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

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Abstract

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Is civil procedure political? In May of 2009, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, which explicitly extended the “plausibility standard,” first articulated in *Bell Atlantic v. Twombly* two years earlier, to all civil pleadings. That standard requires that pleadings, in order to satisfy Rule 8(a) of the Federal Rules of Civil Procedure, must state a plausible claim for relief. For many, these rulings represented a sea change in civil pleading standards. Where prior Supreme Court precedent had provided that a pleading should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim,” the new standard requires that judges utilize their own “judicial experience and common sense” to determine whether claimants have set forth facts sufficient to “nudge[] their claims across the line from conceivable to plausible.” Could this apparently neutral principle of procedure be subject to political manipulation?

After *Twombly*, and again after *Iqbal*, many expressed fears that the new plausibility standard offered judges too much discretion; a judge could dismiss a case where a plaintiff’s claims did not comport with that judge’s experience and common sense. There was a particular fear that this discretion would have a disparate and adverse impact on civil rights cases: i.e., if members of the federal bench were predisposed to disfavor such claims, they might use these precedents to dismiss civil rights cases too readily. Several years have now passed since the Court issued these decisions, and the district courts have compiled a body of thousands of decisions citing these precedents. As a result, it is now possible to assess the impact of these decisions on practice in the lower courts, particularly their effect on civil rights cases. The study described here attempted to do just that by looking at outcomes and trends in motions challenging the specificity of the pleadings in over 500 employment and housing discrimination cases over a period of six years (including decisions issued both
before and after *Twombly* and *Iqbal*). This research reviewed the outcomes in such cases based on a number of metrics, including, most importantly, the political affiliation of the president who appointed the judge issuing each decision reviewed.

The study revealed a statistically significant difference in the outcomes in civil rights cases based on the political affiliation of the president appointing the judge reaching the decision in each case. While there were increases in dismissal rates after *Iqbal*, for all judges regardless of the party affiliation of the president appointing each judge, for judges appointed by Democratic presidents, that difference was statistically insignificant. For judges appointed by Republican presidents, however, there was a 37% increase in the dismissal rate of employment and housing discrimination cases after the Supreme Court’s decision in *Iqbal*, as compared to just a 6% increase in dismissal rates among decisions issued by judges appointed by Democratic presidents. This paper reports on the findings of this study and discusses their implications.
The Politics of Procedure: 
An Empirical Analysis of Motion Practice in Civil Rights 
Litigation under the New Plausibility Standard

Raymond H. Brescia* and Edward J. Ohanian†

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

If one constant undergirds the host of values procedural rules are supposed to promote, it is that judges should apply such rules fairly and impartially. Although at times it may seem that “different rules apply” to certain classes of litigants—take prisoners and other litigants proceeding pro se and as indigents as examples—judges are to apply the rules fairly and impartially regardless of their own political leanings; the political leanings of

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the litigants before them; the substantive legal issues being adjudicated; the sympathy the judge has for a particular cause being pursued in a matter before him or her; or the personal affection that judge may feel, or displeasure that judge may harbor, for a party or his or her attorney. These sentiments are reflected in that fundamental aspect of the right of due process: the right to be heard by an impartial adjudicator.

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

After the Supreme Court issued its rulings in *Bell Atlantic v. Twombly*\(^1\) and *Ashcroft v. Iqbal*,\(^2\) many raised concerns that these precedents introduced a new pleading standard to all civil pleadings in federal court that was so malleable and indeterminate that it could be invoked by the courts disproportionately in contexts where judges were hostile to particular claims, regardless of their merit.\(^3\) Commentators were especially concerned about the less-than-neutral application of this standard in the civil rights context, by judges who disfavored such claims.\(^4\)

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\(^1\) Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).


\(^3\) See, e.g., Tanvir Vahora, *Working Through a Muddled Standard: Pleading Discrimination Cases after Iqbal*, 44 COLUM. J.L. & SOC. PROBS. 235, 266 (2010)(“The Supreme Court upended decades of established precedent and practice with Twombly and Iqbal’s plausibility pleading and provided uncomfortably vague criteria with which to evaluate complaints.”)(footnote omitted); see, also, David Noll, *The Indeterminacy of Iqbal*, 99 GEO. L. J. 117 (2010)(discussing the questions raised by the plausibility standard).

\(^4\) As Ramzi Kassem writes:

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

The question about the impact of procedural rules on civil rights litigants is an important one in light of the critical role the federal courts play in the protection of those rights. From the early days of the Civil Rights Movement, even before the Supreme Court issued its landmark decision in *Brown v. Board of Education*, the federal courts were at the center of fights over the civil rights of African-Americans, and, later, entered the fray on the equality of racial and ethnic minorities and of women. They are now at the center of the fight for marriage equality.

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

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

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

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9 See, *infra*, text accompanying notes 76 through 94.
In this Article, it was revealed that in a sample of employment and housing discrimination cases, courts were more likely to dismiss these cases based on the lack of specificity of the pleadings after the Court’s decision in *Iqbal*. Furthermore, that study also found, after *Iqbal*, a significant rise in both the number of reported decisions in such cases on motions challenging the specificity of the pleadings, as well as a significant rise in the number of decisions dismissing such actions.

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

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

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

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

I. The Evolution of Pleading Standards and the Rise of the Plausibility Standard in \textit{Twombly} and \textit{Iqbal}.

Rule 8(a)(2), itself a “short and plain” rule, provides that, in terms of the factual allegations regarding the claims set forth therein, a pleading must contain the following: “a short and plain statement of the claim showing that the pleader is entitled to relief.”\footnote{11 Fed. R. Civ. P. 8(a)(2).} Interpreting this standard in 1957, in a civil rights action, the Supreme Court found that a complaint should not be dismissed for failure to state a claim under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”\footnote{12 Conley v. Gibson, 355 U.S. 41, 45-46 (1957).} This interpretation of the Rule was re-affirmed in several subsequent Supreme Court opinions.\footnote{13 See, e.g., McLain v. Real Estate Bd., 444 U.S. 232, 246 (1980) (quoting \textit{Conley’s} no set of facts” language with approval); see also Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976) (same).}

In late 2006, the Court was given an opportunity to review the \textit{Conley} standard in the case \textit{Bell Atlantic v. Twombly}.\footnote{14 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).} An
anti-trust case, the plaintiffs there had alleged that the similar pricing schemes of defendants must have been the result of illegal collusion. Evidence of such parallel conduct, with nothing more, was, according to the plaintiffs, sufficient to overcome defendants’ motion to dismiss for failure to state a claim under Rule 12(b)(6) of the federal rules.\(^{15}\)

In assessing the strength of the plaintiffs’ claims, the Court introduced what has been called the “More Plausible Test”.\(^ {16}\) The Court assessed the likelihood of plaintiffs’ allegations compared to another completely lawful explanation for the defendants’ conduct: i.e., that the price fluctuations were a product of market forces as opposed to illicit agreement.\(^ {17}\) The Court concluded that “without some further factual enhancement,” the plaintiffs’ allegation of mere parallel conduct, “stops short of the line between possibility and plausibility of entitlement to relief.”\(^ {18}\) As such, the complaint deserved dismissal because, when viewed through the lens of the plausibility standard, the plaintiffs failed to “nudge[] their claims across the line from conceivable to plausible.”\(^ {19}\) Making clear that this plausibility standard should supercede Conley’s “no set of facts” approach, the Court issued a polite coup de grâce, finding that that Conley standard had “earned its retirement.”\(^ {20}\)

