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**BURN UP THE CHAFF WITH UNQUENCHABLE FIRE:  
WHAT TWO DOCTRINAL INTERSECTIONS CAN TEACH  
US ABOUT JUDICIAL POWER OVER PLEADINGS**

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#### INTRODUCTION

As long as there have been courts to resolve disputes, there has been tension between principles of access and efficiency. We want the judicial system to be open to claimants, but if the doors of justice are opened too wide, then means are needed for intercepting those cases that, in hindsight, ought not to have been welcomed in the first place. We need, in other words, tools for effectively gathering the wheat into the barn but reliably burning up the chaff, as promptly and justly as possible.<sup>1</sup> This is not only a matter of fairness to defendants but also of preserving resources for those who do belong so that they may have a meaningful opportunity at relief.<sup>2</sup>

The balance between access and efficiency certainly can be adjusted through modifications to the substantive law. Procedural reforms, however, are uniquely capable of transsubstantively regulating the flow of judicial business. The Supreme Court and Congress (sometimes acting in concert through the Rules Enabling Act<sup>3</sup> process and sometimes acting independently) have calibrated and recalibrated the balance between access and efficiency over the years and in innumerable ways through adjustments in the procedural law. These alterations range from: setting the scope of and limits on the process of conducting discovery<sup>4</sup> to imposing penalties on litigants and their lawyers for abusing the judicial process;<sup>5</sup> establishing prerequisites to the institution of

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<sup>1</sup> *Matthew* 3:11-12 (New Revised Standard) (“I baptize you with water for repentance, but one who is more powerful than I is coming after me . . . . His winnowing fork is in his hand, and he will clear his threshing floor and will gather his wheat into the granary; but the chaff he will burn with unquenchable fire.”).

<sup>2</sup> See *Jones v. Bock*, 127 S. Ct. 910, 914 (2007) (observing that most prison litigation cases, which as of 2005 accounted for almost ten percent of all civil cases filed in federal court, “have no merit” and “many are frivolous,” and that “[t]he challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit”).

<sup>3</sup> 28 U.S.C. § 2072 (2000).

<sup>4</sup> Compare, FED. R. CIV. P. 26(b)(1) (stating the current default position that parties may obtain discovery of “any matter, not privileged, that is relevant to the claim or defense of any party” and providing that “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action”), with FED. R. CIV. P. 26(b)(1) (1993) (stating the pre-2000 formulation which makes discoverable any information “relevant to the subject matter involved in the action”).

<sup>5</sup> Compare FED. R. CIV. P. 11 (1993) (detailing and expanding the procedure for and nature of sanctions), with FED. R. CIV. P. 11 (1983) (providing a more general and less

litigation<sup>6</sup> to adjusting rule-based incentives for encouraging the voluntary disposition of cases;<sup>7</sup> and countless other ways in between.<sup>8</sup> Indeed, at least in the modern era, it is no exaggeration to say that running through nearly every debate over the scope, applicability, content, and purpose of procedural law is this fundamental thematic tension: how to balance access to justice against the perceived need for regulating the flow of cases through the judicial system in an orderly and efficient manner.<sup>9</sup>

In a series of three cases in 1986, the Court fully engaged this same debate over the scope of judicial procedural power, signaling its acceptance of summary judgment as the principal method of intercepting cases during the

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severe approach to sanctions). There is a substantial body of academic literature discussing the two versions of Rule 11. See, e.g., Georgene Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 591-628 (1998). See generally *Symposium: Happy (?) Birthday Rule 11*, 37 *LOY. L.A. L. REV.* 516 (2004) (discussing the 1983 and 1993 versions of Rule 11 and the impact the rule has had on enhancing legal professionalism and curbing nonmeritorious litigation).

<sup>6</sup> See, e.g., 42 U.S.C. § 1997e(a) (2004) (“No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”); FLA. STAT. ANN. § 766.104 (West 2004) (providing that counsel in a medical malpractice action must conduct a reasonable investigation to determine that a good faith basis for a suit exists, and that for purposes of this statutory section, “good faith may be shown to exist if the claimant or his or her counsel has received a written opinion . . . of an expert”); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005) (mandating service of plaintiff’s expert reports against each defendant health care provider within 120 days after filing suit).

<sup>7</sup> FED. R. CIV. P. 68. See generally Robert G. Bone, “To Encourage Settlement”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 *Nw. U. L. REV.* (forthcoming 2008) (examining the history of the conventional understanding of Rule 68 as a tool for settlement promotion).

<sup>8</sup> See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 *GEO. L.J.* 887 (1999) (examining the history and challenges of “court rulemaking” and advocating for a model of rulemaking in which Congress defers to the court rulemaking process and limits intervention to those situations where there is a compelling need to alter the court-made rules); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 *NOTRE DAME L. REV.* 1677 (2004) (providing a historical account of procedural law in the federal courts, with an emphasis on congressional involvement); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 *N.Y.U. L. REV.* 1165 (1996) (discussing the intersection of procedural and statutory reform undertaken by both the Supreme Court and Congress); Richard L. Marcus, *Reform Through Rulemaking?*, 80 *WASH. U. L.Q.* 901 (2002) (discussing different views on the history of judicial rulemaking and the impact the rulemaking has had on litigation and the judiciary at large).

<sup>9</sup> See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 *J. EMPIRICAL LEGAL STUD.* 591, 624 (2004).

litigation process,<sup>10</sup> or as Arthur Miller more descriptively put it, as a “powerful tool for judges to control dockets and respond to the supposed ‘litigation explosion.’”<sup>11</sup> Whether *Celotex* and the rest of the 1986 trilogy were the cause,<sup>12</sup> or only a contributing factor,<sup>13</sup> summary judgment has become a fixture of modern civil pretrial practice.

But the times they are a-changin’,<sup>14</sup> we are told. Even if the Court’s interpretation of the summary judgment standard in *Celotex* was prompted in no small part by concern over the “litigation explosion” contemporaneously perceived to exist, the post-modern account of the state of the civil justice system insists that cases have become even more complicated since then.<sup>15</sup>

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<sup>10</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986) (holding that the moving party in a motion for summary judgment may discharge its burden by pointing out an absence of evidence to support the non-moving party’s case and characterizing Rule 56 as a rule intended to dispose of nonmeritorious claims); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (stating that when deciding motions for summary judgment, “[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party”).

<sup>11</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1056 (2003).

<sup>12</sup> See, e.g., Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1334-35 (2005) (citing, as evidence of the trilogy’s impact, data that show a decrease in the number of federal trials and an increase in summary judgment motions since 1986).

<sup>13</sup> See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 (2007) (collecting empirical evidence and concluding, inter alia, that incidence of summary judgment motion practice began increasing before 1986).

<sup>14</sup> BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

<sup>15</sup> See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770-72 (2008) (refusing to extend the court-established implied cause of action for section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 to customer and supply companies, finding that “there would be a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees. Our precedents counsel against this extension . . . .”); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007) (“Private securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (identifying judicial and legislative policy considerations which have led the Court and Congress to take steps to curb “perceived abuses of the class-action vehicle in litigation”); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005) (dismissing plaintiff’s claims as insufficient under FED. R. CIV. P. 8 assuming “that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss,” while simultaneously emphasizing the necessity for

Discovery costs have soared, as have abusive discovery practices,<sup>16</sup> prompting concern that the 1938 Federal Rules of Civil Procedure are no longer suitable for the burdens of modern litigation.<sup>17</sup> The net effect of these transformations of the litigation landscape is that the mere institution of a lawsuit triggers previously unseen degrees of burden. Summary judgment, once the defendant's favored salvation, may no longer be up to the task of ameliorating these harsh effects. New tools are needed to intercept cases before these burdens are triggered. And the most promising new tool being talked about today is judicial regulation of cases at the pleading stage, such as is reflected by Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>18</sup>

Of course, there is nothing new about Rule 12(b)(6): it was part of the original package of federal rules that went into effect in 1938, with antecedents in the English common law.<sup>19</sup> What is new is a heightened sense of the need to use it perhaps more robustly than previously employed. The Supreme Court recently reinvigorated this debate over access and efficiency with its 2005 decision in *Dura Pharmaceuticals, Inc. v. Broudo*<sup>20</sup> and subsequent 2007

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some "indication of the economic loss and proximate cause"); *id.* at 347-48 (observing that a low pleading threshold as to the "loss causation" element of a plaintiff's claim in a securities fraud class action "would tend to transform a private securities action into a partial downside insurance policy").

<sup>16</sup> See, e.g., *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 182 (3d Cir. 1988) ("[L]itigation today is too expensive a process to waste time on fanciful claims . . ."); *Jacobs v. Tempur-Pedic Int'l, Inc.*, No. 4:07-CV-02-RLV, 2007 WL 4373980, at \*2 (N.D. Ga. Dec. 11, 2007) (recognizing that while courts should be cautious in granting motions to dismiss prior to discovery, courts must not "forget that proceeding to antitrust discovery can be expensive"); *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase."), *cited with approval in Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007).

<sup>17</sup> See, e.g., Richard A. Epstein, *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 65-66 (2007) [hereinafter Epstein, *How Motions to Dismiss*] ("The nub of the difficulty is that the notice pleading regime of 1938 performs erratically in the context of modern complex litigation . . . [T]he 1938 Federal Rules of Civil Procedure are not well suited to the complexities of modern litigation, especially in antitrust law, and arguably in other areas as well.").

<sup>18</sup> FED. R. CIV. P. 12(b)(6).

<sup>19</sup> See Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1875-76 (2008) (commenting that "[t]he common law demurrer to the pleadings has much similarity to the motion to dismiss" as it is defined in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), but arguing that post-*Twombly* the motion to dismiss standard is no longer comparable as it now requires "that the plaintiff . . . plead a plausible claim").

<sup>20</sup> 544 U.S. 336, 346 (2005) (requiring a plaintiff to plead loss causation and stating that failure to require such a pleading would allow parties to file nonmeritorious, abusive claims).

decisions in *Bell Atlantic Corp. v. Twombly*<sup>21</sup> and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*<sup>22</sup> Dry and technical as they may have been, the Court's decisions symbolize the predominant thematic tension by asking how much judicial power courts should invest in regulating the litigation process through enforcement of pleading norms.

The Court's recent decisions, and *Twombly* in particular, may or may not mark a fundamental change in where courts strike the balance between access and efficiency. It is still too early to say.<sup>23</sup> What is certain, even at this early date, is that these cases are receiving a great deal of attention in the lower courts. Consider, as one important barometer, that in its first nine months on the job courts cited *Twombly* more than 4000 times.<sup>24</sup> This astonishing figure can be contrasted with the number of times courts cited *Celotex Corp. v. Catrett*,<sup>25</sup> the second most cited case of all time,<sup>26</sup> in its first nine months (roughly 400 times).<sup>27</sup>

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<sup>21</sup> 127 S. Ct. 1955, 1964-65 (2007) (requiring a complaint to contain factual matter supporting its claim for relief).

<sup>22</sup> 127 S. Ct. 2499, 2508 (2007) (articulating heightened pleading requirements in a "private securities complaint").

<sup>23</sup> Cf. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (reversing the court of appeals' dismissal of petitioner's claim under Rule 12(b)(6) and characterizing the pleading requirements after *Twombly* as akin to the traditional notice pleading standard of *Conley*). One notable recent attempt at an early empirical study of *Twombly*'s impact found that courts have applied the decision in substantive areas far beyond antitrust, the subject matter of the *Twombly* litigation. Kendall W. Hannon, Note, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814-15 (2008). Its preliminary findings also suggest courts are not granting dismissals at a higher rate after *Twombly* except in one notable area: civil rights cases. *Id.* at 1836 n.161 (categorizing civil rights cases as any claims brought under 42 U.S.C. §§ 1981, 1983, 1985, *Bivens* claims, and Due Process and Equal Protection claims).

<sup>24</sup> The citing references were determined by conducting a query for "Twombly" in the Westlaw ALLCASES database with date restrictions from May 21, 2007, the date of the decision, through February 21, 2008. *Dura* has also been cited quite frequently since it was announced (approximately 650 times through February 2008 according to an ALLCASES query for "Dura Pharms., Inc. v. Broudo" between January 1, 2005 and February 1, 2008), while *Tellabs*, a Private Securities Litigation Reform Act (PSLRA) pleading case, understandably has been cited far less often (approximately 250 times through February 2008 according to an ALLCASES query for "Tellabs" between June 21, 2007 and February 1, 2008).

<sup>25</sup> 477 U.S. 317, 323-24 (1986).

<sup>26</sup> Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 142-44 tbl.1 (2006).

<sup>27</sup> The citing references were determined by conducting a query for "Celotex Corp. v. Catrett" in the Westlaw ALLCASES database with date restrictions from June 25, 1986, the date of the decision, through March 25, 1986.

The fact that *Twombly* is being cited a great deal does not tell us what it is being cited for, nor what kind of impact it is having on the ground.<sup>28</sup> Nevertheless, these figures certainly suggest it is not altogether inappropriate to assume defendants are now more regularly urging judges to intercept complaints at the pleading stage.<sup>29</sup> We may presume, then, that courts are (at the least) actively engaged in grappling with the scope of judicial procedural power to regulate the flow of cases through more rigorous assessments of pleading sufficiency.

The rulemakers have noticed this activity in the lower courts. At the January 2008 meeting of the Committee on Rules of Practice and Procedure, there was discussion among members whether the Advisory Committee on Civil Rules should be tasked with considering changes to the pleading rules.<sup>30</sup> Initial suggestions spanned the gamut, ranging from: expanding the categories in Rule 9, the one provision in the federal rules that specifically calls for heightened pleading;<sup>31</sup> to reconsidering the motion for more definite statement in Rule 12(e);<sup>32</sup> to suggesting some modest revision to Rule 8, which might be offered up as a pretext for adding a brief, pointed remark in the Advisory

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<sup>28</sup> For studies including prior efforts at gathering statistical evidence on Rule 12(b)(6) practice, see generally PAUL R. J. CONNOLLY & PATRICIA A. LOMBARD, *FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS* (1980); THOMAS E. WILLGING, *FED. JUDICIAL CTR., USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS* (1989). See also CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 465 (6th ed. 2002) (discussing the results of a 1962 study sampling motions, undertaken at the behest of the Advisory Committee on Civil Rules); Hannon, *supra* note 23 (offering a preliminary study of reported decisions citing *Twombly*); Patricia M. Wald, *Summary Judgment at Sixty*, 76 *TEX. L. REV.* 1897, 1915 n.111 (1998) (including referenced data on Rule 12(b)(6), but indicating that such data was not specifically tracked in the study).

<sup>29</sup> See Wendy N. Davis, *Just the Facts, But More of Them*, A.B.A. J., Oct. 2007, at 16, 18 (predicting increased filings of motions to dismiss by defense counsel); *infra* text accompanying notes 100-110 (discussing how the *Twombly* standard has seemingly armed defendants with incentives to challenge the sufficiency of plaintiffs' allegations).

<sup>30</sup> See JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, *MINUTES OF THE MEETING OF JANUARY 14-15*, at 37-44 (2008) [hereinafter *JUDICIAL CONFERENCE COMM. MINUTES*], available at <http://www.uscourts.gov/rules/Minutes/ST01-2008-min.pdf>.

<sup>31</sup> *Id.* at 44; see *FED. R. CIV. P.* 9.

<sup>32</sup> *JUDICIAL CONFERENCE COMM. MINUTES*, *supra* note 30, at 44; see *FED. R. CIV. P.* 12(e); Memorandum from Edward Cooper to the Advisory Comm. on Civil Rules, Notice Pleading: The Agenda After *Twombly*, (Nov. 5, 2007) [hereinafter *Cooper Memorandum*], available at <http://www.uscourts.gov/rules/Agenda%20Books/CV2007-11.pdf>. For the latest empirical work on Rule 12(e) by the Federal Judicial Center at the behest of the Advisory Committee on Civil Rules, see Memorandum from Joe Cecil & George Cort to the Honorable Michael Baylson, *FRCivP 12(e) Motions for a More Definite Statement* (Mar. 28, 2007) (on file with author) (concluding, inter alia, that Rule 12(e) motions "are rarely filed, when filed are rarely decided, and when decided are rarely granted").

Committee Note after the rule, something to the effect of “and we really mean it.”<sup>33</sup>

With the renewed attention to the judicial gatekeeping role over pleading norms, some lower courts have shown greater enthusiasm for dismissing cases at the pleadings stage, at least as to certain kinds of claims and claimants, than the traditional pleading precedents dating to *Conley v. Gibson*<sup>34</sup> appear to indicate is appropriate. This tendency of lower courts to more readily dismiss claims at the pleading stage has been shown by Richard Marcus and, after him, Chris Fairman.<sup>35</sup>

What all of this suggests is that for reasons related to, but also far larger than, the Court’s decisions in *Dura*, *Twombly*, and *Tellabs*, we have arrived at a point in history where debate must be joined anew over the scope of judicial power to regulate the flow of judicial business. It is probably immaterial whether we have arrived at this point because the nature of civil litigation truly has changed; because of the piecemeal but relentless phenomenon Marcus and Fairman previously documented; because the Court’s recent decisions may be read as giving its imprimatur to a stricter review of pleading sufficiency across an even wider swath of cases; or through some combination of these factors. Whatever the reason, here we are just the same, confronted by some of the most pressing questions imaginable about where and how to strike the balance between access and efficiency.<sup>36</sup>

To be more precise, the key questions (facing litigants, rulemakers, courts, and theorists alike) are these: Are there instances in which allegations should be scrutinized more thoroughly before a case is allowed to proceed forward to discovery, and beyond? If so, how often should that be? Even if it is possible to define that relevant universe, what should the standard of review for sufficiency be? And, ultimately, what are the benefits of a more rigorous enforcement regime? What are the costs?

