



1-1-2012

The Roberts Court and the Civil Procedure Revival

Howard Merrill Wasserman
howard.wasserman@fiu.edu

Follow this and additional works at: https://ecollections.law.fiu.edu/faculty_publications

Recommended Citation

Howard Merrill Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev. Litig. 313 (2012).
Available at: https://ecollections.law.fiu.edu/faculty_publications/95

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections. For more information, please contact lisdavis@fiu.edu.

HEINONLINE

Citation: 31 Rev. Litig. 313 2012



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Nov 11 17:20:01 2014

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0734-4015](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0734-4015)

The Roberts Court and the Civil Procedure Revival

Howard M. Wasserman*

I.	INTRODUCTION	313
II.	ORGANIZING THEMES IN THE CIVIL PROCEDURE REVIVAL	316
III.	THE ROBERTS COURT AND OTHER RULEMAKING ACTORS.....	332
	A. <i>The Supreme Court and the Rules Enabling Act</i>	333
	B. <i>The Supreme Court and the Lower Courts</i>	338
	C. <i>The Court and Congress</i>	345
IV.	CONCLUSION	349

I. INTRODUCTION

Each Chief Justice of the United States makes his mark on his Court, leading different jurisprudential projects and agendas, and moving and developing the law in some area. The New Deal Court of Charles Evan Hughes extended government power and ultimately upheld the New Deal;¹ the Warren Court is associated with the expansion of individual liberties, especially in the areas of racial equality, freedom of speech, and criminal procedure;² the Rehnquist Court is associated with federalism.³ Even if a Court never completes its doctrinal project,⁴ it targets some area of the law in a

* Professor of Law, FIU College of Law. This paper was presented in *Evolution or Revolution? American Civil Procedure in the 21st Century*, at the 2011 Meeting of the Southeastern Association of Law Schools.

1. *E.g.*, *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406–08 (1937).

2. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 494 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954). *See also* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (arguing that much of the Warren Court’s jurisprudence can be understood as attacking and remedying systemic racial inequality).

3. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995). *See also* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1114–15 (2006) (arguing that hostility to litigation and the institution of judicially focused dispute resolution was a central theme of Rehnquist Court jurisprudence).

4. *Cf.* *Gonzales v. Raich*, 545 U.S. 1, 2 (2005) (upholding federal prohibition on purely intrastate possession and production of marijuana); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that Congress validly abrogated sovereign immunity in enacting Americans With Disabilities Act); Neuborne, *supra* note 2, at 60.

particular direction. What a particular Court cares about may change over time and may not always be clear, especially in the early years of a new Court with a new Chief Justice and a mass of new members.

John G. Roberts was sworn in as Chief Justice of the United States in September 2005, and three Associate Justices have joined the Court since then.⁵ Entering its seventh Term in October 2011, the Roberts Court is newly engaged in an unexpected area—civil procedure. The Court includes four Justices whose backgrounds suggest particular solicitude for and perhaps keen interest in civil procedure: Chief Justice Roberts was a civil litigator; Justice Ginsburg, also a civil litigator, has written extensively on civil procedure; Justice Kagan taught civil procedure; and Justice Sotomayor was a district court judge for six years, meaning she alone among the Justices has worked with the Federal Rules and understands how they function on the ground.⁶ Over the past six Terms, the Court has heard and decided more than twenty cases in core civil procedure areas, including pleading,⁷ summary judgment,⁸ relation back of amended pleadings,⁹ personal jurisdiction,¹⁰ federal question jurisdiction,¹¹ diversity jurisdiction,¹² jurisdictionality,¹³

5. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 12, 2011).

6. *Id.*

7. *E.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

8. *Scott v. Harris*, 550 U.S. 372, 386 (2007). *See also* Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 180, 180 (2008).

9. *Krupski v. Costa Crociere S. p. A.*, 130 S. Ct. 2485, 2497 (2010).

10. *E.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2783–84 (2011).

11. *Mims v. Arrow Fin. Servs. LLC*, No. 10-1195, 2012 WL 125429 (U.S. Jan. 18, 2012); *Gonzalez v. Thaler*, No. 10-895, 2012 WL 43513 (U.S. Jan. 10, 2012); *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 683 (2006).

12. *E.g.*, *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010); *Marshall v. Marshall*, 547 U.S. 293, 299–300 (2006); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005).

removal procedure,¹⁴ class actions,¹⁵ civil representation,¹⁶ arbitration of civil and civil rights claims in lieu of litigation,¹⁷ appealability,¹⁸ remedies,¹⁹ and the *Erie–Hanna* doctrine.²⁰ Several of these decisions have been significant and potentially far-reaching.

The Court's re-engagement with civil procedure is welcome. While the lower courts do an admirable job in creating, developing, and applying procedural law, the Supreme Court is a necessary source of procedural leadership and, we would hope, clarity—a point Roberts made in his confirmation hearings.²¹ Of course, having civil procedure on the doctrinal agenda will not draw the attention or ire of the popular media or the public; do not expect public calls to

13. *E.g.*, *Gonzalez v. Thaler*, No. 10-895, 2012 WL 43513 (U.S. Jan. 10, 2012); *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1241 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 502–04 (2006). *See also* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008) (discussing conflation of jurisdiction with other legal concepts); Howard M. Wasserman, *The Demise of "Drive-By" Jurisdictional Rulings*, 105 NW. U. L. REV. 947, 947–48 (2011) [hereinafter Wasserman, *Drive-By*] (same); Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 579–82 (2007) (same).

14. *E.g.*, *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1867 (2009); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 639 (2006).

15. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011); *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

16. *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

17. *E.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2779–80 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

18. *E.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2026 (2011); *Ortiz v. Jordan*, 131 S. Ct. 884, 893 (2011); *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009); *Will v. Hallock*, 546 U.S. 345, 354 (2006).

19. *E.g.*, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1675 (2010); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514 (2008); *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007).

20. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010). *See generally* Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987 (2011).

21. Charles W. "Rocky" Rhodes, *What Conservative Constitutional Revolution? Moderating Five Years of Judicial Conservatism After Six Years of the Roberts Court*, 63 RUTGERS L. REV. (forthcoming 2011) (manuscript at 40–41), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892953.

impeach Roberts over the scope of Rule 8(a). Indeed, it may not draw the attention of many beyond the civil procedure professoriate, and even then only with a modicum of sarcasm. In June 2011, Justice Kagan announced the unanimous decision in *Smith v. Bayer Corp.*, which dealt with the Anti-Injunction Act and the preclusive effect of a class certification decision, introducing the case as a “complicated procedural ruling.”²² One blogger reporting at the Court restated this introduction as, “if you understand anything I say, you have a law degree AND you had your cup of coffee.”²³

If civil procedure and the Federal Rules comprise a significant part of the Roberts Court’s emerging jurisprudential agenda, it is worth exploring the Court’s activity in this area, both to see and understand the trend that has been developing and to predict where it might go in coming years. This essay first examines some organizing themes in the recent decisions on the subject. It then considers the Court’s actions with respect to the other actors and procedures in civil rulemaking—Congress, lower federal courts, and the committees working under the Rules Enabling Act²⁴ (REA)—and the ambivalence, if not hostility, among the competing rulemaking institutions.

II. ORGANIZING THEMES IN THE CIVIL PROCEDURE REVIVAL

Five themes have developed in the Court’s early cases that provide some perspective on the new developments in civil procedure. These themes do not necessarily link all the cases into a coherent whole, but they do provide some ideas around which to organize our understanding of the Court’s activity.

First, it is fair to call the Court’s interest in procedure a “revival,” because it comes after a substantial lull in procedure cases on the Court’s docket during the later years of the Rehnquist Court. The recent uptick is all the more striking. When in the October 2010

22. 131 S. Ct. 2368, 2376 (2011).

23. Howard M. Wasserman, *Federal Procedure Day at the Supreme Court*, PRAWFSBLAWG (June 16, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/06/federal-procedure-day-at-the-supreme-court.html> (emphasis in original).

24. 28 U.S.C. § 2072 (2006).

Term, the Court decided companion personal jurisdiction cases,²⁵ it marked the Court's first decisions on personal jurisdiction in more than twenty years.²⁶ For perspective, Justice David Souter joined the Court in the fall of 1990 (five months after *Burnham*) and served for nineteen years,²⁷ but he never decided a personal jurisdiction case, despite occasional explicit requests from lower-court judges for the Supreme Court to provide some definitive answers to lingering questions.²⁸

There were similar gaps in other areas. The Roberts Court decided its first case on Rule 15(c), controlling relation back of amended pleadings, in almost twenty years²⁹ (and the first under the Rule as amended in 1991³⁰), and its first direct case on the *Erie-Hanna* doctrine in almost fifteen years.³¹ The Court also has resolved questions about procedural statutes that have lingered for decades. In 1958, Congress amended the diversity jurisdiction statute to define a corporation's citizenship, in part, by its principal place of business;³² in 2009, the Court for the first time addressed and resolved the meaning of that term.³³

Second, the Court has tried to clean up doctrinal confusion created by its predecessor Courts. One area of clean-up, which I have written about previously, is jurisdictionality and the elimination of "drive-by jurisdictional rulings," decisions in which a legal rule has been labeled as jurisdictional only through "unrefined" analysis

25. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

26. *E.g.*, *Burnham v. Superior Ct.*, 495 U.S. 604 (1990).

27. Biographies of Current Justices of the Supreme Court, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 12, 2011).

28. *See, e.g.*, *Luv n' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 474–76 (5th Cir. 2006) (DeMoss, J., specially concurring) (calling on the Supreme Court to resolve the debate about stream-of-commerce in personal jurisdiction analysis), *cert. denied*, 548 U.S. 904 (2006).

29. *Compare Krupski v. Costa Crociere S. p. A.*, 130 S. Ct. 2485, 2497 (2010), *with Schiavone v. Fortune*, 477 U.S. 21, 29 (1986).