Two years later, when given the opportunity to make clear that the new plausibility standard should apply to all civil pleadings, the Court heard and decided Twombly’s sister opinion: Ashcroft v. Iqbal. The original plaintiffs in Iqbal were detained as part of the global law enforcement effort that followed in the wake of the attacks of September 11\(^ {\text{th}}\). Iqbal himself was held in a maximum security unit of the Metropolitan Detention Center in Brooklyn, NY, under harsh conditions of confinement, on various charges unrelated to any acts of terrorism.\(^ {21}\) Iqbal pled guilty to certain charges and was deported to Pakistan.\(^ {22}\) Almost two years after his deportation, he filed suit against various defendants in the federal court for the Eastern District of New York, including Attorney General Ashcroft and Federal Bureau of Investigation Director Mueller.\(^ {23}\)

With respect to the defendants Ashcroft and Mueller, the complaint alleged their involvement in several aspects of the

\(^{15}\) Id., at 548-50.

\(^{16}\) Brescia, supra note 10, at 279.

\(^{17}\) Id. at 568-69.

\(^{18}\) Id. at 557 (alteration in original).

\(^{19}\) Id. at 570.

\(^{20}\) Id., at 563.


\(^{22}\) Iqbal v. Hasty, 490 F.3d 143, 149 (2007 ).

\(^{23}\) First Amended Complaint & Jury Demand, supra note 21, at 4-10.
allegedly illegal treatment of the plaintiffs. The complaint contained allegations that Ashcroft and Mueller approved of a “policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI.” According to the complaint, Ashcroft was the “principal architect” of this policy and Mueller was “instrumental in [its] adoption, promulgation, and implementation.” Furthermore, the complaint alleged that these defendants “knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]…[to harsh and unlawful] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin . . . .”

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

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

The Supreme Court took up the review of the Second Circuit’s decision and articulated two “working principles” at the heart of the Twombly approach to pleadings. First, it found that conclusory allegations were not entitled to the presumption of truth normally afforded allegations at the motion to dismiss stage. Second, it reaffirmed the plausibility standard, stating that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”

24 Id. at 13-14.  
25 Id. at 4.  
26 Id. at 4-5.  
27 Id. at 17-18; see also Ashcroft v. Iqbal, 556 U.S. at 669 (recounting allegations in the complaint).  
29 Iqbal v. Hasty, 490 F.3d at 175-178.  
30 556 U.S. at 678.  
31 Id. at 678-679.
The Court went on to elaborate on the meaning of the plausibility standard, stating that assessing the plausibility of a complaint is a “context-specific task.” And such a task “requires the reviewing court to draw on its judicial experience and common sense” when assessing plausibility.

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

Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

According to the Court, because the terrorist attacks were carried out by Arab Muslim members of an Islamic fundamentalist group, it was entirely plausible that a law enforcement effort in their wake would sweep up individuals who happened to be perceived as Arab Muslim in the absence of any discriminatory motive. As the Court noted, “[a]s between that ‘obvious alternative explanation’ for the arrests” (i.e., that the race or ethnicity of the detainee was purely incidental) “and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” In addition, the Court found that Iqbal’s allegations regarding the “hold until cleared” policy were devoid of “factual content to ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’”

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32 Id. at 679.
33 Id.
34 Id. at 680-681.
35 Id. at 681 (emphasis added).
36 As the Court of Appeals noted, Iqbal’s claim was that he was discriminated against based on a perception that he was Arab Muslim, while in reality, he was of Pakistani descent, and not Arab. Iqbal v. Hasty, 490 F.3d at148 n. 2.
37 556 U.S. at 682 (citation omitted).
38 Id. at 683 (quoting Twombly, 550 U.S. at 570).
II. The Plausibility Standard, Due Process and the Lesson of Rule 11.

A. Critiques of the Plausibility Standard.

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

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

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

1. The Promise of Procedural Neutrality and Trans-Substantivity.

A central organizing principle of trans-substantive, procedural rules is that they should function in a neutral, apolitical way. They should not be subject to political manipulation by the courts, and, through their even-handed application, they should promote “equal justice under law.” 42 This concept is embodied in the Rules Enabling Act, the Congressional directive authorizing the courts to craft their own procedural rules. There, Congress has said as follows:

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Professor, University of Washington School of Law) (expressing concern that judges employing the plausibility standard will dismissing otherwise meritorious civil rights claims on technical grounds), available at http://judiciary.house.gov/hearings/printers/111th/111-124_54076.PDF; Kassem, supra note 4, at 1444-46 (criticizing subjective aspects of plausibility standard and expressing fear that the standard will be used disproportionately to dismiss claims members of non-dominant, minority communities).

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

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.\(^{43}\)

The Rules Enabling Act does two things that both point to the goal of neutral procedural\(^{44}\) rules that provide the mechanism through which substantive rights and duties are measured. First, it places the duty to draft the rules in the branch of government—the judiciary—that, it was presumed, would be influenced the least by political forces.\(^{45}\) Second, it ensured, explicitly, that procedural rules should not “abridge, enlarge or modify” any substantive right.\(^{46}\) The campaign to place the power for federal rulemaking

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\(^{44}\) Of course, identifying the line between “substance” and “procedure” is often quite difficult, as is identifying a procedural action that is completely neutral and non-normative. A decision on a procedural matter designed to provide access to the courts has a normative value. That decision can also have political ramifications, whether that access is provided to a litigant to challenge federal health care legislation, which some of one political stripe might support, or to protect the environment against corporate interests, which others would favor. On some of the values underlying procedural rules, see Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2226 (1989). In terms of the substance-procedure divide, the late Robert Cover’s description of this divide is, not uncharacteristically, elegant, if not original: “that which controls the conduct of litigation” is procedural and “that which controls social conduct outside the courtroom” is substantive. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718, 721-722 (1975).

\(^{45}\) Carrington, *supra* note 42, at 2075 (“Congress placed rulemaking under the institution it perceived to be least responsive to interest group politics.”)(footnote omitted). *See, also*, Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 444, n.45 (1958) (“Rule-making is a matter for research, study, and judicial analysis and critiques, not one for the public platform.”). Carrington also argues that Rule 1’s emphasis on trans-substantive values also establishes the apolitical nature of the Rules. Carrington, *supra*, at 2077 (“Rule 1 expresses the aspiration, established by the Court, to the rulemaking process’s political neutrality. We can expect near universal support for the goals of justice, dispatch, and economy in litigation.”)

