importantly, a complaint need only put a defendant “on notice” of the claims or damages at issue,<sup>104</sup> and a plaintiff is not required to plead either facts or legal theories.<sup>105</sup> Thus, the drafters rejected the common law pleading

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101. The core tenets of the Federal Rules of Civil Procedure were notice pleading, liberal amendments, and liberal discovery. Steven S. Gensler, *An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 257 (2008). The goal of notice pleading and liberal discovery was to ensure that plaintiffs with potentially meritorious claims got their day in court. Cavanagh, *supra* note 99, at 877. *But see* Bone, *Pleading Rules*, *supra* note 41, at 895–96 (arguing that the drafters were pragmatists more than they were idealists, and that their pragmatic vision operated at a “deeper level than preferences for discovery and trial”).

102. The Advisory Committee has continuously rebuffed those who have criticized the liberal standards of the Rules and sought stricter pleading requirements. *See, e.g.*, Minutes of the Advisory Committee on Civil Rules 6–7 (Oct. 21–23, 1993), available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Minutes/CV10-1993-min.pdf> (rejecting calls for a heightened pleading standard); Report of the Civil Rules Advisory Comm. from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 606 (June 2, 2006), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-2006.pdf> (noting it would be possible, but highly controversial, to replace notice pleading with some form of fact pleading). The lone exception to notice pleading—as far as the Rules are concerned—is found in Rule 9(b), which imposes a higher level of pleading requirement than Rule 8(a): “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b). (Note that this standard only applies to two types of claims: fraud and mistake.)

103. FED. R. CIV. P. 8(a). The original Rule 8 also had minimal requirements:

A pleading which sets forth a claim for relief . . . shall contain: (1) a short and plain statement of the grounds upon which the court’s jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

FED. R. CIV. P. 8 (1938) (amended 1966, 1987, 2007). The drafters intentionally avoided any mention of the word “fact” in the text of their new pleading rule. Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 18 (citing CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 242–43 (2d ed. 1947)).

104. FRIEDENTHAL ET AL., *supra* note 3, § 5.7, at 268. “As long as the opposing party and the court can obtain a basic understanding of the claim being made, the requirements are satisfied.” *Id.*

105. *See, e.g.*, *Hefferman v. Bass*, 467 F.3d 596, 599 (7th Cir. 2006) (“The point of a notice pleading standard is that the plaintiff is not required to plead either facts or legal theories.”).

model, “which required that pleadings sound . . . a cognizable legal *theory* of recovery,”<sup>106</sup> and code pleading, which typically “required a plaintiff to allege *facts* sufficient to establish a cause of action.”<sup>107</sup>

Despite facing some criticism,<sup>108</sup> pleading requirements were not substantially altered during the seventy years between their promulgation in 1938 and the decisions in *Twombly* and *Iqbal*.<sup>109</sup> In the years after the Rules were enacted, detractors argued that more should be required to make out a sufficient claim.<sup>110</sup> Many of those arguing for a more stringent pleading standard were worried that as litigation became more complex, liberal pleading provisions would lead to unnecessary delay, expense, and abuse.<sup>111</sup> Moreover, some argued that notice pleading did not sufficiently screen meritless claims, forcing some defendants to either pay exorbitant legal fees or to settle claims even where they did nothing wrong.<sup>112</sup> Nevertheless, plaintiffs with

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106. Cavanagh, *supra* note 99, at 877–78 (emphasis added).

107. *Id.* (emphasis added).

108. See Sherwin, *supra* note 98, at 300 (“Adoption of Rule 8 did not end the debate over pleading.”). Sherwin recounts Charles Clark’s continued efforts, even after the promulgation of the Rules, to ensure that notice pleading would be protected. *Id.* at 300–02. By 1944, Clark had become a Judge on the Court of Appeals for the Second Circuit, and his opinion in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), was often quoted by lower courts before the Supreme Court’s decision in *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007). See, e.g., *Nakasheff v. Cont’l Ins.*, 89 F. Supp. 87, 91 (D.C.N.Y. 1950) (denying motion to dismiss and citing *Dioguardi*, 139 F.2d at 775).

109. See Dorf, *Wreaks Havoc*, *supra* note 28 (noting that notice pleading was retained between the time the Rules were first drafted and *Twombly*).

110. Critics of Rule 8(a)(2) wanted to add a requirement that the “short and plain statement” should contain “the facts constituting a cause of action.” Sherwin, *supra* note 98, at 302 (citing *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1953)). Although the Advisory Committee took stock of the criticism of Rule 8, it ultimately decided to make no change. The Committee concluded that critics constituted a “minority” of practitioners and that notice pleading had worked “satisfactorily” during its first seventeen years. See Report of the Proposed Amendments to the Rules of Civil Procedure for the United States District Courts 19 (Oct. 1955), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf>; see also *Twombly*, 550 U.S. at 582 (Stevens, J., dissenting) (recalling that the movement to revise Rule 8 to require a plaintiff to plead a “cause of action” “failed”).

111. Sherwin, *supra* note 98, at 302. Some of these fears have been realized. See *infra* notes 120–30, 141–42, and accompanying text for an explanation of some of the problems created by liberal discovery. See also Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 65 (2007) (“[N]otice pleading . . . performs erratically in the context of modern complex litigation.”). But cf. Hannon, *supra* note 75, at 1818 (arguing that the *Conley* Court understood the risks posed by liberal pleading but ultimately concluded that these risks could be addressed by other pretrial procedures such as summary judgment).

112. If a court fails to grant a defendant’s motion to dismiss, a defendant may be compelled to settle the claim rather than go through the discovery process. See *Twombly*, 550 U.S. at 559 (arguing that “the threat of discovery expense will push cost-conscious defendants to settle even

meritorious, but difficult to prove, cases benefit from notice pleading because it allows increased access to the court system.<sup>113</sup>

In order to truly appreciate how notice pleading works, one must also understand the related principle of liberal discovery.<sup>114</sup> Pretrial discovery, which was another principal goal of the Rules' drafters,<sup>115</sup> occurs after the pleadings stage of litigation and is the process through which parties exchange evidence with each other, in an effort to reveal facts and prevent one party from surprising the other with evidence at trial.<sup>116</sup> By creating discovery rules that required parties to exchange certain documents, rulemakers sought to establish a procedural system that allowed plaintiffs to discover facts essential to making their case, if those facts existed.<sup>117</sup>

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anemic cases" before reaching the pretrial stages of discovery and summary judgment). The litigation costs for discovery alone can be in the millions of dollars; thus, in some cases, concerns about the costs of discovery "can overwhelm concerns about the merits of the [plaintiff's] underlying claim." Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 101–02 (2009).

113. Notice pleading allows plaintiffs who are presently unable to discover the facts necessary to prove their case to proceed to discovery where they are more likely to uncover those facts. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) ("[N]otice pleading . . . relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."). This is especially true in certain types of cases, such as antitrust and civil rights cases, where the plaintiff must prove intent or state of mind. See *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (reasoning that courts should generally not foreclose cases before discovery is completed where motive and intent play leading roles because the necessary proof is largely in the hands of the alleged wrongdoers); Spencer, *supra* note 28, at 482 (noting that in many antitrust cases, the facts that a plaintiff needs to support her claims lie within the exclusive possession of the defendant).

114. Under the common law and the Field Code, it had been very difficult for plaintiffs to obtain discovery from defendants. Georgene Vairo, *Who Makes the Rules?*, LOY. L. SCH. L.A. (Aug. 26, 2009), <http://media.lls.edu/DJvairo082609.html>. There are many advantages to the liberal pleading and discovery system created by the drafters of the Rules: plaintiffs have easy access to courts; parties are unable to hide evidence from each other; and settlements are encouraged because both parties know before trial whether the plaintiffs have sufficient evidence to prove their claims. *Id.*

115. The drafters intended for notice pleading and discovery to work in tandem to achieve the goal of resolution of cases on the merits. Thomas P. Gressette, Jr., *The Heightened Pleading Standard of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 408–09 (2010).

116. Many of the most important discovery procedures are governed by Rule 26:

*Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

FED. R. CIV. P. 26(b)(1).

117. For example, Rule 11(b)(3) allows an attorney to file a complaint with the Court so long as the factual contentions it contains "have evidentiary support or . . . will likely have evidentiary

Liberal discovery rules worked well for a while,<sup>118</sup> and the Rules were even celebrated as an “ideal” system for some time after their passage.<sup>119</sup> Yet, as litigation began to grow more complex in the 1970s, the nature of discovery began to change, and defendants began to complain about the growing cost and nuisance of discovery.<sup>120</sup> Discovery can now include hundreds of thousands or even millions of documents.<sup>121</sup> The drafters of the Rules, who worked in an era of

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support after a reasonable opportunity for further investigation or discovery.” FED. R. CIV. P. 11(b)(3). See also *supra* note 113 and accompanying text, which explains why discovery is especially important in some types of cases.

118. See Shah, *supra* note 72, at 117 (noting that in their first thirty years, the Rules’ discovery provisions “seemed to have worked”). It should be noted that *Twombly* and *Iqbal* did not affect discovery rules; liberal discovery is still the norm. These cases merely made it harder for plaintiffs to get to the discovery stage of the pre-trial process.

119. Bone, *Who Decides?*, *supra* note 43, at 1972; see also Carrington, *supra* note 67, at 300 (explaining that early advocates of the Rules envisioned procedural reform as a way to affect substantive law and to make civil courts “an effective tool for social, economic, and political change”).

120. See Vairo, *supra* note 114 (explaining that abusive filing practices and plaintiff-friendly laws led to complaints by corporate defendants). The growth of complex statutory schemes that grant rights to individuals took litigation far beyond the era of simple tort claims or patent infringement suits. Epstein, *supra* note 111, at 65. For example, private rights of action for employment discrimination or for antitrust violations led to a dramatic increase in the number of lawsuits filed, Vairo, *supra* note 114, and increased pre-litigation battles between adversarial parties, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386–91 (1982) (using hypothetical cases to describe the growing number of pre-litigation court contests). Justice Warren E. Burger, speaking at the famous 1976 Pound Conference, which addressed, among other things, the problems associated with exploding discovery costs, said:

There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers’ trial strategy.

William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978). Erickson’s article summarizes the main recommendations emanating from the Pound Conference with respect to procedure in the federal courts. *Id.* at 280–94.

121. See, e.g., *FDIC v. Ernst & Whinney*, 137 F.R.D. 14, 17 (E.D. Tenn. 1991) (noting the approximately 2.3 million pages of discovery turned over by one party); Vairo, *supra* note 114 (recounting the story of an antitrust case involving so much discovery that some estimated the pages would “stack up to the moon and back”). When the Rules were promulgated, the modern photocopy machine had not even been invented; in October 1938, just months after the Rules took effect, American physicist Chester Floyd Carlson successfully made the first Xerox copy. Still, it was not until the 1960s that Xerox machines were mass produced and almost a decade longer before they were commonplace. Paul Katzeff, *Chester Carlson Proved That a Copycat Could Win Run Off Something New: He Strove Past Financial Hardship and Commercial Doubters to Invent the Historically Crucial Xerox*, INVESTOR’S BUS. DAILY, at A9 (Nov. 16, 2007); see also Richard M. Steuer, *Plausible Pleading: Bell Atlantic Corp. v. Twombly*, 82 ST. JOHN’S L. REV. 861, 862 (2008) (recalling same history).

relatively simple and straightforward litigation, likely did not envision discovery as it exists in modern litigation.<sup>122</sup>

Under notice pleading, judges often felt bound to allow a plaintiff to develop her case in discovery, even if it appeared that the case had a relatively small chance of success.<sup>123</sup> For many types of claims, the motion to dismiss had become nearly impotent because every plaintiff's attorney knew how to draft a complaint that satisfied the low threshold established in *Conley v. Gibson*.<sup>124</sup> Moreover, defendants were occasionally forced to bear the costs of discovery—or choose to settle in order to avoid legal fees associated with discovery<sup>125</sup>—even where they had not engaged in wrongdoing.<sup>126</sup>

The Advisory Committee worked to make discovery less costly and less intrusive by passing minor amendments to the Rules in 1980 and

122. The Rules that were drafted in 1938 “were drafted with reference to the litigation most common at the time, such as actions on promissory notes, negligence suits for traffic-intersection collisions, actions for money had and received and patent infringement cases” and often turned on one or two key facts. Epstein, *supra* note 111, at 62; *see also* Oct. 2005 Minutes of the Civil Rules Advisory Comm. 30 (Oct. 27–28, 2005) [hereinafter Oct. 2005 Minutes], available at <http://www.uscourts.gov/rules/Minutes/CV11-2005-min.pdf> (acknowledging that the drafters of the Rules were focused on a very different mix of cases than are most common today). Discovery in the early years of the Rules typically involved on-premises review of a limited amount of original documents. Scott A. Moss, *Litigation Discovery Cannot be Optimal but Could be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 899 (2009).

123. *See* Richard E. Donovan, *Supreme Court's Twombly Decision Should Benefit Defendants in Many Commercial Cases*, METROPOLITAN CORP. COUNS., July 2007, at 21, available at <http://www.metrocorpcounsel.com/pdf/2007/July/21.pdf> (stating that the decision in *Bell Atlantic Corp. v. Twombly* made it much less likely that a defendant would have to spend the time and money in discovery on a meritless case because the judge felt bound to allow the plaintiff to develop her case in discovery).

124. 355 U.S. 41 (1957); *see* Epstein, *supra* note 111, at 66 (explaining that all that is required to satisfy Rule 8(a)(2) when filing a private antitrust claim is “to draft a complaint that says that the named defendants agreed to collude with each other in setting prices or dividing markets within specified geographical and temporal limits”).

125. Professor Paul Stancil explains the problem using a common metaphor: “[Plaintiff’s] fishing expeditions are sometimes so expensive that the defendant will pay the plaintiff to leave even a lake the defendant knows to be empty.” Stancil, *supra* note 112, at 116.

126. *See* Dorf, *Wreaks Havoc*, *supra* note 28 (noting that while notice pleading does a great job of keeping potentially meritorious claims in court, it can also subject some defendants who have done nothing wrong to costly discovery). In 1999, the Advisory Committee finished compiling empirical data on the costs associated with modern discovery. The Committee determined that discovery costs represent approximately 50% of all federal litigation expenditures and can account for “as much as 90% of the litigation costs in cases where discovery is actively employed.” Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure (May 11, 1999), 192 F.R.D. 340, 357 [hereinafter Niemeyer, May 1999 Memorandum] (noting that more than 80% of litigators responding to a Federal Judicial Center Survey indicated that they wanted changes to be made to the discovery rules).

1983; these changes, however, did little to silence critics.<sup>127</sup> In 1989, the Brookings Institution think tank<sup>128</sup> issued an expansive report that was critical of the manner in which federal litigation was being conducted.<sup>129</sup> In response, Congress passed the Civil Justice Reform Act of 1990 to reduce the expenses and delays associated with civil litigation.<sup>130</sup> Galvanized by these developments, the Advisory Committee decided to take a more direct approach to changing the procedural rules of discovery and immediately took up an ambitious attempt to reform the discovery process.<sup>131</sup> In 1993, just four years after the Brookings report,<sup>132</sup> the Rules were comprehensively changed for the first time with respect to the timing, amount, and process of discovery.<sup>133</sup>

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127. Cavanagh, *supra* note 99, at 884. Members of the Supreme Court called the 1983 Amendments mere “tinkering.” See Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting). Justice Powell argued that the proposed changes were inadequate, and he urged the rulemakers to take up a formal re-examination of the discovery Rules. *Id.* at 997–1001. For a closer analysis of the frustration with discovery and the Advisory Committee’s attempts at reforms in 1980 and 1983, see Shah, *supra* note 72, at 116–18. Among the 1983 reforms was a revision to Rule 16 that was intended to encourage judges to take a more “hands-on” role in managing their dockets and included a specific amendment encouraging settlement as a topic of pretrial conference discussions. Cavanagh, *supra* note 99, at 884; see also Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 325–26 (2008) [hereinafter Bone, *Making Effective Rules*] (detailing that some critics pushed for more alternative dispute resolution while others pushed for stricter pleading, more limited discovery, harsher sanctions for frivolous filings, and more active trial judge involvement in settlement promotions). Changes to Rules 11 and 26 were intended to discourage baseless claims and prevent discovery abuse. Cavanagh, *supra* note 99, at 884.

128. The Brookings Institution is a non-profit public policy think tank based in Washington, D.C. *About Brookings*, <http://www.brookings.edu/about.aspx> (last visited Oct. 19, 2010).

129. BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989).

130. 28 U.S.C. §§ 471–482 (2006). The Act implicitly directed district courts to experiment with differing procedures to reduce the time and expense of civil litigation. Each district court was to appoint an advisory group which in turn would submit a report to the Judicial Center with recommendations on how best to reduce expense and delay. *Id.* § 472.

131. See generally ADVISORY COMM. ON CIVIL RULES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE RULES OF EVIDENCE 51–77 (May 1, 1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1992.pdf> (explaining the proposed changes to discovery procedures).

132. The proposed amendments were passed on December 1, 1993, less than four years after the Brookings Institution report. FED. R. CIV. P. 26 (amended 1993).

133. Cavanagh, *supra* note 99, at 884. The 1993 Amendments imposed prescriptive limits on the number of depositions and interrogatories in a given case, required that parties meet and confer prior to the pretrial conference to formulate a joint discovery plan, barred any discovery until after the discovery plan had been approved by a judge, and introduced the concept of mandatory automatic disclosure. *Id.* at 884–86.