30. FED. R. CIV. P. 15(c) (amended 1991).

31. *Compare Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010), *with Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427–28 (1996).

32. 28 U.S.C. § 1332(c)(1) (2006).

33. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1189–90 (2010).

without rigorous consideration of the label's meaning or consequences.³⁴ The Court has explicitly retreated from its own admittedly "profligate" and "less than meticulous" use of the word "jurisdiction," making a deliberate, concerted move towards greater "discipline" in defining which rules are jurisdictional and which are not.³⁵ Some Justices have even argued that these earlier drive-by rulings are no longer entitled to full precedential effect.³⁶

The Supreme Court also wants lower courts to follow its lead on this issue. It has taken on some cases explicitly to resolve jurisdictionality issues.³⁷ In other cases, it has reached out to announce the proper characterization of a rule, even where its jurisdictional or non-jurisdictional nature was not at the heart of the case or even contested by the parties; the Court simply believed the lower court had mischaracterized the rule, wanted to signal the proper understanding going forward, and could do so without affecting the outcome.³⁸ The Court is willing to correct what it views as doctrinal missteps in the lower courts, even when tangential to the broader issue in the case before it.

Third, the Court has made significant theoretical and doctrinal pronouncements, often producing dramatic theoretical and doctrinal shifts. The most-discussed example is pleading standards, which have generated something of a scholarly cottage industry.³⁹

34. Wasserman, *Drive-By*, *supra* note 13, at 947–48.

35. *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); Wasserman, *Drive-By*, *supra* note 13, at 947.

36. *Reed Elsevier*, 130 S. Ct. at 1251 (Ginsburg, J., concurring in part and concurring in the judgment); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006); Wasserman, *Drive-By*, *supra* note 13, at 952, 967.

37. *E.g.*, *Henderson*, 131 S. Ct. at 1200; *Reed Elsevier*, 130 S. Ct. at 1241; *Arbaugh*, 546 U.S. at 516.

38. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2876–77 (2010); Wasserman, *Drive-By*, *supra* note 13, at 949.

39. Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 873 (2009); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 116 (2009); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62 (2007); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 1 (2010);

The Rehnquist Court's two statements on Federal Rule of Civil Procedure 8(a)(2) and pleading—in 2002 and 1993—reaffirmed the Court's historic decision in *Conley v. Gibson*, rejected heightened or fact pleading outside of fraud, and accepted that a complaint is sufficient unless it “appears beyond doubt that the pleader can assert no set of facts that would entitle him to relief.”⁴⁰ True, the lower courts had frequently required plaintiffs to plead increasingly specific facts—so much so that Professor Chris Fairman labeled notice pleading a “myth.”⁴¹ But the Rehnquist Court twice rebuffed them.⁴²

But *Twombly* in 2007⁴³ and *Iqbal* in 2009⁴⁴ changed, or appeared to change, the pleading landscape. Read together, the cases gave the “no set of facts” standard its “retirement,”⁴⁵ requiring instead that a pleading contain sufficient facts, accepted as true when pled in a non-conclusory manner, to enable a judge applying her own common sense and experience to conclude that it is plausible that a violation of the plaintiff's rights had occurred.⁴⁶ Part of what made *Twombly* (and subsequently *Iqbal*) so surprising is that the change came from nowhere, introducing entirely new concepts—

Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1011–12; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 1 (2009); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010); Symposium, *Pondering Iqbal*, 14 LEWIS & CLARK L. REV. 1, 1 (2010); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss* (manuscript at 3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134.

40. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513–14 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993).

41. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551–52 (2002); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

42. Emily Sherwin, *The Story of Conley*, in CIVIL PROCEDURE STORIES 319–20 (Kevin Clermont ed., 2d ed. 2008).

43. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

44. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

45. *Twombly*, 550 U.S. at 562–63.

46. *Iqbal*, 129 S. Ct. at 1949–50; *Twombly*, 550 U.S. at 556–57.

nonconclusoriness and plausibility—that had not appeared in any pleading cases from any court.⁴⁷

Debate remains on whether *Iqbal* and *Twombly* actually changed anything district courts are doing on the ground beyond rhetoric.⁴⁸ Nevertheless, the cases do represent a reversal of the dynamics between the Supreme Court and the lower courts. Rather than the Supreme Court rebuffing lower courts when they pushed pleading standards upward as in *Leatherman* and *Swierkiewicz*, the Court adopted the higher standards that some lower-court judges had been imposing, reversed two more permissive decisions by the lower courts in the process, and signaled to lower-court judges that the stricter approach some had been taking was appropriate under the Federal Rules.⁴⁹

We may see a similar theoretical and rhetorical shift in personal jurisdiction after *McIntyre v. Nicastro*, where the Court considered whether a non-U.S. defendant could be subject to jurisdiction in New Jersey, when it never entered or sent its product there but instead sold throughout the United States through an Ohio distributor.⁵⁰ Writing for a plurality, Justice Kennedy held there was no jurisdiction because the defendant had national contacts with the United States, but not with the forum state.⁵¹ Kennedy repeatedly spoke about personal jurisdiction in structural terms of judicial power, sovereignty and sovereign authority, submission by the defendant (through its conduct) to the power of the sovereign, and the invalidity of a “judgment rendered in the absence of authority.”⁵² But, as Justice Ginsburg argued in dissent, this marked at least a rhetorical (if not substantive) departure from prevailing personal jurisdiction doctrine, which is grounded in due process concerns for foreseeability, reasonableness, and fundamental fairness, not the “reach” of a sovereign’s power or the defendant’s consent to that

47. Kevin M. Clermont, *Three Myths About Twombly–Iqbal*, 45 WAKE FOREST L. REV. 1337, 1352–53, 1355–56 (2010); Clermont & Yeazell, *supra* note 39, at 832.

48. Mark Moller, *Procedure’s Ambiguity*, 86 IND. L.J. 645, 667 (2011).

49. Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 151–52 (2010); Moller, *supra* note 48, at 666–67.

50. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

51. *Id.* at 2790–91.

52. *Id.* at 2786–89.

sovereignty.⁵³ This new submission-to-authority language makes personal jurisdiction sound more like subject-matter jurisdiction, with the latter's focus on structural adjudicative authority over a case.

There were hints of a different doctrinal shift in the companion personal jurisdiction case, which involved general jurisdiction in North Carolina over the Turkish subsidiary of an American company in a case arising from a tire that exploded in France.⁵⁴ A unanimous Court appeared to narrow, if not outright reject, "doing business" general jurisdiction.⁵⁵ That doctrine provides that a business entity could have continuous and systematic minimum business contacts with a forum that, if substantial enough, could subject it to jurisdiction in that forum for all purposes.⁵⁶ Several lower courts, including the lower court in *Goodyear*, had carried that doctrine quite far.⁵⁷ But the Supreme Court rejected this "sprawling" view of general jurisdiction.⁵⁸ It drew a sharp line between general and specific personal jurisdiction and seemed to limit the former to the "paradigm" of the defendant's home or places where it is "essentially at home."⁵⁹ These include an individual's domicile and a business's place of incorporation and principal place of business.⁶⁰ But the Court never indicated whether home could go beyond those places. Even if doing substantial "continuous and

53. *Id.* at 2798–99 (Ginsburg, J., dissenting).

54. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850–51 (2011).

55. *Id.* at 2856–57.

56. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 415–16 (1984).

57. *See e.g.*, *Brown v. Meter*, 681 S.E.2d 382, 394 (N.C. Ct. App. 2009) (finding general jurisdiction in state over foreign manufacturer on stream-of-commerce theory), *rev. denied*, 695 S.E.2d 756 (N.C. 2010), *rev'd sub nom.* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003) (holding that out-of-state defendant could be subject to general jurisdiction based on extensive marketing and sales in forum, extensive contacts with vendors in forum, and operation of "sophisticated virtual store"), *vacated on granting of reh'g en banc*, 366 F.3d 789 (9th Cir. 2003), *dismissed as moot*, 398 F.3d 1125 (9th Cir. 2005).

58. *Goodyear*, 131 S. Ct. at 2856–57.

59. *Id.* at 2853–54.

60. *Id.*

systematic” business in a state—operating stores, maintaining offices, and making sales—can create general jurisdiction, the Court left unexplained how much business is sufficient to render a defendant essentially at home in a state.⁶¹

Fourth, and relatedly, the Court has frequently painted with minimalist strokes in its procedure cases. As Cass Sunstein defines the concept, a minimalist court tries to say no more than necessary to resolve a case and justify an outcome, leaving as much as possible undecided.⁶² Courts do not decide issues that are not before them; they take cases as presented (presumably as framed by the litigants in the adversary process), decide only the piece of the puzzle presented, and leave other pieces for later resolution by other actors.⁶³ This minimalist stance is not surprising. Roberts regularly espouses the virtues of minimalism, insisting, for example, “if it is not necessary to decide more [to dispose of a case], it is necessary not to decide more”⁶⁴ He and Justice Alito (who joined the Court the same Term as Roberts⁶⁵) both advocated such minimalism in their confirmation hearings⁶⁶ and both have carved out uniquely narrow positions in some other areas.⁶⁷

61. Allan Erbsen, *Personal Jurisdiction*, *Goodyear v. Brown, and Homely Line Drawing*, PRAWFSBLAWG (July 28, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/07/personal-jurisdiction-goodyear-v-brown-and-homely-line-drawing.html#more>.

62. Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2242 (2006).

63. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3, 10–11 (1999); Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 29 (2010); Moller, *supra* note 48, at 662; Rhodes, *supra* note 21 (manuscript at 4–5); Sunstein, *supra* note 62, at 2242.

64. PDK Labs., Inc. v. U.S. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment); Rhodes, *supra* note 21 (manuscript at 17–18). See also *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16 (quoting Chief Justice Roberts’s comments at Georgetown University Law Center graduation).