\(^{46}\) As Carrington argues:

One may view the Rules Enabling Act of 1934 as an accommodation in our constitutional scheme, a subconstitutional structure designed to increase the long term
had been waged for decades, informed by the belief that the judiciary was the governmental branch best insulated from politics. The proponents of the court rulemaking model thought that the judiciary, rather than the legislature, should promulgate the Rules because they believed in a sharp dichotomy between substance and procedure and trusted that courts would devise sound procedural rules through the application of “neutral expertise.” This view largely prevailed during the 1950s and 1960s, which corresponded with a period of significant consensus in favor of legal process theory in American public law and resulted in “the golden age of court rulemaking.”

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

Carrington, supra note 42, at 2072-2073 (footnotes omitted).


50 As David Marcus writes:

If value is defined as a choice of substantive policy, a law is value-neutral if it does not directly regulate conduct “at the stage of primary private activity.” By providing particularized procedural requirements for different areas of substantive law, substance-specific rules directly contribute to the achievement of particular regulatory goals for individuals' primary activity. The preference or burden they foist upon a particular area of substantive policy thus precludes value-neutrality. The generality of trans-substantive rules, however, does not permit
the interests of particular groups of disputants is an obvious objective, indeed perhaps a paramount value, of any enterprise engaged in dispute resolution.” Over time, the rulemaking process has changed, permitting more of an interest group approach to rulemaking, through which more stakeholders are involved in the process, but the emphasis on trans-substantivity and neutrality still remains.

Of course, the theory of trans-substantivity barely leaves the dock before it starts to take on water. The Rules themselves are infused with examples where particular areas of law and claims are to be treated differently. There is discretion granted to district judges in numerous places, permitting ad hoc decisions such a direct connection between process and substantive end. By this admittedly restrictive but (one hopes) analytically useful understanding of value, trans-substantive rules are indeed value-neutral.

Marcus, supra note 47, at 380 (2010).
Carrington, supra note 42, at 2074 (footnote omitted).

On the evolution of the rulemaking process, see Mulligan & Staszewski, supra note 49, at 1198-1201, and Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency, 87 GEO. L. REV. 887, 902-907 (1999). I am quite mindful of the theoretical mine field that is traversed when one discusses neutrality in the law as a concept. The critiques of neutrality as a possibility, or even its normative value, are legion, and they come from many quarters. Representative scholarship on neutrality includes, Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877 (1988) (articulating a feminist perspective on neutral adjudication); David Kairys, INTRODUCTION TO THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 5-15 (David Kairys ed., 3rd Ed. 1998)(offering a progressive critique of the neutrality of decisionmaking); Roberto M. Unger, THE CRITICAL LEGAL STUDIES MOVEMENT 5-8 (1986)(offering the Critical Legal Studies critique of neutrality). When discussing procedural neutrality, perhaps a better way to think of neutrality in this context is “free from apparent bias.” In common discourse, there is likely a consensus around the meaning of neutrality and impartiality that sidesteps more theoretical critiques of those concepts.

And the justification for trans-substantivity is not always ironclad. As Cover wrote:

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

Cover, supra note 44, at 732-733 (footnote omitted).

See, e.g., Rule 9, which requires pleading allegations of fraud with particularity.
throughout the course of a lawsuit. Congress has intervened to impose specific procedural rules on claims by immigrants, prisoners, class action litigants and securities litigants. Each district has its own rules and orders. Indeed, every judge has his or her own court rules, and no two cases are ever treated exactly alike, let alone cases involving similar areas of law. Like Tolstoy’s description of unhappy families, which are each unhappy in unique ways, each case stands on its own, “in its own way.”

Despite the apparent challenges of trans-substantivity and neutrality in a world of district and court rules, wide ranging discretion and legislated rules for particular areas of law, the overarching principles remain: generally speaking, procedural rules should be simple and general; applicable to wide areas of law; and applied neutrally, regardless of the litigant or his or her case. When the norm of the neutrality of procedural rules is violated, and broken with respect to particular areas of law, this betrays the trans-substantive ethos of those rules, and the general purpose of the rules—to provide a neutral ground upon which substantive conflicts are resolved—is undermined. And when

62 As Richard Marcus writes:

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

63 See, e.g., Stephen B. Burbank, *Procedure, Politics and Power*, 52 J. OF LEG. ED. 342, 344 (2002)(“[W]hen one knows that a rule has a statistically significant differential impact on a class of litigants or in a particular type of case, the veil is lifted, the myth of neutrality as to litigant power is exploded, and
this general purpose is undermined, it has broader implications for the proper functioning of the courts, for their legitimacy and for their role in the constitutional structure, as the following discussion shows.

2. Due Process Concerns.

As the Supreme Court recently re-affirmed, “[i]t is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” Thus, a fundamental aspect of due process is the right to have one’s case heard by an impartial adjudicator. If at the core of due process protections lies the right to impartial adjudication, the biased application of an otherwise neutral rule would certainly violate those protections.

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

While every grant of discretionary power is, perhaps, fraught with such a danger, when the decision permits discretion with few guideposts beyond a particular judge’s subjective

the question of lawmaking power to address the situation is unavoidable.)(footnote omitted).

“experience and common sense,” and that discretion can result in the dismissal of a case with prejudice, it should raise deeper concerns about the risks posed by such near limitless discretion. Furthermore, if “abuse of discretion” is the standard for appellate review of such decisions, is appellate review out of reach? How can appellate judges ascertain whether a particular judge’s experience and common sense should suggest that a claim is plausible or not? Thus, the broad grant of discretion at the trial level leaves appellate judges, paradoxically, with little room to maneuver to serve as a check on such discretion.  


When courts apply otherwise neutral principles in ways that favor or disfavor certain litigants, they are making value judgments about the types of substantive rights that they will enforce and those they will reject, without, it would seem, regard for the political judgments made by the legislative branch of the scope and reach of those rights. This dichotomy between the substantive rights that courts must adjudicate, and the procedural rights they must apply, is captured in the Rules Enabling Act, and its language limiting courts from abridging, enlarging or modifying substantive rights through the passage of procedural rules. Despite the delegation of authority to the judiciary to draft its own rules of procedure, the limitation on that delegation with respect to protecting substantive rights—i.e., rights established by Congress—reflects the separation of powers logic behind the Rules Enabling Act and the delegation of authority it accomplished. In part, this division of authority reflects the perceived comparative

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

institutional advantages of the different branches of government: the legislature determines the scope and existence of rights from within the crucible of the political arena, and the judiciary adjudicates those rights free from the passions of politics in accordance with neutral rules of the game.\textsuperscript{71} When judges do, in fact, abridge, enlarge or modify substantive rights through the drafting or application of procedural rules, it raises distinct separation of powers concerns.