*C. Court Precedent: Affirm Notice Pleading and Defer to the Formal Rulemaking Process*

Although Congress did not provide the Court with the specific authority to interpret the Rules, that power has long been assumed to exist because disputes over the meaning and effect of the Rules often arise in litigation, and the Court is the final arbiter of those disputes.<sup>134</sup> These interpretations have great consequences because they set precedent for how the lower courts are to determine similar procedural questions.<sup>135</sup> In the 1957 case *Conley v. Gibson*, the Supreme Court forcefully affirmed notice pleading and declared that the Rules “do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>136</sup> *Conley* was a monumental decision, cited thousands of times by lower courts,<sup>137</sup> and, over the next thirty-five years, the Court repeatedly and unanimously upheld its pleading standard.<sup>138</sup> For a time, the Court’s decisions effectively ended the discussion over pleading requirements as scholars and practitioners lost interest in the debate and accepted notice as the primary purpose of federal pleading.<sup>139</sup>

Litigation became more complex, however, in the 1970s and 1980s,<sup>140</sup> and by the 1990s, there was a growing chorus of opponents to notice pleading and liberal discovery.<sup>141</sup> While many agreed that the

134. The Rules apply to cases in the federal courts, and the Supreme Court is the final arbiter in those cases. See 28 U.S.C. § 1254 (laying out the methods by which the Court may review cases from the courts of appeals). The Rules abound with technical requirements, and their terms often create dispute. *Carter v. Beverly Hills Sav. & Loan Ass’n*, 884 F.2d 1186, 1194 (9th Cir. 1989) (Kozinski, J., dissenting). For example, in *Carter*, the majority and the dissent disagreed over the meaning of Rule 58’s requirements that the clerk sign the judgment and that the judgment be entered into the docket. *Id.* at 1189–90; *id.* at 1193–94 (Kozinski, J., dissenting).

135. In general, any decision issued by the Court establishes a precedent, and stare decisis requires lower courts to adhere to precedent set by higher courts. Hilton, *supra* note 28, at 1727. Just days after the Court decided *Iqbal*, lawyers were citing the case in their briefs and lower courts were relying on it when examining defendants’ motions to dismiss. Kristina Peterson, *Business Capitalizes on Ruling in Political Case*, WALL ST. J., June 27, 2009, at A2.

136. 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). The Court held: “[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.” *Id.* at 45–46 (emphasis added).

137. A September 26, 2010 Westlaw search reveals over 36,000 federal court citations to *Conley*, 355 U.S. 41, between November 18, 1957 and May 21, 2007. <http://www.westlaw.com> (follow “Citing References” hyperlink; then follow “Limit KeyCite Display” hyperlink; limit search by jurisdiction and date).

138. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (9–0 decision); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (8–0 decision) (Douglas, J., took no part in the decision).

139. Sherwin, *supra* note 98, at 317.

140. See *supra* note 120 for an explanation of why and how litigation was becoming more complex during this time.

141. See Report of the Advisory Comm. on Civil Rules from Patrick E. Higginbotham, Chair,

system of notice pleading and liberal discovery had worked well and had opened the door to many plaintiffs who would have been dismissed under a fact-pleading regime, there were still concerns that discovery was costing too much and that some plaintiffs were abusing the system.<sup>142</sup> Nevertheless, despite the fact that judicial amendment of the Rules would have been an easy way to satisfy these concerns,<sup>143</sup> until 2007 the Court had repeatedly refused this approach.<sup>144</sup>

### 1. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*

By the early 1990s, a form of heightened pleading arose in some lower courts in certain types of cases.<sup>145</sup> For example, the Court of Appeals for the Fifth Circuit began demanding greater pleading specificity for civil rights claims filed under 42 U.S.C. § 1983.<sup>146</sup>

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Advisory Comm. on Civil Rules, to Hon. Alicemarie H. Stoler, Chair, Standing Comm. on Rules of Practice & Procedure 47–48 (May 17, 1996), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1996.pdf> (“Dissatisfaction with the discovery practice has not been allayed by the many amendments that began in 1970.”); Niemeyer, May 1999 Memorandum, *supra* note 126, at 357 (noting that more than 80% of litigators responding to a Federal Judicial Center Survey indicated that they wanted changes to be made to the discovery rules); see also Vairo, *supra* note 114 (“[T]he sense that the system was broken, especially from the defense perspective, persisted.”). In general, the controversy pitted the plaintiff’s bar against the corporate defense bar. Bone, *Who Decides?*, *supra* note 43, at 1974.

142. Three Supreme Court justices, in an opinion authored by Justice Scalia and joined by Justices Thomas and Souter, dissented from the transmittal of the 1993 amendments to Congress. Order of the Supreme Court Forwarding Rule Changes to Congress, 507 U.S. 1089, 1096 (1993) (Scalia, J., dissenting, joined by Thomas, J., and, in part, by Souter, J.). “The proposed radical reforms to the discovery process are potentially disastrous and certainly premature,” wrote Justice Scalia. *Id.* at 1099. It seems no coincidence that these three justices were all in the majority in *Twombly*. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

143. See generally Moore, *supra* note 43 (arguing that the Court should take a more active role in interpreting the Rules).

144. See *infra* Part II.C.1–2 (explaining that in both *Leatherman* and *Swierkiewicz* the Court was urged to apply heightened pleading but refused to do so in both cases); see also Brian Thomas Fitzsimons, Comment, *The Injustice of Notice and Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 207 (2007) (positing that, according to the Supreme Court, arguments about the rising cost of discovery were “wasted on the courts,” and that proponents of heightened pleading would be better served lobbying for an amendment to Rule 9(b)).

145. Lower courts occasionally departed from notice pleading and “imposed heightened pleading standards in types of cases thought to be especially subject to abusive filing.” Sherwin, *supra* note 98, at 319. For example, lower courts have imposed various heightened pleading standards for antitrust, civil rights, conspiracy, and defamation claims. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011–59 (2003).

146. See, e.g., *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987) (“We have also consistently required a section 1983 plaintiff to state specific facts and not merely conclusory allegations.”), *abrogated by* *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). Section 1983 of the Civil Rights Act allows individuals to seek

However, not every lower court applied such a standard, and in 1992 the Supreme Court granted certiorari in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* to resolve the conflict between the Courts of Appeals.<sup>147</sup>

In *Leatherman*, the Court held that it was inappropriate for lower courts to impose any type of heightened pleading standard and that any requirement greater than notice pleading was prohibited by the Rules.<sup>148</sup> Writing for a unanimous court, Chief Justice Rehnquist emphasized the Rules' distinction between notice pleading under Rule 8 and heightened pleading under Rule 9(b)<sup>149</sup> and concluded that because the Rules only demanded heightened pleading for cases alleging fraud or mistake, this necessarily meant that the Rules did not require plaintiffs to plead with specificity in other types of cases, including civil actions under § 1983.<sup>150</sup> Importantly, the Court explained that it could not impose heightened pleading through judicial amendment; amending the Federal Rules, the Court reasoned, must be accomplished through the formal rulemaking process.<sup>151</sup>

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redress for alleged violations of constitutionally protected rights under, for example, the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 42 U.S.C. § 1983 (2006); *see also* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). Section 1983 lawsuits may expose public officials to liability for their official actions, and—attempting to do justice to the doctrine of official immunity—the Fifth Circuit imposed heightened pleading requirements to protect government officials from unwarranted exposure. *Elliott v. Perez*, 751 F.2d 1472, 1476–77 (5th Cir. 1985), *abrogated by Leatherman*, 507 U.S. 163.

147. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 505 U.S. 1203 (1992) (granting certiorari); *see also Leatherman*, 507 U.S. at 165 (explaining the rationale behind the grant of certiorari).

148. *Leatherman*, 507 U.S. at 168.

149. For an explanation of Rule 9(b), *see supra* note 102.

150. Although Rule 9(b) does impose a particularity pleading requirement for “averments of fraud or mistake,” the Rule “contains no mention of such a requirement for any other causes of action, including those brought “under § 1983[. . .] *expressio unius est exclusio alterius*.” *Leatherman*, 507 U.S. at 168. The Latin phrase is a canon of construction that holds that the specific inclusion of named items implies the exclusion of other, unnamed items. BLACK’S LAW, *supra* note 3, at 620.

151. The Chief Justice appeared to be cognizant of the concerns of municipal defendants but told them, essentially, that the Court was not the proper forum for requesting Rule amendments, and that any efforts to change pleading standards should be coordinated through the formal rulemaking process:

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. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

## 2. *Swierkiewicz v. Sorema N.A.*

Just over one decade later, the Court again stepped in to resolve a circuit split, this time concerning the proper pleading standard for employment discrimination cases filed under Title VII of the Civil Rights Act of 1964.<sup>152</sup> In *Swierkiewicz v. Sorema N.A.*, the Court again unanimously held that a heightened pleading standard conflicts with the Rules.<sup>153</sup> The Court embraced notice pleading and ruled that it is improper to dispose of potentially meritorious claims at the pleading stage of litigation; the facts are truly identified only after pleading and discovery and only then is it appropriate to adjudicate unmeritorious claims through summary judgment.<sup>154</sup> The Court was not unsympathetic to the respondents, who had argued that notice pleading allows plaintiffs to proceed based on conclusory allegations of discrimination and encourages disgruntled employees to bring unsubstantiated lawsuits.<sup>155</sup> But, just as they had in *Leatherman*, the Court explained that such arguments were lost on the Court and informed the defendants that “a requirement of greater [pleading] specificity . . . is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’”<sup>156</sup>

### III. DISCUSSION: AMENDMENT THROUGH JUDICIAL INTERPRETATION IN *TWOMBLY* AND *IQBAL*

After the Court reaffirmed notice pleading twice in less than eleven years—and told its critics to lodge their complaints with the Advisory Committee instead—it seemed as though the *Conley* standard had entrenched itself as the applicable standard for all civil actions,<sup>157</sup>

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*Leatherman*, 507 U.S. at 168–69.

152. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509–10 (2002).

153. *Id.* at 511–13.

154. *Id.* at 512. In refusing to amend Rule 8(a) through interpretation, the Court also based its reasoning on its belief that “[o]ther provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)’s simplified notice pleading standard.” *Id.* at 513. The Court pointed to Rule 8(e)(1) (“no technical forms of pleading or motions are required”), Rule 8(f) (“all pleadings shall be so construed as to do substantial justice”), and the combination of Rule 84 (explaining that the Federal Rules of Civil Procedure Forms are sufficient under the rules and are intended to “indicate the simplicity and brevity of statement which the rules contemplate”) and Form 11 (then Form 9). *Id.* at 513–14 & n.4 (citing FED. R. CIV. P. 8, 84; FED. R. CIV. P. app. Form 9 (1963)).

155. Brief for Respondent at 34–40, *Swierkiewicz*, 534 U.S. 506 (No. 00-1853), 2002 WL 384241.

156. *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168).

157. The actions listed in Rule 9(b) were exceptions, as were those for which Congress had explicitly provided a higher pleading standard.

barring an amendment to the Rules through the formal rulemaking process.<sup>158</sup> Yet, in two cases decided less than two years apart, the Court reversed course and dramatically altered pleading requirements through judicial amendment.<sup>159</sup> This Part will discuss the Court's watershed opinion in *Twombly*,<sup>160</sup> the reaction to that case,<sup>161</sup> and the Court's attempt in *Iqbal* to answer the main question left unresolved by *Twombly*.<sup>162</sup>

### A. Bell Atlantic v. Twombly

In 2007, the Court decided to hear a case to address the proper standard for pleading an antitrust conspiracy.<sup>163</sup> Notice pleading in the context of private antitrust lawsuits was highly controversial.<sup>164</sup> Although any well-versed plaintiff's attorney knew how to draft a complaint alleging parallel conduct<sup>165</sup> to survive a 12(b)(6) motion under notice pleading,<sup>166</sup> requiring plaintiffs to meet a higher pleading

158. For fifty years after *Conley*, the Court's interpretations of the requirements at the pleading stage had consistently reaffirmed notice pleading: "When a federal court reviews the sufficiency of a complaint . . . [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In fact, just a few weeks before the *Twombly* decision was handed down, the Court of Appeals for the Seventh Circuit, emphasizing the continuing validity of *Conley*, *Leatherman*, and *Swierkiewicz*, stated: "[A] judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life. Any decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal unless X is on the list in FED. R. CIV. P. 9(b)." *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007) (quoting *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006)).

159. See *infra* Parts III.A–C.

160. See *infra* Part III.A.

161. See *infra* Part III.B.

162. See *infra* Part III.C.

163. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (citing *Bell Atl. Corp. v. Twombly*, 548 U.S. 903 (2006) (granting certiorari)).

164. Epstein, *supra* note 111, at 66.

165. Parallel conduct (also known as "conscious parallelism") occurs when two or more competitors independently decide to engage in a certain business practice with full knowledge that their competitor is likely to do the same. The practice can be anticompetitive because it can prevent outside competition, thus preserving an oligarchy within the marketplace served by the competitors. See generally Harry Steinberg, *Oligopolistic Interdependence: The FTC Adopts a "No Agreement" Standard to Attack Parallel Non-Collusive Practices*, 50 BROOK. L. REV. 255, 264–69 (1984) (explaining "conscious parallelism"). The crucial question in a complaint filed under the Sherman Act, 15 U.S.C. § 1 (2006), is whether the challenged anticompetitive conduct stems from independent decision making or from an agreement. *Twombly*, 550 U.S. at 553. This is because parallel conduct, while circumstantial evidence of an agreement, is not itself illegal. *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–41 (1954).

166. By the early 2000s, plaintiffs' attorneys knew that, to survive a motion to dismiss, all one had to do was cite parallel conduct as circumstantial evidence of a conspiracy and then one could hope to uncover direct evidence of a conspiracy through discovery. See Epstein, *supra* note 111,

standard might ask too much: proof of a conspiracy (an illegal agreement) typically comes from facts that a plaintiff cannot learn except through discovery.<sup>167</sup> As a result, notice pleading and liberal discovery can be essential to private enforcement of antitrust violations.<sup>168</sup>

The district court in *Twombly* imposed a heightened pleading requirement and dismissed the plaintiff's complaint in response to a 12(b)(6) motion.<sup>169</sup> The court held that although parallel conduct was circumstantial evidence of an agreement, the plaintiffs failed to plead the existence of any so-called "plus factors" that would indicate that the parallel behavior of the defendants was actually the result of a conspiracy.<sup>170</sup> The Second Circuit vacated the district court decision<sup>171</sup> and held that "plus factors are not *required*" under Rule 8(a), even in an antitrust claim.<sup>172</sup>

The Supreme Court reversed.<sup>173</sup> The Court ruled that, in order to survive a motion to dismiss, a plaintiff must provide sufficient factual

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at 66 ("[E]very plaintiff knows how to draft a complaint that says that the named defendants agreed to collude with each other in setting prices or dividing markets within specified geographical and temporal limits.").

167. See *supra* note 113 (explaining the significance of access to discovery in antitrust cases and other types of cases where a plaintiff must prove intent or state of mind); see also Steinberg, *supra* note 165, at 264 ("Because agreements that violate section 1 are rarely formally entered into by those who would restrain trade, courts have allowed the use of circumstantial evidence to prove agreement.").

168. Spencer, *supra* note 28, at 465–66.

169. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007). See also *supra* note 27 for an explanation of a 12(b)(6) motion to dismiss. A brief background of the facts in *Twombly* is useful in understanding the case and its impact on pleading. In 1984, AT&T's monopoly of the nationwide local telephone business was divested, creating Regional Bell Operating Companies (called Incumbent Local Exchange Carriers ("ILECs")). *Twombly*, 550 U.S. at 548, 550 n.1. The plaintiffs in *Twombly* represented a "putative class" of subscribers to local telephone and/or high-speed Internet services provided by ILECs. In their lawsuit, the plaintiffs' complaint alleged that the ILECs had conspired to restrain trade in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, in two ways: first, it alleged that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of rival service providers; second, it alleged that the ILECs agreed to refrain from competing against one another by not encroaching on each other's territory. *Id.* at 550–51.

170. *Twombly*, 313 F. Supp. 2d at 179.

171. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 119 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007). Unlike the district court, the Second Circuit cited *Conley v. Gibson* and its "no set of facts" language. *Id.* at 106–07. The Second Circuit also cited both *Leatherman* and *Swierkiewicz* to support its conclusion that the Rules impose more demanding pleading requirements *only* for those claims listed under Rule 9(b). *Id.* at 107.

172. *Id.* at 114.

173. *Twombly*, 550 U.S. at 570.

allegations to “raise a right to relief above the speculative level”<sup>174</sup> and to push the complaint across the “line between possibility and plausibility . . . .”<sup>175</sup> The Court attempted to draw a distinction between “detailed factual allegations,”<sup>176</sup> which would not be required under this “plausibility” standard, and “enough factual matter (taken as true) to suggest that an agreement was made.”<sup>177</sup> Significantly, the Court “retired” *Conley*’s “no set of facts” language.<sup>178</sup> “*Conley* [merely] described the breadth of opportunity to prove what an adequate complaint claims, not the *minimum standard* of adequate pleading to govern a complaint’s survival.”<sup>179</sup>

The Court gave three justifications for its newfound interpretation of Rule 8(a). First, the Court explained that because it had previously held that proof only of parallel conduct was insufficient to win at trial or survive summary judgment—litigation stages *after* pleading—it would now do so *at* the pleading stage.<sup>180</sup> Next, the Court asserted frustration with the exploding cost of discovery in antitrust cases and the fact that plaintiffs can force a large company to settle early in a case simply out

174. *Id.* at 555.

