Procedure

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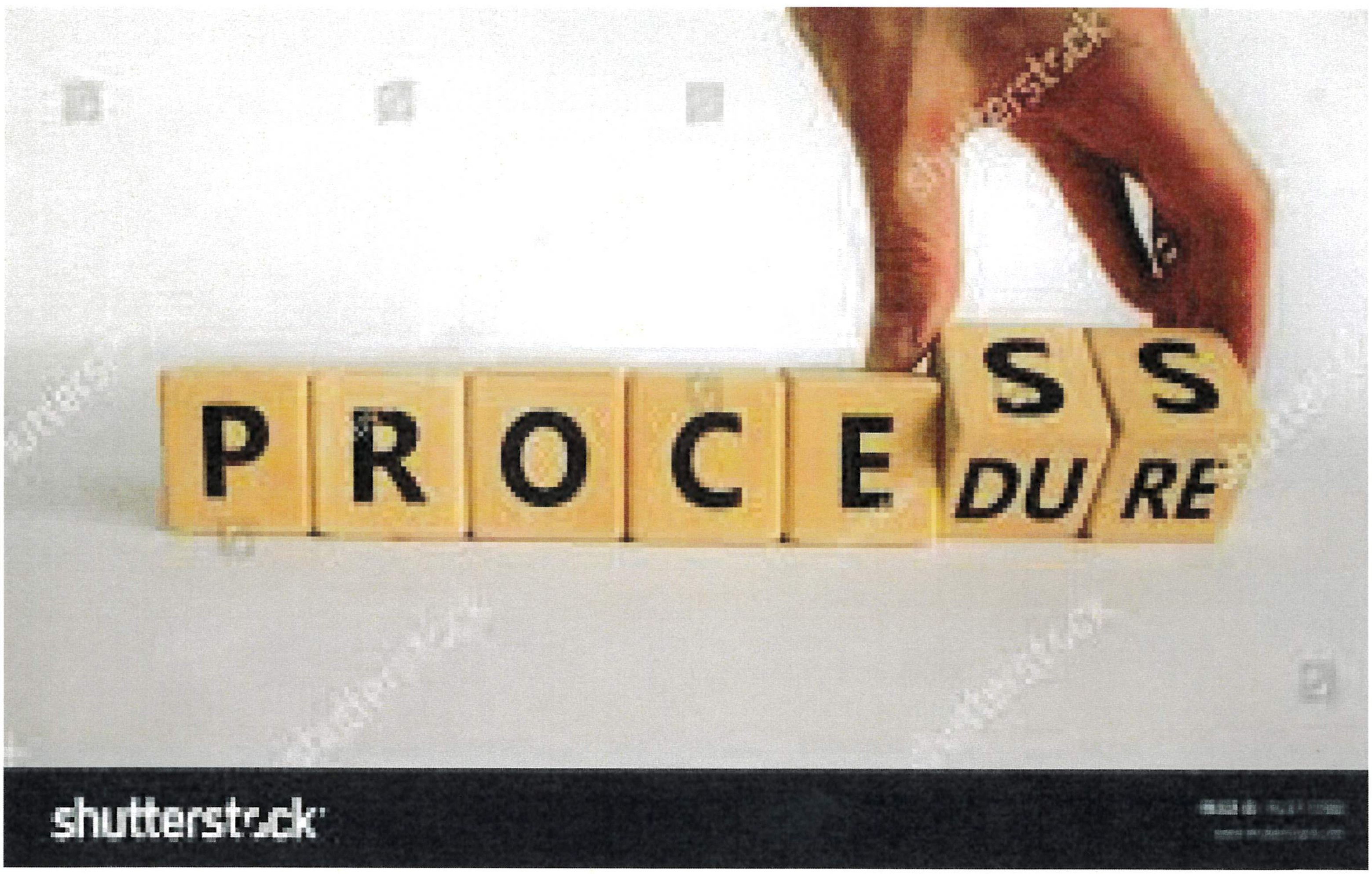

Teaching Civil Procedure: A Retrospective View

Paul D. Carrington

I have taught Civil Procedure in American law schools for forty years. The course I taught in 1999 bears only a very loose resemblance to the one I taught in 1960. My 1960 course bore scant resemblance to the one I took from Austin Scott in 1952–53, and virtually none to the course he took from James Barr Ames in 1907. Scott taught with a twinkle in his eye that enabled him to pillory students without their thinking his motive was other than to help them clear the cobwebs from their thinking. The content of his material mattered little. And apparently this was even more true for the teaching of Ames, of whom Scott said to me, "I did not need a course in legal ethics because I knew James Barr Ames."

A Short History of the Civil Procedure Course

Nevertheless, the two of our forebears in American law teaching who had the best opportunity to shape a curriculum in law omitted to teach Civil Procedure. They came to this common failure from opposing positions.

The first of the two was George Wythe, who had an open choice at the time of his appointment as professor of law and politics at William and Mary in 1779. Wythe understood his mission to be the nurturing of public virtue. Although a scholar of repute, he was not an academic person in the contemporary sense: he was a sitting judge while also a teacher. And it was not his purpose, nor did he seek to attract students, to prepare them to appear in court. He was preparing his students for public life in the Commonwealth of Virginia. He had his students for a single academic year, and he was their only law teacher.[8]

Wythe was constricted in his choices of content by the availability of reading materials. His lectures were in part a guide to Blackstone, the one generally

6. Paul D. Carrington, The Revolutionary Idea of University Legal Education, 31 Wm. & Mary L. Rev. 527 (1990) [hereinafter Revolutionary Idea]; Paul D. Carrington, Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years, 41 Mercer L. Rev. 673 (1990) [hereinafter Teaching Virtue]; Paul D. Carrington, Teaching Law in the Antebellum Northwest, 23 U. Tol. L. Rev. 3 (1991).

7. I have tried to develop this theme more fully in Stewards of Democracy: Law as a Public Profession (Boulder, 1999).

8. See Carrington, Revolutionary Idea, *supra* note 6, at 533–38.

available and readable law book. His students read not only those parts of Blackstone depicting the English law of contracts and property and the common law of crimes, but also the account of the English constitution, which Wythe apparently employed as an occasion to extol the greater virtues of the Virginia constitution he had helped write.[9] He also lectured on Roman law, a subject on which he was acknowledged to be the most learned American.[10] He introduced his students to the literature of political economy, notably the then recent works of Adam Smith and Baron Charles Montesquieu. He also conducted moot courts and fortnightly meetings of his students organized as a legislative body.[11]

Wythe's successor, St. George Tucker, followed a similar pattern and at the conclusion of his teaching career, in 1803, published an Americanized edition of Blackstone, eliding Blackstone's royalisms and adding an extended treatment of American constitutional law based on Tucker's own lectures.[12] The Transylvania University Law Department, perhaps the most important in antebellum times because of the large number of its graduates who participated in our national public life, followed Wythe's leadership in emphasizing public law, comparative law, and political economy, while also affording access to Kent's *Commentaries on American Law*,[13] a work, like Blackstone's, giving short shrift to adjective law.[14]

By the 1830s, there seems to have been a general understanding that an academic law program would occupy about five months of the year, and that students completing the program would be in residence two such years. Topics were often studied in alternating years. Transylvania may have been the first American university to conduct a final examination in law, given at the end of the program. Only those who passed received a degree. Most failed—which was OK, because the credential meant very little anyhow. Antebellum Harvard under Story and Greenleaf gave a degree to all who were present for the prescribed period.[15] Thomas Cooley's Michigan and Theodore Dwight's Columbia did almost the same.[16]

To hear systematic lectures on common law pleading in the time of Wythe or Tucker, one would have had to enroll at the proprietary school in Litchfield,

9. Alonzo Thomas Dill, George Wythe: Teacher of Liberty, ed. Edward W. Riley, 42–43, 54–58 (Williamsburg, 1979).

10. William Wirt, Sketches of the Life and Character of Patrick Henry, 2d ed., 47–48 (Philadelphia, 1818).

11. Carrington, Revolutionary Idea, *supra* note 6, at 535–36.

12. Blackstone's Commentaries on the Laws of England with Notes of Reference to the Constitution and the Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803).

13. The first edition was published in Boston, 1826–30.

14. See generally Carrington, Teaching Virtue, *supra* note 6.

15. 2 Charles Warren, History of the Harvard Law School and of Early Legal Conditions in America, 2d ed., 88–92 (New York, 1970); Arthur E. Sutherland, The Law at Harvard, A History of Ideas and Men, 1817–1967, at 123–24 (Cambridge, Mass., 1967).

16. Elizabeth Gaspar Brown, Legal Education at Michigan 1859–1959 at 740 (Ann Arbor, 1959); Julius Goebel, A History of the School of Law, Columbia University 50 (New York, 1955). Dwight was required to administer an examination before awarding a degree to his students.

where James Gould taught the subject with élan.[17] Indeed, shortly before he retired, he published his lectures on pleading; they were an extended encomium to the intricacies of the forms of action.[18] But Litchfield was not a university law school; its profit-seeking aim was to market Competence, not Virtue of the sort that Wythe, Tucker, and Cooley sought to nurture.

A reason that eighteenth-century pleading may have commended itself to Litchfield as a subject to teach was its arcane character. Only a lawyer could master the difference between trespass and trespass on the case; to know that distinction marked one as anointed because common law pleading was a task for which common sense was useless. A proprietary institution selling resaleable information could hardly afford to pass up the opportunity to celebrate such a subject. On the other hand, it was a subject having little interest to most university law teachers, for much the same reason.[19] The system was only marginally more rational than trial by ordeal, or the Japanese alternative of sumo, both of which were religious ceremonies invoking the will of God to resolve disputes. It had no more political content, and far less intellectual content, than other complex games such as chess.

Gould's teaching of the subject was misguided, whatever his aim. Common law pleading was already in eclipse in England as well as America. Jeremy Bentham had likened aspects of common law pleading to a syphilis of government.[20] His view was widely shared, and in the early nineteenthth century there was a movement afoot on both sides of the Atlantic to discard this barbaric sport. The forms of action Gould extolled in 1832 were abolished in England in 1836.[21] Among those sharing Bentham's scorn of common law procedure were Jacksonians who regarded English procedure as just another burden the aristocracy imposed on honest folk as a means of preserving the wealth and status of lawyers.[22]

New York University was founded by Benthamite utilitarians who admired the pragmatism of the new German universities and of the University of London.[23] One of its first achievements, in 1838, was to open a law school

17. Marian C. McKenna, Tapping Reeve and the Litchfield Law School 81–106 (New York, 1985); see also Simeon Eben Baldwin, James Gould, 1770–1838, *in* 2 Great American Lawyers, ed. William Draper Lewis, 455, 458 (Philadelphia, 1907).

18. A Treatise on the Principles of Pleading in Civil Actions (New York, 1936) (1892).

19. Asahel Stearns, the professor of law at Harvard from 1817 to 1829, may have been an exception. See Sutherland, *supra* note 15, at 72. Nathaniel Beverley Tucker, who was the professor of law and police at William and Mary from 1834 to 1851, may have been another. See Professor Beverley Tucker's Valedictory Address to His Class, 1 S. Literary Messenger 597, 597–602 (1835), *reprinted in* Essays on Legal Education in Nineteenth Century Virginia, ed. W. Hamilton Bryson, 103, 107 (New York, 1998).

20. A Fragment on Government; or, A Comment on the Commentaries, Being an Examination of . . . Sir William Blackstone's Commentaries . . . , 2d ed. (London, 1823), *reprinted in* The Collected Works of Jeremy Bentham, eds. J. H. Burns & H. L. A. Hart (London, 1977).

21. William S. Holdsworth, The New Rules of Pleading of the Hilary Term, 1834, 1 Cambridge L.J. 261, 270–78 (1923).

22. Steven N. Subrin, David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision, 6 Law & Hist. Rev. 311 (1988).

23. Theodore Francis Jones, New York University 1832–1932 at 6 (New York, 1933); on the University of London, see Hugh Hale Bellot, The University College, London, 1826–1926 (London, 1929).

under the leadership of Benjamin Butler, President Jackson's attorney general.[24] Butler proposed a three-year part-time curriculum of which the first year would be devoted to the "science" of pleading, with supplementary work on jurisprudence and constitutional law. Apparently he felt compelled to justify the attention to pleading:

> Nor will the task of instructing in these branches be unworthy the efforts of an able and learned jurist. Our forms of proceeding, though generally prolix, and often encumbered with needless technicalities, are yet intimately connected with the principles of the Law. And as a general rule, he who best understands the nature and design of the instruments which the Law employs, will not only be most expert in the business of his profession, but be best qualified to look above the mere form, and to lay hold of, and appropriate to their true uses, the higher parts of his profession.[25]

One of Butler's first steps was to employ David Graham, the author of an 1832 book on New York practice.[26] Graham was an associate of David Dudley Field in the effort to abolish common law procedure in New York, an effort that achieved success in 1848.[27] It was Graham who lectured on civil procedure that founding year. Alas, for reasons not fully known, the school closed after one year, to be reopened two decades later.[28]

Max Weber explained the movement uniting Bentham, Field, and Graham as a response to the Enlightenment.[29] What they sought to do was to persuade those with the power to do so to delete dysfunctional formalities to assure, insofar as it is possible, that the judgments of law courts are based on the law and the facts, and are not the result of a misstep of counsel. One evident purpose in teaching pleading at New York University was to enlist support in the profession for the reforms that would be forthcoming a decade later. Timothy Walker, the founder of the Cincinnati Law School, was not a Jacksonian, but he shared the Jacksonians' interests in law reform, and he did some teaching of pleading in the 1840s to the same reformist end.[30] In the 1870s John Norton Pomeroy, another reformer, also gave attention to the subject at the Hastings College of Law of the University of California.[31]

Joseph Story may have been the first American law professor to teach the topics of jurisdiction and judgments. His lectures, presented in the 1830s,

24. The Law School Papers of Benjamin F. Butler: New York University School of Law in the 1830s, ed. Ronald L. Brown, 7–9 (New York, 1987) [hereinafter Law School Papers].

25. *Id.* at 124.

26. *Id.* at 8.

27. Robert Wyness Millar, Civil Procedure of the Trial Court in Historical Perspective 43–51 (New York, 1952); Subrin, *supra* note 22.

28. Law School Papers, *supra* note 24, at 9–11.

29. 1 Economics and Society, eds. Guenther Roth & Claus Wittich, 657 (New York, 1968); From Max Weber: Essays in Sociology, eds. H. H. Gerth & C. Wright Mills, 293 (New York, 1946).

30. Walter Theodore Hitchcock, Timothy Walker: Antebellum Lawyer, eds. Harold Hyman & William P. Hobby, 56, 79–81, 153–88 (New York, 1990).

31. Thomas Garden Barnes, Hastings College of Law: The First Century 88–114 (San Francisco, 1978). See, e.g., John Norton Pomeroy, The Code of Remedial Justice, Reviewed and Criticized (Albany, 1877).

were part of a longer treatment of conflict of laws, a subject on which Story was the first American author.[32] There was little national law on those topics until the Fourteenth Amendment was ratified in 1868.[33] Story's colleague Simon Greenleaf lectured on evidence and published the first work on that subject in 1852.[34] The law of evidence was largely the product of American judicial decisions accommodating the institution of the jury trial to the conditions of nineteenth-century America. Greenleaf's book would go through many editions before his subject was reworked by his former student, James Bradley Thayer,[35] and then by Thayer's student, John Henry Wigmore.[36]

All of the works mentioned, and the teaching they expressed, were instruments of law reform. They were written in the spirit of the Jacksonian reforms of pleading and were a part of the tradition marked by Weber. The moral premise underlying the teaching of Graham, Walker, Story, Greenleaf, Thayer, Pomeroy, and Wigmore was that courts should seek in their procedures and administrative arrangements the means of providing judgments disinterestedly applying law made by a government of the people to facts, and thus to impose a resolution on disputes. Implicit in their teaching was the duty of the legal profession to support courts engaged in that enterprise. These teachers were, unlike Gould, children of the Enlightenment. They were also missionaries for a secular faith that law can be an effective instrument of popular self-government.

There is an additional reason for the stunted development of civil procedure teaching in university law schools in the nineteenth century. This was the local character of much of the applicable law. Butler's New York University was among the few schools deigning to teach the law of a state, because most schools were desperate to attract students from more than one state. This was especially true of Story's Harvard; Story had been summoned by the benefactor, Nathan Dane, to celebrate the national law, not the localisms that were dividing the Republic.

Civil procedure does not appear to have had a significant place in the curriculum of Simeon Eban Baldwin's Yale Law School or Theodore Dwight's Columbia.[37] Cooley's Michigan curriculum, however, included lectures on

32. 1 Warren, *supra* note 15, at 492–93; Sutherland, *supra* note 15, at 113–15; R. Kent Newmyer, Supreme Court Justice Joseph Story: A Statesman of the Old Republic 296–300 (Chapel Hill, 1985).

33. Pennoyer v. Neff, 95 U.S. 714 (1877); Harris v. Balk, 198 U.S. 215 (1905); on the background of *Pennoyer*, see Wendy Collins Perdue, Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and *Pennoyer* Reconsidered, 62 Wash. L. Rev. 479 (1987).

34. A Treatise on the Law of Evidence (Boston, 1852).

35. A Preliminary Treatise on Evidence at Common Law (Boston, 1898). On the relationship between these works, see William Twining, Theories of Evidence: Bentham and Wigmore 5–9 (London, 1985).

36. A Treatise on the System of Evidence in Trials at Common Law Including the Statutes and Judicial Decision of All Jurisdictions in the United States, 4 vols. (Boston, 1904–08).

37. Frederick C. Hicks, Yale Law School: 1869–94 Including the County Court House Period (New Haven, 1937); Goebel, *supra* note 16, at 44–68.

equity, evidence, and code pleading, and it even offered instruction in trial practice through a moot court.[38]

The second important moment for the law curriculum was, of course, Langdell's. There was much that was fresh about his approach.[39] He appears to have known nothing about Wythe or those who followed him, or about any events or institutions west of the Hudson River. He did not, so far as we know, consider the possibility of teaching law to foster public virtue. He had no interest in social or political reform of any kind; a royalist at heart, he placed no value on the traditions of self-government. His charge, given him by President Eliot, was to elevate the status of the Harvard Law School by making it exclusive, apolitical, and academic.[40] Like many New Englanders more English than the English, he did not regard the Constitution of the United States or even the legislative enactments of Congress as law.[41] Law, in his view, was what life-tenure judges made while unencumbered by any texts drafted by amateurs in legislative committees and constitutional conventions. Hence he preferred to consign constitutional law to the undergraduate curriculum so that professional law students might never have their minds sullied by the vulgarities of politics.

As a part of the scheme to make a Harvard legal education more valuable in the marketplace, Langdell proposed to extend the period of study from the usual two terms of about five months to three academic years of nine months each. This decision was in no way driven by a demand of Harvard students for more instruction, or of Harvard teachers for more time in which to cover material they deemed important. The purpose, and the only purpose, was to make Harvard Law more rigorous and hence more exclusive, as President Eliot had directed. Langdell needed to provide twenty-seven months' worth of curriculum in lieu of the traditional ten, while if possible diminishing the place in the curriculum of public law or other matters soiled by politics. This created a huge vacuum for private law courses, and thus a fresh canvas to which he was free to apply his crayon. His acolyte, James Barr Ames, was the author of no fewer than nine casebooks used to fill the time created by Langdell.[42] It can be no surprise that, in Langdell's lifetime, the Harvard Law dropout rate was very high. A minority of those not excluded by the novel

38. Brown, *supra* note 16, at 226–49.

39. 2 Warren, *supra* note 15, at 359–78; Sutherland, *supra* note 15, at 166–84; Paul D. Carrington, Hail! Langdell! 20 Law & Soc. Inquiry 691, 707–16 (1995).

40. 2 Warren, *supra* note 15, at 396–97; 2 Henry James, Charles W. Eliot: President of Harvard University, 1869–1909 at 61–63 (Boston, 1930); Charles W. Eliot, Langdell and the Law School, 33 Harv. L. Rev. 518 (1920).

41. See Christopher Columbus Langdell, Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period, 19 Harv. L. Rev. 151 (1906). Cf. Albert Venn Dicey, Lecture on the Relation Between Law and Public Opinion in England During the Nineteenth Century (London, 1905).

42. The Centennial History of the Harvard Law School, 1817–1917 at 175–89 (Cambridge, Mass., 1918).

examinations bothered to stay three years to imbibe such repetition, and many entered the profession with but a piece of a Harvard Law education.[43]

Prominent among the new courses was Torts, a subject never before taught to law students anywhere. Indeed, the first book ever written about Torts had been published as recently as 1867.[44] Also added to the Harvard curriculum was formal instruction in civil procedure. Not; God save us, American procedure fashioned by such low-minded Jacksonians as David Dudley Field, but English civil procedure, the only kind worthy of study by good Anglophiles such as Langdell and Ames.

Ames, if it can be believed, taught his students at Harvard in 1880 the rigors of pleading under the Hilary Rules.[45] The Hilary Rules were the first English manifestation of Bentham's influence on procedural law reform. They were adopted by Parliament in 1836 as the result of the strenuous efforts of Henry Brougham, who challenged his legislative brethren:

> It was the boast of Augustus, that he found Rome of brick and left it of marble. . . . But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it a patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.[46]

Alas for Brougham, and even more for Ames, the Hilary Rules proved to be a disaster in practice and were repealed in 1852, a quarter-century before Ames began to teach them at Harvard.[47] Their fault lay in the unrealistic demands they imposed on counsel—a fault to which Ames, who never in his life appeared in court, was quite blind. It is as well that the pleading course was given only a minor place in the Langdell curriculum.

Because Langdell's Harvard was promoting university legal education as the route to Competence rather than Virtue, it sought to overcome the disadvantage of being a national institution and to solve the problem of filling out three full years of instruction by offering specialized third-year courses on local practice in the states to which the largest numbers of its students went. Generally these were taught by practitioners from the several states involved.[48]

Civil Procedure and Judicial Law Reform

The teaching of civil procedure received a powerful impulse from the Progressive era. Roscoe Pound, then the dean at Nebraska, made a celebrated address to the American Bar Association in 1905 signaling the beginning of a

43. Sutherland, *supra* note 15, at 178–81; 2 Warren, *supra* note 15, at 521.

44. Francis Hilliard, The Law of Remedies for Torts, or Private Wrongs (Boston, 1867).

45. Millar, *supra* note 27, at 45–46.

46. 2 Speeches of Henry Lord Brougham 485 (London, 1838).

47. 15 Sir William Holdsworth, A History of English Law, eds. A. L. Goodhart & H. G. Hanbury, 7th ed., 108–11 (London, 1965).

48. 2 Warren, *supra* note 15, at 448, 452.

new era of reform.[49] Pound was joined in leading this endeavor by his sometime colleague at Northwestern, Wigmore.[50] By the time of Pound's address, the 1848 Field Code had been transmogrified by the New York legislature into the Throop Code, one of the most elaborate and least workable schemes ever devised for the resolution of disputes.[51] Disenchanted by the propensity of American legislatures to ornament procedural systems with dissonant provisions favorable to the interests of whatever faction or interest group held their attention at the moment, the Progressive reformers favored court rule-making as the mechanism for reform.[52] This was an English innovation of 1873 expressed for the first time in America in the Wyoming Constitution of 1890.[53] The Progressives also promoted enactment of the early precursors of long-arm legislation,[54] "merit selection" of judges,[55] more thorough merger of law and equity, and liberal joinder of parties and claims.[56] Among the most passionate advocates for procedural reform was William Howard Taft, a man not otherwise given to radical ideas.[57]

This Progressive reform movement was taking shape at the same time that the academic legal profession was emerging as a group somewhat apart from the practicing bar. A whole generation of the newly minted career law teachers was imbued with an interest in civil procedure and a keen sense of the promise of reform to make civil law enforcement more effective. Among those who were active in reform efforts and who influenced the teaching of civil procedure in the era after World War I were Charles Clark at Yale,[58] Edson R. Sunderland at Michigan,[59] and Arthur Vanderbilt at New York University.[60]

49. The Causes of Popular Dissatisfaction with the Administration of Justice, 40 Am. L. Rev. 729 (1906).

50. William R. Roalfe, John Henry Wigmore: Scholar and Reformer 111–13, 207 (Evanston, 1977); Paul D. Carrington, The Missionary Diocese of Chicago, 44 J. Legal Educ. 467, 502, 507–10 (1994).

51. Herbert Peterfreund & Joseph M. McLaughlin, New York Practice: Cases and Other Materials 2 (Mineola, 1968); Harold R. Medina, Important Features of Pleading and Practice Under the New York Civil Practice Act 2–3 (New York, 1922); Millar, *supra* note 27, at 55–56.

52. Steven B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1035–98 (1982).

53. Wyo. Const. art. 5, §2.

54. E.g., "doing business" legislation, upheld in Commercial Mut. Accident Co. v. Davis, 213 U.S. 245 (1909), and nonresident motorist legislation, upheld in Kane v. New Jersey, 242 U.S. 160 (1916) and Hess v. Pawloski, 274 U.S. 352 (1927).

55. The concept was proposed by Albert Kales of Northwestern University and was promptly adopted as the chief cause of the newly organized American Judicature Society. Michal R. Belknap, To Improve the Administration of Justice: A History of the American Judicature Society 40–41 (Chicago, 1992).

56. Millar, *supra* note 27, at 98–142.

57. See, e.g., The Selection and Tenure of Judges, 38 A.B.A. Rep. 418 (1913).

58. See Procedure: The Handmaid of Justice; Essays of Judge Charles E. Clark, eds. Charles A. Wright & Harry M. Reasoner (St. Paul, 1965); Judge Charles Edward Clark, ed. Peninah R. Y. Petruck (New York, 1991).

