

June 2015

The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard

Raymond H. Brescia

Edward J. Ohanian

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Civil Procedure Commons](#), and the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Brescia, Raymond H. and Ohanian, Edward J. (2014) "The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard," *Akron Law Review*: Vol. 47 : Iss. 2 , Article 2.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol47/iss2/2>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

**THE POLITICS OF PROCEDURE: AN EMPIRICAL
ANALYSIS OF MOTION PRACTICE IN CIVIL RIGHTS
LITIGATION UNDER THE NEW PLAUSIBILITY STANDARD**

Raymond H. Brescia and Edward J. Ohanian†*

I.	Introduction	330
II.	The Evolution of Pleading Standards and the Rise of the Plausibility Standard in <i>Twombly</i> and <i>Iqbal</i>	334
III.	The Plausibility Standard, Due Process, and the Lesson of Rule 11	338
	A. Critiques of the Plausibility Standard	338
	B. The Consequences of the Plausibility Standard, the Logic of the Rules, and the Limits of Due Process.....	339
	1. The Promise of Procedural Neutrality and Trans- Substantivity	339
	2. Due Process Concerns	343
	3. Separation of Powers Concerns	345
	4. Legitimacy	346
	C. The Lessons of Rule 11.....	348
IV.	Gauging the Impact of <i>Twombly</i> and <i>Iqbal</i>	351
	A. The Impact of <i>Twombly</i> and <i>Iqbal</i> : Previous Studies ..	351

* Associate Professor of Law and Director, Government Law Center, Albany Law School; J.D., Yale Law School (1992); B.A., Fordham University (1989). Formerly a Visiting Clinical Associate Professor of Law, Yale Law School (2011-2012); Associate Director of the Urban Justice Center in New York City, a Skadden Fellow at The Legal Aid Society of New York and clerk to the Hon. Constance Baker Motley. The authors would like to thank Stephen Burbank, Matthew Glomski, and Judith Resnik for their comments on earlier drafts, as well as those who participated in the Albany Law School Scholarship Workshop Series, including Sheldon Halpern, Robert Heverly, Timothy Lytton, Elizabeth Renuart, and Donna Young. The authors are also grateful for the valuable feedback received from participants in a scholarship workshop at Suffolk University Law School, including Kathleen Engel, Stephen Ferrey, Joseph Glannon, Andrew Perlman, Jessica Silbey, and Linda Sandstrom Simard. This author played a small role in the litigation that culminated in the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009): the legal services office at which he worked at the time, the Urban Justice Center, was first retained by Mr. Iqbal and his co-plaintiff well before the commencement of the suit. His direct involvement in the action was limited, however.

† J.D., Albany Law School (2014); B.A. in Mathematics, Marist College (2010).

B. Methodology	354
C. Results.....	355
1. Overall Dismissal Rates	355
2. Dismissal Rates by Party Affiliation of the Nominating President	356
3. Dismissal Rates by Gender of Deciding Judge.....	357
4. Dismissal Rates by Race of Judge	358
5. Number of Motions and Number of Dismissals	359
D. Implications	362
IV. Conclusion: The Promise of Procedure	363
Appendix A.....	367
Appendix B: Statistical Significance.....	370
Appendix C.....	372

I. INTRODUCTION

In a democracy, procedural rules hold out the promise that their design reflects certain values of that society. For example, procedural rules should promote the efficiency of the courts that apply them. They should be clear and understandable. However, the Federal Rules of Civil Procedure also reflected additional values, at least when they were first adopted. Most importantly, perhaps, they promoted an ethos of access to justice. With liberal discovery rules, expanded joinder provisions and straightforward pleading rules, the Civil Rules encouraged the ultimate resolution of matters on the merits, and favored disposition by trial. In the decades since their passage, and most recently through a series of decisions issued in the last six years, the U.S. Supreme Court has taken into account other values in adjudicating the scope and contours of procedural rules. When doing so, they have invoked the need to preserve the ability of judges to manage their dockets and protect defendants from the costs of drawn out litigation.

If one constant undergirds the host of values procedural rules are supposed to promote, it is that judges should apply such rules fairly and impartially. Although at times it may seem that “different rules apply” to certain classes of litigants—take prisoners and other litigants proceeding *pro se* and as indigents as examples—judges are to apply the rules fairly and impartially regardless of their own political leanings; the political leanings of the litigants before them; the substantive legal issues being adjudicated; the sympathy the judge has for a particular cause being pursued in a matter before him or her; or the personal affection

that judge may feel, or displeasure that judge may harbor, for a party or his or her attorney. These sentiments are reflected in that fundamental aspect of the right of due process: the right to be heard by an impartial adjudicator.

A procedural rule that lends itself to partisan application betrays this core procedural principle and raises due process concerns.¹ What's more, when such partisan use is exposed in the adjudication of particular rights established through the substantive lawmaking function of the legislative branch, it implicates separation of powers concerns. Ultimately, if a seemingly neutral procedural rule can be applied differently by different judges based on a particular quality of the judge, the litigants, or the substantive issue at stake, it raises doubts about the effectiveness of that rule to serve the goal of impartial justice.

After the Supreme Court issued its rulings in *Bell Atlantic v. Twombly*² and *Ashcroft v. Iqbal*,³ many raised concerns that these precedents introduced a new pleading standard to all civil pleadings in federal court that was so malleable and indeterminate that it could be invoked by the courts disproportionately in contexts where judges were hostile to particular claims, regardless of their merit.⁴ Commentators were especially concerned about the less-than-neutral application of this standard in the civil rights context by judges who disfavored such claims.⁵

The question about the impact of procedural rules on civil rights litigants is an important one in light of the critical role the federal courts

1 *See infra*.

2 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

3 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

4 *See, e.g.,* Tanvir Vahora, *Working Through a Muddled Standard: Pleading Discrimination Cases After Iqbal*, 44 COLUM. J.L. & SOC. PROBS. 235, 266 (2010) ("The Supreme Court upended decades of established precedent and practice with *Twombly* and *Iqbal*'s plausibility pleading and provided uncomfortably vague criteria with which to evaluate complaints.") (footnote omitted); *see, also* David Noll, *The Indeterminacy of Iqbal*, 99 GEO. L. J. 117 (2010) (discussing the questions raised by the plausibility standard).

5 As Ramzi Kassem writes:

Because judicial outcomes are not insulated from the influence of judges' backgrounds and because *Iqbal* gives judges ample berth to express their subjective outlooks as they apply the indeterminate plausibility standard to incipient claims, *Iqbal* raises concern that Muslim and other minority plaintiffs asserting discrimination claims may fare poorly unless pleading standards are readjusted.

Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Minority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1474-1475 (2010); *see, also* 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 (2010) (describing disparate impact of plausibility standard on civil rights cases).

play in the protection of those rights. From the early days of the Civil Rights Movement, even before the Supreme Court issued its landmark decision in *Brown v. Board of Education*,⁶ the federal courts were at the center of fights over the civil rights of African-Americans, and, later, entered the fray on the equality of racial and ethnic minorities and of women. They are now at the center of the fight for marriage equality.

Sometimes, as in the *Brown* litigation and its progeny, courts have adjudicated the scope and extent of constitutional rights. Since the mid-1960s, they have ruled on the application of federal statutes protecting civil rights in the context of employment, housing, and public accommodations. At times, courts have been receptive to such substantive claims and took expansive views of their reach and application. Indeed, in 1966, Rule 23 of the Federal Rules of Civil Procedure was amended to incorporate and validate some of the creative mechanisms used by judges and litigants in civil rights litigation up to that point in history.⁷ At other times, they have curtailed such rights, holding, for example, that affirmative action programs designed to assist blacks and other minorities discriminated against whites.⁸

In some instances, Congress has stepped in to give explicit guidance to the courts as to how they should approach the substantive adjudication of civil rights claims.⁹ Similarly, when otherwise neutral procedural rules seemed to be applied unequally against certain classes of civil rights litigants, as was the case with the 1983 amendments to Rule 11 of the federal rules, efforts at the legislative rulemaking level corrected such apparent disparate application of the otherwise neutral rule.¹⁰

This Article attempts to assess, empirically, whether the Court's introduction of the so-called "plausibility standard" in the context of civil pleadings has had a disparate impact on civil rights claims, particularly in employment and housing discrimination cases. In a previous study conducted by one of the co-authors of this Article,¹¹ it

6 *Brown v. Board of Education*, 347 U.S. 483 (1954).

7 Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997) (noting role of civil rights litigation in informing 1966 amendment to Rule 23).

8 *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding affirmative action in municipal contracting unconstitutional).

9 *See, e.g., The Civil Rights Act of 1991*, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(k)(1)(A)) (changing, *inter alia*, certain procedural requirements in employment discrimination cases in light of restrictive judicial rulings).

10 *See infra* text accompanying notes 76-94.

11 Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L. J. 235 (2012).

was revealed that in a sample of employment and housing discrimination cases, courts were more likely to dismiss these cases based on the lack of specificity of the pleadings after the Court's decision in *Iqbal*. Furthermore, that study also found, after *Iqbal*, a significant rise in both the number of reported decisions in such cases on motions challenging the specificity of the pleadings, as well as a significant rise in the number of decisions dismissing such actions.

While this prior study found statistically significant differences in outcomes in cases and in the number of motions filed and motions granted after *Iqbal*, that study did not look at a range of known qualities of the judges issuing these decisions to determine whether any particular quality tended to correspond to an outcome in a particular case. For example, did the gender of the judge tend to matter in the dismissal rate of cases? The instant study attempts to assess the relevance of certain characteristics of the judges issuing decisions dismissing cases on the grounds that the complaints were not sufficiently specific to satisfy the command of Rule 8(a) and the plausibility standard read into the rule in *Twombly* and *Iqbal*. To pursue such ends, this study looked at a range of judicial characteristics—the party affiliation of the president appointing each judge, the gender of each judge, and the race or ethnicity of the judge—to determine whether any of these characteristics corresponded to a difference in outcomes in civil rights cases.

This study assessed outcomes in 548 cases involving motions to dismiss in employment and housing discrimination claims in federal court from 2004 through the end of 2010. This assessment revealed that several of these characteristics—e.g., party affiliation of the nominating president—had a statistically significant relationship to the outcomes of decisions granting or denying motions to dismiss challenging the specificity of the pleadings. More specifically, this study revealed a statistically significant relationship between dismissal rates and time period (i.e., pre-*Twombly*, post-*Twombly* but pre-*Iqbal*, and post-*Iqbal*) in reported opinions of judges appointed by Republican presidents, in those issued by white judges, and those issued by male judges. In contrast, in decisions by judges appointed by Democratic presidents, and in decisions issued by women, there was no statistically significant relationship between outcomes of motions to dismiss on the grounds of the lack of specificity of the pleadings and time period. Because of small sample sizes, the results with respect to the race and ethnicity of the judges were somewhat inconclusive.

These findings raise questions about whether the plausibility standard, as articulated by the Court in *Twombly* and *Iqbal*, can

appropriately be described as a neutral principle of procedure. When deploying the plausibility standard, the Court stated that district court judges should use their “judicial experience and common sense” to determine whether a complaint’s allegations contain enough specificity to make them plausible. Yet if variations in outcomes in decisions based on the party affiliation of the president appointing the judge exist, does this suggest that this rule of procedure is one that may be open to an unacceptable degree of interpretative flexibility? Moreover, does such flexibility too easily lend itself to pre-existing judicial proclivities, ones that might otherwise favor or oppose a particular plaintiff’s cause?