Yet another measure of the importance and timeliness of the debate taking place in the courts over these questions is that, following *Twombly*’s thundering arrival in 2007, academic interest in the subject has been rekindled.

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<sup>33</sup> Cooper Memorandum, *supra* note 32, at 5; *see* FED. R. CIV. P. 8.

<sup>34</sup> 355 U.S. 41, 47 (1957) (holding that the Federal Rules of Civil Procedure only require “notice pleading” in a complaint, meaning “notice of what the plaintiff’s claim is and the grounds upon which it rests”).

<sup>35</sup> Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551 (2002) [hereinafter Fairman, *Heightened Pleading*]; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 989 (2003); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435-36 (1986); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1756 (1998) [hereinafter Marcus, *The Puzzling Persistence of Pleading Practice*].

<sup>36</sup> *See* Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) (“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”); *id.* at 234 (“The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”).



Perhaps it is not surprising, given the stakes, that there has been considerable divergence in the normative accounts advanced in the scholarly literature regarding judicial regulatory power over pleading norms. The majority view among academics has been that robust efforts to regulate at the pleading stage are wrongheaded and inconsistent with the traditional pleading standard the Court has followed since *Conley*.<sup>37</sup> For this reason, I refer to those in this camp as “Traditionalists.” A minority of scholars have written in favor of an expanded judicial role, praising the holdings in cases like *Dura* and *Twombly*, if not all of their reasoning. Most prominent among them is Richard Epstein, whose previous work the *Twombly* Court itself relied upon.<sup>38</sup> In this paper, I refer to the decisions in cases like *Dura* and *Twombly* and the literature supporting an enhanced conception of judicial pleading power as the “Reformist” view.

Though all these academic accounts have much to commend, none adequately provides a satisfactory theory of judicial regulatory authority over pleading norms. Traditionalists powerfully emphasize the dangers of a freewheeling judicial power, but mostly they have chosen to ground their critiques by reference to traditional pleading norms. This highlights the problem that the ambiguities inherent in the Court’s pleading law jurisprudence hamper efforts to limit judicial power over pleading sufficiency standards.<sup>39</sup> Thus, Traditionalist arguments have not been successful in adequately responding to the Reformist view, which highlights the danger of

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<sup>37</sup> See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 135 (2007), available at <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>; Brian Thomas Fitzsimmons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 206 (2008); Randy Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 177; Robert E. Shapiro, *Requiescat in Pace*, LITIGATION, Fall 2007, at 67, 67; A. Benjamin Spencer, *Plausibility Pleading*, 93 B.C. L. REV. 431, 431-32 (2008); *The Supreme Court, 2006 Term – Leading Cases*, 121 HARV. L. REV. 185, 305 (2007); Thomas, *supra* note 19, at 1871; Gregory P. Joseph, *Supreme Court Rewrites Pleading Requirements* (2008), <http://www.josephnyc.com/articles/viewarticle.php?47>; Posting of Michael Dorf to Dorf on Law, <http://www.michaeldorf.org/2007/07/federal-rule-of-civil-procedure-1-and.html> (July 18, 2007, 08:06); Posting of Michael Dorf to Dorf on Law, <http://www.michaeldorf.org/2007/05/end-of-notice-pleading.html> (May 24, 2007, 07:35); Posting of Randy Picker to The University of Chicago Law School Faculty Blog, [http://www.uchicagolaw.typepad.com/faculty/2007/05/closing\\_the\\_doo.html](http://www.uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html) (May 21, 2007, 16:45).

<sup>38</sup> RICHARD EPSTEIN, AEI-BROOKS JOINT CTR. FOR REGULATORY STUDIES, *MOTIONS TO DISMISS ANTITRUST CASES: SEPARATING FACT FROM FANTASY* 4-5 (2006), cited with approval in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007); Epstein, *How Motions to Dismiss*, *supra* note 17, at 64; see also Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 644 (2008).

<sup>39</sup> See *infra* Part III.A-B.

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too much access and trumpets a judicial gatekeeping role at the pleading stage.<sup>40</sup> Because of these limitations in the existing Traditionalist critiques, I argue that a more cohesive normative theory to restrain judicial pleading power requires going outside of *Twombly* and judicial interpretation of the law of pleading, and instead looking to other related rules and doctrines.

To be more specific, I argue that we can profitably focus attention on two doctrinal intersections with pleading practice: one obvious and the other less so, at least at first blush. The first and most significant point of intersection is with federal judicial application of, and attitudes toward, summary judgment. Courts and commentators have certainly recognized the doctrinal relationship between Rule 8's pleading standard and the summary judgment rule. However, even if this doctrinal intersection is familiar, the Court's insistence that the two rules can be applied congruently has gone largely unchallenged. By bringing attention to the doctrinal inconsistencies between the two rules, I mean to directly call into question the Court's view of their congruence and thereby hope to expose the fatal flaws in accounts of judicial procedural power that fail to adequately reflect the two rules' differences.

Statutory authority to remove a case from state to federal court is a less obvious point of intersection with pleading practice. No other commentator has highlighted removal law or its importance to the debate over the proper scope of judicial power over pleadings. Nor have courts given it any meaningful consideration. Of the 4000 cases citing *Twombly*, literally one recognizes (and, then, only in passing) the doctrinal intersection between the Court's decision interpreting Rule 8 and removal law.<sup>41</sup> In this Article, I hope to demonstrate that the intersection between Rule 8 and removal law, though of less central importance than the linkage with summary judgment, can also help thinking about appropriate limits on judicial power to enforce pleading norms.

Part I begins the discussion by focusing primary attention on *Twombly*. The case not only appears to be regarded as the new seminal authority on judicial regulatory power over pleading standards, but it also exemplifies the difficulties inherent in marking the boundaries of that authority. My purpose in this first Part is to set the table for the argument that follows by placing *Twombly* in context. I do so by describing the Court's decision and drilling down on the doctrinal and policy reasons that animate the Court's decision. Part II then identifies and fully fleshes out the important points of doctrinal intersection and inconsistency among federal pleading standards, the summary judgment rule, and removal practice.

Finally, Part III draws meaning from the doctrinal discussion that the preceding Part illuminates. I do not argue that attending to the doctrinal connections between pleading and summary judgment, and pleading and removal law, will allow us to identify consistently, *ex ante*, those occasions when greater scrutiny of factual allegations is warranted. Going forward, more

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<sup>40</sup> See *infra* Part III.A-B.

<sup>41</sup> See *infra* note 170.

research into, and understanding of, factual contexts will be vital to any coherent model of judicial authority over pleading norms.<sup>42</sup> Even though my goals in this Article are far more modest than developing a general, sustainable theory of judicial regulatory power, I do endeavor to show that awareness of these doctrinal linkages will enable us to gain greater purchase in establishing practically meaningful constraints on the exercise of judicial power at the pleading stage of a case.

#### I. FEDERAL PLEADING PRACTICE AND *BELL ATLANTIC V. TWOMBLY*

The traditional pleading sufficiency standard from *Conley* reflects wariness against overregulation at the pleading stage.<sup>43</sup> It does so primarily by making legal insufficiency the principal category of review.<sup>44</sup> Thus, if a pleader alleges a non-existent cause of action, the court will deem the allegations legally insufficient.<sup>45</sup> For example, suppose a plaintiff brings a claim for negligent infliction of emotional distress not realizing, or perhaps hoping the other side does not realize, that there is no such cause of action in her jurisdiction because only intentional inflictions are actionable.<sup>46</sup> Her claim, as plead, is legally insufficient and the court may dismiss it, or it may give her one more opportunity to fix the deficiency and only throw it out if she does not.<sup>47</sup> However, except in rare instances, under the traditional norm courts may not undertake a review of factual sufficiency. The primary exception is when the pleader fails to provide “fair notice”<sup>48</sup> of the claims, but this part of Rule 8 has been interpreted so liberally that most pleadings readily suffice.<sup>49</sup>

In *Twombly*, the plaintiffs alleged that the major telecommunications providers had engaged in illegal, anti-competitive conduct in violation of Section 1 of the Sherman Act.<sup>50</sup> By a seven-to-two margin, the Court upheld the district court’s dismissal of their claims at the pleading stage and on a non-

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<sup>42</sup> See *infra* text accompanying notes 277-279.

<sup>43</sup> *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

<sup>44</sup> *Id.*

<sup>45</sup> FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 3.6 (4th ed. 1992).

<sup>46</sup> See, e.g., *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993).

<sup>47</sup> *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002) (“If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.”); JAMES, *supra* note 45, § 3.6.

<sup>48</sup> *Swierkiewicz*, 534 U.S. at 512 (“Federal Rule of Civil Procedure 8(a)(2) . . . provides that a complaint must include only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’ Such a statement must simply ‘give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” (quoting *Conley*, 355 U.S. at 47)).

<sup>49</sup> JAMES, *supra* note 45, § 3.6.

<sup>50</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1962 (2007).

traditional ground.<sup>51</sup> That is, it found the factual allegations insufficient.<sup>52</sup> As the Court read the complaint, the plaintiffs had alleged nothing more than *parallel* conduct by the defendants; but the Sherman Act punishes only illegal contracts, combinations, and conspiracies – that is, *agreements* – to restrain trade.<sup>53</sup> Speaking of the substantive antitrust legal standard, the Court emphasized that the “inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”<sup>54</sup> In other words, something more than parallel conduct is needed in order to prove a violation of Section 1 of the Sherman Act.<sup>55</sup> Without something more (referred to by antitrust scholars as “plus” factors),<sup>56</sup> the Court reasoned the substantive law of antitrust dictates that a plaintiff would not be able to survive summary judgment.

A. *Announcing Plausibility as the Touchstone*

It is no small jump to move from justifying the disposal of a case by summary judgment, after a full opportunity for discovery, to making the argument for termination, essentially on the merits, at the pleading stage. The *Twombly* Court squarely took on this issue. Recognizing that “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,”<sup>57</sup> the Court insisted that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . .”<sup>58</sup> Applying this pleading burden to the plaintiffs’ claims in *Twombly*, the Court then framed the pleading obligation in terms of a need for “plausible” allegations, in what Ben Spencer has rightly called the “most striking aspect”<sup>59</sup> of the Court’s opinion:

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement

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<sup>51</sup> *Id.* at 1974.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1966.

<sup>54</sup> *Id.* at 1964.

<sup>55</sup> Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. 117, 122 (2007).

<sup>56</sup> For a careful discussion of “plus” factors under antitrust law and their relevance to *Twombly*, see *id.* at 119.

<sup>57</sup> *Twombly*, 127 S. Ct. at 1964.

<sup>58</sup> *Id.* at 1964-65; see also *id.* at 1965 n.3.

<sup>59</sup> Spencer, *supra* note 37, at 441.

at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.<sup>60</sup>

What facts did these plaintiffs omit? The “pleadings mentioned no specific time, place, or person involved in the alleged conspiracies,”<sup>61</sup> the Court wrote, contrasting the plaintiff’s complaint with the model negligence complaint in Form 9 of the Federal Rules of Civil Procedure, which sets out the specific time, place, and persons involved.<sup>62</sup> But what does this mean, exactly? The problem is not that the allegations were too general or too ambiguous. The Court declared, “our concern is not that the allegations in the complaint were insufficiently ‘particular[ized].’”<sup>63</sup> In other words, the defendants could certainly understand the claims brought against them. The difficulty, instead, was that even though the defendants had fair notice of what the case was about, and even though the plaintiffs expressly peppered allegations of “conspiracy” and “agreement” throughout the complaint, these allegations were merely conclusory.<sup>64</sup>

Since the plaintiffs did not plead a sufficient factual context to suggest an illegal agreement, the Court effectively read these conclusory allegations out of the complaint, leaving only allegations of parallel conduct.<sup>65</sup> That was not good enough. In this fashion, the Court insisted it was appropriate to take up what it called the “antecedent question”<sup>66</sup> of pleading sufficiency to dispose of a complaint containing nothing more than allegations that render the plaintiff’s entitlement to relief implausible.<sup>67</sup> As the majority reasoned, if an antitrust plaintiff cannot survive summary judgment because all he has is evidence of parallel conduct, then it does not make sense to let him go beyond the pleading stage with insufficient allegations.<sup>68</sup>

This message that it is better to intercept a case at the pleading stage is not one the Court can announce in the abstract. After all, the Court’s role here is to interpret the plaintiff’s pleading obligation under Rule 8. Its role in deciding whether the intermediate appellate court was correct in reversing the trial court’s dismissal order is supposed to be cabined by what the existing rule provides, not by what it might or should. The Court was fully conscious of this need to interpret the existing rule and, by focusing more closely on how the Court justifies its recitation of the pleading burden in Rule 8, we can gain significant traction in deciphering *Twombly*.

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<sup>60</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>61</sup> *Id.* at 1971 n.10.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1973 n.14 (quoting FED. R. CIV. P. 9(b)-(c)) (citation omitted).

<sup>64</sup> *See id.* at 1966.

<sup>65</sup> *Id.* at 1971 n.11.

<sup>66</sup> *Id.* at 1964.

<sup>67</sup> *Id.* at 1973 n.14.

<sup>68</sup> *Id.* at 1964.

B. *Rule 8(a)(2)'s "Showing" Requirement*

The Court offered two reasons to support its reading of Rule 8(a)(2). It based the first directly on the language of the rule and the second on the policy reasons the Court presumed animate the rule. The Court first offered assurances that Rule 8(a)(2)'s direction that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief"<sup>69</sup> does not require detailed factual allegations.<sup>70</sup> Nevertheless, focusing again on the Rule's language, Justice Souter, writing for the majority, wrote that "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."<sup>71</sup> That is because, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."<sup>72</sup>

This understanding of what it means for the pleader to "show" an "entitle[ment] to relief" also explains why the Court clarified what it perceived as the greatly misunderstood citation to *Conley* and its observation that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>73</sup>

Following what they thought was settled law, the *Twombly* plaintiffs conceded they would need something more than parallel conduct when it came time to evaluate their evidence.<sup>74</sup> They argued, however, that the problem with imposing a plausibility standard at the pleading stage is that it conflicted with

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<sup>69</sup> FED. R. CIV. P. 8(a)(2).

<sup>70</sup> *Twombly*, 127 S. Ct. at 1965 n.3 ("[T]he Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim.'" (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

<sup>71</sup> *Id.* Ben Spencer has observed that, as far as the Court is concerned, the most important word in Rule 8(a)(2) is "grounds." Spencer, *supra* note 37, at 441 (quoting *Twombly*, 127 S. Ct. at 1964-65). I agree with Professor Spencer. As I have discussed, the Court highlights the pleader's obligation to allege the "grounds" of his "entitlement to relief." See, e.g., *Twombly*, 127 S. Ct. at 1965 n.3. Indeed, the relevance of *Twombly*'s repeated references to the words "grounds" and "entitlement to relief" will bear relevance to our discussion below of the doctrinal intersection between pleading and removal. See *infra* Part II.B.1. But if these references are part of the Court's interpretive judgment in *Twombly*, it is relevant that the former term is not a part of Rule 8 ("grounds" is from *Conley*, 355 U.S. at 47), while the "entitlement to relief" language in Rule 8(a)(2) is necessarily linked to and dependent on the present participle immediately preceding it. FED. R. CIV. P. 8(a)(2) (stating that the pleading must contain "a short and plain statement . . . *showing* that the pleader is entitled to relief" (emphasis added)).

<sup>72</sup> *Twombly*, 127 S. Ct. at 1965 n.3 (quoting *Conley*, 355 U.S. at 47).

<sup>73</sup> *Conley*, 355 U.S. at 45-46; see also *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) ("[T]he Supreme Court's emphasis [in *Twombly*] on Rule 8's requirement of a 'showing' is new.").

<sup>74</sup> *Twombly*, 127 S. Ct. at 1968.

the Court's previous understanding of Rule 8 in *Conley*.<sup>75</sup> The Court parried that it is wrong to read the *Conley* interpretation of Rule 8 and its "no set of facts" language so permissively, saying "this approach to pleading would dispense with any *showing* of a 'reasonably founded hope' that a plaintiff would be able to make a case."<sup>76</sup> *Conley*, the Court now clarified, "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."<sup>77</sup> In other words, "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."<sup>78</sup> But adequately stating a claim, or "showing that the pleader is entitled to relief,"<sup>79</sup> requires "a complaint with enough factual matter (taken as true) to suggest that an agreement was made."<sup>80</sup>

### C. *The Policy Purposes Behind the "Showing" Requirement*

If the *Twombly* Court's reading of the language in Rule 8 was central to its decision, the majority's opinion also placed considerable weight on the policy purposes it perceived animate the rule's pleading requirements. In this Section, I focus on these animating policy purposes. By way of introduction to the Section, I would note that although the opinion is (perhaps strategically) ambiguous,<sup>81</sup> close examination reveals that the Court invoked two related but distinct policy concerns to justify its reading of the rule. Unpacking these two policy concerns is the primary goal of this Section of the paper.