59. See The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725 (1926); A Reply to Senator Walsh, 6 Or. L. Rev. 73 (1926); The Regulation of Legal Procedure, 35 W. Va. L.Q. 131 (1927); The Grant of Rule-making Power to the Supreme Court of the United States, 32 Mich. L. Rev. 1116 (1934).

60. Eugene C. Gerhart, Arthur T. Vanderbilt: The Compleat Counsellor 77–89, 140–83, 205–52 (Albany, 1980).

Also influential as teachers were Austin Scott of Harvard[61] and Jerome Michael at Columbia.[62] Casebooks prepared in that era integrated for the first time the teaching of pleading with the teaching of jurisdiction and the basic features of the civil jury trial.[63] Their presentations were uniformly historical in their orientation; students were taught to appreciate the difference between the forms of action and code pleading, and to prepare themselves for further reforms along the lines of those appearing in the Federal Rules promulgated in 1938. Much of the teaching of procedure in those decades was done in the upper-class years, although an introductory first-year one-semester course was not uncommon.

Many teachers of procedure became active reformers of legal institutions. The most important success was achieved by Clark and his associates, including Sunderland, who were responsible for the promulgation of the Federal Rules of Civil Procedure in 1938. Clark was the principal proponent of summary judgment and notice pleading; Sunderland can be said to have invented the pretrial conference. Vanderbilt also enjoyed dramatic success in leading radical reform of the legal institutions of New Jersey. But there were numerous others. Harold Medina of Columbia took up the cause of reforming the municipal courts of New York City.[64] Single-handedly he took on Mayor LaGuardia in legislative chambers at Albany. Thurman Arnold at the University of West Virginia began to gather empirical data to inform efforts to improve the administration of civil justice.[65]

The 1938 rules were a hit.[66] Examined in a cold light today, they were no triumph of professional draftsmanship. In fairness, they were not presented at the time as a permanent solution to the problem posed by Rule 1 of achieving speedy, just, and efficient disposition of every civil case. Even the reformers of 1938 were aware of the iron law of unintended consequences, and they were mindful that vigorous advocates would exploit any weakness they might find in the structure created. But the new rules lent unaccustomed strength to the traditional purpose of discerning the truth with respect to disputed facts;

61. Scott joined the Harvard faculty in 1909 and is best known for his work in trusts. But he was a magnetic teacher, and his casebook, A Selection of Cases and Other Authorities on Civil Procedure in Actions at Law (Cambridge, Mass., 1919), was a creative work. See also Austin Wakeman Scott, Fundamentals of Procedure in Actions at Law (New York, 1922).

62. Michael's work was primarily devoted to evidence, which led him, like Wigmore, to a study of psychology and to a long association with Mortimer Adler. His tightly crafted casebook for a first-year introductory course was widely adopted and is worthy of examination today. The Elements of Legal Controversy: An Introduction to the Study of Adjective Law (Brooklyn, 1948).

63. See, e.g., Thurman Wesley Arnold & Fleming James, Cases and Materials on Trials, Judgments and Appeals (St. Paul, 1936); Edson R. Sunderland, Cases and Materials on Judicial Administration (Chicago, 1937); Arthur T. Vanderbilt, Cases and Other Materials on Modern Procedure and Judicial Administration (New York, 1952).

64. A brief account of Medina's career is Goebel, *supra* note 16, at 287–88.

65. Laura Kalman, Legal Realism at Yale, 1927–1960 at 31–32 (Chapel Hill, 1986); Voltaire and the Cowboy: The Letters of Thurman Arnold, ed. Gene M. Gressley, 162–74 (Boulder, 1977).

66. Charles Alan Wright, The Law of Federal Courts, 5th ed., 429–30 (St. Paul, 1994); Geoffrey C. Hazard Jr., Undemocratic Legislation, 87 Yale L.J. 1284, 1287 (1978).

more than a few malefactors made generous settlement offers rather than face the horrors of a "deposition upon oral examination." The new rules also obliterated some arcane distinctions, such as the false dichotomy made in English law between law and equity, and thus made it harder for unjust litigants to take refuge in technicality. By liberalizing joinder, they fostered comprehensive resolution of disputes. And the rules were drafted with studied looseness of text to free judges from the duties to observe procedural niceties that impeded their efforts faithfully to apply the substantive law. Procedure became more a servant, albeit not a slave, to substance.

The broad acceptance with which the Federal Rules were received led to a further round of reform at midcentury. Many states adopted variations on the national rules, and some even adopted them in haec verba.[67] Among the major state reforms was a renovation of the New York Civil Practice Act in which Jack Weinstein, then of Columbia, was instrumental.[68] Characteristic of these reforms of state practice was the merger of law and equity, i.e., the abolition of the ancient traditions of the English Court of Chancery as a distinct feature of American law. The learning of equity scholars like John Norton Pomeroy became substantially obsolete, and teachers such as Zechariah Chafee retired, not to be replaced.[69] Much of the reform of state procedures was effected through the participation of teachers of civil procedure.

Discourse over the possible improvement of the Federal Rules was maintained by the presence of the Advisory Committee whose work was conducted out of the offices of James William Moore at Yale,[70] and then of Benjamin Kaplan[71] and Albert Sacks[72] at Harvard. Interest in empirical testing of procedural institutions was manifested in the career of Maurice Rosenberg at Columbia[73] and in the establishment in 1966 of the Federal Judicial Center.[74]

Through the 1960s, much of the most respected scholarship in the field of civil procedure illuminated and criticized rules of court. Premier work was

67. John B. Oakley & Arthur F. Coon, The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure, 61 Wash. L. Rev. 1367 (1986).

68. On the history of the act, see 1 Jack B. Weinstein et al., The New York Civil Practice (New York, 1963).

69. Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America, Adapted for All States and to the Union of Legal and Equitable Remedies Under the Reformed Procedure, 5 vols. (San Francisco, 1941); Chafee, Cases on Equity: Jurisdiction and Specific Performance (Cambridge, Mass., 1934); Chafee, Some Problems of Equity: Five Lectures Delivered at the University of Michigan, April 18, 19, 20, 21 and 22, 1949 (Ann Arbor, 1950).

70. Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 Yale L.J. 718 (1975).

71. Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1), 81 Harv. L. Rev. 356 (1967).

72. Mary Kay Kane, The Golden Wedding Year: Erie Railroad Co. v. Tompkins and the Federal Rules, 63 Notre Dame L. Rev. 671 (1988).

73. See Paul D. Carrington, Maurice Rosenberg, 95 Colum. L. Rev. 1901 (1995).

74. Joseph L. Ebersole, The Federal Judicial Center: A Nontraditional Organization in the Federal Judiciary of the United States, rev. ed. (Washington, 1979).

done by Moore[75] and by Charles Alan Wright at Texas,[76] but also significant were narrower and sometimes more penetrating treatments such as the thorough job done on requests for admissions by Ted Finman of the University of Wisconsin;[77] on directed verdicts by Edward H. Cooper, then at Minnesota;[78] on judicial notice of foreign law by Arthur Miller, then at Michigan;[79] or on summary judgment by Martin B. Louis of the University of North Carolina.[80]

No sooner were the new rules promulgated in 1938 than the Supreme Court decided *Erie R.R. v. Tompkins*.[81] For generations of teachers and students, this would prove to be a great moment in the life of the law. If given the full range of application favored by Justice Frankfurter,[82] *Erie* would have killed the new rules and remanded the federal courts back to the ancient practice of conforming their procedure to that of local state courts. The line between substance and procedure, between what is properly a matter of state law and what is a matter of federal practice, or between what is properly a subject of a rule enacted by the Supreme Court rather than Congress, evoked a rich literature and a formidable line of Supreme Court decisions culminating in *Hanna v. Plumer* in 1965.[83] America was aboil in national procedural issues.

Also a continuing issue with high visibility was the federal constitutional limits on state court jurisdiction over persons and property. By the mid-1960s, most states had adopted extended long-arm legislation, often extending the reaches of their courts to the outer limit allowed by the Fourteenth Amendment.[84] Much scholarly writing was devoted to this subject, and many teachers introduced their course with a treatment of the due process limits of state court jurisdiction, beginning with *Pennoyer v. Neff*,[85] and proceeding through *International Shoe Co. v. Washington*,[86] to *Hanson v. Denckla*.[87]

Another enlarged element of instruction centered on the text of the Seventh Amendment. The interface of the new rules of court, merging law and equity and allowing liberal joinder of parties and claims, with the ancient

75. James William Moore, Moore's Federal Practice: A Treatise on the Federal Rules of Civil Procedure (Albany, 1938). This work evolved into a 20-volume set.

76. In 1959 Wright became editor of William W. Barron & Alexander Holtzoff, Federal Practice and Procedure, 7 vols. (Albany, 1950).

77. The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371 (1962).

78. Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903 (1971).

79. Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613 (1967).

80. Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745 (1974).

81. 304 U.S. 64 (1938).

82. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

83. 380 U.S. 460 (1965). The literature is reviewed in Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 Duke L.J. 281.

84. 1 Robert C. Casad, Jurisdiction in Civil Actions, 2d ed., §§ 4-3 to 4-10 (Salem, 1991).

85. 95 U.S. 714 (1877).

86. 326 U.S. 310 (1945).

87. 357 U.S. 235 (1958).

distinction embedded in the 1791 text proved to be an intractable problem that still troubles the Supreme Court.[88] This has proved to be one area in which legal history has continuing and direct pertinence to the disposition of contemporary litigation.[89] State courts have struggled with similar issues arising under the texts of state constitutions, but the decisions of the Supreme Court have dominated discourse.[90]

Numerous other procedural issues arising in state court litigation have been found in recent years to be subject to parameters established by the Fourteenth Amendment. Among these are adequacy of notice of proceedings,[91] the right to notice before provisional remedies are granted,[92] applicability of statutes of limitations,[93] res judicata,[94] the right to be represented by counsel,[95] the right to proceed in forma pauperis in some proceedings,[96] allocation of the burden of proof,[97] peremptory strikes of jurors,[98] and, most recently, the settlement of class actions.[99] Although all these topics have been constitutionalized by the Supreme Court, they have been left to the instruction of civil procedure teachers.

The literature and teaching of civil procedure in the decades following World War II reflected the maturation of the legal process as a means not merely of resolving disputes, but of enforcing rights and duties. Disenchantment with the administrative process of law enforcement led legislative bodies increasingly to rely upon private law enforcement by individual plaintiffs employing modern civil procedure to bring malefactors to account.[100] In this important respect, American civil litigation became unique in the world.

Localism as an impediment to teaching the national law diminished in its importance. The ascendant nationalization of the academic profession meant that law teachers absorbed in issues of local law would lose status within the

88. See Feltner v. Columbia Pictures Relevision, Inc., 118 S.Ct. 1279 (1998); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

89. Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639 (1973).

90. See generally Randy J. Holland, State Constitutions: Purpose and Function, 69 Temple L. Rev. 989 (1996); Randall T. Shepard, A New Generation: The Maturing Nature of State Constitution Jurisprudence, 30 Val. U. L. Rev. 421 (1996).

91. See, e.g., Greene v. Lindsey, 456 U.S. 444 (1982).

92. See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).

93. See, e.g., Tulsa Prof'l Collection Serv. v. Pope, 485 U.S. 478 (1988).

94. See, e.g., Martin v. Wilks, 490 U.S. 755 (1989).

95. See, e.g., Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

96. Boddie v. Connecticut, 401 U.S. 371 (1971).

97. Hicks Acting *ex rel.* Feiock v. Feiock, 485 U.S. 624 (1988); Santosky v. Kramer, 455 U.S. 745 (1982).

98. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994).

99. Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

100. Morton Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 213–46 (New York, 1993).

academic discipline, so that professional considerations were incentives to teachers to direct their attention to federal practice. And the increasing mobility of lawyers gave additional weight to the attractions to students of a study of the national law on the subject.

WORLD-WIDE VOLKSWAGEN V. WOODSON --THE REST OF THE STORY
72 Neb. L. Rev. 1112 (1993)
By Charles Adams

I. THE ACCIDENT

Lloyd Hull knew he had a serious drinking problem. Ever since his retirement from the Navy two years before, it seemed as though he needed to get a little high, or better, every day. After getting off work on September 21, 1977, in Berryville, Arkansas, Lloyd was on his way to visit his older sister in Okarche, Oklahoma. Next to the bottle of Jim Beam on the front seat was a loaded .22 Magnum pistol for shooting jack rabbits on his sister's farm. Lloyd was driving a 1971 Ford Torino he had bought just the week before, paying $500 down. It had a large V-8 engine, good tires and brakes, and was in perfect working condition.[1]

As he drove along, Lloyd took shots from the bottle of bourbon. After passing through Tulsa around nightfall, he relaxed as he got on the Turner Turnpike that runs to Oklahoma City. He was not in any particular hurry to get to his sister's place, and he was not paying attention to his speed. Later he assumed he must have been driving too fast on account of the liquor. Lloyd did not notice the small car ahead of him until he was nearly on top of it. By the time he managed to hit ***1123** his brakes, it was too late to avoid the car. His Torino slammed into the other car, a little off center on the driver's side. Lloyd saw the small car continue down the road for a few seconds after the collision, come to a stop, and then catch on fire. Lloyd pulled over and watched the small car burn, but he did not get out of his Torino. He noticed that the needle on his speedometer was jammed at seventy-five miles per hour.[2]

Harry Robinson suffered from arthritis. During the long winters in Massena, New York, a small town on the St. Lawrence Seaway next to Canada, his ankles and knees would swell up and bleed so badly that he had to stay in bed for two or three months at a time. His doctor had told him he needed a dry, warmer climate, and so he and his wife, Kay, had sold their restaurant and were moving to Tucson, Arizona with their three children. Kay was driving the 1976 Audi 100 LS that she and Harry had purchased new the year before from Seaway Volkswagen in Massena. Their daughter, Eva, age thirteen, and oldest son, Sam, sixteen, rode with her. Harry had rented a U-Haul truck for the furniture, and he and their other son, Sidney, age fifteen, were riding in the truck about fifty yards ahead of the Audi.[3]

Sam was in the front seat of the Audi, and he was the first to see the approaching headlights through the rear window. Sam yelled to his mother that the car behind was going to hit them, and as Kay looked in her rearview mirror, the Torino crashed into the back of the Audi.[4]

Sam saw the fire start in the area over the rear seat right after they were hit. Kay took her foot off the gas pedal and pulled the car off to the side of the road and put it in park. The fire covered the area above the rear seat and was spewing out gray sooty smoke. The blaze spread quickly over the rear seat, and the inside of the car got hot rapidly. Sam and Kay both tried to open their front doors but could not open either of them even though the doors were not locked. Somehow they had been jammed shut by the collision. Sam and Kay tried the rear doors, but they were jammed, too. Eva jumped from the back into the front seat. By that time flames were shooting out of the space where the seat back and the bottom cushion met in the rear seat. All the windows were rolled up, except for the side vent on Kay's side, and none of them would open either. Kay, Eva, and Sam were trapped.[5]

By the time they tried to open all the doors and windows, the fire ***1124** had spread to the front of the car. Kay lay down on the front seat and tried to kick out the side window, but could not. The car was full of smoke and she could not see anything. Sam tried desperately to break the window with his fist. Kay heard people moving outside the car, but she could not see them. She heard Eva's hair catch on fire; it sounded like a torch.[6]

Harry Robinson noticed the Audi's headlights moving back and forth in the side mirrors of the U-Haul truck. His son, Sidney, looked out the right mirror and saw the flames ignite. He said "That's Mama's car," and Harry pulled over and got out of the cab. The Audi was moving toward them sliding sideways, and fire and smoke were coming out of the trunk. The Audi came to a stop and rolled backwards onto the grass by the side of the road. Due to his arthritis, Harry was only able to hobble toward the car and Sidney reached it first. Harry tried to open the doors on the driver's side, and then moved around the car to try the doors on the other side. When he reached the passenger side, the rear window blew out, and the fire seemed to erupt at the back of the car. Harry could see his family struggling inside. Sam appeared to be banging his head against the window, trying to break out. Meanwhile, Sidney was pounding on the outside of the windshield with his fist. Just when it seemed that Kay, Eva, and Sam would never get out of the car alive, a hero came to their rescue.[7]

Mike Miller first noticed the Ford Torino when he passed it on the right. As he looked over at the driver, Mike could tell he was drunk. At a curve further down the highway, the Torino nearly came to a stop and nearly went off the road, but it got back on the highway, practically running over some barrels beside the road. Then it picked up speed and passed Mike. A short time later Mike saw a ball of fire. He immediately stopped and ran over to the burning Audi, leaving his car door open and the engine running.[8] As he ran, he thought perhaps he should have driven back to the tollgate at the entrance to the Turner Turnpike to report the accident instead of trying to help the people in the burning car himself.[9]

By the time Mike reached the Audi, the passenger compartment was engulfed in flames and filled with smoke. All he could see inside were two dark figures moving around, but he could hear people in the car screaming and banging on the windows. Sidney was not doing any good beating on the windshield with his fist, so Mike pushed him aside and kicked at the windshield. As it started to cave in, he gave it another ***1125** push and knocked a big hole through the windshield on the passenger side.[10]

The fire was so intense by now that it looked as if there were a flame thrower in the back of the car with the blaze swirling around and concentrated on the driver's side. As flames curled around the hole that Mike had made in the windshield, two arms appeared. Mike reached down to grab Sam's arms above the elbows, but Mike's hands slipped off the burning flesh. He grabbed Sam again, this time by the wrists, and pulled his head and shoulders through the hole. While Mike dragged Sam off the hood of the car, another man on the scene, Etsel Warner, pulled Eva through the hole.[11]

The fire continued to burn furiously, and Mike could not see anyone else through the thick black smoke in the car. Then he heard Harry yell, "Get my wife out of there." Mike looked through the hole and a hand suddenly appeared reaching through the smoke and flames. Kay had felt Sam and Eva go out of the car, and when nobody reached in for her, she figured that she must be on the wrong side. She moved over to the other side of the car and stuck her hand out. Mike grabbed her wrist and pulled as hard as he could. Luckily, Kay weighed only 98 pounds, and she practically flew through the hole and out of the inferno.[12]

Mike helped the three victims move away from the burning car. After taking only a couple of steps, Mike heard a small explosion from inside the car. Mike did not look back, but kept walking, only faster, and he got the three victims to lie down. Kay and Eva had been wearing polyester blouses, which had melted and were stuck to their bodies.[13]

The highway patrol arrived on the scene, then the fire department, and finally an ambulance. Highway Patrol Trooper Spencer walked to the Ford Torino to question Lloyd Hull, who had a two inch gash on his lower lip, but was otherwise unhurt. Since Mr. Hull was obviously drunk, Trooper Spencer arrested him and took him to the hospital to have his lip sewn up, and then to jail, where he remained for fourteen days.[14]

Kay, Sam, and Eva Robinson all received severe burns. Sam suffered first and second degree burns on his face, neck, upper back, and arms. A nostril was burned, and he had a deep scar on his right cheek, ***1126** and keloid scars on his chin, arms, and hands. Because she had been in the burning car longer, Eva's injuries were more serious. She suffered third degree burns on her neck, shoulders, and arms. Her vocal chords were burned, and she required skin grafts on her back, shoulders, and right hand. Fortunately, though, Eva had covered her face, and it had not been burned as badly as it otherwise might have been. Both Sam and Eva were hospitalized for six weeks in Tulsa, and spent many months undergoing physical therapy and reconstructive surgery.[15]

Since Kay Robinson had been trapped in the burning car the longest, her burns were the most horrible of all. She had burns on forty-eight percent of her body--thirty-five percent of which were third degree. Kay was in the intensive care unit for seventy-seven days and was hospitalized in Tulsa for another several months. She underwent thirty-four operations, all but two of which were under general anesthetic, for skin grafts and other reconstructive surgery. Most of her fingers were amputated, and she had severe scarring over the entire upper part of her body. Eva and Kay also suffered severe psychological trauma both from the ordeal and from their permanent disfigurement.[16]

With his wife and children hospitalized, Harry Robinson began the process of seeking redress for their injuries. The effort was to continue for more than fifteen years in state and federal trial courts in Oklahoma, a federal trial court in Arizona, the Oklahoma Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court. Along the way the litigation would produce a landmark Supreme Court decision in the area of personal jurisdiction, World-Wide Volkswagen Corporation v. Woodson.[17]

II. FILING THE LAWSUIT

Harry Robinson first retained a Tulsa attorney named Charles Whitebook who brought in the Tulsa law firm of Greer and Greer, headed by two brothers who had specialized in personal injury litigation for many years. Jefferson Greer was the lead attorney, but his younger brother Frank devoted a significant amount of his time to the case as well. Mr. Greer was a prominent member of the personal injury plaintiffs' bar, having served as President of the Oklahoma Trial Lawyers Association in 1966 and as a Governor of The Association of Trial Lawyers of America in 1977. He had more than twenty years of experience trying personal injury cases and had handled some of the ***1127** earliest products liability cases in Oklahoma.[18]

Lloyd Hull was an obvious defendant, but he had no liability insurance, and consequently any judgment the Robinsons could obtain against him would be uncollectible. To obtain an enforceable judgment, the Robinsons would have to sue the manufacturer of the Audi on a products liability claim. To prevail, they would need to establish that the Audi was defective and that its defects had caused their injuries.

At the time of the Robinsons' accident, the law of products liability was undergoing fundamental change in Oklahoma. Prior to 1974, a manufacturer's liability under Oklahoma law for injuries caused by a defective product could be based upon one of only two theories: negligence, or breach of express or implied warranties of the manufacturer.[19] In 1974, the Oklahoma Supreme Court adopted a rule of strict liability for manufacturers for defects in their products in Kirkland v. General Motors Corporation,[20] relying on section 402A of the Restatement (Second) of Torts. Thus, if the Robinsons could establish that the Audi was defective, its manufacturer would be strictly liable for their injuries, regardless of negligence.[21]

The dollar amounts of jury verdicts in personal injury cases had been increasing dramatically during the 1970s.[22] In February 1978, a California jury returned a verdict for $128.5 million in Grimshaw v. Ford Motor Company.[23] There were a number of similarities between the Grimshaw case and the Robinson's case against the manufacturer of the Audi. In Grimshaw, the gas tank of a 1972 Ford Pinto exploded when the Pinto was "rear-ended" while stalled on a freeway. The driver died as a result of the fire, and Richard Grimshaw, a thirteen year old passenger, suffered severe burns on his face and entire body.[24]

It was evident that there was the potential for the Robinsons to ***1128** recover a substantial, perhaps multi-million dollar verdict. The extent of their injuries, the pain and suffering, and the psychological trauma would surely win a jury's sympathy. On the other hand, the Oklahoma law of products liability was in its early stages of development, and there were a number of unsettled legal issues. The trial would be complicated by the need for testimony by experts in automotive engineering and safety, as well as the usual medical experts and experts on damages. Moreover, the German auto manufacturers had earned a reputation for being particularly aggressive defendants. While Mr. Greer realized at the outset that the case would be difficult to try, he could not have anticipated the extent of the obstacles he would encounter.

An aspect of the Robinsons' case that Mr. Greer immediately recognized as significant was the fact that the accident had occurred just a few miles outside of Tulsa County in Creek County,[25] Oklahoma, making venue proper in Creek County.[26] An oil boom had come to Creek County at the turn of the century, but had ended shortly after World War I, and it had been an especially depressed area during the 1930's.[27] By the 1970's, Creek County was a blue collar community that had become known to personal injury lawyers throughout the state as being particularly sympathetic to personal injury plaintiffs. The attractiveness of Creek County as a plaintiffs' venue was and is demonstrated by the numerous change of venue cases that have originated there.[28] Mr. Greer regarded Creek County as one of the best venues in which to try a personal injury lawsuit in the United States.[29] He rated it on a par with Dade County, Florida, or Cook County, Illinois,[30] both notoriously high-verdict jurisdictions, and he estimated that a case in Creek County was worth twice as much as it would be in Tulsa County.

Mr. Greer knew he needed to be prepared for the defendants' attempt to defeat venue in Creek County through removal of the case to the United States District Court for the Northern District of Oklahoma in Tulsa, a standard defense strategy in cases involving ***1129** nonresident defendants. Since the Robinsons had been citizens of New York, he would have to name defendants who were also citizens of New York to destroy diversity of citizenship and thereby block removal. After verifying that Seaway Volkswagen, Inc., the car dealer from whom the Robinsons had purchased the Audi, was incorporated in and had its principal place of business in New York, Mr. Greer named Seaway Volkswagen as one of the defendants in the case. He also named World-Wide Volkswagen, Inc., the distributor which supplied the Audi to Seaway Volkswagen, as another defendant. World-Wide Volkswagen was also a citizen of New York, since it was incorporated there. The other defendant originally named in the case was Volkswagen of America, Inc., which had imported the Audi from Germany and was a citizen of New Jersey.[31]

Mr. Greer filed separate petitions on behalf of each of the Robinsons in the Bristow Division of the District Court of Creek County on October 18, 1977. The Presiding Judge was Charles S. Woodson. Each of the petitions alleged a single cause of action for products liability based on defects in the design and location of the Audi's gas tank.[32]

On May 23, 1978, Mr. Greer filed amended petitions in which he added Volkswagenwerk Aktiengesellschaft (Volkswagen of Germany) as a defendant. At the time Mr. Greer understood that Volkswagen of Germany had manufactured the Audi. He later was informed through a conversation with defense counsel and in responses to his interrogatories that the manufacturer of the Audi was Audi NSU Auto Union Aktiengesellschaft (Audi NSU). Accordingly, on June 14, 1978, he obtained an order substituting Audi NSU for Volkswagen of Germany as the defendant manufacturer. The correct identity of the Audi's manufacturer would later become a crucial issue in the case.[33]

Volkswagen of Germany, Volkswagen of America, and Audi NSU were affiliated companies, and all were represented in the United States by the prestigious Wall Street law firm of Herzfeld and Rubin.[34] Rhodes, Hieronymus, Holloway and Wilson, a Tulsa law firm specializing in insurance defense, was retained as local counsel. Bert Jones, a senior partner at Rhodes, Hieronymous, took charge of the case in Tulsa. Separate counsel were needed for the other defendants, World-Wide and Seaway Volkswagen, and Mr. Jones recommended Tulsa lawyers, Mike Barkley and Dan Rogers, respectively, to represent ***1130** them.[35]

Mike Barkley was twenty-nine years old at the time, and he had recently set up his own office. Before that, he had been an associate for several years at Rogers, Rogers and Jones, an insurance defense firm in which Dan Rogers was a named partner. Having been on his own for only a short while, Mike was thrilled to get the call from Mr. Jones concerning the case, and he was eager to defend his new client, World-Wide Volkswagen.[36]

Volkswagen of America, World-Wide and Seaway Volkswagen each filed special appearances to contest jurisdiction in Oklahoma and venue in Creek County, and after a hearing on December 21, 1977, Judge Woodson overruled their special appearances.[37] Harry Robinson's deposition was taken on December 30, and the defendants learned that prior to the accident he and Kay Robinson had sold their home and business in New York and had already purchased a new home in Arizona.[38] On January 5, 1978, the defendants joined in a petition for removal to the United States District Court for the Northern District of Oklahoma, claiming that the Robinsons were no longer citizens of New York, and consequently, federal subject matter jurisdiction existed based on diversity of citizenship.[39]

Mr. Greer responded with a motion to remand in which he contended that although the Robinsons were in the process of changing their citizenship, they did not become citizens of Arizona until arriving there after their release from the hospital in Tulsa.[40] He argued that when their petition was filed in Creek County,[41] the Robinsons were still citizens of New York,[42] like World-Wide Volkswagen and Seaway, and thus there could be no federal subject matter jurisdiction based on diversity of citizenship.

