STATEMENT OF

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Access to Justice Denied: Hearing on *Ashcroft v. Iqbal*

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Good afternoon, Mr. Chairman and Members of the Subcommittee. It is an honor to appear today and assist in this important discussion about our federal courts.

By way of introduction, I am a University Professor at New York University, and I was the Bruce Bromley Professor of Law at Harvard Law School for many years. I have taught the civil procedure course and advanced courses in complex litigation for almost fifty years. Beginning in the late 1970s, I served as the Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States and then as a member of the Committee and as the Reporter for the American Law Institute's Project on Complex Litigation. I have argued cases involving issues of federal procedure in every United States Court of Appeals and in the United States Supreme Court and I am the co-author of the multivolume treatise *Federal Practice and Procedure*.

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2] should be seen as the latest steps in a long-term judicial trend that has favored increasingly early case disposition in the name of efficiency, economy, and the avoidance of abusive and frivolous lawsuits. In my judgment, insufficient attention has been paid during this period to the important policy objectives and societal benefits of federal civil litigation. Given the significance of the procedural changes that have occurred in recent times and the public policy implications of *Twombly* and *Iqbal*, in effect today's hearing explores the character of access to civil justice in our national courts.

History matters. So let me offer some context for these two cases. When adopted in 1938, The Federal Rules of Civil Procedure represented a major break from the common law and code systems that preceded them. Although the drafters retained many of the prior procedural conventions, the Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and merit adjudications based on the full disclosure of relevant information.[3] The structure of the Rules sharply reduced the prior emphasis on the pleading stage, aiming to minimize the pleadings and motion practice, which experience showed served more to delay proceedings and less to expose the facts, ventilate the competing positions, or further adjudication on the merits.[4] According to the Supreme Court in *Conley v. Gibson*,[5] pleadings only needed to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" to survive a motion to dismiss. Fact revelation and issue formulation were to occur later in the pretrial process.

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[1] 550 U.S. 544 (2007).
[2] ___ U.S. ___, 129 S. Ct. 1937 (2009).
[3] Charles E. Clark, *Pleading under the Federal Rules*, WYO. L.J. 177 (1958).
[4] AM. BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed.) (1938).
[5] 355 U.S. 41, 47 (1957).

Moreover, rather than eliminating claims based on technicalities, the Federal Rules created a system that minimized procedural traps, with trial by jury as the gold standard for determining a case's merits. Generalized pleadings, broad discovery, and limited summary judgment became integral, interdependent elements of pretrial.[6] Although so-called notice pleading allowed a wide swath of cases into the system, discovery and summary judgment operated to expose and separate the meritorious from the meritless; cases that survived the motion to dismiss narrowed in scope as they approached trial on their merits.[7]

Beneath the surface of these broad procedural concepts lay several significant social objectives. The Rules were designed to support a central philosophical principle—the courts' procedural system should be premised on citizen access and equality of treatment. This certainly was a baseline democratic principle of the 1930s and post-war America with regard to social relations, the distribution of power, marketplace status, and equality of opportunity.

As significant new areas of federal substantive law emerged—e.g., civil rights, environment, consumerism—and existing ones were augmented, the importance of private enforcement of many national policies came to the fore. The openness of the Rules enabled people to enforce Congressional and constitutional policies through private civil litigation. The federal courts increasingly were seen as an alternative or an adjunct to centralized or administrative governmental oversight in fields such as competition, capital markets, product safety, and discrimination.[8] Even though private lawsuits sometimes are seen as an inefficient method of enforcing public policy, their availability has dispersed regulatory authority, achieved

[6] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Clark, *supra* note 4, at 185.
[7] *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1220.
[8] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

greater transparency, provided a source of oversight and governance, and led to leaner government involvement.

Much, of course, has changed in the litigation world in the more than seventy years since the Rules were promulgated. The culture of the law and the legal profession itself are far different. Long gone are the days of a fairly homogenous community of lawyers litigating relatively small numbers of what today would be regarded as modest disputes involving a limited number of parties. The federal courts have become a world unimagined in 1938: a battleground for titans of industry to dispute complex claims involving enormous stakes; a forum in which contending ideological forces contest some of the great public policy issues of the day; and the situs for aggregate litigation on behalf of large numbers of people and entities pursuing legal theories and invoking statutes unknown in the 1930s. Opposing counsel compete on a national and even a global scale, and attorneys on both sides employ an array of litigation tactics often intended to wear out or deter opponents. Litigation costs have risen and many cases seem interminable.[9] The pretrial process has become so elaborated with time-consuming motions and hearings that it seems to have fallen into the hands of some systemic Sorcerer's Apprentice. Yet trials are strikingly infrequent, and, in the unlikely event of a jury trial, only six or eight citizens are empanelled. In short, the world of those who drafted the original Federal Rules largely has disappeared. Today, civil litigation often is neither civil nor litigation as we used to know it.

