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The Burdens of Pleading

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ARTICLE

THE BURDENS OF PLEADING

ALEXANDER A. REINERT[†]

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“Our attitude towards pleading formalities will be largely determined by what we expect of the pleadings.”

–Hon. Charles E. Clark¹

INTRODUCTION

Twenty-five years ago, at a conference held at Northeastern University School of Law marking the fiftieth anniversary of the Federal Rules of Civil

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¹ Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456 (1943).

Procedure, pleading was invoked more often as a model of the Rules' commitment to merits adjudication than as a problem to be solved.² Although participants adverted to an ongoing debate about whether more should be demanded of pleadings, they mostly worried about the effect of other procedural reforms on access to justice.³ After all, there were many recent reforms to debate: amendments to Rule 11, restrictions on class actions, the Supreme Court's Rule 56 trilogy, limitations on discovery, and tightened standing requirements.⁴ But when it came to pleading, participants took as a given the liberal notice pleading regime established by *Conley v. Gibson*,⁵ even as they recognized that some lower courts had experimented with non-trans-substantive pleading regimes for particular categories of cases.⁶

For the balance of the last quarter century, the conference participants' overall optimism about the state of pleading would prove sensible. Thrice the Supreme Court emphasized the importance of notice pleading and the illegitimacy of attempts to alter the pleading standards outside of the rulemaking process.⁷ Most lower courts that had flirted with heightened pleading standards for specific categories of cases eventually beat a retreat, if not a hasty one.⁸

Yet, with the announcement of *Bell Atlantic Corp. v. Twombly*⁹ and *Ashcroft v. Iqbal*,¹⁰ the Supreme Court changed what courts expect of notice pleading. Whether one calls it "the new summary judgment motion,"¹¹ "new" or "heightened" pleading,¹² or (as I will use throughout this paper) plausibility pleading, the burdens of pleading have changed. Many scholars have already

² See generally Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988*, 137 U. PA. L. REV. 1873, 1874 (1989).

³ See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1902–03, 1906 (1989) (discussing developments in subject matter jurisdiction, fee-shifting, and standing doctrines).

⁴ *Id.* at 1913–18 (discussing reforms).

⁵ 355 U.S. 41 (1957).

⁶ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2105–07 (1989) (noting that, "in recent decades, lower federal courts appear to have entertained Rule 12 motions with increasing frequency, especially in a few substantive classes of cases"); Weinstein, *supra* note 3, at 1914 (discussing pleading rules for "specialized kinds of cases").

⁷ See *infra* note 29.

⁸ See *infra* note 22.

⁹ 550 U.S. 544 (2007).

¹⁰ 556 U.S. 662 (2009).

¹¹ Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 28–34 (2010) (discussing similarities between plausibility pleading and summary judgment).

¹² See SCOTT DODSON, *NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS?* 4–5 (2013) (adopting the term "New Pleading").

written about the burden plausibility pleading imposes upon claimants.¹³ As most commentators have argued, the introduction of plausibility pleading is congruent with many other restrictions on courthouse access that have emerged over the past fifty years.¹⁴ In this Article, I do not focus on the pleading burden as it is received by and applied against claimants, nor do I make additional arguments that plausibility pleading limits access to the courthouse. Instead, I argue that the burden of plausibility pleading also falls on judges, and that judges are poorly situated to shoulder that burden—especially when one considers how restrictions on courthouse access and other changes have reshaped the nature of litigation in the federal courts.

To preview my argument briefly, plausibility pleading formally asks judges—for the first time since the advent of the Federal Rules—to engage in a merits-based analysis at the pleading stage based on their “judicial experience and common sense.”¹⁵ Judges are expected to engage in this inquiry with only the factual allegations in the complaint at their disposal. Putting aside the difficulty of conducting this analysis under the best of circumstances, our federal judges have extremely limited judicial experience to apply to merits-based decisions. The number of trials, the ultimate arbiter of merit, has fallen precipitously in the past fifty years.¹⁶ Trials have been replaced by settlements (the terms of which are often secret, even to the judge handling the case), alternative dispute resolution (with outcomes that judges may review only for arbitrariness, if they review them at all), and summary judgment (a poor substitute for trial).¹⁷ With these gaps in judicial experience, a judge is left to compensate with “common sense,” relying on heuristics that may interfere with accurate decisionmaking.¹⁸

This argument is not made to denigrate federal judges but rather to identify the impoverished landscape of actual merits-based determinations upon which federal courts can draw to assess the plausibility of new claims. Moreover, the argument should be familiar to even casual readers of *Twombly*;

¹³ See, e.g., Alexander A. Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 1-2 (2012) (reviewing the breadth of literature on the topic).

¹⁴ See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309-10 (2013) (introducing an analysis of pleading changes in the context of other procedural “stop signs” erected during the past twenty-five years); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 105 (2008) (listing changes in pleading rules as one example of many changes that have made it harder for plaintiffs to access the courts).

¹⁵ *Iqbal*, 556 U.S. at 679.

¹⁶ See *infra* subsection II.A.1.

¹⁷ See *infra* subsection II.A.2–II.A.5.

¹⁸ See *infra* Section II.B.

there, the Court determined that judges were incapable of managing discovery given their limited knowledge and understanding of the cases before them.¹⁹ Thus began the shift toward plausibility pleading. If one accepts *Twombly*'s reasoning, however, it is counterintuitive to ask courts to do more with less by requiring a merits-based determination at the pleading stage.

The structure of this Article is straightforward. In Part I, I review the changes wrought by plausibility pleading. In Part II, I present the core of my argument: namely, that it is unrealistic to expect judges to shoulder the new burden of plausibility pleading given the structural and practical changes in the work of the federal judiciary over the past fifty years. I conclude the Article with remarks about the links between different procedural eras and their would-be reformers.

I. FROM *CONLEY* TO *IQBAL*

*Iqbal*²⁰ and its predecessor, *Twombly*,²¹ introduced a change in federal pleading standards that had, until then, remained essentially static for decades.²² In 1938, the Federal Rules of Civil Procedure established a “notice pleading” system for federal courts via Rule 8(a)(2), abandoning

¹⁹ Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559-60 & n.6 (2007).

²⁰ 556 U.S. 662.

²¹ 550 U.S. 544.

²² The pleading standard under Federal Rule of Civil Procedure 8(a), first announced in *Conley v. Gibson*, 355 U.S. 41 (1957), had remained in place despite intermittent attempts to heighten pleading requirements for specific kinds of litigation. See, e.g., Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998-1011 (2003) (summarizing different categories of heightened pleading). By 2007, though, when *Twombly* was decided, only the Eleventh Circuit explicitly maintained a heightened pleading standard for a specific type of case, namely civil rights cases. See *Dalrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003) (“[W]e must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity.”). By then, however, the Supreme Court had consistently rejected lower courts’ attempts to apply heightened pleading standards to particular kinds of cases. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-14 (2002) (rejecting the Second Circuit’s application of a heightened pleading standard in employment discrimination cases); *Leatherman v. Tarant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (holding that federal courts may not apply more-stringent-than-usual pleading standards to civil rights cases alleging municipal liability under 42 U.S.C. § 1983). In keeping with this message, nearly every circuit other than the Eleventh had recognized that the sufficiency of complaints should be assessed under a single standard, regardless of the substantive matter of the lawsuit. See *Doe v. Cassel*, 403 F.3d 986, 989 & n.3 (8th Cir. 2005) (finding that *Swierkiewicz* abrogated the Eighth Circuit’s heightened pleading standard for § 1983 suits and listing cases from the First, Second, Third, Sixth, Seventh, Ninth, and Tenth Circuits that reached the same conclusion); *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) (rejecting a heightened pleading standard in qualified immunity cases).