4. Legitimacy.

At the core of the legitimacy of judicial decision making is the perception that courts are unbiased. With no other power to enforce their own edicts, courts rely on the perceptions of their legitimacy; that legitimacy is undermined, in turn, by perceptions of bias and partiality.\textsuperscript{72} Furthermore, if the procedures through which a substantive decision is reached are perceived as fair, the public tends to accept the outcome regardless of whether a particular individual agrees with the substance of a particular result. This position was most strongly advocated by members of the legal process school, who argued that as long as the procedure is right, the outcome is fair.\textsuperscript{73}

Of course, history reveals that judges are not immune from considering the political ramifications of their actions, and should be—rightly—sensitive to the political climate in which their


\textsuperscript{73} Mark Spiegel, The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules, 32 CONN. L. REV. 155, 166 (2000)(citations omitted). These sentiments are echoed by others. See, e.g., Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 HARV. L. REV. 1791, 1839-1840 (2009)(“In international and constitutional law alike, the social psychology literature lends some support to the view, long intuited by judges and lawyers, that the perceived procedural fairness of judicial decisionmaking plays an important role in establishing legitimacy and motivating compliance. Constitutional rules or judicial decisions that appear to be “neutral” “principled,” or “impartial” may win public approval, regardless of the public’s agreement or disagreement with the outcomes on the merits.”)(footnotes omitted).
decisions are issued.\textsuperscript{74} In recent years, members of the Supreme Court have expressed these sentiments, in dissents \textsuperscript{75} and in public. \textsuperscript{76} Furthermore, in the majority opinion in \textit{Planned Parenthood of Southeastern Pa. v. Casey},\textsuperscript{77} the justices expressed their collective recognition of the political context in which that case was being decided when they were invited to consider overruling \textit{Roe v. Wade}. There, the Court stated as follows:

\begin{quote}
The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception.
\end{quote}

\textsuperscript{74} As Robert Post writes, courts must be attuned to the political ramifications of their actions, especially when they might undermine values important to the community:

If courts genuinely believe that certain values are essential for the maintenance of the polity and of the rule of law, the fact that judicial decisions may undermine these values cannot blithely be dismissed as irrelevant to the internal purposes of the law. Insofar as law is concerned with the fundamental commitments that underpin the solidarity of the polity—and these emphatically include the relative autonomy of the law itself—it would be self-defeating for judges to define their role in ways that ignore these fundamental commitments. If judges incorrectly appraise these commitments—and in the past judges have been very badly mistaken in their estimations of the fundamental commitments of the polity—the political system will itself correct their error.


\textsuperscript{75} Justice Stevens’s dissent in Bush v. Gore, which was joined by Justices Ginsburg and Breyer, provides as follows: “[a]lthough we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.” Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

\textsuperscript{76} As Justice Brennan, in public comments, stated: “Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate.” William Brennan, \textit{The Constitution of the United States: Contemporary Ratification}, Text and Teaching Symposium, Georgetown University, Washington, D.C. 3 (Oct. 12, 1985).

\textsuperscript{77} 505 U.S. 833 (1992)
that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.\textsuperscript{78}

The clarity with which judges must assess the ramifications of their holdings point not to the complete separation between politics and legitimacy, but, rather, their connection and the narrow path judges must take when seeking to preserve that legitimacy. That is, courts must be keenly sensitive to and aware of the political ramifications their decrees will have, while protecting against appearing “too political.” The application of procedural rules is not immune from this walk on the political tightrope. Indeed, as the experience with the 1983 amendments to Rule 11 makes clear, when courts appear to be too political in their application of otherwise neutral procedural rules, the rulemaking apparatus can take corrective action and re-calibrate the rules to prevent against such actions when they become, themselves, threats to judicial legitimacy.

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

C. The Lessons of Rule 11.

In the civil rights context in particular, remedial action has been taken when courts have appeared to overstep their judicial functions and were limiting substantive rights through procedural mechanisms. The best example of this, perhaps, is when the rulemaking apparatus corrected perceived disparate enforcement of Rule 11.\textsuperscript{79} The 1983 amendments to Rule 11,\textsuperscript{80} which were

\textsuperscript{78} Id., at 865.

\textsuperscript{79} Another example can be found in Congress's efforts to scale back some of the more onerous barriers the courts had put in place against civil rights litigants seeking to vindicate claims of employment discrimination. After several Supreme Court precedents appeared to make pleading and proving employment discrimination actions more difficult, Congress passed the Civil Rights Act of 1991, which restored some of the procedural standards erected by earlier judicial precedents. Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)). For a detailed description of the legislative changes accomplished through the Act, see, David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAWYER 849 (1992).
promulgated to deter frivolous claims and defenses, stimulated a debate regarding whether the 1983 version of Rule 11 was procedurally neutral. First, the volume of decisions was particularly striking. In the first forty-five years in which the Rule was in place, there had been twenty-five reported cases in which Rule 11 was invoked. In just ten years after the 1983 amendment, there were over 6,000 reported Rule 11 rulings. Moreover, several empirical studies provided data-driven insights about the impact of Rule 11 on civil rights cases. In March 1987, the Chief

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

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

FED. R. CIV. P. 11 (amended Apr. 28, 1983, effective Aug. 1, 1983). See also Spiegel, supra note 73, at 156 (“The 1983 amendments to Rule 11 added a requirement that the lawyer make a reasonable inquiry into the facts and the law before filing court papers, thereby adopting an objective standard in contrast to the pre-1983 version’s subjective standard. Moreover, sanctions now became mandatory upon a finding of violation, and they could be imposed upon the lawyer, the client, or both.”).

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

82 See e.g., Spiegel, supra note 73, at 160.

83 Id., at 157-158.

84 Although two earlier studies concluded that civil rights cases were disproportionately affected by the 1983 Rule 11 amendments, these studies were based solely on reported cases. See Melissa Nelken, Sanctions Under Amended Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313 (1986); Georgene M. Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189 (1988). In contrast, four later empirical studies used more comprehensive methodologies that went beyond reported cases. See Lawrence Marshall, Herbert M. Kritzert, & Frances Kahn Zemans, The Use and Impact of Rule 11, 86 NW. U.L. Rev. 943 (1992) (hereinafter AJS Study); Gerald F. Hess, Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study, 75 MARQ. L. REV. 313 (1992) (hereinafter Hess

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Judge of the Court of Appeals for the Third Circuit appointed a Task Force to study the implementation of Rule 11. The Task Force collected data “regarding every motion for, and every sua sponte consideration of, sanctions under Rule 11 during the period July 1, 1987 through June 30, 1988” in the Third Circuit. Ultimately, while noting that their results were less stark than those in studies based on reported decisions alone, the Task Force concluded that “the findings tend to confirm published suggestions that the Rule has a disproportionate impact on civil rights plaintiffs.”

The Third Circuit Report indicated that:

Requests for sanctions in civil rights cases constituted only a slightly larger slice of our pie (24/132 or 18.2%) than one would expect on the basis of civil filings in this circuit (16% of civil filings in the period ending June 30, 1988) . . . Yet, plaintiffs (and/or their counsel) were sanctioned on motion in civil rights (including employment discrimination) cases in our survey at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases.