65. Biographies of Current Justices of the Supreme Court, SUPREME CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 12, 2011).

66. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 343 (2006) (statement of J. Samuel A. Alito, Jr., Nominee to Be Associate Justice of the United States); *Confirmation Hearing*

But Supreme Court minimalism can be criticized for functionally shifting decision costs to other actors—namely lower courts and future litigants—without providing explicit guidance and forcing them to read between the lines to give content to the law, often at greater future expense.⁶⁸ While the Court has reached out to create issues in some jurisdictionality cases, that weakness has been on display in many other procedural areas. For example, *Twombly* initially left as many questions as it resolved. Did it apply to all cases or only to antitrust cases?⁶⁹ Did the Court impose heightened or fact pleading, something it explicitly disclaimed?⁷⁰ Was *Conley* truly overruled or was *Twombly* simply an application of *Conley*, beyond rejecting the overstated (and arguably misunderstood⁷¹) “no set of facts” language? Did plausibility apply to pleadings other than complaints, such as answers and counterclaims, or to non-merits issues, such as jurisdictional allegations?⁷²

Iqbal resolved some of those questions two years later: plausibility was the new standard for Rule 8(a)(2), and it definitely applied beyond antitrust.⁷³ But other questions remained. *Iqbal* more explicitly emphasized the policy justifications underlying the

on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States); Rhodes, *supra* note 21 (manuscript at 17–18, 22).

67. *E.g.*, *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2742 (2011) (Alito, J., joined by Roberts, C.J., concurring in the judgment); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (plurality opinion of Alito, J., joined by Roberts, C.J. and Kennedy, J.); *Morse v. Frederick*, 551 U.S. 393, 422–23 (2007) (Alito, J., concurring).

68. SUNSTEIN, *supra* note 63, at 48; Neil S. Siegel, *A Theory in Search of Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2006 (2005); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 326 (1998).

69. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 457–59 (2008).

70. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007).

71. Sherwin, *supra* note 42, at 315–16.

72. Clermont, *supra* note 47, at 1359–61; Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. (forthcoming 2012) (manuscript 8–22), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1721062.

73. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

new pleading standard: protecting certain high-ranking government defendants in certain cases from the purportedly overwhelming costs and burdens of discovery and litigation.⁷⁴ That leaves lower courts to question whether the plausibility requirement perhaps should not apply in cases that do not implicate those policy concerns—non-discovery-intensive cases or cases not involving qualified immunity and sensitive, high-ranking government officials.⁷⁵ Ultimately, *Iqbal*'s “extremely fuzzy content” makes it readily “susceptible to both permissive and restrictive interpretations” in later cases, facts, and contexts.⁷⁶

Minimalism's gaps and shifted costs may be exacerbated by the Court's failure to achieve a majority. Consider *McIntyre* again. In its 1987 *Asahi* decision, the Court left open whether a defendant established minimum contacts simply by placing a product into the stream of commerce knowing or expecting that it could end up in the forum (as four Justices, led by Justice Brennan, argued) or whether the defendant must do something more to intentionally serve or reach the forum (as four Justices, led by Justice O'Connor, argued).⁷⁷ That dispute between “stream of commerce” and “stream of commerce plus” rattled around the lower courts for more than twenty years.⁷⁸ In *McIntyre*, the New Jersey Supreme Court had discussed this long-standing debate and adopted “stream of commerce” as the approach

74. *Id.* at 1953–54.

75. See *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.) (suggesting that *Twombly* and *Iqbal* might not control where defendant is unlikely to face heavy burden of compliance with discovery demands or where case does not involve high-level government officials). See also Howard M. Wasserman, *Iqbal*, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 175 (2010) [hereinafter Wasserman, *Procedural Mismatches*] (discussing similar narrow approach to *Iqbal*, although emphasizing that nothing in the decision limits it in that way).

76. Moller, *supra* note 48, at 664.

77. Compare *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 111–12 (1987) (O'Connor, J., joined by Rehnquist, C.J., Powell, and Scalia, JJ.), with *id.* at 116–18 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in part and concurring in the judgment).

78. E.g., *Luv n' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 474–76 (5th Cir. 2006) (DeMoss, J., specially concurring), *cert. denied*, 548 U.S. 904 (2006); *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 587–89 (N.J. 2010), *rev'd*, 131 S. Ct. 2780 (2011).

more consistent with the due process theory underlying personal jurisdiction.⁷⁹

The expectation when the Court took *McIntyre* was that it would finally resolve the split. But it did not (or was unable to) do so. Four Justices again adopted stream-plus; Justice Kennedy's plurality explicitly and sharply rejected the view that merely placing a product in the stream of commerce could be a sufficient contact, rejected the emphasis on a defendant's expectations as opposed to intention, and labeled Justice Brennan's stream of commerce view "inconsistent with the premises of lawful judicial power."⁸⁰ But Justices Breyer and Alito, although agreeing that jurisdiction was lacking, declined to resolve the debate, believing it unnecessary to decide the broad abstract legal question in a case in which, in their view, the absence of contacts with the forum state was clear.⁸¹

In other words, after waiting twenty years to hear a personal jurisdiction case and taking a case that squarely presented the stream-stream-plus divide, the Court still left the issue unresolved. Lower courts might take cues from the plurality's emphatic language, as well as its recasting of the doctrine in sovereignty terms, as a reason to move towards stream-plus. But this still imposes on lower courts the costs and burdens of reading tea leaves.

Of course, in civil procedure, as in other areas, the Court is minimalist, except when it is not.⁸² *Wal-Mart v. Dukes* involved a massive sex-discrimination class action against a major nationwide corporation, making it the rare civil procedure case to draw significant scholarly and mainstream media coverage, which largely focused on its potential effect on substantive employment discrimination law.⁸³ The district court had certified a nationwide

79. *Nicastro*, 987 A.2d at 589.

80. *McIntyre*, 131 S. Ct. at 2784.

81. *Id.* at 2792–93 (Breyer, J., joined by Alito, J., concurring in the judgment).

82. Richard L. Hasen, *Money Grubbers: The Supreme Court kills campaign finance reform*, SLATE (Jan. 21, 2010), <http://www.slate.com/id/2242209/>. See also *Citizens United v. FEC*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring) (“[S]ometimes it is necessary to decide more.”) (emphasis in original).

83. E.g., Adam Liptak, *Justices Take up Crucial Issue in Wal-Mart Suit*, N. Y. TIMES, Mar. 30, 2011, at B1; Adam Liptak, *Supreme Court to Weigh Sociology Issue in Wal-Mart Discrimination Case*, N. Y. TIMES, Mar. 28, 2011, at A17; Jason Bent, *Comment to Oral Argument Transcript in Wal-Mart v. Dukes*, WORKPLACE

class of nearly 1.5 million present and former Wal-Mart employees, who alleged that discretionary pay and promotion decisions by supervisors at different stores in different places at different times (pursuant to corporate policy delegating such decisions to local discretion) violated Title VII.⁸⁴ The plaintiffs sought injunctive and declaratory relief, damages, and back pay.⁸⁵

The Court was unanimous that the class action could not be brought. Federal Rule of Civil Procedure 23(b)(2) by its terms permits only class actions for injunctive or declaratory relief, not individual monetary relief that is more than incidental to the equitable relief.⁸⁶ Minimalism would dictate that the Court stop there. It had decided what it had to in order to reject the class action and resolve the question before it. The case should have been remanded for determination of whether the class could be maintained under a different part of Rule 23, namely Rule 23(b)(3), which permits class certification so long as the class action device is the best way to adjudicate the controversy and the common questions of law or fact predominate over any differences among class members.⁸⁷

But a five-Justice majority did not stop at this narrowest basis for decision. Instead, it reached out to decide additional issues. The Court had granted certiorari on whether the class satisfied the threshold in Rule 23(a)(2) that there be “questions of law or fact common to the class,”⁸⁸ although Wal-Mart had not raised that issue in its petition.⁸⁹ The majority held that the class failed to meet this threshold; given the size and geographic spread of the class, differences among the class members, and differences among the

PROF BLOG (Mar. 30, 2011), http://lawprofessors.typepad.com/laborprof_blog/2011/03/oral-argument-transcript-in-wal-mart-v-dukes.html; Michael Waterstone, Wal-Mart and the Future of Employment Discrimination Class Action Law, SUMMARY JUDGMENTS (June 22, 2011), <http://llsblog.lls.edu/faculty/2011/06/wal-mart-and-the-future-of-employment-discrimination-class-action-law.html>.

84. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547–48 (2011).

85. *Id.* at 2547.

86. *Id.* at 2557–59; *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

87. FED. R. CIV. P. 23(b)(3); *Wal-Mart*, 131 S. Ct. at 2547 n.1, 2561 (Ginsburg, J., concurring in part and dissenting in part).

88. FED. R. CIV. P. 23(a)(2).

89. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010) (mem.).

actors and decisions being challenged, there was no commonality among the plaintiffs.⁹⁰ This triggered a back-and-forth between Justices Scalia and Ginsburg over whether predominance—the balance of commonalities and differences among class claims and claimants—is properly part of the Rule 23(a)(2) commonality analysis, or whether that provision imposes a lower threshold, satisfied so long as there are some similar questions among class members.⁹¹ From a minimalist perspective, however, the additional discussion was inappropriate because it was unnecessary; the Court had already found a reason to reject the class and any further analysis should have been left to the lower courts on remand.⁹²

The Court similarly split on what to decide in *Camreta v. Greene*.⁹³ Before the Court was an appeal by a deputy sheriff and a child protective services caseworker from Oregon who together had interviewed a 14-year-old girl without a warrant or parental permission about alleged sexual abuse at the hands of her father.⁹⁴ The officials had prevailed on qualified immunity grounds; the Ninth Circuit held that the defendants had violated the plaintiffs' Fourth Amendment rights in the warrantless seizure, but that it was not clearly established that such a seizure was unconstitutional.⁹⁵ The plaintiffs did not seek review in the Supreme Court, but the defendants did, challenging the first-step determination that they had violated the plaintiffs' rights.⁹⁶ A five-Justice majority first concluded that the Court could hear the appeal even from a victorious party in a qualified immunity case; a prevailing-party appeal was permissible under the Court's statutory jurisdictional grant⁹⁷ and qualified immunity presented a "policy reaso[n] . . . of

90. *Wal-Mart*, 131 S. Ct. at 2556–57 (2011).