technical rules applied in both common law and code pleading jurisdictions.²³ In 1957, the Supreme Court explicitly recognized the notice pleading system in *Conley v. Gibson*.²⁴ Under this regime, complaints satisfied Rule 8(a)(2) without providing detailed facts, so long as they provided adequate notice to the defendant of the nature of the suit.²⁵ In addition, a motion to dismiss pursuant to Rule 12(b)(6) would not be granted “unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief.”²⁶ Rule 12(b)(6) was to be invoked in those rare cases in which no viable legal theory supported the plaintiff’s claim.²⁷

Notice pleading remained the standard, subject to some detours by lower courts,²⁸ for the fifty years between *Conley* and *Twombly*. The Supreme Court occasionally found it necessary to remind lower courts that the pleading rules could not be changed outside the rulemaking process,²⁹ even as it acknowledged that heightened fact pleading might have “practical merits.”³⁰ *Twombly* was the first sign of change, and I will highlight three significant aspects of the decision. First, the Court “retired” the language from *Conley* that tested a Rule 12(b)(6) motion by whether “the plaintiff can prove no set of facts”³¹ consistent with the defendant’s liability.³² Second, in

²³ See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438-40 (1986) (reviewing the history of pleading standards in England and the United States prior to the promulgation of the Federal Rules). For an overall history of the Federal Rules, see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

²⁴ 355 U.S. 41 (1957).

²⁵ *Id.* at 47.

²⁶ *Id.* at 45-46.

²⁷ See, e.g., Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1191-92 (2010) (discussing the historic role of Rule 12(b)(6)).

²⁸ Christopher Fairman, however, points to examples from many areas of law in which lower courts have constructed heightened pleading standards, arguing that notice pleading, at least in practice, has rarely been the rule. Fairman, *supra* note 22, at 998-1011. But this claim should not be overstated. See *supra* note 22 (citing cases demonstrating that, by the time *Twombly* was announced, most circuits had abandoned heightened pleading standards for particular types of cases).

²⁹ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (reversing the Second Circuit’s departure from notice pleading in employment discrimination cases); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting a heightened pleading standard for § 1983 claims against municipalities); see also *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (cautioning courts that issues of pleading, discovery, and summary judgment should be resolved through rulemaking or legislation).

³⁰ *Swierkiewicz*, 534 U.S. at 515.

³¹ *Conley*, 355 U.S. at 45.

³² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 563 (2007) (reviewing criticisms of *Conley* and concluding that expansive language of the case “has been questioned, criticized, and explained away long enough” and had therefore “earned its retirement”).

its place, *Twombly* substituted a “plausibility” inquiry,³³ a term that was new to Rule 12 adjudications.³⁴ Finally, the *Twombly* Court justified its new standard as necessary to protect defendants from the threat of burdensome discovery that extracts settlements even for claims of dubious merit.³⁵ “Careful case management” by district court judges had not worked, according to the Court, necessitating recourse to plausibility pleading standards.³⁶

Twombly was not the last word, however, because some observers and lower courts limited its reach to cases in which the costs of discovery were likely to be high and settlement-coercing.³⁷ *Iqbal* resolved this short-lived dispute by making it clear that plausibility pleading applied to all civil cases, not just antitrust claims.³⁸ *Iqbal* also articulated a two-step process for evaluating the sufficiency of a complaint.³⁹ First, courts must review each allegation in a complaint and exclude from consideration those allegations stated in a “conclusory” fashion.⁴⁰ Second, and consistent with *Twombly*, courts must conduct a plausibility analysis that assesses the fit between the nonconclusory facts alleged and the relief claimed.⁴¹ The judge may assess plausibility by calling on her “judicial experience and common sense,”⁴² a surprising turn from the judicial role contemplated in *Conley*.⁴³ In sum, and most important for this Article, plausibility pleading depends on the judge to conduct a preliminary evaluation of the likelihood of a claim’s success.⁴⁴

³³ *Id.* at 556-57.

³⁴ See Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 3-9 (reviewing the use of the word “plausible” in the summary judgment context).

³⁵ 550 U.S. at 558-59.

³⁶ *Id.* at 559 (internal quotation marks omitted).

³⁷ See, e.g., *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488-89 (6th Cir. 2009) (suggesting that *Twombly* was “limited to expensive, complicated litigation” (internal quotation marks omitted)).

³⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (declaring that the “decision in *Twombly* expounded the pleading standard for all civil actions” (internal quotation marks omitted)).

³⁹ *Id.* at 678-79.

⁴⁰ *Id.*

⁴¹ *Id.* at 679.

⁴² *Id.*

⁴³ See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (failing to provide any active role for the judge at the pleading stage).

⁴⁴ See, e.g., Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 148 (2010) (describing plausibility pleading as an “explicit invitation for the judge to use his or her own experience and intuitions as a baseline for whether a complaint can proceed”); Marcia L. McCormick, *Implausible Injuries: Wal-Mart v. Dukes and the Future of Class Actions and Employment Discrimination Cases*, 62 DEPAUL L. REV. 711, 721 (2013) (arguing that plausibility pleading “implicitly invites the judges to ask whether they believe the allegations”); Tung Yin, *“I Do Not Think [Implausible] Means What You Think It Means”*: *Iqbal v. Ashcroft and*

Plausibility pleading has taken the federal judicial world by storm. *Iqbal* already has been cited by approximately 70,000 reported opinions in less than five years, while *Twombly* has been cited 93,000 times over about six and a half years.⁴⁵ The cases have also earned a fair share of academic attention. Many scholars have criticized *Iqbal* and *Twombly* for altering the meaning of the Federal Rules outside of the traditional procedures contemplated by the Rules Enabling Act.⁴⁶ Others have lamented the vague and ill-defined standard for its break from history and difficulty of application.⁴⁷ Scholars have even questioned the constitutionality of the plausibility analysis.⁴⁸ Some academics, however, find at least a kernel of opportunity in the advent of plausibility pleading.⁴⁹ Almost all commentators agree that *Iqbal* and *Twombly* break from the liberal pleading doctrine enunciated in 1957 by *Conley*.⁵⁰

Judicial Vouching for Government Officials, 14 LEWIS & CLARK L. REV. 203, 215-16 (2010) (arguing that the Supreme Court essentially performed “judicial vouching” in *Iqbal* by finding implausible the plaintiff’s assertions that the defendants could have intentionally discriminated against Arabs and Muslims).

⁴⁵ These figures are those reported by Westlaw’s KeyCite feature on February 14, 2014.

⁴⁶ See, e.g., Burbank, *supra* note 27, at 1191 (“In *Twombly* and *Iqbal*, . . . the Court ignored the requirements of the Enabling Act and its own prior decisions on the difference between judicial interpretation and judicial amendment.”); Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 GEO. WASH. L. REV. 9, 28 (2009) (“Although *Twombly* did not alter the words of Rule 8(a)(2) itself, it substantially changed the provision’s understood meaning.”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84-89 (2010) (discussing how *Twombly* and *Iqbal*, as “legislative-like decisions,” work against the Supreme Court’s prior endorsements of the rulemaking process); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 334 (2012) (“Critics of the new pleading regime have targeted [the Supreme Court’s] unexpected willingness to alter the pleading standard through adjudication rather than through rulemaking . . .”).