175. *Id.* at 557.

176. *Id.* at 555.

177. *Id.* at 556. The Court explained that the “plausibility” standard “does not impose a *probability* requirement . . . . And of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that *actual proof* of those facts is improbable.” *Id.* (emphasis added). Nevertheless, it was clear that the Court was imposing something other than notice pleading because the defendants had adequate notice of the claims against them. See 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, 1229 (2008). The complaint alleged:

Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.

Consolidated Amended Class Action Complaint at 2, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220), 2003 WL 25629874, *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007). The problem, according to the Court, was that although the defendants had notice of the claims, the allegations they contained were “conclusory.” See *Twombly*, 550 U.S. at 557.

178. *Twombly*, 550 U.S. at 563. Justice Souter argued that the phrase had been “questioned, criticized and explained away long enough” and that it had “puzzl[ed] the [legal] profession for 50 years. . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.* at 562–63.

179. *Id.* at 563 (emphasis added).

180. *Id.* at 554 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954)).

of fear of proceeding to discovery.<sup>181</sup> Although the Court did not draw a clear distinction between the “growing expense of discovery” and the “risk of discovery abuse,” it was clearly wary of both.<sup>182</sup> Finally, the Court determined that careful case management and judicial control of discovery were not sufficient methods to weed out groundless claims.<sup>183</sup>

Although the Court explicitly stated that it was not imposing a heightened pleading standard,<sup>184</sup> in his dissent, Justice Stevens explained that he had a difficult time understanding the opinion any other way.<sup>185</sup> Justice Stevens’s dissent retraced the history of pleading and concluded that, under the design of the Rules, dismissal was appropriate only when it was obvious that a plaintiff had no chance of proving her claims and that there was no chance that proceeding to discovery would help her do so.<sup>186</sup> Notice pleading represented a policy choice embodied in the Federal Rules, Justice Stevens argued, and the Court had consistently reaffirmed that basic understanding of the Rules since they were promulgated.<sup>187</sup> Finally, Justice Stevens reminded his counterparts that the Court had twice unanimously held that pleading Rules could only be amended through the formal rulemaking process.<sup>188</sup>

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181. *See id.* at 558–59 (“[A] plaintiff with a largely groundless claim [should not] be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” (citations omitted)).

182. *Id.* at 557–59.

183. The Court defined groundless claims as those that fall “just shy of a plausible entitlement to relief.” *Id.* at 559. The Court reasoned that judicial supervision during the pretrial stage had only been modestly successful in checking discovery abuse and explicitly rejected the feasibility of “phased discovery,” which was advocated by the dissenting opinion. *Id.* at 560 n.6. “Phased discovery” or “bifurcated discovery” is discovery that is divided into multiple stages. Instead of allowing full-blown discovery, a court employing phased discovery seeks initially to limit discovery to essential documents in an attempt to resolve preliminary issues and determine if further discovery is worthwhile. If the initial discovery does not prove fruitful for the plaintiff, the defendant can make a motion for summary judgment. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 169 (D.D.C. 2009) (“Bifurcated discovery is warranted if the interests of economy and reduced costs outweigh any minimal prejudice which would befall plaintiffs from delaying discovery on the merits.” (quotations omitted)).

184. *Twombly*, 550 U.S. at 569 n.14.

185. *Id.* at 588 (Stevens, J., dissenting). Justice Stevens was joined by Justice Ginsberg in most of his dissent.

186. *Id.* at 577.

187. *Id.* at 583.

188. *Id.* at 584–85 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993)).

### B. Reaction to *Twombly*

Reaction from the legal community to *Twombly* was intense and largely critical.<sup>189</sup> The Court's decision caused confusion among legal practitioners,<sup>190</sup> and questions were raised about the application of the supposedly heightened pleading standard.<sup>191</sup> Many commentators feared that the Court had effectively replaced notice pleading with a heightened form of pleading that required plaintiffs to plead facts in their complaints.<sup>192</sup> Some attacked the Court's opinion for its refusal to honor *stare decisis*.<sup>193</sup> There was a nearly unanimous fear within liberal circles that the decision would have a disastrous effect on private policing of illegitimate corporate behavior.<sup>194</sup> Nevertheless, some legal

189. See, e.g., *Leading Case*, *supra* note 98, at 306 (“Rather than changing procedural rules through decisions in individual cases, judges should leave such alterations to institutions that have the ability to evaluate the costs and benefits of potential changes via empirical analysis.”); Spencer, *supra* note 28 (arguing, generally, that *Twombly* represents a dramatic departure from the “liberal ethos” of the Rules).

190. See Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 910–18 (2008), for a discussion of some of the questions left unanswered by *Twombly* (e.g., “Can *Twombly* be limited to Sherman Act section 1 antitrust conspiracy claims?”; “Can *Twombly* be limited to conspiracy cases?”; “To what extent will *Twombly* impact class action practice in the federal courts?”; “Can *Twombly* be limited to large, complex cases, particularly those in which discovery is likely to be costly and asymmetrical? Should it be?”; “Should *Twombly* apply in all federal cases?”; “What are the implications of conflating the standards for motions to dismiss and motions for summary judgment and directed verdicts?”; “What impact will *Twombly* have in the state courts?”).

191. Compare Keith Bradley, *Pleading Standards Should Not Change After Bell Atl. v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007) (arguing that *Twombly* must be analyzed in the antitrust context), with Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007) (stating the Second Circuit's conclusion that “it would be cavalier” to believe that *Twombly* applies only to antitrust claims), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). See generally Anthony Martinez, Note, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 ARK. L. REV. 763 (2009) (surveying and analyzing various Courts of Appeals' opinions interpreting *Twombly*).

192. See, e.g., Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 138 (July 9, 2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (“The best reading of [*Twombly*] is that the new standard is absolute, that mere notice pleading is dead for all cases and causes of action.”); Steuer, *supra* note 121, at 862 (“There can be little doubt that the Supreme Court purposefully recalibrated the pleading requirements under Rule 12(b)(6) in *Twombly*.”).

193. See, e.g., Hoffman, *supra* note 177, at 1235 (observing that a “majority of scholars” share the view that *Twombly* amounts to a “sea of change in the traditional pleading standard the Court has followed since *Conley*”); *Leading Case*, *supra* note 98, at 305–06 (finding that the Court did not follow its own precedent interpreting Rule 8); Spencer, *supra* note 28, at 468–69 (arguing that the Court had abruptly and radically revised pleading doctrine, but it had offered no compelling reasons for doing so). For an explanation of horizontal *stare decisis*, see *supra* note 28.

194. Michael Dorf, *The End of Notice Pleading?*, DORF ON LAW (May 24, 2007, 7:35 AM), <http://michaeldorf.org/2007/05/end-of-notice-pleading.html> (predicting that *Twombly* will “likely do great damage in the lower courts”).

observers were more cautious with their appraisal of *Twombly*, arguing that the import of the case would only be felt in the area of antitrust litigation.<sup>195</sup> Others wondered, given the Court's previous refusals to impose heightened pleading standards in *Leatherman* and *Swierkiewicz*, whether *Twombly* had in fact created a new, heightened pleading standard.<sup>196</sup>

It appears that *Twombly* had a similarly mixed effect on the disposition of cases making their way through the lower federal courts. In the first two years following the Court's decision, lower courts cited *Twombly* over 6,500 times,<sup>197</sup> but at least one attempt to empirically study the effect of *Twombly* concluded that lower courts were not requiring a uniformly heightened pleading standard in the wake of *Twombly*.<sup>198</sup> Generally, some confusion over the meaning of a holding is to be expected after any major pronouncement of the Court, but the Court often allows such confusion to percolate in lower courts so that the consequences of its decision can be better realized and understood.<sup>199</sup>

The Advisory Committee also responded to *Twombly*. In its first meeting after *Twombly*, the Advisory Committee examined the Court's

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195. See Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 634–36 (2006) (listing the reasons why a “heightened pleading” interpretation of *Twombly* should be resisted); J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN'S L. REV. 849, 851 (2008) (contending that if *Twombly* imposes a heightened pleading standard, “it does so only in the very narrow context of (1) antitrust conspiracy complaints; (2) only when those complaints explicitly rest allegations of conspiracy on pleaded inferences rather than factual allegations; and (3) in the unique historical context of the telecommunications industry”); cf. Bone, *Pleading Rules*, *supra* note 41 (arguing that *Twombly* does not represent a sharp shift from the intent of the 1938 drafters of the Rules). See generally *Leading Case*, *supra* note 98, at 310 n.51, for a list of both the commentary that argued that *Twombly* applied to all civil actions and the commentary that believed that it applied only in the antitrust context.

196. Compare *Twombly*, 550 U.S. at 569 n.14 (“[W]e do not apply any ‘heightened’ pleading standard . . .”), and Hannon, *supra* note 75, at 1838 (conducting an empirical analysis of post-*Twombly* decisions and concluding, “*Twombly* has not affected how courts have adjudicated the sufficiency of complaints in a majority of substantive legal areas”), with Spencer, *supra* note 28, at 431 (“Notice pleading is dead. Say hello to plausibility pleading.”).

197. Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents at 2, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4792462 [hereinafter Professors' Brief].

198. See generally Hannon, *supra* note 75, at 1815 (finding, with the exception of civil rights cases, a great deal of consistency between *Conley*-era and post-*Twombly* rulings on Rule 12(b)(6) motions to dismiss).

199. See, e.g., *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (arguing that the Court does not need to resolve “disuniformity” as soon as it appears because insight can be gained from the experiences of lower courts).

decision and discussed what, if any, modifications to the Rules should be made.<sup>200</sup> Cognizant of the multitude of issues involved, the Committee was reticent to make immediate amendments to pleading requirements.<sup>201</sup> Instead, the Committee determined that further examination of the effect of *Twombly* on lower courts was necessary,<sup>202</sup> and by December 2008, the Committee had made plans to significantly analyze notice pleading and discovery in response to *Twombly*.<sup>203</sup>

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200. Minutes of the Civil Rules Advisory Comm. 31–35 (Nov. 8–9, 2007) (Dec. 10, 2007 version) [hereinafter Nov. 2007 Minutes], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2007-min.pdf>; see also Report of the Civil Rules Advisory Comm. from Hon. Mark H. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 12 (Dec. 17, 2007) [hereinafter Dec. 2007 Report], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2007.pdf> (questioning whether the Committee should draft rules redirecting, modifying, or even retracting *Twombly*).

201. See Nov. 2007 Minutes, *supra* note 200, at 35 (“Discussion of the vistas opened by the *Twombly* opinion concluded with general agreement that the Committee should not immediately move into more aggressive action on its pleading projects.”).

202. Dec. 2007 Report, *supra* note 200, at 12. The gathering and analysis of surveys and empirical data is often performed by the Federal Judicial Center. See, e.g., *id.* (noting that the Federal Judicial Center might conduct empirical studies on the effect of *Twombly*). The Advisory Committee explained its decision to study the *Twombly* effect rather than immediately change the Rules:

Further discussion now can be useful for at least two purposes. One is to get a better sense of how others understand *Twombly*, and how it has had whatever impact it has had in the very short term of its present life. A second purpose is to consider the alternative opportunities that may be available to amend present rule texts. If there are pressing immediate problems that seem likely to endure for some time, and if they can be understood well enough to support effective rulemaking, the Advisory Committee may have been too timid. If the Committee should be launching rules amendments now, it is important to understand that.

*Id.*

203. See Report of the Civil Rules Advisory Comm. from Hon. Mark H. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 6–7 (Dec. 9, 2008) [hereinafter Dec. 2008 Report], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2008.pdf> (resolving to hold a conference in the first half of 2010 to begin exploring contemporary pleading, discovery, and related topics).

The Federal Judicial Center is moving forward on pulling together empirical data. [We] are designing a new discovery survey. . . . Other researchers also are gathering empirical information. The planning committee is considering whether to ask a few people to prepare initial “think pieces,” of modest length, to help focus further planning and stimulate discussion by those who will be recruited for the panels.

Minutes of the Civil Rules Advisory Comm. 10 (Feb. 2–3, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV02-2009-min.pdf>. The Committee held the important conference on procedural rules in May 2010 at Duke University. Report of the Civil Rules Advisory Comm. from Hon. Mark H. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 1–2 (May 17, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf>. For an explanation of the conference, see *infra* note 385.

The Committee realized that if changes were eventually needed, they would be best served by surveying the views and experiences of practitioners and supplementing “these resources with disinterested and expert empirical research.”<sup>204</sup> Nevertheless, no immediate changes were proposed; many Committee members wanted to give lower courts an opportunity to work through the Court’s holding and there was additional concern that, due to the changing nature of discovery—“as it moves increasingly into a world of electronically stored information that displaces paper documents”—any major procedural attempts to curb access to discovery through heightened pleading would be “premature.”<sup>205</sup>

### C. Ashcroft v. Iqbal

In June 2007, the Court of Appeals for the Second Circuit applied *Twombly* in a civil rights case involving a post-9/11 detainee who had sued Attorney General John Ashcroft, FBI director Robert Mueller, and other officials from the FBI and the Bureau of Prisons, for various violations of his constitutional rights.<sup>206</sup> On interlocutory appeal from an order granting the defendant’s motions to dismiss, the Second Circuit gave thoughtful consideration to Supreme Court precedent in the area of pleading standards, including *Twombly*.<sup>207</sup> The Second Circuit first

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204. Dec. 2008 Report, *supra* note 203, at 7. The Federal Judicial Center is the education and research agency for the federal courts. FED. JUDICIAL CTR., <http://www.fjc.gov> (last visited Nov. 18, 2010).

205. Dec. 2008 Report, *supra* note 203, at 7.

206. *Iqbal v. Hasty*, 490 F.3d 143, 147–50 & n.3 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). According to Javaid Iqbal’s complaint, he was arrested following the 9/11 attacks and eventually assigned to a maximum security unit for more than six months. *Id.* at 147–48. Allegedly, the FBI had detained thousands of Arab Muslim men as part of its investigation into 9/11; Ashcroft and Mueller had approved a policy of holding detainees “of high interest” in highly restrictive conditions until they were “cleared” by the FBI; and prison officials did not conduct a review of the detainees’ conditions. *Id.* at 148. Iqbal pled that Ashcroft and Mueller “‘knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’” *Iqbal*, 129 S. Ct. at 1951. Iqbal also alleged that Ashcroft was the “principal architect of this invidious policy.” *Id.* Iqbal specifically asserted that he was held in solitary confinement, was not provided adequate food, was brutally beaten by prison guards, was subjected to daily strip and body-cavity searches, and routinely had his Koran confiscated. *Iqbal*, 490 F.3d at 149. In an unpublished opinion decided before *Twombly*, the district court denied most of the defendants’ motions to dismiss. *Elmaghraby v. Ashcroft*, No. 04 CV 01809, 2005 WL 2375202, at \*35 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part sub nom.* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The district court also noted: “In recent years, the Supreme Court has repeatedly rejected judicially-created heightened pleading standards in favor of the liberal notice-pleading requirement of Federal Rule of Civil Procedure 8(a).” *Id.* at \*11 n.13.

207. The defendants appealed from the district court’s order denying their motions to dismiss

reasoned, based on *Leatherman* and *Swierkiewicz*, that a judicially-imposed heightened pleading standard conflicted with both the language of Rule 8(a) and the rulemaking process.<sup>208</sup> Moreover, the Second Circuit noted that *Swierkiewicz* reaffirmed that heightened pleading standards should not be used for any types of actions not listed in Rule 9(b), including, of course, civil rights claims against government officials.<sup>209</sup>

The Second Circuit then turned to *Twombly*. After giving consideration to the Court's opinion and to post-*Twombly* commentary, the Second Circuit determined that *Twombly* did not impose a universal standard of heightened or fact pleading, but instead required lower courts to apply "a flexible 'plausibility standard'" obligating a plaintiff to support her claims with some factual allegations only in contexts where such support was necessary to render the claim plausible.<sup>210</sup> In applying this standard to the case before it, the Second Circuit determined that Iqbal's claim should be allowed to proceed. Even so, the Second Circuit was leery of the risk of discovery abuse targeting high-level government officials. Therefore, it held that "the [d]istrict [c]ourt not only may, but *must* exercise its discretion" throughout the litigation process to protect the defendants from "unnecessary and burdensome discovery or trial proceedings."<sup>211</sup>

Just as they had in *Twombly*, the Supreme Court reversed.<sup>212</sup> The Court first explained that a reading of *Twombly* that would limit its holding to the context of antitrust disputes was incompatible with the Rules because the *Twombly* decision was based on the Court's interpretation of Rule 8, which applied to "all civil actions"<sup>213</sup> (except, of course, those listed in Rule 9(b)). After briefly reviewing *Twombly*, the Court concluded that Iqbal's "complaint ha[d] not nudged his claims of invidious discrimination across the line from conceivable to plausible."<sup>214</sup> Next, the Court explained that its denunciation of the careful-case-management approach in *Twombly* was also applicable in

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on the ground of qualified immunity. *Iqbal*, 490 F.3d at 151.

208. *Id.* at 154.

209. *Id.* at 153–54.

210. *Id.* at 157–58.

211. *Id.* at 159 (internal quotations omitted). The court even laid out specific restrictions that the district court had to impose for particular claims. *Id.*

212. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

213. *Id.* at 1953 (quoting FED. R. CIV. P. 1).