91. *Compare id.* at 2556–57 (considering dissimilarities to determine whether there is a single common question with a common answer), *with id.* at 2565–67 (Ginsburg, J., concurring in part and dissenting in part) (arguing that Rule 23(a) examines only similarities among the plaintiffs).

92. *Id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

93. 131 S. Ct. 2020 (2011).

94. *Id.* at 2027.

95. *Id.*

96. *Id.*

97. *Id.* at 2029–30. *See* 28 U.S.C. § 1254(1) (granting Supreme Court appellate jurisdiction "[b]y writ of certiorari granted upon the petition of any party").

sufficient importance” to justify departing the settled prudential practice of not reviewing prevailing-party petitions.⁹⁸ After all that, however, the Court dismissed the case as moot, because the plaintiff no longer resided in Oregon and was about to turn eighteen.⁹⁹ Justice Sotomayor, joined by Justice Breyer, agreed that the case was moot and that the judgment should be vacated, but criticized the majority for taking on the complicated and uncertain threshold issue in a case in which there clearly was no longer a live case or controversy and thus no reason to explore the controversial appealability issue.¹⁰⁰

Fifth, the new civil procedure cases stand to be framed in unfortunately simplistic political terms as the Court’s conservative majority protecting big business, in keeping with their broader political and ideological preferences. Certainly corporate defendants prevailed in some of the more significant cases—such as *Wal-Mart*, *McIntyre*, *Rent-A-Center*, and *Twombly*. And the analysis in many cases has been favorable to, and applauded by, repeat-player defendants in modern litigation—notably business and government defendants—seeking relief from the burdens of litigation, discovery, and liability.¹⁰¹ Criticism of the new pleading regime has focused on its likely disparate impact on plaintiffs in civil rights and other cases in which a defendant’s state of mind is unknowable without the benefit of discovery, discovery now unavailable because the plaintiff is unable to sufficiently plead state of mind at the outset.¹⁰² The result in the eyes of many critics is a systematic slamming of the courthouse door.¹⁰³ One might call this the ideological drift of civil procedure; conservative judges have adopted the idea once expressed

98. *Id.* at 2030 (alteration in original).

99. *Id.* at 2033–34.

100. *Id.* at 2036–37 (Sotomayor, J., concurring in the judgment).

101. Epstein, *supra* note 39, at 66–68; Mark Herrmann & James M. Beck, Opening Statement: *Pleading Standards After Iqbal*, in *Debate: Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 146–47 (2009). See Moller, *supra* note 48, at 693.

102. Burbank, *supra* note 39, at 117; A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 160 (2008); Wasserman, *Procedural Mismatches*, *supra* note 75, at 169.

103. *Has the Supreme Court Limited Americans’ Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stephen B. Burbank) [hereinafter *Burbank Testimony*].

by former Democratic Congressman John Dingell: “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.”¹⁰⁴

But a pure attitudinal model does not work in the main run of procedure cases, which have not been categorically political. Most have been unanimous or nearly unanimous,¹⁰⁵ while in others the Court has broadly agreed on the outcome if not the reasoning.¹⁰⁶ Consider that Justice Souter wrote, and Justice Breyer joined, the majority opinion in *Twombly*. Of course, both subsequently dissented in *Iqbal*,¹⁰⁷ perhaps suggesting that neither fully grasped what the Court was doing in the earlier case. Consider also the split in the non-minimalist case of *Camreta*.¹⁰⁸ Justice Kagan wrote for herself, Chief Justice Roberts, and Justices Scalia, Thomas, and Ginsburg to reach the appealability issue despite mootness; Justices Sotomayor and Breyer insisted it was unnecessary to reach the issue; and Justices Kennedy and Alito criticized the majority for reaching out to expand the Court’s power to hear appeals from prevailing parties—which they believed was unsupported by text or precedent—and criticized existing qualified immunity doctrine.¹⁰⁹

Other cases have similarly broken against simplistic popular perceptions of ideological and political lines. In *Shady Grove*, the Court held that Rule 23 governed certification of a class action on a state-law claim in federal court, trumping a state rule that would have prohibited such a class action.¹¹⁰ Justice Scalia wrote an

104. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

105. See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011) (unanimous); *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2372 (2011) (unanimous); *Krupski v. Costa Crociere S. p. A.*, 130 S. Ct. 2485, 2489 (2010) (unanimous); *Mohawk Indus., Inc v. Carpenter*, 130 S. Ct. 599, 602 (2009) (unanimous); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 311 (2007) (unanimous); *Scott v. Harris*, 550 U.S. 372, 373 (2007) (unanimous).

106. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011).

107. *Clermont & Yeazell*, *supra* note 39, at 850.

108. *Supra* notes 93–100 and accompanying text.

109. *Camreta v. Greene* 131 S. Ct. at 2033; *id.* at 2036–37 (Sotomayor, J., joined by Breyer, J., concurring in the judgment); *id.* at 2038 (Kennedy, J., joined by Alito, J., dissenting).

110. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010).

opinion, joined by Chief Justice Roberts, Justices Thomas and Sotomayor, and Justice Stevens (in part), allowing the class action under the federal rule,¹¹¹ while Justices Ginsburg and Breyer joined with Justices Kennedy and Alito in an opinion that would have forbidden it under the state rule.¹¹²

Adam Steinman argues that *Shady Grove* was a unique case that reversed the litigants' typical positions for federalism purposes, with the plaintiffs arguing for a uniquely plaintiff-friendly federal rule.¹¹³ But in the long run, plaintiffs are more likely to benefit from favorable state rules and thus more likely to want state law to apply in federal court, the position that the more liberal Justices Ginsburg and Breyer urged; looking forward, therefore, the line-up of the Justices makes ideological sense.¹¹⁴ On the other hand, odd line-ups just may be part of *Erie-Hanna*, which makes sense given its federalism grounding.¹¹⁵ We saw a similarly unexpected ideological divide fifteen years earlier in *Gasperini v. Center for the Humanities*—the Court's most recent *Erie-Hanna* case prior to *Shady Grove*.¹¹⁶ Justice Ginsburg wrote a majority opinion joined by Justices O'Connor, Kennedy, Souter, and Breyer requiring that a state tort-reform provision designed to reduce the size of damage awards—by enhancing the power of trial and appellate judges to review and reduce jury awards—must apply in federal court.¹¹⁷ Justice Scalia was joined in dissent by Chief Justice Rehnquist and Justice Thomas, insisting that the more plaintiff-friendly federal rule—requiring deferential review of jury awards—should apply.¹¹⁸

Tellingly, however, the expected political divide does reveal itself in the most fundamental procedure cases, those touching on core issues at the heart of civil litigation and reflecting foundational divides about the purpose and operation of the civil justice system.

111. *Id.* at 1434.

112. *Id.* at 1459.

113. Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1137 (2011).

114. *Id.* at 1179.

115. *Id.* at 1180.

116. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418 (1996).

117. *Id.* at 418–19.

118. *Id.* at 448–49 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

The ideological 5–4 splits, in which the more conservative justices prevail, have not been random. The Court has divided sharply in cases addressing compelled arbitration of civil rights claims in lieu of litigation,¹¹⁹ class actions,¹²⁰ and pleading in civil rights actions¹²¹—all cases bluntly limiting certain plaintiffs’ access to the courts and constraining (as a legal or practical matter) the meaningful opportunity to obtain judicial remedies for violations of rights. It also is notable that among the four Justices with proceduralist backgrounds (Roberts, Ginsburg, Sotomayor, and Kagan), the Chief Justice has been in the majority in the ideological cases restricting court access and the other three have been in dissent or at least in meaningful substantive disagreement with the Court.¹²²

To the extent some procedure decisions can be explained as purely ideological, it reveals some continuity between the Roberts Court’s focus on civil procedure and its predecessor Court’s focus on, and antipathy towards, litigation in general. Andrew Siegel previously argued that a vast swath of the Rehnquist Court’s jurisprudence reflected “hostility” to litigation and an effort to reduce opportunities to pursue legal or public goals through the “social institution of litigation.”¹²³ Siegel defined this hostility as an “attitudinal orientation” against the “complex of cultural attitudes about problem-solving, institutional arrangements, doctrinal rules, and professional roles that nourish our particular judicially focused dispute-resolution system.”¹²⁴ That hostility explained doctrines as diverse as state sovereign immunity,¹²⁵ private rights of action,¹²⁶

119. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2779–80 (2010).

120. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

121. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1943 (2009).

122. *Supra* notes 82–92, 105–18.

123. Siegel, *supra* note 3, at 1114.

124. *Id.*

125. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity acting under its power to regulate Indian commerce).

126. *See Alexander v. Sandoval*, 532 U.S. 275 (2001) (rejecting private right of action to enforce disparate impact regulations under Civil Rights Act of 1964).

and attorneys' fees.¹²⁷ Siegel also found a political valence at least correlated to the outcomes of these cases, although this valence was of limited force because most cases were not bluntly political.¹²⁸ Particularly absent in those decisions was any "handwringing over the denial of remedies to plaintiffs," or any "sense of reluctance that symmetry or precedent requires an otherwise unpalatable result."¹²⁹

The Roberts Court has shown similar hostility to litigation as a means of vindicating legal rights, the apparent difference being that this Court's hostility manifests itself in general procedural doctrine. This ideological continuity is unsurprising, given that three members of the Rehnquist Court's conservative wing remain on the Court, and the additions of Chief Justice Roberts (who replaced Chief Justice Rehnquist) and Justice Alito (who replaced Justice O'Connor) did not meaningfully alter the Court's basic ideological balance. Note, however, that we have seen in some more recent cases handwringing over burdens on plaintiffs and possible denial of judicial access.¹³⁰

III. THE ROBERTS COURT AND OTHER RULEMAKING ACTORS

While the Roberts Court has taken a renewed leadership role in civil procedure, it is not the sole procedural rulemaker, and adjudication is not the only way, and arguably not the best way,¹³¹ to

127. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (rejecting "catalyst theory" as basis for awarding attorneys fees to civil rights plaintiffs).