⁴⁷ See Donald J. Kochan, *While Effusive, “Conclusory” Is Still Quite Elusive: The Story of a Word, Iqbal, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. 215, 222-35 (2011) (discussing the history of usage of the word “conclusory”); see also Reinert, *supra* note 13, at 22-28 (reviewing the Supreme Court’s use of the word “conclusory”).

⁴⁸ Two scholars have argued that plausibility pleading violates the Seventh Amendment. See generally Kenneth S. Klein, *Is Ashcroft v. Iqbal the Death (Finally) of the “Historical Test” for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467 (2010); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

⁴⁹ Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 466-68 (2010) (arguing that plausibility pleading affords an opportunity to reconsider the Federal Rules’ trans-substantive approach); Mark Moller, *Procedure’s Ambiguity*, 86 IND. L.J. 645, 646-47 (2011) (maintaining that plausibility pleading allows courts “to adopt a blend of different, conflicting interpretations of a statute (or procedure)—yielding an average result that compromises . . . between competing preferences”).

⁵⁰ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 121-25 & nn.11-24 (2011).

In conclusion, as others have argued, plausibility pleading has injected instability into the spectrum of pleading.⁵¹ Plausibility pleading resembles other heightened pleading regimes in some respects, but only enough to sow confusion and doubt as to its application.⁵² Perhaps if one squints enough, the plausibility inquiry looks like summary judgment,⁵³ but that provides little assistance at the pleading stage. It is not only the pleading standard's content that has changed, but also the terms of the debate. Courts now expect the pleader to shoulder new and different burdens,⁵⁴ and courts also impose new responsibilities on pleading itself. The next Part shows why plausibility pleading cannot realistically meet these expectations.

II. (MIS)FITTING PLAUSIBILITY PLEADINGS INTO OUR CURRENT PROCEDURAL LANDSCAPE

"Each aspect of the Federal Rules of Civil Procedure (or any state code of procedure) is part of a complex, highly interdependent system that collectively governs the litigation process. Any alteration of one structure inevitably affects the functioning of the others, which, in turn, affects the entire process."

—Arthur R. Miller⁵⁵

Arthur Miller's words capture the dynamic interplay among the multiple layers of our procedural system—an interplay that is particularly relevant to recent changes in pleading doctrine. Unfortunately, whether conceived of as an innovative or retrograde doctrine, plausibility pleading does not fit neatly in the existing procedural world. This argument, based on plausibility pleading's compatibility with the wider procedural landscape, differs from the criticism that *Iqbal* and *Twombly*—like many decisions before them—

⁵¹ See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010) ("The new approach . . . clashes . . . with the prior procedural system [and] magnifies the destabilizing effect that comes from cutting a procedural system from its moorings.").

⁵² See, e.g., *id.* at 832-33 (discussing differences between plausibility pleading and historical "fact pleading"). For example, in some respects, the *Twombly-Iqbal* distinction between conclusory and factual allegations resembles the distinction courts make between conclusions of law and conclusions of fact, and between ultimate facts and evidential facts. See Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 832 (1924) (criticizing the idea of distinctions between these categories of allegations).

⁵³ See, e.g., Thomas, *supra* note 11, at 28-34 (discussing the similarities and differences between Rule 12(b)(6) motions to dismiss and summary judgment motions).

⁵⁴ See, e.g., Reinert, *supra* note 13, at 32-35 (discussing plausibility pleading as an "information-forcing" regime).

⁵⁵ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 446 (1991).

continue to restrict access to the courthouse.⁵⁶ This Part does not dispute the latter claim, but rather seeks to show an even more complicated problem. Our legal system, given earlier changes, cannot reliably sustain the burdens that plausibility pleading now imposes.

Plausibility pleading requires judges to perform a novel and important task at the pleading stage: assess pleadings for their substantive merit, or their “plausibility.” For judges to apply the plausibility pleading standard effectively, they must have relevant judicial experience and reliable common sense upon which to rest their decisions. When one considers our “complex, highly interdependent” legal system,⁵⁷ asking judges to rely on their “judicial experience and common sense”⁵⁸ to assess plausibility is ill-advised, because federal judges have become increasingly removed from merits-based adjudication. Rather than rely on sound judicial experience, judges might rely on unreliable heuristics that take them further from accurate conclusions. Indeed, the dearth of judicial experience may partly explain why, as the available empirical data suggest, plausibility pleading has not effectively filtered cases on the basis of merit.⁵⁹

A. *The Minimal Experience of Judges in Merits-Based Determinations*

1. The Vanishing Trial

The first place one might look for judicial experience in assessing merit would be trial adjudication. Data show, however, that the number of trials in both state and federal courts has significantly declined over the past seventy-five years.⁶⁰ In 1938, nearly 20% of filed cases were tried,⁶¹ a percentage that

⁵⁶ See, e.g., Levin, *supra* note 44, at 145-48 (comparing plausibility pleading and the Rule 56 summary judgment trilogy and showing that “the likely effect of both is to reduce access by plaintiffs to trial and juries”); Miller, *supra* note 14, at 346 (“[Under *Twombly* and *Iqbal*], even when a potential plaintiff’s claims may have merit, cases may not be initiated because the risk of loss without any prospect of compensation . . . is too great.”).

⁵⁷ Miller, *supra* note 55, at 446.

⁵⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

⁵⁹ See Reinert, *supra* note 50, at 161 (presenting data that show, inter alia, that “*Iqbal* and *Twombly* pose the potential to eliminate cases that have better than a 50% chance of being successful”).

⁶⁰ See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 fig.1 (2004) (showing that the number of civil trials across all U.S. district courts dropped from more than 12,000 in the 1980s to less than 5000 in 2002); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 713 tbl.1 (2004) (presenting trial statistics from 1970 through 2000). *But see* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 520-21 n.115 (1986) (arguing that data regarding trial prevalence seventy-five years ago may be unreliable).

dropped to about 12% by the 1950s, and then to 1.7% by 2003.⁶² And although total dispositions increased five-fold between 1962 and 2000, the absolute number of trials decreased by one-fifth.⁶³ Overall, the data indicate that our legal system no longer disposes of many more cases by trial than by summary judgment; much the opposite, it is now much more common to dispose of cases through summary judgment than through trial.⁶⁴

As a consequence, judges increasingly lack the experience of seeing a case through from its pleading stage to its ultimate resolution by a factfinder. The result of this decrease in trial experience manifests itself in the settlement context, and some commentators observe that settlement reflects the “strategic position of repeat players”⁶⁵ more than calculations about the merits.

Most important for this Article, having fewer trials leaves judges with less “judicial experience” in evaluating the strengths and weaknesses of cases.⁶⁶ Moreover, legal doctrine and arguments become increasingly removed from the facts, “[c]ontests of interpretation replace contests of proof,” and the law’s impact on primary conduct becomes more indeterminate.⁶⁷ These trends limit the effectiveness of a judge attempting to apply a plausibility standard at the pleading stage. If a judge were to ask herself, “Does this claim resemble any I have seen in the past?” and “How did those claims turn out?,” she would have few answers on which to rely.