To describe these findings and explore their implications, this Article proceeds as follows. Part II provides a brief overview of the evolution of pleading standards, from the introduction of the federal rules to the issuance of *Twombly* and *Iqbal*. Part III will provide an overview of past studies on the impact of these decisions on litigation in the federal courts, explore some of the implications of the plausibility standard and the due process questions it raises. Part IV describes the methodology and findings of this study and explores some of the implications of these findings.

II. THE EVOLUTION OF PLEADING STANDARDS AND THE RISE OF THE PLAUSIBILITY STANDARD IN *TWOMBLY* AND *IQBAL*

Rule 8(a)(2) specifies that in a pleading, a party must provide a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹² Interpreting this standard in 1957, in a civil rights action, the Supreme Court found that a complaint¹³ should not be dismissed for failure to state a claim under Rule 12(b)(6) “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.”¹⁴ This interpretation of the Rule, known as the *Conley* standard, was re-affirmed in several subsequent Supreme Court opinions.¹⁵

In late 2006, the Court was given an opportunity to review the

¹² FED. R. CIV. P. 8(a)(2).

¹³ While the Supreme Court addressed whether a complaint was sufficient to stand the test of Rule 8(a), this Rule applies to all pleadings. This study assessed district courts’ reviews of complaints only, and did not assess other pleadings to which the Rule applies.

¹⁴ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

¹⁵ See, e.g., *McLain v. Real Estate Bd.*, 444 U.S. 232, 246 (1980) (quoting *Conley*’s “no set of facts” language with approval); see also *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976).

Conley standard in *Bell Atlantic v. Twombly*,¹⁶ an anti-trust action. The plaintiffs had alleged that the similar pricing schemes of the defendants and the failure to appear to compete in certain geographic markets must have been the result of illegal collusion.¹⁷

In assessing the strength of the plaintiffs' claims, the Court introduced what has been called the "More Plausible Test."¹⁸ The Court assessed the likelihood of plaintiffs' allegations compared to another completely lawful explanation for the defendants' conduct: i.e., that the price fluctuations were a product of market forces as opposed to illicit agreement.¹⁹ The Court concluded that "without some further factual enhancement," the plaintiffs' allegation of mere parallel conduct "stops short of the line between possibility and plausibility of entitle[ment] to relief."²⁰ Thus, the complaint deserved dismissal because, when viewed through the lens of the plausibility standard, the plaintiffs failed to "nudge[] their claims across the line from conceivable to plausible."²¹ Making clear that this plausibility standard should supersede *Conley*'s "no set of facts" approach, the Court issued a polite *coup de grâce*, finding that the *Conley* standard had "earned its retirement."²²

Two years later, when given the opportunity to make clear that the new plausibility standard should apply to all civil pleadings, the Court heard and decided *Twombly*'s sister opinion: *Ashcroft v. Iqbal*²³ The original plaintiffs in *Iqbal* were detained as part of the global law enforcement effort that followed in the wake of the attacks of Sept. 11, 2001. *Iqbal* himself was held in a maximum-security unit of the Metropolitan Detention Center in Brooklyn, New York, under harsh conditions of confinement, on various charges unrelated to any acts of terrorism.²⁴ *Iqbal* pled guilty to certain charges and was deported to Pakistan.²⁵ Almost two years after his deportation, he filed suit against

16 550 U.S. 544 (2007).

17 *Id.* at 548-50. A review of the complaint in the action indicates that the plaintiffs in *Twombly* had alleged more than mere parallel conduct, including statements of at least one industry executive; allegations that appear to have been ignored in the Supreme Court's opinion. See Consolidated Amended Class Action Complaint, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2472651, at *20-27.

18 Brescia, *supra* note 11, at 279.

19 *Twombly*, 550 U.S. at 568-69.

20 *Id.* at 557 (alteration in original).

21 *Id.* at 570.

22 *Id.* at 563.

23 556 U.S. 662 (2009).

24 First Amended Complaint & Jury Demand at *15, *Elmaghraby v. Ashcroft*, No. 1:04-cv-01809-JG-SMG (E.D.N.Y. Sept. 27, 2005), 2004 WL 3756442.

25 *Iqbal v. Hasty*, 490 F.3d 143, 149 (2nd Cir. 2007).

various defendants in the federal court for the Eastern District of New York, including Attorney General Ashcroft and Federal Bureau of Investigation Director Mueller.²⁶

With respect to the defendants Ashcroft and Mueller, the complaint alleged their involvement in several aspects of the allegedly illegal treatment of the plaintiffs. The complaint contained allegations that Ashcroft and Mueller approved of a “policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI.”²⁷ According to the complaint, Ashcroft was the “principal architect” of this policy,²⁸ and Mueller was “instrumental in [its] adoption, promulgation, and implementation.”²⁹ Furthermore, the complaint alleged that these defendants “knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] . . . [to harsh and unlawful] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin”³⁰

Ashcroft and Mueller filed 12(b)(6) motions to dismiss, and the trial court, citing the “no set of facts” language from *Conley v. Gibson*, granted the motion in part but denied it with respect to many claims contained in the complaint, including those related to the alleged conduct of Ashcroft and Mueller described above.³¹

While Ashcroft and Mueller’s appeal was pending in the Second Circuit Court of Appeals, the Supreme Court issued the decision in *Bell Atlantic v. Twombly*, and the appellate court’s ruling in *Iqbal* ultimately measured the plaintiff’s complaint against the plausibility standard, finding, for the most part, that the complaint had satisfied it.³² The Second Circuit ruled in this fashion given the context in which the allegations of the complaint arose: i.e., the court found that given the importance and high profile nature of the law enforcement actions following the September 11th attacks, it was plausible that defendants Ashcroft and Mueller had some role in the allegedly unlawful treatment experienced by the plaintiff.³³

The Supreme Court reviewed the Second Circuit’s decision and, in

26 First Amended Complaint & Jury Demand, at *4-10.

27 *Id.* at *13-14.

28 *Id.* at *4.

29 *Id.* at *4-5.

30 *Id.* at *17-18; *see also* Ashcroft v. Iqbal, 556 U.S. 662, 669 (2009) (recounting allegations in the complaint).

31 *See* Elmaghraby v. Ashcroft, No. 1:04-cv-01809-JG-SMG, 2005 WL 2375202, at *29 (E.D.N.Y. Sept. 27, 2005).

32 *Iqbal v. Hasty*, 490 F.3d 143, 170 (2nd Cir. 2007).

33 *Id.* at 175-78.

its opinion reversing the Second Circuit, articulated two “working principles” at the heart of the *Twombly* approach to pleadings. First, it found that conclusory allegations are not entitled to the presumption of truth normally afforded allegations at the motion to dismiss stage.³⁴ Second, it reaffirmed the plausibility standard, stating, “only a complaint that states a plausible claim for relief survives a motion to dismiss.”³⁵

The Court went on to elaborate on the meaning of the plausibility standard, stating that assessing the plausibility of a complaint is a “context-specific task.”³⁶ Such a task, the Court held, “requires the reviewing court to draw on its judicial experience and common sense” when assessing plausibility.³⁷

Applying the first of the working principles, the Court rejected the allegations that Ashcroft and Mueller had condoned harsh conditions of confinement, finding them merely conclusory, warranting dismissal.³⁸ The Court then went on to review the allegations that the policy of “hold until cleared” fell along racial lines against the plausibility standard.³⁹ It explicitly applied the More Plausible Test to these allegations, and found that, because of the existence of other, more likely and entirely lawful explanations for the conduct, they did not set forth a plausible claim for relief. The Court found as follows: “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.”⁴⁰

According to the Court, because the terrorist attacks were carried out by Arab Muslim members of an Islamic fundamentalist group, it was entirely plausible that a law enforcement effort in their wake would sweep up individuals who happened to be perceived as Arab Muslim in the absence of any discriminatory motive.⁴¹ As the Court noted, “[a]s between that ‘obvious alternative explanation’ for the arrests” (i.e., that the race or ethnicity of the detainee was purely incidental) “and the purposeful, invidious discrimination respondent asks us to infer,

34 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

35 *Id.* at 678-79.

36 *Id.* at 679.

37 *Id.*

38 *Id.* at 680-81.

39 *Id.* at 682-83.

40 *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (emphasis added).

41 As the Court of Appeals noted, *Iqbal*’s claim was that he was discriminated against based on a perception that he was Arab Muslim, while, in reality, he was of Pakistani descent and not Arab. *Iqbal v. Hasty*, 490 F.3d 143, 147-48 n.2 (2nd Cir. 2007).

discrimination is not a plausible conclusion.”⁴² In addition, the Court found that Iqbal’s allegations regarding the “hold until cleared” policy were devoid of “factual content to ‘nudge’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’”⁴³

III. THE PLAUSIBILITY STANDARD, DUE PROCESS, AND THE LESSON OF RULE 11

A. Critiques of the Plausibility Standard

The new plausibility standard is just seven years old, but the *Twombly* and *Iqbal* precedents have been cited tens of thousands of times, and its critics are nearly as numerous.⁴⁴ One of the main critiques of the plausibility standard is that it is too indeterminate and leaves judges with few standards to apply when considering whether the allegations in a pleading satisfy the requirements of Rule 8(a). The main fear surrounding the nature of the standard—that it is somewhat vague and indeterminate—is that it leaves room for improper biases—conscious and/or implicit⁴⁵—to creep into judicial decision making in certain areas of law, areas where a particular judge, or a group of judges, might harbor a hostile predisposition to litigants seeking to vindicate certain rights.⁴⁶

42 *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (citation omitted).

43 *Id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

44 Critiques of the plausibility standard include: Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 9-10 (2010) (arguing that the introduction of the plausibility standard is part of the Supreme federal judiciary’s “continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (criticizing the plausibility standard); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 852 (2010) (arguing that it was Congress’ role and not the Court’s to adopt a new pleading standard); Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLIN L. REV. 205, 208 (2010).

45 The literature on judicial bias is extensive. Recent scholarship on the topic is collected at Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 649-97 n.2 (2011) (citations omitted). The research on implicit judicial bias is still evolving. See, e.g., Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

46 See, e.g., *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 61-62 (2009) [hereinafter *Access to Justice Hearing*] (statement of John Vail, Senior Litigation Counsel and Vice President, Center for Constitutional Litigation), available at http://judiciary.house.gov/hearings/printers/111th/111-36_53090.PDF (criticizing plausibility standard for providing judges with too much discretion); *id.* at 79, 84-89 (statement of Debo P.

Such a defect implicates several values that are supposed to infuse procedural rules and procedural justice. First, adjective, procedural rules are supposed to be trans-substantive and neutral, i.e., applicable to all areas of law and not subject to manipulation in a way that affects particular substantive rights adversely. Second, when procedural rules are applied differently in contexts affecting different substantive rights, it creates separation of powers concerns, i.e., that judges are overstepping their functions and entering the province of the legislature by treating some substantive rights differently than others.⁴⁷ Third, when partiality creeps into decision making, enabled by the application of vague rules, it implicates due process concerns: that is, when supposedly neutral rules are drawn with such imprecision, it invites the introduction of improper partiality to infect decision making.⁴⁸ Moreover, when the judicial function is infected with such partiality, it implicates a fundamental element of due process: the right to have one's case heard by an impartial adjudicator. Such questions then raise a fourth concern; they raise doubts about the legitimacy of judicial decisions when judges are seen as applying supposedly neutral rules in ways that favor certain classes of litigants over others.⁴⁹ These values are discussed below.

