PLEADING AND THE DILEMMAS OF "GENERAL RULES"

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Abstract

This article comments on Professor Geoffrey Miller's article about pleading under *Tellabs* and goes on (1) to use *Tellabs*, *Bell Atlantic Corp*. v *Twombly*, and *Iqbal v. Hasty* (in which the Court has granted review) to illustrate the limits of, and costs created by, certain foundational assumptions and operating principles that are associated with the Rules Enabling Act's requirement of "general rules," and (2) more generally, to illustrate the costs of the complex procedural system that we have created. Thus, for instance, the argument that the standards emerging from *Twombly* should be confined to antitrust conspiracy cases confronts the foundational assumptions that the Federal Rules are trans-substantive and that they cannot be amended by judicial interpretation. Similarly, in *Iqbal*, the Government presumably denies that it is calling for the imposition of a heightened fact pleading requirement in cases involving high government officials entitled to an immunity defense because the Court seems to have made it impossible for the judiciary openly to impose such a requirement other than through "The Enabling Act Process." The Court may, however, take a different view of the appropriate contextual plausibility judgment than did the lower court in *Iqbal*. If so, however, the Court would thereby confirm the view that *Twombly* is an invitation to the lower courts to make ad hoc decisions reflecting buried policy choices. I therefore argue that, if the Court is persuaded that the changes already made to pleading jurisprudence are insufficient to accommodate the needs of the immunity defense, it should forthrightly require fact pleading as a matter of substantive federal common law.

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INTRODUCTION

Professor Geoffrey Miller's paper on pleading under the Private

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Securities Litigation Reform Act of 1995 (PSLRA) after *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[1] is both interesting and useful, and I agree with almost all of it.[2] In this contribution to the Symposium, I will first discuss the few matters about which Professor Miller and I apparently disagree. I will then use the occasion of commenting on Miller's paper as an opportunity to attach a large tail to a small dog by turning to the broader landscape of pleading, and arguing that *Tellabs*, another recent pleading decision of the Supreme Court of the United States, *Bell Atlantic Corp. v. Twombly*,[3] and a case soon to be decided, *Iqbal v. Hasty*,[4] illustrate costs of, and constraints imposed by, some of the foundational assumptions and operating principles of modern American procedure.

The foundational assumptions I discuss are the notions that (1) the "general rules" required by the 1934 Rules Enabling Act[5] should be not only uniformly applicable in all federal district courts, but uniformly applicable in all types of cases (transsubstantive); (2) judicial discretion should be preferred to formalism in the creation of such general rules; and (3) once made through "The Enabling Act Process," these general rules can only be changed through that process (or by legislation).

The operating principles I discuss are (1) the view that general rules should be not only transsubstantive but also, as it were, transprocedural, and accordingly that different rules should not (usually) be written for cases having different procedural needs; and (2) the operating principle that has translated the preference for judicial discretion into a preference for judicial power, resulting in the position that legislative procedure is illegitimate.

The PSLRA's ambiguities explored by Miller resulted from a democratic process that is acknowledged as appropriate for the creation of policy on important social issues, such as the issues that are implicated when a system chooses pleading rules. Whether or not the choices in the provision considered in *Tellabs* are wise, they are confined

1. 127 S. Ct. 2499 (2007).

2. *See* Geoffrey P. Miller, *Pleading After* Tellabs, 2009 WISC. L. REV. ___.

3. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

4. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008).

5. *See* Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. As currently codified, the relevant language is:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

28 U.S.C. § 2072(a) (2006).

to cases brought under the PSLRA. And if the policy choices it reflects are buried, the concern is democratic accountability in the weak sense of lawmakers taking responsibility for their actions.

The Federal Rules of Civil Procedure ("Federal Rules") at issue in *Twombly*, by contrast, resulted from a process that is *not* acknowledged as appropriate for the creation of policy on important social issues. If the policy choices they make are buried, the concern may be democratic accountability in both the weak sense and in the strong sense of separation of powers.

The argument (made by some lower courts and scholars) that the standards emerging from *Twombly* should, and can, be confined to antitrust conspiracy cases confronts the foundational assumptions that the Federal Rules are transsubstantive and cannot be amended by judicial interpretation. Moreover—taking the view that those standards do, in fact, represent a change through judicial interpretation—the Supreme Court acting as such under Article III is ill equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings, even in the antitrust context. Individual litigation under Article III is even more obviously inadequate for the policy choices implicated in considering standards for the adequacy of pleadings on a transsubstantive basis.

The Court has an opportunity to clarify the meaning and scope of its *Twombly* standards in *Iqbal*, but it is difficult to imagine what the Court could do, other than affirm, without exacerbating confusion about pleading standards. Yet, both the facts that the Court granted certiorari and that *Iqbal* involves the interplay of pleading and the federal common law of official immunity prompt concern that reversal is likely. The question becomes how that could be accomplished with minimum collateral damage. I argue that, if the Court is persuaded that the changes already made to pleading jurisprudence are insufficient to accommodate the needs of the immunity defense, it should forthrightly require fact pleading as a matter of substantive federal common law.

These three cases thus illustrate the limits of, and costs created by, foundational assumptions and operating principles imputed to, or entailed in, the concept of general rules. I conclude with reflections about one particular aspect of modern American procedure that has always seemed to me perhaps the most serious such cost: its complexity.

It is well and good to defend a choice of judicial discretion over formalism as the price of procedural justice. That argument is not available, however, for the defense of the operating principle that refuses to contemplate separate general rules for simple cases. One might regard that choice as akin to the amount-in-controversy requirement in the

diversity statute, a necessary defense against the consumption of a scarce resource by everyday cases of no importance. The comparison does not work, in part because the cases in question by hypothesis meet any jurisdictional requirement, and more importantly because the argument reflects a buried policy choice afflicted with defects in democratic accountability. Moreover, awareness that many states have followed the model of the Federal Rules suggests that the ultimate cost of crafting the general rules for complex cases may be closing this country's courts to those with everyday disputes.

I. ASSESSING THE ADEQUACY OF COMPLAINTS ALLEGING SCIENTER AFTER *TELLABS*: TWO TESTS OR ONE?

Professor Miller's analysis of the proper approach to assessing the adequacy of securities-fraud complaints after *Tellabs* is rigorous and sophisticated, and what he has to say is illuminating even if one disagrees, as I do, with the analytical architecture that he attributes to the Court. The statutory language in question provides that "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [scienter]."[6] The *Tellabs* Court's interpretation of *strong inference* was that "an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference."[7]

I join Professor Miller in rejecting any interpretation of the Court's opinion that would give trumping force to a cogency requirement by interpreting it as more demanding than "the requirement of comparative inferential strength,"[8] although Miller acknowledges that Judge Richard Posner's opinion on remand in *Tellabs* need not be read to do that.[9] My disagreement concerns the anterior question whether the Court in fact intended to prescribe two tests for the adequacy of the particularized pleadings on scienter that the PSLRA requires. Justice Ruth Bader Ginsburg's opinion is hardly a model of precision or consistency in the use of language. On the view I take of it, that opinion well illustrates what lexicographer H. W. Fowler called "elegant variation," a vice of those "intent rather on expressing themselves prettily than on conveying

6. 15 U.S.C. § 78u-4(b)(2) (2006).

7. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504–05 (2007).

8. Miller, *supra* note 2, at 105.

9. *See Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008); Miller, *supra* note 2, at 109 n.18.

their meaning clearly."[10] For it appears to me that the Court regards the adjective *cogent* as a synonym of *strong* (the word used in the PSLRA), as also of *compelling*. In other words, "cogent and at least as compelling as any plausible opposing inference" is an example of lawyers' penchant not just for "elegant variation" but for elegant redundancy, akin to "arbitrary and capricious."

The Court tells us that one cannot determine whether an inference is strong without comparing it to other inferences.[11] Since "strong inference" is the statutory standard, this raises the question why a comparative inquiry alone is not sufficient. If the inference of scienter emerging from that inquiry is at least as strong (or compelling) as any inference of nonscienter, then it is a strong inference as required by the PSLRA. Judge Posner, who may have led Professor Miller down a path to nowhere, acknowledged, "It is easier to consider the second, the comparative, question first."[12] Indeed it is, because if (1) *cogent* means *strong*, and (2) whether an inference is strong can only be determined through a comparative exercise, answering the second question will always answer the first.