#### 1. The Problem of Discovery Costs

The first and most patent policy justification the Court recognized as underlying the pleading standard in Rule 8 was the problem of costly discovery. The *Twombly* majority recited that while "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, [it is] quite another to forget that proceeding to antitrust discovery can be expensive."<sup>82</sup> Consequently, "a district court must retain the power to insist

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1969 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1969 n.8.

<sup>79</sup> FED. R. CIV. P. 8(a)(2).

<sup>80</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>81</sup> See Editorial, *The Devil in the Details*, 91 JUDICATURE 52, 54 (2007) ("Twombly is an exercise in strategic ambiguity that empowers the lower federal courts to tighten pleading requirements in cases or categories of cases that augur similar discovery burdens (or are otherwise disfavored), while preserving deniability in the Court through the use of its discretionary docket to correct perceived excesses . . .").

<sup>82</sup> *Twombly*, 127 S. Ct. at 1966-67.

upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”<sup>83</sup> In this fashion, the Court pegged the plausibility standard to its assumption that high discovery costs are the problem to avoid:

Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. . . . [W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, “this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.”<sup>84</sup>

On this account, to have courts that more rigorously intercept cases at the pleading stage is a welcome efficiency gain. It means that cases can properly be disposed of before defendants are forced to decide whether to settle merely because the cost of litigating through discovery is greater than the expense of resolving the case. Thus, concerned about the potentially exorbitant discovery costs that would follow denial of the Rule 12(b)(6) challenge, the Court concluded that the allegations of parallel conduct by the *Twombly* plaintiffs were insufficient, warranting the case’s dismissal before it was allowed to move forward into the discovery phase.<sup>85</sup>

## 2. Combating Nonmeritorious Lawsuits

If the focus on costly discovery underlies part of the argument for more rigorous judicial gatekeeping at the pleading stage, there is a second primary influence that we may discern to be at work in *Twombly*. Although the concern here is related to high discovery expenses, the shift is subtle but important.

In keying on the burdens of discovery, as Ben Spencer previously has pointed out, the *Twombly* Court seamlessly moved from talking about the problem of “enormous discovery expenses” to “discovery abuse” as though the two are always one and the same.<sup>86</sup> Quoting extensively from a provocatively entitled law review article by Judge Easterbrook, *Discovery as Abuse*,<sup>87</sup> the Court elided any difference between the two, perceiving only that a more robust pleading gatekeeper role is necessary to ward off the twin evils of

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<sup>83</sup> *Id.* at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

<sup>84</sup> *Id.* at 1965-66 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2004)).

<sup>85</sup> *Id.* at 1967.

<sup>86</sup> Spencer, *supra* note 37, at 451-53. Indeed, Spencer suggests a third concern the Court raised which is separate from discovery: heavy judicial caseloads. *Id.* at 453 (parsing the *Twombly* opinion and highlighting the Court’s reference to “this troika of policy concerns – litigation expense, discovery abuse, and overburdened caseloads”).

<sup>87</sup> Frank Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989).



discovery: to keep discovery costs from burgeoning out of control, and to check potential discovery abuses.<sup>88</sup>

There is more to the Court's concern than general discovery abuse by civil litigants. The *Twombly* majority casts the discovery abuse problem in one-dimensional terms. Even though defendants are equally capable of abusing discovery, and are at least as equally incentivized to do so, the Court focused only on the problem of discovery abuse by reference to the incidence of nonmeritorious litigation ("groundless" is the Court's word of choice) brought by plaintiffs.<sup>89</sup> In this regard, we can make sense of the *Twombly* majority's reference to the (unanimous) Court's earlier remarks in *Dura* that "allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid,"<sup>90</sup> and the *Twombly* majority's consequent ruling that "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."<sup>91</sup>

The cited passage reveals the *Twombly* majority repeated the concern over "groundless" suits by plaintiffs several other times,<sup>92</sup> up to and including its closing explanation for why a more rigorous pleading standard is the necessary policy cure. Again relying, *inter alia*, on Easterbrook, a judge the Court regarded as in a position to know,<sup>93</sup> as well as on its prior opinion in *Dura*, the majority in *Twombly* framed the need for a robust judicial gatekeeping role at the pleading stage by linking the burden of discovery expense with the problem of nonmeritorious litigation: "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a §1 [of the Sherman Antitrust Act] claim."<sup>94</sup>

Thus, allowing the lower courts considerable authority to dismiss at the pleading stage is not only an efficient means of dealing with the problem of costly discovery. It is also a valuable way of combating the institution of

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<sup>88</sup> *Twombly*, 127 S. Ct. at 1967 n.6 (citing Frank Easterbrook, *supra* note 87, at 638-39).

<sup>89</sup> *Id.* at 1967 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." (citations omitted)).

<sup>90</sup> *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005), *cited in Twombly*, 127 S. Ct. at 1966.

<sup>91</sup> *Twombly*, 127 S. Ct. at 1966 (quoting *Dura*, 544 U.S. at 347).

<sup>92</sup> *Id.* at 1967.

<sup>93</sup> *Id.* at 1967 n.6.

<sup>94</sup> *Id.* at 1967 (quoting *Dura*, 544 U.S. at 347); *see id.* 1967 n.6 (citing Easterbrook, *supra* note 87, at 638-39).

“groundless” claims that otherwise will precipitate needless discovery and thereby skew the settlement equation. In other words, costly discovery is very troublesome, but costly discovery that has been triggered by a groundless suit – oh, Lordy! Now there is a reason to invest courts with the power to scrutinize and, when appropriate, dismiss cases at the pleading stage.

D. *Scholarly Commentary After Twombly*

Commentators have reentered the debate over a more rigorous judicial regulatory power over pleading sufficiency following the Court’s 2007 decisions.<sup>95</sup> A few have written in support of the Court’s holdings, most prominently Richard Epstein, whose previous work the *Twombly* court itself relied upon.<sup>96</sup> I will have more to say about Epstein’s work and the Reformist view more generally below.<sup>97</sup> For now I turn to the majority, Traditionalist academic account that has been critical of the decision. As with all binary formulations, much nuance is lost, and so it should not be surprising to find a diversity of viewpoints even among those who favor retaining traditional pleading norms.

As to the meaning and import of *Twombly* itself, some scholars have argued the case speaks only to the substantive law of antitrust, and does not touch procedural law generally.<sup>98</sup> Reading the case as having something important to say about antitrust law is surely right, but to suggest the case does not speak at all to the scope of judicial authority over pleading standards hardly seems plausible.<sup>99</sup> It already appears likely, given the astonishing number of citations to the case in such a short period of time, that *Twombly* (either on its own or in concert with *Dura*) has emboldened defendants to more routinely urge courts

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<sup>95</sup> See *supra* notes 34-39.

<sup>96</sup> *Twombly*, 127 S. Ct. at 1964 (citing EPSTEIN, *supra* note 38, at 3-4).

<sup>97</sup> See *infra* text accompanying notes 250-253.

<sup>98</sup> Bradley, *supra* note 55, at 120; see also Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 625-32 (2007); Darren Bush & Shubha Ghosh, *Predatory Conduct and Predatory Legislation: Exclusionary Tactics in Airline Markets*, 45 HOUS. L. REV. 343, 369-74 (2008); *infra* text accompanying notes 116-121.

<sup>99</sup> See *Iqbal v. Hasty*, 490 F.3d 143, 157 n.7 (2d Cir. 2007) (“[I]t would be cavalier to believe that the Court’s rejection of the ‘no set of facts’ language from *Conley* . . . applies only to section 1 antitrust claims.”).

to test the sufficiency of a plaintiff's allegations.<sup>100</sup> Those 4000 reported *Twombly* sightings are not all antitrust cases.<sup>101</sup>

Suja Thomas has argued that *Twombly* cannot be so limited.<sup>102</sup> Building on her earlier work with regard to summary judgment,<sup>103</sup> she argues that the Court's reading of Rule 12(b)(6) in *Twombly* is so expansive as to now render that rule unconstitutional under the Seventh Amendment.<sup>104</sup> Even as I am struck by the provocative argument she has constructed, I have serious doubts that it has any reasonable prospect of gaining considerable adherents in positions of judicial or legislative power.<sup>105</sup> The hurdles her constitutionality claim must overcome with regard to summary judgment are even higher when applied to the motion to dismiss, in no small part thanks to *Tellabs*.<sup>106</sup>

A majority of scholars share Thomas's view that *Twombly* amounts to a sea of change in the traditional pleading standard the Court has followed since *Conley*. "Notice pleading is dead,"<sup>107</sup> Benjamin Spencer eulogized following the decision's announcement, as did Robert Shapiro, intoning with similar spirit: "*Requiescat in pace*."<sup>108</sup> One prominent commentator, Scott Dodson, spelled out the matter more fully:

[T]he best reading of *Bell Atlantic* is that Rule 8 now requires notice-plus pleading for all cases (though especially for cases with costly discovery). It invites defendants to file motions to dismiss under Rule 12(b)(6) with

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<sup>100</sup> See Davis, *supra* note 29, at 18. To be sure, Rule 12(b)(6) applies to all allegations – by both plaintiffs and defendants – but for a collection of reasons plaintiffs, not defendants, are the ones who usually face sufficiency challenges. The Supreme Court in *Twombly* certainly thought that is where the focus of Rule 12(b)(6) predominantly lies. See *supra* text accompanying notes 70-74.

<sup>101</sup> See Hannon, *supra* note 23, at 1814-15 (showing, through initial empirical work on *Twombly*, that the case has been applied by courts across many different substantive areas, with antitrust cases representing less than five percent of all reported cases).

<sup>102</sup> Thomas, *supra* note 19, at 1888-89.

<sup>103</sup> Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 179-80 (2007).

<sup>104</sup> Thomas, *supra* note 19, at 1853-55.

<sup>105</sup> See John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 526 (2007) ("Because summary judgment is such an integral part of the everyday workings of the U.S. civil justice system, and because everyone assumes that the system would be crushed under the weight of innumerable trials if summary judgment disappeared, courts will turn a blind eye to the interpretive problems raised by [Suja] Thomas and by the litigants who will cite her work."). But see Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613, 1621-23 (2008) (citing efforts by lawyers to raise constitutionality concerns as to summary judgment in current litigation).

<sup>106</sup> See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2512 n.8 (2007) ("In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment.").

<sup>107</sup> Spencer, *supra* note 37, at 431.

<sup>108</sup> Shapiro, *supra* note 37, at 67.

greater frequency where the complaint does not allege supporting facts, and it suggests that at least some of those motions should be granted with more regularity.<sup>109</sup>

In short, the majority view is that *Twombly* fundamentally changed the pleading landscape: a “blockbuster” case, as Randy Picker characterizes it.<sup>110</sup>

But if Traditionalists persuasively warn of the dangers of a free-wheeling judicial power to review the factual sufficiency of allegations, they have been less successful in grounding their critiques in sustainable doctrinal limits on the exercise of that power. Traditionalists have primarily couched their arguments against overregulation at the pleading stage by reference to the long-standing pleading standard from *Conley*<sup>111</sup> and/or to the related conception that a heightened judicial pleading power is inconsistent with the “liberal ethos” of the federal rules.<sup>112</sup> But, basing their critiques on the traditional pleading standard itself, Traditionalist accounts cannot adequately counter assertions that reasoned petitions to that reservoir of power allow the Court to address modern litigation’s practical exigencies.<sup>113</sup> Indeed, it was precisely this concern that led the majority in *Twombly* to reject the long-accepted view of *Conley* that, literally read, would mean no claim could be dismissed on factual insufficiency grounds.<sup>114</sup> The Traditionalist view is further complicated by the Court’s reliance on *Twombly* only a few days later in a decision seemingly

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<sup>109</sup> Dodson, *supra* note 37, at 140-41.

<sup>110</sup> Picker, *supra* note 37, at 51.

<sup>111</sup> See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1981, 1983 (2007) (Stevens, J., dissenting) (“[E]ven if the majority’s speculation is correct, its “plausibility” standard is irreconcilable with Rule 8 and with our governing precedents. . . . We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*.”); Shapiro, *supra* note 37, at 68 (“[W]hether you rely on first impressions or careful analysis, *Twombly* seems to change the rules. . . . Given the facts of *Twombly*, it did not just overrule *Conley*, it seems to overrule notice pleading itself.”); Spencer, *supra* note 37, at 445-46 (“The problem with [the *Twombly* majority’s] view of Rule 8(a) . . . is that it significantly raises the pleading bar beyond where *Conley* had placed it long ago.”).

<sup>112</sup> Spencer, *supra* note 37, at 479 (stressing that, in a departure from the “liberal ethos” underlying the rules’ original goal of providing litigants access to resolving disputes, the *Twombly* Court “appears to have exalted goals of sound judicial administration and efficiency above the original core concern of the rules”).

<sup>113</sup> Epstein, *How Motions to Dismiss*, *supra* note 17, at 63 (stating that the Supreme Court “has taken a position that is consistent with the view of notice pleading that animated the drafting of the Federal Rules”: to facilitate access to litigants with valid judicial claims).

<sup>114</sup> Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (“Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment.”), *cited with approval in Twombly*, 127 S. Ct. at 1969.

professing adherence to the traditional minimalist pleading approach under Rule 12(b)(6).<sup>115</sup>

One prominent dissenter from the predominant reading of *Twombly* as having changed the pleading landscape is Allan Ides. The leading proponent of a more moderate view, Ides's detailed parsing of the Court's decision and of some of its earlier precedents, especially *Swierkiewicz v. Sorema, N.A.*,<sup>116</sup> prompts him to conclude that *Twombly* is an unremarkable application of the Court's prior decisional law.<sup>117</sup> In his judgment, the Court was driven to its conclusion by the substantive law of antitrust.<sup>118</sup> On this reading, there is nothing in the Court's holding that suggests a new norm of pleading sufficiency for other kinds of cases.

Whether Ides's interpretation will turn out, in the long run, to be predictive of how the lower courts will apply *Twombly*, his view appears to have limited significance in the immediate present. There is more than enough tangible evidence to make the case (certainly enough for anyone already receptive to it) that traditional pleading norms are under attack. There is the problem of *Dura*, as well as the persistent line of lower court authorities Marcus and Fairman documented that have been raising the pleading standard, at least in certain kinds of cases.<sup>119</sup> And, even if this phenomenon is not fully transsubstantive, it seems evident that any prospective claimant's ex ante calculation will be affected by the perception that the Court's new authorities will be seized upon as a basis for trumping the traditional norm.<sup>120</sup> As regards *Twombly* itself, even Ides concedes that the case is suffused with loose language and not easily cabined.<sup>121</sup>

Finally, some have suggested that perhaps one way to read the decision in *Twombly* is to regard it as an effort by the Court to impose heightened judicial scrutiny over pleadings but, simultaneously, to try to corral the extent of the

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<sup>115</sup> *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (emphasizing Rule 8's notice-pleading standard by refusing to require the pleading of specific facts).

<sup>116</sup> 534 U.S. 506, 508 (2002) (reversing the dismissal of a plaintiff's claim in which the lower court required the pleading of "special facts," and holding that a claim must only demonstrate entitlement to relief).

<sup>117</sup> Ides, *supra* note 98, at 625-32.

<sup>118</sup> *Id.* at 629 ("[T]he Court's opinion holds that as a matter of Substantive Sufficiency, a complaint asserting a § 1 Sherman Act claim must include 'factual matter' plausibly suggestive of an agreement in restraint of trade.").

<sup>119</sup> See, e.g., Fairman, *Heightened Pleading*, *supra* note 35, at 574-96; Marcus, *The Puzzling Persistence of Pleading Practice*, *supra* note 35, at 1764-66; see also *supra* notes 34-35 and accompanying text.

<sup>120</sup> See Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 262-67 (2006) [hereinafter Hoffman, *Access to Information*] (addressing the problem of ex ante influences on litigant decisionmaking based on perceptions of formal barriers to entry); *infra* text accompanying Part III.D.1.

