

*IQBAL, TWOMBLY, AND THE LESSONS OF THE  
CELOTEX TRILOGY*

by  
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*This Essay compares the Twombly/Iqbal line of cases to the Celotex trilogy and suggests that developments since the latter offer lessons for the former. Some of the comparisons are obvious: decreased access and increased judicial discretion. However, one important similarity has not been well understood: namely that the driving force in both contexts has been the lower courts rather than the Supreme Court. Further, while we can expect additional access barriers to be erected in the future, our focus should be on lower courts, rather than other institutional players, as the likely source of those barriers.*

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I. INTRODUCTION

The Supreme Court’s recent rulings in *Ashcroft v. Iqbal*<sup>1</sup> and *Bell Atlantic v. Twombly*<sup>2</sup> fundamentally alter the Court’s approach to the standards governing pleading. *Iqbal* confirmed and magnified what many suspected *Twombly* represented: a dramatic and radical shift from a liberal notice pleading standard<sup>3</sup> to a heightened, but nebulous, plausibility standard.<sup>4</sup> But this was hardly an unprecedented shift.

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<sup>1</sup> 129 S. Ct. 1937 (2009).

<sup>2</sup> 127 S. Ct. 1955 (2007).

<sup>3</sup> *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).

<sup>4</sup> *Iqbal*, 129 S. Ct. at 1949–54. The plausibility standard first appeared in *Twombly*, 127 S. Ct. at 1965–71. Scholars immediately began to debate whether, how, and in

Indeed, the more one looks at these opinions, the more one finds striking parallels to the Court's similar shift in the summary judgment context less than three decades ago. I speak, of course, of the famous (infamous?) *Celotex* trilogy.<sup>5</sup> This Essay explores these parallels and suggests that our history with summary judgment offers some critical lessons for our future with pleading.

This Essay assumes familiarity with the *Iqbal* and *Twombly* cases and proceeds as follows: Part II identifies three parallels between the Court's apparent shift in the pleadings context and its earlier shift in that of summary judgment. The first two of these parallels relate to their access-limiting features and the consequent empowering of the judge. I suspect that most participants in this symposium will not object to my drawing these parallels. Indeed, some of these are fast becoming accepted as fact among civil procedure aficionados.<sup>6</sup>

The third parallel, however, is likely to be simultaneously the most controversial and the most important because of its broader implications and the lessons it suggests. Specifically, I argue that, contrary to what I perceive to be the emerging conventional wisdom, neither the imposition of heightened pleading standards nor the Court's blessing of summary judgment in the *Celotex* trilogy represented, in the main, innovations on the part of the Supreme Court. In fact, these doctrinal developments are not primarily the work of the Supreme Court at all, but rather of the lower courts. Far from representing a sudden change in course for the federal courts, they are best viewed as lag indicators (albeit imperfect ones) of what had been going on in the lower courts for years.

Although this final claim may be controversial, the truth is that it fits comfortably with the first two observations. It is the lower courts, and not the Supreme Court, that are invested in docket control mechanisms and that stand to benefit from decreasing access and enhancing the role of

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what circumstances it altered pleading doctrine. See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135 (2007); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW'S WRIT, Aug. 13, 2007, <http://writ.news.findlaw.com/dorf/20070813.html>; Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007). The majority of the scholarship argued that *Twombly* had far-reaching consequences.

<sup>5</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>6</sup> Yes, we exist, and we are a fun lot. My claims about the conventional wisdom comes from my reading of, and participation in, conversations about the cases privately and through internet discussions on a civil procedure professors' listserv. In addition, Jon Siegel, Howard Wasserman, and others have discussed the case extensively on legal blogs like PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg>, Concurring Opinions, <http://www.concurringopinions.com>, and elsewhere. Finally, these views have been broadly reflected in the emerging law review literature on these cases.

the judge. It thus makes sense—even if we generally do not think of it this way—that the lower courts, rather than the Supreme Court, are the force behind these innovations.