Unlike Professor Miller, in other words, I do not believe that the Court intended by the use of *cogent* to establish "a baseline of plausibility that an inference of scienter must meet in order to meet the *Tellabs* standard."[13] To be sure, Miller has been able to imagine a situation in which an inference that qualified as *strong* under the Court's required comparative analysis might not be deemed plausible under a particular view of what plausibility requires, because, although as strong as any competing inference, it is not "strong compared with the competing inferences taken together."[14] At the least, however, bringing plausibility on to the stage for this purpose is unfortunate because, in rejecting the view that the PSLRA requires only a plausible inference of scienter, the Court equated *plausible* with *reasonable*.[15] Further, it is difficult to square Miller's advocacy of two tests with the view (which I share) that "[t]he proper test, in the majority's view, is that the plaintiff wins in the event the competing inferences are equally strong."[16]

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10. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 130 (1926).

11. *See Tellabs*, 127 S. Ct. at 2510 ("The strength of an inference cannot be decided in a vacuum. The inquiry is inherently comparative: How likely is it that one conclusion, as compared to others, follows from the underlying facts?").

12. *Makor*, 513 F.3d at 707.

13. Miller, *supra* note 2, at 106.

14. *Id.*

15. *See Tellabs*, 127 S. Ct. at 2504–05 ("[A]n inference of scienter must be more than merely plausible or reasonable . . . .").

16. Miller, *supra* note 2, at 105; *see id.* at 126 ("[T]here is no deference accorded to inferences of scienter aside from the stipulation that a tie goes to the

Miller describes his putative discrete cogency requirement as "much less complex," and, contrary to Judge Posner on remand in *Tellabs*,[17] urges courts to address it "before investigating comparative inferential strength."[18] In truth, he is advocating two comparative exercises. For, as Judge Posner observed, "The plausibility of an explanation depends on the plausibility of the alternative explanations."[19] Miller admits as much when he states, "The court merely needs to evaluate the strength of a single inference—that of scienter—and to compare this against an absolute baseline of inferential strength."[20] Even if the two comparative exercises Miller imputes to *Tellabs* are not doomed to redundancy, his survey of the content that could be given to such an absolute baseline is likely to inspire fear and loathing in anyone who understands the threat that legal indeterminacy about the freedom of judges to police inferences presents to policies underlying both the substantive law and the Seventh Amendment.[21] And what is the point if, as Miller appears to conclude, the absolute baseline should be set at a point where, predictably, an inference satisfying the requirement will often not be as strong as "competing inferences taken together"?[22] That, after all, is the situation with which his putative discrete cogency requirement is supposed to

plaintiff."). In rejecting a "super comparative strength standard,"*id.* at 108, as the baseline for his putative discrete cogency requirement, Professor Miller observes that it "would nullify the requirement of comparative inferential strength as an independent factor, notwithstanding the clear emphasis in the *Tellabs* opinion on the importance of this analysis." *Id.* Indeed it would. Because the comparative analysis alone engaged the Court's attention, it seems unlikely that the Justices intended to smuggle another requirement through, here, the front door ("cogent and at least as compelling as any opposing inference").

17. *See Makor*, 513 F.3d at 707; *supra* text accompanying note 11.

18. Miller, *supra* note 2, at 108.

19. *Makor*, 513 F.3d at 711.

20. *See* Miller, *supra* note 2, at [109]. The notion that one can evaluate the strength of an inference—determine where it falls on the baseline—without first (or, apart from) making the comparison Professor Miller calls for neglects Judge Posner's reminder. *See supra* text accompanying note 19.

21. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPERICAL LEGAL STUD. 591, 623 (2004) (contending that neither the Seventh Amendment, as interpreted, nor the Supreme Court's 1985–86 summary-judgment trilogy provides much protection against "a court that, for whatever reason, has an expansive definition of chaff and hence is impatient with the pleas of a litigant to continue with an apparently weak case").

22. Miller, *supra* note 2, at [106]. Professor Miller apparently favors an "intermediate standard" that (in his example) posits a 20 percent probability for the inference of scienter, and three competing inferences not implicating scienter with probabilities of 25 percent, 25 percent, and 30 percent, respectively. *See* Miller, *supra* note 2, at 108. Although the example does indeed "illustrat[e] that the two tests can be applied independently of one another," *id.* at 108, it also illustrates why the discrete cogency requirement he champions would usually not do the work that supposedly justifies its existence.

deal. Thus, it is no surprise that this putative requirement is nowhere to be seen in the last two thirds of Professor Miller's article, where he very valuably explores the process of inference in typical scenarios presented by securities-fraud cases.[23]

II. FOUNDATIONAL ASSUMPTIONS AND OPERATING PRINCIPLES

One of the foundational assumptions of modern American procedure is that the Rules Enabling Act's reference to "general rules"[24] forecloses the promulgation of different prospective rules for cases that involve different bodies of substantive law. The Advisory Committee that the Supreme Court appointed in 1935 discussed the meaning of that phrase at its first meeting.[25] The focus of the discussion was whether, as one of its members had contended in a remarkable piece of revisionist history published the year before,[26] the Enabling Act could be read to accommodate different rules on the same subject (e.g., discovery) for the district courts in different states—in other words, conformity to state law as under the Conformity Act of 1872.[27] Firmly (and correctly) rejecting this position,[28] the Advisory Committee seems simply to have assumed that its interpretation of general rules in that respect entrained the

23. *See id.* at [109–27].

24. *See supra* n. 5.

25. Summary of Proceedings of the First Meeting of the Advisory Committee, held in the Federal Building at Chicago, June 20, 1935, microformed on Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988, No. CI-103-30, at 6-7 (Cong. Info. Serv.) [hereinafter Summary of Proceedings] ("The first matter considered was the meaning of the term *general rules* as used in the statute, and whether the statute contemplates that all rules promulgated shall operate uniformly in all the districts, or whether the Court may promulgate some rules for some districts and other rules for other districts. In this connection the discussion covered the question of conformity between state and federal practice. After full discussion, it was the unanimous opinion of those present that the statute contemplates that in sofar as unified rules are promulgated they must operate uniformly in all the districts . . . .").

26. *See* Edson R. Sunderland, *The Grant of Rulemaking Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1128 (1934); *see also*, Edson R. Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A. J. 404, 405 (1935). The *Michigan* article almost cost its author a seat on the Advisory Committee, and Charles Clark used it to advance his own interest in becoming the Reporter. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1135–36 (1982) (discussing Sunderland's revisionist articles, the discussion at the Advisory Committee's first meeting, and Clark's maneuvering).

27. Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197. Sunderland could not attend this meeting. *See* Summary of Proceedings, *supra* note [25], at 1..

28. *See id.* at 7..

additional requirement that rules promulgated under the Enabling Act be not only geographically uniform but transsubstantive.[29]

The meaning of the Enabling Act aside, the normative question whether we are well served today by a rule-making enterprise that continues to frame rules and amendments for all cases filed in federal district court, no matter what the source or content of the substantive law, has been a subject of vigorous discussion and debate in the literature.[30] Defenders of this foundational assumption have, by and large, ignored the fact that those questioning it are not calling for wholly different procedural regimes for different bodies of substantive law.[31] The call in this respect has been for consideration of altering only discrete Federal Rules, or portions thereof, that do not satisfactorily implement the policies underlying a body of substantive law or a particular scheme of substantive rights, with all other Federal Rules remaining applicable.[32]

29. *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 713–14 n.140 (1988) [hereinafter Burbank, *Of Rules and Discretion*] ("The question whether uniformity necessarily entails trans-substantivity was not addressed probably because it was assumed."); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1935 (1989) [hereinafter Burbank, *Transformation*] (noting lack of support for that position in legislative history of the 1934 Act or in the long history preceding its enactment); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 956–61 (1987); *id.* at 995–96 ("Such an integration of procedure and substance, however, would have required a degree of technicality, categorization, and definition that was at odds with the simplicity and uniformity themes the proponents had developed to propel their reform."). As Professor Bone maintains, the view then obtaining that procedure was independent of substantive law "implied that procedural rules could and should be general in nature and 'trans-substantive.'" Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324 (2008).