2. The Rise of Private Adjudication

Yet another trend limiting judicial experience in merits-based determinations is the growth of arbitration and alternative dispute resolution. Since at least the 1980s, the Supreme Court has found in the Federal Arbitration Act a national policy that favors arbitration agreements.⁶⁸ There is little question

⁶¹ Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 469 (2009).

⁶² Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1258-59 (2005).

⁶³ See Galanter, *supra* note 60, at 461-64 & tbl.1, fig.1 (describing and presenting data from the Administrative Office of the U.S. Courts).

⁶⁴ See *id.* at 484 (“In 1975, the portion of disposition by trial (8.4 percent) was more than double the portion of summary judgments (3.7 percent), but in 2000 the summary judgment portion (7.7 percent) was more than three times as large as the portion of trials (2.2 percent).”).

⁶⁵ *Id.* at 526.

⁶⁶ See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 566 (1991) (arguing that, in the securities class action context, judges lack the ability to foster substantively accurate settlements).

⁶⁷ Galanter, *supra* note 60, at 530.

⁶⁸ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) (describing the primary goals of the Federal Arbitration Act and case law discussing the policy of the act); see also Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47

that arbitration has expanded in response.⁶⁹ Predispute arbitration agreements have evolved from being highly contested to being fully accepted by federal courts.⁷⁰ The rise of private adjudication, in turn, has at least two consequences relevant here. First, it is one more means by which judges are removed from their traditional adjudicatory role. Second, because private dispute resolution is usually confidential, judges and the public are deprived of additional information about the nature and quality of particular areas of litigation. Both of these consequences matter for plausibility pleading because they affect the quality of judicial experience available for assessing the merits of a particular dispute.

As the enforceability and scope of arbitration agreements have increased, arbitration has become ubiquitous across disparate areas of the law. One scholar estimated that between 15% and 25% of employers adopted arbitration agreements to resolve employment disputes in 2009.⁷¹ A more recent study found that mandatory arbitration clauses are present in almost 77% of consumer contracts and 93% of employment contracts.⁷² And the percentage of employees covered by such agreements is likely a fair bit higher than the percentage of employers who use them because larger employers are more likely to adopt mandatory arbitration agreements.⁷³

The goal of arbitration, of course, is to reduce costs and risks associated with litigation.⁷⁴ Merchants may view arbitration as cheaper, faster, and less

WM. & MARY L. REV. 1711, 1715 (2006) (recognizing the “national policy favoring arbitration” (internal quotation marks omitted)).

⁶⁹ See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 408-12 (2007) (reviewing empirical studies of employment arbitration); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 834 (2002) (“Together, these major decisions have inspired numerous companies to require their customers and employees to arbitrate rather than litigate future disputes.”).

⁷⁰ See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 9-11 (reviewing the expansion of arbitration in the twentieth century).

⁷¹ Colvin, *supra* note 69, at 411.

⁷² Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880, 882-84 (2008) (reporting on a survey of consumer contracts for companies with “significant market shares or name recognition in the telecommunications, credit, and financial services industries” and results from an employment contract database).

⁷³ Colvin, *supra* note 69, at 410.

⁷⁴ See John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL’Y J. 1007, 1009-11 (2002) (suggesting that corporate employers embrace arbitration because they distrust the legal system and fear large jury awards); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 204 (1997) (citing a study finding that 75% of employers surveyed adopted arbitration plans to reduce litigation costs); Colvin, *supra* note 69, at 411-12

transparent than litigation.⁷⁵ Courts, too, seem to have embraced arbitration agreements in part because they reduce litigation.⁷⁶ Indeed, one key narrative on the Supreme Court's road to arbitration is that arbitration is no better or worse than judicial resolution of competing claims.⁷⁷

Whatever one's view of the relative value of procedures for adjudication in public courts, the private nature of arbitration and its ken make plausibility pleading yet more difficult to apply. Most important, arbitrators generally do not publish or explain their decisions, essentially leaving everyone but the parties in the dark about the facts of the dispute and the reasons for how the dispute was resolved.⁷⁸ Indeed, it is the confidentiality of arbitration that makes it so appealing to many parties.⁷⁹ This secrecy has earned its critics, who recognize that one of arbitration's costs is the loss of information that one can obtain from public trials and proceedings—information which permits litigants to better evaluate the law and make critical decisions.⁸⁰ But critics have not focused on the negative effect that increased private dispute resolution has on judicial experience—experience critical for judges who now have to assess a claim's plausibility early in the life cycle of a case.

3. Secret Settlements

Along with private adjudication, the principal reason most cases do not proceed to trial is that they are settled.⁸¹ And settlements can bear on a

(summarizing data suggesting that past experiences with litigation were the primary driver for employers who adopted employment arbitration).

⁷⁵ Sternlight, *supra* note 69, at 832.

⁷⁶ Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 661 (1996) (suggesting that, in encouraging arbitration, the Supreme Court was "at least influenced by a desire to conserve judicial resources").

⁷⁷ *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

⁷⁸ *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 455-56 (1996) (comparing arbitration to adjudication).

⁷⁹ *Id.* at 456.

⁸⁰ *See, e.g.*, Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 322-27 (1995) (questioning the use of arbitrators to resolve public law disputes because confidentiality undermines enforcement efforts); *see also* Sternlight, *supra* note 69, at 839 (discussing the failure of arbitration to educate the public about claims and defenses that arise in public law litigation, such as those involving consumer safety, employment discrimination, and abuses by financial institutions).

⁸¹ *See, e.g.*, Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 319-21 (1999) (explaining, from an economic perspective, why the vast majority of cases settle).

judge's assessment of plausibility. After all, if settlements enable a putative plaintiff to better evaluate the connection between a defendant's conduct and the plaintiff's injury,⁸² they would be of similar benefit to judges assessing the plausibility of that claim and other similar claims.⁸³ But confidential settlements have become the norm in most private law cases, further depriving courts of potentially relevant information.⁸⁴

Secret settlements have been criticized on multiple grounds. First, they interfere with the ability of lawyers and judges to accurately assess the merits of any particular settlement⁸⁵ and with the public's ability to accurately monitor health and safety issues.⁸⁶ Moreover, secret settlements erode a court's ability to reliably understand background states of affairs because

⁸² See Andrew F. Daughety & Jennifer F. Reinganum, *Informational Externalities in Settlement Bargaining: Confidentiality and Correlated Culpability*, 33 RAND J. ECON. 587, 592 (2002) ("The disposition of P_1 's suit is likely to affect the probability that P_2 makes the connection between her injury and D 's activity.").

⁸³ Cf. Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 402-03 (2006) (arguing that publicly available discovery has the potential to verify allegations of wrongdoing).

⁸⁴ See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 945-46 (2006) (observing that often, the only document filed with the court is a joint stipulation of dismissal on grounds of settlement); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007) (noting that public settlements are the exception); Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 459 (2006) (noting that it is common for settlement agreements to be confidential, even if a formal request to seal settlement documents is not made in most cases).