Claire Eagan had been the law clerk for Allen E. Barrow, the chief federal judge in the Northern District of Oklahoma, since graduating ***1131** in 1976 from Fordham University School of Law. One of her last assignments for Judge Barrow before entering private practice in 1978 was the Robinsons' motion to remand to Creek County. Ms. Eagan's research supported Mr. Greer's position, and she drafted Judge Barrow's order remanding the case to Creek County.[43]

Ms. Eagan left her employment with Judge Barrow at the end of April, 1978, and on the following Monday began work at Hall, Estill, Hardwick, Gable, Collingsworth and Nelson, the largest law firm in Tulsa. By coincidence, Mike Barkley joined the Hall, Estill firm on the same day. On the first day in their new jobs, Mr. Barkley appeared in Ms. Eagan's office, dropped the World-Wide Volkswagen file on her desk, and told her that she was now assigned to assist him with getting World-Wide Volkswagen out of the state court action.[44]

III. THE BATTLE OVER JURISDICTION

Since removal had not been successful, World-Wide Volkswagen's only way to avoid trial in Creek County was by establishing that Oklahoma lacked personal jurisdiction over the company. On January 5, 1978, the same day the defendants had filed the petition for removal, World-Wide Volkswagen and Seaway Volkswagen had filed separate motions for Judge Woodson to reconsider his order overruling their special appearances.[45] No action had been taken on the motions to reconsider while the case was in federal court, but once it was ***1132** remanded to Creek County, Mike Barkley had the motions set for rehearing and sent Claire Eagan to handle the argument. It was the first motion she had ever argued.[46]

In 1978, Oklahoma had two long-arm jurisdiction statutes that permitted its courts to exercise jurisdiction over nonresident defendants, sections 187 and 1701.03 of title 12 of the Oklahoma Statutes.[47] Section 187 had been adopted in 1963 and was based on the Illinois long arm statute.[48] Although section 187 authorized the assertion of personal jurisdiction over nonresidents with respect to causes of action arising from a variety of acts, none of these applied to World-Wide Volkswagen.[49] Section 1701.03 had been adopted in 1965 as a part of the Uniform Interstate and International Procedure Act. It was somewhat broader than section 187 and authorized the exercise of personal jurisdiction over a nonresident defendant as to causes of action arising from either of the following:

(3) causing tortious injury in this state by an act or omission in this state;

(4) causing tortious injury in this state by an act or omission outside this state if)the nonresident regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.[50] The Robinsons' injuries had occurred in Oklahoma, but the acts or omissions of World-Wide Volkswagen that were alleged to have caused the injuries would appear to have been in New York, rather than Oklahoma.

Moreover, World-Wide Volkswagen's distribution franchise was limited to Connecticut, New York, and New Jersey, and it neither conducted business in Oklahoma nor derived any revenue from the state. Thus, there seemed to be a strong basis for arguing that World-Wide Volkswagen was not subject to personal jurisdiction under Oklahoma's long-arm statutes. On the other hand, only two years before, the Oklahoma Supreme Court had held that section 1701.03 authorized the assertion of jurisdiction over Volkswagen of America and a Volkswagen distributor in Texas in another products liability case.[51]

***1133** Ms. Eagan argued to Judge Woodson that Oklahoma did not have personal jurisdiction over her client under section 1701.03, because World-Wide Volkswagen did not sell any automobiles in Oklahoma. In addition, she maintained that construing section 1701.03 to extend personal jurisdiction over World-Wide Volkswagen would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Judge Woodson advised the inexperienced lawyer that the Fourteenth Amendment did not carry much weight in Creek County, and the motion to reconsider was denied.[52]

Ms. Eagan was ready to abandon her effort, but Mike Barkley was convinced that Creek County had no jurisdiction over his client. He told her to prepare an application to assume original jurisdiction and a petition for a writ of prohibition and file it with the Oklahoma Supreme Court. Although Volkswagen of America and Audi NSU had also objected to jurisdiction at the trial court level, they did not join in World-Wide Volkswagen's petition to the Oklahoma Supreme Court. However, Seaway Volkswagen, the auto dealer, did join in the petition. Seaway Volkswagen's liability was based on its having sold a defective product that World-Wide Volkswagen had supplied, and therefore, it was entitled to indemnity from World-Wide Volkswagen.[53] Moreover, as long as Seaway Volkswagen did not take a position that was adverse to World-Wide Volkswagen, it would be entitled to indemnification for its attorney's fees.[54] Consequently, World-Wide Volkswagen assumed primary responsibility for defending the case against Seaway Volkswagen and itself, and Seaway Volkswagen took a passive role throughout the litigation, joining in all of World-Wide Volkswagen's actions.

The Oklahoma Supreme Court granted the application to assume original jurisdiction, but it denied the writ of prohibition.[55] Mr. Greer maintained before the Oklahoma Supreme Court that jurisdiction existed under both paragraphs (3) and (4) of section 1701.03, citing the Illinois Supreme Court's holding in Gray v. American Radiator & ***1134** Standard Sanitary Corporation.[56] The Gray case involved an interpretation of the provision in the Illinois long-arm statute that authorized the assertion of jurisdiction arising from the "commission of a single tort within this State."[57] Reasoning that a tort was not complete until a plaintiff sustained an injury, the Illinois Supreme Court decided that a defendant that had manufactured and sold a defective product in another state committed a tort in Illinois and was therefore subject to jurisdiction there, because the plaintiff's injury resulting from the defect was sustained in Illinois.[58]

The Oklahoma Supreme Court ruled that a similar interpretation of paragraph (3) would render paragraph (4) nugatory, because it would make it impossible to have a tortious injury in the state caused by an act or omission outside the state.[59] Nevertheless, it held that paragraph (4) conferred jurisdiction over World-Wide Volkswagen, because given the retail value of the Audi, World-Wide Volkswagen had derived substantial revenue from the Robinsons' use of the Audi in Oklahoma as well as from the sale of other automobiles that from time to time would foreseeably be used in Oklahoma. The Oklahoma Supreme Court explained its holding as follows:

)T he product being sold and distributed by)World-Wide and Seaway Volkswagen is by its very design and purpose so mobile that)World-Wide and Seaway Volkswagen can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by)World-Wide and Seaway Volkswagen were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that)World-Wide and Seaway Volkswagen derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that)World-Wide and Seaway Volkswagen derive substantial revenue from goods used or consumed in this State.[60]

As soon as the Oklahoma Supreme Court's decision came down, Mr. Barkley told Ms. Eagan to pack her bags because they were going to New York.[61] Mr. Barkley was still not ready to give up, and he wanted to obtain authorization from his client to petition the United States Supreme Court for certiorari. When Mr. Barkley and Ms. ***1135** Eagan met with World-Wide Volkswagen's corporate counsel and its insurer in New York, both refused to authorize them to incur any additional legal expenses contesting the jurisdictional issue. Their justification was that World-Wide Volkswagen was entitled to indemnification against Volkswagen of America and Audi NSU for the same reason that Seaway Volkswagen was entitled to be indemnified by World-Wide Volkswagen.[62] Since World-Wide Volkswagen was not willing to pay to take the case to the United States Supreme Court, Ms. Eagan thought the battle over jurisdiction was finally at an end.

But Mr. Barkley took Ms. Eagan across the street to the offices of Herzfeld and Rubin, the law firm representing Volkswagen of America and Audi NSU. Mr. Barkley explained to the lawyers at Herzfeld and Rubin that if World-Wide and Seaway Volkswagen were dismissed for lack of personal jurisdiction, Volkswagen of America and Audi NSU could remove the case to federal court and avoid a trial before a "plaintiff's jury" in Creek County. He managed to convince them that it was in their clients' interests to underwrite the legal expenses of taking the case to the United States Supreme Court, particularly since their clients were already obligated to indemnify World-Wide and Seaway Volkswagen's legal expenses. As a result of Mike Barkley's meeting with Herzfeld and Rubin, Volkswagen of America and Audi NSU agreed to pay for World-Wide Volkswagen's petition for certiorari.[63] In addition, Herzfeld and Rubin would participate in the preparation of the briefs, and a senior partner of Herzfeld and Rubin, Herbert Rubin, would argue World-Wide Volkswagen's cause before the Supreme Court instead of Mike Barkley.[64] Had the "upstream" defendants not paid World-Wide Volkswagen's legal expenses, there would have been no World-Wide Volkswagen Corp. v. Woodson decision by the United States Supreme Court.

The work began on the petition for certiorari. The weakest link in the Oklahoma Supreme Court's opinion was its conclusion that World-Wide and Seaway Volkswagen derived substantial revenue from the use of automobiles in Oklahoma, since it was likely that no ***1136** automobiles they had ever sold, aside from the Robinsons' Audi, had been used in Oklahoma. However, the Oklahoma Supreme Court is the final authority on matters of Oklahoma law,[65] such as the meaning of the phrase "derives substantial revenue from goods used . . . in this state" in section 1701.03(4). The only issue the United States Supreme Court could address was whether Oklahoma's exercise of jurisdiction over World-Wide and Seaway Volkswagen violated their rights to due process of law under the Fourteenth Amendment to the United States Constitution.[66]

Although it had long been a fundamental topic in every law school civil procedure course, at the time the petition for certiorari was being prepared, the constitutionality of a state court's exercise of personal jurisdiction over nonresident defendants had been addressed in only a a relatively small number of Supreme Court cases. One hundred years before, the Supreme Court had ruled in the landmark case of Pennoyer v. Neff[67] that the Fourteenth Amendment's Due Process Clause places limits on a state court's exercise of jurisdiction over nonresident defendants.[68] The Pennoyer scheme of personal jurisdiction was based on the physical presence of defendants: in general, the courts of a forum state could exercise jurisdiction over any persons and property within its borders but could not exercise jurisdiction over persons and property outside its borders.[69] Serious problems ultimately developed in applying this jurisdictional scheme to nonresident motorists, who might cause an accident in a state and depart before the victims could serve them with summons. Similar difficulties were presented by modern corporations that conduct business nationwide but lack a physical presence in many states. These problems led the Supreme Court to scrap the Pennoyer scheme in 1945 and replace it with a fairness standard based on minimum contacts and "traditional notions of fair play and substantial justice"[70] in International Shoe Co. v. Washington.[71]

During the early 1950s, the Supreme Court applied the new International Shoe standard flexibly in several cases,[72] each time upholding the exercise of personal jurisdiction. But in 1958, it ruled that a Florida ***1137** state court's exercise of jurisdiction was unconstitutional in Hanson v. Denckla.[73] After Hanson, the Supreme Court seemed to lose interest in the area, and during the next two decades, it did not take any cases involving personal jurisdiction. Then in 1977 and 1978, the Supreme Court handed down Shaffer v. Heitner[74] and Kulko v. Superior Court,[75] two decisions in which it reversed assertions of personal jurisdiction over nonresident defendants by state courts.

The brief accompanying World-Wide and Seaway Volkswagen's petition for certiorari emphasized the Supreme Court's three most recent cases in which it had ruled in favor of defendants contesting personal jurisdiction.[76] In Hanson v. Denckla, the Supreme Court first articulated the rule that for a defendant to be subject to a state court's jurisdiction, there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[77] The Supreme Court again employed this "purposeful availment" requirement to strike down state courts' assertion of jurisdiction over nonresident defendants in Shaffer v. Heitner[78] and Kulko v. Superior Court,[79] and World-Wide and Seaway Volkswagen urged its application in their own case.[80] They pointed out that the Robinsons were responsible for the Audi's entering Oklahoma, and argued that they should not be subject to jurisdiction in Oklahoma because of "a fortuitous event precipitated by the unilateral, voluntary act of the Robinsons in driving through that state."[81] World-Wide and Seaway Volkswagen further argued the mere fact it may have been foreseeable that the Robinsons might drive to Oklahoma should not be enough to permit its courts to exercise jurisdiction over the companies; ***1138** otherwise, any local seller would become subject to suit in every state where a purchaser might take a product.[82] They contended that to provide a sufficient basis for jurisdiction, foreseeability had to be coupled with the "affiliating circumstances" that the seller purposefully availed itself of the benefits of the forum state.[83]

Mr. Greer responded that World-Wide and Seaway Volkswagen were parts of a national network of Audi dealers, including one located in Tulsa on Route 66.[84] Consequently, both World-Wide and Seaway Volkswagen could reasonably anticipate that purchasers of their automobiles would travel to

Oklahoma and require servicing there. He also cited a number of cases upholding jurisdiction where torts committed in another state resulted in injuries in the forum state.[85] The Robinsons' brief in opposition to the petition for certiorari concluded with an appeal to the Supreme Court that it not return to the restrictive jurisdictional doctrine of Pennoyer v. Neff, which the Supreme Court had rejected twenty years before.[86]

The Supreme Court grants fewer than five percent of the thousands of petitions for certiorari that are filed with it each year.[87] The chances of having one's case heard by the High Court are therefore ordinarily slim, but the likelihood that the Court would grant World-Wide Volkswagen's petition seemed especially remote. Not only had the Supreme Court heard few cases involving personal jurisdiction over the preceding two decades, but it had denied numerous petitions for certiorari presenting issues similar to those raised by World-Wide Volkswagen.[88]

***1139** One aspect of World-Wide Volkswagen's case, however, distinguished it from the others: it was the first petition for certiorari in a products liability case where the allegedly defective product had been brought into the forum state by a consumer, rather than by the manufacturer or a distributor.[89] This would prove to be crucial to the Supreme Court's decision that Oklahoma lacked jurisdiction over World-Wide Volkswagen and Seaway.[90] Another factor that may have influenced the Supreme Court was the coincidental filing of an appeal in Rush v. Savchuk,[91] a case from Minnesota involving an issue of quasi in rem jurisdiction.[92] The Supreme Court noted probable jurisdiction in Rush v. Savchuk on the same day that it granted World-Wide and Seaway Volkswagen's petition for certiorari, and ordered the two cases set for argument together.

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World-Wide and Seaway Volkswagen's battle over jurisdiction ***1143** ended with the Supreme Court's decision, which has become a staple of civil procedure courses and casebooks since 1980. But the battle over jurisdiction was only a preliminary skirmish in the many years of litigation that lay ahead for the parties who remained in the case.

Note about subsequent history of the case

On remand, the case went to trial. The federal jury rendered a verdict for the defendants. That was appealed and there was a second trial but ultimately, after 20 years of litigation, the Robinsons received no compensation at all for their injuries.

HOW EQUITY CONQUERED COMMON LAW: THE FEDERAL RULES OF CIVIL PROCEDURE IN HISTORICAL PERSPECTIVE

STEPHEN N. SUBRIN†

I. COMMON LAW, EQUITY, AND THE FEDERAL RULES OF CIVIL PROCEDURE

Much of the formal litigation in England historically took place in a two-court system: "common law" or "law" courts, and "Chancery" or "equity" courts.[23] Although they were complementary, law and equity courts each had a distinct procedural system, jurisprudence, and outlook. The development of contemporary American civil procedure cannot be understood without acknowledging these differences. The more formalized common law procedure has been so ridiculed that we tend to ignore its development to meet important needs, some of which still endure, and that many of its underlying purposes still make sense. Conversely, especially during this century, equity has been touted in ways that obscure the underlying drawbacks to its use as the procedural model.

A. *Common Law Procedure*

The law courts had three identifying characteristics: the writ or formulary system, the jury, and single issue pleading.[24] Each matured in England between the thirteenth and sixteenth centuries and later influenced legal development in America. Each represented a means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent, and predictable manner.

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[23] A rich variety of other courts also existed. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1047-89 (W. Lewis ed. 1898).

[24] *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 26-46 (1969). The three Central law courts were King's Bench, Exchequer, and Common Pleas. For a description of the courts, see *id.* at 20-22; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).

Subjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king's secretary, adviser, and agent. The Chancellor's staff, the Chancery, sold writs, "royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant."[25] Clerks organized complaints into categories, and particular writs came to be used for particular types of oft-repeated complaints.[26] Over time, "plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to."[27]

The writs gradually began to carry with them notions of what events would permit what result or remedy. Ultimately, an organized body of what is now commonly called substantive law evolved from the writs.[28] Distinct procedural characteristics developed for different writs. Each writ implied a wide range of procedural, remedial, and evidentiary incidents, such as subject matter and personal jurisdiction, burden of proof, and methods of execution.[29] The writ of novel disseisin, for instance, was designed to provide for the rapid ejection of one who was wrongfully on the plaintiff's land. It was accompanied by more expeditious procedures than the writ of right, which decided the ultimate issue of ownership.[30] The writ system also confined adjudication. The

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[25] S. MILSOM, *supra* note 24, at 22.

[26] *See* T. PLUCKNETT, *supra* note 24, at 353-54.

[27] S. MILSOM, *supra* note 24, at 25.

[28] *See* H. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1886) ("So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . . .").

[29] *See* F. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES 296-98 (A. Chaytor & W. Whittaker eds. 1920).

[30] *See id.* at 318-23. "Seisin" has a meaning similar to, but different from, possession. Feudalism renders dysfunctional our concepts of "possession," "right," or "title." *See* S. MILSOM, *supra* note 24, at 103-05. Other examples of the common law attempt to integrate substantive rights and methods for their enforcement can be seen in the writs of covenant and replevin. In covenant, the requirement of a seal for proof probably improved the likelihood that only honest claims were pursued. *See id.* at 213. In replevin, the distrainee (the plaintiff who says that his goods were wrongfully taken) is entitled to immediate possession of the goods upon giving a "bond for the value of the chattels, conditioned on his loss of the suit and failure to return the chattels to the defendant." S. COHN, THE COMMON-LAW FOUNDATION OF CIVIL PROCEDURE 19 (1971); *see* F. MAITLAND, *supra* note 29, at 355. This, too, should discourage frivolous suits, as well as self-help. For contemporary suggestions to integrate different areas of substantive law with different procedures, see Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 900 (1974); Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE, *supra* note 6, at 65.

obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants.[31]

Like the evolution of the writ, the development of the jury trial represented movement toward confinement, focus, rationality, and a legal system of defined rules to regulate human conduct. Before the development of the jury, parties at common law were tested before God through ordeal, battle, or the swearing of "compurgators."[32] With the inception of juries, disputants began telling their respective stories to their peers, who determined which version was correct. Because human beings (rather than God) were to hear and decide the case, an individual might have found it favorable to present facts that might have changed the minds of the now-human dispute resolvers. Once the idea emerged that a special set of circumstances could necessitate a different verdict, the seed of substantive law had been planted: specific facts would trigger specific legal consequences. The jury concept brought with it, therefore, the idea of consistent and predictable law application by human beings, rather than divine justice by mysterious means. It now became logical for a trial to focus on proof relevant to those specific facts at issue that carry with them a legal consequence.[33]

Common law also evolved as a technical pleading system designed to resolve a single issue. When it became apparent that specific facts should bring about specific legal results, it made sense to determine whether the plaintiff's story, if true, would permit recovery and, if so, what facts were in dispute. Assuming the defendant did not contest that he was properly brought before the correct court, but still disputed the case, the common law procedure permitted first a demurrer, and then confession and avoidance, or traverse.[34] Under single issue pleading, the parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue.[35]

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[31] *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 462 (3d ed. 1985) [hereinafter F. JAMES & G. HAZARD (3d)]; F. MAITLAND, *supra* note 29, at 298-99.

[32] *See* H. LEA, SUPERSTITION AND FORCE 252, 279 (3d ed. 1878); T. PLUCKNETT, *supra* note 24, at 114-18; C. REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 186-87 (1980).

[33] *See* S. MILSOM, *supra* note 24, at 30-32; T. PLUCKNETT, *supra* note 24, at 124-30.

[34] *See* S. COHN, *supra* note 30, at 47; T. PLUCKNETT, *supra* note 24, at 409-10, 413-14.

[35] *See* 1 J. CHITTY, TREATISE ON PLEADING 261-63 (1879); S. COHN, *supra* note 30, at 46-48; T. PLUCKNETT, *supra* note 24, at 405-15; C. REMBAR, *supra* note 32, at 224-28. *See generally* H. STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW (1824) (discussing the "science" of pleading under the common law system).

Lawyers well into the nineteenth century on both sides of the Atlantic viewed the "common law" procedural system as comprising the writ or form of action, the jury, and the technical pleading requirements that attempted to reduce cases to a single issue. This system became rigid and rarefied.[36] Due to the countless pleading rules, a party could easily lose on technical grounds.[37] Lawyers had to analogize to known writs and use "fictions" because of the rigidity of some forms of action.[38] Lawyers also found other ways around the common law rigidities, such as asserting the common count and general denials, which made a mockery of the common law's attempt to define, classify, and clarify.[39]

The common law procedural system, nonetheless, had its virtues. The formality and confining nature of the writs and pleading rules permitted judges, who were centralized in London, to attempt (and often to succeed) in forging a consistent, rational body of law, which provided lawyers with analytical cubbyholes.[40] The common law system, furthermore, permitted increased participation by the lay community. If the pleading resulted in the need for a factual determination, it could be sent to the county where the parties resided. A judge from the Central Court could easily carry the papers, reduced to a single issue, in his satchel, and convene a jury at an "assize."

The focusing of cases to a single issue also aided both judges and lawyers in their effort to understand and apply the law, as well as assisting lay jurors in resolving factual disputes. The use of known writs, each with their own process, substance, and remedy, allowed the integration of the ends sought and means used. The system presumably achieved—or at least tried to achieve—some degree of predictability about what legal consequences citizens could expect to flow from their conduct. Comparing the traditional common law system to that of his own day, Maitland (1850-1906) commented on the common law's attempt to control discretion: "Now-a-days all is regulated by general

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36 *See* T. PLUCKNETT, *supra* note 24, at 410.

37 *See* J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 331; C. REMBAR, *supra* note 32, at 225-31. On the number and subtlety of writs, see 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 564-67 (2d ed., reissued 1968).

38 *See, e.g.*, C. REMBAR, *supra* note 32, at 224.

39 *See* J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 338-39; F. MAITLAND, *supra* note 29, at 300-01; S. MILSOM, *supra* note 24, at 247-52; C. REMBAR, *supra* note 32, at 207-12; Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 520-21 (1907).

40 For an example of the relationship of writs and common law pleading to the development of the legal profession, see S. MILSOM, *supra* note 24, at 28-42; T. PLUCKNETT, *supra* note 24, at 216-17.

rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules."[41]

B. *Equity Procedure*

By the early sixteenth century it was apparent that the common law system was accompanied by a substantially different one called equity. Equity was administered by the Chancellor, as distinguished from the three central common law courts with their common law judges.[42] The contemporary English historian, Milsom, explains that one cannot find the precise beginning of the Equity Court, for, in a sense, it had been there all along.[43] As previously noted, although the writs had started as individualized commands from the Chancellor, by the fourteenth century several of the writs had become routinized.[44] Grievants, however, continued to petition the Chancellor for assistance in unusual circumstances, such as where the petitioner was aged or ill, or his adversary particularly influential.[45] Whereas the writ and single issue common law system forced disputes into narrow cubbyholes, these petitions to the Chancellor tended to tell more of the story behind a dispute. Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law.[46] The bill in equity became the procedural vehicle for the exceptional case. The main staples of Chancery jurisdiction became the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships.[47]

The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's con-

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[41] F. MAITLAND, *supra* note 29, at 298.

[42] Around 1523, Christopher St. Germain explored the relationship of equity to the common law system in *Dialogues Between a Doctor of Divinity and a Student of the Common Law.* For a discussion of this work and its impact, see S. MILSOM, *supra* note 24, at 79-83; T. PLUCKNETT, *supra* note 24, at 279-80.

[43] *See* S. MILSOM, *supra* note 24, at 74-87.

[44] *See supra* notes 25-27 and accompanying text.

[45] *See* F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-75, 77.

[46] *See* F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-79; T. PLUCKNETT, *supra* note 24, at 688-89.