128. Siegel, *supra* note 3, at 1126.

129. *Id.*

130. *Cf. McIntyre v. Nicastro*, 131 S. Ct. 2780, 2799–801 (Ginsburg, J., dissenting) ("Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?").

131. See, e.g., Clermont & Yeazell, *supra* note 39, at 850 (arguing that rulemaking bodies, not courts, should have "hosted the discussion" of pleading standards); Lumen Mulligan & Glen Staszewski, *An Agency Approach to the Supreme Court's Interpretation of Procedural Rules*, 59 UCLA L. REV. (forthcoming June 2012) (manuscript at 5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1897864 (arguing that notice-and-comment rulemaking process of Civil Rules Advisory Committee is preferable to

make and elaborate on procedural rules. The early years of the Roberts Court have been marked by a great deal of procedural rulemaking outside of Supreme Court adjudication—by Congress, by all the actors in the REA process, and by lower courts, all often coming in response to the Court’s adjudicative activity. This period also has been marked by some strained or uncertain interactions among the various procedural actors.

A. *The Supreme Court and the Rules Enabling Act*

The Roberts Court has been, at best, ambivalent towards the REA. Formally, the Court is statutorily charged with promulgating rules of procedure, with Congress reserving for itself only the power to disapprove the rules the Court has created.¹³² Practically, however, the process is controlled by the Standing Committee of the Judicial Conference and the Civil Rules Advisory Committee, which study, debate, draft, and approve rules through a lengthy, multi-stage notice-and-comment process that now takes, on average, two to three years.¹³³ The Court does not review or approve potential rules until they have been through five levels of committee and public consideration and review. In fact, the Justices often see the Court’s role as that of a mere conduit, not certifying the merits or wisdom of a particular rule or taking ownership of the underlying policies, but signaling only that the committees properly adhered to rulemaking processes.¹³⁴

The idea that the committees, rather than the Court itself, drive the rulemaking process arguably has affected the Court’s recent procedural adjudication. Perhaps the Justices have realized that they wield greater, more direct power in an adjudicative posture,

adjudication); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102 (2002) (“[A]lterations to the [Federal Rules of Civil Procedure] should undergo the process specified in the Enabling Act, rather than taking effect through judicial fiat”).

132. 28 U.S.C. §§ 2072, 2074 (2006).

133. 28 U.S.C. § 2073 (2006). See also Mulligan & Staszewski, *supra* note 131 (manuscript at 14) (describing the timeline for amending rules in accordance with the Enabling Act); Struve, *supra* note 131, at 1103–04 (same).

134. Mulligan & Staszewski, *supra* note 131 (manuscript at 61–62); Struve, *supra* note 131, at 1127–28.

rather than the more complicated rulemaking posture, and have shifted their attention and efforts there. For example, while the Court narrowed Rule 23 and class actions in a number of decisions, including *Wal-Mart*¹³⁵ and *Concepcion*,¹³⁶ neither the committees nor the Court have altered that rule in any meaningful way, and its basic structure remains the same as when it was enacted in 1966.¹³⁷

Pleading again exemplifies the Roberts Court's approach to adjudicative rulemaking. Prior to 2007, the Court had twice declined invitations to reject *Conley* or to demand anything more than a "short plain statement" in civil rights cases, both times directing normative arguments about the appropriate pleading standard to the REA process.¹³⁸ But the Roberts Court displayed no such qualms or deference in *Twombly* or *Iqbal*.¹³⁹ In fact, *Twombly* short-circuited a preliminary discussion of notice pleading by the Advisory Committee, a discussion tabled following the Court's decisions.¹⁴⁰ Critics of the new pleading regime have targeted this unexpected willingness to alter the pleading standard through adjudication rather than through rulemaking, criticizing the Court for making policy-based decisions without the benefit of policy-based evidence or the type of empirical study that the rulemaking process ensures.¹⁴¹ Interestingly, some legislative proposals to undo *Twombly* and *Iqbal* would not have announced a new standard, but only reinstated the status quo prior to *Twombly*, sending the issue to the committees for more in-depth study and consideration.¹⁴²

135. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

136. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

137. Scott Dodson, *Squeezing Class Actions*, SCOTUSBLOG (Aug. 30, 2011, 3:35 p.m.), <http://www.scotusblog.com/2011/08/squeezing-class-actions/>.

138. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168–69 (1993).

139. Mulligan & Staszewski, *supra* note 131 (manuscript at 9).

140. Minutes of Meeting of Civil Rules Advisory Committee, May 22–23, 2006, at 37, available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Minutes.aspx>.

141. Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 876–77, 883 (2010); Burbank, *supra* note 39, at 114, 116; Clermont & Yeazell, *supra* note 39, at 851.

142. *Burbank Testimony*, *supra* note 103 (arguing that legislation undoing the Court's decisions should return to the status quo until more open and in-depth study and discussion can proceed).

The Court, or at least Justice Scalia, is sending similarly mixed signals as to how much the committee process should influence adjudication of Federal Rules questions. Writing for the Court in *Wal-Mart* that Rule 23(a)(2)'s commonality requirement was not satisfied where there were significant differences among class members, Justice Scalia never mentioned, much less relied on, the Advisory Committee Notes to Rule 23 for guidance in understanding the meaning and scope of the rule or the role of predominance under 23(a) (as opposed to 23(b)).¹⁴³ Later, he insisted that "it is the Rule itself, not the Advisory Committee's description of it, that governs" in rejecting the argument that a class could be certified under Rule 23(b)(2) where claims for monetary relief are tangential to claims for injunctive relief.¹⁴⁴ Similarly, in *Krupski v. Costa Crociere*, Scalia flatly refused to join the portion of the majority opinion that examined the Advisory Committee Notes to Rule 15 to determine the scope and meaning of mistake in relation back.¹⁴⁵ Scalia insisted that the Notes are equivalent to ordinary legislative history, which he famously rejects as antithetical to textualism in statutory interpretation.¹⁴⁶

But, as Catherine Struve has argued, the Advisory Committee Notes are not ordinary legislative history. Legislative history consists of reports by congressional committees and individual members' floor-debate statements about a piece of legislation passed by two distinct houses of Congress; such statements may not reflect the views or intent of the enacting legislative body.¹⁴⁷ By contrast, the Advisory Committee is a singular body that prepares the explanatory notes contemporaneously with the text of the rule and both the text and Notes travel through the REA process together.¹⁴⁸ *Krupski* marked just the second time that Justice Scalia had explicitly rejected use of the Advisory Committee Notes in this way, while he

143. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–52 (2011).

144. *Id.* at 2559.

145. 130 S. Ct. 2485, 2498–99 (2010) (Scalia, J., concurring in part and concurring in the judgment).

146. *Id.*

147. Struve, *supra* note 131, at 1159–60.

148. *Id.* at 1159.

has over the years written or joined multiple decisions that have cited and relied on the Notes for interpretive authority.¹⁴⁹

Stricter textualism in rule interpretation also revives the debate over how much interpretive leeway the Court should have. In one view, the Court, being both rule interpreter and formal rulemaker under the REA, has broader interpretive license; because the Court is the source of the Rule, the separation of powers concerns triggered by overly liberal statutory interpretation are absent.¹⁵⁰ The competing, and more recent, view accounts for the actual REA process and the power the committees wield, insisting that the Court owes a greater level of deference to the committees.¹⁵¹ In seeming to favor the former position and seize greater interpretive latitude, while also rejecting or limiting the persuasive or interpretive force of the Advisory Committee Notes, the Court may be attempting to wrest rulemaking away from the REA and the committees. By elaborating on the rules through narrower, minimalist adjudication, the Court itself makes new rules while circumventing the committees and the interest-group conflicts built into the REA process.¹⁵²

While the Court grapples with the appropriate balance between adjudication and rulemaking, the REA process has been as active as ever. The prior six years have seen a number of significant amendments to the Federal Rules of Civil Procedure. The most notable was the Restyling Project, effective in December 2007, which rewrote all the rules in clearer, more modern language and organization, without changing the meaning or understanding of the rules.¹⁵³ There were major changes to the text of Rule 56 on summary judgment, designed to bring the rule in line with practice that had followed court-pronounced procedures;¹⁵⁴ to all the

149. *Id.* at 1161–63.

150. Joseph P. Bauer, Schiavone: *An Un-Fortune-Ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 728–29 (1988); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1092–93 (1993).

151. Struve, *supra* note 131, at 1129–30, 1135.

152. *Cf.* Moller, *supra* note 48, at 688–89.

153. Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 156 (2006).