Part III concludes by offering several lessons from the summary judgment context for the future of pleading and civil procedure jurisprudence more generally. Most importantly, I suggest that we are likely to see the trends that the *Twombly/Iqbal* line and the *Celotex* trilogy represent continue, and that the best way to identify the next move is to look at the lower courts rather than the Supreme Court.

## II. THE PARALLELS BETWEEN *TWOMBLY/IQBAL* AND THE *CELOTEX* TRILOGY

Consider the following brief narrative. For a fairly long time, the Supreme Court was not particularly receptive to arguments that trial courts should use a particular tool for managing their dockets except in the most extreme cases. Then, suddenly, the Court did something of an about-face and embraced this tool. As a result, plaintiffs will find it more difficult to pursue their cases.

I am describing, of course, the *Twombly/Iqbal* line of cases;<sup>7</sup> but I could just as easily be describing the *Celotex* trilogy, in which the Supreme Court apparently put aside its previous misgivings about the use of summary judgment as a tool for managing dockets. Indeed, reading these more recent cases, one cannot help but feel a sense of *déjà vu*. In this Part, I will expand on this general observation and identify some stark parallels between the two sets of cases. As I indicated in the introduction, some of these embrace the emerging scholarly consensus; but the most important parallel, which relates to how we in the legal academy think about and talk about the Supreme Court's role, represents something of a challenge to what I take to be the conventional wisdom.

### A. *Access, Access, Access—and Beyond*

The first and most obvious similarity between the imposition of heightened pleading standards and the earlier embrace of summary judgment as a docket management tool is that the likely effect of both is to reduce access by plaintiffs to trials and juries.<sup>8</sup> The granting of

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<sup>7</sup> See *infra* notes 33–35 and accompanying text.

<sup>8</sup> See, e.g., Posting of Jon Siegel to Concurring Opinions, *Iqbal Keeps Spreading*, <http://www.concurringopinions.com/archives/2009/09/iqbal-keeps-spreading.html> (Sept. 8, 2009, 12:40 PM); Posting of Jon Siegel to LAW PROF on the LOOSE, *Iqbal's Children*, <http://jsiegel.blogspot.com/2009/08/iqbals-children.html> (Aug. 4, 2009, 1:06 PM) [hereinafter *Iqbal's Children*]; Posting of Jon Siegel to LAW PROF on the LOOSE, *Icky Iqbal*, <http://jsiegel.blogspot.com/2009/05/icky-iqbal.html> (May 19, 2009, 7:00 AM); Posting of Scott Dodson to Civil Procedure & Federal Courts Blog, *Beyond Twombly*, <http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html> (May 18, 2009); Michael C. Dorf, *The Supreme Court*

summary judgment, in the most basic terms, is the judge saying, “The story that you tell is not supported by enough evidence, so you are not entitled to a jury trial.” The plausibility standard is similar. Here, the judge effectively says, “Your story is so implausible that not only are you not entitled to a jury trial, you are not entitled to proceed.” To be sure, the two are not the same; the new pleading standard goes so far as to prevent plaintiffs in these cases from ever even having the opportunity to conduct discovery in order to generate evidence.<sup>9</sup> But they are similar in that they are both ways of getting rid of cases that seem (at least to someone) to be meritless.<sup>10</sup>

Beyond simply limiting access by plaintiffs to courts and juries, enhanced roles of motions to dismiss and motions for summary judgment may have profound effects throughout the case management process. They potentially diminish the role of the jury,<sup>11</sup> raise the costs of litigation for plaintiffs (and possibly defendants as well),<sup>12</sup> drive down settlement costs,<sup>13</sup> and change the kinds of cases that are brought in the first place.<sup>14</sup>

In these respects, both the *Twombly/Iqbal* line and the *Celotex* trilogy are part of a much larger trend towards limiting access throughout the federal trial system. Other examples of this trend include “jurisdiction-stripping;”<sup>15</sup> the push and rush to settle;<sup>16</sup> sealed settlement agreements;<sup>17</sup>