<sup>121</sup> Ides, *supra* note 98, at 606.

decision's reach by pegging the need for heightened judicial scrutiny to the risk of exorbitant discovery costs.<sup>122</sup> In other words, one might read the Court as saying something to the effect of, "*We are not ruling that greater judicial review is necessary for all cases, just that it may be necessary when discovery costs could spiral out of control.*"

But if the Court did mean to use discovery costs as a constraining device (or even if it did not, but some regard this as a possible constraint that could be used), that effort was probably not only doomed from the start but is also likely causing, and will continue to cause, all sorts of mischief.<sup>123</sup> *Twombly* may have been a case where those costs in absolute dollars would have been enormous, but the real issue would seem to be *relative* discovery costs, not *absolute* costs. The problem, after all, was not just that discovery costs likely would have been substantial. If that is all there was to it, then it presumably would be responsive for a plaintiff to argue that a particular defendant could easily absorb any expenses that may come.<sup>124</sup> But it seems clear that what the Court really had in mind was concern about the distorting impact discovery costs can have on settlement of individual cases. In other words, *Twombly*'s concern was that when the costs of discovery in a particular case are too high, relative to the value of the dispute, then the defendant is incentivized to settle without regard to the merits of the case.<sup>125</sup>

Once we recognize that the rationale for focusing on discovery requires focusing on relative, not absolute, discovery costs, it is apparent that appeals could routinely be made by defendants to justify invoking a more robust judicial scrutiny at the pleading stage. Even if discovery costs are not significant in most litigation – they are not, as the best available empirical evidence shows<sup>126</sup> – *Twombly* invites defendants to try to say they are.<sup>127</sup>

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<sup>122</sup> See, e.g., Dodson, *supra* note 37, at 138; *The Supreme Court, 2006 Term, supra* note 37, at 309 (“[W]hat drove the majority’s opinion was not a lack of faith in trial judges’ abilities to manage discovery; rather, it was a lack of confidence in the Federal Rules’ system of discovery itself.”).

<sup>123</sup> Dodson, *supra* note 37, at 139 (observing that in cases with asymmetric access to information, “the Court’s standard is likely to bar many antitrust cases (and mass tort, discrimination, and a host of other cases) *with merit*”).

<sup>124</sup> Indeed, the financial giants named as defendants in *Twombly* would seem to have been precisely the sort capable of absorbing the discovery burdens awaiting them.

<sup>125</sup> See *supra* text accompanying notes 92-94 (discussing discovery costs used as leverage to broker settlements for nonmeritorious lawsuits).

<sup>126</sup> In 1997, Tom Willging led a study for the Federal Judicial Center which was subsequently published after a conference held at Boston College Law School. Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998). One of the major conclusions of the study was that over half of lawyers interviewed reported that they had no problems with obtaining document production, initial disclosure, expert disclosure, or depositions in their case. *Id.* at 553-54 tbl.10. Willging’s study cogently summed up what the empirical data regarding discovery practices has shown:

In sum, while the lower courts may eventually settle on a more moderate interpretation of the case, it seems hard to dispute that the Court's pleading jurisprudence is anything but ambiguous.<sup>128</sup> Given these uncertainties, as well as the doctrinal and practical limitations of the existing academic literature, developing a more coherent account of judicial procedural power requires a different vantage point.

## II. IDENTIFYING DOCTRINAL INTERSECTIONS AND INCONSISTENCIES AMONG PLEADING STANDARDS, SUMMARY JUDGMENT, AND REMOVAL LAW

We have seen how the Court tethered its more exacting pleading burden to its interpretation of the language of Rule 8, as well as to its understanding of

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Empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast to this picture of discovery, empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally – but with notable exceptions – yields information that aids in the just disposition of cases. The results of the [present] FJC study reported in this Article are, for the most part, consistent with those findings.

....

... Our research suggests . . . that for most cases, discovery costs are modest and perceived by attorneys as proportional to parties' needs and the stakes in the case.

*Id.* at 527, 531. In short, few cases seem to have the kind of significant discovery expenses and controversies the *Twombly* court found so troubling.

<sup>127</sup> Nor do we know what accounts for the heightened discovery costs that exist even within a small segment of the litigation population. In this regard, Elizabeth Thornburg has powerfully argued that concern over discovery abuse primarily seems to focus only on one side of the street: that is, on abusive requests (and, even more one-sidedly, on abusive requests by *plaintiffs*). See Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 229-31 (1999). That defendants can equally be perpetrators of abusive discovery is rarely considered. Critics who focus on abusive requests rarely consider "abusive *resistance* to discovery, even though empirical research has consistently identified resistance as a bigger problem than overbroad requests." *Id.* at 240. Thus, the burden on those who would peg a heightened pleading standard to an assumption of high discovery costs and attendant abuses must be able to demonstrate that the source of those problems largely lies on the plaintiff's side of the ledger. More rigorous scrutiny of the plaintiff's allegations cannot be supported on an account of rampant discovery costs and abuses if defendants are equally or more responsible for these costs and abuses.

<sup>128</sup> *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (2007) ("What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new 'plausibility' paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law . . ."); see Cooper Memorandum, *supra* note 32, at 6 ("The complex *Twombly* opinion, however, invites speculation at least as much as prediction. . . . One phrase or another can be made to point in almost any direction.").

the policy reasons that animate this pleading standard. In this Part, I look past the Court's prior decisions on pleading sufficiency to contrast its reading of Rule 8 with two other procedural devices in civil litigation: (1) summary judgment, under Rule 56;<sup>129</sup> and (2) removal practice, the general guidelines for which are laid out in 28 U.S.C. §§ 1441, 1446 and 1447.<sup>130</sup> All three of these procedural tools – pleading standards, summary judgment, and removal law – play a role in regulating the flow of judicial business, and all are doctrinally hinged together in important ways. My objectives in this Part are to identify the points of doctrinal intersection among pleading sufficiency standards, summary judgment, and removal law, and ultimately to highlight the inconsistencies in the Court's treatment of these three procedural devices.

#### A. Summary Judgment

##### 1. Doctrinal Intersections

That there are important points of connection between Rule 8's pleading standard and the summary judgment rule is well recognized. The most patent intersection between Rule 8 and Rule 56 is in the language of the two rules. Under Rule 8, the pleader must provide a short and plain statement "showing" the entitlement to relief,<sup>131</sup> while under Rule 56 the movant's summary judgment evidence must be sufficient to "show" that no genuine issue of material fact exists.<sup>132</sup> While it is appropriate to be cautious not to read too much significance into a single word, it is probably also a mistake to overlook the significance the Court itself has ascribed to particular rule language.<sup>133</sup>

Beyond this facial intersection, there is also a functional relationship between the two rules, a point already highlighted in connection with the earlier discussion of *Twombly*. As the *Twombly* Court observed, just as summary judgment serves as a vehicle for termination of claims that do not need resolution by the finder of fact at trial, pleading standards can serve a similar function at an earlier stage in the proceedings. We saw the Court say so expressly, describing the Rule 12(b)(6) challenge in *Twombly* as the "antecedent question" to the Rule 56 inquiry.<sup>134</sup>

It is now plain – if it was not already – that Rules 12(b)(6) and 56 are hinged together doctrinally. As the Court saw it, if an antitrust plaintiff's complaint cannot survive summary judgment because all they have is evidence of parallel conduct, then why delay the inevitable? It is better to intercept the case now,

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<sup>129</sup> FED. R. CIV. P. 56.

<sup>130</sup> 28 U.S.C. §§ 1441, 1446, 1447 (2000).

<sup>131</sup> FED. R. CIV. P. 8(a)(2).

<sup>132</sup> FED. R. CIV. P. 56(c).

<sup>133</sup> See *supra* Part I.B (discussing the relevance placed by the *Twombly* majority on Rule 8(a)(2)'s "showing" requirement); *infra* text accompanying notes 140-144 (discussing *Celotex's* interpretation of the "show" requirement in Rule 56).

<sup>134</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007).



at the pleading stage. In this regard, *Twombly* has been said to be the *Matsushita*<sup>135</sup> of pleading.<sup>136</sup> On this reading, enforcement of pleading standards in cases like *Twombly* is not only similar to summary judgment, but it is even more vitally necessary since summary judgment cannot adequately weed out groundless claims, given the threat of massive discovery expenses and other litigation costs and risks.<sup>137</sup>

## 2. Doctrinal Inconsistencies

Although both Rules 8 and 56 require the pleader and movant, respectively, to make a satisfactory “showing,” the Court has interpreted these words quite differently in different contexts. Justice Souter’s opinion in *Twombly* emphasizes that Rule 8(a)(2)’s “showing” requirement means something more than “a blanket assertion” that the pleader is entitled to relief.<sup>138</sup> Rule 56 similarly requires the proof offered by the movant for summary judgment to “show” the entitlement to relief, that is, entitlement to summary judgment.<sup>139</sup> But in *Celotex*, the Court famously explained that a defendant who does not bear the evidentiary burden of proof at trial can meet its burden to “show” that summary judgment is warranted merely by “pointing out to the district court” that there is no genuine issue of material fact.<sup>140</sup>

Practically speaking, treating the two “showing” requirements differently means a defendant, by making not much more than a naked assertion that there is no evidence to support the plaintiff’s case, may invoke Rule 56 and force a plaintiff to demonstrate her proof at summary judgment.<sup>141</sup> Yet, for a plaintiff

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<sup>135</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986) (requiring plaintiffs in antitrust cases to meet a heightened showing for an inference of conspiracy to survive a summary judgment motion).

<sup>136</sup> Epstein, *How Motions to Dismiss*, *supra* note 17, at 77; Spencer, *supra* note 37, at 487; Thomas, *supra* note 19, at 1866 n.89.

<sup>137</sup> *Twombly*, 127 S. Ct. at 1966-67; Epstein, *How Motions to Dismiss*, *supra* note 17, at 66-67.

<sup>138</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>139</sup> FED. R. CIV. P. 56(c).

<sup>140</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1348 (2005) (“*Celotex* most clearly altered well-established summary judgment practice, and in any event, *Celotex*, far more than the others [in the trilogy], decisively opened the eyes of the federal courts to the propriety of summary judgment in certain cases . . .”).

<sup>141</sup> *See* Redish, *supra* note 140, at 1345 (“Since *Celotex*, the majority of lower federal courts have wisely read that decision to impose virtually no burden at all on the movant where she would have no burden of proof at trial.”). *But see Celotex*, 477 U.S. at 328 (White, J., concurring) (“[T]he movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.”); *cf.* Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment*

to be able to maintain her suit in federal court and thereby gain use of the discovery tools needed to develop the case, she must make a greater “showing,” according to the Court in *Twombly*.<sup>142</sup>

While the Court may not have directly addressed the apparent inconsistency between its reading of the two “showing” requirements in Rules 8 and 56, it has done so implicitly by explaining in *Celotex* why it was inappropriate to place on the defendant a greater showing requirement than merely to “point out” the absence of a genuine issue of material fact. The Court noted that the defendant, *Celotex*, did not bear any evidentiary burden at trial.<sup>143</sup> Consequently, *Celotex* could just sit back and wait for the plaintiff to put on her case-in-chief at trial. If the plaintiff failed to put forward sufficient evidence on all the elements of her claims, then the jury could not reasonably rule in her favor, and *Celotex* could stand up at the close of the plaintiff’s case and secure a verdict in its favor as a matter of law. If this is so, the Court reasoned, then why should the defendant bear a greater burden at the summary judgment stage?<sup>144</sup>

Although this justification for the virtual elimination of the burden on most summary judgment movants has a kind of immediate attractiveness (and, indeed, can ultimately be defended),<sup>145</sup> it is not at all obvious why, in theory, the movant’s burden at summary judgment must be no greater than at trial. After all, summary judgment is an extraordinary remedy: we are taking a case away from the jury. There are plenty of other examples in the law where we require more of someone who seeks an extraordinary remedy.<sup>146</sup> Perhaps for this very reason some states have long had a summary judgment rule that places a greater burden on movants than *Celotex* requires under Rule 56.<sup>147</sup>

Not only can a higher burden be justified theoretically on the party seeking summary dismissal, but practical experience also suggests that little is lost by insisting on a greater showing to obtain summary judgment, even from those

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*Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 122-25 (2006) (discussing a defendant’s burden in summary judgment motions after *Celotex* as requiring the defendant point to deficiencies in “Rule 56(c) documents that would be expected to reveal any evidence supporting the plaintiff’s claim” when such documents are available).

<sup>142</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>143</sup> *Celotex*, 477 U.S. at 324.

<sup>144</sup> *Id.* at 325.

<sup>145</sup> See *infra* text accompanying notes 226-228 (arguing that the nature and timing of summary judgment justify a lower burden on moving parties).

<sup>146</sup> Writs of mandamus are a prime example. See, e.g., *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947) (“Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . . As extraordinary remedies, they are reserved for really extraordinary causes.”).

<sup>147</sup> See, e.g., TEX. R. CIV. P. 166a. But see TEX. R. CIV. P. 166a(i) (providing the 1999 revisions to supplement the state’s “traditional” motion for summary judgment historically available under Rule 166a with a “no-evidence” summary judgment motion which closely tracks the federal standard under Rule 56).

who do not bear the burden of proof at trial. In any kind of sophisticated or otherwise complex litigation, it is all but a foregone conclusion that a party not carrying the burden of proof at trial will make far more than a minimum showing in moving for summary judgment.<sup>148</sup> Even in more routine litigation, a party not carrying the burden of proof at trial has many incentives not to rely on the minimum burden set by Rule 56. Justice Brennan recognized this dynamic in his dissent in *Anderson v. Liberty Lobby*: “[A]ware that the judge will be assessing the ‘quantum’ of the evidence he is presenting, [no responsible attorney] will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client’s case.”<sup>149</sup> There is a natural desire among litigants to make the strongest case for the court. There is also the equally natural fear that if a litigant does no more than the minimum and consequently fails to make the strongest case, he risks having to go forward to trial, a costly and risky proposition his client very much wants to avoid.<sup>150</sup> The client might even hold his lawyer accountable if he perceives the lawyer could have done more. On top of all this, we should not overlook the agency costs that misalign client and lawyer interests; remuneration based on hourly billing likely affects the quantum of summary judgment proof that defendants usually offer.<sup>151</sup>

To be clear, I am not arguing that the burden at the summary judgment stage on defendant-movants must be the same as the “showing” requirement imposed on plaintiffs by Rule 8. But, because it is neither theoretically required nor practically necessary for the movant’s summary judgment burden to be lower than the plaintiff’s under Rule 8, the case for permitting a de minimus “showing” at summary judgment requires something else. We will come to this in Part III, but before doing so, we must turn to the second doctrinal intersection with pleading practice.

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<sup>148</sup> See generally D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 891-94 (2006) (arguing that a plaintiff’s position may be stronger if it survives a motion for summary judgment than it would be if summary judgment was never sought, and thus the defendant has an incentive to put on a stronger showing when moving for summary judgment).

<sup>149</sup> *Anderson v. Liberty Lobby*, 477 U.S. 242, 267 (1986) (Brennan, J., dissenting).

<sup>150</sup> Relatedly, the nonmovant who survives summary judgment may have less incentive to settle. See Rave, *supra* note 148, at 891-92 & n.100.

<sup>151</sup> Cf. Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 564 (2004) (“A measurable increase in filings of contract disputes seemingly reflected an apparent tendency of businesses to take their disputes to court more frequently than they had in the past. This might be plausibly explained by the entrenchment in the third quarter of the twentieth century of the practice of business litigators to bill for their services by the hour, for this created a strong incentive to leave no stone unturned and no motion unmade.”).

### B. *Removal*

To be sure, removal is a less obvious point of intersection with pleading practice. Removal cannot dispose of the case, unlike the granting of a motion to dismiss or a motion for summary judgment. Removal's ostensible impact is merely a change in forum.

Of more significant note, it should be emphasized that because of differences between merits allegations under Rule 8 and jurisdictional allegations made at removal, it is likely that we will gain less purchase in the debate over judicial pleading power by reference to the intersection between pleading and removal than we can with regard to the connection between pleading and summary judgment. When a court is engaged in reviewing the sufficiency of a pleader's allegations under Rule 12, it is deciding whether the substantive allegations on the merits are sufficient. In the context of removal, two very different questions regarding jurisdictional allegations are asked: whether the case was properly removed,<sup>152</sup> and if so, whether it comes within a grant of original jurisdiction to the district court.<sup>153</sup> Because the contexts are different, no demand for doctrinal consistency requires that the pleading burdens be equivalent. Indeed, since considerations unique to removal come into play, it is entirely appropriate for the defendant's § 1446(a) burden to be *higher* than the plaintiff's pleading obligations in the complaint.<sup>154</sup> One of those principles is the longstanding presumption that the plaintiff is the master of her complaint.<sup>155</sup> The other is the special gravitational pull that principles of federalism exert in this context, a force reflected in the traditional rule of "strict construction" against removal.<sup>156</sup>

But if the intersection between pleading and removal is more attenuated and not of as much import for present purposes as the linkage between pleading and summary judgment, close scrutiny nevertheless reveals certain doctrinal similarities that, if properly understood, can inform normative thinking about judicial pleading power.

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<sup>152</sup> 28 U.S.C. § 1446 (2000) (describing the procedures for removal).

<sup>153</sup> *Id.* § 1441 (describing the conditions under which a defendant may choose to remove a civil action from a state court to a federal court of competent jurisdiction).

<sup>154</sup> *Id.* § 1446.

<sup>155</sup> Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1575 (2008) (observing that the plaintiff is the master of her complaint and "gets his or her way if there is a possibility that his or her position . . . is correct").

<sup>156</sup> *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *see also* *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (quoting *Shamrock*, 313 U.S. at 108, for the proposition that the "policy underlying removal statutes 'is one calling for the strict construction of such legislation'").