154. FED. R. CIV. P. 56, Advisory Committee's Note to 2010 Amendment, Subdivision (b).

discovery rules to provide for disclosure and discovery of electronically stored information;¹⁵⁵ and to the basic rules for amending pleadings.¹⁵⁶ These changes show the modern rulemaking process at work—a several-year process of multi-layered study, public input, empirical analysis, and consideration of the broad interaction of different rules and the body of the rules as a whole. Interestingly, the Rules Committee has not gone beyond preliminary discussion of *Iqbal* and *Twombly*, seemingly waiting for “convincing empirical evidence that the cases are impacting dismissal practice” before making a serious move to alter Rule 8(a) to override or affirm those decisions.¹⁵⁷ The Committee also may recognize that the Court—which still must sign off on any changes to the Rules—is unlikely to approve amendments that so quickly overturn its own decisions.¹⁵⁸

Of course, the Court has not abandoned its rulemaking authority and still defers to its own rulemaking process, particularly where Congress appears to have expressed a recent preference for that move. *Mohawk Industries v. Carpenter* considered the scope of the judge-made collateral order doctrine, an interpretation of the final judgment rule that permits immediate appellate review of some otherwise non-dispositive trial court decisions.¹⁵⁹ The Court unanimously declined to allow immediate review of orders rejecting assertions of attorney–client privilege.¹⁶⁰ Critical to its analysis were two recent congressional delegations of authority to the Court to enact (through the REA process) rules defining finality¹⁶¹ and establishing additional grounds for interlocutory appeals.¹⁶² Those statutes, and the congressional assumption that the Court would act on those new delegations, limited the appropriateness of judge-made appealability doctrines. Writing for the Court, Justice Sotomayor

155. FED. R. CIV. P. 26(a)(1)(A)(ii); FED. R. CIV. P. 34(a)(1)(A).

156. FED. R. CIV. P. 15(a), Advisory Committee’s Note to 2009 Amendment.

157. Hoffman, *supra* note 39 (manuscript at 2).

158. Clermont & Yeazell, *supra* note 39, at 857.

159. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603–05 (2009); 28 U.S.C. § 1291.

160. *Id.* at 603.

161. 28 U.S.C. § 2072(c) (as amended in 1990).

162. 28 U.S.C. § 1292(e) (as amended in 1992).

emphasized the “important virtues” of rules enacted through the REA, drawing as it does on the “collective experience of [the] bench and bar” and “facilitat[ing] the adoption of measured, practical solutions.”¹⁶³ Justice Thomas concurred to make that point even more emphatically. He insisted that Congress’s delegations are entitled to full respect and that the policy judgments inherent in deciding what issues should be subject to immediate review should be left entirely to the rulemaking process and never addressed through judge-made collateral-order doctrine analysis, as the majority did even in rejecting the appeal.¹⁶⁴

B. *The Supreme Court and the Lower Courts*

The Supreme Court is not the only court engaged in procedural rulemaking via adjudication. Most procedural questions are decided in the lower federal courts, particularly by district court judges addressing issues that cannot be appealed and remain entirely in the district courts’ hands. In fact, two commentators argue that because the lower courts are available to handle routine procedural adjudication and interpretation of the Rules, the Supreme Court should spend less time in its adjudicative role and more time on procedural rulemaking as the leader of the REA process.¹⁶⁵

The best adjudication occurs when the Supreme Court clears up confusion or inconsistencies among the lower courts and leaves them with a clearer rule to apply going forward. For example, the Court’s recent decisions on jurisdictionality remind lower courts to avoid imprecise jurisdictional rulings by adopting a narrow view of what rules genuinely control adjudicative authority.¹⁶⁶ Those efforts appear to be working. For example, a Third Circuit panel overturned two of its own precedents in holding that statutory limits on the extraterritorial application of federal antitrust laws went to the merits

163. *Mohawk Indus.*, 130 S. Ct. at 609.

164. *Id.* at 612 (Thomas, J., concurring in part and concurring in the judgment).

165. Mulligan & Staszewski, *supra* note 131 (manuscript at 7).

166. Wasserman, *Drive-By*, *supra* note 13, at 968; *supra* notes 34–38 and accompanying text.

rather than adjudicative jurisdiction.¹⁶⁷ The court justified its decision by citing more recent Roberts Court decisions, which, though not involving antitrust laws, reflect a consistent trend towards narrowing what is jurisdictional and a sharper recognition that extraterritoriality (of all statutes) must be read as a merits limitation.¹⁶⁸ The decision initially created a multi-way split on the issue.¹⁶⁹ But lower courts are reading the same signals from the Supreme Court and appear ready to resolve the split themselves. The Seventh Circuit, one court on the opposite side of the split with the Third Circuit, soon acknowledged that recent Supreme Court decisions have called into question its jurisdictional view of extraterritoriality of antitrust laws.¹⁷⁰

Another success in this regard is *Hertz Corp. v. Friend*, in which the Court clarified the meaning of “principal place of business” as a place of corporate citizenship for diversity jurisdiction.¹⁷¹ The lower courts had overcomplicated the question, adopting multi-factor tests and consistently adding new factors and combinations of factors in deciding principal place.¹⁷² The result was an approach “at war with administrative simplicity” that “has failed to achieve a nationally uniform interpretation of federal law.”¹⁷³ The Court entered this debate explicitly to establish a clearer, less administratively complex, generally obvious rule that

167. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, No. 10-2288, 2011 WL 3606995, at *4 (3d Cir. Aug. 17, 2011).

168. *Id.* at *2–3; Howard Wasserman, *Third Circuit on Jurisdictionality of FTAIA*, PRAWFSBLAWG (Aug. 23, 2011), <http://prawfsblawg.blogspot.com/prawfsblawg/2011/08/third-circuit-on-jurisdictionality-of-ftaia.html>.

169. *Compare Animal Science*, at *4 (treating FTAIA as a merits limitation), with *In re DRAM Antitrust Litigation*, 546 F.3d 981, 985 n.3 (9th Cir. 2008) (declining to resolve the issue), and *United Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 950–51 (7th Cir. 2003) (en banc) (holding that extraterritoriality of FTAIA goes to court’s jurisdiction). See also Wasserman, *Drive-By*, *supra* note 13, at 952; Howard Wasserman, *Jurisdiction, Merits, and Non-Extant Rights*, 56 U. KAN. L. REV. 227, 242–43 (2008) (arguing that FTAIA should be handled as a merits limitation); Wasserman, *Jurisdiction, Merits and Substantiality*, *supra* note 13, at 688–89 (same).

170. *Minn-Chem, Inc. v. Agrium, Inc.*, 657 F.3d 650, 658–59 (7th Cir. 2011). The court found it unnecessary to decide the issue in this case. *Id.*

171. 130 S. Ct. 1181, 1185 (2010).

172. *Id.* at 1185–86.

173. *Id.* at 1192.

lower courts could apply in a nationally uniform manner.¹⁷⁴ It turned to a much simpler, more straightforward definition of principal place of business as the singular “place where a corporation’s officers direct, control, and coordinate the corporation’s activities.”¹⁷⁵

At the same time, the Supreme Court has been ambivalent towards the lower courts’ role in interpreting and applying procedural rules. *Twombly* and *Iqbal* were explicitly concerned with civil litigation and burdensome discovery interfering with business activities and the ability of high-ranking government officials to perform their public functions.¹⁷⁶ One answer, suggested by Justice Stevens, was to depend on trial judges to engage in managerial judging—to exercise their discretion to tightly control and narrow discovery in appropriate cases.¹⁷⁷ But the majority would have none of it. During argument in *Iqbal*, Justice Scalia put it most pointedly: “Well, I mean, that’s lovely, that—that the—the ability of the Attorney General and Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge.”¹⁷⁸ In fact, careful case management was particularly ineffective in civil rights cases involving executive qualified immunity.¹⁷⁹ Ironically, of course, the solution for this distrust of trial judges’ case-management abilities was to vest those same judges with broad discretion to parse pleadings and evaluate the plausibility of allegations through the exercise of their personal judicial experiences and common sense.¹⁸⁰

Distrust aside, lower courts bear primary responsibility for making the Court’s procedural pronouncements work on the ground. The assumption underlying the flood of scholarship that followed *Iqbal* and *Twombly* was that the cases worked a major, dramatic

174. *Id.* at 1193–94.

175. *Id.* at 1192.

176. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

177. *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting).

178. Transcript of Oral Argument at 35–36, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5168391.

179. *Iqbal*, 129 S. Ct. at 1953.

180. *Id.* at 1950; Miller, *supra* note 39, at 30; Wasserman, *Procedural Mismatches*, *supra* note 75, at 176–77.

change in pleading law.¹⁸¹ The issue for the lower courts was to figure out the degree: what the cases actually meant, what they would bring about on the ground, how they would change pleading and civil litigation for better or for worse, and what category of cases would be particularly hard hit.¹⁸² But no one could say for certain what lower courts would do with these “deeply inscrutable” decisions.¹⁸³

Scholars and policymakers have sought to measure the effect on the lower courts, but studies have yielded inconsistent conclusions that often turn on the methodology used and the framing of the results.¹⁸⁴ Two findings have been consistent. One is an increase in 12(b)(6) activity in the district courts, meaning an increase in the filing of motions to dismiss.¹⁸⁵ The second, especially prominent in a study by the Federal Judicial Center for the Advisory Committee, and somewhat corroborated in others, is that the increase in the granting of 12(b)(6) motions has largely been on

181. Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 122–23 (2011).

182. *Supra* text accompanying notes 69–72.

183. Moller, *supra* note 48, at 645–46. *See also* Miller, *supra* note 39, at 28 (observing that the Court’s “radical departure” in *Twombly* and *Iqbal* from prior pleading practice “raise[d] novel questions of how the new pleading-motion regime [would] work going forward . . .”).

184. *See* JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2011), available at <http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/file/motioniqbal.pdf> (analyzing filing and resolution of motions to dismiss for failure to state a claim); Patricia W. Hatamyar, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, U. RICH. L. REV. (forthcoming 2012) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883650 [hereinafter Hatamyar, *Updated Study*]; Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010) [hereinafter Hatamyar, *Tao*]; Hoffman, *supra* note 39 (manuscript at 17–18); William H. J. Hubbard, *The Problem of Measuring Legal Change, with Application to Bell Atlantic v. Twombly* (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883831.