B. The Consequences of the Plausibility Standard, the Logic of the Rules, and the Limits of Due Process

1. The Promise of Procedural Neutrality and Trans-Substantivity

A central organizing principle of trans-substantive, procedural rules is that they should function in a neutral, apolitical way. They should not be subject to political manipulation by the courts, and, through their

Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund) (expressing fear that plausibility standard in *Iqbal* will have a disparate impact on civil rights litigants); see also *Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 25, 32-34 (2009) (statement of Professor Eric Schnapper, University of Washington School of Law) (expressing concern that judges employing the plausibility standard will dismiss otherwise meritorious civil rights claims on technical grounds), available at http://judiciary.house.gov/hearings/printers/111th/111-124_54076.PDF; Kassem, *supra* note 5, at 1444-47 (criticizing subjective aspects of plausibility standard and expressing fear that the standard will be used disproportionately to dismiss claims of members of non-dominant, minority communities). On the impact of cultural biases on judicial fact-finding and decision making, see Dan M. Kahan, *et al.*, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

⁴⁷ See *infra* notes 78-81 and accompanying text.

⁴⁸ See *infra* notes 72-77 and accompanying text.

⁴⁹ See *infra* notes 82-88 and accompanying text.

even-handed application, they should promote equal justice under law.⁵⁰ This concept is embodied in the Rules Enabling Act, the Congressional directive authorizing the courts to construct their own procedural rules. There, Congress has said as follows:

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

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.⁵¹

The Rules Enabling Act does two things that point to the goal of neutral procedural⁵² rules that provide the mechanism through which substantive rights and duties are measured. First, it places the duty to draft the rules in the branch of government—the judiciary—that, it was presumed, would be influenced the least by political forces.⁵³ Second, it ensures, explicitly, that procedural rules should not “abridge, enlarge or modify” any substantive right.⁵⁴

50 Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074 (1989) (footnote omitted).

51 28 U.S.C. § 2072 (1990).

52 Of course, identifying the line between “substance” and “procedure” is often quite difficult, as is identifying a procedural rule that is completely neutral and non-normative. A decision on a procedural matter designed to provide access to the courts has a normative value. That decision can also have political ramifications, whether that access is provided to a litigant to challenge federal health care legislation, which some of one political stripe might support, or to protect the environment against corporate interests, which others would favor. On some of the values underlying procedural rules, see Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2226 (1989). In terms of the substance-procedure divide, the late Robert Covert’s description of this divide is, not uncharacteristically, elegant, if not original: “that which controls the conduct of litigation” is procedural and “that which controls social conduct outside the courtroom” is substantive. Robert M. Covert, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 721-722 (1975).

53 Carrington, *supra* note 50, at 2075 (“Congress placed rulemaking under the institution it perceived to be least responsive to interest group politics.”) (footnote omitted). See also, Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 444, n.45 (1958) (“Rule-making is a matter for research, study, and judicious analysis and critiques, not one for the public platform.”). Carrington also argues that Rule 1’s emphasis on trans-substantive values also establishes the apolitical nature of the Rules. Carrington, *supra* note 50, at 2077 (“Rule 1 expresses the aspiration, established by the Court, to the rulemaking process’s political neutrality. We can expect near universal support for the goals of justice, dispatch, and economy in litigation.”).

54 As Carrington argues:

One may view the Rules Enabling Act of 1934 as an accommodation in our constitutional scheme, a subconstitutional structure designed to increase the long term

The campaign to place the power for federal rulemaking in the judiciary had been waged for decades,⁵⁵ informed by the belief that the judiciary was the governmental branch best insulated from politics.⁵⁶

The proponents of the court rulemaking model thought that the judiciary, rather than the legislature, should promulgate the Rules because they believed in a sharp dichotomy between substance and procedure and trusted that courts would devise sound procedural rules through the application of “neutral expertise.” This view largely prevailed during the 1950s and 1960s, which corresponded with a period of significant consensus in favor of legal process theory in American public law and resulted in “the golden age of court rulemaking.”⁵⁷

The trans-substantive nature of the rules—that they, for the most part, are to be applied to different causes of actions and substantive areas equally—is also a reflection of the notion that procedural rules are neutral (or are at least supposed to be) in force and effect.⁵⁸ As Paul Carrington writes: “Neutrality with respect to the interests of particular groups of disputants is an obvious objective, indeed perhaps a

effectiveness of the federal courts and thus indirectly of the legislative branch as well. The consequences of rulemaking are long-term, radiate in many directions, and relate to numerous other arrangements.

Carrington, *supra* note 50, at 2072-73 (footnotes omitted).

55 David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 394 (2010).

56 On the siting of rulemaking in the courts due to the perception of immunity from political influence, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 889 (1999); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1708 (2004); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272-80 (1997).

57 Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1202-03 (2012) (footnotes omitted).

58 As David Marcus writes:

If value is defined as a choice of substantive policy, a law is value-neutral if it does not directly regulate conduct “at the stage of primary private activity.” By providing particularized procedural requirements for different areas of substantive law, substance-specific rules directly contribute to the achievement of particular regulatory goals for individuals’ primary activity. The preference or burden they foist upon a particular area of substantive policy thus precludes value-neutrality. The generality of trans-substantive rules, however, does not permit such a direct connection between process and substantive end. By this admittedly restrictive but (one hopes) analytically useful understanding of value, trans-substantive rules are indeed value-neutral.

Marcus, *supra* note 55, at 380.

paramount value, of any enterprise engaged in dispute resolution.”⁵⁹ Over time, the rulemaking process has changed, permitting more of an interest group approach to rulemaking, through which more stakeholders are involved in the process, but the emphasis on trans-substantivity and neutrality still remains.⁶⁰

Of course, the theory of trans-substantivity barely leaves the dock before it starts to take on water.⁶¹ The Rules themselves are infused with examples where particular areas of law and claims are to be treated differently.⁶² There is discretion granted to district judges in numerous places, permitting ad hoc decisions throughout the course of a lawsuit.⁶³ Congress has intervened to impose specific procedural rules on claims by immigrants,⁶⁴ prisoners,⁶⁵ class action litigants,⁶⁶ and securities litigants.⁶⁷ Each district has its own rules and orders. Indeed, every

59 Carrington, *supra* note 50, at 2074 (footnote omitted).

60 On the evolution of the rulemaking process, *see* Mulligan & Staszewski, *supra* note 57, at 1198-1201, and Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L. J. 887, 902-07 (1999). I am quite mindful of the theoretical minefield that is traversed when one discusses neutrality in the law as a concept. The critiques of neutrality as a possibility, or even its normative value, are legion, and they come from many quarters. Representative scholarship on neutrality includes, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (articulating a feminist perspective on neutral adjudication); DAVID KAIRYS, INTRODUCTION TO THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 5-15 (David Kairys ed., 3rd ed. 1998) (offering a progressive critique of the neutrality of decision making); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 5-8 (1986) (offering the Critical Legal Studies critique of neutrality). When discussing procedural neutrality, perhaps a better way to think of neutrality in this context is “free from apparent bias.” In common discourse, there is likely a consensus around the meaning of neutrality and impartiality that sidesteps more theoretical critiques of those concepts.

61 The justification for trans-substantivity is not always ironclad. As Covert wrote:

It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.

Covert, *supra* note 52, at 732-33 (footnote omitted).

62 *See, e.g.*, FED. R. CIV. P. 9, which requires pleading allegations of fraud with particularity.

63 Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1929 (1989).

64 *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 348, 110 Stat. 3009-546, 3009-639 (codified as amended at 8 U.S.C. 1182(h) (2006 & Supp. 2010)).

65 42 U.S.C. § 1997e (2006).

66 *See* Class Action Fairness Act of 2005 §§ 4(a), 5, 28 U.S.C. §§ 1332(d), 1453 (2006) (limiting access to state courts for certain types of class actions).

67 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) (imposing heightened pleading requirements in certain securities cases); Securities Litigation Uniform Standards Act of 1998 §

judge has his or her own court rules, and no two cases are ever treated exactly alike, let alone cases involving similar areas of law.⁶⁸ Like Tolstoy's description of unhappy families, which are each unhappy in unique ways, each case stands on its own, "in its own way."⁶⁹

Despite the apparent challenges of trans-substantivity and neutrality in a system in which district- and judge-specific rules predominate, wide-ranging discretion is permitted, and legislated rules for particular areas of law have been created, the overarching principles remain: generally speaking, procedural rules should be simple and general; applicable to wide areas of law; and applied neutrally, regardless of the litigant or his or her case.⁷⁰ When the norm of the neutrality of procedural rules is violated, and broken with respect to particular areas of law, this betrays the trans-substantive ethos of those rules, and the general purpose of the rules is undermined—to provide a neutral ground upon which substantive conflicts are resolved.⁷¹ Moreover, when this general purpose is undermined, it has broader implications for the proper functioning of the courts, for their legitimacy and for their role in the constitutional structure, as the following discussion shows.

2. Due Process Concerns

As the Supreme Court recently reaffirmed, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"⁷² Thus, a fundamental aspect of due process is the right to have one's case heard by an impartial adjudicator.⁷³ If at the core of due process

101, 15 U.S.C. § 77p (2006) (limiting state securities litigation).

68 David Shapiro, *Federal Rule 16: A Look at the Theory and the Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1973 (1989).

69 LEO TOLSTOY, ANNA KARENINA 1 (Richard Pevear & Larissa Volokhonsky, trans., 2001).

70 As Richard Marcus writes:

[A]t the heart of a neutralist perspective on procedure is an honest attempt to fashion rules that will fairly accommodate the concerns of accuracy, participation and efficiency. Although attitudes toward these concerns may be colored by matters of "ideology," that is not somehow a trump that makes the entire exercise a charade.

Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 774 (1993).

71 See, e.g., Stephen B. Burbank, *Procedure, Politics and Power*, 52 J. OF LEG. ED. 342, 344 (2002) ("[W]hen one knows that a rule has a statistically significant differential impact on a class of litigants or in a particular type of case, the veil is lifted, the myth of neutrality as to litigant power is exploded, and the question of lawmaking power to address the situation is unavoidable.") (footnote omitted).

72 *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

73 *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). On the evolution of due process rights in

protections lies the right to impartial adjudication, when judges apply otherwise neutral rules in a partial manner, it certainly violates those protections.

Due process concerns are further implicated by the plausibility standard because of its very indeterminacy. In other contexts, vague rules are seen as lending themselves to uneven application, and inviting biased decision making. Legislative rules that are vague can be found to be void for vagueness under the due process rubric not only because they fail to give adequate notice to the public as to what behavior is expected, but also because they give too much discretion to those applying the rules to do so in a biased way.⁷⁴ Standardless delegation of authority to administrative agencies by Congress can be deemed unconstitutional, although the Court has read this restriction narrowly since the New Deal.⁷⁵ Discretionary employment practices that have a disparate impact on a protected class of employees can be the source of employer liability in the employment discrimination context.⁷⁶ In the judicial context, vague standards raise similar concerns: i.e., they are susceptible to less than neutral application.

While every grant of discretionary power is, perhaps, fraught with such danger, when the decision permits discretion with few guideposts beyond a particular judge's subjective "experience and common sense," and that discretion can result in the dismissal of a case with prejudice, it should raise deeper concerns about the risks posed by such near limitless discretion. Although "abuse of discretion" is not the appropriate standard for appellate review of decisions on motions to dismiss, has the Supreme Court, with its focus on judicial experience and common sense, shifted the focus from a legal analysis toward judicial authority at the motion to dismiss stage that is more akin to discretion? Moreover, does reliance on the district court judge's judicial experience and common sense place appellate review out of reach? Indeed, how can appellate judges ascertain whether a particular judge's experience and common sense should suggest that a claim is plausible or not? Thus, the broad leeway at the trial level leaves appellate judges, paradoxically, with little room to maneuver to serve as a check on district court judges'

the technological age, *see* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309 (2012).