30. *See, e.g.*, Burbank, *Of Rules and Discretion, supra* note 29 (criticizing insistence on transsubstantivity); Paul A. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) (defending transsubstantivity); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Federal Rules*, 84 YALE L.J. 718, 731 (1975); Subrin, *supra* note 29. Recently, Professor Bone has asserted that "we must bury, once and for all, the thoroughly misguided idea that transsubstantivity is an independent value or ideal for the Federal Rules." Bone, *supra* note 29, at 333.

31. *See, e.g.*, Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989) ("This critique contemplates separate sets of rule for civil rights cases, antitrust cases, routine automobile cases, and so on.").

32. *See* Burbank, *Of Rules and Discretion*, *supra* note 29, at 716–17 (noting the existence of RICO standing orders and asking, "[W]hy should we not have uniform rules that govern such cases, and those like them, *in the respects in which they are deemed atypical*, either because of their procedural requirements or the requirements of the substantive law?"); *see also* Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery*

Notwithstanding this discussion and debate, and notwithstanding dramatic evidence of the costs of transsubstantive procedure furnished by, for example, the modern class action under Rule 23 as amended in 1966,[33] transsubstantivity has remained a foundational assumption for all subsequent advisory committees. An important reason may be that departures from it raise questions of institutional power and legitimacy.[34]

Another foundational assumption of modern American procedure is that judicial discretion is to be preferred to formalism (defined as a preference for rules having substantial determinative content).[35] This is also an operating principle entailed by the first foundational assumption, that is, by the supposed attributes of general rules. For rules of the scope required by the traditional interpretation of that term, formalism is hopeless.[36] In any event, viewed either as a normative preference or as a practical necessity, this characteristic of modern American procedure is hardly surprising when one considers that the chief architects of the original 1938 Federal Rules were steeped in knowledge of the costs of inflexibility associated with common law and code procedure, infatuated with the flexibility of equity (to the point of ignoring its costs), and

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Reform and the Case for Selective Substance-Specific Procedure, 46 FLA. L. REV.27 (1994)..

> No one I know is suggesting a return to the forms of action or a wholesale rejection of transsubstantive procedure. Some of us, however, are suggesting that it is time both to face facts (in particular the fact that uniformity and transsubstantivity rhetoric are a sham) and to find out the facts (in particular the facts about discretionary justice). A "veil of ignorance" may be an apt metaphor to describe federal rulemaking to date. It is not, I contend, an appropriate normative posture for the rulemakers of the future.

Burbank, *Transformation, supra* note 29, at 1940–41; *see* Bone, *supra* note 29, at 333–34; *id*. at 334 ("[The o]ptimal level of generality should be determined not by reference to some trans-substantive ideal, but by balancing the costs and benefits of general versus specific rules.").

33. *See, e.g.*, Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1927–31 (2006) (discussing the problem of inefficient overenforcement posed by small-claims class-action lawsuits under Federal Rule 23).

34. *See infra* text accompanying notes 108 & 116.

35. GEOFFREY C. HAZARD, JR., RESEARCH IN CIVIL PROCEDURE 9 (1963) ("[A] rule, to have cognitive and normative significance as such, must have an important degree of determinative content to the group to whom it is addressed.").

36. *See* Burbank, *Transformation*, *supra* note 29, at 1940–41 ("[U]niformity and trans-substantivity rhetoric are a sham."); Burbank, *Of Rules and Discretion*, *supra* note 29, at 715 ("Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense.").

thoroughly versed in both the ethos of progressive regulation and the lessons of legal realism.[37]

Another operating principle, related to, but not required by, the foundational assumption concerning general rules, is that different rules should not (usually) be written for cases having different procedural needs, as for instance to establish different procedural tracks.[38] Whether this (as it were) transprocedural impulse has been thought a necessary (or useful) protection for transsubstantivity or for the discretion of the individual district-court judge, it was in any event sufficiently strong to prevent any district court from effectively responding to a congressional call for experimentation with procedural tracking in 1990.[39] When one considers that the federal courts are effectively inaccessible to many whose claims satisfy the amount-in-controversy requirement of the diversity statute,[40] it does not seem far-fetched to believe that, like that requirement itself, this transprocedural impulse has been useful to ensure that the business of the federal courts is business.[41]

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37. *See* Subrin, *supra* note 29, *passim*; *see also* Burbank, *supra* note 21, at 597–98 & n.20 (discussing ties of the two chief architects of the Federal Rules to the Progressive and Legal Realism movements). For another view of "the Progressive drive for procedural uniformity," see Kenneth W. Graham, Jr. *The Persistence of Progressive Proceduralism* (reviewing JULIUS LEVINE, DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS (1982)), 61 TEX. L. REV. 929 (1983). Professor Graham attributes its embrace by academics to

> [their] unconscious understanding that lack of uniformity is a threat to the claim that procedure is a value-free science. If there is more than one scientifically valid way to litigate, then the choice of one or the other procedural system must be based on values; in other words, the selection of one mode of proceeding over another is a political choice.

Id. at 945.

38. For a limited exception, see FED. R. CIV. P. 26(a)(1)(B) (exempting eight categories of cases from initial disclosure requirement).

39. *See* JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 11–13 (1996); *id.* at 12 ("The consequence was that almost all general civil cases to which CJRA procedural principles might be relevant were placed in the standard track, if any tracking assignment was made.").

40. *See* GREGORY P. JOSEPH, FEDERAL LITIGATION – WHERE DID IT GO OFF TRACK? (2008), *available at* http://www.josephnyc.com/articles/viewarticle.php?53 ("Twenty-five years ago, on January 1, 1983, it cost parties roughly the same to litigate in state and federal court. Plaintiffs chose federal court sometimes for expansive discovery or to get a good judge, even though state court was an available alternative and additur impermissible in federal court. Today, plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues."); *see also* Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 JUDICATURE 163 (2008); *infra* text accompanying notes 118–120.

41. *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 256 (1992) ("[T]he Justices generally if implicitly believed that they should maintain federal jurisdiction over

Finally, again not logically entailed (by the foundational assumption that judicial discretion is to be preferred to formalism) but institutionally convenient, is an operating principle that translates that preference into a preference for judicial power and, under the cover of the Enabling Act Process, paints statutory procedure as illegitimate, even when crafted for territory outside of the supposed boundaries of that process (because substance-specific). It is quite literally astonishing that the institutional federal judiciary has repeatedly objected when Congress has proposed to do what the rulemakers contend they cannot do, namely, fashion a particular procedural rule for a particular substantive context thought to require a departure from the Federal Rules. One of the occasions for such objections was the consideration of bills that became the PSLRA.[42] As I have previously observed:

> [B]ehind the judiciary's objections there may, therefore, lie either a claim that the Federal Rules represent the best accommodation of procedural values, and the best effectuation of substantive values, for every type of case in federal court, or a claim that the costs to such values are outweighed by the benefits of formally uniform procedure.[43]

Or again:

> [F]or those many matters where the Federal Rules make no choices, leaving the procedure/substance accommodation to discretionary decisionmaking, the claim must be that Congress's substantive agenda is *always* better served by

issues and interests that they regarded as having national importance."); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1533 (2008) (suggesting that supposed need to deal with overlapping class-action lawsuits "may provide cover to those among CAFA's supporters, in and out of Congress, who do not wish to be associated with the notion that the business of the federal courts is business").

42. *See* Burbank, *Role of Congress*, *supra* note 29, at 1702, 1729, 1731 (discussing the judiciary's opposition to various congressional bills containing procedural provisions, including bills that led to the PSLRA).

43. *Id.* at 1731. *Formally uniform* as used here refers not to formalism, but to the fact that the Federal Rules are largely uniform only in appearance, not in fact. *See supra* note 36. I also noted:

> An objection that invokes "The Enabling Act Process" may simply (albeit fecklessly) signal the judiciary's concern that, given the circumstances in which so much contemporary legislation is enacted, described above, statutory procedure is unlikely to be well made, viewed either discretely or as part of the larger procedural landscape in which it will repose.

Id.