Similar to the Third Circuit Report, both the FJC Report and Hess Study employed methodologies that focused primarily on case data. Although the FJC Report did not explicitly confirm

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85 Third Circuit Report, supra note 84, at ix.
86 Id., at 5.
87 Id., at xiv.
88 Id., at 69. Based on the data produced in the Third Circuit Report, Professor Spiegel used a distinct measure of disproportionality and derived that “although civil rights cases were 16% of total civil filings, they constituted 37% of the total number of cases where sanctions were imposed.” Spiegel, supra note 73, at 172–73.
89 The FJC Report included the Rule 11 activity in five federal district courts—the District of Arizona, the District of the District of Columbia, the Northern District of Georgia, the Eastern District of Michigan, and the Western District of Texas—that were chosen due to the availability of computerized information. FJC Report, supra note 84, Section 1B, at 1. Ultimately, “[t]he FJC Study included more than 55,000 cases.” Spiegel, supra note 73, at 170 (derived figure). The Hess Study gathered data on state and federal cases in Spokane County, Washington. Hess Study, supra note 84, at 316. Federal court data was gathered for civil cases filed from August 1, 1983 to December 31, 1990 by
that Rule 11 had a disproportionate impact on civil rights plaintiffs,\textsuperscript{90} its results were consistent with the findings of the Third Circuit Report where such an impact was found.\textsuperscript{91} As one commentator notes, in the data reported by the FJC Study for the District of Arizona, although civil rights cases were 5% of total caseload, sanctions against civil rights cases were 14% of total sanctions imposed. This pattern was similar in other districts.\textsuperscript{92} Consistent with the results of the FJC Report, the Hess Study results indicated that Rule 11 had a disproportionate impact on civil rights cases: “A disproportionately high percentage of Rule 11 requests were made in civil rights cases (34%) compared to the portion of civil rights case on the docket (24%).”\textsuperscript{93}

Unlike the three other empirical studies that focused on case data, the AJS Study made its determinations based on a survey of 4,494 attorneys across three juridical circuits: the Fifth, Seventh, and Ninth.\textsuperscript{94} Notwithstanding this methodological difference, the AJS Study similarly concluded that Rule 11 had a disproportionate impact on civil rights cases.\textsuperscript{95} This conclusion was based on the fact that “[a]lthough civil rights cases made up 11.4% of federal cases filed, [the AJS Study] survey show[ed] that 22.7% of the cases in which sanctions had been imposed were civil rights cases.”\textsuperscript{96}


\textsuperscript{90} \textit{FJC Study, supra} note 84, Section 1C, at 1 ("To address the question of whether Rule 11 sanctions have been imposed in cases involving good-faith arguments for change in the law, we recommend that the reader consult the individual case summaries and make an independent evaluation.").

\textsuperscript{91} Spiegel, \textit{supra} note 74, at 173.

\textsuperscript{92} \textit{Id.} Professor Spiegel derived additional figures regarding sanction requests from the data in the \textit{FJC Report} that also indicated disproportionality. \textit{Id.}, at 171 ("Civil rights cases were 9.75% of the 55,328 cases, but comprised 22.76% of the Rule 11 cases").

\textsuperscript{93} \textit{Hess Study, supra} note 84, at 352. The \textit{Hess Study} noted, however, that “civil rights plaintiffs were sanctioned at a similar rate (12% of requests) as other represented plaintiffs (16%).” \textit{Id.}, at 352. When looking at sanctions imposed, rather than sanctions requested, it is evident that “a significantly higher percentage of sanctions were granted against civil rights plaintiffs as a percentage of total sanctions granted than the percentage of civil rights cases relative to the total caseload.” Spiegel, \textit{supra} note 73, at 173. \textit{See also Hess Study, supra} note 84, at 339.

\textsuperscript{94} \textit{AJS Study, supra} note 84, at 950. The survey elicited a response rate of 74.9%. \textit{Id.}

\textsuperscript{95} \textit{Id.}, at 966 ("our evidence tends to confirm the commentary about Rule 11’s disproportionate impact on civil rights cases.").

\textsuperscript{96} \textit{Id.}, at 965–66. It is also important to note that with respect to sanctions filed, as opposed to sanctions imposed, Rule 11 motions were filed in 18.7% of civil
In response to these and other concerns, the rulemaking apparatus kicked in and Rule 11 was further amended in 1993 to make the imposition of sanctions discretionary, and, most importantly, to provide a “safe harbor”: litigants could avoid sanctions if their opponents point to some offending pleading or allegation and that pleading or allegation is withdrawn. 97

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

III. Gauging the Impact of Twombly and Iqbal.

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

Studies of the impact of Twombly and Iqbal on motion practice in federal courts have generated somewhat varying results. The first, conducted by Professor Patricia Hatamyar Moore, found a slight rise in dismissal rates in motions after Twombly but before Iqbal, from forty-six to forty-eight percent. After Iqbal, she found a larger increase, with a dismissal rate of fifty-six percent. 98 A more recent study conducted for the federal Judicial Conference Advisory Committee on Civil Rules, found differing results. 99 Unlike the Hatamyar study, this study conducted sampling of decisions from a number of districts and did not rely on decisions reported in electronic databases. While this study found an increase in the dismissal rate in the sampled cases from sixty-six percent to seventy-five percent, it did not find a rise in dismissal

rights cases whereas civil rights cases made up only 11.4% of federal cases filed. Id., at 965. See also Spiegel, supra note 73, at 172.


rates in most categories of cases where leave to re-plead was not granted.\textsuperscript{100}

One shortcoming of these previous studies is that they both looked at outcomes in motions to dismiss based on a range of grounds, not just for lack of specificity of the pleadings. A more recent study,\textsuperscript{101} conducted by one of the co-authors of this Article, attempted to overcome this apparent shortcoming by conducting a study of outcomes in cases involving motions to dismiss where only the specificity of the pleadings was challenged. In addition, that study focused on outcomes in cases involving only employment and housing discrimination. Finally, that study looked beyond just dismissal rates to look at other aspects of these decisions—e.g., the number of motions filed and dismissals granted on these grounds, the nature of the application of the plausibility test by the district court judges when assessing the sufficiency of the pleadings. That study showed the following:

- **Dismissal Rates:**

  In the pre-	extit{Twombly} group of cases, the overall dismissal rate was sixty-one percent and forty-six percent of cases were dismissed, at least partially “with prejudice.” In the period between \textit{Twombly} and \textit{Iqbal}, the overall dismissal rate was fifty-six percent, with the “with prejudice” rate forty percent. After \textit{Iqbal}, the overall dismissal rate rose to seventy-two percent, with the “with prejudice” rate rising to fifty percent.\textsuperscript{102}

- **Application of the Plausibility Standard:**

  An analysis of the manner in which courts were applying the plausibility test revealed that district courts almost never invoked the “More Plausible Test,” nor did they even assess the plausibility of the allegations in the complaint. Rather, to the extent courts ostensibly reviewed the plausibility of the pleadings, what they did, if they invoked plausibility at all, was simply assess whether the plaintiffs had pled the elements of their claims.\textsuperscript{103}

\textsuperscript{100} \textit{Id.} at 13. While the dismissal rate of dismissals with prejudice remained static for most types of cases, the Cecip Report found one area in which dismissal rates rose significantly after \textit{Iqbal}, i.e., in those cases involving “financial instruments,” including mortgages. \textit{Id.}, at 12. In the pre-	extit{Twombly} cases, the general dismissal rate was forty-seven percent (without leave to re-plead) in such cases; after \textit{Iqbal}, a general dismissal rate of ninety-two percent (without leave to re-plead). \textit{Id.}, at 14, tbl. 4.