Along with these changes in litigation have come corresponding judicial shifts in interpreting the Rules and other barriers to the meaningful day in court Americans deserve. A few illustrations: Two decades before the recent pleading decisions, a 1986 trilogy of Supreme

[9] Although a sharp increase in criminal matters coupled with the federalization of such matters as securities litigation and class actions has outstripped the growth in the federal judiciary, I do not believe the data supports the notion that we have been struck by a "litigation explosion." *See generally* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 459 (2004).

Court summary judgment cases[10] broke with prior jurisprudence restricting the motion's application to determining whether a genuine issue of material fact was present and sent a clear signal that Rule 56 provided a mechanism for disposing of cases short of trial when the district judge felt the plaintiff's case was not deemed "plausible." In 1995, Congress enacted the Private Securities Litigation Reform Act,[11] which created a super-heightened pleading standard for certain aspects of securities claims and deferred access to discovery with the aim of reducing "frivolous suits." Despite the well established position of notice pleading under *Conley* and absent any revision of Rule 8 by the rulemaking process, lower federal courts repeatedly applied heightened pleading standards in many types of cases, effectively restricting access to our courts.[12] For more than a quarter of a century, amendments to the Federal Rules (along with various judicial practices) have had the effect of containing or controlling discovery, restricting class actions, limiting scientific testimony, and enhancing the power of judges to manage cases throughout the pretrial process.[13]

Yet, until *Twombly* in 2007, the Supreme Court stood firm in its commitment to the access principle at the pleading stage.[14] With the advent of "plausibility" pleading the Rule 12(b)(6) motion to dismiss seems to have stolen center stage as the vehicle of choice for disposing of allegedly insufficient claims and for protecting defendants from supposedly excessive discovery costs and resource expenditures—objectives previously thought to be achievable under other rules and judicial practices.

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[10] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[11] Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of Title 15 of the United States Code).

[12] *See generally* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

[13] FED. R. CIV. P. 16, 26. Rule 16 was amended in 1983 and 1993, and Rule 26 was amended in 1993 and 2000. There have been other constraints imposed on discovery. *See, e.g.*, FED. R. CIV. P. 30(d)(2), 33(a).

[14] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

These procedural developments have come at the expense of the values of access to the federal courts and the ability of citizens to secure an adjudication of the merits of their claims. What has been done is not a neutral solution to an important litigation problem, but rather it is the use of procedure to achieve substantive goals that undermine important national policies by limiting private enforcement of Congressional enactments through various changes that benefit certain economic interests. To paraphrase a friend and an accomplished proceduralist, what we have seen is the "subversion of statutory protections to benefit Wall Street at the expense of Main Street."

Twombly and *Iqbal* have brought a long-simmering debate over these procedural movements to a feverish pitch. The defense bar, along with the large private and public entities it typically represents, asserts that a heightened pleading standard is necessary to keep litigation costs down, weed out abusive lawsuits, and protect American business interests at home and abroad. The plaintiffs' bar, supported by various civil rights, consumer, and environmental protection groups, argue that heightened pleading is a blunt instrument that will bar meritorious claims and undermine national policies. *Twombly-Iqbal* will weigh heavily on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths, often in cases in which critical information is largely in the hands of defendants that is unobtainable without access to discovery.

I believe that democratic participation in the civil litigation process has an important role to play in our society. Effective governance and the enforcement of national policies are impaired if claims are consistently thrown out on the complaint alone. If we truly value fairness and justice, plaintiffs need the access to information the discovery Rules provide to ensure that

Congressional policies are vindicated and equal access to the courts is not eroded. Given these stakes, legislative oversight seems appropriate.

The changes the Court made to the underlying pleading standard in *Twombly* and *Iqbal* are striking. Under *Conley*'s notice pleading standard, courts were authorized to grant motions to dismiss only when "it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[15] Judges were to accept all factual allegations as true and draw all inferences in favor of the pleader. Despite the vagueness of the *Conley* standard, judges employing it on a motion to dismiss had years of precedent aiding them to achieve some consistency and continuity. Moreover, they understood that the motion should be denied except in clear cases. In recent decades, unfortunately, lower courts frequently ignored the standard without rulemaking authority and applied a heightened or inconsistent fact pleading standard in certain types of cases setting the stage for *Twombly* and *Iqbal*.[16]

The assertion by some that these two cases are not a dramatic shift has credibility only if they are compared to the earlier decisions by lower federal courts that deviated from *Conley*. Plausibility pleading now officially has transformed the complaint's function from *Conley*'s limited role of providing notice of the claim into a more demanding standard that requires a more extensive factual presentation.[17] It is now common for federal courts to characterize formerly

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[15] *Conley*, 355 U.S. at 45–46.