185. CECIL ET AL., *supra* note 184, at 8–12; Hoffman, *supra* note 39 (manuscript at 16).

grants with leave to amend—that is, with the plaintiff having an opportunity to replead and correct the defects in the pleading.¹⁸⁶

Both findings make intuitive sense. If *Iqbal* and *Twombly* signal to lower-court judges that their prior, stricter approach was authorized by Rule 8(a)(2), the decisions also incentivize defense lawyers to at least explore early dismissal. But *Twombly* and *Iqbal* were about factual sufficiency in complaints—the amount of fact and detail that plaintiffs must plead to state a claim and get to discovery. A factual-insufficiency dismissal typically should be accompanied by an opportunity to replead and add (if possible) greater detail to cure the defect.¹⁸⁷ This suggests an unexpected dynamic in the lower courts: courts are granting motions to dismiss, but are dismissing without prejudice and giving plaintiffs additional opportunities to plead the necessary facts, rather than dismissing the complaint entirely.¹⁸⁸ Lower court judges now may be seeking some balance in the face of charges that *Iqbal* slammed the courthouse doors on plaintiffs. Complaints will be dismissed, but plaintiffs will be given additional opportunities to get it right. Meanwhile, the ironic effect is increased litigation costs, shifted away from discovery (which is what motivated the majorities in both *Iqbal* and *Twombly* and what concerned many commentators¹⁸⁹) and into the threshold pleading stage.

One might argue that giving plaintiffs an opportunity to replead to try to state a claim means the harsh effects of *Iqbal* have been mitigated.¹⁹⁰ But there are problems with that argument. First, the

186. CECIL ET AL., *supra* note 184, at 13–14; Hatamyar, *Updated Study*, *supra* note 184 (manuscript at 2); Hatamyar, *Tao*, *supra* note 184, at 598, 618; Hoffman, *supra* note 39 (manuscript at 17).

187. *Vance v. Rumsfeld*, Nos. 10-1687, 10-2442, 2011 WL 3437511, at *14 n.11 (7th Cir. Aug. 8, 2011); Wasserman, *Procedural Mismatches*, *supra* note 75, at 182.

188. Hoffman, *supra* note 39 (manuscript at 17–18).

189. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); Epstein, *supra* note 39, at 66–67; Herrmann & Beck, *supra* note 101, at 157.

190. JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 4 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf); Hoffman, *supra* note 39 (manuscript at 17).

initial Federal Judicial Center (FJC) study showed that amended complaints were more likely to be dismissed without leave to amend.¹⁹¹ This suggests that while courts give plaintiffs additional opportunities to cure defects, at some point, perhaps as soon as the first amended complaint, a plaintiff runs out of chances and the courthouse door is shut by the higher pleading standard. Second, a follow-up FJC study released in November 2011 found that the opportunity to amend did produce a statistically significant reduction in the overall rate of movant advantage and success on 12(b)(6).¹⁹² But this cannot necessarily account for cases in which plaintiffs were deterred from repleading after the first dismissal, resigned to being unable to marshal the necessary information or resources to overcome the inevitable successive motion to dismiss.¹⁹³

Four years after *Twombly* and two years after *Iqbal*, we do not see any particular pattern in the lower courts. Perhaps lower courts are still undertaking the difficult task of working out the precedent. Perhaps, as Marc Moller argues, the Court simply “intervene[d] against a set stage of heterogeneous lower court practice” and “provide[d] formal cover for that heterogeneity.”¹⁹⁴ Perhaps we will see not common trends, but rather continued heterogeneity and variance among cases and courts. At a minimum, *Iqbal* has empowered district judges resolving 12(b)(6) motions to rely on their common sense and judicial experience, an inherently discretionary inquiry likely to produce just such variance.¹⁹⁵ Or perhaps it just takes longer to identify any consistent or widely common trends in the lower courts.¹⁹⁶

191. CECIL ET AL., *supra* note 184, at 22, 28.

192. CECIL ET AL., *supra* note 190, at 1, 4.

193. Wasserman, *Procedural Mismatches*, *supra* note 75, at 182.

194. Levin, *supra* note 49, at 151-52; Moller, *supra* note 48, at 667. *See also supra* notes 39-49 and accompanying text.

195. Miller, *supra* note 39, at 30; Wasserman, *Procedural Mismatches*, *supra* note 75, at 177; Hoffman, *supra* note 39 (manuscript at 1-2). *Cf.* Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1502 (2007) (arguing that variance is a positive outcome for fact-specific inquiries).

196. Stephen B. Burbank, *Rebuttal: Time Out, in Debate: Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA L. REV. PENNUMBRA 141, 152 (2009); Clermont & Yeazell, *supra* note 39, at 839-40, 846; Hubbard, *supra* note 184 (manuscript at 32).

Krupski v. Costa Crociere provides another example of lower-court judges working out the precise scope of a Supreme Court decision. *Krupski* adopted an expansive interpretation of the “mistake concerning the proper party’s identity” prong for relating back amendments under Rule 15(c)(1)(C)(ii).¹⁹⁷ A mistake occurs, the Court held, whenever a party “misunderstood crucial facts” regarding potential defendants’ liability and thus failed to name a possibly liable person, in contrast to a “fully informed decision” not to pursue a particular person as a defendant.¹⁹⁸ The Court cited several dictionary definitions of mistake, including one calling it “a wrong action or statement proceeding from faulty judgment, inadequate knowledge or inattention.”¹⁹⁹ The broad analysis turned on the goals of relation back—balancing the defendant-protective policies underlying statutes of limitations with the preference in Rule 15 for resolution on the merits that demanded a broad understanding of when a mistake has occurred.²⁰⁰

One question that has long confounded lower courts is whether a plaintiff makes a mistake when she sues a John Doe or pseudonymous defendant, where the defendant’s true identity is not known to the plaintiff at the time of filing the original complaint. Prior to *Krupski*, most courts had held that lack of knowledge is not a mistake under Rule 15, thus an amended complaint could not relate back when the plaintiff later discovers Doe’s real name.²⁰¹ *Krupski* did not involve an unknown defendant, but the Court’s expansive, policy-based understanding of mistake has caused some district

197. *Krupski v. Costa Crociere* S. p. A., 130 S. Ct. 2485, 2493–94 (2010).

198. *Id.* at 2493–94, 2496.

199. *Id.* at 2493–94.

200. *Id.* at 2494.

201. Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 797–98 (2003). Compare *Goodman v. Praxair, Inc.*, 494 F.3d 458, 470–71 (4th Cir. 2007) (insisting that lack of knowledge of defendant’s name is not a mistake), and *Barrow v. Wethersfield*, 66 F.3d 466, 469–70 (2d Cir. 1996) (same), with *Singletary v. Pa. Dep’t of Corr.*, 266 F.3d 186, 200–01 & n.5 (3d Cir. 2001) (applying prior circuit precedent allowing relation back of a claim against a previously unknown defendant and calling on Rules Advisory Committee to clarify the issue).

courts to reconsider, creating a new split.²⁰² If a mistake is a failure to name a party as a result of anything less than a fully informed decision, including insufficient knowledge of some fact, there is no reason that lack of knowledge of the defendant's actual name can never be a mistake.

C. *The Court and Congress*

Congress has also become more active in procedural rulemaking. The most prominent piece of procedural legislation was the Class Action Fairness Act of 2005, which pushed large-money state-law class actions from state to federal court by granting federal jurisdiction on minimal diversity.²⁰³ The Court has yet to directly handle a CAFA case, other than to note its inapplicability to the class actions that had reached the Court.²⁰⁴ Senator Al Franken has pushed back against decisions favoring arbitration over litigation, sponsoring a successful amendment to the 2010 Defense Appropriations Bill that limited the power of federal-government contractors to compel arbitration,²⁰⁵ and proposing an amendment to the Federal Arbitration Act prohibiting corporations from compelling

202. *Compare* Daniel v. City of Matteson, No. 09-cv-3171, 2011 WL 198132, at *4 (N.D. Ill. Jan. 18, 2011) (holding that relation back unequivocally requires mistake and lack of knowledge as to proper defendant is not a mistake), *and* Dominguez v. City of New York, No. 10 Civ. 2620, 2010 WL 3419677, at *2–3 (E.D.N.Y. Aug 27, 2010) (same), *with* Archibald v. City of Hartford, 274 F.R.D. 371, 377–78 (S.D.N.Y. 2011) (discussing whether *Krupski* changes analysis of whether lack of knowledge of defendant's name constitutes mistake), *and* Bishop v. Best Buy Co., No. 08 Civ. 8427, 2010 WL 4159566, at *3 (S.D.N.Y. Oct. 13, 2010) (same).

203. 28 U.S.C. §§ 1332(d), 1453 (2006).

204. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2376 (2011). *Smith* held that the Anti-Injunction Act, 28 U.S.C. § 2283, barred a federal court, which had rejected class certification under Rule 23, from enjoining a substantially identical state-court class action. *Id.* The state class action in *Smith* was not removable because there was only minimal diversity, but it likely would have been removable under CAFA; this indicates that future defendants will not have to worry about parallel or duplicative state class actions, and the need for a federal injunction of state litigation likely will not arise. *Id.* at 2381–82 & n.12.

205. Franken Amendment, S. Amend. 2588, to Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. § 8116(a)(1) (2009).

employees to arbitrate civil rights, sexual harassment, and assault claims.²⁰⁶

Congress also must confront procedural concerns when trying to respond to the Court on substantive matters. In *Morrison v. National Australian Bank*, the Court held that the extraterritorial application of § 10(b) of the Securities Exchange Act of 1934 was a merits question,²⁰⁷ but that § 10(b) and Rule 10-b(5) (promulgated under § 10(b) and coextensive with it) did not apply to misconduct by foreign defendants who harmed foreign plaintiffs in securities transactions on foreign exchanges.²⁰⁸ In § 929P(b) of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress attempted to overturn *Morrison* and give federal securities fraud law extraterritorial reach.