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*Dismisses a 9/11 Detainee’s Civil Lawsuit*, FINDLAW’S WRIT, May 20, 2009, <http://writ.news.findlaw.com/dorf/20090520.html>; Posting of Howard Wasserman to PrawfsBlawg, *Iqbal and the Death of Notice Pleading: Part I*, <http://prawfsblawg.blogs.com/prawfsblawg/2009/05/iqbal-and-the-death-of-notice-pleading-part-i.html> (May 18, 2009, 4:48 PM); Posting of Howard Wasserman to PrawfsBlawg, *Iqbal and the Death of Notice Pleading: Part II*, <http://prawfsblawg.blogs.com/prawfsblawg/2009/05/iqbal-and-the-death-of-notice-pleading-part-ii.html> (May 18, 2009, 6:12 PM).

<sup>9</sup> *Iqbal’s Children*, *supra* note 8; Posting of Jon Siegel to Concurring Opinions, *Iqbal Empirics*, <http://www.concurringopinions.com/archives/2009/09/iqbal-empirics.html> (Sept. 9, 2009, 6:50 AM) [hereinafter Siegel, *Iqbal Empirics*].

<sup>10</sup> See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016 (2003).

<sup>11</sup> Obviously, if more cases are dismissed earlier, potentially fewer cases can make it to a jury.

<sup>12</sup> Heightened pleading standards potentially introduce costs. See discussion *infra* Part III. See also Siegel, *Iqbal Empirics*, *supra* note 9.

<sup>13</sup> A greater likelihood of dismissal might lead to lower settlements.

<sup>14</sup> Attorneys may decline to bring claims that may not survive motions to dismiss.

<sup>15</sup> See, e.g., Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 293 (2007).

<sup>16</sup> See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (“I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets.”); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

<sup>17</sup> See, e.g., Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina’s New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 804 (2004);

unpublished, unexplained, inaccessible, and non-precedential judicial opinions;<sup>18</sup> the resort to para-judicial personnel for case management;<sup>19</sup> and sealed files and secret dockets.<sup>20</sup> No doubt there are more, but the point is that the common perception of our judicial system as open and accessible—a place for people to go to actually have their disputes adjudicated on their merits—is something of a farce. Rather, it is best

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Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT. L. REV. 375, 377–378 (2006).

<sup>18</sup> See, e.g., Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973 (2008); Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555 (2005); Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1 (1989); Susan W. Brenner, *Of Publication and Precedent: An Inquiry into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 461 (1990); Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 249–50 (1998); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expediency or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004); Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155 (1992); Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429 (2003); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007) [hereinafter Pether, *Clerks and Staff*]; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003); Arthur B. Spitzer & Charles H. Wilson, *Trial Balloon: The Mischief of the Unpublished Opinion*, LITIG., Summer 1995; Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67 (2004). In addition to this list, which is by no means complete, the *Washington and Lee Law Review* hosted an excellent symposium on the issue, published at Symposium, *Have We Ceased to be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions*, 62 WASH. & LEE L. REV. 1429 (2005) [hereinafter Symposium]; Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553 (2005).

<sup>19</sup> See Pether, *Clerks and Staff*, *supra* note 18.

<sup>20</sup> See *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1024–31 (11th Cir. 2005). See also Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 714–15 (2004); David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807 (2003).

understood as a bureaucratic system for disposing of disputes. And now, as with the *Celotex* trilogy and summary judgment, the Supreme Court has blessed another means of dispute disposal.

*B. Empowering the Judge*

A closely-related and perhaps similarly obvious parallel between the *Twombly/Iqbal* line of cases and the *Celotex* trilogy is that they explicitly enhance the judge's role as gatekeeper. More to the point, they each call on the judge to use his or her own experiences and intuitions as barometers for whether a case should proceed or be ejected.