[47] *See* F. MAITLAND, *supra* note 29, at 7-8. Maitland illustrates equity jurisdiction with "an old rhyme": " 'These three give place in court of conscience/Fraud, accident, and breach of confidence.' " *Id.* at 7. The idea that more formal legal rules should be accompanied by a more discretionary approach in order to prevent injustice was not new. On the Jewish notion of justice and mercy, see 10 ENCYCLOPAEDIA JUDAICA 476, 476-77 (1977). On the Greek notion of *epieikeia*, connoting "clemency, leniency, indulgence, or forgiveness," see G. MCDOWELL, *supra* note 9, at 15.

science.[48] This had far-reaching repercussions. In a common law suit, the self-interest of the parties was thought too great to permit them to testify.[49] The Chancellor, however, compelled the defendant personally to come before him to answer under oath each sentence of the petitioner's bill. There were also questions attached. This was a precursor to modern pretrial discovery.[50] Equity did not take testimony in open court, but relied on documents, such as the defendant's answers to questions.[51]

As the defendant was before the Chancellor to have his conscience searched, the Chancellor could order him personally to perform or not perform a specific act.[52] Such authority was necessary to enforce a trust. If the defendant was found to be holding land in trust for another, he could be compelled to give the use and profit of the property to the beneficiary.[53] The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages.[54]

The Chancellors were usually bishops, and so the term "conscience" again became associated with equity.[55] Notwithstanding the writs and the common law that developed around the writs, the Chancellor was expected to consider all of the circumstances and interests of all affected parties. He consequently was also to consider the larger moral issues and questions of fairness.[56] The equity system did not revolve around the search for a single issue. Multiple parties could, and often had to, be joined.[57] There was now a considerably larger litiga-

[48] *See* 5 W. HOLDSWORTH, A HISTORY OF THE COMMON LAW 216 (2nd ed. 1937); S. MILSOM, *supra* note 24, at 81-82.

[49] *See* T. PLUCKNETT, *supra* note 24, at 689.

[50] *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 171-72 (2d ed. 1977) [hereinafter F. JAMES & G. HAZARD (2d)].

[51] *See id.*; C. REMBAR, *supra* note 32, at 298; Bowen, *supra* note 39, at 524-25.

[52] *See* S. MILSOM, *supra* note 24, at 81-82; T. PLUCKNETT, *supra* note 24, at 689. It is appropriate to use "he" for defendants because during this period women were usually treated as incompetent to be parties to a suit. *See* F. JAMES & G. HAZARD (2d), *supra* note 50, at 415.

[53] *See* C. REMBAR, *supra* note 32, at 296.

[54] *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22 (1973); F. MAITLAND, *supra* note 29, at 254-67; S. MILSOM, *supra* note 24, at 81-82; Bowen, *supra* note 39, at 517-18.

[55] *See* T. PLUCKNETT, *supra* note 24, at 685-86, who wrote: "[T]he ecclesiastical chancellors were certainly not common lawyers, and it must have been a perfectly natural instinct, then as now, for a bishop when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law."

[56] *See* S. MILSOM, *supra* note 24, at 79-81. Sixteenth century theorists recognized "the appeal to the chancellor [as being] for the single [divine] justice, in circumstances in which the human [common law] machinery was going to fail." *Id.* at 80.

[57] *See* Bowen, *supra* note 39, at 516, 523-31 ("[I]t was a necessary maxim of the

tion package. This less individualized justice demanded and resulted in more discretionary power lodged in a single Chancellor, who resolved—often in a most leisurely manner—issues both of law and fact.[58] The lay jury was normally excluded.[59]

By the sixteenth century, the development of common law jurisprudence thus reflected a very different legal consciousness from equity. Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized. Just as the common law procedural rules and the growth of common law rights were related, so too were the wide-open equity procedures related to the scope of the Chancellor's discretion and his ability to create new legal principles. In equity, the Chancellor was required to look at more parties, issues, documents, and potential remedies, but he was less bound by precedent and was permitted to determine both questions of facts and law.[60] The equity approach distinctly differed from the writ-dominated system. Judges were given more power by being released from confinement to a single writ, a single form of action, and a single issue, nor by being as bound by precedent; and they did not share power with lay juries.[61]

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law.[62] Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a "gloss" or "appendix" to the more structured common law.[63] An expansive equity practice developed as a necessary companion to common law.[64]

Court of Chancery that all parties interested in the result must be parties to the suit.").

[58] *See* S. Milsom, *supra* note 24, at 82-83 ("It is a regular institution, but not applying rules; rather it is using its discretion to disturb their effect.").

The length of equitable proceedings was notorious. This aspect of equitable proceedings has been attributed to the court's desire to effect complete rather than merely substantial justice, as well as the self-interest of Chancery officials who profited from lengthy suits. *See* 1 W. Holdsworth, A History of English Law 373-74 (3rd ed. 1944).

[59] *See* S. Cohn, *supra* note 30, at 1.

[60] *See* C. Rembar, *supra* note 32, at 275.

[61] For summaries of the different approaches of law and equity, see L. Friedman, *supra* note 54, at 21-23; F. James & G. Hazard (3rd), *supra* note 31, at 11-14; S. Milsom, *supra* note 24, at 74-83.

[62] *See* R. Hughes, Handbook of Jurisdiction and Procedure in United States Courts 418-20 (2d ed. 1913).

[63] *See* F. Maitland, *supra* note 29, at 18-19.

[64] On occasion, a new equity rule would become part of the law applied in the common law courts. *See* F. James & G. Hazard (3d), *supra* note 31, at 16; T.

The disparities between law and equity were not always stark. Not all common law declarations were incisive, and common law pleading did not always isolate tidy issues; sometimes there was joinder of parties or issues. Conversely, equity often developed its own formal rules of both substance and process.[65] It is true, however, that when looked at as a whole, the common law writ/single issue system took seriously the importance of defining the case; integrating forms of action with procedure and remedy; confining the size of disputes; and articulating the legal and factual issues. In short, a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences.

This Article will explore flaws in equity and law when we examine the evolution of procedure in America. It is important to note here, however, that from the beginning, equity's expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice.[66] This is not to minimize the problems associated with common law practice, or the need for a more flexible counterpart to the common law. The point is that a less structured multiparty, multi-issue practice has always had significant burdens.[67]

PLUCKNETT, *supra* note 24, at 689.

[65] For examples of permissible joinder of parties and forms of action at common law, see F. JAMES & G. HAZARD (2d), *supra* note 50, at 452-54, 463-64. Much of the writing of the legal realists emphasized the discretion inherent in all judging and dispute resolution. *See, e.g.*, the Chapters on "Rule-Skepticism," "Fact-Skepticism," and "The Prediction of Decisions" in W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS 48-182 (1968) (examining the realist movement's revolt against classical jurisprudence). *See infra* note 131 (on how equity practice became complicated).

[66] *See, e.g.*, 1 W. HOLDSWORTH, *supra* note 58, at 425-28; C. REMBAR, *supra* note 32, at 298-303; R. WALKER AND M. WALKER, THE ENGLISH LEGAL SYSTEM 31 (3rd ed. 1972); Bowen, *supra* note 39, at 524-27. One commentator has noted that some of the problem in equity

> no doubt, was due to a defect which equity never cured—the theory that Chancery was a one-man court, which soon came to mean that a single Chancellor was unable to keep up with the business of the court. Not until 1913 do we find the appointment of a Vice-Chancellor.

T. PLUCKNETT, *supra* note 24, at 689 (footnote omitted). For complaints about equity in America, see *infra* notes 90-106 and accompanying text.

[67] Equity also became associated with monarchy and nondemocratic principles, because of its inherent discretion, rejection of the lay jury, and clashes with Parliament and the law courts. *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 14-16. *See generally* Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127 (1941) (exploring the power struggle between the courts of common law and equity in the 17th century).

C. *The Equity-Dominated Federal Rules of Civil Procedure*

In the twentieth century, Federal Rules proponents emphasized that they were not suggesting new procedures. They rather insisted that they were just combining the best and most enlightened rules adopted elsewhere.[68] For the most part the proponents were right, but their argument ignores the implications of their choices regarding what the "best" rules were. The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.[69] The expansive and flexible aspects of equity are all implicit in the Federal Rules. Before the Rules, equity procedure and jurisprudence historically had applied to only a small percentage of the totality of litigation.[70] Thus the drafters made an enormous change: in effect the tail of historic adjudication was now wagging the dog. Moreover, the Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery.[71]

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[68] *See, e.g.*, AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE (E. Hammond ed. 1939) (proceedings of the Institute on the Federal Rules of Civil Procedure and the Symposium on the Federal Rules of Civil Procedure). For a description of the sources of various rules, *see Hearings on the Rules of Civil Procedure for the District Courts of the United States: Hearings Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 4 (1938) [hereinafter *1938 House Hearings*] (statement of Homer Cummings, U.S. Attorney General); AMERICAN BAR ASSOCIATION, *supra*, at 28, 32 (statement of Edgar B. Tolman, member of the drafting committee); *id.* at 45, 51, 54-55, 57, 59, 66 (statement of Charles E. Clark, Dean of Yale Law School).

[69] *See 1938 House Hearings*, *supra* note 68, at 73 (statement of Edgar B. Tolman); P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 19, 20 (2d ed. 1977); 4 C. WRIGHT & A. MILLER, *supra* note 1, § 1008; Clark & Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 434-35 (1935) [hereinafter Clark & Moore I]; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1058 (1955).

[70] *See* Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-38 (1982).

[71] *Compare* Rule 25 (Bill of Complaint—Contents) of the Federal Equity Rules of 1912 in J. HOPKINS, THE NEW FEDERAL EQUITY RULES (1913) [hereinafter FED. EQ. R.] (requiring, inter alia, "ultimate facts") *with* FED. R. CIV. P. 8(a)(2) (General Rules of Pleading: Claims for Relief); *compare* FED. EQ. R. 26 (Joinder of Causes of Action) (requiring that joined causes of action be "cognizable in equity," and that "when there is more than one plaintiff, the causes of action joined must be joint . . . .") *with* FED. R. CIV. P. 18(a) (Joinder of Claims and Remedies: Joinder of Claims) and 20(a) (Permissive Joinder of Parties: Permissive Joinder); *compare* FED. EQ. R. 47 (Depositions—To Be Taken in Exceptional Instances) (permitting oral depositions only "upon application of either party, when allowed by statute, or for good and exceptional cause . . . .") *with* FED. R. CIV. P. 30(a) (Depositions Upon Oral Examination: When Depositions May be Taken); and *compare* FED. EQ. R. 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (limiting interrogatories to "facts and documents material to the support or defense of the cause") *with* FED. R. CIV. P. 26(b)(1) (General Provisions Governing Discovery: Discovery Scope and Limits in General).

The purpose of this Article is not to show the derivation of each Federal Rule. The drafters of the Rules, treatises, and articles have already done this.[72] This Article, however, will establish how different people and various historical currents ultimately joined together in a historic surge in the direction of an equity mentality. The result is played out in the Federal Rules in a number of different but interrelated ways: ease of pleading;[73] broad joinder;[74] expansive discovery;[75] greater judicial power and discretion;[76] flexible remedies;[77] latitude for

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[72] They show the extensive borrowings from equity, particularly from the Federal Equity Rules of 1912, *supra* note 71. *See, e.g.*, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES app. at 83, 84 table 1 (March 1938) (showing "Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure"); C. WRIGHT & A. MILLER, *supra* note 1 (providing a rule by rule discussion); Holtzoff, *supra* note 69, at 1058.

[73] *See, e.g.*, FED. R. CIV. P. 2 (One Form of Action), 8(a), (c), (e) (General Rules of Pleading: Claims for Relief, Affirmative Defenses, Pleading to be Concise and Direct; Consistency), 11 (Signing of Pleadings, Motions, and Other Papers; Sanctions), 15 (Amended and Supplemental Pleadings). For a comparison to previous American procedure, see *infra* text accompanying notes 93-97, 143-49. For a criticism of the leniency in pleading, see McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 124-25 (1952) [hereinafter McCaskill, *Philosophy of Pleading*].

[74] *See, e.g.*, FED. R. CIV. P. 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 15 (Amended and Supplemental Pleadings), 18 (Joinder of Claims and Remedies), 19 (Joinder of Persons Needed for Just Adjudication), 20 (Permissive Joinder of Parties), 22 (Interpleader), 23 (Class Actions), 24 (Intervention), 25 (Substitution of Parties), 42 (Consolidation; Separate Trials). For comparative code provisions, see *infra* text accompanying notes 150-51.

[75] *See* FED. R. CIV. P. 26-37 (Depositions and Discovery). For contemporary discovery problems, see *supra* note 7. For comparative code provisions, see *infra* text accompanying notes 152-57.

[76] One lawyer complains: "It has become increasingly clear that if one can but find him, there is a federal judge anywhere who will order nearly anything." Publius, *Let's Kill All the Lawyers*, WASHINGTONIAN, Mar. 1981, at 67. For comments on the enlarged, amorphous, and multi-issued nature of lawsuits and the vast amount of law available to lawyers and judges, see discussions in THE POUND CONFERENCE, *supra* note 6. Examples of Federal Rules of Civil Procedure that lend themselves to, or specifically provide for, judicial discretion include: 1, 8(a), (e), 11, 12(e), 13, 14, 15, 16, 19(b), 20, 23, 26(b)(1), (c), (d), 35(a), 37(a)(4), (b)(2), 39(b), 41(a)(2), 42(a), (b), 49, 50(a), (b), 53(b), 54(b), 54(c), 55(c), 56(c), 59(a)(1), 60(b)(1), 60(b)(6), 61, 62(b), 65(c). I have used current numbers, but for the most part, they are identical or similar to the 1938 rules. The case law rarely has provided more predictability or better defined standards than the rules, as is demonstrated by looking up the aforementioned rules in J. MOORE, MOORE'S FEDERAL PRACTICE (2nd ed. 1984), or C. WRIGHT & A. MILLER, *supra* note 1. One usually finds in these treatises a wide range of cases offering a baffling array of interpretations that usually provide no more certainty than the vague rule itself. On case management, see *supra* note 17.

[77] *See* Chayes, *supra* note 20, at 1292-96; Oakes, *"A Plague of Lawyers?": Law and the Public Interest*, 2 VT. L. REV. 7, 12-15 (1977).

lawyers;[78] control over juries;[79] reliance on professional experts;[80] reliance on documentation;[81] and disengagement of substance, procedure, and remedy.[82] This combination of procedural factors contributes to a procedural system and view of the law that markedly differs from ei-

[78] "'Americans increasingly define as legal problems many forms of hurts and distresses they once would have accepted as endemic to an imperfect world or at all events as the responsibility of institutions other than courts.'" Goldstein, *A Dramatic Rise in Lawsuits and Costs Concerns Bar*, N.Y. Times, May 18, 1977, at A1, col. 3, B9, col. 1 (quoting Professor Maurice Rosenberg, a Columbia University law professor); *see also* J. LIEBERMAN, THE LITIGIOUS SOCIETY 18 (1981) (noting the role of attorneys in fostering litigation); Carpenter, *The Pampered Poodle and Other Trivia*, 6 LITIGATION 3 (Summer 1980) (discussing the enormous magnitude of trivial litigation); Taylor, *supra* note 12 (stating that lawyers find ways to keep each other busy based on their training to find potential conflicts in the simplest of relationships). At least one commentator, however, has cautioned about claims of litigiousness. *See* Galanter, *supra* note 12, at 36-69.

[79] Litigants must now claim the right to a jury trial at an earlier stage of the litigation than had been the norm. *See* FED. R. CIV. P. 38(b) (Jury Trial of Right; Demand). For the more jury-protective provision of the Field Code, see 1848 N.Y. Laws, ch. 379, § 221 [hereinafter 1848 CODE]; *see also* FED. R. CIV. P. 50(a), (b) (Motion for a Direct Verdict and Judgment Notwithstanding the Verdict), 56 (Summary Judgment). On previous constitutional doubts as to directed verdict and judgment n.o.v., see Galloway v. United States, 319 U.S. 372, 396-411 (1943) (Black, J., dissenting); Slocum v. New York Life Ins. Co., 228 U.S. 364, 376-400 (1913). Cases such as *Galloway*, which stated that the practice of granting a directed verdict was approved explicitly in the Federal Rules of Civil Procedure, *see* 319 U.S. at 389, were considered by some as making inroads on the quality of the right to a jury trial, notwithstanding the language in the Enabling Act (currently codified at 28 U.S.C. § 2072 (1982)) that the rules should not "abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

It is true that some cases under the Federal Rules are jury-protective. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc., v. Westover, 359 U.S. 500 (1959). These cases do not alter the essential point, however, that the major thrust of the Federal rules is pro-judge rather than anti-jury. *See infra* text accompanying notes 512-13.

[80] For example, under the Enabling Act of 1934, the Supreme Court and the Advisory Committee, rather than Congress or state legislatures, formulated the procedural rules. Those rules empowered judges at the expense of juries. The rules facilitated the role of courts to deal with larger societal problems, perhaps making it easier for other branches to refrain from resolving those issues. *See, e.g.*, Chayes, *supra* note 20, at 1288-1302; Oakes, *supra* note 77, at 8-10. Public policy cases, as well as personal injury and commercial cases, in turn increasingly relied on experts to aid the court, both because lawyers prepared and presented the cases, and because experts were widely utilized as witnesses.

[81] *See* Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28, 28-29 (Spring 1981); Sherman & Kinnard, *supra* note 7, at 246; *Those #*X!!! Lawyers*, TIME, April 10, 1978, at 58-59. Again borrowing from equity, there has been a decrease on the importance of oral testimony in open court and of the trial itself, with profound influence on the quality and meaning of dispute resolution, and on the nature of trial advocacy. *See* Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A. J. 860 (July 1980); Stanley, *President's Page*, 62 A.B.A. J. 1375, 1375 (1976); *infra* text accompanying notes 445-48.

[82] *See infra* text accompanying notes 110-21, 214-15, 381-82.

ther a combined common law and equity system or the nineteenth century procedural code system.[83] The norms and attitudes borrowed from equity define our current legal landscape: expansion of legal theories, law suits, and, consequently, litigation departments; enormous litigation costs; enlarged judicial discretion; and decreased jury power.

Before discussing how the shift to an equity-type jurisprudence came about, it is important to issue four warnings. First, I am not arguing that before the Federal Rules there had been no movement toward equity. To the contrary, the Field Code of 1848 took some steps in that direction, and there were subsequent experiments in liberalized pleading, joinder and discovery.[84] What I *am* saying is that the Federal Rules were revolutionary in their approach and impact because they borrowed so much from equity and rejected so many of the restraining and narrowing features of historic common law procedure. It was the synergistic effect of consistently and repeatedly choosing the most wide-open solutions that was so critical for the evolution to what exists today.

Second, I am not saying that the Federal Rules are solely responsible for shaping the contours of modern civil litigation. Factors such as citizen awareness of rights, size and scope of government, and individual and societal expectations for the good and protected life should also be considered.[85] Causes and effects here, as with other historical questions, are virtually impossible to disentangle. So far as I can determine, the Federal Rules and the Enabling Act are simultaneously an effect, cause, reflection, and symbol of our legal system, which is in turn an effect, cause, reflection, and symbol of the country's social-economic-political structure. It cannot be denied, however, that the Federal Rules facilitated other factors that pushed in the same expansive, unbounded direction.[86]

Third, to criticize a system in which equity procedure has swallowed the law is not to criticize historic equity or those attributes of modern practice that utilize equity procedure. This is not an attack on

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[83] *See* Schaefer, *Is the Adversary System Working in Optimal Fashion?*, in THE POUND CONFERENCE, *supra* note 6, at 171, 186 ("The 1906 lawyer would not recognize civil procedure as it exists today, with relaxed pleading standards, liberal joinder of parties and causes of action, alternative pleadings, discovery, and summary and declaratory judgments.").

[84] *See* G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 17-18 (1932); *infra* text accompanying notes 132-38.

[85] One should also consider the growth in legislation and regulation, transactions and their complexity, photocopying and data processing, nontangible property, and the size of law firms. *See supra* text accompanying note 18.

[86] *See infra* notes 355-58 and accompanying text (describing the impact of the New Deal on the development of the Federal Rules).

those aspects of *Brown v. Board of Education*[87] or other structural cases that attempt to re-interpret constitutional rights in light of experience and evolving norms of what is humanitarian. I *do* criticize, however, the availability of equity practice for all cases, the failure to integrate substance and process, and the failure to define, categorize, and make rules after new rights are created. In other words, I question the view of equity as the dominant or sole mode instead of as a companion to a more defined system.

Fourth, I am not suggesting that we should return to common law pleading or to the Field Code. Nonetheless, there are aspects of common law thought, pre-Federal Rules procedure, and legal formalism that may continue to make sense and should inform our debate about appropriate American civil procedure.[88]

Class Discussion Questions on English and early American Legal History

1. As Subrin described it, the conventional understanding of English legal history is that the law courts demanded procedural rigidity and technicality and that, by contrast, equity courts allowed for greater procedural flexibility. Try to point to some examples in both systems that reflect the conventional understanding.

2. Take a look at the chart below. What content can you add to each of the boxes? For the upper right-hand box, try to point to specific examples that Subrin mentions of how, after 1938, our modern procedural systems (federal and state) were influenced heavily by English equity courts. That is, what examples can you point to that reveal equity's imprints on modern federal and state procedure.

Type of Law	Before 1938	After 1938
Procedural law applied by American state and federal courts in civil cases		
Substantive law applied by American state and federal courts in civil cases		

3. Try to identify some concrete examples of positive values that can be furthered by a judicial system that adopts the rigid and technical procedures generally demanded by English law courts. On the flip side, what downstream consequences might we be concerned about if a system adopts equity's greater flexibility, including imbuing its judges with added discretion?

TRADITIONAL EQUITY AND CONTEMPORARY PROCEDURE (Wash. L. Rev, Vol. 78) 2003

Thomas O. Main*

III. THE PROCEDURAL MERGER OF LAW AND EQUITY

Beginning in the middle of the nineteenth century, a reform effort to simplify legal procedure originated in the State of New York.[213] The reformers were frustrated with the practical and theoretical complexities of parallel systems of law and equity.[214] Enticed by the rhetoric of uniformity,[215] these reformers sought to unify law and equity into a single system of codes.[216] Such codes offered a simple set of uniform rules better suited for the practical task of procedure to efficiently process the more important issues of substantive law.[217] One commentator described the technicalities of common law pleading as "needless distinctions, scholastic subtleties and dead forms which have disfigured and encumbered our jurisprudence."[218] The reform effort was successful, as Section 62 of the new New York Code of Civil Procedure declared for New York state courts:

> The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished: and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.[219]

The Field Code abolished the common law forms and merged law and equity in a greatly simplified procedure.[220] Code reformers took great pains to emphasize that the new codes reorganized only the procedure of law and equity.[221] Accepting Blackstone's view that substance and procedure were conceptually distinct,[222] the Field Code took the additional step of recognizing the divisibility in fact of substance and procedure: "The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law."[223]

The merged procedure of the codes borrowed heavily from equity practice.[224] Much like the old bills in equity, the Field Code provided that the pleadings should state the facts;[225] thus the codes, like equity, de-emphasized the importance of framing an issue.[226] The Code adopted for all actions numerous equity practices and processes, including latitude in the joinder of claims and parties.[227] Further, echoing King James I's resolution of the dispute between Bacon and Coke three centuries prior,[228] any conflict between the substantive doctrines of law and equity was to be resolved in favor of equity.[229]

The innovative codes proved popular elsewhere and were adopted in most states. The system inaugurated by the New York Code of 1848 was adopted promptly by Missouri and Massachusetts in 1849 and 1850, respectively.[230] In 1851, California adopted a version of the Field Code, and prior to the outbreak of the Civil War, Iowa, Minnesota, Indiana, Ohio, the Washington Territory, Nebraska, Wisconsin and Kansas likewise enacted similar procedural codes.[231] Within twenty-five years, procedural codes had been adopted in a majority of the states and territories.[232] Additionally, the Field Code had at least some influence in all states, as all states departed somewhat from the common law system of pleading in response to the proliferation of the codes.[233] For example, some of the states that did not model the codes nevertheless modified their pleading rules by statutes, allowing the assertion of equitable defenses in actions at law.[234]

Nevertheless, the reform effort that was remarkably successful in the state courts initially drew only skepticism from the federal courts. Although law and equity were administered on different "sides" of the same federal courts,[235] a commitment to the formal separation of law and equity was venerated and, arguably, constitutionally grounded. Justice Grier emphasized the significance of the separation in an 1858 opinion of the Court:

> This [dual] system, matured by the wisdom of ages, founded upon principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sociologists, who invest new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts.[236]

Bolstered by constitutional references to systems of law and of equity,[237] commentators long sustained the argument that "the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States."[238]

However, the resolve for separate systems weakened as popular confusion and dissent mushroomed. A primary source of the confusion and dissent was federal procedure, which, both prior and subsequent to state adoption of the procedural codes, followed state procedure in law cases and a uniform federal procedure in equity cases.[239] Thus, there was a uniform simplified procedure in equity for the federal courts throughout the country. Yet in law cases the various federal courts were applying the procedure of the corresponding state court.