Congress did so by amending the jurisdictional provisions in three securities statutes, granting district courts jurisdiction over actions initiated by the government concerning “conduct occurring outside the United States that has a foreseeable effect within the United States” or “within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors.”²⁰⁹ But Congress failed to amend § 10(b), the substantive securities fraud provision interpreted in *Morrison* as not having extraterritorial application. Substantive federal securities fraud law, as interpreted, thus remains unamended, unaltered, and, under *Morrison*, without extraterritorial reach. In other words, federal district courts have adjudicative jurisdiction over certain extraterritorial cases, but no substantive federal law applies extraterritorially or prohibits extraterritorial behavior.

206. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

207. *Morrison v. Nat’l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2876–77 (2010). It logically follows that extraterritorial application of other federal statutes also is a merits question. Wasserman, *Drive-By*, *supra* note 13, at 951–52.

208. *Morrison*, 130 S. Ct. at 2877–78, 2883.

209. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010) (amending Securities Act of 1933, 15 U.S.C. § 77v(a); Securities Exchange Act of 1934, 15 U.S.C. § 78aa; and Investors Advisors Act of 1940, 15 U.S.C. § 80b-14).

Congress failed to recognize the Court's broader procedural agenda of eliminating imprecise "drive-by jurisdictional rulings."²¹⁰ The Court needs Congress to be similarly cautious in what it legislatively labels as jurisdictional—Congress must avoid enacting drive-by jurisdictional statutes.²¹¹ But § 929P is just such a drive-by enactment; it attempts to achieve substantive results by tinkering with jurisdiction without actually altering substantive legal rules. Congress completely missed what the Court signaled in *Morrison*; it read only the substance of the Court's extraterritoriality analysis and sought to override that, but missed the finer, equally important, procedural point about jurisdictionality that should have told Congress how to amend substantive legal rules.

A different, potentially more significant, trend is Congressional efforts to engage more directly with the Federal Rules beyond its limited role in the REA process²¹² by amending the Rules via ordinary bicameral legislation. These proposals are frequently made and discussed, although they are never enacted or seriously pursued. Former Senator Arlen Specter was the driving force behind several Senate efforts to undo *Twombly* and *Iqbal* and return to the pleading regime established by Rule 8(a)(2) and *Conley*.²¹³ In 2011, the Republican-controlled House introduced the Lawsuit Abuse Reduction Act (LARA), comprehensive tort-reform legislation that included amendments to Rule 11 making sanctions for frivolous filings mandatory rather than discretionary, focusing sanctions on compensating the party that sought the sanctions rather than deterring future misconduct, and making imposition of attorneys' fees the common and preferred sanction.²¹⁴

This competing congressional activity demonstrates that there is no essential political valence behind legislative efforts to control

210. Wasserman, *Drive-By*, *supra* note 13, at 947; *supra* notes 34–38, 171–75.

211. Wasserman, *Drive-By*, *supra* note 13, at 961.

212. 28 U.S.C. § 2074 (2006).

213. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); *Burbank Testimony*, *supra* note 103.

214. Lawsuit Abuse Reduction Act of 2011, S. 533, 112th Cong. (2011); Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. (2011). Similar bills were proposed when the Republicans controlled Congress during the previous decade. See Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (2005).

procedural rules; it merely depends on the rules targeted. Democrats seek to overturn Supreme Court interpretations of rules seen as anti-plaintiff, while Republicans seek to change REA-promulgated rules to the benefit of business defendants. Notably, both proposals reflect congressional ambivalence towards the REA—LARA appears borne of the concern that interest-group politics within the REA process would defeat any proposal for a stricter Rule 11,²¹⁵ while proposals addressing pleading standards assume that the Court is unlikely to approve a rule overturning its recent judicial interpretations.²¹⁶

Congress's new procedural engagement gives the Court another actor to which to punt procedural questions, beyond resolving them itself or sending them to the Rules Committee. For example, Justice Kennedy's plurality opinion in *McIntyre* suggested that Congress might enact a statute establishing personal jurisdiction in federal court in diversity cases based on national contacts, even if the defendant lacks contacts with the forum state or any other single state.²¹⁷

The choice to direct the issue to Congress is telling. There is a nice question whether the Court (or, more fundamentally, the rulemaking committees) could provide via the REA for national-contacts jurisdiction in diversity cases. Federal Rule of Civil Procedure 4(k)(2) already allows for such personal jurisdiction in federal question cases.²¹⁸ Enacting a similar provision for diversity cases through the Federal Rules raises REA concerns,²¹⁹ while doing so via statute raises *Erie* federalism and choice of law issues.²²⁰ More fundamentally, deferring the issue of national contacts to Congress or the REA process still leaves open the very issue that has divided lower courts—whether jurisdiction based on national contacts, even if statutorily authorized, comports with due process, a

215. Moller, *supra* note 48, at 689.

216. Clermont & Yeazell, *supra* note 39, at 857.

217. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (“It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts.”).

218. FED. R. CIV. P. 4(k)(2).

219. Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 81 n.316 (2010). See also 28 U.S.C. § 2072(b) (“Such rules shall not abridge, enlarge or modify any substantive right.”).

220. Erbsen, *supra* note 219, at 50 n.203.

constitutional question that a statutory grant of jurisdiction does not obviate.²²¹

IV. CONCLUSION

Perhaps calling the Roberts Court's recent activity a civil procedure "revival" overstates things. The Rehnquist Court did not entirely ignore civil procedure.²²² Procedure cases remain a small part of the Court's already small docket.²²³ Nevertheless, more than twenty procedure cases on in six years is not insignificant.

Concurring in the judgment in *McIntyre*, Justice Breyer expressed uncertainty as to how the current personal-jurisdiction framework works (or does not work) in light of modern technology, communications, travel, and commerce, hinting that he, too, would be open to reconsidering and changing the analysis if presented with a more modern case.²²⁴ Breyer called on the Court to find a case implicating those modern issues quickly, so the Court might fully air and resolve those questions.²²⁵ The irony, of course, is that modern technology, communications, travel, and commerce make it easier for people and entities to reach into and engage in foreign forums through their conduct and also to litigate there, arguably pushing the doctrine towards a greater focus on foreseeability, convenience, and fundamental procedural fairness²²⁶ and a lesser focus on concepts

221. *Id.* at 51–52 & nn.211–14.

222. Particularly as to Rule 23 and class actions, see e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997), and subject matter jurisdiction, see, e.g., *Exxon Mobil v. Allapattah*, 545 U.S. 546, 559 (2005); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310 (2005).

223. *Mulligan & Staszewski*, *supra* note 131 (manuscript at 54).

224. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793–94 (Breyer, J., concurring in the judgment). Two days after deciding *McIntyre*, the Court denied cert in two personal jurisdiction cases, including an Ohio case involving internet activity. *Clemens v. McNamee*, 615 F.3d 374 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 3091 (2011); *Roberts v. Kauffman Racing Equip., L.L.C.*, 930 N.E. 2d 784 (Ohio 2010), *cert. denied*, 131 S. Ct. 3089 (2011).

225. *McIntyre*, 131 S. Ct. at 2791–94 (2011) (Breyer, J., concurring).

226. Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 *JURIMETRICS* 575, 608 (1998); Dustin E. Buehler, *Economic Evolution*,

such as sovereign authority, consent, and submission to power that dominate Justice Kennedy's plurality.²²⁷ In any event, expect the Court to take up personal jurisdiction again soon; we might even see the next decade repeat the 1980s, when the Court decided many of its canonical personal jurisdiction cases.²²⁸

And it is not only about personal jurisdiction, as the October 2011 Term again includes several cases addressing core procedural and jurisdictional issues.²²⁹ In addition, the Court reached out to pronounce that the First Amendment's ministerial exemption to federal employment law is a constitutional affirmative defense to the merits of a discrimination claim and not a limit on the court's adjudicative jurisdiction,²³⁰ continuing its drive to clarify the line between jurisdiction and merits.²³¹

Moreover, the Roberts Court, in its current or in ideologically similar form, likely will last for another generation. Five of the nine justices are under the age of sixty-five; four have served six years or

Jurisdictional Revolution 45–47 (July 8, 2011) (manuscript at 45–47), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880975).

227. *McIntyre*, 131 S. Ct. at 2786–89.

228. *E.g.*, *Asahi Metal Indus. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 366 U.S.408 (1984); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

229. *See Mims v. Arrow Fin. Servs. LLC*, No. 10-1195, 2012 WL 125429, at *7 (U.S. Jan. 18, 2012) (holding that federal statute granting state courts jurisdiction over federal cause of action did not strip federal courts of jurisdiction over that cause of action); *Gonzalez v. Thaler*, No. 10-895, 2012 WL 43513, at *9 (U.S. Jan. 10, 2012) (holding that content of Certificate of Appealability in habeas action was non-jurisdictional). *See generally* *Kiobel v. Royal Dutch Petroleum*, 132 S. Ct. 472 (2011) (granting certiorari on whether corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350, goes to subject matter jurisdiction or merits of the claim); *First Am. Fin. Corp. v. Edwards*, 131 S. Ct. 3022 (2011) (granting certiorari on standing to sue under federal statute); *Reynolds v. United States*, 131 S. Ct. 1043 (2011) (granting certiorari on standing to challenge Attorney General rulemaking).

230. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, No. 10-553, 2012 WL 75047, at *15 n.4 (U.S. Jan. 11, 2012).

231. Howard M. Wasserman, *Adjudicative Jurisdiction, Prescriptive Authority, and the Ministerial Exemption*, ___ U. PA. L. REV. PENNUMBRA ___ (forthcoming 2012) (unpublished manuscript) (on file with author).

fewer, including three of the Justices whose backgrounds evince a unique interest in civil litigation and its processes.²³² In short, there is good reason to expect the Roberts Court to continue the civil procedure revival and to continue making procedure a central part of its jurisprudential agenda.

232. *Biographies of Current Justices of the Supreme Court*, SUPREME CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 13, 2011).