\textsuperscript{101} Brescia, \textit{supra} note 10.

\textsuperscript{102} \textit{Id.}, at 268-275.

\textsuperscript{103} \textit{Id.}, at 277-279.
Similarly, judges did not invoke their “judicial experience and common sense” in assessing the adequacy of the pleadings.104

- Volume of Motions and Dismissals:

In the time periods analyzed in this study, both the number of motions filed, and the number of dismissals granted, rose considerably after *Iqbal*. For example, decisions on such motions after *Iqbal* were generated at a rate greater than five times the rate pre-*Twombly*, suggesting that motions to dismiss on the grounds the complaint lacked specificity were filed at a much higher rate after *Iqbal*.105 Additionally, the number of cases in which complaints were dismissed, either in whole or in part, rose dramatically after *Iqbal*: for example, 26 cases were dismissed pre-*Twombly*, while 115 were dismissed in a similar time-frame post-*Iqbal*.106

B. Methodology:

The instant study draws from the database compiled for the original *Iqbal Effect* study.107 A quick overview of that database follows.108 First, a collection of 548 cases109 was gathered using various search terms in the Lexis database of reported decisions. The goal was to identify decisions on motions to dismiss in employment and housing discrimination cases110 in which the

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104 Id., at 284.
105 Id., at 280-283.
106 Id.
107 See, id.
108 For a detailed overview of the methodology utilized in compiling the database, see Id., at 262-268.
109 The original *Iqbal Effect* database held well over 600 cases. In this study, decisions issued by magistrate judges, who are not nominated by the Executive, were excluded. For an overview of the rule of magistrate judges in the federal system, see, generally, Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661 (2005).
specificity of the pleadings was challenged.\textsuperscript{111} Three groups of cases were then created: Group I, which included decisions on such motions issued between January 2004 and the decision in \textit{Twombly}; Group II, which included decision on such motions issued between \textit{Twombly} and before the decision in \textit{Iqbal}; Group III, which included decisions issued after \textit{Iqbal}, and before mid-December, 2010. A range of techniques were utilized to exclude motions to dismiss that did not involve challenges to the specificity of the pleadings, including, \textit{inter alia}, such grounds as expiration of relevant statutes of limitations or failure to exhaust administrative remedies.\textsuperscript{112}

Cases were then coded based on the outcome of the decision on the motion to dismiss in each case. Consistent with the manner in which other studies have coded decision outcomes, if any aspect of a motion to dismiss was granted, it was treated as a dismissal.\textsuperscript{113} In the original \textit{Iqbal Effect} study, outcomes were further refined to whether each matter was dismissed “with prejudice” or without. In that study, cases were categorized as dismissed “with prejudice” in one of three scenarios: when the deciding court explicitly denied leave to re-plead; when it found that the matter was dismissed with prejudice; or, simply, if the opinion was silent on whether the plaintiff could re-plead any claims.\textsuperscript{114} This study did not go into such detail.

Once the database was compiled and the cases coded, the dismissal rate in the decisions was analyzed based on certain characteristics of the deciding district court judge: i.e., the judge’s race or ethnicity, the gender of the judge, and the party affiliation of the president who nominated the judge.\textsuperscript{115} The results of this analysis follows.

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\textsuperscript{111} A detailed description of these searches can be found in Brescia, \textit{supra} note 10, at 262-264, nn. 118-123.

\textsuperscript{112} For a detailed overview of the bases for excluding cases from the database, see \textit{id.}, at 264-268.

\textsuperscript{113} See, e.g., Cecil Report, \textit{supra} note 99, at 5.

\textsuperscript{114} See Brescia, \textit{supra} note 10, at 261. According to the federal rules, a dismissal is considered an “adjudication on the merits” unless the deciding court explicitly states that the outcome is without prejudice. Fed. R. Civl P. 41(b). This methodology was also used in the Cecil Report, \textit{supra} note 99, at 5.

\textsuperscript{115} The data on judge profiles is maintained by the Federal Judicial Center and is available at: http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx
C. Results

1. Overall Dismissal Rates.

Taken as a whole, the dismissal rates for all cases in the database across the three time periods are as follows. In Group I, the pre-Twombly period, the dismissal rate for all employment and housing discrimination cases in which the specificity of the pleadings was challenged was 62%. In the period immediately following the issuance of the Twombly opinion, but before Iqbal (i.e., Group II), the dismissal rate actually went down, to 56%. Following Iqbal (i.e., the Group III cases), the dismissal rate for all cases increased to 71%. These results are displayed graphically below in Table 1.

Table 1: Overall Dismissal Rates.\textsuperscript{116}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Overall_Dismissal_Rates.png}
\end{figure}

2. Dismissal Rates by Party Affiliation of the Nominating President.

As discussed above, the cases were identified by the party affiliation of the president who nominated the judge issuing the decision in each case. The dismissal rates of those decisions revealed a statistically significant\textsuperscript{117} difference in the outcome in these cases. And identifying the cases in this way reveals somewhat diverging results from the overall dismissal results laid out in Table 1, above.

\textsuperscript{116} The raw values for each Table can be found at infra Appendix A.
\textsuperscript{117} The p-values for each Table can be found at infra Appendix B.
Of the motions decided by judges nominated by Democratic presidents in Groups I, 64% were dismissed. The Group II and Group III figures are 58% and 67% respectively. The difference in these case outcomes across the three time periods was not statistically significant.

The results of cases issued by judges nominated by Republican presidents, on the other hand, reveals statistically significant differences across the three time periods. In the Group I period, these judges dismissed 61% of the cases before them. In the Group II period, the dismissal rate went down to 54% of cases. In the Group III period, the dismissal rate rose considerably, to 74%. In other words, there was a 37% increase in dismissal rates after *Iqbal* when compared to the time-period after *Twombly* but before *Iqbal*. Comparing the pre-*Twombly* period to the post-*Iqbal* period, there was a 21% increase in dismissal rates in cases decided by judges nominated by Republican presidents.

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

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

Table 2: Dismissal Rates by Party Affiliation of the Nominating President.
3. Dismissal Rates by Gender of Deciding Judge.

To assess the relevance of other characteristics of the deciding judges, two more tests were performed on the data, one based on the gender of the deciding judge and a second based on the race of the deciding judge. For gender, male judges in the Group I time period dismissed cases 61% of the time; for Group II, 52% of the time; and in Group III, 70% of the time. Female judges dismissed cases in the Group I time period 64% of the time; in the Group II time period, 66% of the time; and in the Group III time period, 72% of the time. The differences in outcomes of decisions issued by male judges, set forth graphically in Table 3, were statistically significant.

Table 3: Dismissal Rates by Gender of Judge.