214. *Id.* at 1950–51 (internal quotations omitted).

all cases.<sup>215</sup> The Court thus rejected the Second Circuit's conclusion that judicial supervision could successfully control discovery.<sup>216</sup>

A dissent filed by Justice Souter reasoned that the majority had "misapplied" the pleading standard from *Twombly*.<sup>217</sup> Justice Breyer, who also dissented, seemed to agree with the Second Circuit that a trial court could successfully manage a complex case and structure discovery in ways that diminish the risk of imposing undue burdens on government officials.<sup>218</sup> Significantly, however, neither dissent took issue with the Court's extension of *Twombly* to all civil actions. Even if it had not been before *Iqbal*, notice pleading was now certainly dead.<sup>219</sup>

#### IV. ANALYSIS

This Part analyzes the Court's judicial amendment of Rule 8(a) in *Twombly* and *Iqbal*, compares it to the formal rulemaking process, and concludes that the Court should not have overstepped its interpretive prerogative and should, in the future, leave changes to the Rules to the formal rulemaking process.<sup>220</sup>

In two cases, the Supreme Court effectively "rewr[o]te" the Federal Rules of Civil Procedure "without . . . informed deliberation as to the

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215. *Id.* at 1953. The Court attempted to explain its rejection of the careful-case-management approach:

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

*Id.* at 1953–54.

216. *Id.* at 1953 ("We have held . . . that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 550, 559 (2007) ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management . . .'" (internal quotation marks and citations omitted))).

217. *Id.* at 1955 (Souter, J., dissenting). Justice Souter was joined by Justices Stevens, Ginsberg, and Breyer.

218. *Id.* at 1961–62 (Breyer, J., dissenting).

219. See Dodson, *supra* note 192, at 138 (concluding that notice pleading is dead); Spencer, *supra* note 28, at 431 ("Notice pleading is dead."); see also Tony Mauro, *Plaintiffs' Attorneys Mobilize to Soften New Pleading Standard*, N.Y. L.J., Sept. 24, 2009, at 5 ("With remarkable speed and success, 'Iqbal motions' to dismiss because of insufficient pleadings have become common place in federal courts . . .").

220. See *infra* Part IV.A–F (laying out the arguments supporting the thesis that the Court should not use a litigated dispute to rewrite the Rules).

costs of doing so.”<sup>221</sup> In the past, when judges reviewed a motion to dismiss, they *had* to accept the claims contained in a plaintiff’s complaint as true.<sup>222</sup> “The sole exception to this [requirement],” as Justice Souter wrote in his *Iqbal* dissent, “[a]y with allegations that are sufficiently fantastic to defy reality as we know it . . . .”<sup>223</sup> This is no longer the law. After *Iqbal*, lower court judges can draw their own conclusions about the veracity of a plaintiff’s complaint because some of its claims will no longer be entitled to an assumption of truth.<sup>224</sup> This is at odds with years of precedent under notice pleading and allows judges to substitute themselves for juries by testing the credibility of a plaintiff’s claims and determining issues of fact.<sup>225</sup>

Simply put, the Court disregarded the formal rulemaking process and imposed its own view of necessary pleading requirements.<sup>226</sup> One could argue that Rule 8(a) came to stand for notice pleading only through judicial interpretations such as *Conley*, and it is therefore legitimate for the Court to revisit its earlier interpretations and revise them.<sup>227</sup> The problem with this view is that notice pleading is not a

221. *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting); see also Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 180 (2010) (explaining that *Twombly* and *Iqbal* dramatically rewrote federal pleading rules).

222. See, e.g., *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (“We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.”).

223. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). Justice Souter provided some examples: “[C]laims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Id.*

224. After *Iqbal*, lower court judges can test the “plausibility” of a plaintiff’s claims and close the courthouse door if they do not ring true. Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10. “[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 129 S. Ct. at 1950.

225. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328 (2007) (describing the jury’s authority to “assess the credibility of witnesses, resolve any genuine issues of fact, and make the ultimate determination whether” the plaintiff has met its burden in proving that the defendant acted with the required level of intent); see also BLACK’S LAW, *supra* note 3, at 873 (defining a “jury” as “[a] group of persons selected according to law and given the power to decide questions of fact”). By moving the process of weeding out unworthy claims to the pleading stage, the Court has given incredible discretion to judges:

Rule 12(b)(6) is a procedural tool that can prematurely disrupt the judicial process. Unlike summary judgment, a pleading sufficiency challenge is designed to be made before the case advances to the discovery stage. That is both the promise and the curse, depending on one’s vantage point, of a robust power that lets judges mete out judgment based only on the sufficiency of a plaintiff’s allegations of wrongdoing, decreeing to some “you shall pass,” but to others, “you shall not pass.”

Hoffman, *supra* note 177, at 1268.

226. *Leading Case*, *supra* note 98, at 310.

227. *Bone*, *Pleading Rules*, *supra* note 41, at 893.

product of judicial interpretation but was a foundational goal of the entire system of Rules.<sup>228</sup> The Rules created a procedural system that permitted dismissal of a plaintiff's claims only when proceeding to discovery and other stages of the trial process would be futile.<sup>229</sup> Moreover, the language of Rule 8(a) belies the Court's interpretation: Rule 8(a) requires a complaint to contain only a "short and plain statement," not enough facts to meet some amorphous "plausibility" standard.<sup>230</sup>

Worse still, the Court disregarded the formal rulemaking process, which was created by Congress with consideration of separation of powers principles.<sup>231</sup> This system has been maintained because of the Court's limited ability to fully understand the implications of procedural rulemaking decisions<sup>232</sup> and the Advisory Committee's capacity to continually evaluate the Rules and to make thoughtful and comprehensive changes.<sup>233</sup> The Court had even previously admonished against the judicial creation of heightened pleading standards.<sup>234</sup>

This Part analyzes the Court's decisions and outlines the arguments against judicial amendment of the Rules. First, this Part argues that the Court should respect the congressionally-established rulemaking process because of the Constitution's separation of powers.<sup>235</sup> Next, this Part shows how judicial amendment of the Rules does not involve important features of the formal rulemaking process, including public input, deliberative analysis supported by neutral empirical analysis, and an ability to make systematic changes to the Rules.<sup>236</sup> In analyzing

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228. *See* *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

229. *Bell Atl. Corp. v. Twombly*, 550 U.S. 550, 577 (2007) (Stevens, J., dissenting).

230. *Id.* at 580 ("[T]he pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts."); Epstein, *supra* note 111, at 71 ("Read literally, Rule 8 does not leave *any* avenue open for a defendant to have a case dismissed on the ground that it lacks any credible factual evidence to support it.").

231. *See* Part II.A.1 (noting that Congress only gave the Court limited rulemaking powers within the framework of the formal rulemaking process, and reserved for itself the ultimate authority to approve or reject Rule changes).

232. Moore, *supra* note 43, at 1061–62 (noting the "inability of the Court to engage in effective independent rulemaking"). As far back as 1979, there was concern that because of increasing burdens, the Justices could not give proposed Rules the kind of close study necessary to ensure their effective function. BROWN, *supra* note 21, at vi.

233. *See* Moore, *supra* note 43, at 1058–59 (noting the "special expertise" possessed by the bodies involved in the formal rulemaking process).

234. *Infra* notes 242–43 and accompanying text.

235. *See infra* Part IV.A.

236. *See infra* Part IV.B. With systematic revisions, the formal rulemakers are able to make

*Twombly* and *Iqbal*, this Part next shows how the Court's imposition of "plausibility" pleading created a host of problems that will not be easily resolved, but could have been better addressed by the formal rulemakers.<sup>237</sup> The final section of this Part's critique of *Twombly* and *Iqbal* argues first that changes to pleading requirements raise significant policy concerns and have moral implications because they regulate access to the judicial system, and second that court access is a politically- and emotionally-charged issue which should be modified only through the congressionally-established framework for amending the Rules.<sup>238</sup>

Next, this Part lays out the various criticisms of the formal rulemaking process and shows why, despite such criticism, the formal rulemaking process is still superior to judicial amendment.<sup>239</sup> Finally, this Part concludes with a proposal that, in the future, the Court should not amend the Rules through judicial interpretation and should defer to the formal rulemaking process.<sup>240</sup>

#### A. *The Court Has No Authority to Amend the Rules Through Judicial Interpretation*

Except for the inherent power to amend the Rules that Congress has reserved for itself, the rulemaking structure that Congress has implemented does not envision Rule changes outside the formal rulemaking structure,<sup>241</sup> and for years, the Court repeatedly acknowledged that it had no authority to rewrite the Rules through judicial "interpretation."<sup>242</sup> As seen in *Leatherman* and *Swierkiewicz*, the Court again advocated deference and explicitly ruled that heightened

changes to more than one Rule at a time, if necessary.

237. See *infra* Part IV.C.

238. See *infra* Part IV.D; see also Oct. 2005 Minutes, *supra* note 122, at 30 (recognizing that notice pleading is a "sensitive topic" and any changes invite charges that the purpose is to limit court access for disfavored types of litigation); Bone, *Making Effective Rules*, *supra* note 127, at 320 (noting that procedural changes in these areas can provoke intense political controversy).

239. See *infra* Part IV.E.

240. See *infra* Part IV.F.

241. See 28 U.S.C. §§ 2073–2074 (2006) (establishing the "method of prescribing" Rules); see also Josephson, *supra* note 99, at 900 ("The *Twombly* decision raises the recurring issue of whether courts are capable of revising the meaning of the federal rules through judicial interpretation.").

242. *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 548–49 (1991) ("This Court is not acting on a clean slate; our task is not to decide what [a R]ule should be . . ."); see also, e.g., *Becker v. Montgomery*, 532 U.S. 757, 764 (2001) (reasoning that the Court will not, without an amendment so ordering, extend the plain meaning of a word in a Rule); *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989) (stating that the Court's task is merely to "apply the text, not improve upon it").

pleading could *only* be achieved through the formal rulemaking process.<sup>243</sup> This deference was proper because the Rules must be accorded the same authoritative weight as statutes and should not be modified by judicial construction.<sup>244</sup>

In *Twombly* and *Iqbal*, however, the Court ignored this precedent.<sup>245</sup> Instead, the Court decided to use its common law power to impose heightened pleading.<sup>246</sup> The Court's actions delegitimize the formal rulemaking process,<sup>247</sup> and raise separation of powers concerns because Congress intentionally preserved itself as the final decision maker on changes to the Rules.<sup>248</sup>

### B. *The Arguments Against Judicial Amendment of the Rules*

Even if there were no separation of powers concerns raised by judicial amendment of the Rules, it would still not be a wise practice.<sup>249</sup> Many benefits that are gained from the formal rulemaking process are not achieved through judicial amendment.<sup>250</sup>

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243. See *supra* Part II.C.1–2.

244. See *Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186, 1194 (9th Cir. 1989) (Kozinski, J., dissenting) (“The Federal Rules, more importantly, are promulgated . . . pursuant to the Rules Enabling Act; federal courts must treat them as they would statutes, and may not modify them by judicial construction.” (citing *Harris v. Nelson*, 394 U.S. 286 (1969))).

245. The Court is generally bound by its own precedent, a concept known as horizontal stare decisis. *Hilton*, *supra* note 28, at 1727.

246. Common law power is the power to create law through judicial decisions, which is differentiated from law made through constitution, statute, or code. BLACK'S LAW, *supra* note 3, at 293.

247. Professors' Brief, *supra* note 197, at 5 (arguing that Court-imposed heightened pleading has the “potential to destabilize the carefully constructed rulemaking process envisioned by Congress under the Rules Enabling Act and painstakingly administered . . . since 1934”). Some say that the formal rulemaking process has not been compromised because if the formal rulemakers wished to change pleading standards or other Rules they could still do so following amendment of the Rules through judicial interpretation. Yet, the Court holds veto power over any proposed rules, see *supra* note 90 and accompanying text, and it is unlikely to approve a proposed amendment that would undo its work, *Struve*, *supra* note 16, at 1135–36; see also Michael C. Dorf, *The Supreme Court Dismisses a 9/11 Detainee's Civil Lawsuit*, FINDLAW, May 20, 2009, <http://writ.news.findlaw.com/dorf/20090520.html> [hereinafter Dorf, *Supreme Court Dismisses*] (noting that the Court could block future Rule amendments that would overturn plausibility pleading).

248. See generally Professors' Brief, *supra* note 197, at 1 (urging the Court to respect the Rules Enabling Act and refrain from imposing a heightened pleading standard through judicial amendment). *But see* Moore, *supra* note 43, at 1092 (concluding that there are no separation of powers concerns “if the Court includes an analysis of purpose and policy in interpreting the Rules”).

249. See *infra* this Part (laying out the arguments that promote the formal rulemaking process over amendment of the rules through judicial interpretation).

250. See *infra* this Part (arguing that, for example, judicial amendment does not include public input, thorough and neutral empirical analysis, or the ability to engage in systematic Rule

One of the most glaring problems with judicial amendment is the lack of public input involved in writing judicial opinions.<sup>251</sup> The formal rulemaking process gains strength from the input of litigators and judges who deal with procedural issues on a daily basis<sup>252</sup> and are able to provide insight into how Rules are working and whether they need to be changed.<sup>253</sup> And while members of the Court may be sensitive to the interests of certain actors in the litigation process—to the extent that *Twombly* and *Iqbal* are about docket control, the Court may have been responding to the concerns of the judiciary—the Court generally lacks the ability to collect input from all interested parties, including litigators, judges, bar associations, and government officials.<sup>254</sup>

The formal rulemaking process also ensures that new Rules or amendments will be subjected to a deliberate analysis and will be informed by judges and practitioners that employ the Rules on a day-to-day basis.<sup>255</sup> Unlike the Court, which may decide only one or two procedural cases each term, the Advisory Committee is engaged in a year-round process of studying procedure.<sup>256</sup> Moreover, the Advisory

changes).

251. Litigants' briefs, oral arguments, and briefs from amicus curiae cannot replace the public input stages of the formal rulemaking process. See Rabiej, *supra* note 78, at 323 (noting the "exacting review" present in the formal rulemaking process); Teter, *supra* note 79, at 155 (arguing that the formal rulemaking process is both cautious and deliberate).

252. See *supra* note 79 (describing that the Advisory Committee's membership includes individuals who understand the day-to-day performance of the Rules); see also Dec. 2008 Report, *supra* note 203, at 7 ("Much will be gained by gathering the views and experiences of lawyers, judges, and academics. . . . A baseline of information [is] the only way to measure progress or regress over time."); see also, e.g., Letter from Sam C. Pointer, Jr., Chair, Advisory Comm. on Civil Rules, to Hon. Robert E. Keeton, Chair, Standing Comm. on Rules of Practice & Procedure 1 (May 1, 1992) [hereinafter Pointer Letter], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1992.pdf> (reporting on the hundreds of public comments received by the Advisory Committee in response to proposed Rule amendments); Niemeyer, May 1999 Memorandum, *supra* note 126, at 356 (noting the unusual amount of positive feedback received by the Advisory Committee in response to proposed discovery amendments).

253. See Bone, *Process of Making Process*, *supra* note 43, at 950 (arguing that Committee members respect the benefits of public input in the rulemaking process). The Advisory Committee, which is engaged in a constant analysis of the Rules, can obtain feedback on the "efficacy of procedural rules in practice." Bone, *Who Decides?*, *supra* note 43, at 1990.

254. Struve, *supra* note 16, at 1136–37. If these interested parties do not meet the Court's requirements for filing a brief as amice curiae, or cannot afford the expense of filing such a brief, the Court will not have the benefit of their viewpoint on the potential consequences of a precedent-setting decision. See *supra* note 20 (explaining amicus curiae briefs). Preparing and filing an amice curiae brief can be quite expensive, costing a party thousands of dollars. Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 661 (1993).

255. Struve, *supra* note 16, at 1140.

256. The Advisory Committee's membership includes judges and practitioners who are familiar with the day-to-day performance of the Rules. *Supra* note 79. On the other hand, among

Committee is specifically designed to predict the effect of major procedural changes and therefore has a prospective, rather than retrospective, quality.<sup>257</sup> For example, the Advisory Committee can commission research into the costs and benefits of a proposed amendment.<sup>258</sup> Yet, the *Twombly* majority, apparently concerned with the “common lament” that judges could not successfully protect defendants in the discovery process through careful case management, failed to present any empirical evidence to support this position and provided no explanation for *why* case management could not work.<sup>259</sup>

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the Justices that decided *Twombly* and *Iqbal*, there is one common thread: lack of trial experience (only Justice Ginsberg had experience as a litigator, and she joined the dissent in both cases). During oral arguments for *Iqbal*, Justice Breyer at least acknowledged his naivety in terms of the important pre-trial procedural steps; Justice Breyer’s general confusion over procedure was punctuated with his statement, “I can’t remember my civil procedure course,” which was greeted with laughter. Transcript of Oral Argument at 13–17, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5168391. Although Justice Sotomayor brought needed trial experience to its bench, the Court is likely to “continue to stumble in matters of federal trial court procedure” for years to come. Dorf, *Wreaks Havoc*, *supra* note 28.

257. The Advisory Committee is sensitive to public input from litigators, judges, and legal scholars, and can “collect and process information, assess global effects, and compare different . . . options.” Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 38.

258. *Leading Case*, *supra* note 98, at 313 (“Unlike the Advisory Committee . . . which can commission empirical research into the costs and benefits of heightened pleading, the Court can rely only on the facts of the case before it and the Justices’ own intuitions.”). Professor Carl Tobias explains the empirical studies commissioned by the Advisory Committee in 1996 in the wake of the Civil Justice Reform Act of 1990 (“CJRA”). See *supra* note 130 and accompanying text for an explanation of the CJRA:

During 1996, the Judicial Conference Advisory Committee on the Civil Rules appointed a Discovery Subcommittee to explore whether those provisions of the Federal Rules of Civil Procedure that govern discovery required amendment. The Discovery Subcommittee astutely commissioned studies by the RAND Corporation Institute for Civil Justice, which had recently concluded a thoroughgoing assessment of the principles, guidelines, and techniques for decreasing cost and delay applied by pilot districts under CJRA, and by the Federal Judicial Center, the principal research arm of the federal courts, which had primary responsibility for preparing the analyses of the measures enforced by the CJRA demonstration districts. The new evaluations . . . expanded on the empirical data that RAND and the Federal Judicial Center had assembled, assessed and synthesized in the CJRA effort . . . .