In the summary judgment context, the doctrinal test for whether to grant or deny summary judgment is whether, in light of all of the evidence, "a reasonable jury" could believe what the party opposing summary judgment claims.<sup>21</sup> Who decides what a "reasonable jury" could believe, and thus whether the party is entitled to a jury? The judge, of course. But can anyone seriously disagree with the proposition that different judges have different views of what a reasonable jury might believe? Every time a court of appeals divides on what might be reasonable is evidence that different views exist, as is every instance in which an appellate court reverses a lower court on this question. Further, we also have evidence that in some cases, factors like a judge's gender will influence whether he or she finds an interpretation of the facts to be reasonable.<sup>22</sup> Thus, the judge's personal experiences and intuitions, which inevitably differ from judge to judge, shape the kinds of cases that a jury gets to see.

In the pleadings context the story is even worse. Justice Kennedy's explanation of the role of the judge in *Iqbal* is, depending on your view of this sort of thing, refreshingly candid or stunningly lawless (or perhaps both). Confronting the obvious critique of the vagueness and ambiguity of the plausibility standard introduced in *Twombly*, Kennedy writes that "[d]etermining whether a complaint states a plausible claim . . . [is] context-specific[,] . . . requir[ing] the reviewing court to draw on its . . . experience and common sense."<sup>23</sup> This can only be read as an explicit invitation for the judge to use his or her own experience and intuitions as a baseline for whether a complaint can proceed.

I am certainly not the first to compare these aspects of the *Celotex* trilogy and the *Twombly/Iqbal* line. Suja Thomas has already written extensively on this topic in arguing that modern summary judgment and

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<sup>21</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

<sup>22</sup> Deborah Rhode, *In a "Different" Voice: What Does the Research About How Gender Influences Judging Actually Say?*, SLATE, June 10, 2009, <http://www.slate.com/id/2220220> (citing and discussing empirical studies).

<sup>23</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

the new pleading standards are both unconstitutional for precisely this reason.<sup>24</sup> And so, again, I shall move on.

*C. It Came From Below*

Now we arrive at what I expect will be the least intuitive and most controversial link between the *Celotex* trilogy and the recent cases on pleading: the most interesting story here lies not with the Supreme Court, but with the lower courts.

To the extent we wish to identify bad actors in these cases, it is tempting, easy, and convenient to point the finger at the Supreme Court Justices. And indeed, this is what we have seen among those who have opposed the increased prominence of summary judgment;<sup>25</sup> and we are already beginning to see it in the present context.<sup>26</sup> The opinions themselves and the Justices who wrote them have become the focus of the critique. But this is a mistake, at least in part.

The idea that the Supreme Court divined heightened pleading standards and an increased role for summary judgment out of thin air, or that these cases are primarily about the Supreme Court, are myths that require puncturing. The real culprits here, and the proper focus of our attention, are the many trial and appellate courts that changed practices on the ground and finally pushed the Supreme Court to sign on to these shifts in practice.<sup>27</sup> At most, the Supreme Court has been a lag indicator for what was already happening in the lower courts.

Consider first the summary judgment context. The story that emerges from the literature is that, once upon a time, summary judgment was a seldom-used device with little significance. But along came the Supreme Court's *Celotex* trilogy, and all of that changed. Suddenly, the use of summary judgment by litigants and judges exploded, radically altering the federal system of civil adjudication.<sup>28</sup>

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<sup>24</sup> Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) [hereinafter Thomas, *Motion to Dismiss*]; Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

<sup>25</sup> See, e.g., Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1913–17 (1998) (summarizing the views of critics of the *Celotex* trilogy).

<sup>26</sup> See Thomas, *Motion to Dismiss*, *supra* note 24, at 1853.

<sup>27</sup> See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007).