[16] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)"); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules.").

[17] For a glimpse at the initial application of the enhanced factual pleading established by *Twombly* and *Iqbal* in a variety of substantive contexts, *see e.g.*, Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, (6th Cir. 2009)(consumer confusion regarding trademark and fair use), Farash v. Continental Airlines, Inc., 2009 WL 1940653 (2d Cir. 2009) (negligence and assault claims under New York law); Sheehy v. Brown, 2009 WL 1762856 (2d Cir. 2009) (slip op.) (§§ 1983 and 1985 claims); St. Clair v. Citizens Financial Group, 2009 WL 2186515 (3d Cir. 2009) (slip op.) (RICO claim); Lopez v. Beard, 2009 WL 1705674 (3d Cir. 2009) (slip op.) (First, Eighth, Fourteenth Amendments, and Age Discrimination Act claims); Morgan v. Hubert, 2009 WL 1884605 (5th Cir. 2009) (slip op.) (Eighth Amendment deliberate indifference claim); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (Alien

acceptable allegations as "formulaic," "conclusionary," "cryptic," "generalized," or "bare."[18] Indeed, it is striking to note that the *Iqbal* majority opinion did not once use the word "notice." The Supreme Court's change in policy seems to suggest a movement backward in time toward code and common law procedure, with their heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint. The past practice of reading the complaint in the light most favorable to the plaintiff seems to have been replaced by the long-rejected practice of construing a pleading against the pleader.

Twombly and *Iqbal*, in fact, have altered Rule 12(b)(6) procedure even more dramatically in some respects. The decisions have unmoored our long-held understanding of the motion to dismiss as a test of a pleading's legal sufficiency. The drafters of the Federal Rules replaced the demurrer with the Rule 12(b)(6) motion in hopes of reducing adjudications based on "procedural booby traps."[19] The common law demurrer, the code motion to dismiss, and our prior understanding of Rule 12(b)(6) all focused only on the complaint's legal sufficiency, not on a judicial assessment of the case's facts or actual merits. Now, *Twombly* and *Iqbal* may have transformed the well-understood purpose of the motion to dismiss into a potentially Draconian method of foreclosing access based solely on an evaluation of the challenged pleading's factual presentation, filtered through the extra-pleading "judicial experience and common sense" factors announced by the Court. The transmogrification of this threshold procedure has pushed the motion to dismiss far from its historical function and, in my view, beyond its permissible scope of inquiry.

Tort Statute and Torture Victims Protection Act claims); Moss v. U.S. Secret Service, 572 F.3d 962 (9th Cir. 2009) (First Amendment viewpoint discrimination claim); Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (employment standards); Logan v. Sectek, Inc., 632 F.Supp. 179, (D. Conn. 2009) (Age Discrimination Act claim); Spencer v. DHI Mortg. Co., Ltd., ___ F.Supp.2d ___, 2009 WL 1930161 (E.D. Cal. 2009) (negligent breach of duty); Vallejo v. City of Tucson, 2009 WL 1835115 (D. Ariz. 2009) (slip op.) (Voting Rights Act claim).

[18] *See e.g.*, Maldonado v. Fontanes, 508 F.3d 263 (1st Cir. 2009); Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC, ___ F.Supp.2d ___, 2009 WL 2191318 (S.D.N.Y. 2009).

[19] Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

Not only has plausibility pleading undone the simplicity and legal basis of the Rule 8 pleading regime and the limited function of the motion to dismiss, but it also grants virtually unbridled discretion to district judges. Under the new standard, the Court has vested trial judges with the authority to evaluate the strength of the factual "showing" of each claim for relief and thus determine whether or not it should proceed.[20] In conducting this analysis, judges are first to distinguish factual allegations from legal conclusions, since only the former need be accepted as true.[21] Some post-*Iqbal* decisions suggest that the conclusion category is being applied quite expansively, embracing allegations that one might well consider to be factual and therefore historically jury triable.[22] By transforming factual allegations into legal conclusions and drawing inferences from them, judges are performing functions previously left to juries at trial, and doing so based only on the complaint.[23]

Once trial judges have identified the factual allegations, they then must decide whether a plausible claim for relief has been shown by relying on their "judicial experience and common sense,"[24] highly subjective concepts largely devoid of accepted—let alone universal—meaning. Further, the plausibility of factual allegations appears to depend on the judge's opinion of the relative likelihood of wrongdoing as measured against a hypothesized innocent explanation. As is true of the division between fact and legal conclusion, the Court has provided little direction on how to measure the palpably nebulous factors of "judicial experience," "common sense," and "more likely" alternative explanation it has inserted into the threshold Rule 12(b)(6) dynamic.