⁸⁵ See, e.g., Alexander, *supra* note 66, at 567 (noting that "in a world where all cases settle, it may not even be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes"); Moss, *supra* note 84, at 898 ("When more settlements are public, other attorneys and parties can make better estimates of the settlement values of their own claims, because they can see the settlement amounts—the 'pL' estimates—in prior similar cases."); Rhonda Wasserman, *Secret Class Action Settlements*, 31 REV. LITIG. 889, 920 (2012) ("If settlements are routinely filed under seal, courts will lack the comparative data needed to gauge the fairness of settlements submitted for their approval."); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 517 (1994) (discussing the utility of settlements for case valuation in the mass tort context).

⁸⁶ See generally Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 792 (2004) (citing the Firestone litigation as an example of the negative impact of confidential orders, given that recalls and federal investigation of defect tires were not initiated until eight years after the first product liability suits); Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1458 (2006) (providing examples of secret settlements of cases involving public health hazards, including automobiles, vaccines, painkillers, heart valves, toxic leak sites, asbestos, tobacco, and breast implants, among others); Goldstein, *supra* note 83, at 401-03 (noting that, unlike many European countries, the United States relies on civil litigation to reveal information of public interest); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995) (discussing public controversy about secret settlements concealing health and safety matters in the 1980s); Moss, *supra* note 84, at 906-08 (explaining how secret settlements render consumers unable to distinguish between safe and unsafe products).

courts themselves cannot investigate and present facts.⁸⁷ For a court required to assess the “plausibility” of a particular claim, ignorance about the substantive content of settlements of similar claims will be another barrier to accuracy.

4. Access to Discovery

Protective orders preventing disclosure of information learned during discovery have also become routine.⁸⁸ They have proliferated largely because the actors in any given case—the litigants and the judge—often have converging interests in maintaining secrecy.⁸⁹ To the extent that the propriety of protective orders has been debated, discussion has focused on informational costs to the public and other litigants. Critics of protective orders maintain that both the public and other litigants have valid interests in obtaining discovery in pending lawsuits,⁹⁰ while proponents argue that litigation is not

⁸⁷ Owen Fiss spoke more broadly to some of these concerns in the context of settlement itself, predicting that, for example, a judge called upon to modify a consent decree will lack competence precisely because “[h]e has no basis for assessing the request.” Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1083-85 (1984).

⁸⁸ See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999) (“Consensual secrecy pervades virtually every phase of modern civil litigation.”); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 11 (1983) (noting that “parties are often overzealous” in making confidentiality designations).

⁸⁹ See *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 n.18 (3d Cir. 1986) (stating that courts sign off on blanket protective orders because “the time that it would take a judicial officer to rule on the protectability of thousands of documents could cripple the court,” and because the document-by-document approach would be unduly expensive for the parties); William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565, 566 (2008) (explaining that parties to mass tort litigation often agree to protective orders because they are “a practical way to deal with the sheer volume of exhibits,” they respect some documents’ legitimate need for secrecy, and they provide additional settlement leverage for plaintiffs); Goldstein, *supra* note 83, at 415-16 (arguing that “[t]he routine granting of umbrella protective orders . . . benefits defendants and judges at the expense of the public”); Marcus, *supra* note 88, at 9 (describing antitrust defendants’ motivation to keep documents confidential to prevent disclosure to codefendant competitors that might itself be used in later antitrust litigation as evidence of price-fixing); Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL’Y 53, 57-58 (2000) (“Defendants want to avoid disclosure of damaging information. Plaintiffs desire to use this damaging information as a negotiation tool for larger settlements for clients in the future.”).

⁹⁰ See Doré, *supra* note 88, at 306-07 (summarizing the views of “public access advocates”); Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL’Y 67, 92 (2000) (focusing on how sharing discovery among cases based upon closely related situations saves time and costs); Goldstein, *supra* note 83, at 375-79 (arguing that protective orders threaten public health and safety interests); Luban, *supra* note 86, at 2653 (noting that public access to discovery information “might save lives” and “inform[] public deliberation about an issue of substantial political significance”); Alan B. Morrison, Essay, *Protective Orders, Plaintiffs, Defendants*

a venue for generating information to be shared collectively.⁹¹ This emphasis on the public's access to information, while important, unfortunately obscures the importance of *judicial* access to information. To the extent that judicial interests have been considered at all in this debate, the focus has been on how protective orders aid judges by conserving their scarce resources and time.⁹² Lost in the commentary, however, is any recognition that providing greater informational access to judges will improve the quality of their decisionmaking—particularly when judges must consider alternative explanations for the misconduct alleged by plaintiffs in light of their “judicial experience and common sense.”⁹³

Drawing upon an example from litigation against General Motors, one can imagine how the confidentiality of discovery materials can interact with judicial assessments of plausibility. In 1992, General Motors settled a lawsuit with the family of a man who had died in his GM pickup truck, which caught fire after a side-impact collision with another vehicle.⁹⁴ The amount of the settlement and all documents exchanged during discovery were treated as confidential by the parties.⁹⁵ Indeed, as a condition of the settlement, the family was made to return to General Motors all documents provided by the company.⁹⁶ After suit was brought pursuant to a Texas Rule of Civil Procedure permitting courts to make public certain discovery information when it relates to disclosures that “have a probable adverse effect upon the general public health or safety,”⁹⁷ General Motors ultimately released the documents.⁹⁸ Apparently, the company had known since 1974 that its fuel tank design posed a “greater fire hazard than other fuel tank

and the Public Interest in Disclosure; Where Does the Balance Lie?, 24 U. RICH. L. REV. 109, 115-16 (1989) (arguing that disallowing sharing of information among plaintiffs' attorneys maximizes inefficiency); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL'Y L. & ETHICS 587, 662-63 (2005) (noting that protective orders may interfere with disclosure of information to regulatory bodies such as the FDA).

⁹¹ See, e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 472 (treating courts as best situated for information management, not information production or consumption); Miller, *supra* note 55, at 467 (arguing against the presumption that all litigation is important to the public).

⁹² See, e.g., Miller, *supra* note 55, at 488-89 (opining that asking courts to analyze and disseminate discovery information “would distract judges from their primary mission”).

⁹³ Andrew Goldstein has discussed the role of confidentiality in preventing the public from monitoring judicial behavior or seeking education about courts' everyday activities, but not how access to information assists judges themselves. Goldstein, *supra* note 83, at 381-82.

⁹⁴ *Id.* at 419.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ TEX. R. CIV. P. 76a(2)(c).

⁹⁸ Goldstein, *supra* note 83, at 420.

configurations, but had not changed the design until 1988.”⁹⁹ Now, consider a judge, prior to the release of the General Motors records, evaluating a complaint alleging that General Motors “knew” that the placement of fuel tanks on its pickup trucks was unnecessarily dangerous. A judge who was aware of the documents unsealed after the 1992 settlement would surely evaluate plausibility differently from a judge who was ignorant of those documents.