### 1. Doctrinal Intersections

The doctrinal intersections begin with the language of 28 U.S.C. § 1446(a).<sup>157</sup> Defendants need not do much to remove a case from state to federal court. Removal is one of the very few procedural tools that a party does not need to ask for permission to use: the defendant files a *notice of removal*, not a *motion to remove*. One of the few things that is required is that the notice must contain “a short and plain statement of the grounds for removal.”<sup>158</sup> This language, which immediately calls to mind Rule 8, is not by coincidence. Section 1446 was amended in 1988 in the Judicial Improvements and Access to Justice Act<sup>159</sup> to expressly delete the previous requirement that the petition for removal “state the facts supporting removal” and to follow instead Rule 8’s formulation.<sup>160</sup> The House Committee Report explains the reason for the change:

Subsection (b)(1) makes minor changes to 28 U.S.C. 1446(a) removal procedure. The present requirement of a verified petition is changed to a requirement that a notice of removal be signed pursuant to Civil Rule 11. This change is in keeping with general modern distaste for verified pleading. The sanctions available under Civil Rule 11 apply to every “other paper”, but it seems desirable to make it clear that they are available in cases of improvident removal. The present requirement that the petition of removal state the facts supporting removal has led some courts to require detailed pleading. Most courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish by civil rule 8(a).<sup>161</sup>

There is a curious duality in the legislative history’s insistence both that the 1988 change was merely “minor” and that the previous statutory formulation – the requirement that the defendant set forth the “facts supporting removal” – had been interpreted to set a higher bar on defendants in removing cases from state to federal court. If one puts this peculiar juxtaposition to one side, the take-away is clear: the 1988 amendment reflects a congressional intent that § 1446 should mirror Rule 8 and what was perceived to be its liberal pleading standard.

It is necessary to say further that, although the quoted passage from the House Committee Report only mentions “civil rule 8(a),”<sup>162</sup> the intended

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<sup>157</sup> 28 U.S.C. § 1446(a).

<sup>158</sup> *Id.*

<sup>159</sup> 28 U.S.C. § 1446 (1982) (current version at 28 U.S.C. § 1446 (2000)).

<sup>160</sup> *Id.*

<sup>161</sup> H.R. REP. NO. 100-889, at 71-72 (1988), as reprinted in 1988 U.S.C.C.A.N. 5982, 6032.

<sup>162</sup> *Id.*

reference is to Rule 8(a)(1), specifically. The language Congress adopted in § 1446(a) mirrors the language in Rule 8(a)(1).<sup>163</sup> Additionally, the legislative history expressly refers to borrowing “the jurisdictional pleading requirement” of Rule 8(a),<sup>164</sup> which is found in the first subsection of the rule.

There is also a second way in which the law governing removal is related to the law of pleading under Rules 8 and 12. In both instances, the short and plain statements that are being provided in the complaint and notice of removal are the representations made by the plaintiff and defendant, respectively, that the case belongs in federal court. In the complaint, the plaintiff does so by setting forth adequate allegations of the grounds for the court’s jurisdiction,<sup>165</sup> as well as of the entitlement to<sup>166</sup> and demand for relief;<sup>167</sup> in the notice of removal, the defendant demonstrates that a case belongs in federal court only by submitting adequate allegations of the grounds for the court’s jurisdiction.<sup>168</sup> I say more about this functional relationship below.

## 2. Doctrinal Inconsistencies

If these points of doctrinal intersection suggest the possibility that judicial interpretations of pleading and removal could bear relevance to one another, recognition of the linkages has been limited. When the doctrinal overlap between Rule 8 and removal has been considered by courts, the focus has been exclusively in one direction: that is, on the relevance of Rule 8 to removal law.<sup>169</sup> Moreover, there has been virtually no consideration given post-*Twombly* to whether the Court’s plausibility standard in that case should be applied in the removal context. The only reported decision to see any connection between *Twombly* and § 1446(a) is *Rescuecom Corp. v. Chumley*,<sup>170</sup> but *Twombly* proved of little importance in the case. The court in *Rescuecom* found the defendant had easily met its burden of showing the action came within the grant of original jurisdiction to the federal court under 28 U.S.C. § 1332(a)<sup>171</sup> since it relied on the plaintiff’s own allegations as proof that the amount in controversy was above \$75,000.<sup>172</sup>

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<sup>163</sup> See *supra* note 160 and accompanying text.

<sup>164</sup> H.R. REP. NO. 100-889, at 71-72; *cf.* *Mich. Mfrs. Serv., Inc. v. Robertshaw Controls Co.*, 134 F.R.D. 154, 156 (E.D. Mich. 1991) (quoting the same House Committee Report, apparently in error, as making an explicit reference to Rule 8(a)(1)).

<sup>165</sup> FED. R. CIV. P. 8(a)(1).

<sup>166</sup> FED. R. CIV. P. 8(a)(2).

<sup>167</sup> FED. R. CIV. P. 8(a)(3).

<sup>168</sup> 28 U.S.C. § 1446(a) (2000).

<sup>169</sup> See, e.g., *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1216-17 (11th Cir. 2007).

<sup>170</sup> 522 F. Supp. 2d 429, 435 & n.4 (N.D.N.Y. 2007) (citing *Bell Atl. v. Twombly*, 127 S. Ct. 1955, 1965-74 (2007)) (stating that “the amount in controversy plausibly suggested by the factual allegations of Plaintiff” met the statutory requirement).

<sup>171</sup> 28 U.S.C. § 1332(a).

<sup>172</sup> *Twombly*, 127 S. Ct. at 435.

None of this is necessarily surprising since, as we have noted, the precise intersection in the law is between Rule 8(a)(1) and § 1446; notably, *Twombly*'s interpretation of Rule 8 was directed, instead, to Rule 8(a)(2).<sup>173</sup> Even more precisely, *Twombly*'s focus was not on the "short and plain" part of that rule, but rather, the rule's requirement of a short and plain statement "*showing the pleader is entitled to relief*."<sup>174</sup> And § 1446(a), like Rule 8(a)(1), is formulated (at least slightly) differently: there is no requirement of a "showing" that the pleader "is entitled to relief," instead, the command is "a short and plain statement of the grounds for removal."<sup>175</sup>

Whether warranted or not, a key manifestation of this incomplete awareness of the doctrinal intersection between pleading and removal is that, in judging whether a defendant's showing in the notice of removal is adequate, courts often are forgiving of defendants, even as *Twombly* suggests courts should be less permissive in assessing the factual sufficiency of merits allegations made by plaintiffs in the complaint. We may discern this permissive attitude as to removal from considering: (a) the standard of proof on which courts measure whether a defendant's removal motion sufficiently shows that the case is within a grant of original jurisdiction to the federal courts; (b) the willingness of most courts to consider factual proof beyond the removing documents in deciding the propriety of removal; and (c) the virtual immunity from cost-shifting under § 1447(c) that the Supreme Court has accorded to defendants.<sup>176</sup>

a. *The Standard of Proof*

It is astonishing that although statutory authority to remove a case from state to federal court has existed ever since the First Judiciary Act of 1789,<sup>177</sup> the case law interpreting the standards of pleading and proof the defendant must satisfy remains remarkably unsettled even today.<sup>178</sup> While most courts appear to insist on standards that are at least as demanding on defendants at the

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<sup>173</sup> *Twombly*, 127 S. Ct. at 1964.

<sup>174</sup> *Id.* at 1964 (emphasis added).

<sup>175</sup> 28 U.S.C. § 1446(a) (emphasis added). *See also infra* text accompanying notes 184-186 (discussing how the burden of proof in removal is at least as high (if not higher) than the standard under Rule 8).

<sup>176</sup> 28 U.S.C. § 1447(c) (2000) (providing that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal").

<sup>177</sup> Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (1789). *See generally* Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 437-39 (1999) (discussing the original removal provision in the Judiciary Act of 1789).

<sup>178</sup> *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1008-11 (2006) (discussing the difficulty in analyzing the merits of claims on the basis of jurisdiction); Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1118-26 (1987) (examining various judicial standards and the cognitive reasons for creating them even when they fail to clearly establish clear judicial guidelines).

removal stage as *Twombly*'s plausibility standard is on plaintiffs' pleadings, one consequence of this uncertainty has been to permit courts predisposed to retaining jurisdiction over a removed case to do so by lowering the defendant's standard of proof at removal.

Kevin Clermont and Ted Eisenberg have helpfully summarized the case law on this score. They note that the burden imposed on defendants removing a case from state to federal court varies among the courts:

[The required showing] ranges from requiring the defendant to show a legal certainty that recovery, if there is one, will exceed \$75,000, down the step-scale of probability to requiring a showing that more likely than not any recovery will exceed \$75,000. Some courts have required less, such as a substantial possibility or a reasonable possibility, but such authority is relatively scanty and shaky. Of late, the courts, and especially the appellate courts, markedly appear to be converging on the preponderance-of-the-evidence standard, which requires a more-likely-than-not showing.<sup>179</sup>

In the most recent battle over the appropriate standard of proof at removal, several appellate courts determining the propriety of a defendant's removal of the suit on the authority of the Class Action Fairness Act ("CAFA")<sup>180</sup> have been especially generous in their application of the governing law.<sup>181</sup> Far more troubling is the willingness of many CAFA courts to shift a portion of the burden of proof from the party who desires to litigate in federal court (which in this context has usually meant the removing defendant) onto the plaintiff.<sup>182</sup> These cases only barely hide their unabashed preference for reading the grant of federal jurisdiction broadly, an approach curiously out of step with the long-standing presumption against jurisdiction.<sup>183</sup> They make plain that we should

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<sup>179</sup> Clermont & Eisenberg, *supra* note 155, at 1570-71 (citations omitted).

<sup>180</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2006)).

<sup>181</sup> *E.g.*, *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448-49 (7th Cir. 2005); *see also* Clermont & Eisenberg, *supra* note 155, at 1574 ("The *Brill* court seems to have required merely as a burden of production that the defendant show by a preponderance that the claim exceeded the jurisdictional amount. At the same time, the court said that this showing would sustain federal jurisdiction unless the plaintiff could come back to show to a legal certainty that the claim did not meet the jurisdictional amount.").

<sup>182</sup> Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 419-34 (2008) [hereinafter Hoffman, *Burdens of Jurisdictional Proof*] (discussing that the shift of the burden of demonstrating the case falls within one of the jurisdictional "exceptions" onto the plaintiff).

<sup>183</sup> *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); Hoffman, *Burdens of Jurisdictional Proof*, *supra* note 182, at 414. *But see* Michael Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1830-31 (2007). Collins argues:

Federal courts exercise limited jurisdiction. They can hear only those cases and controversies provided for in Article III of the Constitution and implemented by Congress. Arising from the limited nature of their power is a long-standing "first



not dismiss the standard of proof as a mere procedural technicality. The standard of proof and where it is placed are key determining factors in the jurisdictional battle, so much so that – at least among the most recent CAFA cases – these factors appear to be virtually dispositive of the forum contest.<sup>184</sup>

But if some courts inclined to aggrandize federal judicial power have seized on the uncertainty that lingers in the proper standard of proof, Clermont and Eisenberg are certainly correct to emphasize that the majority of cases insist on a showing from the defendant at removal that is at least as high (if not higher) than the *Twombly* plausibility standard under Rule 8.<sup>185</sup> Of course, that is how it should be since other principles unique to the removal contest justify a higher burden of proof on defendants desirous of taking a case from state to federal court.<sup>186</sup>

b. *Looking Beyond the Removal Documents*

A second difference between how courts measure the sufficiency of a plaintiff's complaint under Rule 8 and the sufficiency of the defendant's showing at removal under § 1446(a) is that whereas courts look no further than the pleadings themselves under Rule 12(b)(6), there is a willingness to look beyond the removal documents in deciding whether to credit the defendant's jurisdictional allegations at removal.<sup>187</sup> For instance, if a complaint alleges only that the plaintiff is a resident of *X* state, the defendant is usually allowed to rely on other evidence to establish the plaintiff's *citizenship* (which is the

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principle of federal jurisdiction" that requires federal courts to dismiss a suit at any stage of the proceedings if subject matter jurisdiction is lacking. Closely related to this first principle are the presumption against the existence of jurisdiction and the imposition of the burden to establish it upon the party who invokes it.

*Id.* Collins's historical research suggests, however, that longstanding federal practice was different than the conventional understanding of limited jurisdiction. *Id.* at 1836.

<sup>184</sup> See Clermont & Eisenberg, *supra* note 155, at 1578 ("The standard of proof is determinative of jurisdiction, meaning that the parties know what they are doing when they wage battle over this seemingly arcane point . . . . [T]he party whom the court sticks with the burden of proof on a spongy jurisdictional determination will suffer."); Hoffman, *Burdens of Jurisdictional Proof*, *supra* note 182, at 411-12 ("[A]llocation of the burden of proof is a key determinant in the forum contest's outcome.").

<sup>185</sup> Clermont & Eisenberg, *supra* note 155, at 1571-72 (characterizing the predominant "preponderance of the evidence" standard as a "still tough approach against removal jurisdiction").

<sup>186</sup> See *supra* text accompanying notes 155-156 (listing federalism and the presumption that plaintiff is master of her complaint as two such examples).

<sup>187</sup> 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3734, at 370 (3d ed. 1998) ("[I]n practice, the federal courts usually do not limit their inquiry to the face of the plaintiff's complaint, but rather consider the facts disclosed on the record of the case as a whole in determining the propriety of removal."); accord *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976) (citing WRIGHT ET AL., *supra*).

relevant information, not her residency)<sup>188</sup> in making the case that diversity of jurisdiction exists between them.<sup>189</sup> Similarly, if a plaintiff pleads without an *ad damnum* clause quantifying the extent of her damages, the defendant is usually permitted to look to other evidence beyond the complaint itself in justifying removal on the grounds that it exceeds the \$75,000 amount in controversy floor set by § 1332.<sup>190</sup> Section 1446(b) affirms the permissibility of looking to jurisdictionally relevant facts beyond the complaint and notice of removal, whether gathered through stipulation, pre-removal discovery or other means.<sup>191</sup> Some courts even permit post-removal discovery to confirm existence of jurisdiction,<sup>192</sup> though others have frowned upon the practice.<sup>193</sup> The critical effect of this willingness to look beyond the allegations made in the complaint is to accord a defendant far greater latitude than would otherwise be the case if courts went no further than the four corners of that document.

There are sound policy reasons for not limiting the defendant only to the allegations set forth by the plaintiff in demonstrating the existence of federal jurisdiction. One reason is that it would permit plaintiffs to evade federal jurisdiction merely by omitting jurisdictionally relevant factual allegations and thereby thwart the legislative scheme of concurrent jurisdiction that, by virtue of § 1441(a), may be enjoyed by either party.<sup>194</sup> A second reason is that, even when no such intent is present, defendants may be at a disadvantage, relative to claimants, in terms of their knowledge of relevant jurisdictional facts.<sup>195</sup> As we shall see, this latter point bears special significance, in terms of the doctrinal relevance of removal law to the question of judicial power, when testing the factual sufficiency of a plaintiff's merits allegations under Rule 12.<sup>196</sup>

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<sup>188</sup> 28 U.S.C. § 1332 (2000) (granting federal district courts original jurisdiction in civil actions between citizens of different states).

<sup>189</sup> WRIGHT ET AL., *supra* note 187, § 3734, at 368-69.

<sup>190</sup> *Id.* at 370-72; 28 U.S.C. § 1332.

<sup>191</sup> *See* 28 U.S.C. § 1446(b).

<sup>192</sup> *See* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (stating that post-removal discovery may be permissible, but "should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity").

<sup>193</sup> *See* Lowery v. Alabama Power Co., 483 F.3d 1184, 1215 (11th Cir. 2007) (refusing to allow post-removal discovery on a jurisdictional matter based on policy grounds and judicial economy).

<sup>194</sup> WRIGHT ET AL., *supra* note 187, § 3734, at 368 ("[S]uch a limitation would encourage a plaintiff who wished to remain in state court to plead in a way that would obscure any basis for removal.").

<sup>195</sup> *Id.* ("There are many situations in which the requisite jurisdictional facts will not appear on the face of the state court complaint and if the defendant cannot show that the existence of these missing facts by excluding them in the notice of removal, he might be deprived of the statutory right to remove.").

<sup>196</sup> *See infra* Part III.D.

## c. 28 U.S.C. § 1447(c)

And then there is the third respect in which courts have demonstrated a permissive attitude to defendants at removal. We noted earlier Rule 11's applicability to all pleadings, motions, and other papers that are filed.<sup>197</sup> The rule covers all filings by plaintiffs and their lawyers as well as defendants and their counsel.<sup>198</sup> In addition to Rule 11, by special statutory provision under 28 U.S.C. § 1447(c), Congress has granted federal judges discretion to impose costs on defendants for improvident removals.<sup>199</sup> This cost-shifting statute is separate and independent from any sanctions warranted by Rule 11.