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[20] *Twombly*, 550 U.S. at 556 n. 3.
[21] *Iqbal*, 129 S. Ct. at 1940.
[22] *See* cases cited *supra* note 17.
[23] This thesis and the ramifications of it are strikingly demonstrated in Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). *See also* Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 BOS. COLL. L. REV. 759 (2009) (asserting that judges dismiss case based on their own views of the facts).
[24] *Iqbal*, 129 S.Ct. at 1950.

Once again, a citizen's due process right to a day in court before a jury of his or her peers is threatened.

The subjectivity at the heart of *Twombly-Iqbal* raises the concern that rulings on motions to dismiss may turn on individual ideology regarding the underlying substantive law, attitudes toward private enforcement of federal statutes, and resort to extra-pleading matters hitherto far beyond the scope of a Rule 12(b)(6) motion to dismiss. As a result, inconsistent rulings on virtually identical complaints may well be based on judges' disparate subjective views of what allegations are plausible.[25] Courts already have differed on issues that were once settled. For instance, the Third Circuit has ruled that the 2002 Supreme Court decision in *Swierkiewicz v. Sorema, N.A.*,[26] which upheld notice pleading in employment discrimination actions, no longer was valid law after *Twombly-Iqbal*.[27] Courts in other circuits disagree.[28]

Twombly and *Iqbal* have swung the pendulum away from the prior emphasis on access for potentially meritorious claims;[29] it probably will affect litigants bringing complex claims the hardest. Those cases -- many involving Constitutional and statutory rights that seek the enforcement of important national policies and often affecting large numbers of people -- include

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[25] *Cf.* Lonny S. Hoffman, *Burn Up The Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1259–60 (2008) (noting that summary judgment filings and grant rates vary widely by case type and court).

[26] 534 U.S. 506 (2002).

[27] Guirguis v. Movers Specialty Services, Inc., 2009 WL 3041992 (3d Cir. 2009) (slip op.); Fowler v. UPMC Shadyside, --- F.3d ---, 2009 WL 2501662 (3d Cir. 2009).

[28] Gillman v. Inner City Broadcasting Corp. 2009 WL 3003244, at *3 (S.D.N.Y. 2009) ("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*."); *but see* Argeropoulos v. Exide Tech., 2009 WL 2132442, at *6 (E.D.N.Y. 2009) ("[T]his kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard for assessing motions to dismiss, . . . [b]ut it does not survive the Supreme Court's 'plausibility standard,' as most recently clarified in *Iqbal*.").

[29] *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) ("Such a fluid, form-shifting standard is troubling . . . it is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like, *creating a class of disfavored actions* in which plaintiffs will face more hurdles to obtaining a resolution of their claims on the merits." (emphasis added)).

claims in which factual sufficiency is most difficult to achieve at the pleading stage and tend to be resource consumptive. Already, recent decisions suggest that complex cases, such as those involving claims of discrimination, conspiracy, and antitrust violations, have been treated as if they were disfavored actions.[30] Perhaps the propensity to dismiss these claims should come as no surprise: *Twombly* and *Iqbal* arose in two such contexts, and lower courts may find it easier to apply the Supreme Court's reasoning to complaints with seemingly similar facts. Yet ambiguity abounds. Where is the plausibility line and what must be pled to survive a motion to dismiss? How will each judge's personal experience and common sense affect his or her determination of plausibility? As a result of these and other uncertainties, the value of prior case law and predictability are obscured, and plaintiffs will be left guessing as to what each individual judge will consider sufficient. Throughout, the defendant basically gets a pass.

Moreover, how can plaintiffs with potentially meritorious claims plead with factual sufficiency without discovery, especially when they are limited in terms of time, lack resources for pre-institution investigations, and critical information is held by the defendants? Some courts have acknowledged that demands for plausibility pleading may shut "the doors of discovery"[31] on the very litigants who most need the information gathering resources the Federal Rules have made available in the past.[32] Indeed, *Twombly-Iqbal* can be seen the latest element of the long-running trend in the lower courts toward constricting the private enforcement of important

[30] *See, e.g.*, Cooney v. Rossiter, --- F.3d ---, 2009 WL 3103998 (7th Cir. 2009) (dismissing conspiracy claim); In re Travel Agent Comm'n Antitrust Litigation, --- F.3d ---, 2009 WL 3151315 (6th Cir. 2009) (dismissing antitrust collusion claim); Ibrahim v. Dep't of Homeland Sec., 2009 WL 2246194 (N.D.Cal. 2009) (dismissing discrimination complaint).

[31] *Iqbal*, 129 S. Ct. at 1950.

[32] Ibrahim v. Dep't of Homeland Sec., 2009 WL 2246194, at *10 (N.D. Cal. 2009) ("A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will not often have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court.").

statutory and Constitutional rights in many contexts[33] — a far cry from Congress's intent when it created some of them.