⁷⁴ *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 359-61 (1983) (describing protections underlying the void-for-vagueness doctrine).

⁷⁵ On the non-delegation doctrine and the Court's narrow interpretation of it, *see, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

⁷⁶ *See, e.g.*, *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988).

authority.⁷⁷

3. Separation of Powers Concerns

When courts apply otherwise neutral principles in ways that favor or disfavor certain litigants, they are making value judgments about the types of substantive rights they will enforce and those they will reject, without, it would seem, regard for the political judgments made by the legislative branch regarding the scope and reach of those rights. This interplay between the substantive rights that courts must adjudicate and the procedural rights they must apply is captured in the Rules Enabling Act and its language limiting courts from abridging, enlarging or modifying substantive rights through the passage of procedural rules.⁷⁸ Despite the delegation of authority to the judiciary to draft its own rules of procedure, the limitation on that delegation with respect to protecting substantive rights—i.e., rights established by Congress—reflects the separation of powers logic behind the Rules Enabling Act and the delegation of authority it accomplished.⁷⁹ In part, this division of authority reflects the perceived comparative institutional advantages of the different branches of government: the legislature determines the scope and existence of rights from within the crucible of the political arena, and the judiciary adjudicates those rights free from the passions of politics in accordance with neutral rules of the game.⁸⁰ When judges do,

⁷⁷ On the paradox of appellate review of district court judges, see LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 237-241 (2013).

⁷⁸ In the fifteen years immediately preceding the *Twombly* and *Iqbal* decisions, the Supreme Court affirmed the notion that the Rules can only be changed through the process set forth in the Rules Enabling Act or through an act of Congress. See, *Swierkiewicz v. Sorema, NA*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

⁷⁹ On the role of separation of powers concerns in the Rules Enabling Act, see, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). Writing about an early draft of what would ultimately become the Rules Enabling Act, the Senate report on that legislation expressed concerns that delegating the ability to affect substantive rights would place a legislative function in the hands of the judiciary:

Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.

S. Rep. No. 69-1174, at 11. For an analysis of FED. R. CIV. P. 4 in light of these separation of powers concerns, see generally Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41 (1988).

⁸⁰ This arguably simplistic vision of lawmaking and the role of the judiciary are consistent with the legal process school's view of both. See generally HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS* 158-74 (William N. Eskridge, Jr. & Philip P. Frickey, eds., rev. ed. 1994). On comparative institutional analysis and the separation of powers, see Neil K. Komisar, *Taking*

in fact, abridge, enlarge, or modify substantive rights through the drafting or application of procedural rules, it raises distinct separation of powers concerns.⁸¹

4. Legitimacy

At the core of the legitimacy of judicial decision making is the perception that courts are unbiased. With no other power to enforce their own edicts, courts rely on the perceptions of their legitimacy; that legitimacy is undermined, in turn, by perceptions of partiality.⁸² Furthermore, if the procedures through which a substantive decision is reached are perceived as fair, the public tends to accept the outcome regardless of whether a particular individual agrees with the substance of a particular result. This position was most strongly advocated by members of the legal process school, who argued that as long as the procedure is right, the outcome is fair.⁸³

Of course, history reveals that judges are not immune from considering the political ramifications of their actions, and should be—rightly—sensitive to the political climate in which their decisions are issued.⁸⁴ In recent years, members of the Supreme Court have expressed

Institutions Seriously: Introduction to a Strategy for Constitutional Analysis, 51 U. CHI. L. REV. 366 (1984).

81 See *Has the Supreme Court Limited Americans' Access to Courts? Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 12 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, Univ. of Pa.) [hereinafter *Burbank Testimony*], available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf>.

82 See, e.g., Owen M. Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 26 (1979) (impartiality is an important “predicate for judicial legitimacy”). For representative scholarship on the legitimacy of judicial decision making, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 44-48 (1980). On perceptions of judicial activism, STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* 9-14 (2009).

83 Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 166 (2000) (citations omitted). These sentiments are echoed by others. See, e.g., Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1839-40 (2009) (“In international and constitutional law alike, the social psychology literature lends some support to the view, long intuited by judges and lawyers, that the perceived procedural fairness of judicial decision making plays an important role in establishing legitimacy and motivating compliance. Constitutional rules or judicial decisions that appear to be “neutral” “principled,” or “impartial” may win public approval, regardless of the public’s agreement or disagreement with the outcomes on the merits.”) (footnotes omitted).

84 As Robert Post writes, courts must be attuned to the political ramifications of their actions, especially when they might undermine values important to the community:

If courts genuinely believe that certain values are essential for the maintenance of the polity and of the rule of law, the fact that judicial decisions may undermine these values cannot blithely be dismissed as irrelevant to the internal purposes of the law. Insofar as

these sentiments, in dissents⁸⁵ and in public.⁸⁶ Furthermore, in the majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸⁷ the justices expressed their collective recognition of the political context in which that case was being decided when they were invited to consider overruling *Roe v. Wade*. There, the Court stated as follows:

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.⁸⁸

The clarity with which judges must assess the ramifications of their holdings points not to the complete separation between politics and legitimacy, but, rather, their connection and the narrow path judges must take when seeking to preserve that legitimacy. That is, courts must be keenly sensitive to and aware of the political ramifications their decrees will have, while protecting against appearing “too political.” The application of procedural rules is not immune from this walk on the political tightrope. Indeed, as the experience with the 1983 amendments

law is concerned with the fundamental commitments that underpin the solidarity of the polity—and these emphatically include the relative autonomy of the law itself—it would be self-defeating for judges to define their role in ways that ignore these fundamental commitments. If judges incorrectly appraise these commitments—and in the past judges have been very badly mistaken in their estimations of the fundamental commitments of the polity—the political system will itself correct their error.

Robert Post, *Theorizing Disagreement: Reconciling the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1348 (2010) (footnotes omitted).

85 Justice Stevens' dissent in *Bush v. Gore*, which was joined by Justices Ginsburg and Breyer, provides as follows: “[a]lthough we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.” *Bush v. Gore*, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

86 As Justice Brennan, in public comments, stated: “Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate.” William Brennan, *The Constitution of the United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University, Washington, D.C. 3 (Oct. 12, 1985).

87 *Planned Parenthood of Southwestern PA v. Casey*, 505 U.S. 833 (1992).

88 *Id.* at 865.

to Rule 11 makes clear, when courts appear to be too political in their application of otherwise neutral procedural rules, the rulemaking apparatus can take corrective action and re-calibrate the rules to prevent against such actions when they become, themselves, threats to judicial legitimacy.

To explore the role the rulemaking process can have in ensuring that procedural rules remain neutral and trans-substantive in their application to protect against implicating the due process, separate of powers, impartiality, and legitimacy concerns described above, we now turn to the experiences with the 1983 amendments to Rule 11 and the corrective action that followed in their wake.

C. The Lessons of Rule 11

In the civil rights context, in particular, remedial action has been taken when courts have appeared to overstep their judicial functions and were limiting substantive rights through procedural mechanisms. The best example of this, perhaps, is when the rulemaking apparatus corrected perceived disparate enforcement of Rule 11.⁸⁹ The 1983 amendments to Rule 11,⁹⁰ which were promulgated to deter frivolous

⁸⁹ Another example can be found in Congress' efforts to scale back some of the more onerous barriers the courts had put that made it more difficult for civil rights litigants to vindicate claims of employment discrimination. After several Supreme Court precedents appeared to make it harder to plead and prove employment discrimination actions, Congress passed the Civil Rights Act of 1991, which restored some of the procedural standards erected by earlier judicial precedents. Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)). For a detailed description of the legislative changes accomplished through the Act, see David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAWYER 849, 850-51 (1992).

⁹⁰ The 1983 version of Rule 11 provided, in relevant part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11 (amended Apr. 28, 1983, effective Aug. 1, 1983). See also Spiegel, *supra* note 83, at 157 ("The 1983 amendments to Rule 11 added a requirement that the lawyer make a reasonable inquiry into the facts and the law before filing court papers, thereby adopting an objective standard in contrast to the pre-1983 version's subjective standard. Moreover, sanctions

claims and defenses,⁹¹ stimulated a debate regarding whether the 1983 version of Rule 11 was procedurally neutral.⁹² First, the volume of decisions was particularly striking. In the first forty-five years in which the Rule was in place, there had been twenty-five reported cases in which Rule 11 was invoked. In just ten years after the 1983 amendment, there were more than 6,000 reported Rule 11 rulings.⁹³ Moreover, several empirical studies provided data-driven insights about the impact of Rule 11 on civil rights cases.⁹⁴ In March 1987, the Chief Judge of the Third Circuit Court of Appeals appointed a Task Force to study the implementation of Rule 11.⁹⁵ The Task Force collected data “regarding every motion for, and every *sua sponte* consideration of, sanctions under Rule 11 during the period July 1, 1987 through June 30, 1988” in the Third Circuit.⁹⁶ Ultimately, while noting that their results were less stark than those in studies based on reported decisions alone, the Task Force concluded that “the findings tend to confirm published suggestions that the Rule has a disproportionate impact on civil rights plaintiffs.”⁹⁷ The Third Circuit Report indicated that:

Requests for sanctions in civil rights cases constituted only a slightly larger slice of our pie (24/132 or 18.2%) than one would expect on the basis of civil filings in this circuit (16% of civil filings in the period

now became mandatory upon a finding of violation, and they could be imposed upon the lawyer, the client, or both.”)

91 FED. R. CIV. P. 11 advisory committee’s note on 1983 amendments (“Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.”).

92 *See, e.g.*, Spiegel, *supra* note 83, at 160.

93 *Id.* at 157-58.

94 Although two earlier studies concluded that civil rights cases were disproportionately affected by the 1983 Rule 11 amendments, these studies were based solely on reported cases. *See* Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). In contrast, four later empirical studies used more comprehensive methodologies that went beyond reported cases. *See* Lawrence Marshall, Herbert M. Kritzer, & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 NW. U.L. REV. 943 (1992) [hereinafter *AJS Study*]; Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313 (1992) [hereinafter *Hess Study*]; FEDERAL JUDICIAL CENTER, *RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* (1991) [hereinafter *FJC REPORT*]; STEPHEN R. BURBANK, AMERICAN JUDICATURE SOCIETY, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989) [hereinafter *THIRD CIRCUIT REPORT*].

95 *THIRD CIRCUIT REPORT*, *supra* note 94, at ix.

96 *Id.* at 5.

97 *Id.* at xiv.

ending June 30, 1988) . . . Yet, plaintiffs (and/or their counsel) were sanctioned on motion in civil rights (including employment discrimination) cases in our survey at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases.⁹⁸

Similar to the Third Circuit Report, both the FJC Report and Hess Study employed methodologies that focused primarily on case data.⁹⁹ Although the FJC Report did not explicitly confirm that Rule 11 had a disproportionate impact on civil rights plaintiffs,¹⁰⁰ its results were consistent with the findings of the Third Circuit Report where such an impact was found.¹⁰¹ As one commentator notes, “in the data reported by the FJC Study for the District of Arizona, although civil rights cases were 5% of total caseload, sanctions against civil rights cases were 14% of total sanctions imposed. This pattern was similar in other districts.”¹⁰² Consistent with the results of the FJC Report, the Hess Study results indicated that Rule 11 had a disproportionate impact on civil rights cases: “A disproportionately high percentage of Rule 11 requests were made in civil rights cases (34%) compared to the portion of civil rights case on the docket (24%).”¹⁰³

98 *Id.* at 69. Based on the data produced in the THIRD CIRCUIT REPORT, Professor Spiegel used a distinct measure of disproportionality and derived that “although civil rights cases were 16% of total civil filings, they constituted 37% of the total number of cases where sanctions were imposed.” Spiegel, *supra* note 83, at 172–73.