Federal equity practice was a model of simplicity and uniformity. Somewhat paradoxically, federal procedure in equity cases was actually a product of a certain hostility toward equity among the early colonists.[240] Conformity to state practice seems to have been demanded, but it became necessary to follow the English equity procedure because a number of the states adopted no equity procedure to which conformity could be had.[241] The first set of Federal Equity Rules, promulgated by the Supreme Court in 1822, contained thirty-three very concise rules of practice and procedure.[242] A few of the rules were mandatory,[243] but most generously accorded federal judges with broad discretionary authority.[244] Moreover, after the extension of the doctrine of *Swift v. Tyson*,[245] to equity cases in 1851, the federal courts enunciated their own views of the principles of equity jurisprudence, without restriction by the decisions of state courts.[246] The Federal Equity Rules proved quite durable and were substantially revised only twice in the succeeding century—in 1842 and in 1912.[247] The latter revision was a comprehensive reform that modeled many of the provisions of the Field Code, especially those dealing with the joinder of parties.[248]

Meanwhile, the procedure in law cases was controlled by congressional legislation requiring the federal courts to follow state procedure "as near as may be."[249] The Conformity Act was unpopular and true conformity seemed largely unobtainable.[250] Noting the success of equity procedure,[251] the American Bar Association blamed legislative control of federal practice for the problem and proposed that the power to promulgate federal rules of procedure for law cases be turned over to the United States Supreme Court.[252] After years of debate and struggle,[253] Congress passed a bill providing:

> [T]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.[254]

The legislation further provided that "[t]he court may at any time unite the general rules prescribed by it for cases in equity with more in actions at law as to secure one form of civil action and procedure for both . . . ."[255] However, the Court did not rush to the task; an advisory committee was appointed the following year.[256] Two years thereafter, a set of uniform rules was promulgated, eliminating the distinction between procedures for cases in equity and in law.[257] "Under the new rules the hideous Conformity Act [wa]s relegated to the limbo of 'old unhappy, far off things.'"[258] In his address to the American Law Institute Chief Justice Hughes stated the objective of the new rules:

> It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity.[259]

Carrying the torch lit by Blackstone 150 years earlier, the reformers argued that procedure had a tendency to be obtrusive, and that it should be restricted to its proper and subordinate role.[260] The Chief Justice transmitted the Rules to Congress over the dissent of Justice Brandeis, and in 1938 the new uniform Federal Rules of Civil Procedure went into effect.[261]

The philosophy and procedures of equity heavily influenced the tenor of the new Federal Rules.[262] One general and generous sentence applicable to all types of cases established a fluid standard of pleading.[263] Parties could plead alternative theories.[264] Plaintiffs were able to pursue novel theories of relief.[265] Related and unrelated claims could be joined in a single action.[266] Judges could hear the counterclaims and cross-claims of parties already joined in the filed action.[267] As in equity, there were numerous specialized devices through which judges could allow the lawsuit to expand further in order to develop a more efficient litigation unit—e.g., impleaders,[268] interpleaders,[269] interventions,[270] and class actions.[271] Complementing the new pleading regime were new liberal rules of discovery,[272] and judges were vested with the authority to "manage" the case through pretrial conferences[273] and special masters.[274]

The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.[275] Indeed, Rule 1 articulated this very purpose: "[The Federal Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[226] Commenting generally on the philosophy and durability of discretionary rules, Professor Carrington mellifluously recites: "Tight will tear. Wide will wear."[227]

Like the Field Code, the reforms were directed exclusively to the procedural problem: the 1934 enabling legislation provided that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."[228] The Supreme Court later confirmed that "[t]he Rules have not abrogated the distinction between equitable and legal remedies. Only the procedural distinctions have been abolished."[229] The fundamental substantive characteristics that distinguished the regimes of law and equity remained intact.[230] Again, in the event of any substantive conflict between law and equity, the latter was to prevail.[231]

Many states, in turn, modeled the federal rules for their state court procedures. In 1960, in the first comprehensive survey of state adoption of the Federal Rules, Professor Charles Alan Wright concluded that, after twenty years of operating under the Federal Rules, state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.[232] Decades later, Professor John Oakley detailed "the pervasive influence of the Federal Rules on at least some part of every state's civil procedure."[233]

The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law

UCLA L. Rev v. 59 (2012)

Lumen N. Mulligan
Glen Staszewski

The rulemaking era began when Congress empowered the Court to promulgate the Rules of Civil Procedure in 1934 with the passage of the Rules Enabling Act.[43] Although the 1934 Act did not specify the use of committees, in 1935 the Court appointed a fourteen-person Advisory Committee—which did not adhere to the notice-and-comment procedures currently required of the Advisory Committee[44]—to do the research and drafting work for the creation of the original Federal Rules of Civil Procedure.[45] Under this first incarnation of the rulemaking process, the Court directly reviewed the work of the Advisory Committee and, if satisfied, reported the promulgated Rules to Congress,[46] which could overrule any of the rules by exercising the legislative veto built into the 1934 Act during the specified "report-and-wait period."[47] Although the Court often deferred to the Advisory Committee's proposals during this early period,[48] it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress.[49] At least once, the Court exercised its rulemaking authority directly in amending a Rule of Criminal Procedure, bypassing the Advisory Committee entirely.[50]

The rulemaking process become more reticulated in 1958 when Congress created the Judicial Conference of the United States, which took over the direct supervision of the Advisory Committee from the Court.[51] This new structure resulted in decreased input into the rulemaking process by the Justices.[52] Indeed, during this period, the Court unfailingly promulgated Rules recommended to it by the Judicial Conference, leading Justices and commentators to describe the Court's role in rulemaking as one of being a "'mere conduit' for the work of others."[53]

By the late 1970s, observers of the rulemaking process, including Chief Justice Burger,[54] leveled charges at every step in the process. They argued that Congress's review of the Rules was flawed.[55] They similarly argued that the Court was not an appropriate entity to promulgate Rules.[56] Commentators chastised the committee structure as acting beyond the bounds of the Rules Enabling Act[57] and for being unrepresentative and closed to public input.[58] The judiciary sought to correct many of these faults without new legislation by commissioning a Federal Judicial Center study, which, upon completion, suggested several amendments to the rulemaking process.[59]

These changes, however, did not satisfy Congress, which passed significant rulemaking reforms in 1988.[60] While retaining the Judicial Conference's role in the rulemaking process, the 1988 Act codified the role of the rulemaking committees for the first time. It mandated the existence of the Standing Committee on Rules of Practice and Procedure, which the Judicial Conference had previously established at its discretion, and charged the Standing Committee with reviewing the proposals of other duly appointed committees and making recommendations to the Judicial Conference.[61] The 1988 Act also formalized the Judicial Conference's practice of deploying area-specific advisory committees.[62] Hence, the Court can only promulgate Rules that have been vetted by the area-specific advisory committees, the Standing Committee, and the Judicial Conference.

The 1988 Act also increased representation and public participation in the rulemaking process. The Act mandates that the various advisory committees include practitioners, trial judges, and appellate judges.[63] Congress also mandated greater transparency and public input. The Act thus requires the Judicial Conference to publish its procedures for amendm--- and adoption of rules.[64] It further requires that the Advisory and Standing Committees conduct open and publicly noticed meetings, record the minutes, and make those minutes publicly available.[65] Additionally, the 1988 Act codified the longstanding practice of the Advisory Committee to attach official drafters' notes to Rule proposals.[66] Finally, the 1988 Act increased the length of the report-and-wait period to Congress. The period now stands at a minimum of seven months.[67]

Thus, the current rulemaking process comprises seven steps.[68] First, the Administrative Office of the United States Courts collects recommendations for new Rules or amendments from the public, practitioners, and judges.[69] These suggestions are forwarded to the appropriate Advisory Committee's reporter[70] (a law professor assigned to each advisory committee to set the agenda and do the initial drafting of rule revisions and explanatory notes[71]), who makes an initial recommendation for action to the Advisory Committee. Second, to go forward with a Rules revision, the Advisory Committee must submit the proposed revision and explanatory note, and any dissenting views, to the Standing Committee in order to obtain permission to advance to the publication and comment period.[72] Third, the Advisory Committee publishes the proposed revision widely, receives public comment, and holds public hearings.[73] At the conclusion of the notice-and-comment period, the Advisory Committee's reporter summarizes the results of the public input and presents them to the Advisory Committee.[74] If the Advisory Committee finds that no substantial changes to the revision are called for, it transmits the revision and accompanying notes and reports to the Standing Committee.[75] If the Advisory Committee makes substantial changes to the proposed revision, it must go through another public notice-and-comment period.[76] Fourth, the Standing Committee reviews the proposed revision.[77] If it makes substantial changes to the proposed revision, the Standing Committee returns the proposed revision to the Advisory Committee.[78] If the Standing Committee does not make substantial changes, it sends the proposed revision to the Judicial Conference.[79] Fifth, the Judicial Conference considers proposed revisions each September, sending approved revisions to the Court or rejected proposals back to the Standing Committee.[80] Sixth, the Court takes the proposed revisions under advisement from September to May 1 of the following year, at which time it must transmit to Congress those Rules it seeks to promulgate.[81] Seventh, under the current law, Congress's report-and-wait period runs another seven months from May 1 to December 1, at which time unaltered revisions to the Rules become law.[82]

58 S.Ct. 817
Supreme Court of the United States.
ERIE R. CO.
v.
TOMPKINS.*
No. 367
|
Argued Jan. 31, 1938.
|
Decided April 25, 1938.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of Swift v. Tyson[1] shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for Southern New York, which had jurisdiction because the company is a corporation of that state. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is, a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the state on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (2 Cir., 90 F.2d 603, 604), that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law, and that 'upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. * * * Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. * * * It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train.'

The Erie had contended that application of the Pennsylvania rule was required, among other things, by section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. s 725, 28 U.S.C.A. s 725, which provides: 'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U.S. 671, 58 S.Ct. 50, 82 L.Ed. 518.

First. Swift v. Tyson, 16 Pet. 1, 18, 10 L.Ed. 865, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be; and that, as there stated by Mr. Justice Story, 'the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.'

The Court in applying the rule of section 34 to equity cases, in Mason v. United States, 260 U.S. 545, 559, 43 S.Ct. 200, 204, 67 L.Ed. 396, said: 'The statute, however, is merely declarative of the rule which would exist in the absence of the statute.'[2] The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34,[3] and as to the soundness of the rule which it introduced.[4] But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, *73 the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.[5]

Criticism of the doctrine became widespread after the decision of Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426.[6] There, Brown &Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville & Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., Railroad station; and that the Black & White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown & Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the Black & White; an injunction issued by the District Court *74 was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of Swift & Tyson had been applied, affirmed the decree.

Second. Experience in applying the doctrine of Swift v. Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;[7] and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.[8]

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift v. Tyson introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.[9] Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment.[10] In addition to questions of purely commercial law, 'general law' was held to include the obligations under contracts entered into and to be performed within the state,[11] the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee;[12] the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state;[13] and the right to exemplary or punitive damages.[14] Furthermore, state decisions construing local deeds,[15] mineral conveyances,[16] and even devises of real estate,[17] were disregarded.[18]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule.[19] And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the Taxicab Case.

The injustice and confusion incident to the doctrine of Swift v. Tyson have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.[20] Other legislative relief has been proposed.[21] If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.[22] But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772, against ignoring the Ohio common law of fellow-servant liability: I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.'

The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes.[23] The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law':

'But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * *

'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'

Thus the doctrine of Swift v. Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in Falchetti v. Pennsylvania R. Co., 307 Pa. 203, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law.[24] In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 00–1853

AKOS SWIERKIEWICZ, PETITIONER *v.* SOREMA N. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[February 26, 2002]

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old.[1] In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a

[1] Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint. See, e.g., *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 164 (1993).

French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, François M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." App. 26. Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.* (1994 ed. and Supp. V), and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §621 *et seq.* (1994 ed. and Supp. V). App. 28. The United States District Court for the Southern District of New York dismissed petitioner's complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." *Id.*, at 42. The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*, *supra*, at 802. See, *e.g.*, *Tarshis* v. *Riese Organization*, 211 F. 3d 30, 35–36, 38 (CA2 2000); *Austin* v. *Ford Models, Inc.*, 149 F. 3d 148, 152–153 (CA2 1998). The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." 5 Fed. Appx. 63, 65 (CA2 2001). We granted certiorari, 533 U. S. 976 (2001), to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases,[2] and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. See 5 Fed. Appx., at 64–65. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1)

[2] The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), in order to survive a motion to dismiss. See, *e.g.*, *Sparrow* v. *United Air Lines, Inc.*, 216 F. 3d 1111, 1114 (CADC 2000); *Bennett* v. *Schmidt*, 153 F. 3d 516, 518 (CA7 1998); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F. 2d 924 (CA8 1993). Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. In addition to the case below, see *Jackson* v. *Columbus*, 194 F. 3d 737, 751 (CA6 1999).

membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid.*; cf. *McDonnell Douglas*, 411 U. S., at 802; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253–254, n. 6 (1981).

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation *of proof* in a private, non-class action challenging employment discrimination." 411 U. S., at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine*, *supra*, at 252–253 ("In [*McDonnell Douglas*,] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination" (footnotes omitted)); 450 U. S., at 255, n. 8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law").

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constric[t] the role of the pleadings." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, *e.g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters*, 438 U. S. 567, 577 (1978); see also *McDonnell Douglas*, *supra*, at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters* v. *United States*, 431 U. S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring* v. *First Interstate Mortgage, Inc.*, 984 F. 2d 924, 927 (CA8 1993)

("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.*, at 47–48; *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168–169 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure §1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.[3] This Court, however, has declined to

[3] "In all averments of fraud or mistake, the circumstances constitut-

extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius.*" 507 U. S., at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U. S. C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).[4]

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before respond-

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ing fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

[4] These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

ing. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley*, *supra*, at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.*, at 24–28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley*, *supra*, at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34–40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman*, *supra*, at 168. Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U. S., at 236.

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AKOS SWIERKIEWICZ, Plaintiff, v. SOREMA N.A., Defendant.	: : : : : : :	CIVIL ACTION NO. 99-CV JURY TRIAL DEMANDED

COMPLAINT

1. This is an employment discrimination action brought by Akos Swierkiewicz to recover damages against SOREMA N.A. ("SOREMA") for the violation of his rights under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et. seq. ("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. ("ADEA").

JURISDICTION AND VENUE

a. Jurisdiction over Mr. Swierkiewicz's Title VII claim is conferred by 42 U.S.C. §2000e-5(f)(3). Jurisdiction over his ADEA claim is conferred by 29 U.S.C. §626(c)(1).

b. Venue is proper in this district pursuant to the general venue statute, 28 U.S.C. §1391, and under Title VII's special venue statute, 42 U.S.C. §2000e-5(f)(3).

PARTIES

2. Plaintiff, Akos Swierkiewicz, resides at 821 Hudson Drive, Yardley, Pennsylvania 19067.

3. Defendant SOREMA is a New York corporation headquartered at 199 Water Street, 20th Floor, New York, New York 10038.

4. At all times relevant hereto, SOREMA has resided and conducted business in this judicial district.

5. At all times relevant hereto, SOREMA has been an employer within the meaning of Title VII and the ADEA.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. On or about July 11, 1997 Mr. Swierkiewicz filed a Charge of Discrimination against SOREMA with the Philadelphia District Office of the Equal Employment Opportunity Commission ("EEOC"), Charge No. 170971447, charging it with unlawful national origin and age discrimination in connection with his dismissal from employment.

7. By notice dated May 3, 1999 and which he received on May 5, 1999, Mr. Swierkiewicz was notified by the EEOC of his right to file a civil action against SOREMA.

8. This lawsuit has been timely filed within 90 days of Mr. Swierkiewicz's receipt of the EEOC's right-to-sue notice.

FACTUAL ALLEGATIONS

9. Mr. Swierkiewicz is a native of Hungary. He became a United States citizen in 1970.

10. Mr. Swierkiewicz is 53 years old. His date of birth is July 25, 1946.

11. SOREMA was formed in 1989. It is a reinsurance company principally owned and controlled by a French parent corporation. At all times relevant hereto, SOREMA's Chief Executive Officer has been François M. Chavel, a French national.

12. From 1970 to 1986, Mr. Swierkiewicz was employed by INA which after its merger in 1982 with Connecticut General, became CIGNA Insurance Company. His last position at CIGNA was Vice President of Special Risk Facilities.

13. From 1986 to 1989, Mr. Swierkiewicz was employed by SCOR U.S., a reinsurance company, as Senior Vice President for Research and Special Risks.

14. On April 17, 1989 Mr. Swierkiewicz began his employment with SOREMA in the position of Senior Vice President and Chief Underwriting Officer ("CUO").

15. In all respects, Mr. Swierkiewicz performed his job in a satisfactory and exemplary manner.

16. Despite plaintiff's stellar performance, in February 1995 Mr. Chavel demoted him from his CUO position to a marketing and services position and transferred the bulk of his underwriting responsibilities to another French national, Nicholas Papadopoulo, who was 32 years old at the time (and 16 years younger than plaintiff).

17. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).

18. A year later, in or about February 1996, Mr. Chavel formally appointed Mr. Papadopoulo as SOREMA's CUO.

19. Mr. Papadopoulo was far less experienced and less qualified to be SOREMA's CUO than was Mr. Swierkiewicz. Indeed, Mr. Papadopoulo had just one year of underwriting experience prior to being appointed CUO by Mr. Chavel. By contrast, plaintiff had more than 26 years of broad based experience in the insurance and reinsurance industry.

20. At the time Mr. Papadopoulo assumed plaintiff's duties as CUO, Mr. Chavel stated that he wanted to "energize" the underwriting department – clearly implying that plaintiff was too old for the job.

21. In light of Mr. Papadopoulo's inexperience, Mr. Chavel brought in Daniel Peed from SOREMA's Houston, Texas office to support him in his CUO duties. Mr. Peed, like Mr. Papadopoulo, was in his early 30s. Shortly after his transfer to SOREMA's office in New York City, Mr. Chavel promoted Mr. Peed to the position of Senior Vice President of Risk Property.

22. Prior to his transfer, Mr. Peed had been a Second Vice President reporting to plaintiff.

23. Not long after plaintiff's demotion, SOREMA hired another French national, Michel Gouze, as Vice President in charge of Marketing. Mr. Gouze, unlike plaintiff, had very little prior experience in the insurance/reinsurance business.

24. Because of his inexperience, Mr. Gouze needed to rely on Mr. Swierkiewicz to perform his marketing duties for SOREMA.

25. Mr. Gouze's marketing duties at times overlapped with those of plaintiff. Despite Mr. Swierkiewicz's requests to better coordinate their duties, Mr. Chavel refused to accommodate those requests or to have Mr. Gouze report to plaintiff.

26. Mr. Swierkiewicz was isolated by Mr. Chavel following his demotion, excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA.

27. Efforts by Mr. Swierkiewicz to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subjected following his demotion proved unsuccessful.

28. On April 14, 1997, following two years of ongoing discrimination on account of his national origin and age, Mr. Swierkiewicz sent a memo to Mr. Chavel outlining his grievances and requesting a severance package to resolve his disputes with SOREMA.

29. Mr. Chavel did not respond to Mr. Swierkiewicz's memo.

30. In the morning, on Tuesday April 29, 1997, Mr. Chavel and Daniel E. Schmidt, IV, SOREMA's General Counsel, met with Mr. Swierkiewicz and gave him two options: either resign his job (with no severance package) or be fired.

Mr. Swierkiewicz refused to resign his employment with SOREMA.

As a result, he was fired by Mr. Chavel, effective that very day (April 29, 1997).

31. SOREMA had no valid basis to fire Mr. Swierkiewicz.

32. Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment.

33. Unlike plaintiff who was fired without cause and without any severance pay or benefits, SOREMA has provided generous severance packages to a number of former executives for whom it had cause to terminate their employment. These include, but are not limited to, the following individuals: Jay Kubinak, Thilo Harda, Douglas Zale, Nigel Harley and Marcus Corbally.

34. As a direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered and will continue to suffer a substantial loss of earnings to which he otherwise would have been entitled. This includes, but is not limited to, the loss of his salary, bonus, automobile allowance and pension credits as well as the loss of his medical and dental insurance, life insurance, short and long term disability insurance and the insurance he had for accidental death and dismemberment.

35. As a further direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered damage to his reputation and harm to his career. He has also experienced physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

36. SOREMA acted willfully and in reckless disregard of Mr. Swierkiewicz's rights under Title VII and the ADEA by discharging him from employment on account of his age and national origin.

STATEMENT OF CLAIMS

COUNT I: VIOLATION OF TITLE VII

37. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 40 of the Complaint as if they were set forth in full.

38. SOREMA terminated Mr. Swierkiewicz's employment on account of his national origin and thereby violated his right to equal employment opportunity as protected by Title VII.

COUNT II: VIOLATION OF THE ADEA

39. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 42 of the Complaint as if they were set forth in full.

40. SOREMA terminated Mr. Swierkiewicz's employment on account of his age and thereby violated his right to equal employment opportunity as protected by the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Mr. Swierkiewicz respectfully requests the Court to enter judgment in his favor and against SOREMA, and to accord him the following relief:

(a) Back pay with prejudgment interest and all the fringe benefits to which he is entitled;

(b) Front pay and benefits to the extent reinstatement is not feasible;

(c) Compensatory damages for his non-economic injuries in an amount authorized by Title VII;

(d) Punitive damages to punish and deter SOREMA from future acts of employment discrimination in an amount authorized by Title VII;

(e) Liquidated damages in an amount equal to twice Mr. Swierkiewicz's back pay losses as authorized by the ADEA;

(f) An award of reasonable counsel fees and costs to compensate Mr. Swierkiewicz for having to prosecute this action against SOREMA; and

(g) Such other legal and equitable relief or may be just and proper under the circumstances.

JURY DEMAND

Mr. Swierkiewicz demands a trial by jury on all the issues in this action that are triable by law.

Respectfully submitted,

RAYNES, MCCARTY, BINDER, ROSS & MUNDY

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Counsel for Plaintiff
Akos Swierkiewicz

Dated: August 3, 1999

Discussion Questions – Thursday, August 29

Background

In *Swierkiewicz*, the plaintiff alleged that his employer, a French-owned company with its headquarters in New York, wrongfully fired him on account of his country of national origin (he was from Hungary).He alleged that being fired violated his rights under Title VII, a federal statute. Most jobs in the United States are "at-will employment," a concept that means that an employer can fire most employees for pretty much any reason. One big exception, however, is that an employer can't take an adverse employment action—such as firing, refusing to hire, demoting, or refusing to promote—for a reason that is illegal under the law. Title VII is one such law. It prohibits adverse employment actions if the action is based on an employee's race, color, religion, sex, or national origin. The statute also gives employees a private right of action to sue, meaning that an employee can bring a civil lawsuit if the employer discriminates against them based on one of these protected categories. And that was the first claim that the plaintiff made in *Swierkiewicz*: that he was terminated on account of his national origin, in violation of Title VII. The other claim that the plaintiff made was that he was also terminated on account of his age. Age isn't a protected category under Title VII but is under another federal statute, the Age Discrimination in Employment Act.

After it was sued, the employer argued that the plaintiff's allegations supporting his two claims were insufficient under Rule 8 and it moved to dismiss them under Federal Rule of Civil Procedure 12(b)(6). The federal trial judge agreed, dismissing the case. The plaintiff appealed that dismissal to the Second Circuit, which affirmed the trial judge's decision. In the Second Circuit's view, to adequately allege that he was fired for a discriminatory reason, he had to plead a prima facia case of discrimination. The appellate court then concluded that he had not done so because he had not alleged circumstances that would support an inference of discrimination. The Second Circuit wrote: "With respect to national origin, the only circumstances Swierkiewicz pled are that he is Hungarian, others at Sorema are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the district court that these allegations are insufficient as a matter of law to raise an inference of discrimination." As to the age discrimination allegation, the appellate court wrote: "The only circumstance that Swierkiewicz alleges gives rise to an inference of age discrimination is Chavel's comment in 1995 that Chavel wanted to "energize" the underwriting department. We agree with the district court that this allegation is insufficient as a matter of law to raise an inference of discrimination."

Questions

1. In reversing the Second Circuit, the Supreme Court said the appellate court had incorrectly used an evidentiary standard to judge the sufficiency of the plaintiff's allegations. Try to articulate the Court's reasoning.

2. The Court also said that imposing a heightened pleading standard in employment discrimination cases conflicts with Rule 8(a)(2). Once again, try to articulate the Court's reasoning. As part of your discussion, try to explain what the Court meant when it said, in

a footnote that appears on page 37 of the Course Materials, that courts are required to "accept as true all of the factual allegations contained in the complaint."

3. Applying what it described as the correct pleading standard, the Court found the plaintiff's allegations to be sufficient under Rule 8(a). Try to articulate the Court's reasoning.

4. As you reflect on this case, do you think the Second Circuit's or the Supreme Court's approach seems more workable to use as a pleading standard in employment discrimination cases? Why?

556 U.S. 662
Supreme Court of the United States

John D. ASHCROFT, Former Attorney General, et al., Petitioners,
v.
Javaid IQBAL et al.

No. 07–1015.
|
Argued Dec. 10, 2008.
|
Decided May 18, 2009.

Opinion

Justice KENNEDY delivered the opinion of the Court.

Javaid Iqbal (hereinafter respondent) is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, ****1943** plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1, 11–12 (Apr.2003), http://www.usdoj.gov/oig/special/0306/full.pdf?bcsi_scan_61073EC0F74759AD=0 & bcsi_scan_filename =full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.,* at 1. Of those individuals, some 762 were held on immigration charges; and a 184–member subset of that group was deemed to be "of 'high interest' " to the investigation. *Id.,* at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.,* at 112–113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal v. Hasty,* 490 F.3d 143, 147–148 (C.A.2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit ***668** ADMAX SHU). *Id.,* at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prisons regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.,* at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04–CV–1809 (JG)(JA), ¶¶ 10–11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21–cause–of–action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his ****1944** treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.,* ¶ 113, at 176a; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *id.,* ¶¶ 143–145, at 182a; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *id.,* ¶ 154, at 184a.

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated ***669** respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." *Id.*, ¶ 47, at 164a. It further alleges that "[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶ 69, at 168a. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶ 96, at 172a–173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶ 10, at 157a, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation," *id.*, ¶ 11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 136a–137a (relying on *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

***670** The Court of Appeals considered *Twombly'* s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F.3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.*" *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. *Id.*, at 174.

****1945** Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise ... between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity," *id.*, at 178. We granted certiorari, 554 U.S. 902, 128 S.Ct. 2931, 171 L.Ed.2d 863 (2008), and now reverse.