4. Dismissal Rates by Race of Judge.

A final dismissal rate analysis consisted of determining the dismissal rates for judges based on their race. For white judges, they dismissed cases in Group I 60% of the time; in Group II, 59% of the time; and in Group III, 72% of the time. These differences were statistically significant. For African-American judges, the dismissal rate in Group I was 64%; in Group II, 44%; in Group III, 62%. For Hispanic or Latino judges, the dismissal rate was 75% in the Group I time period; 38% in the Group II time period; and 90% in the Group III time period. For Asian-American judges, the
Group I dismissal rate was 100% and the Group III dismissal rate was 50%. For Hispanic and Asian-American judges, the sample sizes were so small that these results are not particularly informative. These results are displayed graphically in Table 4, below.

Table 4: Dismissal Rates by the Race of the Deciding Judge.

<table>
<thead>
<tr>
<th>Group</th>
<th>White</th>
<th>African American</th>
<th>Hispanic</th>
<th>Asian American</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group I</td>
<td>60%</td>
<td>64%</td>
<td>68%</td>
<td>72%</td>
</tr>
<tr>
<td>Group II</td>
<td>59%</td>
<td>59%</td>
<td>58%</td>
<td>58%</td>
</tr>
<tr>
<td>Group III</td>
<td>58%</td>
<td>57%</td>
<td>60%</td>
<td>57%</td>
</tr>
</tbody>
</table>

5. Number of Motions and Number of Dismissals.

Previous research revealed a significant increase in the number of reported decisions on motions challenging the specificity of the pleadings and the number of dismissals based on these grounds. Indeed, a comparison of similar time frames pre-

Twombly, post-

Twombly and post-

Iqbal, revealed just 12 reported decisions per calendar quarter on motions challenging the specificity of the pleadings before Twombly, but 61 such decisions in a post-

Iqbal quarter. Furthermore, the number of decisions dismissing cases, in whole or in part, pre-

Twombly was just 46, but in a similar time period post-

Iqbal, was 196.118

This data was analyzed to determine the extent to which some of these results—both the number of reported decisions and the number of dismissals—included any statistically significant difference in the number of reported cases and dismissed cases by the party affiliation of the president who nominated each judge. Here, we also compared the number of decisions and dismissals by party affiliation of the nominating president to the overall number of district court judges by that same affiliation to determine if there was disproportionate representation of either class of judges in this pool of decisions and dismissals. If there was a disproportionate

118 See, Brescia, supra note 10, at 280-283.
number of dismissals by a particular class of judge, one could posit that litigant behavior was steering defendants to make more motions before a certain class of judge.\textsuperscript{119} Here, however, we saw very little variation between the number of decisions and dismissals based on the party affiliation of the nominating judge. If anything, there was a slight overrepresentation of decisions and dismissals issued by judges nominated by Democratic presidents, which suggests that defendants may not be choosing to make motions only before those judges that might be perceived as more likely to grant such dismissals. The results of this analysis is displayed graphically below, in Tables 5\textsuperscript{120} and 6. The “expected” outcomes are a reflection of the anticipated results if the makeup of the judges in the data base pool was a reflection of the makeup of the overall number of district court judges by party affiliation of the presidents who nominated those judges.\textsuperscript{121}

\begin{table}
\centering
\caption{Number of Reported Decisions in Data Base by Party Affiliation of Nominating President Compared to Expected Outcomes by Classification of All District Court Judges.}
\begin{tabular}{|c|c|}
\hline
\textbf{Party} & \textbf{Number of Cases} \\
\hline
Democrat & 302 (55\%)  \\
Republican & 318 (58\%)  \\
\hline
\end{tabular}
\end{table}


\textsuperscript{120} See, \textit{infra}, Appendix C for a time line of Table 5 showing the number of cases in the data base compared to the expected outcomes. The similarities between the actual outcome and the expected outcome are striking, which suggests that the method utilized in case selection was effective at identifying a representative sample of cases.

Table 6: Number of Dismissals by Party Affiliation of Nominating President Compared to Expected Outcomes by Classification of All District Court Judges.

D. Implications.

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

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

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

What might be some cause for relief is that the outcomes were not more stark. Also, as previous research indicates, judges do not seem to be applying their “judicial experience and common sense” to gauge which story was more plausible: the one which alleged illicit conduct or the one that suggested no such conduct had occurred. In other words, judges seem to be ignoring the way in which the Court deployed the plausibility standard in both Twombly and Iqbal. While that may point to the fact that the most problematic aspect of the standard—its indeterminacy—may not appear to be infecting judicial decision making, it raises even more questions about how judges, are, in fact, behaving in the wake of the introduction of the new pleading standard. If judges were applying the More Plausible Test in the same way in which the Court did in Twombly and Iqbal, we would have some way to determine how judges were using the plausibility standard, and appellate courts would have more ground on which to stand when conducting reviews. The fact that all judges—regardless of the party affiliation of the president who nominated them—appear to be dismissing more civil rights cases under Twombly and Iqbal then they did before their issuance, and that judges nominated by Republican presidents seem to be dismissing such cases at a higher rate, while, at the same time, courts are not deploying the plausibility standard in the same way the Court did in Twombly and Iqbal, suggests that trial courts see these precedents as license to dismiss civil rights cases more frequently regardless of the new plausibility standard.

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

Conclusion: The Promise of Procedure

Many have seen parallels between the quintessential American institution of baseball and the law and the legal system through which it is mediated. Legal scholarship often draws from these parallels, mining the elegance of the infield fly rule as law, drawing connections between the electoral college and the World Series, or identifying the similarities between the Erie doctrine and the functioning of the designated hitter rule in interleague play. With Twombly and Iqbal, Arthur Miller has even evoked the old Chicago Cubs double play combination of Tinkers, Evers and Chance immortalized in poem in calling Conley to Twombly to Iqbal a “double play” on the rules of civil procedure.

Judges are not immune from the metaphor of baseball as law. During Chief Justice Roberts’s confirmation hearing, he famously promised to serve as a faithful umpire, calling balls and

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122 As Paul Finkelman writes:

[B]aseball is itself a highly legalistic game. It has an elaborate set of rules, far more so than most other games. At the professional level it requires a highly trained multi-judge panel of umpires to implement and interpret the rules. Every pitch requires a legal ruling. Every time a ball is hit, one of the umpires must make a ruling on whether it is fair or foul. As with our legal system, each umpire has a jurisdiction. The home plate umpire calls a hit ball fair or foul before it reaches a base; the first or third base umpires make the call after the ball is beyond their bag. In the World Series extra umpires are on the field, creating a mini-Supreme Court which provides new pairs of eyes to scrutinize plays in the outfield.


126 See, Miller, supra note 39. See, also, William Hageman, *Remembering “Tinkers to Evers to Chance,”* CHICAGO TRIBUNE (July 10, 2010).
strikes, and not making law or interjecting himself into the legal contests before him.\textsuperscript{127}

This metaphor of the objective umpire is apt when assessing the role procedural rules should play in the contests they play a critical role in resolving. While there are those that look at the application of procedural laws as political, and the promise of neutral adjective law a sham, some recognize the important normative role the promise of procedural neutrality can play, what Robert Cover called its "aspiration."\textsuperscript{128}

Indeed, it is this promise of procedural neutrality that provides a normative metric to deploy to assess whether judges interject themselves into conflicts improperly by applying otherwise neutral rules in a non-objective way. When that occurs, corrective action is possible, as when the 1983 amendments to Rule 11 were further amended just 10 year later to allay fears that this rule was being used disproportionately against certain types of litigants.