99 The FJC REPORT included the Rule 11 activity in five federal district courts—the District of Arizona, the District of Columbia, the Northern District of Georgia, the Eastern District of Michigan, and the Western District of Texas—that were chosen due to the availability of computerized information. FJC REPORT, *supra* note 94, Section 1B, at 1. Ultimately, “[t]he FJC Study included more than 55,000 cases.” Spiegel, *supra* note 83, at 170 (derived figure). The Hess Study gathered data on state and federal cases in Spokane County, Washington. Hess Study, *supra* note 94, at 316. Federal court data was gathered for civil cases filed from August 1, 1983, to December 31, 1990, by searching docket sheets. Hess Study, *supra* note 94, at 317. State court data was gathered for civil cases “that initiated . . . Rule 11 activity between January 1, 1990, and December 31, 1990” by searching case files. Hess Study, *supra* note 94, at 317.

100 FJC REPORT, *supra* note 94, Section 1C, at 1 (“To address the question of whether Rule 11 sanctions have been imposed in cases involving good-faith arguments for change in the law, we recommend that the reader consult the individual case summaries and make an independent evaluation.”).

101 Spiegel, *supra* note 83, at 173–74 (footnotes omitted).

102 *Id.* Professor Spiegel derived additional figures regarding sanction requests from the data in the FJC Report that also indicated disproportionality. *Id.* at 171 (“Civil rights cases were 9.75% of the 55,328 cases, but comprised 22.76% of the Rule 11 cases.”).

103 Hess Study, *supra* note 94, at 352. The Hess Study noted, however, that “civil rights plaintiffs were sanctioned at a similar rate (12% of requests) as other represented plaintiffs (16%).” *Id.* at 352. When looking at sanctions imposed, rather than sanctions requested, it is evident that “a significantly higher percentage of sanctions were granted against civil rights plaintiffs as a percentage of total sanctions granted than the percentage of civil rights cases relative to the total

Unlike the three other empirical studies that focused on case data, the AJS Study made its determinations based on a survey of 4,494 attorneys across three juridical circuits: the Fifth, Seventh, and Ninth.¹⁰⁴ Notwithstanding this methodological difference, the AJS Study similarly concluded that Rule 11 had a disproportionate impact on civil rights cases.¹⁰⁵ This conclusion was based on the fact that “[a]lthough civil rights cases made up 11.4% of federal cases filed, [the AJS Study] survey show[ed] that 22.7% of the cases in which sanctions had been imposed were civil rights cases.”¹⁰⁶

In response to these and other concerns, the rulemaking apparatus kicked in and Rule 11 was further amended in 1993 to make the imposition of sanctions discretionary, and, most importantly, to provide a “safe harbor”: litigants could avoid sanctions if their opponents point to some offending pleading or allegation and that pleading or allegation is withdrawn.¹⁰⁷

The responsiveness of the rulemaking system to legitimate concerns about disparate treatment under the otherwise neutral Rule 11 indicates the possibility that, should similar fears arise in light of the application of the plausibility standard under Rule 8, or any other procedural rule, the amendment process could be invoked to correct any such misapplication. It is to the experience with the plausibility standard that we now turn.

IV. GAUGING THE IMPACT OF *TWOMBLY* AND *IQBAL*

A. *The Impact of Twombly and Iqbal: Previous Studies*

Studies of the impact of *Twombly* and *Iqbal* on motion practice in federal courts have generated somewhat varying results. One, conducted by Professor Patricia Hatamyar Moore, found a slight rise in dismissal

caseload.” Spiegel, *supra* note 83, at 173. See also Hess Study, *supra* note 94, at 339.

¹⁰⁴ AJS Study, *supra* note 94, at 950. The survey elicited a response rate of 74.9%. *Id.*

¹⁰⁵ *Id.* at 966 (“our evidence tends to confirm the commentary about Rule 11’s disproportionate impact on civil rights cases.”).

¹⁰⁶ *Id.* at 965–66. It is also important to note that with respect to sanctions filed, as opposed to sanctions imposed, Rule 11 motions were filed in 18.7% of civil rights cases whereas civil rights cases made up only 11.4% of federal cases filed. *Id.* at 965. See also Spiegel, *supra* note 83, at 172.

¹⁰⁷ See David Marcus, *supra* note 55, at 420 (“Once its ramifications in terms of its impact on civil rights litigation manifested themselves, the Advisory Committee revised [Rule 11] and thereby weakened the blow.”). For an overview of the 1993 amendments to Rule 11, see Byron C. Keeling, *Toward a Balanced Approach to “Fivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1090-94 (1994).

rates in motions after *Twombly* but before *Iqbal*, from 46 percent to 48 percent. After *Iqbal*, she found a larger increase, with a dismissal rate of 56 percent.¹⁰⁸ A more recent study conducted for the federal Judicial Conference Advisory Committee on Civil Rules, found differing results.¹⁰⁹ Unlike the Hatamyar study, this study conducted sampling of decisions from a number of districts and did not rely on decisions reported in electronic databases. While this study found an increase in the dismissal rate in the sampled cases from 66 percent to 75 percent, it did not find a rise in dismissal rates in most categories of cases where leave to re-plead was not granted.¹¹⁰

One shortcoming of these previous studies is that both looked at outcomes in motions to dismiss based on a range of grounds, not just for lack of specificity of the pleadings. A more recent study,¹¹¹ conducted by one of the co-authors of this Article, attempted to overcome this apparent shortcoming by conducting a study of outcomes in cases involving motions to dismiss where only the specificity of the pleadings was challenged. That study focused only on the outcomes in cases in

108 Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 601-02 (2010). Professor Moore has since published a follow-up piece that found results similar to those found in her initial study. See Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012). Other studies have also engaged in similar empirical analysis of different parts of the *Twombly/Iqbal* puzzle. See, e.g., Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012) (showing increased dismissal rates in post-*Iqbal* sample of cases when compared to pre-*Twombly* sample). Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011) (analyzing dismissal rates in employment discrimination cases brought by black litigants, and comparing dismissal rates based on the race of the judge in such cases). For a full collection of published and unpublished studies to date of *Iqbal's* effect, see David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (June 2013).

109 See JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 13 (Fed. Judicial Ctr., 2011) [hereinafter CECIL REPORT], available at <http://ssrn.com/abstract=1878646>. An updated analysis for the Federal Judicial Center confirmed the previous report's findings. See JOE S. CECIL, ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf).

110 *Id.* at 13. While the dismissal rate of dismissals with prejudice remained static for most types of cases, the Cecil Report found one area in which dismissal rates rose significantly after *Iqbal*, i.e., in those cases involving "financial instruments," including mortgages. *Id.* at 12. In the pre-*Twombly* cases, the general dismissal rate was 47 percent (without leave to re-plead) in such cases; after *Iqbal*, a general dismissal rate 92 percent (without leave to re-plead). *Id.* at 14, tbl. 4.

111 Brescia, *supra* note 11, at 239.

which the plaintiffs alleged employment or housing discrimination.¹¹² Finally, that study looked beyond just dismissal rates to look at other aspects of these decisions—e.g., the number of motions filed and dismissals granted on these grounds, and the nature of the application of the plausibility test by the district court judges when assessing the sufficiency of the pleadings. That study showed:

Dismissal Rates. In the pre-*Twombly* group of cases, the overall dismissal rate was 61 percent, and 46 percent of cases were dismissed, at least partially “with prejudice.” In the period between *Twombly* and *Iqbal*, the overall dismissal rate was 56 percent, with the “with prejudice” rate 40 percent. After *Iqbal*, the overall dismissal rate rose to 72 percent, with the “with prejudice” rate rising to 50 percent.¹¹³

Application of the Plausibility Standard. That previous study also provided an analysis of the manner in which courts were applying the plausibility test. It revealed that district courts almost never invoked the “More Plausible Test,” nor did they even assess the plausibility of the allegations in the complaint. Rather, to the extent courts ostensibly reviewed the plausibility of the pleadings, what they did, if they invoked plausibility at all, was simply assessed whether the plaintiffs had pled the elements of their claims.¹¹⁴ Similarly, judges did not invoke their “jud[icial] experience and common sense” in assessing the adequacy of the pleadings.¹¹⁵

Volume of Motions and Dismissals. In the time periods analyzed in the previous study, both the number of motions filed, and the number of dismissals granted, rose considerably after *Iqbal*. For example, decisions on such motions after *Iqbal* were generated at a rate greater than five times the rate pre-*Twombly*, suggesting that motions to dismiss on the grounds the complaint lacked specificity were filed at a much higher rate after *Iqbal*.¹¹⁶ Additionally, the number of cases in which complaints were dismissed, either in whole or in part, rose dramatically after *Iqbal*: for example, 26 cases were dismissed pre-*Twombly*, while

112 *Id.* Like several other studies, this study also suffers from its limitations. One of which is that it does not use covariate controls, and does not attempt to engage in a qualitative comparison of the complaints in decisions issued pre- and post-*Twombly*. See Engstrom, *supra* note 108, at 1213-15. Such a granular and qualitative analysis would likely be beneficial, and would certainly enrich the dialogue concerning the true impact of *Iqbal* on both judicial and litigant behavior in its wake. Whether such an analysis would yield a sufficient volume of quantitative data is another question entirely, given the labor-intensive nature of such work and the difficulty of identifying qualitatively similar pleadings filed before and after *Iqbal*.

113 Brescia, *supra* note 11, at 260-61.

114 *Id.* at 277-79.

115 *Id.* at 284.

116 *Id.* at 280-83.

115 were dismissed in a similar time-frame post-*Iqbal*.¹¹⁷

B. Methodology

The instant study draws from the database compiled for the original *Iqbal Effect* study.¹¹⁸ A quick overview of that database follows.¹¹⁹ First, a collection of 548 cases¹²⁰ was gathered using various search terms in the Lexis database of reported decisions.¹²¹ The goal was to identify decisions on motions to dismiss in employment and housing discrimination cases¹²² in which the specificity of the pleadings was challenged.¹²³ Three groups of cases were then created: Group I included decisions on such motions issued between January 2004 and the decision in *Twombly*; Group II included decision on such motions issued between *Twombly* and before the decision in *Iqbal*; Group III included decisions issued after *Iqbal*, and before mid-December 2010.

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ For a detailed overview of the methodology utilized in compiling the database, *see id.* at 262-68.

¹²⁰ The original *Iqbal Effect* database held well more than 600 cases. In this study, decisions issued by magistrate judges, who are not nominated by the Executive, were excluded. For an overview of the rule of magistrate judges in the federal system, see generally Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661 (2005).

¹²¹ Admittedly, a limit to this study is the fact that it relied on only decisions published in an electronic database. To the extent that such electronically published sources result in a higher percentage of decisions in which the motions were granted, on the belief judges are more likely to submit such decisions for publication, such a distortion is as likely to have impacted the pre-*Twombly* data set as in the post-*Twombly* and post-*Iqbal* data sets. To the extent that it did (and to the extent such a distortion exists at all), it is likely to have affected all three data sets similarly. For an analysis of the differences between published and unpublished decisions in the context of employment discrimination litigation, *see* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990).