If to the uninitiated, this special statutory provision seems like a signal for courts to ameliorate the risk of defendants abusing the unilateral removal authority given to them by § 1446(a), that is not how it has played out. Even before 2005 it was not often that a court's order of remand was accompanied by a shifting of costs under § 1447(c), though in some circuits the prospects were better than in others.<sup>200</sup> No longer. *Martin v. Franklin*<sup>201</sup> reigned in these more liberal treatments and effectively put the kibosh on any reasonable prospect of success. The essential take away from *Martin* is that "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal."<sup>202</sup>

Consider, as one of many examples that could be cited, *Watson v. Philip Morris Co.*<sup>203</sup> This was a case brought in state court by persons who claimed Philip Morris violated state law through their marketing efforts of "light" cigarettes.<sup>204</sup> No diversity of citizenship existed between the parties and no federal question appeared as part of the plaintiff's well pleaded complaint. Nevertheless, Philip Morris removed the case solely on the authority of 28 U.S.C. § 1442(a)(1).<sup>205</sup> This is known as the "Federal Officer Removal Statute." It allows removal of a civil action against the "United States or any

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<sup>197</sup> See *supra* note 161 and accompanying text.

<sup>198</sup> FED. R. CIV. P. 11.

<sup>199</sup> 28 U.S.C. § 1447(c) (2000).

<sup>200</sup> See, e.g., *Sirotzky v. N.Y. Stock Exch.*, 347 F.3d 985, 987 (7th Cir. 2003) (acknowledging that § 1447(c) authorizes an award of fees for obtaining a remand order but that the entitlement is not automatic), *abrogated by Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005); *Hofler v. Aetna US Healthcare, Inc.*, 296 F.3d 764, 770 (9th Cir. 2002) (awarding fees where defendant's removal argument was wrong as a matter of law even though the position was "fairly supportable"), *abrogated by Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).

<sup>201</sup> 546 U.S. 132 (2005).

<sup>202</sup> *Id.* at 141.

<sup>203</sup> 127 S. Ct. 2301 (2007).

<sup>204</sup> *Id.* at 2304.

<sup>205</sup> *Id.*

agency thereof or any officer (or any person acting under that officer).”<sup>206</sup> On its behalf, Philip Morris’s lawyers made the almost laughable argument that since its conduct was so fully regulated by the federal government, the plaintiffs were really suing it for “act[s]” taken “under” a federal officer, namely, the officers who worked for the Federal Trade Commission.<sup>207</sup> Perhaps, had the argument not been made by such serious-looking men and in such an august setting, the argument would have been given the unceremonious boot back to state court right away. But it was made that way, and Philip Morris even got the district court and the Eighth Circuit to go along with it.<sup>208</sup> The Supreme Court – unanimously – corrected the lower courts and sent it back to the state court from whence it was removed.<sup>209</sup> On remand, however, there was not even so much as a mention of imposing costs under § 1447(c).<sup>210</sup>

### 3. The Relationship of Pleading to Removal

By highlighting these three phenomena – inconsistencies in the standard of proof by which the sufficiency of the removal is judged, the willingness of courts to look beyond the removal documents, and the virtual immunity from imposition of fees under § 1447(c) – I do not suggest that courts are imposing a lower burden on defendants at removal than on plaintiffs under Rule 8(a)(2). And I am certainly not suggesting the removal burden has been set below that required of plaintiffs under Rule 8(a)(1). What I have meant to say, thus far, is that the three phenomena we have seen are illustrative of a permissive attitude exhibited by courts as to defendants at removal at the same time that *Twombly* suggests courts may need to be less permissive with plaintiffs in the complaint. It is not a question of direct conflict, but of movement in opposite directions.<sup>211</sup> But that returns us to some unfinished business. I noted earlier that the doctrinal intersection between pleading and removal is somewhat attenuated because the more precise connection is between the jurisdictional pleading

<sup>206</sup> 28 U.S.C. § 1442(a)(1) (2000).

<sup>207</sup> *Watson*, 127 S. Ct. at 2309 (“Philip Morris is ‘acting under’ officers of the FTC when it conducts cigarette testing.”).

<sup>208</sup> *Id.* at 2304.

<sup>209</sup> *Id.*

<sup>210</sup> *See, e.g.,* *Arendall v. Dennis Joslin Jamaica, Inc.*, No. 07-0452-BH-B, 2007 WL 2480271, at \*2 (S.D. Ala. Aug. 28, 2007) (observing that “defendants’ request for post-removal discovery to support their fraudulent joinder/misjoinder arguments belies their contention that removal was proper in this case” but neither mentioning or imposing a fee award under § 1447(c)).

<sup>211</sup> For an example of the movement of courts in opposite directions compare *Rescuecom Corp. v. Chumley*, 522 F. Supp. 2d 429, 435 (N.D.N.Y. 2007), where Judge Scullin demonstrates lenience in removal allegations, with *Riegel v. New York ex rel. N.Y. State Dep’t of Transp.*, No. 1:05-CV-1503, 2008 WL 150488, at \*6 (N.D.N.Y. Jan. 18, 2008), where Judge Scullin exercises a more strict review of pleadings based on the heightened standard after the *Twombly* decision.

requirement of Rule 8(a)(1) and § 1446(a), and I also noted the difference between the language of Rule 8(a)(2) and Rule 8(a)(1) and § 1446(a).<sup>212</sup> The former speaks of the requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief”<sup>213</sup> while the jurisdictional allegation requirement in the latter two is for “a short and plain statement of the grounds” of jurisdiction.<sup>214</sup>

Is there any relevant difference between the two formulations? Perhaps, but it is worth recalling that in describing the standard that a pleader’s obligations under Rule 8(a)(2) must be plausible, the *Twombly* Court emphasized that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions.”<sup>215</sup> “Grounds” is nowhere to be found in Rule 8(a)(2);<sup>216</sup> here, *Twombly* is quoting and following *Conley*’s use of the term.<sup>217</sup> The Court in *Twombly* thought the lack of adequate “grounds” was problematic; that is, without plausible allegations in the complaint, “it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”<sup>218</sup> This suggests it might be appropriate to read *Twombly* as imposing a similar plausibility requirement on jurisdictional allegations at Rule 8(a)(1), with its requirement that the pleader set forth the “grounds of jurisdiction,”<sup>219</sup> just as such a requirement was said to spring out of Rule 8(a)(2)’s “showing the pleader is entitled to relief” language.<sup>220</sup>

Beyond trying to tease meaning out of particular words, it is a mistake to overlook the functional relationship between the pleader’s allegations at Rule 8, both as to jurisdiction and merits, and the defendant’s jurisdictional allegations in the notice of removal. A defendant is obliged not to remove on the basis of speculation. This is the command of Rule 11.<sup>221</sup> The certification rule applies both to plaintiffs and defendants, of course, and is sufficiently broad to cover jurisdictional and merits allegations made in any pleading, motion or other paper.<sup>222</sup> This point becomes significant when we reflect that imposing a plausibility requirement at Rule 8(a)(2) is probably close – if not

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<sup>212</sup> See *supra* text accompanying notes 174-175.

<sup>213</sup> FED. R. CIV. P. 8(a)(2).

<sup>214</sup> 28 U.S.C. § 1446(a) (2000).

<sup>215</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

<sup>216</sup> FED. R. CIV. P. 8(a)(2).

<sup>217</sup> *Twombly*, 127 S. Ct. at 1964-65 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

<sup>218</sup> *Id.* at 1965 n.3 (quoting *Conley*, 355 U.S. at 47).

<sup>219</sup> FED. R. CIV. P. 8(a)(1).

<sup>220</sup> FED. R. CIV. P. 8(a)(2).

<sup>221</sup> FED. R. CIV. P. 11; *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1217 (11th Cir. 2007) (indicating that a defendant who removes an action and thereby “represent[s] to the court that the case belongs before it” is in a similar position as a plaintiff filing a complaint with regards to being subject to Rule 11).

<sup>222</sup> *Lowery*, 483 F.3d at 1217; see also FED. R. CIV. P. 11.

(at least sometimes) equivalent – to the Rule 11(b)(3) proscription against asserting claims for which there is no evidentiary support and no likelihood of evidentiary support after a reasonable opportunity for further discovery.<sup>223</sup> That is, an allegation that is implausible may also be said to violate Rule 11(b)(3), although neither the majority nor the dissent in *Twombly* made mention of this possibility.

I do not mean to suggest that courts have, are likely to, or should start imposing sanctions under Rule 11 when they dismiss allegations as factually implausible under Rule 12(b)(6). But once we recognize that implausible allegations may not be terribly distant from sanctionable allegations, at least on a robust reading of *Twombly*, then the functional comparison between Rule 8(a) and § 1446 comes more sharply into focus because defendants are also not supposed to make allegations as to jurisdiction that are speculative or conclusory. Of course, this in turn raises its own conundrum: If *Twombly*'s plausibility standard is construed as akin to Rule 11(b)(3), then what independent role is plausibility performing?

The best answer may be that Rule 11 is a certification and sanctioning rule and not normally the vehicle for dismissing insufficient claims. That is what Rule 12(b)(6) and Rule 56 are for. Similarly, Rule 11 is not the procedural means for remand; that is § 1447(c)'s role. To the extent plausibility has a role at removal, perhaps it may be best understood as a supplement to the remand analysis the court performs under § 1447(c) when deciding whether to credit jurisdictional allegations, just as it serves a similar function in connection with Rule 12(b)(6), the procedural device by which merits allegations said to be implausible under Rule 8 are tested. As so construed, that gives a doctrinal relevance to *Twombly*'s plausibility test at removal, but this role will necessarily be a modest one. That is because courts have already developed standards by which the sufficiency of a defendant's jurisdictional allegations at removal are tested. Although they vary with the circumstances, at least when the complaint does not affirmatively demonstrate the existence of jurisdiction, the defendant's burden is already as high (and, in fact, probably higher) than the plausibility standard imposed on plaintiffs at Rule 8.<sup>224</sup>

Of course, all this has mostly just been musings about whether *Twombly*'s interpretation of Rule 8 should bear relevance to assessments of a defendant's jurisdictional allegations at removal. For present purposes, where our concern is with the scope of judicial pleading power under Rule 12(b)(6), the second – and more central – question is to consider the doctrinal linkage in reverse: that judicial assessments of removal could bear relevance to the pleading sufficiency determination of merits allegations under Rule 8. Although this intersection is not going to be of equal importance (because of contextual differences) as the doctrinal relationship between pleading and summary judgment, Part III endeavors to show that bringing awareness to the doctrinal

<sup>223</sup> FED. R. CIV. P. 11(b)(3).

<sup>224</sup> See *supra* text accompanying notes 155-156.

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connection of removal to pleading nevertheless can aid normative thinking about the limits of judicial review of merits allegations under Rule 12(b)(6).

### III. WHAT TWO DOCTRINAL INTERSECTIONS CAN TEACH US ABOUT JUDICIAL POWER OVER PLEADING SUFFICIENCY

To this point, I have highlighted the important places of intersection among federal pleading standards, the summary judgment rule and removal practice, and I have also shown that, despite these linkages, courts do not treat them consistently. Now, having identified these doctrinal connections, what can they teach us? How can they help in setting practically meaningful limits on the court's power to review the factual sufficiency of allegations at the pleading stage?

In trying to establish limits on judicial pleading power, Traditionalist accounts rely centrally on references to history. According to this view, cases like *Dura* and *Twombly* are wrongheaded because they are inconsistent with the traditional pleading standard by which the Court, dating back to *Conley*, has long rejected factual sufficiency review of allegations, and the "liberal ethos" on which the traditional standard is based. The "liberal ethos" presumes that pleadings frame what the case is about, while discovery is where factual evidence is gathered to support or rebut the allegations previously made.<sup>225</sup>

But trying to justify limits on judicial pleading power by reference to the same body of law that the Court and its Reformist supporters have called into question is problematic. That does not mean Traditionalists are wrong to be wary of overregulation at the pleading stage; but it does suggest that a different perspective may be needed to aid the construction of a sustainable normative theory of judicial power that places reasonable restraints on its exercise. In this respect, attention to the doctrinal intersections among pleading, summary judgment, and removal provides a vehicle for going outside the law of pleading to help ground Traditionalist arguments for limiting judicial pleading power on firmer footing.

#### A. *The Doctrinal Differences Between Pleading and Summary Judgment*

We observed earlier that because it is neither theoretically required nor practically necessary for the burden on one who seeks summary judgment to be the same as the evidentiary burden she must carry at trial, something more is necessary to justify *Celotex*'s de minimus "showing" standard at summary judgment.<sup>226</sup> What makes it reasonable for the movant to trigger a summary dismissal only by "pointing out" the absence of a genuine issue of material fact is the nature and timing of the Rule 56 contest. In other words, whatever concerns may attend *Celotex*'s virtual elimination of the "showing" requirement for a movant without the burden of proof at trial, they are

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<sup>225</sup> See *supra* text accompanying notes 111-115.

<sup>226</sup> See *supra* Part II.A.2.

substantially ameliorated by the accepted norm that the evidentiary support for claims should not be judged summarily before trial until an adequate opportunity for discovery has been afforded.<sup>227</sup> Effectively, what this means is the risk of disposing of claims for which a reasonable factfinder might have given relief is substantially reduced by the structural protections the summary judgment rule, at least in theory, affords.<sup>228</sup>

This insight helps explain why treating a rigorous pleading sufficiency standard congruently with summary judgment – that is, as nothing more than an earlier but similar stage of judicial gatekeeping – is misguided. It ignores that while there is a risk that some meritorious cases will be thrown out at summary judgment, that risk is lessened by the opportunity for discovery the rule provides.

The primary implication of this insight with regard to summary judgment is that it is appropriate to begin, at the least, with a strong presumption for crediting allegations in a pleading as sufficient because a pleading sufficiency challenge is designed to take place without any opportunity for discovery. Traditionalist accounts similarly assume a strong – if not absolute – presumption of factual sufficiency but do not fully articulate the reasons why this starting assumption is appropriate. Attention to the doctrinal intersection between pleading and summary judgment helps make the rationale for the presumption plain. By allowing for fact gathering before the sufficiency of the evidentiary claims is tested, the nature of the summary judgment test helps minimize to some extent the twin problems that a heightened pleading standard risks: deterring the filing of some meritorious cases and incorrectly dismissing others.<sup>229</sup> Given the different procedural posture in which a pleading factual

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<sup>227</sup> FED. R. CIV. P. 56(f). Rule 56(f) states:

Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

*Id.* See also *Crawford-El v. Britton*, 523 U.S. 574, 600 n.20 (1998) (recognizing that under Rule 56(f) the trial judge has “discretion to postpone ruling on a defendant’s summary judgment motion if the plaintiff needs additional discovery to explore ‘facts essential to justify the party’s opposition’” (quoting FED. R. CIV. P. 56(f))).

<sup>228</sup> *But see supra* Part II.A.1 (discussing how the doctrinal intersection of pleading and summary judgment allows the consideration of dismissal at pleading to serve the same function as summary judgment, just earlier in the proceeding).

<sup>229</sup> See Stephen J. Choi, Karen K. Nelson & A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act* 19-26 (Univ. of Mich. Law Sch. John M. Olin Ctr. for Law & Econ., Working Paper No. 07-008, 2007), available at <http://www.law.umich.edu/centersandprograms/olin/abstracts/Pages/07-008.aspx> (reporting the results of predictive models on the impact of the heightened pleading requirement in the PSLRA and finding that the PSLRA is screening out both claims with and without merit); see *infra* text accompanying notes 262-269 (explaining that the PSLRA’s heightened pleading requirement creates what Choi, Nelson, and Pritchard call a “screening effect.”)



sufficiency challenge arises – that is, where there is no comparable Rule 56(f) – it should be a rare case when judicial scrutiny of the factual sufficiency of allegations can be justified.

B. *The Ambiguity of Plausibility*

Reference to prior experience with summary judgment also helps make plain why the *Twombly* Court’s “plausibility” formulation for assessing the factual sufficiency of allegations at the pleading stage is unworkable and problematic.

Virtually everyone (except, perhaps, the five Justices in the majority in *Twombly*) regards plausibility as an ambiguous standard.<sup>230</sup> Because it is ambiguous, it is probably having (and will continue to have) the effect of increasing costs for nearly all claimants. In this regard, it is not surprising that some have suggested, post-*Twombly*, the prudent approach is to allege more facts than are necessary in the complaint,<sup>231</sup> an especially intriguing possibility because arguably the fatal flaw for the *Twombly* plaintiffs was too many specifics, not too few.<sup>232</sup>

Whether prudent or not, gathering additional factual information to include in the complaint is not costless. Some may even be deterred from seeking relief because of these added costs.<sup>233</sup> Even if groundless cases (however those

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where fewer cases – both meritorious and nonmeritorious – are brought and a greater number of meritorious cases that are brought are dismissed).