<sup>28</sup> See, e.g., Wald, *supra* note 25, at 1914–15, 1917 (1998) (“Simply stated, to these critics the 1986 cases appeared to have sharply tilted the playing field, forcing the more disadvantaged parties to run uphill. These critics also worried that this trio of decisions invaded the province of the factfinder by blocking trials even when material facts were contested, on the basis of judges’ predictions as to whether sustainable inferences could be drawn from the few pieces of evidence that were available at this early stage. What almost everyone in the academic and legal communities agreed on was that the Supreme Court had moved summary judgment out of left field and onto first base, where it began shortening the innings by taking out runners before they

But this story is false. The Supreme Court did not introduce the idea that cases could be “managed” out of the courts through the use of summary judgment in 1986. Rather, as recent empirical analysis has persuasively established, the increased prominence of summary judgment began in the 1970s.<sup>29</sup> Lower courts used it expansively to dismiss apparently meritless cases for quite a long time before the Court jumped on the bandwagon and explicitly adopted the lower courts’ jurisprudence on the appropriate use of summary judgment.<sup>30</sup>

Now consider the current discourse over pleading standards. Once again, we—the scholarly community—are discussing this issue because the Supreme Court has suddenly, it seems, announced a doctrinal shift. (It is, of course, the Supreme Court’s decision in *Iqbal* that brings these articles together.) The Court itself has become the story. Once again, though, I believe that this emerging consensus is mistaken.

Several years ago, well before *Twombly*, Christopher M. Fairman published *The Myth of Notice Pleading*, a comprehensive analysis of pleading standards in the lower courts.<sup>31</sup> In it, Fairman showed that, per the title of the article and notwithstanding the Court’s stated commitment to notice pleading, the trial and appellate courts had instituted higher pleading requirements in a stunning array of cases.<sup>32</sup> In a sense, they were ignoring the Supreme Court’s explicit directives.

Further, one can see that the push towards higher pleading standards comes from the lower courts from the fact that, up until *Twombly*, the Supreme Court had to repeatedly reassert the notice pleading standard and reject lower court efforts to assert higher standards. For example, in 1993, long after the Court had adopted notice pleading as the operative standard, the Court rejected the Fifth Circuit’s heightened pleading standard for civil rights cases alleging municipal liability.<sup>33</sup> The Court stated 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.”<sup>34</sup> Yet, in 2002, the Court had to once again reaffirm its black-letter doctrine because other lower courts—here the courts in the Second Circuit—had imposed heightened pleading standards in discrimination cases.<sup>35</sup> And then 2006 brought *Twombly*, in which, once again, the lower courts had

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could even begin to make the rounds. From 1986 to the present day, summary judgment has remained at first base and, some would say, it is getting progressively better at tagging runners out.” (citations omitted).

<sup>29</sup> Burbank, *supra* note 27, at 620. See also Cecil et al., *supra* note 27, at 861, 896.

<sup>30</sup> Cecil et al., *supra* note 27, at 861, 863, 902.

<sup>31</sup> Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

<sup>32</sup> *Id.* at 998–1059.

<sup>33</sup> *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

<sup>34</sup> *Id.* at 168.

<sup>35</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).



moved towards higher pleading standards.<sup>36</sup> The only difference between *Twombly* and the earlier cases is that, for once, the Supreme Court blinked.

I should be clear that I am not arguing that *every* lower court judge favors or pushed for heightened pleading standards. It is worth noting, for example, that the lower courts in *Iqbal* did not dismiss the case on grounds of insufficient pleadings.<sup>37</sup> Further, I am not even claiming that a majority of lower court judges prefer heightened pleading to notice pleading standards. This is a difficult empirical question that I am not particularly concerned with. Indeed, it seems to me that the debate over pleading standards is at least partly ideological and political. But I do think it is clear that the Supreme Court was pushed by at least *some* lower court judges to adopt heightened pleading standards. Or, to put it another way, in the absence of efforts on the part of lower court judges to erect barriers to entry through the use of heightened pleading requirements, the Supreme Court would not likely have done so on its own.

That said, it is difficult to identify with any certainty what caused the Supreme Court to blink in *Twombly* and *Iqbal* (and, earlier, in the summary judgment context). My speculation is that it was due to some combination of the following factors: Supreme Court Justices' greater identification and association with lower court judges than with plaintiffs; lower courts' consistent articulation of the problems with docket management and frivolous litigation; and a political and socio-legal culture that increasingly views plaintiff-driven civil litigation with mistrust.