Carl Tobias, *Civil Justice Delay and Empirical Data: A Response to Professor Heise*, 51 CASE W. RES. L. REV. 235, 237–38 (2000); see also Dec. 2008 Report, *supra* note 203, at 7 (explaining the Committee’s ability to supplement other resources with “disinterested and expert empirical research”).

259. The Court reasoned, “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (quoting *id.* at 573 (Stevens, J., dissenting)). To support his conclusion, Justice Souter relied heavily on a 1989 law journal article by Judge Easterbrook, another member of the appellate judiciary. *Id.* This reliance seems misplaced because neither Souter nor Easterbrook are engaged in day-to-day litigation battles involving procedural disputes. In his *Twombly* dissent, Justice Stevens took Justice Souter to task for his conclusion that frustration with judicial case-management is a

The Court also supported heightened pleading by reasoning that “proceeding to antitrust discovery can be expensive.”<sup>260</sup> While this statement is technically correct, the Court failed to acknowledge that as many as half of all civil actions involve no discovery.<sup>261</sup> Members of the Advisory Committee have long been aware of this fact, and have cited it as a reason that wholesale changes to pleading requirements may not be the best solution to the problem of expansive discovery in certain types of cases.<sup>262</sup>

Moreover, in *Twombly* and *Iqbal*, the Court proceeded without adequate statistical evidence or objective proof that plausibility pleading would actually improve procedure in the lower courts, and there is no guarantee that it will achieve the goals of reducing litigation costs and the size of court dockets.<sup>263</sup> For example, one possible consequence of *Twombly* and *Iqbal* is more litigation costs at the pleading stage because “lawyers will have to spend more time obtaining facts and drafting complaints in order to ensure survival of a motion to dismiss.”<sup>264</sup> Another potential result is years of increased litigation over the meaning of the new standard.<sup>265</sup>

“common lament:” “It is no surprise that the antitrust defense bar—among whom ‘lament’ as to inadequate judicial supervision of discovery is most ‘common’—should lobby for this state of affairs.” *Id.* at 595 (Stevens, J., dissenting) (citations omitted). Furthermore, others have challenged the Court’s conclusion that judicial case management is generally insufficient to control discovery. *See Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (evinced a belief that “a district court . . . may . . . consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery . . .”). *See generally* Cavanagh, *supra* note 99, at 887 (arguing that the Federal Rules provide significant tools for judicial control of discovery, and those tools appeared to be working before *Twombly*).

260. *Twombly*, 550 U.S. at 558.

261. Cavanagh, *supra* note 99, at 888. Moreover, “the suggestion that frivolous antitrust claims are problematic has little evidentiary support.” Fitzsimons, *supra* note 144, at 213.

262. *See* Niemeyer, May 1999 Memorandum, *supra* note 126, at 357 (reporting that empirical data commissioned by the Advisory Committee revealed that “in almost 40% of federal cases, discovery is not used at all, and in an additional substantial percentage of cases, only about three hours of discovery occurs”). Thus, discovery rules and the risks associated with excessive discovery are only present in a limited proportion of cases. *Id.*; Cavanagh, *supra* note 99, at 883 (pointing to empirical data from the 1980s showing that while discovery abuse was a significant problem in complex federal litigation, it was not a problem in most kinds of federal cases).

263. *See Leading Case*, *supra* note 98, at 313–14 (arguing that the Court “proceeded on a hunch”).

264. “While the high costs of discovery in cases like *Twombly* are particularly salient, it is not clear that they are ultimately greater than the large number of small costs that heightened pleading requirements impose on plaintiffs throughout the system.” *Id.* at 314. One of the reasons that the drafters adopted notice pleading was to avoid “hyper-zealous advocacy” at the pleading stage, a process that can be quite costly itself. *See* Oct. 2005 Minutes, *supra* note 122, at 31.

265. *See* Seiner, *supra* note 221, at 224–25 (“The vagueness of the plausibility test provided by *Iqbal* and *Twombly* almost assures that this standard will spawn years of increased litigation.” (internal quotations omitted)).

Finally, the Court's institutional limitations caution against judicial amendment of the Rules. A key weakness in the Court's ability to address procedural issues is that the Court can only address the facts and law directly before it.<sup>266</sup> The Court generally cannot, for example, pass judgment on the meaning or validity of Rule 11 in a case that involves a dispute about Rule 8.<sup>267</sup>

On the other hand, the Advisory Committee can make systematic changes to the Rules and, if necessary, amend several Rules at once.<sup>268</sup> The Advisory Committee could have proposed changes that incorporated some or all of the following solutions<sup>269</sup>: drafting a "pro-defendant" Rule 8(a);<sup>270</sup> bolstering Rule 11 sanctions for filing frivolous lawsuits;<sup>271</sup> urging enforced application, or at least increased usage, of Rule 12(e), which allows a defendant to file a motion for a more definitive statement, but permits a plaintiff to file such a statement

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266. The Supreme Court will only grant discretionary review—called a writ of certiorari—for "compelling reasons," SUP. CT. R. 10, and a party petitioning the Court for a writ of certiorari must concisely state the questions presented for review, SUP. CT. R. 14. In *Iqbal*, the question presented to the Court (by the petitioners) was whether the plaintiff's "conclusory allegation" was sufficient to state a claim. Brief for the Petitioners at I, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4063957.

267. As a general rule, an appellate court will not rule on an issue that was not reviewed by the trial court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

268. The Federal Rules are intended to work systematically with each other. See Sherwin, *supra* note 98, at 299 n.15 ("In [Charles] Clark's view, procedure should be approached theoretically rather than piecemeal."). This allows the Committee to maintain "coherence" in the Rules. See Struve, *supra* note 16, at 1140 (discussing the structure of the rulemaking process and how it contributes to a "holistic approach to the revision"); see also Bone, *Process of Making Process*, *supra* note 43, at 946 (arguing that procedural rules are interdependent and therefore should be tightly coordinated because "[p]arties view a lawsuit as a unitary event with a single objective, and they pick their strategies at each stage with an eye to the possible effects at every other stage"). Professor Bone explains how the Advisory Committee is better suited to consider systematic changes to the Rules: "[T]he choice of the optimal pleading rule is part of a much larger problem of designing an integrated system of rules that deals as a whole with the frivolous suit problem optimally. This means that pleading rules should be evaluated in conjunction with other devices for reducing frivolous suits . . ." Bone, *Who Decides?*, *supra* note 43, at 2005–06.

269. The goal of this Note is not to suggest that one of these options is necessarily better than the Court's plausibility standard, but that the Advisory Committee was in a better position to weigh the relative merits of each possible solution.

270. See Fitzsimons, *supra* note 144, at 201–02 (proposing a new Rule 8(a) that would "help balance the scale between antitrust conspiracy plaintiffs, defendants, courts, and society as a whole"); *id.* at 225–34 (discussing at length a possible amendment to Rule 8(a)).

271. Rule 11 imposes an ethical obligation on lawyers to conduct some investigation to ensure the legitimacy of a lawsuit before filing in federal court. FED. R. CIV. P. 11(b); see also Bone, *Pleading Rules*, *supra* note 41, at 931–32 (hypothesizing a new penalty system that could be imposed for frivolous filings that would establish well-defined consequences for plaintiffs' attorneys who intentionally file frivolous lawsuits); Bone, *Who Decides?*, *supra* note 43, at 2005 (arguing that the Advisory Committee is in a great position to collect and process "empirical data on the likelihood of frivolous suits for different types of litigation").

if the motion is granted;<sup>272</sup> shifting fees in meritless cases;<sup>273</sup> allowing summary judgment at an earlier stage in some complex cases;<sup>274</sup> or limiting heightened pleading to certain types of cases.<sup>275</sup> Instead, the Court imposed a one-size-fits-all solution to a multifaceted problem.<sup>276</sup>

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272. “The provision for a more definite statement found in Rule 12(e) further affirms the intended liberality of the pleading rules by making repleading rather than dismissal the appropriate remedy for a complaint lacking sufficient detail.” Spencer, *supra* note 28, at 471. Rule 12(e) governs a party’s motion for a more definitive statement:

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

FED R. CIV. P. 12(e). The concept of urging increased usage of Rule 12(e) motions—which keep a plaintiff’s case alive because instead of resulting in dismissal, a successful motion merely requires a plaintiff to more clearly state his or her cause of action—was not a foreign concept to the Court. For example, at oral arguments for *Iqbal*, Justice Souter questioned whether courts should be dismissing inadequate complaints with prejudice under Rule 12(b)(6) or using Rule 12(e) more liberally. Transcript of Oral Argument at 9, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No 07-1015), 2008 WL 5168391. Also, in a 1954 case, the Court overturned the district court’s dismissal of a complaint because, among other reasons, if a complaint is truly insufficient to put a party on notice of the claims against it, that party can always ask for a more definitive statement through a Rule 12(e) motion. *United States v. Employing Plasterers Ass’n*, 347 U.S. 186, 189 (1954).

273. See, e.g., Anthony C. Biagioli, *Hold-Ups and Highway Robberies: A Proposal to Return to the Pre-Bell Atlantic 12(b)(6) Pleading Standard While Subsidizing Defendants’ Discovery Costs (Including Discovery-Related Attorney Fees) in Meritless Cases* (2009) (unpublished comment) (on file with author), available at [http://works.bepress.com/anthony\\_biagioli/1](http://works.bepress.com/anthony_biagioli/1) (articulating an alternative standard that embraces pre-*Twombly* pleading practice and, in antitrust suits and cases with similarly extensive discovery costs, subsidizes defendants’ discovery costs in meritless cases). The “American Rule” is that in the vast majority of lawsuits, each party bears its own litigation costs, including costs for discovery and attorney’s fees, regardless of who ultimately prevails. Stancil, *supra* note 112, at 102. By comparison, in England, the losing party pays litigation costs for all parties. *Id.*

274. See Epstein, *supra* note 111, at 66–67 (arguing that as litigation becomes more complex, the case for terminating cases earlier becomes stronger). For many years, there has been a general understanding that certain types of “big cases” might demand a different set of procedural rules than simpler cases. See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1687 (1992) (“[W]e intuitively understand that the car accident at the corner and the massive securities case do not require the same procedures.”).

275. See, e.g., Bone, *Pleading Rules*, *supra* note 41, at 936 (advocating substance-specific rules).

276. In *Twombly*, the Court created the artificial standard of “plausibility,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), and in *Iqbal*, the Court declared that its new standard would apply to “all civil actions,” 129 S. Ct. at 1953; see also Stancil, *supra* note 112, at 92–93, 95–116 (laying out the complex issues that affect the debate over civil pleading standards).

C. *The Substantial Shortcomings of the Court's Imposition of  
"Plausibility Pleading"*

The Court's solution—establishing plausibility pleading under the existing text of Rule 8(a)—is likely to create a host of problems that systematic action by the Advisory Committee could have avoided. Unlike the Advisory Committee, which often attaches Explanatory Notes to formal amendments in order to clarify any potentially ambiguous language, the Court provided little guidance to lower courts on how to apply its new pleading standard.<sup>277</sup> Attempts to determine what amounts to “plausibility” have already created substantial confusion among judges, litigators, and commentators.<sup>278</sup> Worse yet, this confusion is likely to spawn increased litigation for years to come as courts and litigants try to determine what is required to make a claim plausible.<sup>279</sup> There is even some concern that the plausibility standard is unconstitutional.<sup>280</sup> If the Court had allowed the Advisory

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277. *Iqbal v. Hasty*, 490 F.3d 143, 153 (2d Cir. 2007) (noting that the guidance provided by the Court in *Twombly* is not readily harmonized with its earlier decisions), *rev'd sub nom. Iqbal*, 129 S. Ct. 1937; *Riley v. Vilsack*, 665 F. Supp. 2d 994, 1003 (W.D. Wis. 2009) (“*Iqbal* and *Twombly* contain few guidelines to help the lower courts discern the difference between a ‘plausible’ and an implausible claim and a ‘conclusion’ and a ‘detailed fact.’ The descriptions of plausibility provided by the Court were short on specifics.”); *see also* Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 12 (arguing that the majority in *Iqbal* was “extremely unclear” as to why the conclusions in *Javaid Iqbal*’s complaint were legal conclusions that were not entitled to be assumed as true); *Seiner*, *supra* note 221, at 192 (lamenting that *Twombly* and *Iqbal* “took the clear straightforward pleading standard set forth in *Conley* and replaced it with a much more amorphous plausibility requirement”).

278. *Cavanagh*, *supra* note 99, at 882; *see also* *Dodson*, *supra* note 192, at 141 (“[W]hat is plausible?”); *Seiner*, *supra* note 221, at 180–81 (attempting to “pinpoint exactly where plausibility falls in that gray area between *possible* and *probable*”); *Morgan, Lewis, & Bockius LLP, Phila., Pa., Supreme Court Holds that Rule 8 Pleading Standard Announced in Twombly Applies to ‘All Civil Actions,’* LITIG. LAWFLASH, May 26, 2009, at 3, [http://www.morganlewis.com/pubs/LIT\\_Rule8Pleading\\_LF\\_26may09.pdf](http://www.morganlewis.com/pubs/LIT_Rule8Pleading_LF_26may09.pdf) [hereinafter LITIG. LAWFLASH] (questioning whether the standard applied by courts will in fact be one of plausibility or whether the analysis will instead turn into one of “probability”).

279. Lawyers are known for their ability to spin seemingly unequivocal language to their benefit, and they will probably try to take advantage of lower courts’ confusion about the plausibility standard through extra motions and aggressive arguments. This is why the formal rulemaking process places such an emphasis on clear and tight drafting. *See Rabiej*, *supra* note 78, at 323 (discussing how the Advisory Committee on Civil Rules devotes substantial time to identifying potential ambiguities); *see also supra* notes 264–65 and accompanying text (explaining the potential for increased litigation following the imposition of plausibility pleading).

280. The plausibility standard has caused at least one commentator to question whether *Twombly* and *Iqbal* eliminate the right to trial by jury, as protected by the Seventh Amendment, in some situations. *See* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) (arguing that the new motion to dismiss standard created by *Twombly* and *Iqbal* does not comport with common law pleading requirements and therefore violates the Seventh Amendment). *But see* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326–

Committee to take the lead in amending the Rules, these problems could have been avoided as the Advisory Committee “devotes substantial time to vetting proposed amendments . . . to identify potential ambiguities and eliminate errors.”<sup>281</sup> A systematic revision of pleading standards by the Advisory Committee would have produced much less uncertainty than the plausibility standard established in *Twombly* and *Iqbal* because it would have been subject to public comments and multiple revisions, and could have been promulgated with Explanatory Notes.<sup>282</sup>

In *Iqbal*, even though the Court apparently clarified *when* the *Twombly* standard applies, it failed to clarify *how* lower courts should apply this new standard.<sup>283</sup> For example, the Court held in *Twombly* that a lower court must still accept a plaintiff’s allegations as true, no matter how improbable they seem.<sup>284</sup> Yet, in *Iqbal*, the Court ruled that this tenet would no longer apply to some types of allegations,<sup>285</sup> and even gave license to a skeptical reviewing court to disregard well-pled facts where they do not create more than an inference of the “mere possibility of misconduct.”<sup>286</sup>

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27 (2007) (holding that heightened pleading requirements do not violate the Seventh Amendment); Hoffman, *supra* note 177, at 1235 (relaying the author’s “serious doubts” that Thomas’s Seventh Amendment unconstitutionality argument “has any reasonable prospect of gaining considerable adherents in positions of judicial or legislative power”).

281. Rabiej, *supra* note 78, at 323. Use of empirical data could have helped the Advisory Committee formulate a new pleading standard, understand its potential impact, and craft Explanatory Notes. For example, statistical data suggests that an allegation of discriminatory intent in the employment context is “far more plausible on its face” than the *Twombly* and *Iqbal* opinions might lead courts to believe. See Seiner, *supra* note 221, at 181.

282. See Cavanagh, *supra* note 99, at 891 (arguing that the systematic approach of the Advisory Committee is likely to create less uncertainty than judicial amendment of the Rules on a case-by-case basis). When the Rules are amended, new text and Explanatory Notes are transmitted to Congress together. 28 U.S.C. § 2073(d) (2006). Unlike the Notes that accompanied the original Rules, Explanatory Notes now play a significant role in the rulemaking process because “the Advisory Committee . . . uses the Notes to indicate an amendment’s purpose, guide future interpretations, discuss the amendment’s relation to surrounding law, and provide practice tips for lawyers and judges.” Struve, *supra* note 16, at 1112–13. The Explanatory Notes hold some sway over courts that later interpret the Rules; in ascertaining the meaning of the Rules, the construction given them by the Advisory Committee, though not binding, is “of weight.” *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946); see also *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (clarifying that the Explanatory Notes are a reliable source, providing insight into the meaning of a Rule).

283. See *supra* note 277 (displaying the confusion created by the imposition of “plausibility” pleading).

284. Justice Souter pointed this out in his *Iqbal* dissent. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)).

285. *Id.* at 1949 (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

286. *Id.* at 1950.