<sup>230</sup> See, e.g., Dodson, *supra* note 37, at 142 (explaining it is difficult to determine what “plausible” means); Epstein, *How Motions to Dismiss*, *supra* note 17, at 76-77 (calling the distinction between conceivable and plausible “fuzzy”); Shapiro, *supra* note 37, at 69 (“What really is the new standard? Plausibility? What does that mean? And if we don’t know, isn’t that a huge problem?”); Spencer, *supra* note 37, at 450 (explaining there are three zones of pleading, but the requirements for each zone are unclear); Thomas, *supra* note 19, at 43 (explaining that judges instead of juries now have to determine on a case-by-case basis what is plausible); *The Supreme Court, 2006 Term*, *supra* note 37, at 311-12 (arguing the new standard creates problems of having confusing technicalities).

<sup>231</sup> Joseph, *supra* note 37 (“[E]rring on the side of including more rather than fewer facts is the safer course.”).

<sup>232</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1963 (2007); cf. *NicSand v. 3M Co.*, 507 F.3d 442, 457 (6th Cir. 2007) (“The key failing in *NicSand*’s complaint is not that it has too few details but that it has too many.”); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 780 (7th Cir. 2007) (finding that removing information from a deficient complaint in order to obscure the nature of the claim “does not intuitively comport with the purposes of notice pleading”).

<sup>233</sup> See Melissa L. Nelken, *Sanctions Under Amended Rule 11 – Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1314 (1986) (suggesting that Rule 11 sanctions are a deterrent to filing cases, regardless of whether the sanctions are a punishment or a compensation); Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 115 (1991) (acknowledging that some courts are reluctant to impose Rule 11 sanctions because they may “repress efforts to vindicate civil rights”); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189,

might be defined) warrant judicial intervention at the pleading stage, ambiguity in the standard for determining which cases will receive greater scrutiny means imposing additional costs on everyone, thus carrying serious practical and social consequences.<sup>234</sup>

Plausibility is not only an uncertain standard by which to measure when greater scrutiny is warranted, but it also, and more mischievously, invites a free-wheeling judicial judgment as to the legitimacy of claims. That should give cause for concern, especially given the anti-plaintiff influence emanating out of *Twombly*.<sup>235</sup> That message is not veiled, and courts that want to exercise their newly-minted authority to dispose of those cases they perceive to be unwelcome will not miss it. Indeed, there is direct evidence that courts inclined to exercise a more robust gatekeeping role as to certain less-favored claims have not hesitated to do so by applying pleading standards differently, both under Rule 8<sup>236</sup> and under the heightened pleading standards of the Private Securities Litigation Reform Act (“PSLRA”).<sup>237</sup>

C. *Mining the Most Relevant Empirical Evidence Regarding Summary Judgment*

Consistent with this concern over the unbridled discretion plausibility seems to bestow on courts, experience with summary judgment suggests reason to be cautious before investing courts with additional discretion to target particular

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220-21 (1988) (suggesting the fear of Rule 11 sanctions at the pleading stage will result in fewer meritorious claims being filed); cf. Georgene M. Vairo, Commentary, *Rule 11: Where Are We and Where Are We Going*, 60 *FORDHAM L. REV.* 475, 483 (1991) (describing the deterrent effect of the 1983 version of Rule 11 on at least certain prospective claimants, including those who might have alleged civil rights, employment discrimination, securities fraud cases, and antitrust cases). The 1989 Report of the Third Circuit Task Force on Rule 11, led by Stephen Burbank, offered further empirical evidence of this dynamic. STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 71-72 (1989) (finding that Rule 11 cost-shifting may lead to massive over-deterrence of the number of civil rights cases filed).

<sup>234</sup> See *The Supreme Court, 2006 Term, supra* note 37, at 314 (“Nor did the [*Twombly*] Court consider the fact that heightened pleading standards increase the cost of litigation for all plaintiffs, not merely those filing meritless claims.”).

<sup>235</sup> Shapiro, *supra* note 37, at 69; Editorial, *The Devil in the Details, supra* note 81, at 52 (“[*Twombly*] may close the courthouse to people who previously were able to sue . . .”).

<sup>236</sup> See Hannon, *supra* note 23, at 1836 n.161 (discussing an empirical study of *Twombly*'s impact on determining sufficiency of pleadings under Rule 8 and observing that courts may be more likely to apply heightened standards to civil rights claims).

<sup>237</sup> Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); see *infra* Part III.D.1 (examining studies which found high dismissal rates at the pleading stage for securities claims under the PSLRA).

kinds of cases at the pleading stage.<sup>238</sup> The most recent and best available empirical data on summary judgment has been completed by the Federal Judicial Center (“FJC”).<sup>239</sup> Ostensibly, the major finding of the FJC study was to disprove the common perception that the Supreme Court’s 1986 trilogy of cases “was a turning point in the use of summary judgment, signaling a greater emphasis on summary judgment as a necessary means to respond to claims and defenses without sufficient factual support.”<sup>240</sup> The FJC researchers found instead that summary judgment practice was already on the rise before the Supreme Court trilogy.<sup>241</sup>

A more significant, though less well publicized, finding reached by the FJC was that summary judgment filing and grant rates vary – and sometimes wildly – by case type and by court.<sup>242</sup> Though their studies can be mined for data concerning a number of different substantive law areas, for present purposes it is sufficient to consider one example: summary judgment practice in employment discrimination cases. Across all circuits, summary judgment motions were filed in approximately 39% of employment discrimination cases during the period studied (contrasted, for example, with a rate of 9% in tort cases and 21% in contract cases).<sup>243</sup> More significantly, the FJC researchers found that courts varied widely in the rate at which they granted summary judgment motions in employment discrimination cases. At the low end of the range, 56% of summary judgment motions were granted in whole or in part by courts in the First Circuit.<sup>244</sup> By contrast, courts in the Fifth Circuit led the way with a grant rate of 78%, followed closely behind by the Eleventh Circuit, with a rate of 75%.<sup>245</sup> The absolute high was one federal district in the Eleventh Circuit where the summary judgment motions in employment discrimination cases were granted at a 95% clip.<sup>246</sup>

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<sup>238</sup> Experience with Rule 11 suggests similar lessons. Burbank, *supra* note 9, at 622 (drawing a comparison between summary judgment and Rule 11 experiences and observing that, with empirical evidence as to the latter, the “myths of simple, uniform, and transsubstantive rules went up in smoke”); see Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1963-64 (1989) (finding that Rule 11 applied neither transsubstantively nor equally across the bar).

<sup>239</sup> Cecil et al., *supra* note 13, at 863; Memorandum from Joe Cecil & Joe Cort to the Honorable Michael Baylson, The Federal Judicial Center, Estimates of Summary Judgment Activity in Fiscal Year 2006 (Apr. 12, 2007) (revised June 15, 2007) (on file with author) [hereinafter Cecil & Cort].

<sup>240</sup> Cecil et al., *supra* note 13, at 862.

<sup>241</sup> *Id.* at 861.

<sup>242</sup> *Id.* at 863; Cecil & Cort, *supra* note 239, at 3 tbl.1, 6 tbl.3.

<sup>243</sup> Cecil & Cort, *supra* note 239, at 6 tbl.3.

<sup>244</sup> *Id.* at 3 tbl.1.

<sup>245</sup> *Id.* at 9 tbl.4.

<sup>246</sup> *Id.* In a similar regard, Steve Burbank has remarked that the empirical evidence also suggests at least some plaintiffs are being required to produce more evidence at the summary judgment stage than they would be required to offer at trial. Burbank, *supra* note

These stark disparities in filing rates and, more importantly in grant rates, offer a powerful reason to be wary of expanding the scope of judicial pleading review authority, at least if the goal of transsubstantive rules is not to be entirely jettisoned.<sup>247</sup> Reference to the summary judgment experience thus helps make plain that imbuing courts with discretion to conduct factual sufficiency review of merits allegations is likely to lead to similar disparities in judicial practices at the pleading stage, across different categories of cases and different courts. In this connection, it is also worth recalling experience with the PSLRA where, notwithstanding efforts to constrain judicial decisionmaking through articulation of a seemingly-specific heightened pleading standard, interpretive variance by the courts has been marked.<sup>248</sup> Awareness of this experience suggests that the ambiguity inherent in “plausibility” will engender even greater variances in judicial interpretation than have been observed at summary judgment, adding considerably more costs and uncertainty on litigants in cases now covered by the default rule.<sup>249</sup>

#### D. *The Problem of Information Asymmetry*

##### 1. Lessons from Summary Judgment

Unsatisfied with the Court’s plausibility test, Richard Epstein proposes an alternative approach for cabining judicial power.<sup>250</sup> Epstein argues that courts should dismiss a complaint for factual insufficiency only when the plaintiff

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9, at 624 & n.146. That should prompt concern that robust summary judgment practice may amount to “a demand for more ‘evidence’ at the summary judgment stage than would, when reduced to admissible form, suffice to support a jury verdict if the case were permitted to proceed to trial . . .” *Id.* Perhaps not surprisingly, given the FJC data previously noted, the phenomenon appears especially pronounced in employment discrimination cases.

<sup>247</sup> Burbank, *supra* note 9, at 622 (concluding, based on his own empirical work, that “even the most hard-hearted empiricist [should be persuaded] that some litigants in some types of cases in some courts are not receiving reasonable opportunities to present their cases”).

<sup>248</sup> Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 634 (2002) (finding great variances across circuits – and even within circuits – in judicial interpretation of the “strong inference” pleading standard required by the PSLRA); A.C. Pritchard & Hillary A. Sale, *What Counts As Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. EMPIRICAL LEGAL STUD. 125, 142 (2005) (comparing Second and Ninth Circuit decisions applying the PSLRA at the motion to dismiss stage, and finding the Ninth Circuit courts dismissed those claims at a rate of 63% compared to the Second Circuit’s rate of 36%).

<sup>249</sup> Grundfest & Pritchard, *supra* note 248, at 679 (observing that “[t]he level of discretion [under the PSLRA pleading standard] is sufficiently great that judges frequently can dispose of motions in a manner they deem most appropriate without being overly constrained by the formal definition of the standard”).

<sup>250</sup> Epstein, *How Motions to Dismiss*, *supra* note 17, at 81.

relies solely on publicly available information in its allegations and, relying only on these same public sources, the defendant can show that the plaintiff cannot prevail. In this circumstance, Epstein would empower courts to cut off the opportunity for discovery and dismiss the plaintiff's allegations as hopeless.<sup>251</sup>

Though a more thoughtful effort at trying to corral judicial power than the Court's entirely free-wheeling focus on implausibility, Epstein's account, like the Court's, likewise fails to adequately define the class of cases warranting heightened scrutiny without running into the problem of overregulation error. That is because Epstein and the *Twombly* Court both assume that it will be obvious when allegations made are "hopeless,"<sup>252</sup> to use Epstein's term, or "implausible," to use the formulation from *Twombly*, and therefore appropriately dismissible. The trouble with this view is not just that it is overly optimistic – it surely is! – but also, and more problematically, that it ignores information asymmetries, a subject I have written about before in another context,<sup>253</sup> and which we can again see more clearly by reference to the doctrinal intersections among pleading, summary judgment, and removal.

It is not uncommon for information that is needed to demonstrate the existence of a viable claim to lie solely within the exclusive knowledge and control of another.<sup>254</sup> Writing of the government's ability to use its administrative subpoena powers before formal proceedings have commenced, Graham Hughes has concisely underlined the basic insight: "Litigation depends on information."<sup>255</sup> But if the government relies on its statutory subpoena powers to obtain information through compulsory process prior to the institution of a criminal charge, the formal law can rarely be invoked pre-suit to compel production of the information needed.<sup>256</sup>

Medical malpractice cases are one context in which information asymmetries can often be profound.<sup>257</sup> With regard to securities cases under the PSLRA, Randall Thomas and Kenneth Martin have observed the following:

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 97.

<sup>253</sup> See generally, Hoffman, *Access to Information*, *supra* note 120.

<sup>254</sup> *Id.* at 220.

<sup>255</sup> Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 574 (1994).

<sup>256</sup> Hoffman, *Access to Information*, *supra* note 120, at 225-30.

<sup>257</sup> Several studies of closed-claim medical malpractice files have also shown that the desire to access information is one reason at least some claimants file suit. Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N 1359, 1361 (1992); William M. Sage, *Medical Liability and Patient Safety*, 22 HEALTH AFF. 26, 31 (2003); see also Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 227 (2005).

[T]he plaintiff will need to plead fraud with particularity without obtaining any nonpublic information from the defendants. Undoubtedly, some plaintiffs will be able to satisfy the heightened requirement that they state facts sufficient to establish a strong inference that the defendants acted with scienter – that is, with intent to defraud – without resort to the discovery process. In most cases, however, only in the unusual circumstance where the defendants have disclosed these facts in their own federal securities filings, or in the course of an ongoing federal investigation, would information sufficient to satisfy the pleading requirements become publicly available.<sup>258</sup>

In addition, certain other kinds of corporate wrongdoing suits, civil rights suits, libel suits, intellectual property claims, and labor and employment matters are prominent examples where prospective claimants may face challenges and varying degrees of access to information.<sup>259</sup> As it turns out, some of these are the same kinds of cases shown to have been disproportionately impacted both in terms of their susceptibility to summary judgment as well as to sanctions under Rule 11.<sup>260</sup> Simply put, those who advocate for robust judicial power to dismiss cases at the pleading stage assume it will be clear when there are no facts on which a viable suit may be based; but the problem of information asymmetry makes plain that this assumption is not reliable. Why should we assume that the plaintiff, forced to rely only on public information to make her allegations, would not have found further supporting evidence of misconduct through the discovery of facts privately held and, thus, otherwise inaccessible to her? Why should we trust our judgment as to the “hopelessness” or “implausibility” of the plaintiff’s

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<sup>258</sup> Randall S. Thomas & Kenneth J. Martin, *Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions*, 77 B.U. L. REV. 69, 71 (1997) (footnotes omitted).

<sup>259</sup> See, e.g., *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986) (refusing, in a civil rights suit based on police misconduct, to impose sanctions where “it is extremely unlikely that before formal discovery any citizen would or could be in possession of [sufficient] information” to support the claim); Conrad M. Shumadine et al., *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series* 40 (PLI Libel Litig. Practice, Course Handbook Series No. 604, 2000) (observing that in libel actions against media defendants, “evidence concerning the critical fault element lies with the defendant”); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 498 (1989) (observing that “in numerous civil rights suits, considerable information important to the factual preparation of complaints that appear specific will be in the records or minds of government or corporate defendants and cannot be secured before these pleadings must be filed, becoming available only during discovery”); see also Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 542-58 (1997) (discussing informational imbalances between plaintiffs and defendants).

<sup>260</sup> See *supra* Part III.B.

claims when we have denied the claimant any opportunity to gather additional facts of wrongdoing that may otherwise be hidden from view?<sup>261</sup>

Indeed, the best empirical evidence now available shows that, because of information asymmetries, when a heightened pleading standard is imposed, some meritorious cases will not be filed and, further, some that are filed will be dismissed (or settled for marginal value). In their July 2007 study of securities class actions involving allegations of secondary market fraud, Stephen Choi, Karen Nelson, and A.C. Pritchard found the PSLRA's heightened pleading standard has had "a screening effect," as they call it.<sup>262</sup> One of those effects is that there likely have been fewer lawsuits that settled for nuisance value<sup>263</sup> pre-PSLRA than in the post-PSLRA period.<sup>264</sup> A more significant screening effect, however, was found with respect to suits that would have settled for non-nuisance value (shorthand for a meritorious case) pre-PSLRA:

[A] substantial percentage of suits that would have resulted in a non-nuisance settlement prior to the PSLRA would not have been filed after Congress adopted the PSLRA, and, even if filed, would be less likely to produce a non-nuisance settlement. The screening effect is not observable, however, if we consider cases with "hard evidence" of securities fraud – a restatement of earnings or revenues or an investigation by the SEC – or abnormal insider trading.<sup>265</sup>

In other words, a deterrence and dismissal effect is ascertainable as a result of the heightened pleading requirement of the PSLRA and is most pronounced

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<sup>261</sup> Randy Picker has powerfully observed the problem of information asymmetry in the specific context of antitrust:

Antitrust laws are enforced through a mix of private and public efforts. *Twombly* limits the efficacy of private lawsuits. The Court majority does not seem to recognize the fundamental problem that the critical information regarding the existence or nonexistence of a possible conspiracy resides in the hands of potential defendants. Private litigation substitutes, at least in part, for public enforcement or regulation. The federal government has broad, but not unlimited, authority to serve civil investigative demands (CIDs) prior to bringing an antitrust action. *Twombly* shrinks the domain of private plaintiffs and it does so without even a passing thought about what that will do to the overall level of antitrust enforcement.

Picker, *supra* note 37, at 21 (footnote omitted); *see also id.* at 5 ("*Twombly* raises some basic questions about the mechanics of an adversarial court system. Plaintiffs will often have much less information about possible liability than defendants.").

<sup>262</sup> Choi, Nelson & Pritchard, *supra* note 229, at 3.

<sup>263</sup> Choi, Nelson, and Pritchard explain a nuisance value as the amount a defendant will be willing to pay as a settlement to avoid "the distraction of litigation, high defense attorney fees, negative publicity surrounding a securities lawsuit, and the specter of potentially bankrupting damages" in arguably nonmeritorious cases. *Id.* at 4.