It also remains to be seen how courts will apply the demands of plausibility pleading to relatively uncomplicated civil actions.[34] By deciding to extend plausibility pleading to the entire universe of federal civil cases, it will be applied in many cases that are light years away from the complex claims before them in *Twombly* and *Iqbal*. The difficulties of antitrust and conspiracy claims are far beyond those in most negligence and contract actions, in terms of the complexity of issues, facts, as well as the extent and cost of discovery.

Plausibility pleading extends the Supreme Court's 1986 trilogy of summary judgment cases[35] in which the Court introduced a new "plausibility standard" in that context and transformed Rule 56 motions into a potent weapon for terminating cases short of trial. "Plausibility"—apparently the Court's word *du jour*—now applies both to summary judgment and to pleadings, although the difference between these two utilizations of the word is murky at best. Some even have argued that under *Twombly* the motion to dismiss has become a disguised

[33] *See, e.g.*, Goutam U. Jois, Pearson, Iqbal, and Procedural Judicial Activism (Sept. 12, 2009), *available at* http://ssrn.com/abstract=1472485 (the *Twombly-Iqbal* developments have threatened plaintiffs' ability to recover for Constitutional violations).

[34] The *Twombly* Court asserted the continuing validity of Official Form 11 (formerly Form 9), the paradigm negligence complaint. 550 U.S. at 565 n.10. Yet it also stated that factual allegations, rather than mere conclusions, would be required in order to survive the plausibility hurdle. However, a word like "negligently," which appears in Form 11, may be viewed as either a factual allegation or a legal conclusion. If considered a fact, courts should accept it as true, confirming that Form 11 remains an adequate model for such actions. But if courts begin interpreting "negligently" as a legal conclusion, plaintiffs may have to specify more factual elements, perhaps by requiring the plaintiff to recite the precise actions taken by a defendant motorist that made his or her driving negligent. *See* Farash v. Continental Airlines, Inc., 2009 WL 1940653 (2d Cir. 2009) (requiring specific allegations of nature of defendant's negligence); Doe ex rel. Gonzales v. Butte Valley Unified School Dist., 2009 WL 2424608, at *8 (E.D. Cal. 2009) (declaring sufficiency of Official Forms in doubt). These are precisely the pleading burdens the Federal Rules were designed to avoid.

[35] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

summary judgment motion, attacking not only the legal sufficiency of the pleading, but striving for a resolution by appraising the facts and then characterizing the complaint as conclusory.[36]

However characterized, what we have now is a far different model of civil procedure than the original design: the Federal Rules once advanced trials on the merits, but cases now turn on Rule 12(b)(6) and Rule 56 motions; jurors once were trusted with deciding issues of fact and applying their findings to the law following the presentation of evidence, but now judges are authorized to make these determinations using nothing but a single complaint and their own discretion.

Just as the 1986 trilogy was concerned with restraining the so-called "litigation explosion" through the "powerful tool" of summary judgment,[37] so too the Court in both *Twombly* and *Iqbal* was concerned with developing a stronger "judicial gatekeeping role" for Rule 12(b)(6) motions.[38] Plausibility pleading may well become the courts' primary vehicle for achieving pretrial disposition, moving the gatekeeping function to the very beginning of the case. This is a significant change. Whereas summary judgment typically follows discovery and prevents cases lacking genuine issues of material fact from proceeding to trial, the plausibility pleading standard employs this function at a case's genesis, withdrawing the opportunity to "unlock the doors of discovery." This particularly is true if the district judge stays all proceedings pending the often lengthy period between the dismissal motion and its determination;[39] for many plaintiffs, this effectively denies them any hope of investigating and properly developing their claims.

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[36] Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 66, 98 (2007).
[37] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1056 (2003).
[38] Hoffman, *supra* note 25, at 1220.
[39] *Iqbal*, 129 S. Ct. at 1950.

This new reliance on the motion to dismiss as gatekeeper comes at the expense of the democratic values inherent in trials in open court and the jury system, as well as the utility of private enforcement of important national policies.[40] Although judicial discretion— with its newly declared subjectivity and potential for inconsistency—is hardly a novel aspect of Rule 12(b)(6) practice, *Twombly* and *Iqbal* has escalated it and may have made it the determinative factor in deciding whether plaintiffs will be allowed to proceed to discovery.