Whatever the specific mechanism, what we observe in these cases is a dialectical process in which the lower courts alter the doctrine over time, only to be rebuffed occasionally by the Supreme Court—until the Court finally adopts the higher standards. This, much more complicated version, is the story of the changes to pleading doctrine that we should take to heart.

In addition to being a more complex story, this is also a much more interesting one from a theoretical standpoint. How are we to understand the relationship between the Supreme Court and the lower courts in light of the ongoing fight over pleading standards between them, a fight that the lower courts ultimately won? What did we mean when we said that we had a notice pleading system if cases were routinely dismissed by lower courts under higher standards of their own making? Or, more broadly, what is the law? Is it what the putative lawmaker says, or what those charged with applying it *do*?<sup>38</sup>

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<sup>36</sup> Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

<sup>37</sup> See *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007).

<sup>38</sup> I have explored this and related questions at length elsewhere. My own view is similar to Llewellyn's: the law is what those applying it do. See Levin, *supra* note 18, at 979 (citing KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 12 (1951)).

Most provocatively of all, the process by which lower courts push and move the Supreme Court suggests that our general view of the relationship between the Supreme Court and lower courts may be backwards. It is not necessarily, as we tend to assume, that if we read Supreme Court opinions we can deduce what lower courts will do (under the assumption that they follow precedent); rather, it is that we can read lower court opinions and deduce where the Supreme Court may end up.

It is easy to see why the lower courts have led the way in both the summary judgment and pleadings contexts. After all, the Supreme Court gets to choose its own docket; the lower courts are stuck with whatever cases people choose to bring. As a result, lower court judges are preoccupied with managing their caseloads, and they have driven many of the access-limiting innovations that I have identified.

None of this takes the Supreme Court off the hook, of course. Nor does it suggest that *Twombly* and *Iqbal* will have no real impact on litigation. It does not take the Supreme Court off the hook because to the extent we consider these cases to be bad, at least the lower courts have an excuse in the sense that they face docket pressures that the Supreme Court does not. We can understand, even if we do not approve of, their instinct to manage their dockets in this way. The Supreme Court, though, acted without this excuse. Indeed, because of its ability to control its docket and its distance from the pressures of docket management, the Court is institutionally well positioned to reject and resist these pressures. That it did not do so is surely an indictment of the Court.

The Court also deserves criticism for another reason. Although the lower courts' efforts to institute heightened pleading standards were misguided and even lawless, at least the standards that they articulated were often transparent. For example, in *Swierkiewicz*, the lower courts applied their requirement that pleadings in an employment discrimination case be sufficient to state a prima facie case under the well-known *McDonnell Douglas* standard.<sup>39</sup> A potential plaintiff or plaintiffs' attorney confronted with this rule could at least know what was expected of him or her. In contrast, the Supreme Court's plausibility standard is extraordinarily vague, making it difficult for a party to judge whether a potential lawsuit is worth bringing.

As for how the cases will have an impact below, I think the jury is still out. To the extent that, as I have argued, these cases reflect the lower courts' jurisprudence rather than remake it, one might conclude that they are mostly irrelevant. But I believe that conclusion is too trite, and there are at least two ways in which these cases matter. One way in which they will surely have an impact is that they will generate a great deal of litigation over what "plausible" means.

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<sup>39</sup> *Swierkiewicz v. Sorema N.A.*, 5 Fed. App'x 63, 64 (2d Cir. 2001) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Second, consider what the Court's alternative was in *Twombly*. It could have once again reaffirmed its commitment to notice pleading. This could have had the effect of making the lower courts more cautious, at least temporarily, of dismissing cases for not meeting pleading burdens. But the Court did not do that at all. Instead, it finally gave its stamp of approval for the lower courts' fairly consistent efforts to raise the standards. As a result, the lower courts' decisions and rhetoric may shift in perceptible and imperceptible ways, as may litigant (and potential litigant) behavior. For these reasons, I do not mean to suggest that these cases are beside the point, but rather to caution that they—and the Supreme Court—are not the *main* point.