Furthermore, in *Twombly* the Court proclaimed that pleading under Form 11 was still acceptable, as established by Rule 84.<sup>287</sup> The supposedly valid Form 11 states, “On *date*, at *place* the defendant negligently drove a motor vehicle against the plaintiff.”<sup>288</sup> However, this statement seems to be a “legal conclusion,” meaning that, after *Iqbal*, a district court would not have to accept the statement as true because there are no facts supporting the conclusion that the defendant was driving negligently.<sup>289</sup> The Court did not address this apparent contradiction.

The Court also failed to reconcile *Twombly* and *Iqbal* with its unanimous decision in *Swierkiewicz* to explicitly reaffirm notice pleading.<sup>290</sup> In *Twombly*, Justice Souter avoided the issue by concluding that *Twombly* was not in fact imposing a heightened pleading standard.<sup>291</sup> Yet in *Iqbal*, neither the majority nor the dissent cited to *Swierkiewicz*.<sup>292</sup> Its continuing validity as precedent has certainly been cast into doubt,<sup>293</sup> but the Court’s failure to address the

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287. *Twombly*, 550 U.S. 544, 565 n.10 (2007) (then Form 9). See *supra* note 154 for an explanation of Rule 84.

288. FED. R. CIV. P. app. form 11. This phrase is nothing more than a “formulaic recitation of the elements,” which is supposedly insufficient after *Iqbal*. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). In *Iqbal*, the Second Circuit referred to the Court’s previous approval of Form 11 (it was then still Form 9) in *Twombly*:

[A]lthough the Court faulted the plaintiffs’ complaint for alleging “merely legal conclusions” of conspiracy, it explicitly noted with approval Form 9 . . . which, with respect to the ground of liability, alleges only that the defendant “negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway. . . .” The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading [*Twombly*] to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

*Iqbal v. Hasty*, 490 F.3d 143, 156 (2d Cir. 2007) (citations omitted), *rev’d sub nom. Iqbal*, 129 S. Ct. 1937.

289. See *Leading Case*, *supra* note 98, at 311 (“Form [11] appears to be ‘a wholly conclusory statement of the claim,’ which under *Twombly* would not meet the requirements of Rule 8. But, such a result is impossible because, according to Rule 84, the forms ‘are sufficient under the [R]ules.’”). There are dozens of other reasons why the defendant *could have* hit the plaintiff, all of which reduce the probability that the defendant was negligent at all.

290. Cf. *Seiner*, *supra* note 221, at 194 (noting that a strong argument could be made that *Iqbal* implicitly overrules *Swierkiewicz*).

291. *Twombly*, 550 U.S. at 570 (“Here . . . we do not require heightened fact pleading of specifics . . .”). But see *Spencer*, *supra* note 28, at 477 (arguing that the plausibility pleading standard announced in *Twombly* is no different than the heightened pleading standard that the Court rejected in *Swierkiewicz*).

292. *Iqbal*, 129 S. Ct. 1937.

293. See, e.g., *Kamar v. Krolczyk*, No. 07-0340, 2008 WL 2880414, at \*8 (E.D. Cal. July 22, 2008) (“*Swierkiewicz*’s holding that ‘any set of facts that could be proved consistent’ with the complaint’s allegations could save a complaint from dismissal has been overruled.”).

question directly may create confusion and increase litigation as litigants wrangle over the issue.<sup>294</sup>

Essentially, the Court established the plausibility standard, asserted that Form 11 would still be valid, ignored *Swierkiewicz*, and left the confusion created by these actions to be sorted out by lower courts. Compare this to the Advisory Committee, whose members noted less than one year after *Twombly* that Form 11 and the other illustrative pleading Forms deserve reconsideration.<sup>295</sup> It is this sort of systematic thinking—and the ability to act systematically<sup>296</sup>—that sets the formal rulemaking process apart from judicial amendment of the Rules on a case-by-case basis.<sup>297</sup>

#### *D. Significant Policy Decisions are Better Made Through the Formal Rulemaking Process*

Heightened pleading also implicates important policy considerations that are better addressed through the formal rulemaking process. When courts screen potentially meritorious claims, it is particularly troubling from a moral perspective<sup>298</sup> because in our society, judicial procedure plays an integral role in protecting rights and furthering social reform.<sup>299</sup> When a plaintiff's cause of action is barred from proceeding at the pleading stage, she is essentially denied access to the justice

294. See Dorf, *Supreme Court Dismisses*, *supra* note 247 (discussing the Court's failure to reconcile its decisions in *Twombly*, *Iqbal*, and *Swierkiewicz*).

295. Minutes, Advisory Comm. on Civil Rules 35 (Apr. 7–8, 2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2008-min.pdf>. The Advisory Committee was also aware that any significant alterations to the text of Rules should be accompanied by an explanation or else it will “invite abundant litigation about the meaning” of any new terms. See Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure 73 (May 11, 1999), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-1999.pdf>.

296. See *supra* notes 268–75 (laying out the systematic changes that the Advisory Committee could have considered but that the Court was unable to consider).

297. *Leading Case*, *supra* note 98, at 314–15 (noting that the Court has been criticized “for approving amendments to the Federal Rules without adequate empirical investigation of their costs and benefits” and that “*Twombly* represents an even greater failure by the Court to think seriously about the procedural changes it approved”).

298. Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 33. Professor Bone is especially concerned with how far the Court seems to have extended the *Twombly* holding with its decision in *Iqbal*; the *Twombly* standard, Bone argues, only screens truly meritless suits; *Iqbal*, however, screens not only meritless claims but weak ones as well. See *id.* at 3. “The difference is crucial. Screening weak lawsuits raises much more complex and controversial policy questions than screening meritless suits . . .” *Id.*

299. See Oct. 2005 Minutes, *supra* note 122, at 30 (acknowledging that civil litigation under the Federal Rules is a “far more powerful instrument of social regulation than it would have been under earlier pleading and discovery systems”).

system.<sup>300</sup> Changes to rules that regulate court access, especially those that make it more difficult for plaintiffs to sue the government or large corporations, invoke intense responses from civil rights organizations, liberal political caucuses, and other special interest groups.<sup>301</sup> It is therefore essential that when substantial alterations are made to Rules that affect court access, it is done as deliberately and carefully as possible.<sup>302</sup>

It can be argued that “[t]he procedural system a society uses . . . says a lot about that society.”<sup>303</sup> What would it say about our society, for example, if the “conclusory” claims found in Javaid Iqbal’s complaint were true—some of our highest governmental officials were engaged in systematic civil rights violations—but he was unable to prove them simply because of a procedural shortcoming?<sup>304</sup> What would it say about our society if the phone companies in *Twombly* were in fact conspiring to fix prices, but a private right of action to deter this conduct was barred simply because the Court was worried about the excess costs of discovery?<sup>305</sup> Rulemakers have long preferred the costs

300. See *supra* note 38 and accompanying text (explaining how dismissal at the pleading stage prevents a plaintiff from accessing the court system).

301. See Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 38–39 (arguing that the formal rulemaking process is especially preferable to judicial interpretation when court access in civil rights cases is at stake, “given the political controversy those proposals are likely to generate”). Especially disconcerting to some is that the determination of a defendant’s motion to dismiss may be determined by a lower court judge’s own predilections toward a specific plaintiff or defendant or “uninformed biases and predispositions.” *Leading Case*, *supra* note 98, at 314. As reported in the *New York Times*, Professor Burbank concluded, shortly after *Iqbal*, that the case “licenses highly subjective judgments” and “is a blank check for federal judges to get rid of cases they disfavor.” Liptak, *supra* note 224; see also Bone, *Pleading Rules*, *supra* note 41, at 889 (noting that judges who are eager to screen cases are likely to read the opinion as granting permission to do so).

302. Bone, *Pleading Rules*, *supra* note 41, at 936.

303. Vairo, *supra* note 114.

304. Dorf comments:

Beyond the implications for federal court procedure, *Iqbal* is a troubling case as well for what it says about how a majority of the Supreme Court views allegations of government wrongdoing . . . Perhaps the abuse described in Iqbal’s complaint was all the doing of a few sadistic guards. . . . But given everything else we know about the treatment of detainees under the Bush Administration, it is the Court’s dismissal of Iqbal’s allegations that lacks plausibility.

Dorf, *Supreme Court Dismisses*, *supra* note 247. Justice Scalia, however, thinks that only guilty culprits were held after 9/11 and that any allegation that high-level government officials were imprisoning individuals solely based on their race, religion, or national origin is “[i]mpossible.” Transcript of Oral Argument at 53–54, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5168391.

305. See Josephson, *supra* note 99, at 900 (“[I]n *Twombly*, discovery would most certainly have been expensive, but if the allegations were true, then the discovery costs would be relatively insignificant in comparison to the potentially massive social cost of Bell Atlantic’s

associated with liberal discovery to the risk of screening out meritorious claims at the pleading stage;<sup>306</sup> it makes little sense to dismiss a case at the point in litigation when the courts know the least about it.<sup>307</sup> Still, the rulemakers are constantly seeking to strike an even balance between giving a plaintiff a chance to prove her claims and protecting defendants from enormous discovery costs, and over the years they have used many tools to do so.<sup>308</sup>

In *Twombly* and *Iqbal*, the Court carved its own solution to these issues of policy and morality; although the Court attempted to find textual support for its interpretation of Rule 8(a),<sup>309</sup> the Court's decisions were actually the result of a policy determination that favored defendants over plaintiffs.<sup>310</sup> The Court simply created its own solution

anticompetitive practices.”).

306. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting) (“Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in.”). In 1957, the same year that the Court decided *Conley*, then-Judge Charles Clark wrote the following defense of notice pleading: “I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties.” Charles E. Clark, *Special Pleading in the “Big Case”?*, in *PROCEDURE—THE HANDMAID OF JUSTICE* 147, 148 (C. Wright & H. Reaoner eds., 1965); see also Bone, *Pleading Rules*, *supra* note 41, at 892 (“Clark believed that merits screening should take place after discovery, at summary judgment in some cases and at trial in most.”).

307. Cavanagh, *supra* note 99, at 889.

308. For example, the Advisory Committee has made numerous changes to the Rules governing discovery, see *supra* note 127 (noting changes to the Rules regarding discovery and docket control proposed by the Advisory Committee in the 1980s), and other Rules, such as Rule 11. See generally Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007 (1999) (describing 1993 amendments to Rule 11).

309. The majority reasoned that the language of Rule 8(a) requires a plaintiff to *show* that she is *entitled* to relief. See *Twombly*, 550 U.S. at 555 n.3 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”). This reading of the Rule was not supported by its legislative history nor fifty years of Supreme Court precedent. See *supra* Parts II.B–C (providing the background of notice pleading as a key goal of the Rules and the Court’s support for notice pleading before *Twombly*).

310. See Spencer, *supra* note 28, at 494 (“[T]he interests of protecting defendants against expensive discovery and managing burdensome caseloads were permitted to prevail over the interests of access and resolution on the merits that procedure’s original liberal ethos was designed to promote.”); Dorf, *Supreme Court Dismisses*, *supra* note 247 (noting that the *Iqbal* decision was “undoubtedly” influenced by policy considerations). Rather than following the language or meaning of the Rule, the Court concluded that federal district courts are incapable of protecting defendants from alleged discovery abuse or weeding out weak claims early in the discovery process and sought their own solution to the problem. *McCurry v. Chevy Chase Bank FSB*, 233 P.3d 861, 863 (Wash. 2010) (citing *Twombly*, 550 U.S. at 557–59). Even Judge Richard Posner conceded that the Court’s *Twombly* opinion was rooted in policy and not necessarily based on the meaning of the text of the Rules themselves. See RICHARD A. POSNER, *HOW JUDGES THINK* 53 (2008) (noting that the majority in *Twombly* could not possibly have based its decision on “legalist” principles). A “legalist” is “one who believes in strict adherence to the letter of the law . . . .” BLACK’S LAW, *supra* note 3, at 914.

to the problem of what it considered to be undesirable lawsuits entering the federal court system.<sup>311</sup> While legitimate concerns may have motivated the Court,<sup>312</sup> instead of engaging in a thorough analysis of the consequences of implementing plausibility pleading, the Court simply performed its own “ad hoc cost-benefit analysis” and determined that heightened pleading was the best solution.<sup>313</sup>

The Court’s imposition of plausibility pleading makes it harder for plaintiffs to succeed even when they have meritorious claims.<sup>314</sup> Individual plaintiffs of limited means who sue large corporations or the

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311. The Federal Rules have long served to ease the tension between the competing interests of court access—the desire to ensure that meritorious claims have their day in court—and judicial efficiency: “[I]f the doors of justice are opened too wide, then means are needed for intercepting cases that, in hindsight, ought not to have been welcomed in the first place.” Hoffman, *supra* note 177, at 1218.

312. In *Twombly*, for example the Court was concerned with the enormous potential costs of discovery that would be incurred by the telephone-company defendants. See *Twombly*, 550 U.S. at 558–59. In *Iqbal*, the Court was likely worried about exposing high-level government officials to extensive and intrusive discovery. Cf. *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring) (“prolonged and vexatious discovery processes”), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Would the Court have ruled the same way if faced with less sympathetic defendants or more sympathetic plaintiffs?

313. See *Leading Case*, *supra* note 98, at 306, 315. Justice Ruth Bader Ginsberg, who dissented from the majority in both cases, did not mince words in her criticism of *Iqbal*: “‘In my view . . . ,’ ‘the [C]ourt’s majority messed up the federal rules’ . . . .” Liptak, *supra* note 224, at A10.

314. “[T]he typical defendant often has sole possession of relevant information, and plaintiffs often cannot know critical details of their claims before discovery.” Stancil, *supra* note 112, at 92. This “informational asymmetry” implicates policy because eliminating discovery increases the risk of wrongful dismissals of meritorious claims. See *id.* In *Twombly*, the Court concluded that because more has previously been required of § 1 plaintiffs at the directed verdict and summary judgment stages, a similar requirement should now be imposed at the pleading stage. *Supra* note 180 and accompanying text. *Contra Twombly*, 550 U.S. at 586 (Stevens, J., dissenting) (stating the obvious conclusion that a plausibility requirement at the summary judgment stage should not translate into a plausibility requirement at the pleading stage). This logic ignores the realities of litigation and the difference between pleading and summary judgment. See Hoffman, *supra* note 177, at 1228 (“It is no small jump to move from justifying the disposal of a case by summary judgment, after a full opportunity for discovery, to making the argument for termination, essentially on the merits, at the pleading stage.”). *But see* Epstein, *supra* note 111, at 66–67 (theorizing that as the cost of discovery mounts, the rationale behind terminating litigation earlier gets stronger). At the pleading stage, the plaintiff typically has little or no access to the information necessary to make her case. Plaintiffs occasionally proceed on a small amount of information but with a strong conviction that the defendant is engaged in wrongdoing. In many cases, key facts are obtainable only through discovery, especially when conspiracies are being alleged. See Spencer, *supra* note 28, at 471. It is only through discovery that she gains access to this proof. See Fitzsimons, *supra* note 144, at 226. Obviously if the plaintiff cannot produce sufficient information *after* discovery to successfully prove her case, then summary judgment is proper. See, e.g., *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (“In the absence of [heightened pleading standards], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims . . .”).

federal government (similar to those in *Twombly* and *Iqbal*) are in an especially weak position without access to liberal discovery.<sup>315</sup> As a result, some of the strongest criticism leveled at the Court for *Twombly* and *Iqbal* has been that they one-sidedly favor businesses and government officials, and they will lead to decreased deterrence of illegal and illegitimate behavior because plaintiffs will no longer have access to the information necessary to prove their case.<sup>316</sup>

This is not to say that the Court's concerns were unjustified.<sup>317</sup> Under notice pleading and liberal discovery, legitimate businesses and government actors can become subject to expansive and costly discovery and may become victims of discovery abuse as well.<sup>318</sup> Thus, a significant problem exists under either notice pleading or heightened pleading, and a choice between the two involves balancing the conflicting interests of big business, the government, and private actors.<sup>319</sup> In *Twombly* and *Iqbal*, the Court used pleading requirements to decidedly tip the scale toward the former two at the expense of the latter.<sup>320</sup>

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315. This is as compared to corporate plaintiffs suing another corporation or the government. Many of the types of cases where it is most difficult for a plaintiff to successfully plead a plausible cause of action without discovery—mass tort cases, antitrust cases, and civil rights cases—pit plaintiffs of limited means against big businesses or the government. See *infra* note 361. Antitrust plaintiffs, such as those in *Twombly*, rarely have access to the facts that might nudge their claims across the line from conceivable to plausible, Josephson, *supra* note 99, at 896, and civil rights plaintiffs such as *Javaid Iqbal* are “overwhelmingly poor,” Hannon, *supra* note 75, at 1841.

316. See Fitzsimons, *supra* note 144, at 199–201 (arguing that the Court's *Twombly* decision “ignored the needs of the private plaintiff”). But see Bone, *Process of Making Process*, *supra* note 43, at 948 (noting that there is inherent injustice in “any [procedural] system no matter who makes it or how it is made”).

317. Antitrust discovery can be massive and expensive. See Josephson, *supra* note 99, at 885 (explaining that fact pleading is necessary to filter out at the pleading stage those cases “with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a [section] 1 claim”).

318. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742–43 (1975) (recognizing the potential for abuse in class action lawsuits). A defendant who wins a case on the merits cannot recoup costs incurred during discovery. *Supra* note 273. But see Fitzsimons, *supra* note 144, at 212–13 (arguing that claims of rampant discovery abuse are likely exaggerated and are not supported by empirical evidence).