> trusting to the discretion of federal judges and thus abjuring the potentially potent technique of using procedure to drive, or to mask, substance.[44]

III. PLEADING AND THE DILEMMAS OF "GENERAL RULES"

Professor Miller quotes Judge Posner's observation that, "To judges raised on notice pleading, the idea of drawing a 'strong inference' from factual allegations is mysterious."[45] Until quite recently, much of Miller's paper might have induced cognitive dissonance in those who practice, or are otherwise concerned with, pleading in the federal courts. But times have changed, and pleading's new—or, more precisely, renewed[46]—prominence in the procedural landscape is hardly confined to cases brought under the PSLRA. Indeed, many of Professor Miller's observations about the post-*Tellabs* world of pleading and Rule 12(b)(6) motions to dismiss in cases governed by the PSLRA may be applicable more generally as a result of another Supreme Court pleading decision during the October Term 2006, *Bell Atlantic Corp. v. Twombly*.[47]

In *Twombly*, the Court reinstated the dismissal under Rule 12(b)(6) of an antitrust-conspiracy complaint brought under section 1 of the Sherman Act against the regional telecommunications-service providers remaining after the breakup of AT&T. The plaintiffs alleged two different types of anticompetitive parallel conduct, the first reflecting a conspiracy to prevent competitors from entering the defendants' existing service areas, and the second a conspiracy to ensure that the defendants did not compete in each other's service areas. The plaintiffs inferred the latter conspiracy from the companies' "failure meaningfully [to] pursu[e] attractive business opportunities," and from a statement by Qwest's CEO that such competition might be profitable.[48] In reversing a panel of the United States Court of Appeals for the Second Circuit, the Court abrogated the long-standing standard of *Conley v. Gibson*[49] that "a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to

44. *Id.* at 1731–32.

45. Miller, *supra* note 2, at [103] n.10 (quoting *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir. 2008)).

46. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1975–77 (2007) (Stevens, J., dissenting) (discussing notice pleading as a response to "[t]he English experience with Byzantine special pleading-rules" and the Field Code's requirement of pleading "'facts' rather than 'conclusions'").

47. *Id.*

48. *Id.* at 1962.

49. 355 U.S. 41 (1957).

relief."[50] Agreeing, however, with *Conley* that a complaint must give "fair notice of what the . . . claim is and the grounds upon which it rests,"[51] the Court interpreted the latter as requiring that its "[f]actual allegations must be enough to raise a right to relief above the speculative level."[52] The Court then held that, for a section 1 Sherman Act claim, these standards "require[d] a claim with enough factual matter (taken as true) to suggest that an agreement was made."[53] It concluded that the plaintiffs rested their claims on "parallel conduct and not on any independent allegation of actual agreement among the" companies,[54] and that the statements of the Qwest CEO were taken out of context.[55]

The courts of appeals have struggled to determine *Twombly's* precise meaning and scope of application, and their efforts have resulted in different approaches.[56] In *Iqbal v. Hasty*, the Second Circuit recognized conflicting signals in the Court's opinion, concluding that:

> [T]he Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.[57]

The United States Court of Appeals for the Third Circuit has emphasized *Twombly*'s twin prongs of notice and plausibility, concluding that it required "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element."[58] Meanwhile, the United States Court of Appeals for the Seventh Circuit has focused on notice,[59]

50. *Id.* at 45–46; *see Twombly*, 127 S. Ct. at 1969 ("This famous observation has earned its retirement.").

51. *Twombly*, 127 S. Ct. at 1964 (quoting *Conley*, 355 U.S. at 47).

52. *Id.* at 1965.

53. *Id.*

54. *Id.* at 1970.

55. *See id.* at 1972 n.13.

56. The First, Second, Third, Sixth Seventh, Tenth, Eleventh, D.C. and Federal Circuits have directly addressed the issue. Others have noticed its effect. *See, e.g.*, *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n.7 (4th Cir. 2007). ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach.").

57. *Id*. at 157–58. Since then, the Second Circuit has acknowledged that *Iqbal* "does not offer much guidance to plaintiffs regarding when factual 'amplification [is] needed to render [a] claim plausible.'" *Boykin v. Keycorp*, 521 F.3d 202, 213 (2d Cir. 2008) (quoting *Iqbal*, 490 F.3d at 158).

58. *Phillips v. Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).

59. *See Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 (7th Cir. 2007).

while admitting that *Twombly* probably did not change the notice requirement.[60] In addition, another panel of that court has endorsed a standard that requires greater particularlity in light of the burdens of discovery in complex litigation,[61] an approach anticipated by the Second Circuit in *Iqbal*.[62]

There is an important difference, however, between Professor Miller's project and the business of sorting out the confusion that *Twombly* has created. The ambiguities Miller explores arise in the interpretation of statutory language prescribing procedural requirements for a specific substantive context. They thus emerge from a democratic process which, even if known for strategic ambiguity,[63] is acknowledged as appropriate for the resolution of broad questions of social policy such as those—access to court, competition for legal services, and norm enforcement—to which Miller adverts at the end of his paper.[64] If any policy choices are buried in statutory procedure, the resulting concern involves democratic accountability in the weak sense, namely duly authorized actors taking responsibility for their decisions.[65] Moreover, ambiguous or not, the choices operate only in the substantive context that is the subject of the legislation.

Twombly's ambiguities, on the other hand, arise in the interpretation of prospective court rules crafted for all civil actions in the federal courts. They thus emerge from a process that, although it has increasingly come to resemble the legislative process in recent decades,[66]

60. *See Concentra*, 496 F.3d at 782–83 n.4.

61. *See Limestone Dev. Corp. v. Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (Posner, J.) ("RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a thread-bare claim")..

62. *See Iqbal*, 490 F.3d at 157–58.

63. Professors Grundfest's and Pritchard's work on the strategic uses of ambiguity by Congress and the federal courts used the PSLRA as the basis for empirical testing of their general hypotheses. *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002). Of particular interest for present purposes are their views that (1) Congress chose to "sidestep," *id.* at 658, the state of mind required for liability (i.e., recklessness or knowledge?) in favor of tightening the pleading standard required to withstand a motion to dismiss, and that (2) the resulting strong-inference requirement was the subject of intense debate and disagreement and is itself an example of strategic ambiguity. *See id.* at 652–66.

64. *See* Miller, *supra* note 2, at [123-128].

65. *See* Stephen B. Burbank, *The Costs of Complexity* (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION (1985)), 85 MICH. L. REV. 1463, 1475 (1987).

66. *See* Burbank, *Role of Congress*, *supra* note 29, at 1724 ("[T]he changes in the rulemaking process in the 1980s that were designed to open it up to more and more diverse points of view, make it more transparent, and diminish the need for congressional involvement, may in fact have facilitated a process of redundancy wherein participants treat rulemaking that is at all controversial as merely the first act.").

is *not* acknowledged as appropriate for the resolution of broad questions of social policy. If any such policy choices are buried in the Federal Rules—or (more likely) in discretionary decisions made under their authority—the resulting concern involves democratic accountability in both the weak sense previously defined and in the strong sense of separation of powers.[67] Moreover, even if animated by the perceived substantive or procedural needs of antitrust law and litigation, *Twombly*'s choices cannot comfortably be confined to that context by reason of another foundational assumption, one that the Court has emphatically endorsed in the pleading context on more than one occasion.[68] General rules made through the Enabling Act Process can only be changed through that process (or by legislation).[69]

Still, Professor Miller helps us to see that, by tracking distinctions between the PSLRA's provisions regarding fact pleading and probative force[70] and relating them to different requirements in the Federal Rules of Civil Procedure, we may be able to grasp the architecture of the Court's decision in *Twombly*. We are thus in a better position to understand, even if we have trouble accepting, the Court's assertion that the latter decision did not change the requirements of Federal Rule 8 (or

67. *See* Burbank, *supra* note 65, at 1475.

68. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) ("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."). *But see Jones v. Bock*, 549 U.S. 199, 212 (2007) ("In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.") "Generally"? The Court's unanimous opinion in this case, rejecting all of the three procedural roadblocks that the United States Court of Appeals for the Sixth Circuit had created to thwart prisoner litigation, including a heightened pleading requirement, may here anticipate *Twombly* as a departure from "the usual practice." *Jones* was argued on October 30, 2006. 549 U.S. at 199. *Twombly* was argued on November 27, 2006. 127 S. Ct. at 1955. Perhaps *Jones* was designed to anticipate and calm fears engendered by *Twombly*, which may explain why it so thoroughly confounds the attitudinal model of judicial behavior. *See* Stephen B. Burbank, *The Greening of Harry Blackmun*, 101 NW. U. L. REV. COLLOQUY 137, 142 (2007) ("I doubt that either an attitudinal or a strategic model of judicial behavior can explain a decision like *Jones v. Bock.*"); *see also infra* note 86 (discussing *Erickson v. Pardus*, 127 S. Ct. 2197 (2007)).

69. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'") (quoting 28 U.S.C. § 2072(b)).

70. The PSLRA provision on scienter deals with both. *See* 15 U.S.C. § 74u-4(b)(2) (2006); *see also* Miller, *supra* note 2, at 102 n.3.

Federal Rule 9).[71] In particular, we can now clearly see that *Twombly*'s plausibility requirement has more to do with Rule 12(b)(6) than it does with Federal Rule 8,[72] confirming the message suggested by careful attention to the role of the language in *Conley v. Gibson*[73] that the *Twombly* Court repudiated.[74] That said, it is unfortunate that the Court (1) obscured this message in loose talk about the notice-giving function of pleadings under the Federal Rules, which has nothing to do with Federal Rule 12(b)(6) as opposed to Federal Rule 12(e),[75] and (2) failed to spell out why allegations of conspiracy in the *Twombly* complaint should be viewed differently than the allegation that "the defendant

71. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

72. *Cf. Kirksey v. R.J. Reynolds Tobacco Co*., 168 F.3d 1039, 1041 (7th Cir. 1999) ("Where the plaintiff has gone astray is in supposing that a complaint which complies with Rule 8(a)(2) is immune from a motion to dismiss.").

73. 355 U.S. 41 (1957). The Court in *Conley* treated separately the question whether the complaint in that case stated a claim upon which relief could be granted and whether it was defective for failure to set forth specific facts. As to the former, the Court followed "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 45–46. This is the "famous observation" that the *Twombly* Court said had "earned its retirement." 127 S. Ct. at 1969; *see supra* note 50 and accompanying text. In subsequently rejecting the respondents' contention that the complaint was insufficiently specific, the *Conley* Court regarded as the "decisive answer . . . that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." 355 U.S. at 47. In that regard, the Court observed that "[s]uch simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues," *id.* at 47–48, referring in a footnote to, among others, Federal Rule12(e). *Id.* at 48 n.9.

74. To the extent that *Conley*'s interpretation of the standard under Federal Rule 12(b)(6) faithfully reflected the Court's understanding of the meaning of that rule when first promulgated, *Twombly*'s rejection of the operative language was inconsistent with the notion that the Court was "bound to follow [Federal Rule 12(b)(6)] as [the Court] understood it upon its adoption." *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 861 (1999); *see also supra* note 69 and accompanying text.

75. *See Twombly*, 127 S. Ct. at 1970 n.10. In that regard, the Court elevated another passage in *Conley* to status as part of, rather than a gloss on, Federal Rule 8. *See id.* at 1964 ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47)). Although this passage occurs in that part of *Conley* where the Court rejected the respondents' contention that the complaint was insufficiently specific, *see supra* note 73, the *Twombly* Court used it to support the proposition that a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1965; *see also supra* text accompanying note 51.

negligently drove a motor vehicle against the plaintiff" in an Official Form accompanying the Federal Rules.[76]

Tellabs's distinction between plausible and strong (or cogent) inferences may also be helpful in divining the proper application of *Twombly* if, as lower-court decisions suggest, the Court's reasoning and interpretations are not confined to complaints alleging antitrust conspiracy under the Sherman Act.[77] The problem here is that certain language in *Twombly* can be read to mean that the Court's standard—by hypothesis, generally applicable—is more demanding than the standard under the PSLRA. The language in question can be read to require that inferences—or to the extent that a complaint does not rely on inferences, direct allegations—grounding liability be not just plausible in the *Tellabs* sense (reasonable), and not just as strong (cogent or compelling) as any competing account, but stronger than any account of nonliability.[78] Of course, that would be ridiculous. The answer to this puzzle lies in *Twombly*'s substantive-law context and in the Court's reading of the complaint. As to the former, previous decisions had established that,

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76. *Twombly*, 127 S. Ct. at 1970 ("Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations."); *see id.* at 1971 n.11. Perhaps "legal conclusions" are those the plausibility (reasonableness) of which cannot be confirmed on the basis of the rest of the complaint assessed in light of both background knowledge about human behavior and the substantive law. Thus, it is not implausible that the driver of a car that strikes a pedestrian has been negligent in some respect. *Cf. Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007) ("[W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."). Alternatively, the complaint in Form 11 (formerly Form 9) does not require the adverb, *negligently*, in order to withstand a Federal Rule 12(b)(6) motion, even if one deems the allegation of negligence a legal conclusion. *See infra* text accompanying note 83. In that regard, the Court left the adverb *negligently* out of its discussion of the Form 9 complaint. *See Twombly*, 127 S. Ct. at 1970–71 n.10. *But see Iqbal*, 490 F.3d at 156 ("The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident . . . but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent . . . .").

77. *See, e.g.*, *Iqbal*, 490 F.3d at 157 n.7 ("For example, it would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims."). For an excellent analysis of *Twombly* from this perspective, see A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

78. *See, e.g.*, *Twombly*, 127 S. Ct. at 1964 (describing parallel conduct as "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market"); *id.* at 1966 ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

although parallel conduct grounds a permissible inference of conspiracy, such evidence is insufficient as a matter of law to warrant a finding of conspiracy.[79] As to the latter, rightly or wrongly, the Court in *Twombly* read the complaint as alleging only parallel conduct (refusing to count, among other things, what it deemed legal conclusions of conspiracy).[80] On this view, in other words, *Twombly* was a case in which the plaintiffs pleaded themselves out of court.[81]

Most cases are not subject to a requirement of fact pleading, whether imposed by statute or by Federal Rule 9(b). More important, in most substantive-law areas the courts have not finely and categorically policed the inferences that juries are permitted to draw.[82] In such garden-variety cases, I suggest, a pleading that provides sufficient notice to survive a Federal Rule 12(e) motion should also survive a motion under Federal Rule 12(b)(6) if its nonconclusory allegations, taken as true, and any inferences reasonably drawn from them, tell a plausible (as the *Tellabs* Court would define it) story of liability. As suggested, whether

79. *Id.* at 1982 ("Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants." (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

80. *See, e.g.*, *id.* at 1967; *id.* at 1971 n.11 ("[I]n fact, they proceeded exclusively via allegations of parallel conduct."); *see also id.* at 1972 n.13 (noting that comments by the CEO of Qwest were taken out of context).

81. For an early analysis of *Twombly* along these lines, 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 (2007); *see also* Scott Dodson, Essay, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 139 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf. This view of the case finds additional support in subsequent remarks of the author of the Court's opinion:

> [I]n Bell Atlantic you had a set of allegations in which in effect it was an either or choice. There were two possibilities consistent with the allegations in Bell Atlantic. One was a conspiracy possibility, one was a lawful parallel conduct possibility. And there just wasn't any way to pick one as being a more probable interpretation of what they were getting at.

Transcript of Oral Argument at 10, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) [hereinafter *Iqbal* Transcript] (No. 07-1015) (statement of Justice Souter). Finally, this appears to be the view of the D.C. Circuit. *See Aktieselskabet AF 21. November 2001 v. Fame Jeans,Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) ("In sum, *Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim.").

82. Note, however, an analogous phenomenon in connection with summary judgment, when courts have carved the evidence or the law into smaller segments in order to make cases amenable to pretrial judicial resolution. *See* Burbank, *supra* note 21, at 624–25 (discussing "factual carving, a process that does not require more of the whole but sees less in the parts by subjecting the nonmovant's 'evidence' to piece-by-piece analysis," and "legal carving, whereby the law is subdivided into smaller, more objective units, thus ramifying the issues as to which an adequate factual showing (however defined) must be made").

allegations are disregarded as legal conclusions may depend on whether, without more factual allegations, the complaint tells a story that is both reasonably possible in light of human experience as determined by background knowledge and, if true, would entitle the plaintiff to relief.[83] Finally in this regard, as the Second Circuit's post-*Twombly* opinion in *Iqbal* confirms,[84] judgments about plausibility, like those about cogency or strength, are necessarily comparative.