The Court's move to plausibility pleading was motivated in significant part by a desire to filter out a hypothesized excess of frivolous litigation, to deter abusive practices, and to contain costs. Indeed, assumptions about the prevalence of these phenomena have led to other dramatic changes in pretrial litigation procedure in the past few decades—an increase in judicial case management, a more demanding summary judgment motion, and constraints on discovery. Yet focusing solely on the complaint, with the attendant risk of dismissing, potentially meritorious cases without permitting discovery, or even requiring an answer, in order to reduce cost and delay is a bit like fitting a square peg in a round hole. Pleading should remain limited to its established function—determining whether the plaintiff has stated a legally cognizable claim—and the Court's concerns about containing cost and minimizing abuse should be dealt with through enhanced case management and other procedural tools. *Twombly* and *Iqbal* terminated cases on the basis of unproven assumptions about litigation abuse, costs, and case management; this, in my judgment, is not a responsible way to make fundamental changes in federal practice that implicate important public policies. A "time-out" may be useful to allow for further study that can illuminate our understanding of these matters and allow us to determine what procedural changes, if any, are warranted. At this juncture legislation may be the way to achieve that.

[40] See the concerns along these lines expressed by Judge Merritt dissenting in *In re Travel Agent Commission Antitrust Litigation*, --- F.3d ---, 2009 WL 3151315 (6th Cir. 2009).

The increase in the complexity, magnitude, and number of cases on federal court dockets in the past few decades have caused many to lament the "twin scourges" of the adjudicatory system—namely, cost and delay. Reacting to complaints about those negatives, increased judicial control over the pretrial process has been provided through rulemaking, Supreme Court decisions, and less formal means, most notably the *Manual for Complex Litigation*. For example, during my tour as Reporter to the Advisory Committee on Civil Rules, the Rules were amended in 1983 in the hope of reducing cost and delay by giving district judges the tools to prevent excessive discovery and to take a more active role in moving cases through pretrial and encouraging settlement. Judicial management has continued to develop in the years since.

Until *Twombly*, the Supreme Court consistently sanctioned the efficacy of case management as a way of containing costs and identifying unmeritorious cases.[41] Unexpectedly, in that case, the Court radically shifted its attitude. Based largely on an outdated and largely theoretical 1989 journal article by Judge Frank Easterbrook,[42] Justice Souter concluded that case management has not been a success[43]—the first time the Court had questioned the ability of district judges to control pretrial procedures in a way that might limit costs and delays.[44] This conclusion served as an important justification for establishing the plausibility pleading standard, with Justice Souter citing the potential for imposing large discovery costs on defendants as a reason to dispose of weaker cases at the very beginning of the litigation process.[45] The *Iqbal* majority extended this line of thinking to government defendants.[46] Justice Breyer, however,

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[41] *See, e.g.*, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993); Swierkiewicz v. Sorema N.A, 534 U.S. 506, 512–13 (2002).
[42] *Twombly*, 550 U.S. at 559 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U.L. REV. 635, 638 (1989)).
[43] *Id.*
[44] Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 898–99 (2009) (noting that *Twombly* is first case in which Supreme Court questioned effectiveness of case management).
[45] *Twombly*, 550 U.S. at 558.
[46] *Iqbal*, 129 S. Ct. at 1953.

offered a dissenting view, endorsing "alternative case-management tools" designed "to prevent unwarranted litigation."[47]

Twombly-Iqbal has set up a somewhat illogical dichotomy because the Court entrusted district judges with the freedom to use "judicial experience and common sense" to dismiss a claim at genesis for noncompliance with a heightened pleading requirement, but disparaged their ability to manage cases in an efficient and economic manner to reach a merit determination. Moreover, it has been noted that it is odd that the Justices—none of whom having been trial judges—so easily dismissed case management across the board when some federal district judges actively endorse it, most utilize it, and a number of post-1989 Rule amendments have established constraints on discovery.

This sudden change in viewpoint is especially questionable given the dearth of meaningful information about the nature and scope of cost and delay. Although some of the criticisms of today's civil justice system certainly have merit, the picture generally portrayed is incomplete and distorted. Despite the lack of definition and empirical data, there is an abundance of rhetoric that often reflects ideology or economic self-interest. As a result, reliance on these assertions may well impair our ability to reach dispassionate, reasoned conclusions as to what changes may be needed. If assumptions about frivolous and abusive use of the system are driving pretrial process changes, we must strive to understand these phenomena fully and appraise what is real and what is illusion before they shape our process any further. Fortunately, some efforts in that direction are underway.

[47] Justice Breyer argued that "[t]he law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. . . . [W]here a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case . . . can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." *Id.* at 1962 (Breyer, J., dissenting).