It is likely no accident that new theories and rights were established to protect those with less power just as the promise of procedural neutrality and trans-substantivity took its firmest hold. It is hard to imagine that creative claims like those which rendered unconstitutional court interventions to protect racially restrictive covenants and school desegregation in the decades following the introduction of the federal rules, or claims asserting the right to marriage equality today, would see the light of day if substantive rights were only assertable within well-worn procedural tracks that disfavored the prosecution of new and novel claims that failed to fit within such pre-existing forms.\textsuperscript{129}

\textsuperscript{127} Chief Justice Roberts asserted as follows: “I will remember that it’s my job to call balls and strikes, and not to pitch or bat.” Todd S. Purdum & Robin Toner, Senators to Question 1st Supreme Court Nominee in 11 Years, NY TIMES, (September 13, 2005), available at: http://www.nytimes.com/2005/09/13/politics/politicspecial1/13confirm.html?scp=183&sq=roberts+supreme+court&st=nyt&_r=0 (last visited January 22, 2013).

\textsuperscript{128} Cover, supra note 44, at 733.

\textsuperscript{129} As Richard Marcus writes:

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

Marcus, supra note 62, at 825.
Returning to the baseball metaphor, a realist view of this American sport in the early 21st Century would suggest that it is all a racket, designed to make athletes and their boosters fabulously wealthy at the expense of values far more essential to the advancement of society.

Just as the myth and mythology around sports have their own logic and value, the promise of procedural neutrality, like the hermeneutical approach in *The Life of Pi*, is the far "better story."\(^{130}\) Those that deny its force run the risk of rendering any arguments against improper judicial bias toothless. Without some normative force, one that comes only from an adherence to its importance and the central role it plays in our judicial system, the promise of procedural neutrality will surrender to sheer forces of will and power. And when those with the least power attempt to fight on fields where power alone is the basis on which contests are decided, the powerless will always lose.\(^{131}\)

Fealty to and belief in the norm of procedural neutrality is essential to protect those without formal power within the system and to remain true to the promise of equal justice under law. While this may be a game played by the naïve, is there any other choice? To paraphrase Winston Churchill when speaking about democracy, the promise of procedural neutrality may be seen by some as a less favored approach, it may be only when compared to all others that have been tried.\(^{132}\)

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

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

\(^{130}\) *Yann Martell, The Life of Pi* 398 (2002).

\(^{131}\) See, e.g., Carrington, *supra* note 42, at 2075 ("Procedural neutrality over the longer term corrects the political weakness of individuals whose rights are idiosyncratic or episodic and hence not organizable.")

\(^{132}\) Statement of Winston Churchill, 444 Parl. Deb., H.C. (5th ser.) (1947) 206-07 (U.K.) ("It has been said that democracy is the worst form of government except all the others that have been tried.")
be that state of being that is a game; it might as well be that, in a green field, in the sun.\textsuperscript{133}

Appendix A:

### Dismissal Rates

<table>
<thead>
<tr>
<th></th>
<th>Group 1</th>
<th>Group 2</th>
<th>Group 3</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Dismissed</td>
<td>64</td>
<td>66</td>
<td>67</td>
<td>197</td>
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<tr>
<td>Dismissed</td>
<td>104</td>
<td>85</td>
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<tr>
<td>Total</td>
<td>168</td>
<td>51</td>
<td>229</td>
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<td>Dismissal Rate</td>
<td>61.90%</td>
<td>56.29%</td>
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### Dismissal Rates by Gender

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<th>Group 1</th>
<th>Group 2</th>
<th>Group 3</th>
<th>Total</th>
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<tbody>
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<td>Male Not Dismissed</td>
<td>49</td>
<td>51</td>
<td>48</td>
<td>148</td>
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<tr>
<td>Male Dismissed</td>
<td>77</td>
<td>56</td>
<td>112</td>
<td>245</td>
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<tr>
<td>Male Total</td>
<td>126</td>
<td>107</td>
<td>160</td>
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<td>Male Dismissal Rate</td>
<td>61.11%</td>
<td>52.34%</td>
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<tr>
<td>Female Not Dismissed</td>
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<td>15</td>
<td>19</td>
<td>49</td>
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<tr>
<td>Female Dismissed</td>
<td>27</td>
<td>29</td>
<td>50</td>
<td>106</td>
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<tr>
<td>Female Total</td>
<td>42</td>
<td>44</td>
<td>69</td>
<td>155</td>
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<tr>
<td>Female Dismissal Rate</td>
<td>64.29%</td>
<td>65.91%</td>
<td>72.46%</td>
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## Dismissal Rates by Party Affiliation of Nominating President

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<td>Not Dismissed</td>
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<td>Dismissed</td>
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<td>67</td>
<td>156</td>
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<td>Total</td>
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<td>72</td>
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<tr>
<td>Dismissal Rate</td>
<td>63.51%</td>
<td>58.33%</td>
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<td><strong>Republican</strong></td>
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<tr>
<td>Not Dismissed</td>
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<td>36</td>
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<td>107</td>
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<td>Dismissed</td>
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<td>195</td>
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<td>Total</td>
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<td>54.43%</td>
<td>73.64%</td>
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<tr>
<td></td>
<td>Group 1</td>
<td>Group 2</td>
<td>Group 3</td>
<td>Total</td>
</tr>
<tr>
<td>--------------------------</td>
<td>---------</td>
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<td>Not Dismissed</td>
<td>53</td>
<td>51</td>
<td>52</td>
<td>156</td>
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<td>80</td>
<td>74</td>
<td>132</td>
<td>286</td>
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<tr>
<td>Total</td>
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<td>125</td>
<td>184</td>
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<td>Dismissal Rate</td>
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<td>59.20%</td>
<td>71.74%</td>
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<tr>
<td><strong>African American</strong></td>
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<tr>
<td>Dismissed</td>
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<td>18</td>
<td>40</td>
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<tr>
<td>Total</td>
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<td>18</td>
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<td>69</td>
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<td>Dismissal Rate</td>
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<td>44.44%</td>
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<tr>
<td>Dismissed</td>
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<td>9</td>
<td>21</td>
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<tr>
<td>Total</td>
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<td>8</td>
<td>10</td>
<td>30</td>
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<tr>
<td>Dismissal Rate</td>
<td>75.00%</td>
<td>37.50%</td>
<td>90.00%</td>
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<td><strong>Asian American</strong></td>
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<td>3</td>
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<td>Dismissed</td>
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<td>Total</td>
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Appendix B:

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<th>Table</th>
<th>Variables Compared</th>
<th>P-Value</th>
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<tr>
<td>1</td>
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<td>2</td>
<td>Republican: Dismissed &amp; Group</td>
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</tr>
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<td>African American: Dismissed &amp; Group</td>
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</tr>
<tr>
<td>4</td>
<td>Hispanic: Dismissed &amp; Group</td>
<td>0.048</td>
</tr>
</tbody>
</table>
Appendix C:

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