Whether the ambiguity of the Court's opinion in *Twombly* was strategic—designed to empower the lower courts to vary requirements to withstand a motion to dismiss[85] depending on perceived differences in procedural (i.e., discovery) demands and/or substantive contexts, with the Court retaining the power to police egregious excesses while preserving deniability[86]—remains to be seen. An alternative account is simply that the Court's goal of changing the Federal Rules outside of the Enabling Act Process without admitting that it was doing so understandably yielded a confusing opinion. We may have an answer very soon; review of the Second Circuit's *Iqbal* decision[87] may force the Court to elaborate the acceptable ways by which the requirements of substantive law can alter general rules in operation.

The *Iqbal* case involves claims brought by a citizen of Pakistan whom federal officials arrested after the 9/11 attacks and detained at the (federal) Metropolitan Detention Center in Brooklyn, New York,

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83. For a similar interpretation of *Twombly*, see Robert G. Bone, Twombly, *Pleading Rules and the Regulation of Court Access*, 94 IOWA L. REV. (forthcoming 2009),*available at* http://www.bu.edu/law/faculty/scholarship/workingpapers/2008.html).

84. *See Iqbal v. Hasty*, 490 F.3d 143, 175–76 (2d Cir. 2007), *cert. granted sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008); *see also Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008).

85. One who accepts the view of *Twombly* suggested here probably should not refer to that case as a "pleading decision" unless the intended audience would understand that the reference was to the sufficiency of the complaint to withstand a motion under Federal Rule 12(b)(6), as opposed to Federal Rule 12(e).

86. Editorial, *The Devil in the Details*, 91 JUDICATURE 52 (2007) ("More probably, *Twombly* is an exercise in strategic ambiguity that empowers the lower federal courts to tighten pleading requirements in cases or categories of cases that augur similar discovery burdens (or are otherwise disfavored), while preserving deniability in the Court through the use of its discretionary docket to correct perceived excesses (as in *Erickson*)."). The author was Chair of the Editorial Committee of the American Judicature Society at the time this editorial was published. The reference is to *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), a case decided a few weeks after *Twombly* (without argument and per curiam) in which the Court reversed the United States Court of Appeals for the Tenth Circuit's affirmance of a judgment dismissing a prisoner's complaint under Federal Rule 12(b)(6). For reasons why *Erickson* does not provide much comfort for those concerned that *Twombly* is generally applicable (not confined to antitrust cases), see Editorial, *supra*. On strategic ambiguity more generally, see *supra* note 63.

87. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008).

pending trial on charges (of fraud in connection with identification documents) to which he ultimately pleaded guilty, leading to his removal to Pakistan. The complaint alleged that Iqbal's arrest and seven-month confinement in highly restrictive conditions resulted from unlawful racial and religious discrimination. It also alleged that a number of lower-level Federal Bureau of Investigation and Bureau of Prisons officials and employees were liable for such violations of his rights, due to use of excessive force, unreasonable and unnecessary strip and body-cavity searches, and denial of medical care while in detention. Finally, Iqbal asserted that Robert Mueller, Director of the F.B.I., and John Ashcroft, Attorney General of the United States, adopted and/or approved policies and directives pursuant to which he was arrested and confined, policies and directives that were purposefully designed to discriminate on the basis of religion and race.[88]

In affirming the district court's decision denying motions to dismiss four counts against Mueller and Ashcroft, Judge Jon Newman for a panel of the Second Circuit sought to apply *Twombly*, which had been decided less than two months earlier. He concluded:

> [T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the plaintiff alleges satisfies the plausibility standard [of *Twombly*] without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.[89]

The Supreme Court granted the solicitor general's petition for a writ of certiorari.[90] In its brief, the government argued that, in furtherance of the policies underlying the defense of official immunity, the Court should require that complaints against high-level government officials contain "'specific, nonconclusory factual allegations' that establish . . . cognizable injury."[91]

88. *See id.* at 147–49, 165, 174–76.

89. *Id.* at 175–76; *see also id.* at 166 ("Even as to Ashcroft and Mueller, it is plausible to believe that senior officials of the [Department of Justice] would be aware of the policies concerning the detention of those arrested in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies.").

90. Ashcroft v. *Iqbal,* 128 S. Ct. 2931 (2008).

91. Brief for Petitioners at 15, *Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)); *see id.* at 28; Brief of

Particularly because Judge Newman's opinion in *Iqbal* is such a clear and (dare I say) cogent interpretation of *Twombly*, I can only hope that attachment to substantive law for which the Court has been responsible—the federal common-law defense of official immunity—does not lead it further to deform the general pleading landscape. There is no need for the Court to do so, although the path to a satisfactory accommodation is not without potholes.

If substantive federal common law can displace—or, for those who prefer the cosmetic attribution of the policy choice to Congress, if a federal statute interpreted in light of its underlying policies can preempt[92]—nonsubstantive state law in state court, surely it can also supplant a Federal Rule of Civil Procedure in federal court. Actually, that is *not* clear because of the Enabling Act's supersession clause.[93] That is territory in which, because the clause privileges the last in time, insistence on cosmetic attribution to Congress can cause difficulty.[94] Without such attribution, however, the argument that the Court makes law anew every time it applies judge-made law to different facts may be an adequate postrealist response. Certainly, this argument has force when the Court changes the content of judge-made law. The question remains how best to implement the perceived requirements of substantive federal

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Professors of Civil Procedure and Federal Practice as *Amici Curiae* in Support of Respondents at 24 n.3, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015) [hereinafter Professors' Amicus Brief] ("[T]he Government seeks to convert the Court's description of a discretionary judgment pertaining to what a district court *might* do under Rules 7(a) and 12(e) into a *mandatory* heightened pleading standard under Rule 8(a)(2)."). The author contributed to, and is a signatory of, this amicus brief.

92. *See*, *e.g.*, *Felder v. Casey*, 487 U.S. 131 (1988) (stating that a Wisconsin state court cannot apply short Wisconsin notice-of-tclaim statute in a federal civil-rights action); *infra* note 101 (discussing applicability in state court of pleading requirement found necessary to protect federal common law of official immunity). For discussion of *Felder*, including its use of the language of preemption, see Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX L. REV. 1551, 1557–58 (1992); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 32–39 (1985) (noting the Court's failure to realize that preemptive lawmaking can be used to develop a general theory of federal common law).

93. 28 U.S.C. § 2072(b) (2006) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). For the origins and purposes of the supersession clause, see Burbank, *supra* note 26, at 1051 n.156. For more recent developments involving it, including the unsuccessful attempt to delete it from the Enabling Act as part of the 1988 amendments, see Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1036–46.

94. Concern that the 2007 amendments designed to restyle the Federal Rules without affecting their meaning might otherwise be given superseding effect under section 2072(b) caused the rulemakers to include among them the following: "If any provision in Rules 1–5.1, 6–73, or 77–86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007." FED. R. CIV. P. 86(b).

common law without further deforming the general landscape left by *Twombly*.

There can be no serious question of inadequate notice in *Iqbal* even if that were a relevant question under Federal Rule 12(b)(6) (as opposed to Federal Rule 12(e)).[95] Moreover, Judge Newman's careful analysis of the complaint as pleaded with respect to the defendants of interest—the attorney general and the director of the FBI—would make it difficult to hold that a general plausibility test under Federal Rule 12(b)(6) had not been met. To do so, indeed, seemingly would advance the argument, absurd on its face, that the Federal Rules impose on plaintiffs generally a more demanding standard to survive a motion to dismiss than does the PSLRA on plaintiffs in securities-fraud cases.[96] The government denies that it is calling for the imposition of a heightened fact-pleading requirement in cases against high-level government officials who are entitled to the immunity defense,[97] as well it might because the Court seems to have made it impossible for the judiciary openly to impose such a requirement other than through the Enabling Act Process.[98]

The Court may, however, accept the Second Circuit's view of *Twombly* as prescribing a flexible "plausibility standard," but take a different view of the appropriate contextual plausibility judgment than did the lower courts in *Iqbal*.[99] If so, the Court would thereby confirm the

95. *See Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) ("And like the Form 9 complaint approved in *Bell Atlantic*, Iqbal's complaint informs all of the defendants of the time frame and place of the alleged violations."); *id.* at 156 (linking assessment of "legal conclusions" to whether "the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred"); *supra* note 76.