[Part II deleted]

III

In *Twombly, supra,* at 553–554, 127 S.Ct. 1955, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." ****1948** *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 66, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." 534 U.S., at 68, 122 S.Ct. 515. See also *Wilkie,* 551 U.S., at 549–550, 127 S.Ct. 2588. That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. § 1979, ***676** 42 U.S.C. § 1983." *Hartman,* 547 U.S., at 254, n. 2, 126 S.Ct. 1695. Cf. *Wilson v. Layne,* 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Iqbal Brief 46 ("[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior* "). See *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (finding no vicarious liability for a municipal "person" under 42 U.S.C. § 1983); see also *Dunlop v. Munroe,* 7 Cranch 242, 269, 3 L.Ed. 329 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Robertson v. Sichel,* 127 U.S. 507, 515–516, 8 S.Ct. 1286, 3 L.Ed. 203 (1888) ("A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540–541, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (opinion of KENNEDY, J.) (First Amendment); *Washington v. Davis,* 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). It instead involves a decisionmaker's undertaking ***677** a course of action " 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Ibid.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead ****1949** sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." Iqbal Brief 45–46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is ***678** entitled to relief." As the Court held in *Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.,* at 557, 127 S.Ct. 1955.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.,* at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557, 127 S.Ct. 1955 (brackets omitted).

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.,* at 555, 127 S.Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ****1950** "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for ***679** a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.,* at 556, 127 S.Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U.S.C. § 1. Recognizing that § 1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry ... and ha[d] agreed not to compete with one another." 550 U.S., at 551, 127 S.Ct. 1955 (internal quotation marks omitted). The complaint also alleged that the defendants' "parallel course of conduct ... to prevent competition" and inflate prices was indicative of the ***680** unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a " 'legal conclusion' " and, as such, was not entitled to the assumption of truth. *Id.,* at 555, 127 S.Ct. 1955. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.,* at 565–566, 127 S.Ct. 1955. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.,* at 567, 127 S.Ct. 1955. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.,* at 570, 127 S.Ct. 1955.

B

Under *Twombly* 's construction of Rule 8, we conclude that respondent's complaint ****1951** has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." *Ibid.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 173a–174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, ***681** *id.,* ¶ 10, at 157a, and that Mueller was "instrumental" in adopting and executing it, *id.,* ¶ 11, at 157a. These bare assertions, much like the pleading of conspiracy in *Twombly,* amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U.S., at 555, 127 S.Ct. 1955, namely, that petitioners adopted a policy " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Feeney,* 442 U.S., at 279, 99 S.Ct. 2282. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly,* 550 U.S., at 554–555, 127 S.Ct. 1955. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a " 'contract, combination or conspiracy to prevent competitive entry,' " *id.,* at 551, 127 S.Ct. 1955, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." Complaint ¶ 47, App. to Pet. for Cert. 164a. It further claims that "[t]he policy of holding post–September–11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.,* ¶ 69, at 168a. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

***682** The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, *Twombly, supra,* at 567, 127 S.Ct. 1955, and the purposeful, invidious discrimination respondent ****1952** asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post–September–11th detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶ 69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post–September–11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may ***683** have labeled him a person "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post–September–11 detainees until they were " 'cleared' by the FBI." *Ibid.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly,* 550 U.S., at 570, 127 S.Ct. 1955.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly,* the complaint alleged general wrongdoing that extended over a period of years, *id.,* at 551, 127 S.Ct. 1955, whereas here the complaint alleges discrete wrongs—for instance, beatings—by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly,* where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

***684** It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. Iqbal Brief 37–38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554, 127 S.Ct. 1955. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike, see 550 U.S., at 555–556, and n. 3, 127 S.Ct. 1955.

2

Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." Iqbal Brief 27. We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls ***685** placed upon the discovery process. *Twombly, supra,* at 559, 127 S.Ct. 1955 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side" (internal quotation marks and citation omitted)).

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." *Siegert v. Gilley,* 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (KENNEDY, J., concurring in judgment). There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic." 490 F.3d, at 179.

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even ***686** if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ****1954** ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 172a–173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license ***687** to evade the less rigid—though still operative—strictures of Rule 8. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1301, p. 291 (3d ed. 2004) ("[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) ... should control the second sentence of Rule 9(b)"). And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

NOTICE PLEADING IN EXILE

Adam N. Steinman†

According to the conventional wisdom, the Supreme Court's 2009 decision in Ashcroft v. Iqbal *discarded notice pleading in favor of plausibility pleading. This Article—part of a symposium commemorating the* Iqbal *decision's tenth anniversary—highlights decisions during those ten years that have continued to endorse notice pleading despite* Iqbal. *It also argues that those decisions reflect the best way to read the* Iqbal *decision. Although* Iqbal *is a troubling decision in many respects, it can be implemented consistently with the notice-pleading framework that the original drafters of the Federal Rules of Civil Procedure had in mind.*

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† University Research Professor of Law, University of Alabama. Thanks to Alex Reinert and the *Cardozo Law Review* for organizing a wonderful symposium. This Article benefitted greatly from the comments and insights of my co-panelists—Brooke Coleman, Troy McKenzie, and Ben Spencer. I am also grateful to Danielle Kerem for her excellent research assistance, and to the editors of the *Cardozo Law Review* for their terrific editorial work on this Article.

INTRODUCTION

Symposia like this one, which recognize the anniversary of a significant event or Supreme Court decision, often reflect on the ways things have changed as a result. This Article's goal, by contrast, is to highlight how the Supreme Court's decision in *Ashcroft v. Iqbal*[1] did not change things. Or at least, my goal is to show why *Iqbal*—and its predecessor, *Bell Atlantic Corp. v. Twombly*[2]—should not be interpreted to require a restrictive change in the federal pleading standard set forth in Rule 8 of the Federal Rules of Civil Procedure.[3]

This is not the conventional understanding. Much of the scholarly attention devoted to *Iqbal* and *Twombly* has noted (and typically decried) the Supreme Court's rejection of the lenient notice-pleading standard that most of this symposium's contributors learned in law school.[4] I agree with the many policy-oriented critiques of restrictive pleading standards and applaud the virtues of more lenient ones.[5] But there is a crucial antecedent question of what sort of pleading standard *Iqbal* and *Twombly* actually demand.

Among the hundreds of thousands of federal court citations to *Iqbal* and *Twombly*,[6] one finds an interesting cadre of judicial opinions where notice pleading lives. These decisions continue to embrace *Conley v. Gibson*'s command from more than a half-century ago that "all the Rules require is 'a short and plain statement of the claim' that will give the

1 556 U.S. 662 (2009).

2 550 U.S. 544 (2007).

3 *See* FED. R. CIV. P. 8(a)(2).

4 *See infra* note 37.

5 *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18–23 (2010) [hereinafter Miller, *Double Play*].

6 As of September 2015, *Iqbal* and *Twombly* had each been cited in more than 100,000 federal court opinions, making them the third-most (*Twombly*) and fourth-most (*Iqbal*) frequently cited Supreme Court decisions of all time. *See* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389–93 (2016) [hereinafter Steinman, *Rise and Fall*].

defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."[7] They continue to rely on the Court's twenty-first-century endorsement of notice pleading in *Swierkiewicz v. Sorema N.A.*[8] And they continue to rely on pleading forms from the original Federal Rules of Civil Procedure—which had been used to "illustrate the simplicity and brevity that these rules contemplate"[9] but were controversially removed from the text of the Federal Rules in 2015.[10] I believe that this band of exiles is not only righteous, but right. The best way for courts to interpret and apply the *Iqbal* decision—as it enters its second decade—is in a way that preserves notice pleading.

Part I of this Article briefly summarizes Rule 8's pleading standard and the notice-pleading approach that the Supreme Court embraced during the Federal Rules' first seventy-plus years. Part II describes post-*Iqbal* decisions in the lower federal courts that have continued to endorse notice pleading. Part III addresses the federal pleading forms, which were included in the initial Federal Rules to provide useful exemplars of notice pleading but were abrogated in 2015, and identifies federal courts that have continued to utilize the forms despite *Iqbal* and despite their post-*Iqbal* extraction from the text of the Federal Rules. Part IV examines the two-step pleading framework that *Iqbal* articulated and explains how that framework can—and should—be implemented to save notice pleading.

I. A BRIEF HISTORY OF NOTICE PLEADING

The textual source of the federal pleading standard has remained essentially unchanged since the Federal Rules of Civil Procedure were adopted in 1938. Rule 8 instructs that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[11] This standard came to be known as

7 355 U.S. 41, 47 (1957) (emphasis added).

8 534 U.S. 506 (2002); *see infra* notes 21–27 and accompanying text (discussing *Swierkiewicz*).

9 FED. R. CIV. P. 84 (2014) (abrogated 2015).

10 *See infra* notes 69–76 and accompanying text (discussing the forms and the 2015 amendment).

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

"notice pleading,"[12] although some resisted that moniker during the Federal Rules' early years.[13] This initial disagreement may have reflected differing perceptions of what "notice pleading" actually entailed. As Charles Clark—the chief drafter of the initial Federal Rules—observed:

> The usual modern expression, at least of text writers, is to refer to the *notice function* of pleadings; notice of the case to the parties, the court, and the persons interested. This is a sound approach so far as it goes; but *content must still be given to the word "notice."*[14]

That insight does prompt a crucial question—both descriptive and normative—regarding notice pleading: notice of *what*?[15] The Supreme Court's engagement with that question began with its landmark 1957 decision in *Conley*.[16] *Conley* declared that "all the Rules require is a short and plain statement of the claim that will give the defendant *fair notice* of

12 *See, e.g.*, James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179, 1179 (1938) ("The generality of allegation contemplated by the Rules indicates the influence of the newer concept of 'notice pleading.'"); James M. Douglas & Charles E. Clark, *The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 162–63 (1952) (comments of John W. Willis) (noting that the original Federal Rules advisory committee had "adopt[ed] the concept of notice pleading"); *id.* at 160 (noting that Mr. Willis "of the Federal Rules Service, Washington, D.C. . . . is an expert who, by virtue of his position in reporting all of the decisions, has perhaps as complete a picture as anyone can expect"); Irving R. Kaufman, *Some Observations on Pre-Trial Examinations in Federal and State Courts*, 12 F.R.D. 363, 365 (1952) (noting that "in most cases under our federal rules 'the function of the pleadings extends hardly beyond notification to the opposing parties of the general nature of a party's claim or defense'" and that "[t]he term 'notice pleading' has been applied to this underlying concept").

13 *See, e.g.*, Charles Alan Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 926 (1953) ("The truth is that the Federal and other modern pleading systems no more allow 'notice-pleading,' in the sense in which that term has been traditionally used, than does the Pennsylvania system."); Gunnar H. Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 109 (1956) ("Most courts and textwriters agree that Rule 8 does not countenance mere notice pleading.").

14 Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460 (1943) (emphasis added).

15 Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1324 (2010) [hereinafter Steinman, *Pleading Problem*] ("Judge Clark's observation confirms that a notice-pleading framework is not inherently a lenient one. It depends on what 'content [is] given to the word "notice."'" (quoting Clark, *supra* note 14, at 460)); *id.* at 1340 (proposing an approach to pleading that "attempt[s] to further refine what 'notice' a defendant is entitled to at the pleadings phase").

16 355 U.S. 41 (1957).

what the plaintiff's claim is and the grounds upon which it rests."[17] This standard "do[es] not require a claimant to set out in detail the facts upon which he bases his claim."[18] The Court also explained that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[19]

The Supreme Court frequently reaffirmed this understanding during the Federal Rules' first seven decades, fully embracing the term "notice pleading."[20] In *Swierkiewicz*[21]—an important 2002 decision—the Court found that a plaintiff's allegation that his "age and national origin were motivating factors in [the defendant's] decision to terminate his employment" was sufficient to prevent dismissal of his employment discrimination claim.[22] The Court recognized that Rule 8's "simplified notice pleading standard"[23] might "allow[] lawsuits based on conclusory allegations of discrimination to go forward."[24] As written, however, the Federal Rules "rel[y] on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[25] The unanimous *Swierkiewicz* opinion wrote that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."[26] Imposing a stricter pleading standard, the Court

17 *Id.* at 47 (emphasis added) (internal quotations omitted).

18 *Id.*

19 *Id.* at 45–46.

20 *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002) (describing the federal approach as "a notice pleading system"); *id.* at 512 (describing *Conley*'s "simplified notice pleading standard"); Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (noting "the liberal system of 'notice pleading' set up by the Federal Rules"); *see also* Mayle v. Felix, 545 U.S. 644, 669 (2005) (contrasting the Court's approach to habeas corpus petitions with "the generous notice-pleading standard for the benefit of ordinary civil plaintiffs under Federal Rule of Civil Procedure 8(a)"). Even before *Conley*, the Supreme Court described the Federal Rules as "restrict[ing] the pleadings to the task of general notice-giving." Hickman v. Taylor, 329 U.S. 495, 501 (1947).

21 534 U.S. 506.

22 Amended Complaint ¶ 37, *Swierkiewicz*, 534 U.S. 506 (No. 00-1853), 2001 WL 34093952, at *27a.

23 *Swierkiewicz*, 534 U.S. at 512.

24 *Id.* at 514.

25 *Id.* at 512.

26 *Id.* at 514 (citing Conley v. Gibson, 355 U.S. 41, 48 (1957)).

explained, could be done only by "amending the Federal Rules, . . . not by judicial interpretation."[27]

What a difference a decade makes. The 2000s began with *Swierkiewicz*'s whole-hearted reaffirmance of notice pleading. In 2007, however, *Twombly* first articulated the controversial "plausibility" inquiry,[28] ordering the dismissal of an antitrust conspiracy claim against major telecommunications companies.[29] The *Twombly* majority put into "retirement"[30] some aspects of the *Conley* decision (although it did *not* challenge *Conley*'s "fair notice" standard[31]), prompting Justice Stevens to argue in dissent that the majority's approach was "irreconcilable with Rule 8 and with our governing precedents."[32] And in 2009, *Iqbal* made clear that the *Twombly* approach reflected Rule 8's general pleading standard,[33] applying to all civil cases in federal court and requiring the dismissal of Mr. Iqbal's claims of intentional discrimination against

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27 *Id.* at 515 (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

28 *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

29 *Id.* at 564 ("When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short.").

30 *See id.* at 561–63 (stating that *Conley*'s observation that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" had "earned its retirement," noting concerns about a "focused and literal reading" of that phrase (quoting *Conley*, 355 U.S. at 45–46)); *see also infra* note 108 (discussing this aspect of *Conley* and *Twombly*'s handling of it).

31 *See infra* notes 38–41 and accompanying text.

32 *Twombly*, 550 U.S. at 586 (Stevens, J., dissenting); *see also id.* at 572–73 ("Under rules of procedure that have been well settled . . . , a judge ruling on a defendant's motion to dismiss a complaint 'must accept as true all of the factual allegations contained in the complaint.' But instead of requiring knowledgeable executives . . . to respond to these allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring [defendants] to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. . . . [T]he Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case." (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002)) (other internal citation omitted)).

33 Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (quoting FED. R. CIV. P. 1)).

Attorney General John Ashcroft and FBI Director Robert Mueller arising from his treatment by federal officials in the wake of the 9/11 attacks.[34] *Iqbal* also elicited a vigorous dissent, in which Justice Souter—the author of the *Twombly* majority opinion—argued that the *Iqbal* majority "misapplie[d] the pleading standard under [*Twombly*],"[35] and that Mr. Iqbal's claim should not have been dismissed because "[t]aking the complaint as a whole, it gives Ashcroft and Mueller 'fair notice of what the claim is and the grounds upon which it rests.'"[36]

Following *Twombly* and *Iqbal*, much academic commentary declared the end of notice pleading.[37] Numerous federal courts have continued to embrace it, however. The following Parts of this Article highlight these decisions and explain why they are implementing the best reading of *Twombly* and *Iqbal*.

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34 *Id.* at 666.

35 *Id.* at 688 (Souter, J., dissenting).

36 *Id.* at 698–99 (internal quotation marks and ellipses omitted) (quoting *Twombly*, 550 U.S. at 555).

37 *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (describing "the Court's choice to replace minimal notice pleading with a robust gatekeeping regime"); Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 262 (2009) ("[N]otice pleading has died."); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (arguing that *Twombly* and *Iqbal* "have changed the old notice pleading standard to a new 'plausibility' regime"); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 346 (2013) ("The Supreme Court has moved the system from a notice pleading structure, which is what Rule 8 was designed to be, to a fact pleading structure, which is exactly what the Federal Rules were drafted to reject."); Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1207 (2014) ("Until *Twombly* and *Iqbal*, the Supreme Court maintained a relatively consistent commitment to *Conley*'s notice pleading rule . . . . The role of pleading changed with the Court's decisions in *Twombly* and *Iqbal*."); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 528 (2010) (arguing that *Iqbal* "rejects the concept of notice pleading"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) ("Notice pleading is dead. Say hello to plausibility pleading."); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1848 (2014) (arguing that *Twombly* and *Iqbal* "replaced notice pleading with a scheme labeled plausibility pleading").

II. NOTICE PLEADING AFTER *IQBAL*

The most compelling support for the vitality of notice pleading is hiding in plain sight. The majority opinion in *Twombly* explicitly endorsed notice pleading, quoting *Conley* for the following proposition: "Rule . . . 8(a)(2) requires only [that the complaint] 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[38] Just three weeks after the *Twombly* decision, the Supreme Court's per curiam opinion in *Erickson v. Pardus*[39] explicitly cited *Twombly*'s invocation of *Conley*'s fair-notice standard.[40] The Court wrote:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[41]

The *Iqbal* majority did not purport to do anything more than follow the approach laid out in *Twombly*. It cited *Twombly* exclusively in describing what is required "[t]o survive a motion to dismiss."[42] It then identified the "[t]wo working principles" that "underlie [its] decision in *Twombly*"[43] and described how the "decision in *Twombly* illustrates the two-pronged approach."[44] And in concluding that Mr. Iqbal's complaint was insufficient, the *Iqbal* majority stated that it did so "[u]nder *Twombly*'s construction of Rule 8."[45] Accordingly, if providing "fair notice" was sufficient under *Twombly*, it should likewise be sufficient under *Iqbal*. Or at least, that is the logical implication of the Supreme Court's own words.

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38 *Twombly*, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

39 551 U.S. 89 (2007).

40 *Id.* at 93.

41 *Id.* at 93 (quoting *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47)).

42 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (first quoting *Twombly*, 550 U.S. at 556; then quoting *id.* at 557; and then quoting *id.* at 570).

43 *Id.* at 678.

44 *Id.* at 679. This "two-pronged approach" is described *infra* Section IV.A.

45 *Id.* at 680 ("Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not 'nudged his claims' of invidious discrimination 'across the line from conceivable to plausible.'" (brackets omitted) (quoting *Twombly*, 550 U.S. at 570)).

Indeed, numerous post-*Iqbal* federal-court decisions have emphasized *Twombly*'s endorsement of *Conley*'s fair-notice standard. A unanimous panel decision from the U.S. Court of Appeals for the Eighth Circuit wrote—in remarkably short and plain terms[46]—"*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2)."[47] A unanimous Federal Circuit decision stated that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the ground upon which it rests.'"[48]

The Tenth Circuit's decision in *Khalik v. United Air Lines* is also illustrative.[49] The court of appeals reasoned: "As the Court held in [*Erickson*], which it decided a few weeks after *Twombly*, under Rule 8, 'specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the ground upon which it rests."'"[50] The court wrote that under the *Twombly/Iqbal* approach, "heightened fact pleading" is "expressly rejected;"[51] that "[t]here is no indication the Supreme Court intended a return to the more stringent pre-Rule 8 pleading requirements;"[52] and that "Rule 8(a)(2) still lives."[53] The Tenth Circuit also quoted the Supreme Court's observation from *Swierkiewicz* that "a requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[54]

Another important circuit court examination of *Iqbal* came from Judge Diane Wood, who wrote the unanimous Seventh Circuit decision in *Brooks v. Ross*.[55] Citing *Swierkiewicz*, she wrote that Rule 8 "reflects a

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46 *Cf.* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.").

47 Hamilton v. Palm, 621 F.3d 816, 817 (8th Cir. 2010).

48 Disc Disease Sols. Inc. v. VGH Sols., Inc., 888 F.3d 1256, 1260 (Fed. Cir. 2018) (ellipses in original) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555)).

49 671 F.3d 1188 (10th Cir. 2012).

50 *Id.* at 1192 (ellipses in original) (brackets omitted) (quoting *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555)).

51 *Id.* at 1191 (quoting Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)).

52 *Id.*

53 *Id.*

54 *Id.* at 1191–92 (brackets omitted) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002)).

55 578 F.3d 574 (7th Cir. 2009).

liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court."[56] She also reasoned that the Supreme Court's *Erickson* decision "put to rest" the notion that *Twombly* "had repudiated the general notice-pleading regime of Rule 8," emphasizing that *Erickson* had "reiterated that 'specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.'"[57] And finally: "[t]his continues to be the case after *Iqbal*."[58]

One year later, in *Swanson v. Citibank, N.A.*,[59] Judge Wood authored another important Seventh Circuit opinion. She reasoned that two core pre-*Twombly* principles remained good law after *Iqbal*. First, "all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity."[60] And second, "a basic objective of the rules is to . . . require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved."[61]

The *Swanson* decision held that *Twombly* and *Iqbal* had not "undermined these broad principles."[62] Judge Wood explained:

> The [Supreme] Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: "the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[63]

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56 *Id.* at 580 (quoting *Swierkiewicz*, 534 U.S. at 514).

57 *Id.* at 581 (ellipses omitted) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007)).

58 *Id.*

59 614 F.3d 400 (7th Cir. 2010).

60 *Id.* at 404 (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215, at 165–73 (3d ed. 2004)).

61 *Id.* (quoting 5 WRIGHT & MILLER, *supra* note 60, § 1215, at 165–73).

62 *Id.*

63 *Id.* (ellipses in original) (brackets added) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007)). Judge Wood also noted "[t]he Supreme Court's explicit decision to reaffirm the validity of [*Swierkiewicz*], which was cited with approval in *Twombly*." *Id.* (citations omitted).

Judge Wood's *Swanson* decision did elicit a dissent from Judge Richard Posner.[64] But Judge Wood had the votes.[65] Indeed, the Seventh Circuit's *Swanson* decision prompted an Indiana district court judge to declare that "notice pleading remains the law of the land."[66]

In highlighting these examples, I do not mean to dispute that there are also numerous lower court decisions that cast doubt on the viability of notice pleading in the wake of *Iqbal*.[67] And empirical studies have reported the impact of *Iqbal* on both judicial decisions and litigant behavior.[68] It is important, however, to shine a light on federal court decisions that have continued to apply a notice-pleading standard.

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64 *See id.* at 407 (Posner, J., dissenting) ("I join the majority opinion except with respect to reversing the dismissal of the plaintiff's claim of housing discrimination. I have difficulty squaring that reversal with *Ashcroft v. Iqbal*.").

65 *See In re* Skupniewitz, 73 F.3d 702, 705 (7th Cir. 1996) ("A panel decision is binding on another court panel unless overruled with the approval of the en banc court."); *see also* United States v. Martinez, 821 F.3d 984, 990 (8th Cir. 2016) ("Although I agree with Judge Colloton's dissent in *United States v. Taylor*, 803 F.3d 931, 933–34 (8th Cir. 2015), our panel is bound by the contrary decision of the panel majority in *Taylor*." (Loken, J., concurring)); United States v. Custis, 988 F.2d 1355, 1364 (4th Cir. 1993) ("It should not need to be remarked that it is the opinion of the panel majority that binds and governs district courts within this circuit."); *cf.* Christopher Jackson, Daveed Diggs, Lin-Manuel Miranda & Okieriete Onaodowan, Atlantic Records, *Cabinet Battle #1*, YOUTUBE (Apr. 20, 2017), https://www.youtube.com/watch?v=dSYW61XQZeo [https://perma.cc/2X9Z-BQYL] ("You don't have the votes.").

66 A.B. *ex rel.* Kehoe v. Hous. Auth. of S. Bend, No. 3:11 CV 163 PPS, 2011 WL 4005987, at *4 (N.D. Ind. Sept. 8, 2011) (citing Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010)); *see also* EEOC v. Scrub, Inc., No. 09 C 4228, 2009 WL 3458530, at *1 (N.D. Ill. Oct. 26, 2009) ("*Iqbal* and *Twombly* did not repudiate general notice-pleading." (citing Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009))).

67 *See, e.g.*, Marcus v. Leviton Mfg. Co., 661 F. App'x 29, 31 (2d Cir. 2016) (unpublished) (contrasting "the relaxed 'notice pleading' standards applied by New York state courts" with "the more demanding plausibility standard established by the Supreme Court in [*Twombly*] and [*Iqbal*]"); Clarendon Am. Ins. Co. v. All Bros. Painting, Inc., No. 6:13-CV-934-ORL-22DAB, 2013 WL 5921538, at *5 (M.D. Fla. Nov. 4, 2013) ("In [*Twombly*] and [*Iqbal*], the Supreme Court enunciated a new, heightened pleading standard, abrogating the notice pleading standard stated in [*Conley*]."); *see also* Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278, 288 (4th Cir. 2012) ("It is true that [*Twombly* and *Iqbal*] require more specificity from complaints in federal civil cases than was heretofore the case."); Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (discussing "[t]he demise of *Swierkiewicz*"). *But cf.* Steinman, *Pleading Problem*, *supra* note 15, at 1345 & n.300 (noting that the Third Circuit in *Fowler* "squarely rejected the idea that a complaint must somehow suggest the truth or provability of the allegations contained therein").

68 *See, e.g.*, Christina L. Boyd, David A. Hoffman, Zoran Obradovic & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J.