¹²² The study included cases asserting claims under the following laws: the Civil Rights Act of 1964 § 703(a)(1)-(2), 42 U.S.C.A. § 2000e-2(a)(1)-(2) (2006)(Title VII); Rehabilitation Act of 1973 § 504, 29 U.S.C.A. § 794 (2006); the Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a) (2006); the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 621 (2006); Equal Pay Act of 1963, 29 U.S.C.A. § 206(d) (2006); Family and Medical Leave Act of 1993, 29 U.S.C.A. § 2601 (2006); Equal Protection claims implicating employment or housing discrimination, which are described in *see* DAVID W. LEE, HANDBOOK OF SECTION 1983 LITIGATION § 2.15[A][1] 323-28 (2011); and housing discrimination claims under the Civil Rights Act (FHA) of 1968 § 801-819, 42 U.S.C.A. §§ 3601-3619 (2006). Cases asserting retaliation under any of these protections were also included in the study. *See* Anna Ku, Note, "You're Fired!" *Determining Whether a Wrongly Terminated Employee Who Has Been Reinstated with Back Pay Has an Actionable Title VII Retaliation Claim*, 64 WASH. & LEE L. REV. 1663, 1667-68 (2007) (describing elements of retaliation claims).

¹²³ A detailed description of these searches can be found in Brescia, *supra* note 11, at 262-264, nn. 118-123.

A range of techniques were utilized to exclude motions to dismiss that did not involve challenges to the specificity of the pleadings, including, *inter alia*, such grounds as expiration of relevant statutes of limitations or failure to exhaust administrative remedies.¹²⁴

Cases were then coded based on the outcome of the decision on the motion to dismiss in each case. Consistent with the manner in which other studies have coded decision outcomes, if any aspect of a motion to dismiss was granted, it was treated as a dismissal.¹²⁵ In the original *Iqbal Effect* study, outcomes were further refined to whether each matter was dismissed “with prejudice” or without. In that study, cases were categorized as dismissed “with prejudice” in one of three scenarios: when the deciding court explicitly denied leave to re-plead; when it found that the matter was dismissed with prejudice; or, simply, if the opinion was silent on whether the plaintiff could re-plead any claims.¹²⁶ This study did not go into such detail.

Once the database was compiled and the cases coded, the dismissal rate in the decisions was analyzed based on certain characteristics of the deciding district court judge: i.e., the judge’s race or ethnicity, the gender of the judge, and the party affiliation of the president who nominated the judge.¹²⁷ The results of this analysis follow.

C. Results

1. Overall Dismissal Rates

Taken as a whole, the dismissal rates for all cases in the database across the three time periods are as follows. In Group I, the pre-*Twombly* period, the dismissal rate for all employment and housing discrimination cases in which the specificity of the pleadings was challenged was 62 percent. In the period immediately following the issuance of the *Twombly* opinion, but before *Iqbal* (i.e., Group II), the dismissal rate actually went down, to 56 percent. Following *Iqbal* (i.e., the Group III cases), the dismissal rate for all cases increased to 71

¹²⁴ For a detailed overview of the bases for excluding cases from the database, *see id.* at 264-68.

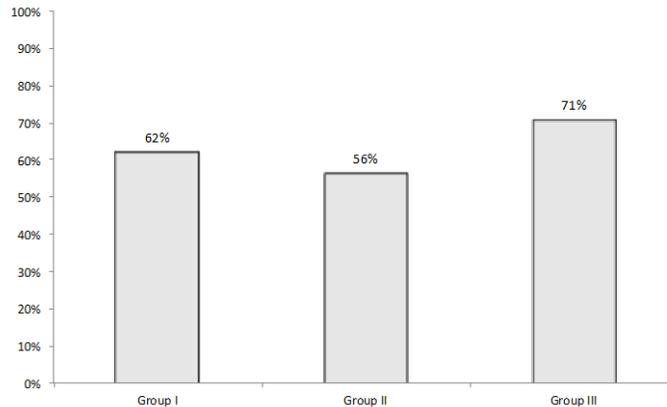
¹²⁵ *See, e.g.*, CECIL REPORT, *supra* note 109, at 5.

¹²⁶ *See* Brescia, *supra* note 11, at 261. According to the federal rules, a dismissal is considered an “adjudication on the merits” unless the deciding court explicitly states that the outcome is without prejudice. FED. R. CIV. P. 41(b). This methodology was also used in the CECIL REPORT, *supra* note 109, at 5.

¹²⁷ The data on judge profiles is maintained by the Federal Judicial Center and is available at <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx>.

percent. These results are displayed graphically below in Table 1.

TABLE 1: OVERALL DISMISSAL RATES.¹²⁸



2. Dismissal Rates by Party Affiliation of the Nominating President

As discussed above, the cases were identified by the party affiliation of the president who nominated the judge issuing the decision in each case. The dismissal rates of those decisions revealed a statistically significant¹²⁹ difference in the outcome in these cases. Moreover, identifying the cases in this way reveals somewhat diverging results from the overall dismissal results laid out in Table 1, above.

Of the motions decided by judges nominated by Democratic presidents in Group I, 64 percent were dismissed. The Group II and Group III figures are 58 percent and 67 percent, respectively. The difference in these case outcomes across the three time periods was not statistically significant.

The results of cases issued by judges nominated by Republican presidents, on the other hand, reveals statistically significant differences across the three time periods. In the Group I period, these judges dismissed 61 percent of the cases before them. In the Group II period, the dismissal rate went down to 54 percent of cases. In the Group III period, the dismissal rate rose considerably, to 74 percent. In other

¹²⁸ The raw values for each Table can be found at *infra* Appendix A.

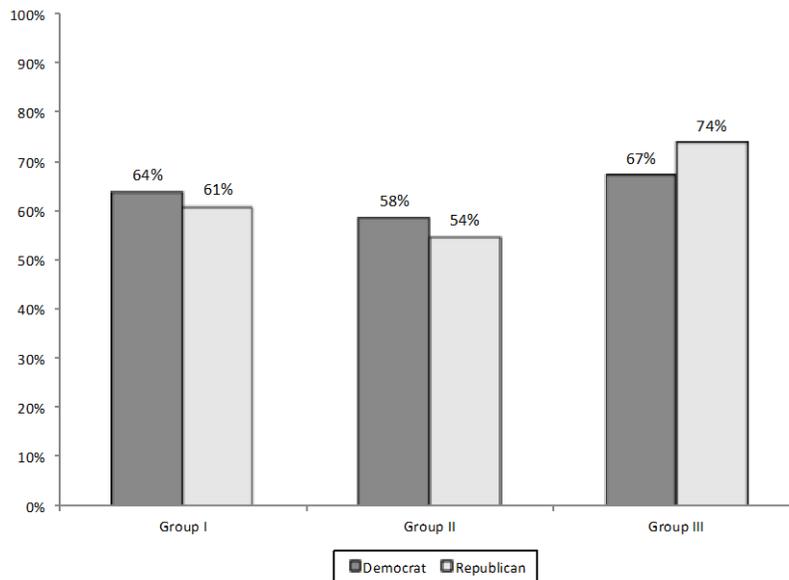
¹²⁹ The p-values for each Table can be found at *infra* Appendix B.

words, there was a 37 percent increase in dismissal rates after *Iqbal* when compared to the time-period after *Twombly*, but before *Iqbal*. Comparing the pre-*Twombly* period to the post-*Iqbal* period, there was a 21 percent increase in dismissal rates in cases decided by judges nominated by Republican presidents.

These outcomes reveal a statistically significant difference in the dismissal rates across these time periods for judges nominated by Republican presidents, meaning the outcomes in *Twombly* and *Iqbal* would appear to have had a statistically significant impact on the decisions on motions challenging the specificity of the pleadings on judges nominated by Republican presidents.

The outcomes in cases based on the political party of the nominating presidents are displayed graphically in Table 2, below.

TABLE 2: DISMISSAL RATES BY PARTY AFFILIATION OF THE NOMINATING PRESIDENT.

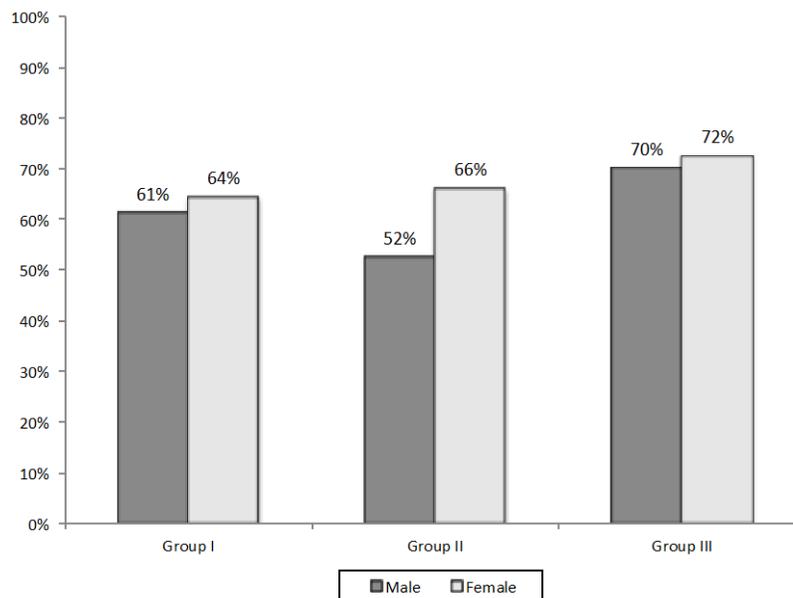


3. Dismissal Rates by Gender of Deciding Judge

To assess the relevance of other characteristics of the deciding judges, two more tests were performed on the data, one based on the gender of the deciding judge and a second based on the race of the

deciding judge. For gender, male judges in the Group I time period dismissed cases 61 percent of the time; for Group II, 52 percent of the time; and in Group III, 70 percent of the time. Female judges dismissed cases in the Group I time period 64 percent of the time; in the Group II time period, 66 percent of the time; and in the Group III time period, 72 percent of the time. The differences in outcomes of decisions issued by male judges, set forth graphically in Table 3, were statistically significant.

TABLE 3: DISMISSAL RATES BY GENDER OF JUDGE.

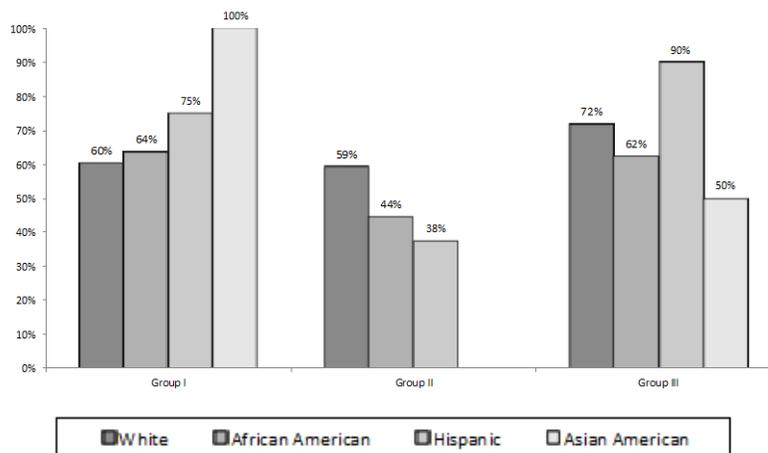


4. Dismissal Rates by Race of Judge

A final dismissal rate analysis consisted of determining the dismissal rates for judges based on their race. For white judges, they dismissed cases in Group I 60 percent of the time; in Group II, 59 percent of the time; and in Group III, 72 percent of the time. These differences were statistically significant. For African-American judges, the dismissal rate in Group I was 64 percent; in Group II, 44 percent; in Group III, 62 percent. For Hispanic or Latino judges, the dismissal rate

was 75 percent in the Group I time period; 38 percent in the Group II time period; and 90 percent in the Group III time period. For Asian-American judges, the Group I dismissal rate was 100 percent and the Group III dismissal rate was 50 percent. For Hispanic or Latino and Asian-American judges, the sample sizes were so small that these results are not particularly informative.¹³⁰ These results are displayed in Table 4, below.