96. *See supra* text accompanying note 78. I share the Second Circuit's view that the allegations that Ashcroft and Mueller were personally involved in the adoption and/or approval of the policies and directives challenged in *Iqbal* tell a story that is plausible (not unreasonable). *See supra* text accompanying note 89. Note that the *Iqbal* complaint does not attempt to hold those individuals responsible for the quotidian abuses during confinement that it alleges in claims against lower-level officials and employees. *See* Professors' Amicus Brief, *supra* note 91, at 15 ("Thus, while the complaint does charge several individuals with *ad hoc* violations of the plaintiff's rights . . . neither Ashcroft nor Mueller is named in any of these fact-specific counts.").

97. *See, e.g.*, *Iqbal* Transcript, *supra* note 81, at 11 (statement of Solicitor General Garre) ("And we're not asking for a heightened pleading standard, Justice Ginsburg."); Reply Brief for Petitioners at 12, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015) ("Petitioners do not ask the Court to adopt any heightened pleading standard. Rather, their position is that the lower courts failed to follow this Court's decisions in this area and give a 'firm application' of the Federal Rules.").

98. *See supra* text accompanying notes 68–69.

99. *Iqbal* Transcript, *supra* note 81, at 36–37 (statement of Chief Justice Roberts) ("Well I thought, and others may know better in connection to Bell Atlantic, but I thought in Bell Atlantic what we said is that there's a standard but it's . . . affected by the context in which the allegations are made. That was a context of a particular type of

view that *Twombly* is an invitation to the lower courts to make ad hoc decisions, often reflecting buried policy choices, and in any event with little fear of reversal because of the impotence of federal appellate review to police discretionary decisionmaking.[100]

For these reasons, if the Court feels that the purposes of the official immunity defense require even greater protection than recently reinvigorated pleading jurisprudence provides, it should forthrightly require fact pleading as a matter of substantive law.[101] Better yet, in light of a slow trickle of ever more troubling information about how the previous administration fought the war on terrorism—despite an approach to governmental secrecy that would have made former Romanian president Nicolae Ceauşescu proud[102]—the Court should affirm the Second Circuit and allow *Iqbal* to proceed to discovery, even if "limited and tightly controlled."[103]

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antitrust violation and that affected how we would look at the complaint. And here . . . because we're looking at litigation involving the Attorney General and the Director of the FBI in connection with their national security responsibilities, . . . there ought to be greater rigor applied to our examination of the complaint."); *see id.* at 43 (statement of Chief Justice Roberts) ("What you have to show is some facts, or at least what you have to allege are some facts, showing that they knew of a policy that was discriminatory based on ethnicity and country of origin.").

100. Bone, *supra* note 29, at 327 ("Reliance on case-specific discretion might be a sensible strategy if proceduralists today still believed, as the original Federal Rules drafters did, that procedural design is a technical exercise largely devoid of substantive value and best performed by trial judges. That belief, however, was thoroughly discredited in the 1970s. The normative issues are not purely technical; they directly implicate substantive values.").

101. If the Court were to do so, any such requirement might be applicable in a state-court action involving the same defense of official immunity, a scenario that is probably only theoretically possible given the availability of removal. *See supra* text accompanying notes 92–93. *Cf. Brown v. W. Ry.*, 338 U.S. 294 (1949) (holding a strict Georgia pleading rule was inapplicable in FELA case in Georgia state court). Unfortunately, *Twombly* has prompted the proliferation of nonsense about the circumstances when federal law displaces state law in state court under the pernicious rubric of "reverse" or "converse" *Erie*. *See* Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV.1431, 1443–53 (2008). Because the only sources of authority for such displacement are the federal constitutional and statutory bases of substantive federal (including common) law, the transsubstantive Federal Rules of Civil Procedure and cases interpreting them are irrelevant (except perhaps as a source of inspiration for a substance-specific rule of federal common law). *See* Burbank, *supra* note 92, at 1557–58; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 805–10 (1986).

102. *See Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1283 (7th Cir. 1990) (Easterbrook, J., concurring) ("Under Romanian law, anything that is not a 'State secret' is a 'Service secret' – in other words, everything is secret.").

103. *See Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007), *cert. granted sub nom. Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008). It is useful in this regard to recall the links

Professor Miller correctly sees as part of the larger significance of *Tellabs* that some of the winnowing work formerly assigned to summary judgment is now assigned to the 12(b)(6) motion to dismiss.[104] In fact, *Twombly* is far more powerful evidence of that proposition because of its striking resemblance to *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[105] in which the Court was both similarly intent on policing inferences to protect the integrity of substantive antitrust law—but at the summary-judgment stage—and similarly ambiguous about the reach of the power to do so outside of that substantive context. Moreover, although *Tellabs* is conclusive proof, were it needed, that Congress has learned that procedure is power, at least Congress was well positioned institutionally to evaluate the social costs and benefits of setting a high bar for complaints filed without benefit of formal discovery, and its task in doing so was circumscribed by the social policies germane to the domain of substantive securities law.

The *Twombly* Court, by contrast, was not well positioned institutionally to evaluate even the *procedural* costs and benefits of tightening the pleading screws on plaintiffs, even in the isolated substantive-law context involved in the case.[106] The Court acting as such

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between the Progressives' project of regulatory "legibility" and the impulses that led to broad discovery under the Federal Rules. *See* Burbank, *supra* note 21, at 597–98 n.20 (discussing Edson Sunderland, a Progressive who was the chief architect of the discovery rules); Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, *in* 16 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 61 (2002).

104. *See* Miller, *supra* note 2, at [126] ("*Tellabs* is an interpretation of the standards governing a motion to dismiss under Rule 12(b)(6). But when one examines how that motion is actually adjudicated in securities fraud cases, it becomes evident that the hydraulic pressures of the PSLRA's pleading rules have deformed the 12(b)(6) motion and converted it into something different—a sort of hybrid between the motion to dismiss and the motion for summary judgment.").

105. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Burbank, *supra* note 20, at 623 ("The contradictions and studied ambiguity of two decisions in the trilogy, each of which was responsive to the perceived requirements of a particular substantive context and might well have been so confined but for the fetish of transsubstantive procedure, provide support for very different approaches to Rule 56."). As Justice Stevens's powerful dissent in *Twombly* points out, granting authority to police inferences at the pleading stage represents a major change, because it may lead to the termination of cases before plaintiffs have had any discovery at all. *See Bell Atl. Corp. v. Twombly*, 1927 S. Ct. 1955, 1982 (2007) (Stevens, J., dissenting).

106. On the theoretical and practical differences between making law by decision versus by Federal Rule, see generally Burbank, *Of Rules and Discretion*, *supra* note 29, at 698–713; *see also* Burbank, *supra* note 26, at 1147–57, 1192–93; Burbank, *supra* note 93, at 1021. Judge Posner is correct that "[r]ight or wrong, the decision in *Bell Atlantic* was pragmatic rather than legalist." RICHARD A. POSNER, HOW JUDGES THINK 54 (2008). Yet, there can be no doubt that consideration of a number of the policy questions presented by *Twombly* would have benefited from the fruits of empirical research, even if only research whose results had already been published. Consider in that regard the Court's discussion of the costs of discovery, which, eschewing any reference to

under Article III was even less well positioned to estimate the procedural costs and benefits of a general rule of plausible pleading (if that is what *Twombly* gives us), let alone the nonprocedural costs and benefits of such a rule, substance specific or general.[107] Yet, the Article III process may have been all that the Court thought was available since the justices likely knew through the chief justice that changing pleading requirements through the Enabling Act Process had been considered and abandoned as political dynamite on more than one occasion, including in the recent past.[108]

CONCLUSION

Twombly's most obvious and immediate consequence has been enormous confusion and resulting transaction costs as a result of uncertainty about the requirements it imposes and its scope of application. Apart from those costs, and whether or not *Twombly* was an exercise in strategic ambiguity, it is an invitation to the lower federal courts to screen out complaints in disfavored classes of cases, whether they are disfavored because of their perceived discovery burdens or for some other reason. I am reminded of observations I made about

systematic as opposed to anecdotal data, relied to a great extent on an article by Judge Easterbrook that is heavy on theory and light on facts. *See Twombly*, 127 S. Ct. at 1967 & n.6 (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)). Not only was that article's analysis predicated on a law-and-economics model of so-called impositional discovery; it was published in 1989, before substantial changes to the discovery rules in 1993, 2000, and 2006—changes that the *Twombly* Court ignored. I am reminded of an observation I made about the Seventh Circuit's attempt to turn Federal Rule 11 into a "fee-shifting statute": "Theory is an irresponsible basis for lawmaking about something as important as access to court, and it is especially irresponsible when the lawmaking involves judicial amendment of a Rule . . . ." Burbank, *Transformation*, *supra* note 29, at 1947–48.