319. See Bone, *Who Decides?*, *supra* note 43, at 2005 (explaining that choosing a pleading specificity standard requires balancing the ability to screen frivolous suits with facilitating meritorious suits). See generally Fitzsimons, *supra* note 144, for a discussion of the balancing that needs to be done to determine optimal pleading and discovery procedures and the numerous issues to be considered.

320. See Peterson, *supra* note 135 (noting that one corporate lawyer called *Iqbal* “an unexpected gift for the business community”); LITIG. LAWFLASH, *supra* note 278, at 3 (maintaining that the clear result from *Iqbal* is that it will “provide a new basis to argue that plaintiffs’ claims should be dismissed at the pleadings stage”); Simpson Thacher & Bartlett LLP,

Yet the Advisory Committee, and not the Court, is the proper body to conduct this “balancing” test.<sup>321</sup> The Court is not well-suited to making these policy decisions in the procedural context, especially compared to the formal rulemaking bodies.<sup>322</sup> Whether plaintiffs with meritorious claims are able to get relief, whether law-abiding defendants should be subjected to expensive or invasive discovery, and whether judicial resources should be preserved so that the system can work for all participants are all important policy questions that are implicated by rules of procedure and are constantly being evaluated by the rulemakers.<sup>323</sup> If it appears that a change could be warranted, the Advisory Committee has the resources available to study its possible effects, solicit comments from practitioners, and draft Explanatory Notes to explain the amendment.<sup>324</sup> Thus, any changes proposed by the Advisory Committee are likely to be thoughtful, informed, and subject to the public scrutiny of several different constituencies.<sup>325</sup> The Advisory Committee, with its multiple stages of public input, is better able to monitor and maintain a “level playing field” in the federal system—one that does not unreasonably favor either plaintiffs or defendants.<sup>326</sup> The formal rulemaking process, with its ability to make

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New York, N.Y., *Bell Atlantic Corp. v. Twombly: Raising the Bar for Pleadings by Antitrust Plaintiffs*, May 22, 2007, at 1, <http://www.simpsonthacher.com/content/publications/pub604.pdf> (determining that *Twombly* provided “welcome relief to defendants”).

321. “In *Twombly*, the Court carefully considered the burden of costly discovery placed on the defendant by less specific pleading, but the Court failed to consider the burden placed on the plaintiff by forcing him . . . to plead facts he cannot access.” Josephson, *supra* note 99, at 895; *see also* Struve, *supra* note 16, at 1137 n.161 (“To the extent that the Court perceives itself to have expertise in matters of litigation procedure, this perception might induce overconfidence, thus leading the Court to unwarranted boldness in implementing its views of desirable policy.”).

322. *See* Struve, *supra* note 16, at 1136 (arguing that, compared with the formal rulemaking process, the Court is “less representative, less knowledgeable, and perhaps more liable to engraft erroneous policy choices on the Rules”); Bone, *Pleading Rules*, *supra* note 41, at 876–77 (theorizing that the Supreme Court is in a poor position to make important policy decisions in individual cases); Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 3 (declaring that the Court is not institutionally well-equipped to deal with important policy questions, and they are better left to the formal rulemaking process).

323. *See generally* Struve, *supra* note 16, at 1133–41 (laying out arguments in favor of the formal rulemaking process over judicial revision of the Rules).

324. *See generally* Duff, *Summary*, *supra* note 9 (describing the steps that the Advisory Committee must take before proposing Rule Amendments and the resources that are available to it).

325. In 1990, the Advisory Committee’s proposed amendments to Rule 11 elicited responses from well over 100 groups and individuals; after receiving these comments, the Committee “responded by making a number of changes to both the text [of the amended Rule 11] and the Notes.” Struve, *supra* note 16, at 1111–12. This process of public input, of course, is completely absent from the process of amending the Rules through judicial interpretation. *See supra* note 20 (noting the general lack of public input involved in decisions made by the Court).

326. Carrington, *supra* note 67, at 302. The Court is not in a good position to comprehend the

systematic changes and its receipt of congressional approval, should be used when altering Rules that affect court access.<sup>327</sup>

### E. *The Arguments Against the Formal Rulemaking Process*

There are two general types of complaints about the formal rulemaking process. First, there are those who complain that rulemakers have not done enough to correct flaws in the current procedural system; these critics focus on the efficacy of the current Rules and on the inability of formal rulemakers to adopt substantial amendments or to move quickly to respond to changes in the nature of litigation.<sup>328</sup> The Court may have reached this conclusion as it took it upon itself to amend perceived defects in the Rules.<sup>329</sup> The second type of complaint is based on charges that the formal rulemaking process is undemocratic.<sup>330</sup>

#### 1. The Formal Rulemaking Process as Too Slow and Too Conservative

The strongest complaint against the formal rulemaking process is that it is too slow and too conservative; dramatic changes to the Rules are rare.<sup>331</sup> Because any change proposed by the Advisory Committee is subject to review and revision by the judicial and legislative branches, there are significant practical limitations under which rulemakers operate.<sup>332</sup> While deference is typically accorded the rulemakers' proposed amendments if they are noncontroversial,<sup>333</sup> controversial amendments are generally passed only with great difficulty and often represent only incremental changes.<sup>334</sup>

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“real-world consequences” of its rulings. *Leading Case*, *supra* note 98, at 313.

327. *Leading Case*, *supra* note 98, at 315 (concluding that the Court should leave important policy decisions to the formal rulemakers or to Congress).

328. *See infra* Part IV.E.1.

329. *See Leading Case*, *supra* note 98, at 309 (arguing that, contrary to Justice Stevens's assertion in his *Twombly* dissent, the majority's holding was not based on “a lack of faith in trial judges' abilities to manage discovery; rather, it was [based on] a lack of confidence in the Federal Rules system of discovery itself”).

330. *See infra* Part IV.E.2.

331. *Cf. Teter*, *supra* note 79, at 160 (explaining the frustration caused by the inherently conservative process of changing the Federal Rules of Evidence—a similar process to changing the Federal Rules of Civil Procedure).

332. *See supra* note 71; *see also Rabiej*, *supra* note 78, at 325–26 (arguing that rulemakers are sensitive to overstepping their authority as outlined by the Rules Enabling Act and “routinely reject proposals that may have substantive rights implications”).

333. *Rabiej*, *supra* note 78, at 327.

334. *See id.* at 325–27 (explaining how practical limitations tend to “restrict rulemakers' options and prevent them from submitting the ‘ideal’ rule or amendment”). There are, however, examples of bold procedural changes created through the modern process. *See generally* Hirt,

The Advisory Committee is also known for its “if it ain’t broke, don’t fix it” attitude, and is often reticent to react to calls for change for fear of disrupting accepted practices.<sup>335</sup> One cause of this conservatism is the nature of the rulemaking process itself—the process is time consuming and involves a minimum of seven stages of review.<sup>336</sup> It takes time for the Committee to develop suggested amendments, as the process often involves empirical research, interviews with practitioners, and other steps of information gathering.<sup>337</sup> Even after a suggested amendment is developed, it can take up to three more years before a suggestion is enacted as a Rule.<sup>338</sup> Furthermore, empirical research can be used to support competing proposals, or may support no amendment at all,<sup>339</sup> and the public comment period can be quite contentious for controversial amendments as members from all sides of the debate are likely to weigh in.<sup>340</sup>

As a result, rulemakers have been accused of dodging the difficult normative and policy issues that are often raised by impactful proposed amendments.<sup>341</sup> To the chagrin of some members of the legal community, rulemakers often seek compromise rather than striving to produce the most effective amendments.<sup>342</sup> Because no objective way exists to choose among competing values, a search for compromise is likely to either “paralyze” the rulemaking process or force rulemakers to

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*supra* note 308, at 1009–20 (describing 1993 amendments to Rule 11); Rabiej, *supra* note 78, at 333–86 (discussing the various amendments to Rule 23).

335. *Cf.* Teter, *supra* note 79, at 160 (describing the approach of the Advisory Committee for the Rules of Evidence).

336. *See supra* Part II.A.2.

337. *See, e.g.*, text accompanying note 204 (noting that before proposing Rule changes, the Advisory Committee may survey experiences of practitioners and conduct empirical research). *But see* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 847 (1993) (concluding that federal rulemakers rarely seek facts bearing on the impact of their proposals, and practicing lawyers play only a small role in decision making about Rules amendments).

338. Rabiej, *supra* note 78, at 323 n.2; Teter, *supra* note 79, at 160 (noting that amendments to the Federal Rules of Evidence can take at least two to three years to complete).

339. *See* Bone, *Process of Making Process*, *supra* note 43, at 915 (observing that empirical studies of procedural amendments are often “subject to interpretation depending on one’s point of view”).

340. *See, e.g.*, Pointer Letter, *supra* note 252, at 1 (reporting the hundreds of comments received by the Advisory Committee).

341. *See* Bone, *Making Effective Rules*, *supra* note 127, at 326 (stating that the Advisory Committee often drafts rules “with vague standards,” therefore leaving the difficult issues to judicial interpretation).

342. *See* Bone, *Process of Making Process*, *supra* note 43, at 916 (noting that rulemakers tend to seek consensus).

“coalesce around highly general rules.”<sup>343</sup> Dynamic amendments are hard to come by, even when there is a general consensus clamoring for change.<sup>344</sup> When the Advisory Committee does decide to take action to amend the Rules, amendments that make their way through the rulemaking process are often so watered down as to render them ineffective, or at least insufficient to address the procedural problems that motivated the amendment in the first place.<sup>345</sup>

Critics of the formal rulemaking process viewed the Committee’s inaction on the issue of abusive filing practices and costly discovery as fitting this common mold.<sup>346</sup> These critics looked at the preferred methods of the Advisory Committee—tightening discovery rules and giving judges more discretion to take control of discovery in complex cases—and determined that they had been only modestly successful in protecting defendants from groundless claims and helping courts to check discovery abuse.<sup>347</sup> To these critics, the Court’s grant of authority to lower courts to dismiss “implausible” claims could be viewed as both effective and efficient.<sup>348</sup>

Nevertheless, efficiency should only be lauded when it produces results that are of similar quality to those produced by less efficient means. As mentioned above, the Court’s holdings have left many questions unanswered, and have caused some unanticipated

343. *Id.* at 916–17; *see also* Bone, *Who Decides?*, *supra* note 43, at 1974 (suggesting that delegating rule-interpreting discretion to the trial court judges is easier for rulemakers and causes less public controversy).

344. *See* Bone, *Who Decides?*, *supra* note 43, at 1974 (noting that it is easier for rulemakers to leave controversial procedural issues to the discretion of trial judges than to deal with them at the drafting stage).

345. *Id.*

346. *See, e.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (arguing that rulemakers’ attempts to give judges discretion to control discovery abuse have been “hollow” because judges typically cannot detect such abuse).

347. *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (reasoning that the careful case-management approach has been unsuccessful in “weed[ing] out” groundless claims); *see also* Bone, *Process of Making Process*, *supra* note 43, at 918 (arguing that a “case-management” model vests too much power in individual judges). *But see supra* note 259 (listing sources disagreeing with the Court’s conclusion that judicial case management has been unsuccessful at checking discovery abuse).

348. With two judicial opinions, separated by only twenty-four months, the Court effectively rewrote pleading standards for all civil actions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The immediate effect of *Twombly* and *Iqbal* is reflected in the sheer number of courts that began citing these cases after they were handed down by the Court. Federal courts have already cited *Twombly* over 30,000 times and *Iqbal* over 10,000 times. <http://www.westlaw.com> (follow “Citing References” hyperlink; then follow “Limit KeyCite Display” hyperlink; limit search by jurisdiction and date).

consequences.<sup>349</sup> This is not surprising because the common law has a retrospective quality, and it is much easier to explain why well-intentioned Rules may not have worked in the past than it is to fashion balanced and thoughtful solutions to problems that still exist.<sup>350</sup> On the other hand, the Advisory Committee is significantly prospective in nature, seeking to understand the effect of changes before they are made.<sup>351</sup>

Further, while some may criticize the slow pace of the formal process, this criticism represents an incomplete analysis of the rulemakers' plodding manner; the multiple-step process is better recognized "as a demonstration of the deliberation and thoughtfulness" put into formal Rules Amendments.<sup>352</sup> The rulemakers understand that even a minor change to procedure can have a significant impact on litigation and substantive outcomes.<sup>353</sup> Moreover, the two to three years that it usually takes for amendments to move through the formal process is not much longer than the time that it takes for the judicial system to resolve procedural disputes.<sup>354</sup>

The charge that formal rulemakers are incapable of passing substantial reforms is also unfounded. The Advisory Committee has taken the lead in dealing with the most prominent procedural issue in American litigation over the last decade—e-discovery.<sup>355</sup> As far back as 1999, the Advisory Committee was tuned into this emerging issue,

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349. See *supra* Part IV.C (listing the problems created by the Court's imposition of "plausibility" pleading).

350. But see Bone, *Process of Making Process*, *supra* note 43, at 949 (arguing that the common law has both prospective and retrospective elements, as does the formal rulemaking process).

351. For an explanation of the Advisory Committee's prospective nature, see *supra* note 257 and accompanying text.

352. Teter, *supra* note 79, at 160 ("Indeed, this approach is preferable to rash and ill-considered changes.").

353. Rabiej, *supra* note 78, at 392 ("The committee thoroughly examined all aspects of every proposed amendment because it understood that even a minor change in the class-action rule might have enormous consequences.").

354. For example, the district court decided *Twombly v. Bell Atlantic Corp.* in October 2003. 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *vacated and remanded*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007). It would take more than three years until the Supreme Court decided *Twombly* on May 21, 2007. 550 U.S. 544. Another two years passed before the Court issued its decision in *Iqbal* (May 18, 2009). *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

355. See generally Marcus, *supra* note 79, at 315–16 (arguing that the Advisory Committee has taken the lead in tackling the procedural issues surrounding e-discovery). The reason that e-discovery is such an important emerging issue is because evidence is now far more likely to be digital, not paper. See *id.* at 316 ("[I]t is increasingly true that business and institutional (and much personal) information is available only from electronic sources."); Moss, *supra* note 122, at 893 (noting that e-discovery accounts for perhaps as much as 90% of corporate data).

keeping “its focus on long-range discovery issues . . . in the emerging information age.”<sup>356</sup> The 2006 Amendments to the Rules provide judges ample authority to manage e-discovery,<sup>357</sup> and represent a herculean effort in the regulation of discovery in the digital age.<sup>358</sup>

## 2. The Undemocratic Nature of the Formal Rulemaking Process

In recent years, despite increased transparency in the rulemaking process and inclusion of public input, some have also criticized the democratic legitimacy of the rulemaking process because rulemakers are not politically accountable.<sup>359</sup> Of course, the politically-accountable branches of our government—the legislative and executive branches—relinquished control of the rulemaking process by passing the Rules Enabling Act, then amending and reaffirming it in the 1980s.<sup>360</sup> The wisdom of this abdication, however, has come under fire because as the boundary between procedure and substance has blurred, the case for rulemaking by technical experts, rather than legislators, has weakened.<sup>361</sup> Political controversy caused by proposed amendments often causes stakeholders in the rulemaking process—such as the plaintiffs’ bar or the corporate bar—to “push [rulemakers] aggressively

356. Niemeyer, May 1999 Memorandum, *supra* note 126, at 358. The rulemakers began addressing the issue of e-discovery before others did. Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 321 (2008).

357. Cavanagh, *supra* note 99, at 887.

358. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 25 REV. LITIG. 633, 665 (2006). The e-discovery amendments were even designed to cope with technology as it changes. *Id.*

359. Carrington, *supra* note 67, at 301 (calling the Rules Enabling Act “avowedly anti-democratic” because it gives procedure-making power to “professional technicians” who are not politically accountable); *see also* Bone, *Process of Making Process*, *supra* note 43, at 888 (“Many critics question the democratic legitimacy of what they see as a politically unaccountable process, and call for more public participation and an expanded legislative role.”).

360. *See* 28 U.S.C. § 2072 (2006) (giving the Court limited power to “prescribe general rules of practice and procedure . . . for cases in the United States district courts”).

361. *See* Bone, *Process of Making Process*, *supra* note 43, at 889 (“Many critics today reject the idea that civil process is normatively independent of substance . . .”). The line between procedure and substance has become blurred through the development of complex litigation in the areas of civil rights, mass tort, and antitrust. These types of cases often pit plaintiffs of modest or limited means against large corporations or the government, and the winner of an early procedural battle often determines the outcome in these types of cases; the goal of the corporation is to defeat the plaintiff’s claims before trial. Thus pleading, discovery, and summary judgment are important procedural stages that are likely to affect the substantive outcome. *See id.* at 909 (noting that it has long been understood that procedural rules can affect substantive outcomes). On the other hand, if a plaintiff can survive the early stages of litigation, she may be able to force a defendant to settle because risk-averse defendants are often unwilling to go to trial and “bet the company” in a jury trial. Vairo, *supra* note 114.

for rules that serve their own private interest at the expense of the public interest.”<sup>362</sup>

The advantages of leaving procedural rulemaking to “technical experts,” however, far outweigh any danger that the process has grown undemocratic.<sup>363</sup> In response to concerns about the secrecy of the formal rulemaking process in the 1960s and 1970s, Congress did not eliminate the formal rulemaking bodies or otherwise seek to return power to the legislature. Instead, Congress sought to strengthen the rulemaking process by adding layers of review and other democratic elements.<sup>364</sup> That the Advisory Committee’s deliberations are a matter of public record<sup>365</sup> and each proposed amendment is sent to over 10,000 groups and individuals for review is an indication that the formal rulemakers value public input and the democratic process.<sup>366</sup> Moreover, while there may be some concern that individuals with a personal stake in the outcome of rulemaking decisions play too big a role in the Rule-amending process, this risk seems far more tenable than allowing Congress to draft procedural rules, where the risk of special interest groups influencing legislation becomes even greater.<sup>367</sup> Finally, Congress must still sign off on any formal Rule amendments, ensuring approval of changes by a democratically-elected body.<sup>368</sup>

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362. Bone, *Making Effective Rules*, *supra* note 127, at 320.