In fact, judges sometimes do use this kind of information to assess complaints under a plausibility regime. Judge Nancy Gertner, for instance, took notice of the public attention devoted to sexual abuse in prisons to find that a complaint raised a plausible inference of deliberate indifference.¹⁰⁰ Judge Jack Weinstein surveyed his colleagues on the bench and concluded that New York City police officers, as a general matter, engaged in “repeated, widespread falsification,” and, therefore, that a constitutional claim against New York City was plausible.¹⁰¹ Where such information from prior cases is unavailable, however, courts have relied on their own suppositions and assumptions to find a claim implausible. In the Southern District of New York, for example, a court dismissed a § 1983 claim against the City of New York that alleged that an officer’s actions in violation of the Fourth Amendment were pursuant to an unwritten City policy, instead finding it more plausible that the officer who carried out the search “was a rogue officer who disobeyed City policy.”¹⁰² Similarly, in a suit against a Tennessee county under a “class of one” theory of equal protection, the Court found an “obvious alternative explanation” for the differential treatment of plaintiffs was that the defendants “made a mistake in applying the law”—not that they singled out plaintiffs for pernicious reasons.¹⁰³ Thus, to the extent that

⁹⁹ *Id.*

¹⁰⁰ See *Chao v. Ballista*, 630 F. Supp. 2d 170, 178 (D. Mass. 2009) (“Given the public attention devoted to sexual abuse in prisons writ large, . . . it is a fair inference from the pleadings that prison officials . . . were deliberately indifferent to the risks and reality of this abuse.”).

¹⁰¹ See *Colon v. City of New York*, No. 09-0008, 2009 WL 4263362, at *2 (E.D.N.Y. Nov. 29, 2009) (noting that “[i]nformal inquiry by the court and among the judges of this court . . . has revealed anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department”).

¹⁰² *5 Borough Pawn, LLC v. City of New York*, 640 F. Supp. 2d 268, 300 (S.D.N.Y. 2009).

¹⁰³ *Arnold v. Metro. Gov’t of Nashville & Davidson Cnty.*, No. 09-0163, 2009 WL 2430822, at *4-5 (M.D. Tenn. Aug. 6, 2009) (“When confronted with nothing more than bare assertions of unlawful activity, a court’s first instinct is not to conclude that a violation occurred when it could ‘just as well be’ explained as innocent conduct.”). For another example of a court making a plausibility determination based on personal assumptions, see *Chassen v. Fid. Nat’l Fin., Inc.*, No. 09-291, 2009 WL 4508581, at *10 (D.N.J. Nov. 1, 2009), which found conclusory the allegation that defendants were part of a RICO enterprise, a conclusion drawn in part from the court’s “common experience.”

the trend toward keeping discovery confidential continues, judges will have even less basis for assessing the merits of a particular claim at the pleading stage.

5. A Potential Counter-Narrative: Summary Judgment

Even though judicial trial experience is limited, one might think that judicial experience with the merits-based determination at summary judgment is a sufficient substitute. After all, summary judgment is the procedural landmark that looms largest after the pleading stage. Moreover, the availability of summary judgment—if not its frequency—has increased since the Rule 56 trilogy of 1986.¹⁰⁴ Given the decline of the jury trial and the rise of settlement, summary judgment has, for many lawsuits, become the final point of judicial intervention.¹⁰⁵

Yet there are several reasons to doubt the notion that experience adjudicating summary judgment motions provides judges with ample grounds for assessing a claim's plausibility at the pleading stage. First, cases that reach the summary judgment stage are not necessarily representative of the distribution of strong and weak cases throughout the federal docket. Due to the prevalence of settlement, both strong and weak cases are likely removed from the pool of cases adjudicated on the merits.¹⁰⁶ Second, because the summary judgment decision is made before the judge has the most and highest-quality information, there is a real risk of error.¹⁰⁷ This error may be

¹⁰⁴ See Mark W. Bennett, Essay, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 688-89 (2012-2013) (discussing the increased use of summary judgment to resolve cases over several decades of employment discrimination jurisprudence); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 87 (2006) (relying on empirical evidence that "[f]ederal courts cite *Matsushita*, *Anderson*, and *Celotex* more than any decisions ever issued by a federal tribunal").

¹⁰⁵ See Bennett, *supra* note 104, at 691-92 (noting that the trilogy has made summary judgment, not jury trials, the "Holy Grail" of litigation (quoting Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005))); Edward Brunet, Essay, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 697-99 (2012) (arguing that summary judgment determinations can prompt a settlement); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016 (2003) (declaring summary judgment the "focal point" of modern litigation).

¹⁰⁶ See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 6-30 (1984) (presenting a model for determining whether the parties will settle or continue litigating a dispute).

¹⁰⁷ See Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 739-42, 755-74 (1989) (discussing the trend away from jury trials to summary judgment proceedings and the resulting accuracy concerns); Miller, *supra* note 105, at 1042 (noting that some plaintiffs with likely meritorious claims

amplified by the 1986 trilogy, which had the effect of skewing summary judgment in a pro-defendant direction.¹⁰⁸ *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*,¹⁰⁹ like *Iqbal* and *Twombly*, gave judges the power to engage in docket reduction by deeming certain allegations “implausible” based on the judge’s perspective on human motivation.¹¹⁰ *Celotex* permitted defendants to move for summary judgment without providing any affirmative evidence at all.¹¹¹ And, for certain cases, *Anderson v. Liberty Lobby, Inc.*,¹¹² heightened the burden on plaintiffs resisting summary judgment.¹¹³ Finally, there are also reasons to question the ability of judges to resolve summary judgment motions without applying subjective standards of believability according to their own inaccessible, irrefutable, and arguably unrepresentative cultural norms.¹¹⁴

Plausibility pleading presents even more troubling risks of error and bias than summary judgment. After all, the summary judgment standard is at least well understood in theory, even if its application is contested. Summary judgment resolutions are also more transparent; they are based on public evidence that has already passed the Rubicon of admissibility. The public can therefore evaluate summary judgment decisions by an external standard—what a reasonable person could find true given the available

cannot afford to assemble a prima facie case prior to trial); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 171-81 (1988) (identifying the limitations of summary judgment and arguing that the increased use of summary judgment will ultimately generate less accurate adjudication).

¹⁰⁸ Stempel, *supra* note 107, at 181 (“[T]he ‘new’ summary judgment shifts the system’s results in favor of defendants and against claimants as well as permits this shift to occur upon a less rich data base.”).

¹⁰⁹ 475 U.S. 574 (1986).

¹¹⁰ Stempel, *supra* note 107, at 102 (stating that, to the *Matsushita* majority, the plaintiffs’ theory of the case failed, because the actions attributed to the defendants “were not the practices of prudent businesspeople and therefore almost certainly could not have occurred”).

¹¹¹ *See id.* at 105-06 (noting that the *Celotex* majority only required the defendant moving for summary judgment to point out in the record the lack of any evidence to support the plaintiff’s contentions).

¹¹² 477 U.S. 242 (1986).

¹¹³ *See id.* at 103-05 (explaining that the *Anderson* Court required that “a movant’s evidence opposing a properly made summary judgment motion must be more than merely possible or colorable,” but rather “must be of sufficient probative value to withstand a directed verdict motion and support the verdict of a reasonable jury”).

¹¹⁴ Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 881-87 (2009) (discussing *Scott v. Harris*, 550 U.S. 372 (2007), and finding, after surveying people who viewed the *Scott* videotape, that the Court’s “view of the facts . . . divide[d] citizens on social, cultural, and political lines”).

evidence.¹¹⁵ The bases for plausibility determinations, by contrast, are opaque at best and invisible at worst. Studying the reliability of plausibility assessments by federal judges presents several obstacles. For instance, it is not clear what would constitute a proper comparison population.¹¹⁶ As a result, it is more difficult to evaluate the extent to which judicial assessments of plausibility are culturally bound than it is to make similar evaluations in the summary judgment context.