In light of this, I think we ought to consider *why* we make the mistake of focusing on the Supreme Court. I want to be very clear that I do not believe that this blind spot is limited to these contexts, or that civil procedure scholars are any more prone to it than anyone else in the legal academy; I believe that there is a bias towards Supreme-Court-watching throughout legal academia. But why do we privilege the Supreme Court? Mostly, I think it is because watching the lower courts is incredibly difficult.<sup>40</sup> There are too many cases, too many judges, too many messy issues, too many moving parts, and too many unpublished orders to be able to identify potential trends and issues as they emerge from the trial courts, and often even from the appellate courts.<sup>41</sup> It is only when a particularly high-profile or stark case, a prominent split among authorities, or an especially notable judicial opinion announces itself that these trends become evident. No surprise or coincidence that these are the cases in which the Supreme Court is likely to take interest.

To be sure, there are some scholars going to heroic efforts to seriously study the trial courts, and we should all be attentive to those efforts.<sup>42</sup> But I do not believe that this will become the norm, even as our empirical tools become better honed and the legal academy becomes more comfortable with empirical methodologies.

In the end, then, I simply suggest that we subtly shift how we think about the Supreme Court. Even as we avidly watch its docket, read its opinions, organize symposia around its surprising moves, critique it, and attempt to influence it, let us always keep in mind the Court is but one actor in our vast bureaucratic system for disposing of disputes, and it is just as likely—more likely, in fact—to be a lag indicator of what is going on below than it is to be on the cutting edge.

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<sup>40</sup> Levin, *supra* note 18, at 981–82.

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007).

### III. SUMMARY JUDGMENT'S LESSONS FOR THE FUTURE OF PLEADING AND CIVIL PROCEDURE

Given that history appears to be repeating itself, I believe that our experience with summary judgment and related changes over the past two decades offers some lessons for the future of pleading and civil procedure jurisprudence more broadly.

First, just as we have seen in the summary judgment context, we should expect to see courts struggle to understand and apply the plausibility standard for some time. Courts already began to do so in the wake of *Twombly*, and though *Iqbal* resolved some of the questions (chiefly by confirming that the plausibility standard applies to all cases), many questions will remain (e.g., “what the heck does ‘plausible’ mean?”). Over time, small but consequential fissures and circuit splits will explicitly or implicitly arise, and once in a while, the Supreme Court will wade back into the fray.

This, of course, is not just a lesson from the summary judgment context, but from any area in which the Supreme Court articulates a new rule, especially when the new rule is as vague as this one. What the summary judgment context in particular suggests, however, is that the differences among courts will not be limited to circuit splits or district splits. Every appellate court panel and every district judge will have its/his/her own intuitions about how to interpret and apply the plausibility standard to specific cases. This is what we have seen in the summary judgment context, where the judge must decide what a “reasonable jury” could believe; and it is what we will likely see in the pleadings context, where the judge must consider his or her own experience in deciding whether a claim is plausible. And we should expect judges to explicitly or implicitly disagree on just these kinds of questions.

The second lesson from our experience with summary judgment is that the plausibility standard may not necessarily introduce efficiencies and cost-savings for defendants into the system. It is an open question in the summary judgment context as to whether the process of litigating a lawsuit on paper necessarily reduces overall costs, either for the court system or even for defendants. It may delay settlement and increase discovery costs and, if the motion is denied, the process may be effectively duplicated if the case goes to a jury.<sup>43</sup>

Similar possibilities present themselves with respect to the motion to dismiss. In specific cases, of course, where “implausible” pleadings get definitively tossed early, defendants will realize immediate savings, as they will if cases that might have been brought under the old regime never get brought in the first place. However, with respect to cases that *survive*

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<sup>43</sup> See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875 (2006).