TABLE 4: DISMISSAL RATES BY THE RACE OF THE DECIDING JUDGE.



5. Number of Motions and Number of Dismissals

Previous research revealed a significant increase in the number of reported decisions on motions challenging the specificity of the pleadings and the number of dismissals based on these grounds. Indeed, a comparison of similar time frames pre-*Twombly*, post-*Twombly* and post-*Iqbal*, revealed just twelve reported decisions per calendar quarter on motions challenging the specificity of the pleadings before *Twombly*, but sixty-one such decisions in a post-*Iqbal* quarter. Furthermore, the number of decisions dismissing cases, in whole or in part, pre-*Twombly* was just forty-six but in a similar time period post-*Iqbal*, was 196.¹³¹

This data was analyzed to determine the extent to which some of

¹³⁰ Where the expected frequencies are small, the Pearson Chi-Square Test diminishes in utility. Instead, one might use Fisher's Exact Test.

¹³¹ See Brescia, *supra* note 11, at 280-83.

these results—both the number of reported decisions and the number of dismissals—included any statistically significant difference in the number of reported cases and dismissed cases by the party affiliation of the president who nominated each judge. Here, we also compared the number of decisions and dismissals by party affiliation of the nominating president to the overall number of district court judges by that same affiliation to determine if there was disproportionate representation of either class of judges in this pool of decisions and dismissals. If there was a disproportionate number of dismissals by a particular class of judge, one could posit that litigant behavior was steering defendants to make more motions before a certain class of judge.¹³² However, we saw very little variation between the number of decisions and dismissals based on the party affiliation of the nominating president. If anything, there was a slight overrepresentation of decisions and dismissals issued by judges nominated by Democratic presidents, which suggests that defendants may not be choosing to make motions only before those judges that might be perceived as more likely to grant such dismissals. The results of this analysis are displayed below in Tables 5¹³³ and 6. The “expected” outcomes are a reflection of the anticipated results if the makeup of the judges in the data base pool was a reflection of the makeup of the overall number of district court judges by party affiliation of the presidents who nominated those judges.¹³⁴

132 On litigant behavior in the shadow of *Twombly* and *Iqbal*, see Jonah B. Gelbach, *Selection in Motion: A Formal Model of Rule 12(B)(6) and the Twombly-Iqbal Shift in Pleading Policy* (Yale L. Sch., Aug. 29, 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138428.

133 See *infra*, Appendix C for a time line of Table 5 showing the number of cases in the database compared to the expected outcomes. The similarities between the actual outcome and the expected outcome are striking, which suggests that the method utilized in case selection was effective at identifying a representative sample of cases.

134 For a breakdown of the judiciary based on the party affiliation of the nominating president, see ALLIANCE FOR JUSTICE, *THE STATE OF THE JUDICIARY: PRESIDENT OBAMA AND THE 111TH CONGRESS 9* (2011), available at http://www.afj.org/judicial-selection/state_of_the_judiciary_111th_congress_report.pdf.

TABLE 5: NUMBER OF REPORTED DECISIONS IN DATA BASE BY PARTY AFFILIATION OF NOMINATING PRESIDENT COMPARED TO EXPECTED OUTCOMES BY CLASSIFICATION OF ALL DISTRICT COURT JUDGES.

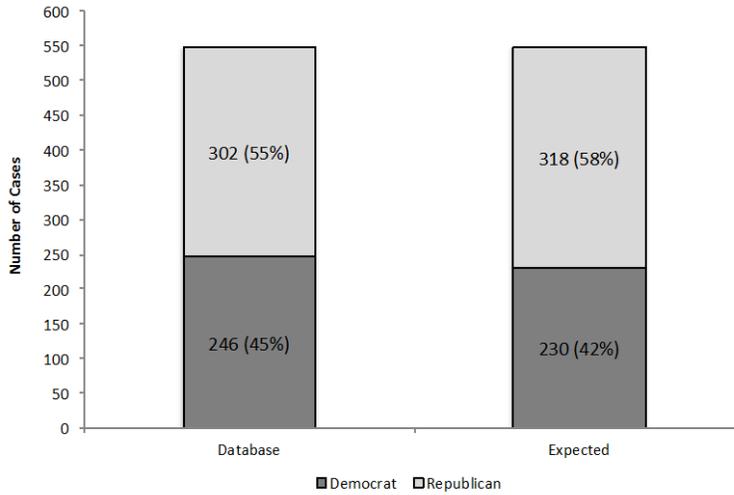
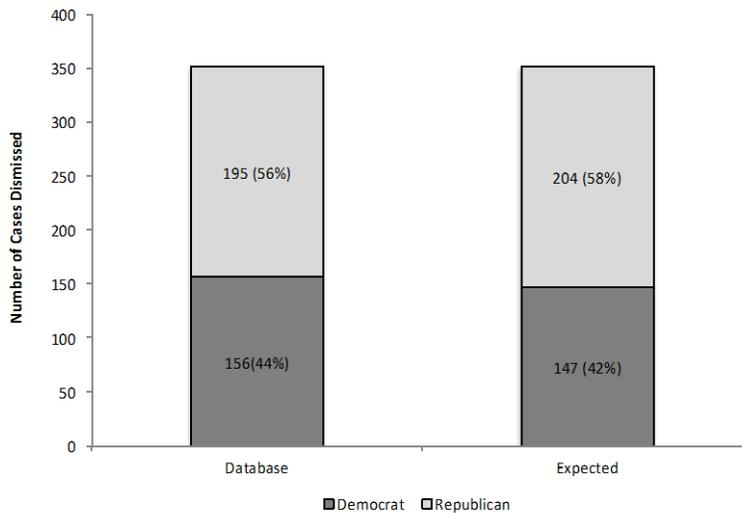


TABLE 6: NUMBER OF DISMISSALS BY PARTY AFFILIATION OF NOMINATING PRESIDENT COMPARED TO EXPECTED OUTCOMES BY CLASSIFICATION OF ALL DISTRICT COURT JUDGES.



D. Implications

The analysis of granted dismissal motions in employment and housing discrimination cases based on the lack of specificity of the pleadings reveals a statistically significant difference in outcomes based on the political party of the president who nominated the judges granting the motions. In the cases analyzed in this study, the dismissal rates on motions before judges nominated by Republican presidents are higher than for judges nominated by Democratic presidents. There were no statistically significant results with respect to judges nominated by Democratic presidents while there were for judges nominated by Republican presidents. While the differences are not stark, they raise questions that warrant further analysis and study.

Looking simply at the universe of civil rights cases assessed in this study, the discrepancy in outcomes between the two classes of judges—described by the party affiliation of the president who nominated the judge—call for more in-depth analysis of outcomes in all civil rights cases, and in all cases in general. One shortcoming of this study is that it did not compare outcomes in civil rights cases to outcomes in other types of cases. While other studies have done that, as stated earlier, those studies had their limitations. While the Hatamyar study showed a rise in dismissal rates in civil rights cases, the Cecil Report did not. Those studies, however, did not assess outcomes in motions just challenging the specificity of the pleadings: i.e., the heart of the issue in both *Twombly* and *Iqbal*. Thus, more research is needed to determine if in civil rights cases, judges—regardless of the president nominating them—are more prone to dismiss these cases as opposed to others.

Analysis of more recent cases, and of all decisions, not just those reported in electronic databases, is warranted. If these findings bear out—that the plausibility standard is being wielded disproportionately against civil rights plaintiffs by judges nominated by Republican presidents—it raises questions about the viability of the plausibility standard as a neutral rule of procedure that is applied impartially and evenly across all substantive areas of law.

What might be some cause for relief is that the outcomes were not starker. In addition, as previous research indicates, judges do not seem to be applying their “judicial experience and common sense” to gauge which story was more plausible: the one that alleged illicit conduct or the one that suggested no such conduct had occurred. In other words, judges seem to be ignoring the way in which the Court deployed the

plausibility standard in both *Twombly* and *Iqbal*.¹³⁵ While that may point to the fact that the most problematic aspect of the standard—its indeterminacy—may not appear to be infecting judicial decision making, it raises even more questions about how judges, are, in fact, behaving in the wake of the introduction of the new pleading standard. If judges were applying the More Plausible Test in the same way in which the Court did in *Twombly* and *Iqbal*, we would have some way to determine how judges were using the plausibility standard, and appellate courts would have more ground on which to stand when conducting their reviews of lower court decisions. The fact that all judges—regardless of the party affiliation of the president who nominated them—appear to be dismissing more civil rights cases under *Twombly* and *Iqbal* than they did before their issuance, and that judges nominated by Republican presidents seem to be dismissing such cases at a higher rate, while, at the same time, courts are not deploying the plausibility standard in the same way the Court did in *Twombly* and *Iqbal*, suggests that trial courts see these precedents as license to dismiss civil rights cases more frequently regardless of the new plausibility standard.

Admittedly, this research merely scratches the surface of these issues and more research could, and should, be undertaken. In light of the decade-long experience with the 1983 amendments to Rule 11, the rulemaking apparatus took a hard look at judicial practice in light of the Rule's new provisions and found it disconcerting enough to revise the Rule to reduce the impact of its new provisions on litigants in general, and, arguably, civil rights plaintiffs in particular. This research, if it does anything, suggests that the plausibility standard warrants a similar hard look at practice since its introduction.

IV. CONCLUSION: THE PROMISE OF PROCEDURE

Many have seen parallels between the quintessential American institution of baseball and the law and the legal system through which it is mediated.¹³⁶ Legal scholarship often draws from these parallels,

¹³⁵ For a discussion of this phenomenon, what Burbank and Subrin call “lawlessness cubed,” i.e., that the Supreme Court, in *Twombly* and *Iqbal*, ignored the requirements of the Rules Enabling Act for amending the rules, and, in turn, lower courts seem to be ignoring the heart of these precedents, see Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C. R. C. L. L. REV. 399, 407-408 (2011).

¹³⁶ As Paul Finkelman writes:

[B]aseball is itself a highly legalistic game. It has an elaborate set of rules, far more so than most other games. At the professional level it requires a highly trained multi-judge panel of umpires to implement and interpret the rules. Every pitch requires a legal ruling. Every time a ball is hit, one of the umpires must make a ruling on whether it is

mining the elegance of the infield fly rule as law,¹³⁷ drawing connections between the Electoral College and the World Series,¹³⁸ or identifying the similarities between the *Erie* doctrine and the functioning of the designated hitter rule in interleague play.¹³⁹ With *Twombly* and *Iqbal*, Arthur Miller has even evoked the old Chicago Cubs double play combination of Tinkers, Evers, and Chance immortalized in poem in calling *Conley* to *Twombly* to *Iqbal* a “double play” on the rules of civil procedure.¹⁴⁰

Judges are not immune from the metaphor of baseball as law. During Chief Justice Roberts’s confirmation hearing, he famously promised to serve as a faithful umpire, calling balls and strikes and not making law or interjecting himself into the legal contests before him.¹⁴¹

This metaphor of the objective umpire is apt when assessing the role procedural rules should play in the contests they play a critical role in resolving. While there are those that look at the application of procedural laws as political, and the promise of neutral adjective law a sham, some recognize the important normative role the promise of procedural neutrality can play, what Robert Cover called its “aspiration.”¹⁴²

Indeed, it is this promise of procedural neutrality that provides a normative metric to assess whether judges interject themselves into conflicts improperly by applying otherwise neutral rules in a non-

fair or foul. As with our legal system, each umpire has a jurisdiction. The home plate umpire calls a hit ball fair or foul *before* it reaches a base; the first or third base umpires make the call after the ball is beyond their bag. In the World Series extra umpires are on the field, creating a mini-Supreme Court which provides new pairs of eyes to scrutinize plays in the outfield.

Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 241-42 (1998) (citations omitted). A collection of representative scholarship drawing these parallels can be found in *BASEBALL AND THE AMERICAN LEGAL MIND* (Spencer Waller *et al.* eds., 1995).

137 Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1476-77 (1975).

138 Michael Herz, *How the Electoral College Imitates the World Series*, 23 CARDOZO L. REV. 1191 (2002).

139 Ian Group, *Level Playing Fields and Parallel Tracks: A Look at the Development of the Erie Doctrine and the Designated Hitter Rule*, 22 NYSBA ENTERTAINMENT, ARTS, AND SPORTS LAW JOURNAL 89 (2011).

140 See Miller, *supra* note 44. See also, William Hageman, *Remembering “Tinkers to Evers to Chance,”* CHICAGO TRIBUNE, July 10, 2010, http://articles.chicagotribune.com/2010-07-05/news/ct-tinker-cubs-story_1_gonfalon-bubble-cubs-fan-poem.

141 Chief Justice Roberts asserted as follows: “I will remember that it’s my job to call balls and strikes, and not to pitch or bat.” Todd S. Purdum & Robin Toner, *Senators to Question 1st Supreme Court Nominee in 11 Years*, N.Y. TIMES, Sept. 13, 2005, http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13confirm.html?scp=183&sq=roberts+supreme+court&st=nyt&_r=0.

142 Covert, *supra* note 52, at 733.

objective way. When that occurs, corrective action is possible, as when the 1983 amendments to Rule 11 were further amended just 10 years later to allay fears that this rule was being used disproportionately against certain types of litigants.

It is likely no accident that new theories and rights were established to protect those with less power just as the promise of procedural neutrality and trans-substantivity took its firmest hold. If a party could only assert substantive claims within well-worn procedural tracks, it would necessarily disfavor the prosecution of new and novel claims that failed to fit into such tracks. In such a regime, it is difficult to imagine creative claims—such as those striking down restrictive covenants and school segregation in the years following the introduction of the federal rules or laws banning same-sex marriage today—ever seeing the light of day.¹⁴³

Returning to the baseball metaphor, a cynic's view of this American sport in the early Twenty-First Century would suggest that it is all a racket, designed to make athletes and their boosters fabulously wealthy at the expense of values far more essential to the advancement of society.

Just as the myth and mythology around sports have their own logic and value, the promise of procedural neutrality, like the hermeneutical approach in *The Life of Pi*, is the far “better story.”¹⁴⁴ Those that deny its force run the risk of rendering any arguments against improper judicial bias toothless. Without this normative value, the promise of procedural neutrality will surrender to the forces of will and power. Moreover, when those with the least power attempt to fight on fields where power alone is the basis on which contests are decided, the powerless will always lose.¹⁴⁵

Faith to and belief in the norm of procedural neutrality is essential to protect those without formal power within the system and to remain true to the promise of equal justice under law. While this may be a game

143 As Richard Marcus writes:

In the end, it is important to remember that the dangers posed are real should the views of the critics prevail. Before we turn our backs on the neutral and trans-substantive system we have today, we should reflect long and hard on the benefits that system has provided. Whatever the short-term advantages of deals that may be arranged politically for favored types of litigants or litigation, the long-term risks of throwing out the baby with the bathwater seem to me very serious.

Marcus, *supra* note 70, at 825.

144 YANN MARTELL, *THE LIFE OF PI* 398 (2002).

145 See, e.g., Carrington, *supra* note 50, at 2075 (“Procedural neutrality over the longer term corrects the political weakness of individuals whose rights are idiosyncratic or episodic and hence not organizable.”).

played by the naïve, is there any other choice? To paraphrase Winston Churchill when speaking about democracy, the promise of procedural neutrality may be seen by some as a less favored approach; it may be only when compared to all others that have been tried.¹⁴⁶

Let us close with the words of Bart Giamatti, who preferred what many would call a romantic view of baseball.

Of course, there are those who learn after the first few times. They grow out of sports. There are also others who were born with the wisdom to know that nothing lasts. These are the truly tough among us, the ones who can live without illusion, or without even the hope of illusion. I am not that grown-up or up-to-date. I am a simpler creature, tied to more primitive patterns and cycles. I need to think something lasts forever, and it might as well be that state of being that is a game; it might as well be that, in a green field, in the sun.¹⁴⁷

146 Statement of Winston Churchill, 444 Parl. Deb., H.C. (5th ser.) (1947) 206-07 (U.K.) (“It has been said that democracy is the worst form of government except all the others that have been tried.”).

147 A. Bartlett Giamatti, *The Green Fields of the Mind*, reprinted in *A GREAT AND GLORIOUS GAME: BASEBALL WRITINGS OF A. BARTLETT GIAMATTI* 13 (Kenneth S. Robson, ed. 1998).

2014

THE POLITICS OF PROCEDURE

367

APPENDIX A:

Dismissal Rates

	Group I	Group II	Group III	Total
Not Dismissed	64	66	67	197
Dismissed	104	85	162	351
Total	168	151	229	548
Dismissal Rate	61.90%	56.29%	70.74%	-

Dismissal Rates by Gender

	Group I	Group II	Group III	Total
Male				
Not Dismissed	49	51	48	148
Dismissed	77	56	112	245
Total	126	107	160	393
Dismissal Rate	61.11%	52.34%	70.00%	-
Female				
Not Dismissed	15	15	19	49
Dismissed	27	29	50	106
Total	42	44	69	155
Dismissal Rate	64.29%	65.91%	72.46%	-

368

AKRON LAW REVIEW

[47:329]

Dismissal Rates by Party Affiliation of Nominating President

	Group I	Group II	Group III	Total
Democrat				
Not Dismissed	27	30	33	90
Dismissed	47	42	67	156
Total	74	72	100	246
Dismissal Rate	63.51%	58.33%	67.00%	-
Republican				
Not Dismissed	37	36	34	107
Dismissed	57	43	95	195
Total	94	79	129	302
Dismissal Rate	60.64%	54.43%	73.64%	-

2014

THE POLITICS OF PROCEDURE

369

Dismissal Rates by Race or Ethnicity

	Group I	Group II	Group III	Total
White				
Not Dismissed	53	51	52	156
Dismissed	80	74	132	286
Total	133	125	184	442
Dismissal Rate	60.15%	59.20%	71.74%	-
African American				
Not Dismissed	8	10	11	29
Dismissed	14	8	18	40
Total	22	18	29	69
Dismissal Rate	63.64%	44.44%	62.07%	-
Hispanic				
Not Dismissed	3	5	1	9
Dismissed	9	3	9	21
Total	12	8	10	30
Dismissal Rate	75.00%	37.50%	90.00%	-
Asian American				
Not Dismissed	0	0	3	3
Dismissed	1	0	3	4
Total	1	0	6	7
Dismissal Rate	100.00%	N/A	50.00%	-

APPENDIX B:
STATISTICAL SIGNIFICANCE

To determine whether there was a statistically significant relationship between dismissal and time group for each demographic characteristic, we used the Pearson Chi-Square Test of independence. In contrast to the original *Iqbal Effect* study, cases in which any aspect of a motion to dismiss was granted were coded “Dismissed” and all other cases were coded “Not dismissed.” Consistent with the prior study, however, the cases were coded Group I, II, or III where “Group I” includes decisions on motions issued between January 2004 and the decision in *Twombly*, “Group II” includes decisions on such motions issued between *Twombly* and before the decision in *Iqbal*, and “Group III” includes decisions issued after *Iqbal* and before mid-December 2010. For each demographic characteristic, we populated a contingency table using the levels of the dismissal and time group variables. For example, see Table B1 below. In Table B1, the figure in the “Dismissed”, “Group II” cell of the Republican contingency table (43) represents the frequency of cases where a judge nominated by a Republican affiliated President granted any aspect of a motion to dismiss after the decision in *Twombly* and before the decision in *Iqbal*. The contingency tables were then used to calculate the p-values in Table B2 below. P-values of .05 are typically considered statistically significant.

TABLE B1: REPUBLICAN CONTINGENCY TABLE

	Group I	Group II	Group III	Total
Not dismissed	37	36	34	107
Dismissed	57	43	95	195
Total	94	79	129	302

2014

THE POLITICS OF PROCEDURE

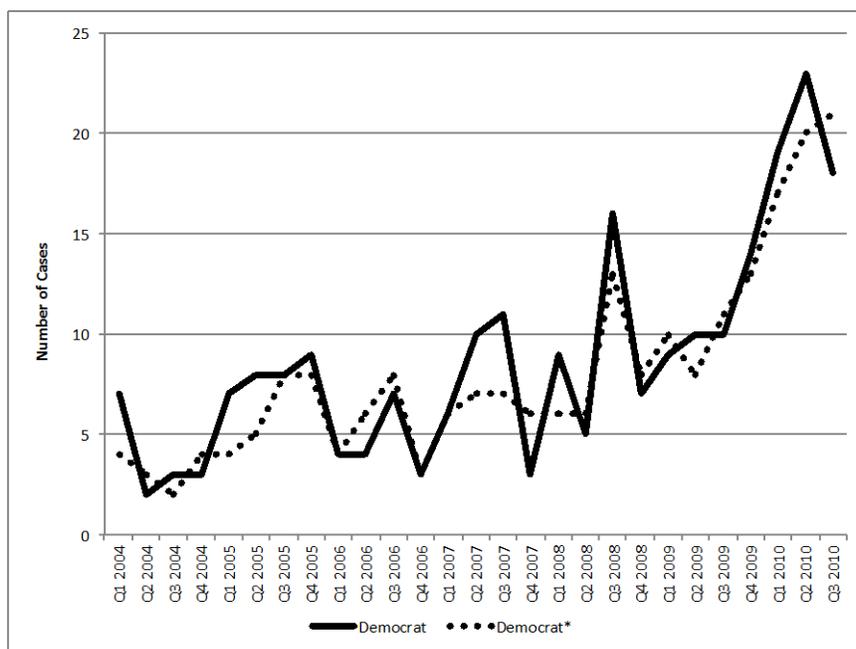
371

TABLE B2: P-VALUES

Table	Variables Compared	P-value
1	Total: Dismissal & Group	0.013
2	Republican: Dismissal & Group	0.012
2	Democrat: Dismissal & Group	0.508
3	Male: Dismissal & Group	0.013
3	Female: Dismissal & Group	0.612
4	White: Dismissal & Group	0.032
4	African American: Dismissal & Group	0.398

APPENDIX C:

This appendix sets forth the number of cases per quarter decided by judges nominated by Democratic presidents and Republican presidents. The solid line indicates the number generated from the database. The dotted line presents the number that would be expected if the same proportion of judges nominated by party affiliation of the nominating president existed in the database as does for the entire body of federal district court judges.



2014

THE POLITICS OF PROCEDURE

373