<sup>264</sup> *Id.* at 21 ("The actual fraction of nuisance suits is 50% pre-PSLRA; our prediction model suggests that only 41% of these firms would have been sued under the PSLRA regime. These suits, of course, are the ones that Congress sought to deter by adopting the PSLRA, so the law is to some extent working as intended.").

<sup>265</sup> *Id.* at 3.

in cases in which access to hard evidence of wrongdoing is not as readily accessible to the plaintiff. In sum, as Choi, Nelson, and Pritchard observe, “there is no free lunch. Congress’s efforts to discourage frivolous litigation may have succeeded, but that success comes at the price of discouraging securities fraud class actions which would likely have been deemed meritorious prior to the PSRLA.”<sup>266</sup> They also report: “These results suggest that plaintiffs’ lawyers require more objective evidence of fraud before they are willing to file suit under the more demanding standards of the PSLRA.”<sup>267</sup> These observations support the hypothesis that “[s]uits lacking evidence of abnormal insider trading or hard evidence of fraud that received a non-meritorious outcome pre-PSLRA are more likely to receive a dismissal or low value settlement post-PSLRA.”<sup>268</sup>

These findings underscore that it is appropriate to be wary of any heightened pleading standard that does not adequately take into account the problem of information asymmetry. As we have seen, the summary judgment rule tries to account for the problem of information asymmetry by providing that the evidentiary support for claims should usually not be judged summarily before trial until an adequate opportunity for discovery has been afforded. In this manner, the rule provides some structural protection to offset the risk of meritorious case dismissal. Yet, in the calculus the Court applied in *Twombly* to justify a more robust gatekeeping role at the pleading stage, no meaningful consideration was given to the additional risk of deterring the filing of or improper termination of meritorious cases, a risk that is being taken on in a context where no comparable structural protections exist.

## 2. Lessons from Removal

Finally, and in a surprisingly related way, the doctrinal connection between pleading and removal can also help order thinking about the limits of judicial pleading power. We noted earlier the established norm that courts look beyond the complaint before testing the sufficiency of the defendant’s jurisdictional allegations at removal.<sup>269</sup> As it turns out, either when a plaintiff brings a case and makes allegations as to the court’s jurisdiction under Rule 8(a)(1), or when a defendant removes a case from state court and makes jurisdictional allegations under § 1446(a), courts are willing to go beyond the allegations to test them.<sup>270</sup> Why is this?

The answer that immediately comes to mind is that there is a desire to get jurisdiction right. Federal courts, we are trained to reflexively say, are courts of limited jurisdiction and are not supposed to hear cases they lack the power

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<sup>266</sup> *Id.* at 26.

<sup>267</sup> *Id.* at 22.

<sup>268</sup> *Id.* at 13.

<sup>269</sup> See *supra* Part II.B.2.b.

<sup>270</sup> WRIGHT ET AL., *supra* note 187, at 1-2.



to hear.<sup>271</sup> Testing the sufficiency of jurisdictional allegations by looking to facts beyond the initial papers filed is certainly one means of guarding against jurisdictional errors. To be sure, the plaintiff's and defendant's allegations are tested under different standards. A plaintiff gets booted out of federal court only if the defendant can show "to a legal certainty" that the case does not come within the court's jurisdiction.<sup>272</sup> By contrast, most courts require more from defendants to stay in federal court when the case has been removed from state court, at least when the complaint does not establish on its face the existence of jurisdiction. As we have seen, in this circumstance defendants usually must make a showing that jurisdiction exists by a preponderance of the evidence.<sup>273</sup>

Even with this higher burden on defendants at removal, we may profitably probe further by asking why courts ever allow defendants in the removal context to look beyond the complaint in demonstrating the existence of jurisdiction. Once again, we have already alluded to the explanation. The alternative would allow plaintiffs exclusive control over forum choice, rendering the removal privilege irrelevant in many cases. The other reason is that a case may be removable even when the complaint itself does not show on its face that it is. This can happen, for instance, when the plaintiff alleges her residency but not her citizenship; or when she fails to plead a specific amount in controversy.<sup>274</sup> In other words, in assessing whether a civil action filed by the plaintiff comes within a grant of jurisdiction to the federal district courts, the defendant may face an *information asymmetry* in terms of the relevant jurisdictional facts.

Once we recognize and take account of the accepted practice at removal of looking beyond the allegations in the complaint, we may better understand removal as an occasion when courts have deemed it appropriate not to make a sufficiency determination about allegations (in this context, jurisdictional allegations) when informational asymmetries exist. Stated more broadly, this is a context where courts are reluctant to make decisions based on insufficient information. The remaining question then becomes why the Rule 12 context, where merits allegations are scrutinized, should be treated differently.

There certainly are sound reasons for concluding that courts ought to be more concerned about testing the sufficiency of merits allegations than

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<sup>271</sup> Cf. Collins, *supra* note 183, at 1832 (describing the limited jurisdiction of federal courts and pointing out that federal courts can at any time dismiss a case for lack of jurisdiction).

<sup>272</sup> See *supra* text accompanying notes 155-156.

<sup>273</sup> See *supra* Part II.B.2.a.

<sup>274</sup> CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 163-64 (3d ed. 1976) ("[T]he citizenship of the parties will not normally be set forth in a state court complaint, and the defendant, seeking to remove on the basis of diversity, must be permitted to show these facts in his petition. In some circumstances the complaint will not sufficiently disclose the jurisdictional amount, and the petition must be used for this purpose." (footnotes omitted)).

jurisdictional allegations. It is certainly not obvious, however, why we should be less concerned about information asymmetries at the 12(b)(6) stage. Indeed, quite to the contrary, it seems more prudent to accord greater latitude at the pleading stage. That is because, at least technically, the question of whether to credit allegations in the notice of removal is only about whether the case should proceed in state or federal court. By contrast, whether to credit merits allegations in a complaint ultimately means deciding whether or not the pleader will be able to seek relief in any court. That is, as to sufficiency review of merits allegations under Rule 12(b)(6), it is an all-or-nothing proposition. How strange it is to be more concerned about correcting the informational imbalance a defendant faces as to jurisdiction and choice of forum than the information imbalance a plaintiff faces in making out whether a wrong has been committed against her for which, if one did, she would then have the right to seek legal redress.<sup>275</sup>

Of course, perhaps it is only strange if one thinks the costs of deterring and/or dismissing meritorious cases are greater than the costs of making a mistake as to forum. From the plaintiff's perspective, the answer seems self-evident. From the defendant's perspective, however, the costs of allowing a nonmeritorious case to get to discovery are hardly insubstantial. That, at least, is the Reformist view.<sup>276</sup>

Awareness of this doctrinal intersection between removal and pleading cannot tell us whether the costs of nonmeritorious cases are, in fact, greater than those of nonmeritorious removals, though there certainly is empirical evidence to suggest that removal means far more than just a change of forum.<sup>277</sup> That point to one side, recognition that informational asymmetries

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<sup>275</sup> In this connection, I am reminded of Linda Silberman's wonderful observation about confusing the relative importance of choice of law and jurisdiction. Linda J. Silberman, Commentary, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.").

<sup>276</sup> See *supra* text accompanying notes 85-94, 122-128.

<sup>277</sup> For instance, in their 2004 study of the impact of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 521 U.S. 1114 (1997), on forum selection by attorneys in class action litigation, Tom Willging and Shannon Wheatman observed the widespread perception among the practicing bar, on both sides of the aisle, of the relative advantages and disadvantages that state and federal forums can offer. THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 22-26 (2004). Kevin Clermont and Ted Eisenberg, who have compiled the best empirical evidence on this score, have arguably confirmed the predominant view. They report a drop in plaintiffs' win rate in federal court, across all classes of cases, from 58% to just above 36%, when the case was first filed by the plaintiff in state court and successfully removed by defendant into federal court. Kevin M. Clermont & Theodore Eisenberg, *Do*

explain, at least in part, why courts look beyond the complaint at removal to facts gathered independently or through discovery should be sufficient to force Reformists to explain why a similar approach before merits allegations are tested would prove more burdensome. I have a view of where the greater burden lies,<sup>278</sup> but I am willing to concede the question is worth pursuing further. And this, ultimately, may be the highest value to bringing awareness to the previously unconsidered intersection between pleading and removal law. It reframes the question so that, in thinking normatively about judicial pleading power, we no longer focus exclusively on when and in what manner allegations made by plaintiffs in a complaint are tested. By looking to allegations made in other contexts, we may learn how and under what circumstances they are evaluated. The resulting discoveries, especially in light of the previously observed influence in cases like *Dura* and *Twombly* of anti-plaintiff sentiments on arguments for expanding judicial power to review the factual sufficiency of allegations,<sup>279</sup> may turn out to be both surprising and revealing.

#### CONCLUSION

If debate over judicial pleading power fits into the familiar thematic tension between access and efficiency that runs through procedural law, added

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*Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593-95 (1998).

Of course, reference to this body of empirical legal literature to support that proposition ought not be necessary for any attentive observer of the legal landscape. Congressional grants of subject matter jurisdiction to the federal courts are often premised on the assumption that adjudication in the federal forum may affect a different outcome. Although this motivation may sometimes be shaded behind strategic rhetoric, one need not look very far for recent prominent examples where such sentiments have been explicitly articulated, such as in the Terri Schiavo imbroglio and, more importantly, in debates leading up to passage of the Class Action Fairness Act. See Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration and CAFA*, 106 COLUM. L. REV. 1872, 1876 (2006) (observing of CAFA's proponents that "[t]he point of moving such classes into federal court is to subject them to a distinctively federal body of class certification principles, and in so doing, to alter the outcomes of class certification decisions from what they otherwise would have been").

<sup>278</sup> Hoffman, *Burdens of Jurisdictional Proof*, *supra* note 182, at 470-71 (critiquing the practice of removing cases solely on the basis of the All Writs Act, mistaking it for an independent source of original jurisdiction from which courts can draw whenever they perceive it necessary to "protect" or "effectuate" judicial power); Lonny Sheinkopf Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle"*, 81 TUL. L. REV. 283, 288 (2006) ("It is abundantly clear from experience that pleas routinely recited to gain the federal forum may often reveal themselves as naked aggrandizements of federal power.").

<sup>279</sup> See *supra* Part I.C (discussing the *Twombly* Court's concern over discovery costs and abuses).

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complications present themselves that do not regularly arise at summary judgment. Rule 12(b)(6) is a procedural tool that can prematurely disrupt the judicial process. Unlike summary judgment, a pleading sufficiency challenge is designed to be made before the case advances to the discovery stage. That is both the promise and the curse, depending on one's vantage point, of a robust power that lets judges mete out judgment based only on the sufficiency of a plaintiff's allegations of wrongdoing, decreeing to some "you shall pass," but, to others, "you shall not pass."

I have argued that bringing awareness to the intersections between pleading and summary judgment and, to a lesser extent, pleading and removal, can provide a more solid doctrinal foundation on which to ground arguments for limiting the scope of judicial pleading power than existing Traditionalist accounts that rely heavily on reference to history, tradition and the "liberal ethos."<sup>280</sup> Given the procedural posture in which a challenge regarding pleading factual sufficiency arises – where there has been no opportunity for discovery, or no comparable Rule 56(f) opportunity for court ordered information gathering – it should be a rare case when judicial scrutiny of the factual sufficiency of allegations can be justified. Experience with summary judgment, where grant rates have been shown to vary widely by case type and by court,<sup>281</sup> further suggests reason to be cautious before investing courts with additional discretion to target particular kinds of cases at the pleading stage. Awareness of the summary judgment experience helps make plain that granting courts discretion to review the factual sufficiency of allegations is likely to lead to similar disparities in judicial practices at the pleading stage, across different categories of cases and across different courts. Even worse, ambiguities inherent in "plausibility" can be expected to produce even greater disparities in judgment, thereby adding great and unnecessary costs on all litigants and exacerbating the risk of deterring and/or dismissing meritorious cases.

Recognition of the intersection between pleading and removal further suggests that it may be doctrinally inconsistent for judges to credit as sufficient a defendant's removal allegations by looking beyond the allegations in the complaint to facts gathered independently or through formal discovery, but to assess the sufficiency of merits allegations before a comparable opportunity for discovery has been afforded. Removal provides a concrete example of how, to counterbalance information asymmetries, courts will defer testing the sufficiency of allegations made until after an opportunity for fact gathering has been afforded. The remaining question is whether there are any principled grounds for deferring review of a defendant's jurisdictional allegations at removal but not allowing plaintiffs a comparable opportunity for discovery before their merits allegations are tested.

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<sup>280</sup> See *supra* text accompanying notes 110-115; see also Hazard, *supra* note 114, at 1685.

<sup>281</sup> See Cecil et al., *supra* note 13, at 863.

The implications of the present study reach only so far, however. The hard question – that even awareness of the doctrinal intersections with summary judgment and removal cannot answer – is whether authority to review the factual sufficiency of allegations is ever warranted, even if it is not in the vast majority of cases. Because that question cannot be answered today, I want to conclude by suggesting a few points on which future research may profitably focus.

Two challenges present themselves in thinking normatively about judicial enforcement of pleading sufficiency standards. The first is to come up with a way to identify those circumstances that warrant closer attention, and to do so in such a manner that there is enough pliancy in the test to be useful, but not too much ambiguity so that unwelcome costs are imposed on all claimants. Then, even if it is possible to identify the relevant universe of potential cases warranting greater attention, the second step is to figure out how allegations that have been placed under the microscope are to be scrutinized. That is, assuming factual sufficiency is allowed in some rare instances, how is a court to decide when to credit certain allegations as sufficient and when not to? What is the standard of sufficiency review?

The answer to these questions almost certainly is going to lie in attending to differences in context.<sup>282</sup> The principal need in terms of future research, then, is going to be identifying differences in factual circumstances to try to get a better sense of when certain contexts may raise sufficient reason to cast doubt on the adequacy of a pleader's allegations. The empirical work the FJC endeavors to undertake in terms of assessing *Twombly*'s impact will be one important step in this direction.<sup>283</sup>

One place attention must focus is the particular problem of “conclusory” allegations. *Twombly* may be read as supporting the argument that the party objecting to the sufficiency of her opponent's allegations bears the initial burden to point to the existence of purely conclusory allegations so devoid of factual content that there is reason to be concerned discovery will not further improve the inadequate allegations that have been offered. But this is too unrefined. Surely not all conclusory allegations ought to trigger heightened judicial review; some allegations probably cannot be plead any other way.<sup>284</sup> Moreover, when conclusory allegations both fail to provide fair notice and to set forth the grounds of entitlement to relief, it may be more appropriate to

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<sup>282</sup> Cf. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1979 n.6 (2007) (Stevens, J., dissenting) (“Whether and to what extent that ‘showing’ [in Rule 8(a)(2)] requires allegations of fact will depend on the particulars of the claim.”); Susan A. Bandes, *Introduction to THE PASSIONS OF LAW* 1, 12 (Susan A. Bandes ed., 1999) (arguing that greater attention must be paid to context in thinking about the proper place for emotions in law).

<sup>283</sup> See *supra* notes 28, 126.

<sup>284</sup> See, e.g., *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1296 (11th Cir. 2007) (explaining that it would be almost impossible to objectively prove a religious belief when a religious belief is by its very nature a subjective and conclusory statement).

insist first on greater factual sufficiency through a Rule 12(e) motion for a more definite statement before allowing a factual sufficiency challenge under Rule 12(b)(6).<sup>285</sup>

Another subject of interest should be the substantive law itself. A particular rule of decision that raises evidentiary burdens above the normal preponderance of the evidence standard may be regarded as exerting a corresponding upward pull on pleading standards. As we have seen, and Allan Ides in particular has powerfully argued, this is a persuasive way to explain the Court's decision in *Twombly*.<sup>286</sup> *Dura* almost certainly can be explained on the same basis. Even when the substantive law has elevated the standard of proof for recovery, however, our previous discussion of the problem of information asymmetry suggests that being attentive to context means more than following a mechanical formula whereby pleading standards automatically rise (and fall) with the substantive law. Substantive law standards of proof matter, but so do relative differences in access to proof. The best predictive models measuring the effect of the heightened pleading standards under the PSLRA pellucidly underscore this point.

Ultimately, I have made no claim in this paper that attending to the doctrinal connections among pleading, summary judgment, and removal law will be enough to produce a general theory of judicial power over pleading norms. But if the ambitions of this project have been more modest, I have nevertheless endeavored to show that reference to the doctrinal intersection between pleading and summary judgment and, to a lesser extent, pleading and removal, helps ground Traditionalist arguments on firmer footing. This project, in turn, may enable us to eventually move closer to a more sustainable theory of judicial pleading power – one with sufficient capacity to honor the fundamental principles both of access and efficiency.

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<sup>285</sup> See *supra* text accompanying notes 29-33; see also *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) (“[I]f a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile.” (citing *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002))).

<sup>286</sup> See Ides, *supra* note 98, at 627 (“[*Twombly*’s] holding reflects the basic and long-accepted principle of Substantive Sufficiency, namely, that a complaint must contain sufficient information to outline or adumbrate a claim on which relief can be granted.”); *supra* text accompanying notes 116-121.