motions to dismiss that would not have been made under the old regime, the defendant is worse off under the new standards. That is, the new standards may discourage early, cheap settlement and encourage more, and more drawn-out, paper litigation, which obviously comes at a cost in lawyers' fees. Perhaps even more importantly, we may see (and in fact are beginning to see) more dismissals without prejudice, leading to an expensive merry-go-round in which plaintiffs file pleadings, defendants challenge them with motions to dismiss, dismissals are granted without prejudice, plaintiffs refile, and so on.<sup>44</sup> Finally, disputes that could have been settled even before cases are filed may not be if defendants anticipate that the case may be dismissed early under the new defense-friendly standards. Ironically, then, as a result of *Twombly* and *Iqbal*, we could see cases filed that would not have been filed under the old standards. In the end, it will be difficult to tell whether, or at least how, when, and how much, the plausibility standard saves defendants money.

Third, we should not expect the pleading context to be the final impediment to access for plaintiffs to the courts. It is merely the latest. This is not simply a lesson from our experience with summary judgment, but from the much more general pattern that we have seen over the past decades. The single counterexample that I can think of—that is, the only recent instance of which I am aware in which the courts have moved towards greater access of a kind—speaks volumes by its relative insignificance. Here I speak of the fairly recent introduction of Rule 32.1 of the Federal Rules of Appellate Procedure, which finally permitted attorneys to cite to unpublished opinions.<sup>45</sup> This was the culmination of years of effort on the part of lawyers, judges, and scholars who were justifiably appalled by ridiculous rules prohibiting lawyers from repeating judges' own words to them.<sup>46</sup> Now, this does represent a triumph, of a sort, in favor of access in the sense that it should incentivize judges to be more careful with what they say and how they rule in unpublished opinions, and that, no doubt, is a good thing.<sup>47</sup> But in the face of all of the moves *against* access, this triumph seems rather beside the point.<sup>48</sup> Thus, given the ratio of moves diminishing access to moves enhancing access (I am no mathematician, so let us eschew precision and simply ballpark the equation as a-whole-lot : a-teeny-tiny-bit), I believe it is safe to predict that the trend will continue.

This, in turn, leads us to the next lesson. Where will future access-diminishing changes come from? They *could* come from legislation, of

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<sup>44</sup> Siegel, *Iqbal Empirics*, *supra* note 9.

<sup>45</sup> FED. R. APP. P. 32.1 (2006). For a discussion on Rule 32.1, see Symposium, *supra* note 18.

<sup>46</sup> See Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005).

<sup>47</sup> See Joan M. Schaughnessy, *Unpublication and the Judicial Concept of Audience*, 62 WASH. & LEE L. REV. 1597 (2005).

<sup>48</sup> See, e.g., William N. Richman, *Much Ado About the Tip of the Iceberg*, 62 WASH. & LEE L. REV. 1723 (2005).

course; they *might* come from rule changes; and they *may* be handed down from the Supreme Court. But both the summary judgment context and the pleading context suggest that we should keep our eyes on lower court judges. They, as I have argued, have been the force behind access-limiting changes in both contexts; and they, of course, are the ones most affected by (and potentially most invested in) these kinds of changes. Unfortunately, for a variety of reasons, it is much more difficult to identify trends in their nascent stages on the trial and appellate courts; but this is where the real action is.<sup>49</sup>

Finally, applying the watch-the-lower-courts lesson, and narrowing the scope considerably, we should be wary of drawing the conclusions that some have that the Supreme Court does not understand trial court practice, or that we would be better off if there were more Justices with trial court judicial experience. The question of limiting access or expanding it is not one that pits wise and experienced lower court judges against naïve Supreme Court Justices. Rather, it is an ideological one. As we have seen in both the summary judgment and the pleadings contexts, the Supreme Court was pushed to its current jurisprudence *by lower courts*. There is little reason to believe, then, that the fact of having trial court experience alone makes one more likely to prefer a notice standard in pleading to a plausibility standard. And, if one requires further evidence for this proposition, look no further than the author of the *Twombly* opinion: Justice David Souter, the single judge then on the court who actually had trial court experience.<sup>50</sup>

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<sup>49</sup> Levin, *supra* note 18, at 979.

<sup>50</sup> Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).