The end result of all of these trends is a federal judiciary that has very little experience evaluating the merits of claims. Trials have decreased and cases have been shunted away from federal court by arbitration doctrine. Information that might assist in assessing plausibility, such as discovery and settlement information, is increasingly inaccessible. And summary judgment adjudication cannot make up for this lack of information and experience.

Overall, it is fair to say that we have transitioned from a 1938 litigation practice that encouraged adjudications on the merits to a contemporary practice that seeks to dispose of cases as efficiently as possible.¹¹⁷ When we move away from public adjudication, we lose something important: information about how our justice system works to resolve disputes.¹¹⁸ This information, and the process by which it is divulged, is important not only for its own sake but also for reinforcing a democratic norm of equal accountability.¹¹⁹ What is sometimes overlooked, however, is that the information is important to ensuring legitimate and reliable future adjudication. Instead of allowing judges to gain experience in adjudicating cases, we have turned them into “efficiency experts trying to curtail run-away cases and provoke settlements, largely on an ad hoc basis.”¹²⁰ The drafters of the Federal Rules have been accused of having had unrealistically high expecta-

¹¹⁵ Cf. *id.* at 886-87 (criticizing the result in *Scott* because it disagreed with assessments of the evidence by certain marginalized groups).

¹¹⁶ Plausibility pleading is not meant to substitute for jury assessments. Rather, it appears to contemplate subjective differences from judge to judge. It is not clear what standard one would use to instruct a comparison population, nor is it clear what evidence the study population would evaluate.

¹¹⁷ See Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 286, 291 (2008) (contrasting the 1938 objective to resolve cases through a fair trial with the current trend of “resolving formally filed litigation short of actual trial”).

¹¹⁸ Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 669 (2010) (describing the benefits of public trials).

¹¹⁹ See *id.* at 667 (“Lawsuits in democratic regimes oblige even the government to disgorge information and hence to be subjected to scrutiny.”).

¹²⁰ Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 101 (1997).

tions of federal judges' abilities to manage their dockets.¹²¹ The advocates of plausibility pleading, however, appear to have placed even higher expectations on the judiciary, without accounting for the more significant barriers posed by the dynamics of our current procedural regime.

B. *Plausibility Pleading and Cognitive Bias*

The expectations associated with plausibility pleading are unrealistic not only because of the changing content of judges' daily work, as discussed above, but also because of how judges apply their prior experience to new cases. When judges attempt to evaluate the merits of a claim, cognitive biases may taint their assessment precisely because the judges' prior experience with actual merits-based determinations is so thin.¹²² Cognitive biases are, of course, only biases. They can be overcome, they do not operate in isolation, and they are not uniform. Yet they cannot be ignored. And although cognitive biases may have an impact on many kinds of judicial decisionmaking, several well-studied biases seem particularly relevant to the plausibility pleading standard.

One cognitive bias that may play a role in judicial merits assessments relates to the well-known importance of first impressions: belief perseverance.¹²³ After forming an initial belief, "we tend to disregard evidence that contradicts that hypothesis and exaggerate evidence that confirms it."¹²⁴ This is particularly problematic if one's basis for drawing the initial conclusion is insubstantial, because it will be a challenge to "interpret correctly subsequent better information that is inconsistent with that hypothesis."¹²⁵ Combined with confirmatory bias—the tendency to interpret ambiguous information as supportive of one's initial hypothesis, particularly when that information is complex—belief perseverance makes clear the importance of initial hypotheses.¹²⁶ Thus, if a judge starts (or arrives after experience) at

¹²¹ See Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57, 82 (1994) ("The original rulemakers overestimated judges' ability to efficiently control discovery, to shape litigation in the face of notice pleading, to appreciate the fine distinctions between a weak case and one deserving summary disposition, and to control errant lawyers and juries.").

¹²² Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities,* 30 REV. LITIG. 733, 740-49 (2011).

¹²³ For a brief explanation of this phenomenon, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation,* 74 N.Y.U. L. REV. 630, 646-47 (1999).

¹²⁴ *Id.* at 646.

¹²⁵ *Id.* at 647.

¹²⁶ See *id.* at 647-48.

the belief that a certain category of cases is overrepresented with high- or low-merit claims, it will likely affect the judge's assessment of the plausibility of the next similar claim. And this belief may persist even when faced with new and better information to the contrary.

Moreover, to the extent that caution is desirable in making certain plausibility determinations, some judges will exhibit overconfidence bias that hinders their ability to make such determinations, especially when the standard being applied explicitly permits them to base their decision on their "judicial experience and common sense." Judges, like most people, overestimate their abilities and underestimate their own biases.¹²⁷ Judges also often falsely believe that others see the world in the same way that they do.¹²⁸ Finally, the representativeness heuristic "prompts people to complete an indeterminate picture in accord with preconceived patterns of thought, experience, or association," a particular problem when judges have so little information to call upon to determine the plausibility of a particular claim.¹²⁹

Similar caution is in order when courts must assess the probabilities associated with a certain claim at the pleading stage, an inquiry that the *Iqbal* Court contemplated (and engaged in). When assessing probabilities, people often begin by setting an arbitrary baseline estimate "for which they make insufficient adjustments."¹³⁰ That baseline is influenced by evidence that is "particularly salient, vivid, or easily 'available'" to the decisionmaker, even if that evidence is not empirically rigorous.¹³¹ And even when a judge has access to reliable and relevant statistical data, she may still substitute unrepresentative conclusions drawn from past events that are easily called to memory.¹³² Relatedly, we tend to overrate the representativeness of the small sample consisting of our own experience.¹³³ The result for probabilistic assessments is significant: mental shortcuts can easily result in an estimate

¹²⁷ Stempel, *supra* note 122, at 743-44 (elaborating on this "self-serving or egocentric bias").

¹²⁸ *See id.* at 744-46 (describing a "false consensus bias" operating in conjunction with other heuristics).

¹²⁹ *Id.* at 747.

¹³⁰ Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 5 (Cass R. Sunstein ed., 2000).

¹³¹ *See* Hanson & Kysar, *supra* note 123, at 662 (discussing the "availability heuristic" bias that affects probability perceptions).

¹³² *Id.* at 663-64 (providing, as an example, evidence that people tend to assess a city's crime rate by whether they personally know someone who has been victimized there, rather than by crime statistics).

¹³³ *Id.* at 665 (reviewing evidence from study of experienced research psychologists who "honored the fallacious *law of small numbers*").

that has “little or no relationship to actual probabilities,” and the decisionmaker will be far too optimistic about the reliability of this estimate.¹³⁴

The presence of these heuristics has led some scholars to call for restraint when judges resolve motions for summary judgment.¹³⁵ One can easily see how these biases could also undermine the accuracy of plausibility pleading determinations. A judge seeking to assess the “plausibility” of a claim for relief may be tempted to call upon her store of experience with similar cases. But, as I argue above, that experience is seriously limited and likely unrepresentative. After all, the vast majority of past similar cases settled, and the judge was likely unaware of the settlement amount, let alone the facts that motivated the settlement. Actual merits-based assessments—trials and motions for summary judgment—are also of limited utility for the reasons explained above.