There can similarly be no doubt that, quite apart from systematic empirical research, consideration of many of the policy questions implicated in *Twombly* would have benefited from a base of experience with first-instance litigation broader than that possessed by the members of the Supreme Court, almost all of which predates Justice Stevens's appointment in 1975.

107. Bone, *supra* note 83, at 86 ("Whatever screening approach is adopted, however, two general points should guide its design. First, the project should be handled by formal rulemaking or the legislative process, not by the common law method of case-by-case interpretation of the Federal Rules. Because it requires a controversial choice of normative metric and a coordinated analysis of different rule options, this project is most suitable for a process open to public input, able to generate and properly consider relevant empirical information, and capable of addressing the issues from a global and systemic perspective. Second, because the screening approach should be tailored to the types of cases that involve meritless filings most seriously, any set of rules should be substance-specific.").

108. *See* Editorial, *supra* note 86.

experience under the 1983 amendments to Federal Rule 11. Having suggested that those amendments "signall[ed] a more candid recognition that different cases may have different requirements," I raised the question "whether and when the only or the best answer to that perception lies in reliance on the discretion of judges, guided by general directions that usually are not informed by empirical study, to deliver on the promise of equal justice."[109]

Perhaps the most troublesome possible consequence of *Twombly* is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive prefiling investigation or because of informational asymmetries. As Judge Richard Nygaard stated in *Phillips v. Allegheny*,[110] "Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts." More generally, *Twombly* is but the most recent signal of a retreat from the goal of adjudication on the merits, a retreat that has already seen the trial-termination rate decline precipitously, to the point that it is a quarter or less of the termination rate by summary judgment.[111]

Ultimately, of course, *Twombly* raises the question whether our society remains committed to private litigation as a means of securing compensation for injury and enforcing important social norms. From that perspective, another important policy issue it raises is whether, if we retreated from that commitment, we would provide alternatives such as social insurance and administrative enforcement.112 In addressing that question, decisionmakers presumably would benefit from information about experience in other countries that did not previously share our commitment to private litigation, that have provided alternatives, but that are now rethinking the best way to achieve their societal goals. It is interesting, if not ironic, that a number of such countries have decided, among other reforms, to relax bans on contingent-fee litigation and to experiment with group and other forms of aggregate litigation.113 In any event, from this perspective, it is again apparent that the policy questions are not the sort that should be answered by nine judges in the exercise of

109. Burbank, *Transformation*, *supra* note 29, at 1936–37.

110. *Phillips v. Allegheny*, 515 F.3d 224 (3d Cir. 2008).

111. *See* Burbank, *supra* note 20, at 616–18.

112. *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

113. *See, e.g.*, CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS: A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE (2008); Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 710–11 (2002) (describing the United Kingdom's change of position regarding "litigation on spec," as a direct result of cuts in the legal aid budget).

Article III judicial power, with little information, less experience, and no power to implement nonlitigation alternatives.

Even if the Court finds a way to decide *Iqbal* without engendering additional confusion and damage to the policies of access to court, compensation for injury, and norm enforcement—and unless it issues a palinode[114] retracting all but the narrow holding in *Twombly*[115]—the latter decision should remain cause for serious concern. We see in it some of the costs of the foundational assumptions and operating principles of modern American procedure.

Now that even Congress has learned how to use procedure, openly or not, to advance substantive goals, greater attention naturally focuses on choices made by those responsible for crafting and interpreting procedural rules, wherever they sit. Yet, the foundational assumption that the Enabling Act requires transsubstantive rules is thought to prevent use of its process when a particular substantive context requires a different procedural rule, while the judiciary's refusal to acknowledge that statutory procedure is legitimate prevents it from taking the initiative in seeking a legislative fix.[116] As a result, courts struggle to make a substance-specific solution fit within the general rule or to change the general rule without admitting that they are doing so. The tendency of the first tactic is to yield a nonoptimal solution for the particular substantive context. The tendency of the second is to yield a nonoptimal solution for all substantive contexts.

More generally, *Twombly* provides additional evidence of the costs of complexity in modern American procedure.[117] We know that elites have had, and still have today, enormous influence in determining the content of law, and that legal elites have had, and still have today, enormous influence in determining the content of that special form of

114. This word denotes a poem in which the poet retracts something said in a previous poem or, more generally, any formal retraction. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 944 (1973). Its allure in, and aptness given, our recent political circumstances should be apparent.

115. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1963 (2007) ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . . .").

116. Note the recent exception in amendments to Federal Rule of Evidence 502, proposed as legislation by the judiciary and enacted by Congress. *See* Pub. L. No. 110-322, 122 Stat. 3537 (2008); S. REP. NO. 110-264, at 4 (2008), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr264.110.pdf ("On December 11, 2007, Chairman Leahy introduced S. 2450, incorporating the language proposed by the Judicial Conference's Advisory Committee."). Because, however, the amendments govern attorney-client privilege, the judiciary had no choice by reason of the Enabling Act's requirement that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b) (2006).

117. *See* Burbank, *supra* note 40; Burbank, *supra* note 65.

prospective law that we call the Federal Rules. By reason of foundational assumptions and operating principles, the rules they secure for the high-stakes, complex cases that are their special concern become the rules for all litigation in federal court.[118] The Cadillac process they enshrine helps to drive out of federal court those who can afford only a Ford.[119] Moreover, to the extent states continue to use the Federal Rules as a model for their courts,[120] the result may be to make courts in general unavailable for the resolution of everyday disputes.

The Federal Rules necessarily confer substantial discretion on Article III judges. The discretion they confer entails the power to make policy choices that, although they may be buried in the obscurity of technical language, are increasingly likely to be exposed by those who have come to recognize the power of procedure, often in recent years aided by systematic empirical data.[121] Growing awareness that questions of "mere procedure" may implicate important social policy encourages those who cannot make an independent judgment to have only so much

118. *See* Burbank, *supra* note 113, at 711 ("The misguided approach to procedural reform that treats all litigation as if it were complex litigation can at least be explained, if not justified, by the quest for uniform and transsubstantive regulation that has preoccupied American procedural policy.").

119. *See* Joseph, *supra* note 40; Maurice Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 249 (1984). I am here taking a point made by Professor Hadfield one step further, or perhaps one step back. She has argued that through a market allocation of lawyers that favors corporate clients over individual clients, the legal system establishes governing the economy as the principal role of the justice system. *See* Gillian K. Hadfield, *The Price of Law*: *How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 1000 (2000). My point is that, in addition to favoring jurisdictional rules that have privileged business throughout most of our history, *see supra* text accompanying notes 40–41, the federal judiciary has created a procedural system so complex that most litigants who can satisfy federal jurisdictional requirements cannot afford to litigate in federal court.

120. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2002) (updating a 1986 study of the extent of state adoption of the Federal Rules). The borrowing is especially problematic to the extent that state court judges are under greater docket and resource pressures than their federal colleagues, depriving them of the ability to use the tools in the Federal Rules for managing litigation.

121. *See Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, Substance in the Shadow of Procedure:Tthe Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C.L.REV. 211 (1992);* Stephen B. Burbank, *Procedure, Politics and Power*, 52 J. LEGAL EDUC. 342, 344 (2002) ("For, when one knows that a rule has a statistically significant differential impact on a class of litigants or in a particular type of case, the veil is lifted, the myth of neutrality as to litigant power is exploded, and the question of lawmaking power to address the situation is unavoidable. It may not be a coincidence, therefore, that the heightened attention to questions of rulemaking power in the past ten years has come during a period of unprecedented attention to empirical investigation of the real-world effects of rules by the rulemakers."); *supra* note 32 (discussing inappropriateness of a "veil of ignorance" as a normative posture for rule makers).

confidence in the integrity of the process and the quality of the legal products it produces as they do in the actors who control it. In an age when politicians, interest groups and the media find it convenient to represent that courts are part not only of the political process, but of ordinary politics, and that judges should be viewed as the policy agents of those who appoint or elect them,[122] that is not good news.

122. *See* Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 910 (2007) (discussing attacks on courts that implement strategies reflecting theory of judicial agency and that are designed "to create and sustain an impression of judges that makes courts fodder for electoral politics").