III. THE CONTINUED RELEVANCE OF THE ABROGATED PLEADING FORMS

In addition to explicitly endorsing the continued validity of notice pleading after *Iqbal*, numerous federal courts have continued to embrace the pleading forms that illustrated the drafters' initial vision. These forms were part and parcel of the Federal Rules of Civil Procedure both at their inception and when the Supreme Court decided *Twombly* and *Iqbal*. As Rule 84 instructed, the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[69] One oft-cited example was Form 11, which provided that the following negligence allegation was sufficient under Rule 8: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."[70] Form 11 did not require a plaintiff to allege in the complaint precisely *why* the defendant's driving was negligent, or what *evidence* it would use to prove negligence.[71]

EMPIRICAL LEGAL STUD. 253, 254 (2013); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2306–07 (2012); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2145 (2015).

69 FED. R. CIV. P. 84 (2014) (abrogated 2015).

70 FED. R. CIV. P. Form 11, ¶ 2 (2014) (abrogated 2015), *reprinted in* Steinman, *Rise and Fall*, *supra* note 6, at 395. Prior to 2007, the form negligence complaint was depicted in Form 9; the pre-2007 sample allegation was, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting) (quoting FED. R. CIV. P. Form 9 (2007) (abrogated 2015)); *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002) (same).

71 Another example from the Federal Rules' pleading forms was Form 18's complaint for patent infringement. Using a patent for electric motors as an example, Form 18 deemed it sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention . . . ." FED. R. CIV. P. Form 18, ¶ 3 (2014) (abrogated 2015). Form 18 did not require allegations regarding how the defendant's motors embodied the plaintiff's patented invention.

Form 11 was a paradigm of notice pleading.[72] In Charles Clark's view, those forms were "the most important part of the rules."[73] Discussing Rule 8's pleading standard, he wrote: "We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms."[74]

In 2015, however, Rule 84 and the accompanying pleading forms were abrogated.[75] That the forms have been removed from the current text of the Federal Rules, however, does not make them irrelevant. According to the advisory committee note that accompanied the 2015 amendment, the purpose of the abrogation was that the forms "are no longer necessary" because "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled."[76] It logically follows—and the advisory committee explicitly clarified—that the removal of the forms "does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8."[77]

Given the stated rationale of the 2015 amendment, it would be a mistake to read the pleading forms that existed for nearly eighty years as no longer relevant.[78] Indeed, even in the wake of *Twombly*, *Iqbal*, and the 2015 amendments, federal courts have continued to rely on now-

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72 *See* Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1106–07 (2015) ("As Charles Clark stated, the forms were intended to give meaning to the rules. . . . Because of Rule 84, Rule 8 and Form 11 are one and the same."); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 40 (2016) [hereinafter Steinman, *End of an Era*] (noting the "iconic pleading forms, which had long stood as exemplars of the lenient approach to pleading that the drafters of the original rules envisioned"); *see also* Miller, *Double Play*, *supra* note 5, at 40 (calling Form 11 "the paradigm negligence complaint").

73 Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

74 *Id.*

75 *See* FED. R. CIV. P. 84 advisory committee's note to 2015 amendment. *See generally* Steinman, *End of an Era*, *supra* note 72, at 22, 27 (summarizing the elimination of the pleading forms and the accompanying advisory committee note).

76 FED. R. CIV. P. 84 advisory committee's note to 2015 amendment.

77 *Id.*

78 *See* Steinman, *End of an Era*, *supra* note 72, at 40–42; *see also* Catherine T. Struve, *Phantom Rules*, 117 COLUM. L. REV. ONLINE 70, 86 (2017) ("Given the Committee Note's explicit statement that Rule 8(a)(2)'s pleading requirement is unaltered by Rule 84's abrogation, and given the weight that some pre-2015 case law had accorded to the forms, claimants are likely to urge that courts continue to rely upon the forms when assessing a pleading's sufficiency.").

abrogated forms such as Form 11. One district court, in finding that a claim for negligent medical treatment was sufficiently pled,[79] stated that it "[drew] comfort from the fact that the old forms attached to the back of the Federal Rules of Civil Procedure did not require much for negligence claims."[80] It added that "[n]o one has suggested that the Supreme Court abrogated the forms—including Form 11—in *Iqbal* and *Twombly*."[81]

Another district court has written that the forms—including Form 11—reflected "simple, intuitive claims that could be pled with little detail while still putting defendants on notice of the alleged conduct of which they were accused."[82] The court wrote that *Twombly* and *Iqbal* "seem not to cast doubt on this role. Indeed, the Court in *Twombly* took pains to say that their decision was not meant to raise pleading standards."[83] Nor did the 2015 amendments undermine the relevance of the forms: "The abrogation of Rule 84 and the Appendix of Forms eliminated the most obvious *landmarks* for this line of thought, but it did not eliminate the *rationale itself*."[84]

As with the previous Part's discussion, this sample of decisions is not meant to be exhaustive.[85] And there are certainly cases that take the

79 Begay v. United States, 188 F. Supp. 3d 1047, 1089 (D.N.M. 2016).

80 *Id.* at 1089 n.47 (citing and quoting FED. R. CIV. P. Form 11 (2014) (abrogated 2015)).

81 *Id.*

82 John Keeler & Co. v. Heron Point Seafood, Inc., No. 1:14 CV 1652, 2017 WL 3705863, at *9 (N.D. Ohio Aug. 28, 2017) (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).

83 *Id.*

84 *Id.* at *10 (emphasis added); *see also* Whitcraft v. Scaturo, No. 5:16-2385-JFA, 2017 WL 371037, at *2 n.4 (D.S.C. Jan. 26, 2017) (stating that, in adopting a Magistrate Judge's report and recommendation, the district court had "removed Fed. R. Civ. P. 84 and App. Form 11 from its consideration as these were abrogated in 2015" but noting that "this abrogation occurred because Rule 84 and the Appendix of Forms were no longer necessary and the abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8" and that therefore "the Magistrate Judge's analysis remains correct" (citations and internal quotation marks and brackets omitted)).

85 Other examples of post-2015 decisions that rely on the abrogated pleading forms include Torres v. Inteliquent, Inc., No. 17-10022, 2018 WL 5809246, at *6 & n.37 (E.D. La. Nov. 6, 2018) (citing and quoting Form 11 to support the proposition that, at the pleading phase, federal courts accept "the factual allegation that a defendant was negligent"); Rosado-Acha v. Rosado, No. 17-1031 (SEC), 2018 WL 1444202, at *8 (D.P.R. Mar. 19, 2018) ("[A] complaint modeled on Form 11 of the Appendix of the Federal Rules of Civil Procedure which contains sufficient facts to make

opposite position—that the abrogated forms are no longer relevant to the federal pleading standards.[86] For the reasons discussed above, however, there is a straightforward argument that the abrogation of the forms should not be read to make a substantive change in the pleading standard in light of the clear advisory committee note accompanying the 2015 amendment.[87] And because those forms illustrated the sort of notice-pleading approach that was envisioned by the Federal Rules' original drafters and implemented by the Supreme Court during the Rules' first seven decades, the reliance on those forms by some lower federal courts reflects a continued embrace of notice pleading.[88]

IV. HOW *IQBAL* CAN PRESERVE NOTICE PLEADING

This Part argues that federal courts that have continued to embrace notice pleading after *Iqbal* are doing exactly what they should be doing. Section A takes a close look at the two-step framework that *Iqbal* articulated. Section B explains how that two-step approach can be implemented in a way that preserves notice pleading. And Section C argues that Supreme Court's post-*Iqbal* decision in *Johnson v. City of*

the claim plausible is ordinarily enough to surpass the standard prescribed under *Twombly-Iqbal*.").

86 *See, e.g.*, Robern, Inc. v. Glasscrafters, Inc., 206 F. Supp. 3d 1005, 1007 n.3 (D.N.J. 2016) ("Plaintiff incongruously argues that while Rule 84 and Form 18 have been abrogated, the pleading standards . . . have not changed.").

87 *See supra* notes 75–78 and accompanying text.

88 Some federal courts took the view that the pleading forms were fundamentally in conflict with the pleading standard reflected by *Twombly* and *Iqbal*, and therefore viewed particular forms as creating "exceptions" from *Twombly* and *Iqbal* for particular claims. *See, e.g.*, Tannerite Sports, LLC v. Jerent Enters., LLC, No. 6:15-cv-00180-AA, 2016 WL 1737740, at *10 (D. Or. May 2, 2016) (describing Form 18's "patent infringement exception to the civil pleading requirements set forth in *Twombly* and *Iqbal*"). Following the 2015 abrogation of the forms, therefore, some courts viewed the advisory committee note's reference to "existing pleading standards" as imposing the *Twombly/Iqbal* approach to claims that had previously been subject to a more lenient, form-based standard. *See* Webasto Thermo & Comfort N. Am., Inc. v. BesTop, Inc., No. 16-cv-13456, 2017 WL 4535290, at *11–12 (E.D. Mich. Oct. 11, 2017). The better understanding—as elaborated in Part IV of this Article—is that what was sufficient before *Twombly* and *Iqbal* (notice pleading, as reflected by the pleading forms) is *still* sufficient today. Properly understood, *Twombly* and *Iqbal* do not mandate a stricter approach to pleading, and neither does the abrogation of the pleading forms.

Shelby reflects precisely such an approach to federal pleading standards after *Iqbal*.

A. *Understanding* Iqbal*'s Two Steps*

Although it may seem surprising to argue that *Iqbal* preserves notice pleading, that is the best reading of the two-step framework that the *Iqbal* majority endorsed. The first step, according to *Iqbal*, is to identify allegations that are mere "legal conclusions" and disregard them for purposes of determining whether the complaint states a claim for relief.[89] The *Iqbal* majority provided little guidance regarding why the crucial allegations in the *Iqbal* complaint qualified as unacceptably conclusory, except to emphasize that a complaint requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation,"[90] or "a formulaic recitation of the elements of a cause of action."[91] Although the lack of meaningful guidance on this issue is a frustrating aspect of the Court's reasoning in *Iqbal*,[92] this shortcoming permits an elegant way to reconcile *Iqbal* with notice pleading. An allegation qualifies as conclusory—as a mere legal conclusion—when it fails to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[93]

What about *Iqbal*'s second step, the infamous "plausibility" inquiry? Although *Iqbal*'s plausibility requirement has garnered the lion's share of scholarly criticism, its role in *Iqbal*'s doctrinal framework is often misunderstood. Most crucially, when a court assesses a complaint's "plausibility," it must *accept as true* all of the nonconclusory allegations: "When there *are* well-pleaded factual allegations, a court should *assume*

89 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

90 *Id.* at 678.

91 *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

92 *See* Steinman, *Rise and Fall*, *supra* note 6, at 358 ("[T]he *Twombly* and *Iqbal* decisions themselves fail to provide concrete guidance on what makes an allegation impermissibly 'conclusory.'").

93 Conley v. Gibson, 355 U.S. 41, 47 (1957); *see* Steinman, *Rise and Fall*, *supra* note 6, at 352 n.113 (arguing that "one might perfectly align *Twombly* and *Iqbal* with notice pleading" by "defining the term 'conclusory' to mean 'failing to provide fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (emphasis omitted)).

their veracity and *then* determine whether they plausibly give rise to an entitlement to relief."[94]

According to the Supreme Court's own words, an allegation can never be disregarded because it is not plausible. It can be disregarded only because it is conclusory.[95] To allow courts to second-guess a *non*conclusory allegation under the guise of "plausibility" would contravene the requirement that nonconclusory allegations must be accepted as true at the pleading phase. Accordingly, if all substantive requirements of a meritorious claim are covered by nonconclusory allegations, then the complaint has *more* than just "plausibly give[n] rise to an entitlement to relief."[96] It has confirmed an entitlement to relief—at least at the pleading phase.[97]

Surprisingly, then, the plausibility step in the *Iqbal* test makes it more *forgiving* than it would otherwise be. It permits a complaint "to pass muster *even if* a substantive requirement of the plaintiff's claim is stated only in conclusory terms."[98] Without the plausibility inquiry a complaint's failure to provide nonconclusory allegations for every element for a meritorious claim would be fatal. Under *Iqbal*'s first-step, conclusory allegations are not entitled to the presumption of truth, so a complaint that addresses a key element *only* with a conclusory allegation would not pass muster. The plausibility inquiry—on the Court's own terms—leaves open the possibility that a complaint that fails to provide nonconclusory allegations for every substantive requirement of a meritorious claim might, nonetheless, "*plausibly* suggest an entitlement to relief."[99]

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94 *Iqbal*, 556 U.S. at 679 (emphasis added); *see also* Steinman, *Rise and Fall*, *supra* note 6, at 352 ("To allow courts to second-guess such allegations under the guise of 'plausibility' would contravene the requirement that nonconclusory allegations must be accepted as true at the pleading phase.").

95 *See supra* text accompanying note 94.

96 *Iqbal*, 556 U.S. at 679.

97 Steinman, *Pleading Problem*, *supra* note 15, at 1316–17.

98 Steinman, *Rise and Fall*, *supra* note 6, at 351 (emphasis added).

99 *Iqbal*, 556 U.S. at 681 (emphasis added); *see also* Steinman, *Rise and Fall*, *supra* note 6, at 355 ("As a logical matter, the potential for the plausibility inquiry to salvage complaints where the requirements of a meritorious claim are addressed only by conclusory allegations makes the pleading framework *more* forgiving, not less.").

Properly understood, the plausibility inquiry would also help to coherently situate aspects of the federal pleading standard that were not squarely incorporated into pre-*Twombly* case law. For example, although this Article embraces a continuing role for *Conley*'s fair-notice standard, *Conley*'s actual articulation of that standard was not entirely complete. Recall *Conley*'s statement that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[100] Standing alone, this language does not incorporate the possibility of a pure legal-sufficiency challenge. It is not *necessarily* sufficient merely to provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[101] Such a claim—even if it is stated with "unquestionable clarity"[102]—should nonetheless be dismissed if that claim would fail as a matter of law.[103] The plausibility inquiry explicitly folds legal sufficiency into the overarching pleading standard. When a complaint fails to state a viable legal claim—even if *all* allegations are accepted as true—it does not "state[] a plausible claim for relief."[104]

100 Conley v. Gibson, 355 U.S. 41, 47 (1957); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (ellipses in original) (quoting *Conley*, 355 U.S. at 47)).

101 *Conley*, 355 U.S. at 47 (internal quotation marks omitted).

102 Steinman, *Rise and Fall*, *supra* note 6, at 355.

103 *Id.* (noting that "legal-sufficiency inquiries . . . have long been an accepted aspect of notice pleading"); *see also id.* at 342 ("Even at the pleading stage, a defendant could challenge a claim's legal sufficiency. If the substantive law does not provide a remedy for the conduct alleged, the complaint's statement of the claim does not show that the pleader is entitled to relief as required by Rule 8(a)(2). And such a complaint fails to state a claim upon which relief can be granted, which justifies dismissal under Rule 12(b)(6)." (footnotes, internal quotation marks, and brackets omitted)).

104 *Iqbal*, 556 U.S. at 679 ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). The same could be said about a complaint in which "the plaintiff has 'pled itself out of court' by including allegations that conclusively undermine a viable claim." Steinman, *Rise and Fall*, *supra* note 6, at 355; *see also id.* at 342–43 & nn.45–46 (citing cases supporting the idea that dismissal is warranted at the pleading phase). That is, the plaintiff's own allegations would reveal no "plausible claim for relief." *Iqbal*, 556 U.S. at 679.

B. *The Key Issue: What Is (and Is Not) Conclusory?*

Once the plausibility inquiry is properly situated and understood, the crucial question becomes how to assess which allegations qualify as conclusory. As discussed above, *Iqbal* permits courts to deny the presumption of truth only to conclusory allegations—not allegations that lack plausibility.[105] One way to reconcile notice pleading with *Iqbal* is with what can be called a transactional approach. What makes an allegation *conclusory* is its failure to ground the allegation in some real-world event or transaction:

> Suppose, for example, that a complaint alleges merely: "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief"; or "the defendant violated the plaintiff's rights under Title VII of the 1964 Civil Rights Act"; or "the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff."[106]

Allegations like this should not be sufficient standing alone to avoid a pleading-stage dismissal—even under a notice-pleading regime. They quite obviously fail to provide "fair notice of what the [plaintiff's] claim is and the grounds upon which it rests."[107] And they can quite sensibly be called "conclusory" for purposes of *Iqbal*'s pleading framework.[108]

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105 *See supra* notes 89–97 and accompanying text.

106 Steinman, *Rise and Fall*, *supra* note 6, at 353.

107 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration added) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

108 These hypothetical allegations also reveal why notice pleading is not undermined by *Twombly*'s decision to "retire[]" *Conley*'s statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46); *see supra* note 30. *Twombly*'s concern was an overly "focused and literal reading" of that phrase that would prevent dismissal "whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Twombly*, 550 U.S. at 561 (internal quotations and brackets omitted). Indeed, a bare allegation "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief" would not show that there is "no set of facts" that would support a viable claim. Accordingly, to follow such a "focused and literal reading" of that language from *Conley* would deem such an

What makes these allegations problematic is that they are not tethered to concrete events—"they fail to provide an adequate transactional narrative."[109] The now-abrogated Form 11, by contrast, identified the conduct and event that gave rise to the plaintiff's claim: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."[110] If that allegation is ultimately proven true, the defendant would be liable as a matter of substantive law. The allegation in Form 11 may not describe precisely *how* the defendant's driving was negligent, but this is not what "fair notice" requires—at least not at the pleading stage. Nor should such an allegation be deemed "conclusory" under *Iqbal*.

The same is true for the employment-discrimination complaint that was at issue in the *Swierkiewicz* case. The plaintiff alleged the various positions he held at the company,[111] his age (fifty-three),[112] his nationality (Hungarian),[113] and that "Plaintiff's age and national origin were motivating factors in [defendant's] decision to terminate his employment."[114] If those allegations are proven true, the defendant would be liable as a matter of substantive law. Although this allegation did not specify how the plaintiff intended to *prove* that discriminatory intent motivated his firing, it made clear the transactions giving rise to his claim. Such allegations are sufficient to provide "fair notice" and, likewise, they should not be disregarded as "conclusory" under *Iqbal*.

What about the decisions in *Twombly* and *Iqbal*? To be clear, it would be entirely reasonable to conclude—contrary to the *Twombly* and *Iqbal* majorities—that the key allegations in those cases had provided a

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allegation sufficient—even though it clearly fails to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47; *see also* Steinman, *Rise and Fall*, *supra* note 6, at 353–57 (noting that a complaint that "alleged nothing more than 'the planet Earth is round'" could not be dismissed under *Twombly*'s "nonsensically literal understanding of [*Conley*'s 'no set of facts'] phrase"). It would be quite perverse, therefore, to read *Twombly*'s rejection of *Conley*'s "no set of facts" language as also rejecting *Conley*'s fair-notice standard—*especially* when that same *Twombly* decision *endorses Conley*'s fair-notice standard. *See supra* notes 38–41 and accompanying text.

109 Steinman, *Pleading Problem*, *supra* note 15, at 1334.

110 FED. R. CIV. P. Form 11, ¶ 2 (2014) (abrogated 2015), *reprinted in* Steinman, *Rise and Fall*, *supra* note 6, at 395.

111 *See* Amended Complaint, *supra* note 22, ¶¶ 17, 19.

112 *See id.* ¶ 13.

113 *See id.* ¶ 12.

114 *See id.* ¶ 37.

sufficient transactional narrative that they should have been accepted as true; and if they had been accepted as true, those complaints should not have been dismissed.[115] There are, however, some ways in which those allegations are distinct from the exemplars of notice pleading—or at least they were perceived as such by the Supreme Court.

In *Twombly*—where the key issue was whether the defendants had agreed or conspired with one another—the majority insisted that the complaint had made no "*independent* allegation of actual agreement."[116] That is, the problem was not the failure to allege evidence to *support* the position that an agreement occurred; it was the failure to make a concrete allegation of *any* such agreement—rather than simply assuming that anticompetitive parallel conduct *itself* constituted an actionable conspiracy.[117] And in *Iqbal*, one might read the complaint as failing to identify what independent actions by Ashcroft and Mueller were motivated by a discriminatory purpose.[118] On this view, *Iqbal* does not indicate that every allegation of discriminatory intent is inherently conclusory—that would be impossible to square with *Swierkiewicz*. Rather, the complaint must adequately identify the liability-generating transactions that were tainted with such animus.[119]

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115 *See* Steinman, *Rise and Fall*, *supra* note 6, at 366 n.181 ("To accept the approach to pleading urged here, one need not necessarily agree with the Supreme Court's findings that the core allegations in the *Twombly* and *Iqbal* complaints should indeed have been disregarded as conclusory. Although there are some ways in which those allegations are less-than-ideal from a transactional standpoint, one could sensibly conclude otherwise." (citations omitted)).

116 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007) (emphasis added).

117 This may have been because the phrasing of the relevant paragraph in the complaint indicated that "the conspiracy derives from the [anticompetitive] parallel conduct" rather than that an agreement was reached to engage in the anticompetitive conduct. Steinman, *Rise and Fall*, *supra* note 6, at 360. Although I disagree that this is how the *Twombly* majority should have understood the *Twombly* complaint, *id.* at 361 n.160, that understanding was the premise of the majority's reasoning—and the majority suggested that an "independent allegation of actual agreement" would have been sufficient. *Twombly*, 550 U.S. at 564.

118 *See* Steinman, *Rise and Fall*, *supra* note 6, at 362.

119 *See id.* at 362–63. This understanding also gives effect to Rule 9(b)'s instruction that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Although the allegation regarding *intent* may be alleged generally, it must be sufficiently tethered to an adequately identified, liability-generating event or transaction to avoid being deemed conclusory. *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

I have elaborated on these potential distinctions in greater detail elsewhere.[120] And I am sympathetic to the view that the *Twombly* and *Iqbal* majorities had misinterpreted the key allegations in the complaints in order to justify the results they reached in those cases.[121] The key point here, however, is that it is possible to reconcile the reasoning and results of *Twombly* and *Iqbal* with notice pleading.[122] Couple this with *Twombly*'s (and *Erickson*'s) explicit embrace of *Conley*'s fair-notice standard,[123] and one can see why the post-*Iqbal* decisions discussed earlier in this Article have it right: notice pleading lives. Or at least, notice pleading lives under the best reading of *Twombly* and *Iqbal*.[124]

C. *A Hint from the Supreme Court?* Johnson v. City of Shelby

The Supreme Court itself hinted at the continued vitality of notice pleading in a 2014 per curiam decision: *Johnson v. City of Shelby*.[125] The primary issue in *Johnson* was whether a plaintiff's failure to explicitly invoke a particular statutory cause of action—42 U.S.C. § 1983—in a complaint alleging due process violations required dismissal at the pleading stage.[126] As to that question, the Supreme Court held that the

120 *See* Steinman, *Rise and Fall*, *supra* note 6, at 360–63; Steinman, *Pleading Problem*, *supra* note 15, at 1336–39.

121 *See, e.g.*, *Iqbal*, 556 U.S. at 697–99 (Souter, J., dissenting) (criticizing the majority's reading of the *Iqbal* complaint); *Twombly*, 550 U.S. at 589–90 (Stevens, J., dissenting) (criticizing the majority's reading of the *Twombly* complaint).

122 As a matter of case-law interpretation, it is not clear whether fidelity to stare decisis should require reconciling the bare results of cases, such as the *Twombly* and *Iqbal* majorities' ultimate findings that the allegations in those complaints were conclusory. *See* Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1742 (2013); *see also id.* at 1783–86 (arguing that stare decisis should not require courts to justify, reconcile, or explain the bare results reached by superior courts, as distinct from the principles articulated in reaching those results).

123 *See supra* notes 38–41 and accompanying text.

124 The corollary to this is: courts that read *Twombly* and *Iqbal* to impose a stricter standard than notice pleading are not following the best reading of those cases. *See* Steinman, *Rise and Fall*, *supra* note 6, at 366–67 ("[A] careful reading of *Twombly* and *Iqbal* not only permits, but compels them to be applied in a manner that preserves the preexisting notice-pleading framework.").

125 574 U.S. 10 (2014).

126 *Id.* at 11.

Johnson plaintiffs' failure to cite § 1983 was not fatal.[127] More significantly for this Article's focus, the Supreme Court went on to explain why the plaintiffs' complaint in *Johnson* complied with the federal pleading standard under *Iqbal*.[128]

Johnson recognized that *Twombly* and *Iqbal* require a plaintiff to "plead facts sufficient to show that her claim has substantive plausibility," but the Court found that the complaint in *Johnson* was "not deficient in that regard."[129] Why? Because the plaintiffs had "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city."[130] As the Court put it: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."[131]

The Supreme Court's *Johnson* decision confirms that a "simpl[e]," "concise[]," and "direct[]" statement of the underlying "events" constitutes a sufficient "factual basis" under *Iqbal*.[132] And a plaintiff is "required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."[133] This reasoning fits quite well with the transactional understanding of notice pleading set out above. Indeed, the *Johnson* plaintiffs' substantive basis for their due process claim was "that they were fired by the city's board of aldermen, not for deficient performance, but because they brought to light criminal activities of one of the aldermen."[134] Like the claims in *Iqbal* and *Swierkiewicz*, the *Johnson* plaintiffs' claim depended on the defendants' state of mind. The *Johnson* decision bolsters the view that an allegation that a defendant had a certain state of mind (say, discriminatory intent) is not inherently conclusory. As discussed above, such an allegation should be accepted as true—including

127 *Id.* at 11 (holding that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted").

128 *Id.* at 12 ("Our decisions in [*Twombly*] and [*Iqbal*] . . . concern the factual allegations a complaint must contain to survive a motion to dismiss. . . . Petitioners' complaint was not deficient in that regard.").

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 10.

its description of the defendant's state of mind—as long as it adequately identifies the liability-generating events or transactions.

CONCLUSION

Iqbal is a troubling decision in many respects. But whether *Iqbal* means the end of notice pleading is a matter of choice, not command. The federal court decisions that have chosen to read *Iqbal* to preserve notice pleading are right—not only as a matter of procedural policy, but as a matter of case-law interpretation.

614 F.3d 400 (2010)

Gloria E. SWANSON, Plaintiff-Appellant,

v.