The Federal Judicial Center (FJC) recently completed a preliminary study regarding attorneys' experiences with discovery and related matters.[48] The results are sobering: overall satisfaction with the pretrial process is higher and discovery costs appear more reasonable than the apocalyptic rhetoric has suggested. A majority of survey respondents believed that the costs of discovery had no effect on the likelihood of settlement and disagreed with the idea that "discovery is abused in almost every case in federal court." Respondents largely were satisfied with the current levels of case management, and over half reported that the costs and amount of discovery were the "right amount" in proportion to the stakes involved in their cases. Expenditures for discovery, including attorneys' fees, amounted to between 1.6 and 3.3% of the total value at stake. Although the significance of these numbers may be debated, it certainly is not the litigant-crushing figures *Twombly* indicated it might be. Real estate brokers charge an even higher percentage for their services. Certainly, some cases genuinely require considerable discovery, and no one doubts that it can be enormously expensive in a small percentage of situations. But, *Twombly-Iqbal* have stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them. For the great body of federal litigation, *Twombly-Iqbal's* medicinal cure may be far worse than the supposed disease. As the FJC study makes clear, anecdotal evidence of cost, delay, and abuse can depart widely from the reality experienced by most litigants.

As to abuse, we have nothing but anecdotes; there is no common agreement, or definition as to what it is or how to distinguish it from legitimate advocacy by one's opponent. By leaving the notions of abusive discovery and frivolous litigation undefined in *Twombly* and *Iqbal* while simultaneously encouraging judges to factor concerns about them when deciding the sufficiency

[48] EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

of complaints, the Court has authorized judges to let their subjective views and attitudes regarding these phenomena and their frequency influence their decision-making. When exercised at the threshold, this broad discretion may undermine historic access norms and debilitate the private enforcement of important substantive policies, as well as Constitutional due process and jury trial rights. It also may lead to greater inconsistencies in the application of federal law, diminish the predictability of outcome that is critical to an effective civil dispute resolution system, and increase forum and judge shopping.

Not only did the Court fail to demonstrate any real proof for its conclusions, it also limited its concerns over costs to those borne by the defendant. If litigation costs are to be used as a justification for revising the existing pleading and motion rules, all costs should be taken into account, including those borne by plaintiffs. The costs to defendants—typically particular large corporate and government entities—in time, money, and reputation are decried frequently. The costs incurred by and imposed on plaintiffs are not discussed anywhere in *Twombly* or *Iqbal*—but they are no less important. Yet, the defense bar and their clients are not always innocent victims of frivolous litigation or abusive conduct or the only bearer of costs; indeed, it is fairly common for attorneys for defendants, who usually are compensated by the hour and paid relatively contemporaneously, to file dubious motions, make unnecessary discovery demands, and stonewall discovery requests to protract cases, enhance their fees, avoid reaching trial and the possibility of facing a jury, and coerce contingent-fee lawyers into settlement. Even more elusive and rarely adverted to, let alone quantified, are the benefits to society that discovery enhances by enabling the enforcement of public policies, promoting deterrence, increasing oversight, providing transparency, and avoiding the expenditures that otherwise might be needed to support government bureaucracies. Because of increased pre-litigation costs, motion practice,

and appeals may follow *Twombly-Iqbal* and the procedural changes that preceded it, erecting access barriers and promoting earlier case disposition may not lead to a meaningful reduction in overall cost.

In sum, significant changes to the Federal Rules have been made in an information vacuum that obscures the true costs of litigation and the net gain (or loss) elevated pleading and pretrial motion practice will produce. It admittedly is difficult to capture this data and even harder to measure the soft, qualitative values of access and merit adjudication, or the other social benefits of private enforcement of constitutional and statutory policies which often are ignored. A sophisticated, wide angle evaluation of the pretrial process is necessary to develop workable solutions. *Twombly* and *Iqbal* did not contribute to that thoughtful, dispassionate process; resetting pleading to the earlier standard by legislation if necessary, provides the rulemakers an opportunity to study the situation, while avoiding the confusion and uncertainties those cases have generated.

The Supreme Court's legislative decisions in *Twombly-Iqbal* have caused many to question the continuing role of the rulemaking process and its current statutory structure. The Rules Enabling Act[49] long has been understood to mean: first, only the rulemaking machinery or an act of Congress can change a properly promulgated Federal Rule;[50] second, the Federal Rules must be "general" and transsubstantive—they must apply in the same way to all types of actions. *Twombly* and *Iqbal* cast doubt on both of these foundational assumptions; yet changes of that magnitude should not be made without more thoughtful deliberation.

[49] 28 U.S.C. § 2072 (1934).
[50] *See* Stephen B. Burbank, *Pleading and the Dilemmas of General Rules*, 2009 WIS. L. REV. 535, 536 (2009).

The Supreme Court has expressed its faith in rulemaking in several cases.[51] Less than a decade prior to *Twombly*, the Court noted that "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."[52] Indeed, forty years ago the Court said: "We have no power to rewrite the Rules by Judicial interpretations."[53] With *Twombly* and *Iqbal*, the Court may have forsaken this commitment by reformulating the Rules' pleading and motion to dismiss standards by judicial fiat.