363. The Judicial Conference was created to “provid[e] the Court the best professional advice and a variety of viewpoints.” See BROWN, *supra* note 21, at 71. The legal expertise of the Court makes it the proper body to resolve disputes over the substantive meaning and effect of laws, but this practice may induce a level of overconfidence when resolving disputes over procedure, an area in which members of the Court are less knowledgeable. See *Leading Case*, *supra* note 98, at 315 (“[T]he Court, which has a limited ability to vigorously consider the impact of procedural innovations, should stick to interpreting the Federal Rules using traditional methods of legal interpretation. If so, the Court will, at the very least, be sure it is not making things worse.”).

364. See *supra* Part II.A.2 (describing changes to the rulemaking process that increased transparency and added multiple layers of review).

365. Until the 1980s, the working papers and correspondence of the Advisory Committee were restricted from public access. See Burbank, *supra* note 67, at 1132 n.529. Today, all records of the Advisory Committee, including meeting minutes, reports, suggestions and comments submitted in response to proposed amendments, statements of witnesses, transcripts of public hearings, and other memoranda are open to the public. These materials are available at the United States Courts’ website: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx>; <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>.

366. See Rabiej, *supra* note 78, at 392 (explaining that the committee’s decision making is exhaustive and detailed and is a matter of public record).

367. See Carrington, *supra* note 67, at 301 (detailing how the legislative and executive branches of the government were substantially excluded from participating in creating the Rules Enabling Act as were the special interest groups).

368. The Court must transmit proposed Rules to Congress, and they take effect only if Congress fails to reject, modify, or defer them. See Duff, *Summary*, *supra* note 9 (citing 28

### F. Looking Forward

Changes to pleading requirements often raise policy concerns and require value judgments that are more legitimately made through an open and participatory process like the formal rulemaking process than through judicial opinions.<sup>369</sup> There is no foolproof way to balance the competing issues at stake in cases like *Twombly* and *Iqbal*; there is no way to add up the dollar value of wasted discovery costs under notice pleading and compare that figure with the dollar value of uncompensated legal wrongs imposed by a stricter pleading regime.<sup>370</sup> Yet, a transparent rulemaking process with widespread opportunity for public participation legitimizes the end result,<sup>371</sup> and the formal

U.S.C. §§ 2074–2075 (2006)).

369. See Bone, *Who Decides?*, *supra* note 43, at 2005. 28 U.S.C. § 2073(c) provides:

(1) Each meeting for the transaction of business under this chapter by any committee appointed under this section shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason for so closing the meeting. Minutes of each meeting for the transaction of business under this chapter shall be maintained by the committee and made available to the public, except that any portion of such minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting.

(2) Any meeting for the transaction of business under this chapter, by a committee appointed under this section, shall be preceded by sufficient notice to enable all interested persons to attend.

28 U.S.C. § 2073(c) (2006).

370. See Michael C. Dorf, *Should Congress Change the Standard for Dismissing a Federal Lawsuit?*, FINDLAW (July 29, 2009), <http://writ.news.findlaw.com/dorf/20090729.html> (explaining that this dollar value comparison would be very subjective, and so the question should be more ideological in nature).

371. The question of the legitimacy of the Rules following the Court’s judicial amendment presents an important and unanswered question: How will state courts respond to *Twombly* and *Iqbal*? The Rules only have force in federal courts, but one sign of the merits of the rulemaking process is the degree to which states have adopted the Rules for use in state courts. See BROWN, *supra* note 21, at v. 35. Prior to *Twombly*, “[t]wenty-six states and the District of Columbia patterned their dismissal standards on the . . . ‘no set of facts’ language from *Conley*.” Dodson, *supra* note 192, at 141. Only time will tell if plausibility pleading will also be accepted or rejected by state courts. Compare Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 347 (Ariz. 2008) (“Arizona has not revised the language or interpretation of Rule 8 in light of *Twombly*.”), McKinnon v. W. Sugar Co-Op Corp., 225 P.3d 1221, 1223 (Mont. 2010) (“A court should not dismiss a complaint 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 that would entitle him to relief.”), Colby v. Umbrella, Inc., 955 A.2d 1082, 1086–87 & n.1 (Vt. 2008) (rejecting adoption of the *Twombly* standard), McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863–64 (Wash. 2010) (rejecting the *Iqbal* and *Twombly* standard on state-law grounds), and Highmark W. Va., Inc. v. Jamie, 655 S.E.2d 509, 513 n.4 (W. Va. 2007) (declining to adopt the *Twombly* standard and citing *Conley* with approval), with Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) (adopting the *Twombly* standard), and Doe v. Bd. of Regents of Univ. of Neb., 788 N.W.2d 264, 278 (Neb. 2010) (adopting plausibility pleading as the standard in Nebraska state courts).

rulemaking process was opened to public input in the 1980s for just this purpose.<sup>372</sup> In *Twombly* and *Iqbal*, the Supreme Court ignored this reality and circumvented the statutorily-established process for amending the Federal Rules.<sup>373</sup> Rather than deferring to the Advisory Committee, Standing Committee, Judicial Conference, and ultimately Congress, the Court decided instead to amend Rule 8(a) with a stroke of the pen.

If the Court was convinced that heightened pleading was the proper solution to the perceived problems with notice pleading and liberal discovery, it could have (like any other legal actor) proposed an amendment to the Rules and allowed the formal rulemaking process to determine the relative benefits and risks associated with such a change.<sup>374</sup> An even more forceful approach would have been to use its opinion in *Twombly* or *Iqbal* to suggest that formal rulemakers adopt a heightened pleading standard; such a proposal or suggestion, signed by a majority of the Court, likely would have carried great weight with the Advisory Committee.<sup>375</sup> This type of strong encouragement would not have gone unnoticed by rulemakers who, when urged to act, can move relatively quickly to make dramatic changes to the Rules.<sup>376</sup> This is

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372. See Moore, *supra* note 43, at 1063 (stating that notice and openness were added to ensure opportunity for the public to participate in the rulemaking process—something that had been lacking in the past); see also *supra* note 85 and accompanying text (describing congressional attempts to increase the transparency of the rulemaking process in an effort to increase both public notice and the quality of the Rules).

373. See Josephson, *supra* note 99, at 900 (discussing the “unique” nature of the Court’s refusal to defer to Congress and the formal rulemaking process as it had in *Swierkiewicz* and *Leatherman*). These decisions simply do not comport with the Court’s precedents, with the text of Rules 8 and 9, or with the formalities of the rulemaking process. Cf. Professors’ Brief, *supra* note 197, at 1 (advocating an approach to pleading practice that complies with the text of the Rules, and implying that the Court’s interpretation in *Twombly* strays from that interpretation); *supra* note 230 (noting that nothing in the language of Rule 8(a) provides support for the Court’s interpretation of it). While it is true that the Supreme Court ultimately must approve changes that come out of the formal rulemaking process, the process itself is important because “the public has an opportunity to weigh in on the changes.” Vairo, *supra* note 114.

374. Anyone, including the Court or specific justices, can suggest an amendment to the Rules. See Struve, *supra* note 16, at 1129–30 (stating that the Court can suggest changes to the Rules just like any other entity—within the rulemaking structure); see also *supra* note 82 (explaining that anyone can suggest a new Rule to the Advisory Committee). It seems obvious that a change suggested by a sitting Supreme Court Justice would carry great weight with the Advisory Committee.

375. The Court could have affirmed the Second Circuit’s holdings as dictated by the precedent of *Swierkiewicz* and *Leatherman*—and the established meaning of Rule 8(a)—but clearly stated its belief that it was time to impose heightened pleading in more situations than had previously been allowed under Rule 9(b). Or the Court could have used *Twombly* “to suggest that the [Advisory Committee] study whether a [general] heightened pleading standard would prove beneficial.” *Leading Case*, *supra* note 98, at 310.

376. See *supra* notes 131–33, 352–58, and accompanying text (explaining the Advisory

why the Court's decision in *Iqbal* was especially egregious: rather than allowing the formal process to work through the issues,<sup>377</sup> the Court waited less than two years to forcefully declare that its plausibility pleading standard was a necessary fix in "all civil actions."<sup>378</sup>

*Twombly* and *Iqbal* certainly have their critics, many of whom argue that a return to notice pleading is imperative to the fair administration of justice.<sup>379</sup> This could only immediately be accomplished by congressional action, and at least one Senator has already proposed legislation to overturn the Court's decisions.<sup>380</sup> While the sentiment behind these complaints and legislation is commendable, it ignores the potential advantages of heightened screening that have already been discussed.<sup>381</sup> Furthermore, an immediate and rash return to notice pleading would exhibit the same procedural flaws as the Court's actions because it would disregard the important advantages provided by formal amendment.

For the foreseeable future, plaintiffs hoping to gain relief in federal courts will have to plead facts sufficient to pass the test imposed by *Twombly* and *Iqbal*.<sup>382</sup> Before *Twombly* and *Iqbal*, the case that federal courts cited when deciding a defendant's motion to dismiss was *Conley*;

Committee's efforts to amend traditional discovery Rules and establish a new procedural framework for the fast-approaching era of e-discovery). In fact, "[t]he [formal rulemaking] process . . . may be expedited when there is an urgent need to amend the [R]ules." Duff, *Summary*, *supra* note 9.

377. See *supra* notes 200–05 and accompanying text (describing the Advisory Committee's reaction to *Twombly* and its immediate efforts to determine if any Rule amendments would be needed in response to the Court's decision).

378. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

379. Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 2.

380. In the months following *Iqbal*, Senator Arlen Specter of Pennsylvania proposed legislation to overturn *Twombly* and *Iqbal* and force courts to apply the "no set of facts" language from *Conley* when considering a defendant's 12(b)(6) motion to dismiss. *Id.* at 2 & n.4. Significantly, Specter's Notice Pleading Restoration Act, while seeking to overturn the Court's decisions, defers to the formal rulemaking process: "Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." S. 1504, 111th Cong. § 2 (2009). Professor Bone has called Specter's proposed legislation "a knee-jerk and rather crude" response to plausibility pleading because it fails to consider the "legitimate screening concerns addressed by *Twombly*." Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 38.

381. Bone, *Plausibility Pleading Revisited*, *supra* note 34, at 38; see also *supra* note 347 and accompanying text (explaining that some critics believed the Advisory Committee's failure to impose some sort of heightened pleading left defendants vulnerable to discovery abuse).

382. See Mauro, *supra* note 219 (noting that "*Iqbal* motions" to dismiss have already become commonplace in federal courts).

now, it will most likely be *Iqbal*.<sup>383</sup> The Advisory Committee, which is generally deferential to the Court, is unlikely to immediately act to change such important Court precedent.<sup>384</sup> The Committee instead will likely take time to analyze the effect of these Court decisions and determine if some greater changes to the Rules are necessary. The Committee will probably gather comments from practitioners about the day-to-day effect of *Twombly* and *Iqbal* and weigh any complaints against the benefits that may have been gained.<sup>385</sup> If changes to pleading requirements are made by the Advisory Committee, it will not happen immediately.<sup>386</sup>

Nevertheless, in the wake of the Court's actions, rulemakers should continue to address other procedural Rules affecting court access and discovery and immediately begin to determine if further clarification or

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383. See Jess Bravin, *New Look at Election Spending Looms in September*, WALL ST. J., at A8 (July 2, 2009) (quoting an attorney who predicts that *Iqbal* will “be the most cited Supreme Court case in a decade”).

384. See Dec. 2007 Report, *supra* note 200, at 12 (noting that nothing will immediately be done to draft a new pleading standard following *Twombly*). As mentioned above, the Court may refuse to promulgate any proposed amendments that would alter the plausibility pleading standard established in *Twombly* and *Iqbal*. See *supra* note 247 (presenting the argument that Court-imposed amendments to the pleading standard undermine the rulemaking process, but noting that the Court held veto power over all proposed Rules regardless).

385. See Dec. 2008 Report, *supra* note 203, at 7 (explaining that, following *Twombly*, the Advisory Committee will begin researching whether future changes to pleading are needed, but there could always be a conclusion that no reforms will be needed until 2020). In May 2010, the Committee held a major conference focusing on access, fairness, cost, and delay in civil litigation in federal courts. The goal of the conference was to build on the successful 1976 Roscoe Pound Conference and the 1997 Boston College of Law Conference on Discovery. *May Conference to Be First of Its Kind to Look at Civil Litigation in Federal Courts*, USCOURTS.GOV (Apr. 12, 2010) [http://www.uscourts.gov/News/NewsView/10-04-12/May\\_Conference\\_to\\_Be\\_First\\_of\\_Its\\_Kind\\_to\\_Look\\_at\\_Civil\\_Litigation\\_in\\_Federal\\_Courts.aspx](http://www.uscourts.gov/News/NewsView/10-04-12/May_Conference_to_Be_First_of_Its_Kind_to_Look_at_Civil_Litigation_in_Federal_Courts.aspx). The conference was exemplary of the open and inclusive process of the formal rulemaking process, as over 200 representatives from the judiciary, practicing bar, academia, research institutions, and the business community attended. UNIV. OF DENVER INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF 2010 CONFERENCE ON CIVIL LITIGATION AT DUKE LAW SCHOOL 1 (2010), <http://www.du.edu/legalinstitute/pdf/DukeConference.pdf>.

The 2010 Conference was an extraordinary undertaking in which the decision-makers of the federal civil rules process reached out to hear from the users of that system about areas of needed improvement. They approached the conference with an open-minded willingness to explore the depth of any problems and the shape of any solutions. Participants presented creative, thoughtful, and well-organized ideas.

*Id.* at 3.

386. See Report of the Civil Rules Advisory Comm. from Hon. Mark H. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 2–4 (May. 17, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf> (explaining that although the Advisory Committee has begun to study the effect of *Twombly* and *Iqbal* and to consider possible Rule amendments, no “clear sense of direction” has emerged).

improvement may be necessary.<sup>387</sup> For example, the Advisory Committee could amend Rule 12(e) and make it a mandatory first option to be used before a defendant can file a Rule 12(b)(6) motion to dismiss.<sup>388</sup> Such a revision would allow plaintiffs who are initially unable to draft a sufficient complaint multiple chances to plead enough facts to satisfy the plausibility standard.<sup>389</sup> Rulemakers may also decide that some changes need to be made to Form 11 to honor Rule 84.<sup>390</sup>

Even as the Advisory Committee analyzes the effects of *Twombly* and *Iqbal*, the Court will likely be asked to interpret other Federal Rules.<sup>391</sup> When this happens, this Note suggests merely that the Court reaffirm what had previously been its long-standing position: the Court has no power to rewrite the Rules through judicial amendment.<sup>392</sup>

## V. CONCLUSION

Until 2007, Rule 8(a) had stood for notice pleading and resolution of a case on its merits.<sup>393</sup> In *Twombly* and *Iqbal*, the Court modified this Rule and “threw out [complaints] that would have been deemed sufficient earlier.”<sup>394</sup> In doing so, the Court established two new requirements under the Rules: first, judges do not have to accept so-called “legal conclusions” in a plaintiff’s complaint; and second, only a complaint that states a plausible claim for relief can survive a 12(b)(6)

387. See *supra* notes 268–69 and accompanying text for a list of some of the remedies that would be available to the Advisory Committee.

388. See *supra* note 272; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 590 n.9 (2007) (Stevens, J., dissenting) (“The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definitive statement.”).

389. See *supra* note 272 (explaining a Rule 12(e) motion for a more definitive statement).

390. See *supra* notes 287–89 (noting the apparent conflict created by *Iqbal* with respect to Form 11 and Rule 84).

391. For example, Wal-Mart has filed a petition for certiorari in a case that would require the Court to interpret and apply Rule 23. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010) (en banc) (upholding, in a sharply divided 6–5 opinion, the district court’s decision that partially granted plaintiff’s motion for class certification); Petition for Certiorari, *Dukes*, 603 F.3d 571 (No. 10-277).

392. *Harris v. Nelson*, 394 U.S. 286, 298 (1969). The public input and democratic process of the formal rulemaking process should “constrain any subsequent interpretation of the rules” because “the terms of delegation [in the Rules Enabling Act] make clear that alterations to the Rules should undergo the [specified process], rather than taking effect through judicial fiat in the course of litigation.” Struve, *supra* note 16, at 1102.

393. See *supra* Part II.B (recalling that Rule 8(a) and notice pleading were key components of the Rules as originally drafted and were meant to support the ultimate goal of resolution of cases on the merits).

394. *Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment v. Union Pac. R.R. Co.*, 537 F.3d 789, 791 (7th Cir. 2008).

motion to dismiss.<sup>395</sup> Despite the Court's valid concerns about the burdens placed on corporate and government defendants under the Rules, the Court was not the proper body to dramatically alter pleading requirements; these changes should have been made, if at all, through the congressionally-established process for amending the Rules.<sup>396</sup> The goal of this Note is simply to encourage the Court to respect that process.

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395. LITIG. LAWFLASH, *supra* note 278, at 2.

396. *See supra* Part IV.