CITIBANK, N.A., et al., Defendants-Appellees.

No. 10-1122.

United States Court of Appeals, Seventh Circuit.

Submitted May 26, 2010.[*]
Decided July 30, 2010.

402 *402 Gloria E. Swanson, Chicago, IL, pro se.

Charles M. Routen, Chicago, IL, pro se.

Abram I. Moore, Attorney, K&L Gates LLP, Robert M. Chemers, Attorney, Pretzel & Stouffer, Chicago, IL, for Defendants-Appellees.

Before EASTERBROOK, Chief Judge, and POSNER and WOOD, Circuit Judges.

WOOD, Circuit Judge.

Gloria Swanson sued Citibank, Andre Lanier, and Lanier's employer, PCI Appraisal Services, because she believed that all three had discriminated against her on the basis of her race (African-American) when Citibank turned down her application for a home-equity loan. Swanson also named her husband, Charles Routen, as a co-plaintiff and a co-appellant but since Swanson is proceeding *pro se,* she may not represent her husband. See FED.R.CIV.P. 11(a); Malone v. Nielson, 474 F.3d 934, 937 (7th Cir.2007). We have therefore dismissed Routen as a party on appeal; we proceed solely with respect to Swanson's part of the case. She was unsuccessful in the district court, which dismissed in response to the defendants' motion under FED.R.CIV.P. 12(b)(6).

Swanson based her complaint on the following set of events, which we accept as true for purposes of this appeal. *Hemi Group, LLC v. City of New York, N.Y.,* ___ U.S. ___, 130 S.Ct. 983, 986-87, ___ L.Ed.2d ___ (2010). In February 2009 Citibank announced a plan to make loans using funds that it had received from the federal government's Troubled Assets Relief Program. Encouraged by this prospect, Swanson went to a Citibank branch to apply for a home-equity loan. A representative named Skertich told Swanson that she could not apply alone, because she owned her home jointly with her husband; he had to be present as well. Swanson was skeptical, suspecting that Skertich's demand was a ploy to discourage loan applications from African-Americans. She therefore asked to speak to a manager. When the manager joined the group, Swanson disclosed to both Skertich and the manager that Washington Mutual Bank previously had denied her a home-equity loan. The manager warned Swanson that, although she did not want to discourage Swanson from applying for the loan, Citibank's loan criteria were more stringent than those of other banks.

Still interested, Swanson took a loan application home and returned the next day with the necessary information. She was again assisted by Skertich, who entered the information that Swanson had furnished into the computer. When he reached a question regarding race, Skertich told Swanson that she was not required to respond. At some point during this exchange,
403 Skertich pointed to a photograph *403 on his desk and commented that his wife and son were part African-American.

A few days later Citibank conditionally approved Swanson for a home-equity loan of $50,000. It hired Andre Lanier, who worked for PCI Appraisal Services, to visit Swanson's home for an onsite appraisal. Although Swanson had estimated in her loan application that her house was worth $270,000, Lanier appraised it at only $170,000. The difference was critical: Citibank turned down the loan and explained that its conditional approval had been based on the higher valuation. Two months later Swanson paid for and obtained an appraisal from Midwest Valuations, which thought her home was worth $240,000.

Swanson saw coordinated action in this chain of events, and so she filed a complaint (later amended) charging that Citibank, Lanier, and PCI disfavor providing home-equity loans to African-Americans, and so they deliberately lowered the appraised value of her home far below its actual market value, so that they would have an excuse to deny her the loan. She charges that in so doing, they violated the Fair Housing Act, 42 U.S.C. § 3605, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1). The district court granted the defendants' motions to dismiss both theories. It relied heavily on *Latimore v. Citibank Fed. Savings Bank*, 151 F.3d 712 (7th Cir.1998), a case in which this court described the evidence required to defeat a defense motion for summary judgment on a credit discrimination claim. Initially, the court liberally construed Swanson's complaint to include a commonlaw fraud claim and declined to dismiss that aspect of the case. Later, however, the defendants moved to dismiss the fraud claim as well, and the district court granted the motion on the grounds that the statements on which Swanson relied were too indefinite and her reliance was unreasonable. This appeal followed.

Before turning to the particulars of Swanson's case, a brief review of the standards that apply to dismissals for failure to state a claim is in order. It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law. *Cf.* *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), disapproved by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("after puzzling the profession for 50 years, this famous observation [the 'no set of facts' language] has earned its retirement"). The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), and *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a "plausibility" standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2).

Critically, in none of the three recent decisions — *Twombly*, *Erickson*, or *Iqbal* — did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure. To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window. It is therefore useful to begin with a look at the language of the rule:

404 *404 (a) Claim for Relief. A pleading that states a claim for relief must contain:

> * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

FED.R.CIV.P. 8(a)(2). As one respected treatise put it in 2004,

> all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity.... [T]his portion of Rule 8 indicates that a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved....

5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 at 165-173 (3d ed. 2004).

Nothing in the recent trio of cases has undermined these broad principles. As *Erickson* underscored, "[s]pecific facts are not necessary." 551 U.S. at 93, 127 S.Ct. 2197. The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: "the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id.* Instead, the Court has called for more careful attention to be given to several key questions: what, exactly, does it take to give the opposing party "fair notice"; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the court?

This is the light in which the Court's references in *Twombly*, repeated in *Iqbal*, to the pleader's responsibility to "state a claim to relief that is plausible on its face" must be understood. See *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *Iqbal*, 129 S.Ct. at 1949. "Plausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, "the plausibility standard is not akin to a probability requirement." 129 S.Ct. at 1949 (quotation marks omitted). As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. Compare *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir.2008) (applying PSLRA standards).

The Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which was cited with approval in *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and
405 that the job went to someone else. That is an *405 entirely plausible scenario, whether or not it describes what "really" went on in this plaintiff's case. A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected. Finally, as the Supreme Court warned in *Iqbal* and as we acknowledged later in *Brooks v. Ross*, 578 F.3d 574 (7th Cir.2009), "abstract recitations of the elements of a cause of action or conclusory legal statements," 578 F.3d at 581, do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law. Such statements therefore do not add to the notice that Rule 8 demands.

We realize that one powerful reason that lies behind the Supreme Court's concern about pleading standards is the cost of the discovery that will follow in any case that survives a motion to dismiss on the pleadings. The costs of discovery are often asymmetric, as the dissent points out, and one way to rein them in would be to make it more difficult to earn the right to engage in discovery. That is just what the Court did, by interring the rule that a complaint could go forward if any set of facts at all could be imagined, consistent with the statements in the complaint, that would permit the pleader to obtain relief. Too much chaff was moving ahead with the wheat. But, in other contexts, the Supreme Court has drawn a careful line between those things that can be accomplished by judicial interpretation and those that should be handled through the procedures set up in the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.* See *Mohawk Indus., Inc. v. Carpenter*, ___ U.S. ___, 130 S.Ct. 599, 609, 175 L.Ed.2d 458 (2009). In fact, the Judicial Conference's Advisory Committee on Civil Rules is engaged in an intensive study of pleading rules, discovery practice, and the costs of litigation, as its recent 2010 Civil Litigation Conference, held at Duke Law School May 10-11, 2010, demonstrates. See Summary of 2010 Conference on Civil Litigation at Duke Law School, University of Denver Institute for the Advancement of the American Legal System, at http://www.du.edu/ legalinstitute/pdf/DukeConference.pdf (last visited July 28, 2010).

Returning to Swanson's case, we must analyze her allegations defendant-by-defendant. We begin with Citibank. On appeal, Swanson challenges only the dismissal of her Fair Housing Act and fraud claims. The Fair Housing Act prohibits businesses engaged in residential real estate transactions, including "[t]he making... of loans or providing other financial assistance ... secured by residential real estate," from discriminating against any person on account of race. 42 U.S.C. § 3605(a), (b)(1)(B). Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint. See *Swierkiewicz*, 534 U.S. at 511-12, 122 S.Ct. 992 (employment discrimination); see also *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 723-24 (6th Cir.2010); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 715 (9th Cir.2009).

The fact that Swanson included other, largely extraneous facts in her complaint does not undermine the soundness of her
406 pleading. She points to Citibank's announced plan to use federal money to make more loans, its refusal to follow *406 through in her case, and Skertich's comment that he has a mixed-race family. She has not pleaded herself out of court by mentioning these facts; whether they are particularly helpful for proving her case or not is another matter that can safely be put off for another day. It was therefore error for the district court to dismiss Swanson's Fair Housing Act claim against Citibank.

Her fraud claim against Citibank stands on a different footing. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Of special relevance here, a plaintiff must plead actual damages arising from her reliance on a fraudulent statement. *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 841 (7th Cir.2007). Without a contract, only out-of-pocket losses allegedly arising from the fraud are recoverable. *Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 78 F.3d 266, 274 (7th Cir.1996) (applying

Illinois law). Swanson asserts that Citibank falsely announced plans to make federal funds available in the form of loans to all customers, when it actually intended to exclude African-American customers from those who would be eligible for the loans. Swanson relied, she says, on that false information when she applied for her home-equity loan. But she never alleged that she lost anything from the process of applying for the loan. We do not know, for example, whether there was a loan application fee, or if Citibank or she covered the cost of the appraisal. This is the kind of particular information that Rule 9 requires, and its absence means that the district court was entitled to dismiss the claim.

We now turn to Swanson's claims against Lanier and PCI. Here again, she pursues only her Fair Housing Act and fraud claims. (The appraisal defendants point out that they do not extend credit, and thus their actions are not covered in any event by the Equal Credit Opportunity Act, 15 U.S.C. § 1691a(e).) The Fair Housing Act makes it "unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race...." 42 U.S.C. § 3605(a). The statute goes on to define the term "residential real estate-related transaction" to include "the selling, brokering, or appraising of residential real property." 42 U.S.C. § 3605(b)(2). There is an appraisal exemption also, found in § 4605(c), but it provides only that nothing in the statute prohibits appraisers from taking into consideration factors other than race or the other protected characteristics.

Swanson accuses the appraisal defendants of skewing their assessment of her home because of her race. It is unclear whether she believes that they did so as part of a conspiracy with Citibank, or if she thinks that they deliberately undervalued her property on their own initiative. Once again, we find that she has pleaded enough to survive a motion under Rule 12(b)(6). The appraisal defendants knew her race, and she accuses them of discriminating against her in the specific business transaction that they had with her. When it comes to proving her case, she will need to come up with more evidence than the mere fact that PCI (through Lanier) placed a far lower value on her house than Midwest Valuations did.
407 See Latimore, 151 F.3d at 715 (need more at the summary judgment stage than evidence of a *407 discrepancy between appraisals). All we hold now is that she is entitled to take the next step in this litigation.

This does not, however, save her common-law fraud claim against Lanier and PCI. She has not adequately alleged that she relied on their appraisal, nor has she pointed to any out-of-pocket losses that she suffered because of it.

We therefore REVERSE the judgment of the district court insofar as it dismissed Swanson's Fair Housing Act claims against all three defendants, and we AFFIRM insofar as it dismissed the common-law fraud claims against all three. Each side will bear its own costs on appeal.

POSNER, Circuit Judge, dissenting in part.

I join the majority opinion except with respect to reversing the dismissal of the plaintiff's claim of housing discrimination. I have difficulty squaring that reversal with Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), unless *Iqbal* is limited to cases in which there is a defense of official immunity — especially if as in that case it is asserted by very high-ranking officials (the Attorney General of the United States and the Director of the FBI) — because the defense is compromised if the defendants have to respond to discovery demands in a case unlikely to have merit. Smith v. Duffey, 576 F.3d 336, 340 (7th Cir.2009); Robert G. Bone, "Plausibility Pleading Revisited and Revised: A Comment on *Ashcroft v. Iqbal*," 85 *Notre Dame L.Rev.* 849, 882 (2010); Howard M. Wasserman, "*Iqbal*, Procedural Mismatches, and Civil Rights Litigation," 14 *Lewis & Clark L.Rev.* 157, 172-73 (2010).

The majority opinion does not suggest that the Supreme Court would limit *Iqbal* to immunity cases. The Court said that "our decision in Twombly [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the forerunner of *Iqbal*] expounded the pleading standard for `all civil actions.'" 129 S.Ct. at 1953. It did add that a district judge's promise of minimally intrusive discovery "provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties." *Id.* at 1954. But this seems just to mean that the Court thought *Iqbal* a strong case for application of the *Twombly* standard, rather than thinking it the only type of discrimination case to which the standard applies.

There is language in my colleagues' opinion to suggest that discrimination cases are outside the scope of *Iqbal*, itself a discrimination case. The opinion says that "a plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else." Though this is not a promotion case, the opinion goes on to say that "Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home equity loan). This is all that she needed to put in the complaint." In contrast, "a more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be

408 connected." The "more complex" case *408 to which this passage is referring is *Twombly,* an antitrust case. But *Iqbal,* which charged the defendants with having subjected Pakistani Muslims to harsh conditions of confinement because of their religion and national origin, was a discrimination case, as is the present case, and was not especially complex.

Suppose this *were* a promotion case, and several people were vying for a promotion, all were qualified, several were men and one was a woman, and one of the men received the promotion. No complexity; yet the district court would "draw on its judicial experience and common sense," Ashcroft v. Iqbal, supra, 129 S.Ct. at 1950, to conclude that discrimination would not be a plausible explanation of the hiring decision, without additional allegations.

This case is even stronger for dismissal because it lacks the competitive situation — man and woman, or white and black, vying for the same job and the man, or the white, getting it. We had emphasized this distinction, long before *Twombly* and *Iqbal,* in Latimore v. Citibank Federal Savings Bank, 151 F.3d 712 (7th Cir.1998), like this a case of credit discrimination rather than promotion. "Latimore was not competing with a white person for a $51,000 loan. A bank does not announce, `We are making a $51,000 real estate loan today; please submit your applications, and we'll choose the application that we like best and give that applicant the loan.'" *Id.* at 714. We held that there was no basis for an inference of discrimination. Noland v. Commerce Mortgage Corp., 122 F.3d 551, 553 (8th Cir.1997), and Simms v. First Gibraltar Bank, 83 F.3d 1546, 1558 (5th Cir.1996), rejected credit-discrimination claims because there was no evidence that similar applicants were treated better, and Boykin v. Bank of America Corp., 162 Fed.Appx. 837, 840 (11th Cir.2005) (per curiam), rejected such a claim because "absent direct evidence of discrimination, there is no basis for a trier of fact to assume that a decision to deny a loan was motivated by discriminatory animus unless the plaintiff makes a showing that a pattern of lending suggests the existence of discrimination."

There is no allegation that the plaintiff in this case was competing with a white person for a loan. It was the low appraisal of her home that killed her chances for the $50,000 loan that she was seeking. The appraiser thought her home worth only $170,000, and she already owed $146,000 on it (a first mortgage of $121,000 and a home-equity loan of $25,000). A further loan of $50,000 would thus have been undersecured. We must assume that the appraisal was a mistake, and the house worth considerably more, as she alleges. But errors in appraising a house are common because "real estate appraisal is not an exact science," Latimore v. Citibank Federal Savings Bank, supra, 151 F.3d at 715 — common enough to have created a market for "Real Estate Appraisers Errors & Omissions" insurance policies. See, e.g., OREP (Organization of Real Estate Professionals), "E&O Insurance," www. orep.org/appraisers-e&o.htm (visited July 11, 2010). The Supreme Court would consider error the plausible inference in this case, rather than discrimination, for it said in *Iqbal* that "as between that `obvious alternative explanation' for the [injury of which the plaintiff is complaining] and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion." Ashcroft v. Iqbal, supra, 129 S.Ct. at 1951-52, quoting Twombly, 550 U.S. at 567, 127 S.Ct. 1955.

Even before *Twombly* and *Iqbal,* complaints were dismissed when they alleged facts that refuted the plaintiffs' claims. See,

409 e.g., Tierney v. Vahle, 304 F.3d 734, 740 (7th Cir.2002); Thomas v. Farley, 31 *409 F.3d 557 (7th Cir.1994); Lightner v. City of Wilmington, 545 F.3d 260, 262 (4th Cir.2008). Under the new regime, it should be enough that the allegations render a claim implausible. The complaint alleges that Citibank was the second bank to turn down the plaintiff's application for a home-equity loan. This reinforces the inference that she was not qualified. We further learn that, subject to the appraisal, which had not yet been conducted, Citibank had approved the $50,000 home-equity loan that the plaintiff was seeking on the basis of her representation that her house was worth $270,000. But she didn't think it was worth that much when she applied for the loan. The house had been appraised at $260,000 in 2004, and the complaint alleges that home values had fallen by "only" 16 to 20 percent since. This implies that when she applied for the home-equity loan her house was worth between $208,000 and $218,400 — much less than what she told Citibank it was worth.

If the house was worth $208,000, she would have owed a total of $196,000 had she gotten the loan, or just a shade under the market value of the house. If the bank had insisted that she have a 20 percent equity in the house, which would be $41,600, it would have lent her only $20,400 ($166,400 — 80 percent of $208,000 — minus the $146,000 that she already owed on the house). The loan figure rises to $28,720 if the house was worth $218,400 rather than $208,000. In either case a $50,000 loan would have been out of the question, especially in the wake of the financial crash of September 2008, when credit, including home-equity credit, became extremely tight. E.g., Bob Tedeschi, "Opening the Tap on Home Equity," *N.Y. Times,* Nov. 7, 2008, p. RE9, www.nytimes.com/2008/11/ 02/realestate/02mort.html. For it was a home-equity loan that the plaintiff was seeking in early February of 2009, at the nadir of the economic collapse — and seeking it from troubled Citibank, one of the banks that required a federal bailout in the wake of the crash. Financial reports in the weeks surrounding the plaintiff's application make clear the difficulty of obtaining credit from Citibank during that period. See Binyamin Appelbaum, "Despite Federal Aid, Many Banks Fail to Revive Lending," *Wash. Post,* Feb. 3, 2009, www. washingtonpost.com/wp-dyn/content/ article/2009/02/02/AR2009020203338_pf. html ("some of the first banks to get funding, such as Citigroup and J.P. Morgan Chase, have reported the sharpest drops in lending"); Liz Moyer, "Banks Promise Loans but Hoard Cash," *Forbes.com,* Feb. 3, 2009, www.forbes.com/2009/02/03/ banking-federal-reserve-business-wall-street-0203_loans.html ("`banks and other lenders have tightened access to credit and are conserving capital in order to absorb the losses that occur when borrowers default,' the company [Citibank] said: `Citi will not and cannot take excessive risk with the capital the American public and other investors have entrusted to the company'"); Mara Der Hovanesian & David Henry, "Citi: The Losses Keep Coming," *Bloomberg BusinessWeek,* Jan. 12, 2009, www.businessweek.com/bwdaily/dnflash/ content/jan2009/db20090112_136301.htm? campaign_id=rss_daily ("banks are not lending. They are using every opportunity to pull loans and force liquidations"). (All web sites were visited on July 11, 2010.)

In *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam), decided two weeks after *Twombly,* the Supreme Court, without citing *Twombly,* reinstated a prisoner's civil rights suit that had been dismissed on the ground that the allegations of the complaint were "conclusory." The suit had charged deliberate indifference to the plaintiff's
410 need for medical treatment. In *410 the key passage in the Court's opinion, we learn that "the complaint stated that Dr. Bloor's decision to remove the petitioner [that is, the plaintiff] from his prescribed hepatitis C medication was `endangering [his] life.' It alleged this medication was withheld `shortly after' petitioner had commenced a treatment program that would take one year, that he was `still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment. *This alone was enough to satisfy Rule 8(a)(2).* Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings" (emphasis added, record citations omitted). It was reasonable to infer from these allegations, assuming their truth, that the defendants (who included Dr. Bloor, a prison doctor) had acted with deliberate indifference to the petitioner's serious medical need by refusing to provide him with any medical treatment after taking away his medication. Indeed it's difficult (again assuming the truth of the allegations) to imagine an alternative interpretation. Hepatitis C is a serious disease and the prisoner had been put in a treatment program expected to last a year. To refuse him any treatment whatsoever seemed (as the other allegations to which the Court referred confirmed) to be punitive. I think *Erickson* is good law even after *Iqbal,* but I also think it's miles away from a case in which all that's alleged (besides pure speculation about the defendants' motive) is that someone was denied a loan because her house was mistakenly appraised for less than its market value.

The majority opinion relies heavily on *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), cited with approval in *Twombly,* see 550 U.S. at 556, 127 S.Ct. 1955 (though not cited in *Iqbal*) and not overruled. Although it is regarded in some quarters as dead after *Iqbal, e.g., Fowler v. UPMC Shadyside,* 578 F.3d 203, 211 (3d Cir.2009); Suja A. Thomas, "The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly,*" 14 *Lewis & Clark L.Rev.* 15, 35 (2010), lower-court judges are not to deem a Supreme Court decision overruled even if it is plainly inconsistent with a subsequent decision. *State Oil Co. v. Khan,* 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *National Rifle Ass'n v. City of Chicago,* 567 F.3d 856, 857-58 (7th Cir.2009), reversed under the name *McDonald v. City of Chicago,* ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). But that principle is not applicable here; *Swierkiewicz* is distinguishable.

The Court rejected a rule that the Second Circuit had created which required "heightened pleading" in Title VII cases. The basic requirement for a complaint ("a short and plain statement of the claim showing that the pleader is entitled to relief") is set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure. Rule 9 requires heightened pleading (that is, a specific allegation) of certain elements in particular cases, such as fraud and special damages. There is no reference to heightened pleading of discrimination claims, however, and *Swierkiewicz* holds that the judiciary is not authorized to amend Rule 9 without complying with the procedures in the Rules Enabling Act. 534 U.S. at 513-15, 122 S.Ct. 992; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168-69, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); Saritha
411 Komatireddy Tice, Note, "A `Plausible' Explanation of Pleading Standards: *Bell Atlantic Corp. v. Twombly,*" 31 *Harv. J.L.* *411 *& Pub. Pol'y* 827, 832 n. 49 (2008). As the Court explained in *Twombly,* "*Swierkiewicz* did not change the law of pleading,

but simply re-emphasized ... that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules." 550 U.S. at 570, 127 S.Ct. 1955. But Title VII cases are not exempted by *Swierkiewicz* from the doctrine of the *Iqbal* case. *Iqbal* establishes a general requirement of "plausibility" applicable to all civil cases in federal courts.

It does so, however, in opaque language: "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 129 S.Ct. at 1949. In statistics the range of probabilities is from 0 to 1, and therefore encompasses "sheer possibility" along with "plausibility." It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn't think a plaintiff's case is more likely than not to be a winner (that is, doesn't think $p > .5$), as long as it is substantially justified that's enough to avert dismissal. Cf. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible.

Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation (similar to that created by class actions, to which Rule 23(f) of the civil rules was a response, *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir.2001); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir.1999); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162-65 (3d Cir.2001); *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir.2009); Fed.R.Civ.P. 23(f) Committee Note) that such an asymmetry creates. *Ashcroft v. Iqbal, supra*, 129 S.Ct. at 1953; *Bell Atlantic Corp. v. Twombly, supra*, 550 U.S. at 557-59, 127 S.Ct. 1955; *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir.2009); *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir.2009); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir.2008). In most suits against corporations or other institutions, and in both *Twombly* and *Iqbal* — but also in the present case — the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant's records (and, through depositions, the minds of the defendant's employees) to obtain evidence of wrongdoing. With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant's operations. If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.

It is true, as critics of *Twombly* and *Iqbal* point out, that district courts have authority to limit discovery. E.g., *Griffin v. Foley*, 542 F.3d 209, 223 (7th Cir.2008); *Searls v. Glasser*, 64 F.3d 1061, 1068 (7th Cir.1995); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir. 1984); *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C.Cir.2005). But especially in busy districts, which is where complex litigation is concentrated, the judges tend to delegate that authority to magistrate judges. And
412 because the magistrate judge to whom a *412 case is delegated for discovery only is not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it, the magistrate judge is likely to err on the permissive side. "One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it. Pursuit of factual and legal issues that will not matter to the outcome of the case is a source of enormous unnecessary costs, yet it is one hard to conquer in a system of notice pleading and even harder to limit when an officer lacking the power to decide the case supervises discovery." Frank H. Easterbrook, "Discovery as Abuse," 69 *B.U. L.Rev.* 635, 639 (1989); see also Milton Pollack, "Discovery — Its Abuse and Correction," 80 F.R.D. 219, 223 (1979); Virginia E. Hench, "Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action," 67 *Temple L.Rev.* 179, 232 (1994).

This structural flaw helps to explain and justify the Supreme Court's new approach. It requires the plaintiff to conduct a more extensive precomplaint investigation than used to be required and so creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery. If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir.2003) (en banc); *Coss v. Playtex Products, LLC*, No. 08 C 50222, 2009 WL 1455358 (N.D.Ill. May 21, 2009); Edward A. Hartnett, "Taming *Twombly*, Even After *Iqbal*," 158 *U. Pa. L.Rev.* 473, 507-14 (2010); Suzette M. Malveaux, "Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases," 14 *Lewis & Clark L.Rev.* 65 (2010). No one has suggested such a resolution for this case.

The plaintiff has an implausible case of discrimination, but she will now be permitted to serve discovery demands that will compel elaborate document review by Citibank and require its executives to sit for many hours of depositions. (Not that the plaintiff is capable of conducting such proceedings as a pro se, but on remand she may — indeed she would be well advised to — ask the judge to help her find a lawyer.) The threat of such an imposition will induce Citibank to consider settlement even if the suit has no merit at all. That is the pattern that the Supreme Court's recent decisions are aimed at disrupting.

We should affirm the dismissal of the suit in its entirety.

[*] After examining the briefs and the record, we have concluded that oral argument is unnecessary. The appeal is therefore submitted on the briefs and the record. FED. R.APP. P. 34(a)(2)(C).