Amendment by judicial dictate lacks the democratic accountability provided by the legislative and rulemaking processes. The Court's revision of the Rules effectively grants five Justices the power to legislate on important procedural matters, often in ways that determine whether litigants ultimately will be able to have a meaningful day in court and whether important Constitutional and Congressional mandates are enforced. In addition to its poor democratic pedigree, the Supreme Court 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."[54] In light of the continuing trend toward increasingly early case disposition, rulemaking by judicial mandate seems inconsistent with many of the historic objectives of our federal civil justice system.

On the second point, the Rules Enabling Act's provision for "prescrib[ing] general rules of practice and procedure"[55] has been understood to mean that the Federal Rules should be

[51] Swierkiewicz *v.* Sorema *N.A*, 534 U.S. 506 (2002); Crawford-El v. Britton, 523 U.S. 574 (1998); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993).
[52] *Crawford-El*, 523 U.S. at 595.
[53] Harris v. Nelson, 394 U.S. 286, 298 (1969).
[54] Burbank, *supra* note 50, at 537.
[55] 28 U.S.C. § 2072 (1934).

"uniformly applicable in all federal district courts [and] uniformly applicable in all types of cases."[56] —the application of Rule 8's pleading standard and the motion Rules should not vary with the substantive law governing a particular claim. Under *Twombly* and *Iqbal*, it is quite possible that, as a practical matter, the Court has abandoned (or compromised) its devotion to the Rules' transsubstantive character. Although the Court claims that the enhanced pleading standard will be applied uniformly in all civil actions, as discussed above it is unclear how the standard will be applied in practice, or whether it makes sense. If the standard is applied stringently in complex cases but leniently in simpler cases in keeping with the Official Forms, plausibility may be transsubstantive in name only. This would violate the Rules Enabling Act's command of "general rules." What might be done about this is a policy decision of enormous magnitude that requires far more study and discussion than is reflected in the Court's assumptions and some aspects may require Congressional consideration. Legislation reinstating the pre-*Twombly-Iqbal* practice would provide time for the rulemaking process to explore many things, including the possibility of moving toward a differential pleading system that could be more appropriate for handling the variegated cases in the federal courts.

Admittedly, today's litigation realities are strikingly different from the world that generated the Federal Rules. Strong forces have moved case disposition earlier and earlier in an attempt to counteract the perceived problems of discovery abuse, frivolous lawsuits, and litigation expense. Some changes in the pretrial Rules may be in order, or course. Perhaps new restrictions and variations on discovery may be appropriate: limited pre-institution or pre-dismissal discovery, increased automatic disclosures, or broader authority for judges to authorize custom-tailored and phased discovery. Enhanced Rule 11 or Rule 37 sanctions might discourage improper behavior. Disciplines such as information science and business management may have

[56] Burbank, *supra* note 50, at 536.

something to offer in the way of identifying the best—or, at least, more effective—practices for minimizing litigation costs and delays. In any case, it is clear that the blunt instrument of plausibility pleading with the pro-dismissal signals it sends to Bench and Bar is not the appropriate answer to the complex problems inherent in today's litigation.

The dramatic procedural changes of the past quarter century clearly present serious questions for the Federal Rules: How many potentially meritorious claims are we willing to sacrifice in order to achieve the benefits of a greater level of filtration? Have we abandoned our gold standard—adjudication on the merits, with a jury trial, if appropriate—and replaced it with threshold judicial judgments based on limited information, discarding all suits that the district court believes are not worth pursuing? And, has litigation changed so much that the ethos of access, equalization, private enforcement of public policies, and merits-adjudication no longer can be served?[57] Although we must live in the present and plan for the future, it is important not to forget the important values and objectives at the heart of the 1938 Federal Rules. Although I am a firm believer in the rulemaking process, a legislative restoration and moratorium may be what is needed to encourage a full exploration of the values of civil litigation and to shed some much needed light on the cavalier assumptions being bandied about concerning costs, abuse, and lawyer behavior. The pretrial disposition drift I have described should be abated pending a thoughtful and extensive evaluation of where we are and what we want our courts to be doing. Sensitive oversight by Congress today might strengthen the rulemaking process for tomorrow.

I urge this Committee to think seriously about whether we are achieving the goals of Federal Rule 1—"the just, speedy, and inexpensive determination of every action and proceeding." After all, embedded in Rule 1 always has been a sense that the Rules and their

[57] *See* Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46 (1957) ("I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleading . . . .").

application should achieve balance and proportionality among the three objectives it identifies. "Speedy" and "inexpensive" should not be sought at the expense of what is "just." The latter is a short word, but it embraces values and objectives of Constitutional and democratic significance. As Justice O'Connor said in *Hamdi v. Rumsfield* [58] "we must preserve our commitment at home to the principles for which we fight abroad."

[58] 542 U.S. 507, 532 (2004).