Finally, the atmospherics of plausibility pleading—the consequences of pleadings surviving motions to dismiss—may function to reduce the reliability of judicial assessments of merit. Costs and benefits posed by risks are generally not assessed independently of each other. In other words, if a particular risk “is perceived as posing high costs, it tends also to be perceived as posing low benefits.”¹³⁶ So if a judge assessing plausibility perceives allowing discovery as a risk that imposes a high cost (namely, the possibility of coercing the defendant to settle), that judge is likely to view the benefits of opening that door to be lower than they are in actuality. If, by contrast, the judge focuses on the risk of eliminating a meritorious claim, her assessment of the benefit of permitting the claim to go forward will relate to how she values the claim in the first place.

The heuristics discussed above could impact the assessment of any kind of claim. But some implicit biases that track explicit racial, gender, or ethnic prejudice¹³⁷ may specifically affect plausibility analysis for particular kinds of claims. For example, in determining employment discrimination claims, the role of implicit racial bias can be quite prominent. This is particularly problematic because the plaintiff will rarely have direct evidence of discrim-

¹³⁴ *Id.* at 667.

¹³⁵ See, e.g., Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 636 (2012) (asserting that “judges should be reluctant to grant summary judgment unless there is essentially *no* serious prospect that others will disagree” about what the facts of the case show).

¹³⁶ Hanson & Kysar, *supra* note 123, at 671.

¹³⁷ See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128-32 (2012) (reviewing empirical data supporting findings of prejudicial attitudes in cognitive biases).

ination.¹³⁸ A judge's assessment of plausibility is therefore susceptible to influence by his implicit biases related to discrimination and its prevalence in the workplace.¹³⁹ And because many judges believe themselves to be more objective than their average colleague (a mathematical impossibility), judges are particularly vulnerable to such biases.¹⁴⁰

CONCLUSION

"The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."

—Judith Resnik¹⁴¹

"I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings I have spent a lifetime studying, teaching, and working in this field and I assert dogmatically that strict special pleading has never been found workable or even useful in English and American law."

—Hon. Charles E. Clark¹⁴²

Both Professor Resnik and Judge Clark are right when it comes to plausibility pleading. At the Federal Rules' fiftieth-anniversary conference, Paul Carrington predicted that pressure to make novel use of Rule 12 could come from impatience with summary judgment's "ineffectiveness as a tool for dealing with unfounded contentions"—pressure that did not abate with the announcement of the 1986 trilogy.¹⁴³ Ultimately the pressure for change came—as it almost always has—from the perceived high costs of discovery. When the Supreme Court turned toward plausibility pleading in *Twombly*, its justification was rooted in the fear that defendants would be coerced into

¹³⁸ *Id.* at 1153-56 (summarizing studies showing that implicit bias affects employer decision-making).

¹³⁹ See Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 433-34 (2010) (arguing that employment discrimination claims have to overcome the judicial assumption that "discrimination is rare and aberrant"); see also Kang et al., *supra* note 137, at 1159-64 (pointing to research suggesting that judges ruling on motions to dismiss and motions for summary judgment likely rule on only enough facts to generate or implicate social biases).

¹⁴⁰ See Kang et al., *supra* note 137, at 1172-73 (highlighting research showing that judges think highly of their own objectivity); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) ("[J]udges might be overconfident about their abilities to control their own biases.").

¹⁴¹ Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

¹⁴² Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46-47 (1957).

¹⁴³ Carrington, *supra* note 6, at 2106.

settling meritless claims to avoid substantial discovery costs.¹⁴⁴ Responding to the dissent's claim that the majority's fear of discovery was overblown and could be mitigated by careful judicial management, the Court responded that the "hope of effective judicial supervision is slim" under the current system.¹⁴⁵ The source of the Court's pessimism was a 1989 article by Judge Easterbrook, from which it quoted extensively.¹⁴⁶ Easterbrook emphasized that courts are ill-equipped to supervise discovery competently because pleadings generally lack detail: "We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information."¹⁴⁷

It is worth taking a moment to consider the logic of the *Twombly* Court's argument. At its heart, it seems to be saying that because judges cannot and do not know enough to supervise discovery, we will instead ask judges to do more with even less information at the pleading stage. Moreover, the consequences of judges' decisions at that stage will be even more severe. Granting a motion to dismiss will end the plaintiff's case; denying the motion will leave the defendant exposed to the same "in terrorem" fear of costly discovery that concerned the Court in *Twombly*.¹⁴⁸ No matter how one approaches the problem, however, for plausibility pleading to work, judges must be well-positioned to apply it. I have tried to argue here that, whether one accepts the *Twombly* Court's pessimism about the "hope of effective judicial supervision" in a notice pleading regime, there is reason to be just as pessimistic about the prospect of accurate judicial application of plausibility pleading, "[g]iven the system that we have."¹⁴⁹

At the same time, plausibility pleading may meet the perceived needs of the current generation in the same way that notice pleading met the needs of the 1938 generation.¹⁵⁰ For instance, one can trace the motivation to implement notice pleading to the perception that ordinary businesspeople would otherwise lose faith in traditional adjudication, filled with potholes that could sink a meritorious claim on the basis of hypertechnical and

¹⁴⁴ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (discussing the "enormous expense" of discovery).

¹⁴⁵ *Id.* at 560 n.6.

¹⁴⁶ *Id.* (citing Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)).

¹⁴⁷ Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989).

¹⁴⁸ 550 U.S. at 546.

¹⁴⁹ *Id.* at 560 n.6.

¹⁵⁰ See Resnik, *supra* note 60, at 540-42 (comparing the adjudicatory concerns of past generations with current procedural needs).

confusing common law rules.¹⁵¹ If Thomas Shelton, who, in 1922, viewed the then-proposed Federal Rules as a means to reduce political dissent, thought that arcane rules were “making Bolsheviks” by dismissing claims on a “technicality,”¹⁵² today’s reformers see defendants losing faith in the legal system due to burdensome discovery imposed by a plaintiff “armed” against defendants “with nothing more than conclusions.”¹⁵³ The 1938 rulemakers worried that the merits were obscured by hypertechnical rules;¹⁵⁴ the current Court worries that discovery costs, not ultimate merit, drive everything. And while the drafters of the 1938 Rules believed in procedure, even as they distrusted a focus on “ultimate truth,”¹⁵⁵ today’s Court may instead have less faith in procedure and more faith in judicial attempts to discover ultimate truth.¹⁵⁶ One can only hope that the next twenty-five years, much like the last, will provide opportunities to assess the wisdom of this faith and, if necessary, the courage to change course.

¹⁵¹ See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 n.45 (1999) (finding motivation for reform in fear that business clients would resort to private adjudication because of frustration with the court system).

¹⁵² See Subrin, *supra* note 23, at 955, 959 (referencing Shelton’s criticisms).

¹⁵³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). See also *Twombly*, 550 U.S. at 559-60 (raising the fear of coerced settlements); Fairman, *supra* note 22, at 1065 (observing that the common themes animating courts when departing from notice pleading are the perceptions of “meritless cases, voluminous discovery, victimized defendants, and crowded dockets”).

¹⁵⁴ Resnik, *supra* note 60, at 540 (“What [the 1938 rulemakers] wanted—simplicity, decisions on the merits, a reduction of reversals on appeal because of procedural mistakes—is what current commentators want.”).

¹⁵⁵ *Id.* at 541-42.

¹⁵⁶ See Kahan et al., *supra* note 114, at 881-87 (arguing that, in summarily deciding the case, “the *Scott* [*v. Harris*, 550 U.S. 372 (2009),] majority transformed an inevitably partial view of social reality reflected in law into a needlessly partisan one”).