

OF PLEADING AND DISCOVERY: REFLECTIONS ON *TWOMBLY* AND *IQBAL* WITH SPECIAL REFERENCE TO ANTITRUST

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This Essay explores the evolving influence of Twombly and Iqbal on modern antitrust litigation. The author argues that any proposed statutory repudiation of Twombly and Iqbal is premature. He also develops a model that calls for a periodic reevaluation of the overall strength of a plaintiff's case to see if a final motion dismissing the case or some part thereof is appropriate before discovery runs its course. That approach should be followed in a limited number of big cases. The key to the successful judicial administration of discovery is to require that plaintiffs gather publicly available information in order to make credible their claims of a valid cause of action. It also encourages a more active judicial supervision of discovery in large cases to evaluate whether the evidence produced at any point warrants further discovery. Finally, the author criticizes the current rules governing "civil investigative demands" from the Antitrust Division as being far too intrusive relative to the parallel rules that govern discovery under the Federal Rules of Civil Procedure.

I. INTRODUCTION: AFTER *TWOMBLY*, WHAT?

The long dormant field of pleading has sprung to life in the past three years with the two major Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*.² The chief source of concern is,

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1. 550 U.S. 544 (2007).
2. 129 S. Ct. 1937 (2009).

of course, the extent to which these decisions have undone the rule in *Conley v. Gibson*,³ which established a relatively limited role for pleading, and placed most of the burden of pretrial work on the discovery process. My general view on this topic is that *Twombly* was correctly decided, but only on the narrow and atypical grounds peculiar to a small, but theoretically important, subclass of antitrust cases.⁴ At no point does the correct resolution of *Twombly* require any general disavowal of *Conley*.

My narrow approach to *Twombly* is somewhat atypical, for the case has led to a far-ranging debate over the role of pleadings in the federal system. One way to view this resurgence of interest is through a doctrinal lens, which examines the formal relationship between the standards applicable to motions to dismiss under Rule 8(a)(2) and Rule 12(b)(6) of the Federal Rules of Civil Procedure and the motions for judgment as a matter of law and summary judgment that are available under Rules 50 and 56. There is, of course, the obvious point that motions under the first two rules were originally designed to deal with questions related to the legal sufficiency of the complaint, whereas the latter were concerned with the factual sufficiency of the evidence. Without question, that gap has been bridged with both *Twombly* and *Iqbal*, even if the relationship between these two tasks is not set out with clarity in either opinion.

In this Essay, I attack this issue in a somewhat different fashion by asking this question: as a functional matter, what is the best way to deal with the legal regime that determines how the plaintiff acquires evidence sufficient to take a case to trial? In most situations, the common answer is, of course, through discovery, which covers three broad classes of information: the production of all sorts of documents, answers to written interrogatories, and oral depositions of both fact and expert witnesses. The question is how extensive that discovery should be. As a matter of hornbook law, Rule 56(c)(1)(A) provides that “a party may move for summary judgment at any time until 30 days after the close of all discovery.”⁵ In principle, this would allow a plaintiff to move for summary judgment the day after the complaint is filed. In practice, however, the usual approach allows for the complete evaluation of that evidence before either party can make a motion to dismiss a claim or defense for its factual insufficiency. There is, in other words, no interim appellate review of this process that allows for an earlier dismissal, even though

3. 355 U.S. 41 (1957).

4. Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 74–82 (2007) [hereinafter Epstein, *(Disguised) Summary Judgments*]. For a discussion, see *infra* notes 38–40 and accompanying text. See also Richard A. Epstein, *Twombly, After Two Years: The Procedural Revolution in Antitrust that Wasn’t*, GCP: ONLINE MAG. FOR GLOBAL COMPETITION POL’Y, July 2009 [hereinafter Epstein, *After Two Years*].

5. FED. R. CIV. P. 56(c)(1)(A).

these issues are subject to supervision at the trial level under Rule 16, which governs, *inter alia*, the management of discovery.

In my view, this way of organizing the system is unwise, chiefly because it fails to address two additional questions: first, whether a plaintiff should be required to investigate a dispute *prior* to filing the complaint at all; second, what level of judicial oversight is required to allow essential information to be acquired through discovery in the least oppressive way possible. Stated otherwise, what *Twombly* and *Iqbal* suggest between them is that the operation of the civil justice system runs better if some investigation is done unilaterally by the plaintiff without any aid from the legal system. Each opinion drew much of its sustenance from the specific claims at issue. *Twombly* involved an antitrust claim that was substantively flawed. *Iqbal* for its part involved broad assertions of government misconduct that were once, but are no longer, guarded against by an absolute immunity rule.⁶ Clearly, it would be inappropriate to use the pleading rules to smuggle in a *de facto* return to the absolute immunity rule. Yet because there was no sense in which official misbehavior could be ruled out as a matter of general legal theory, the court in *Iqbal* rightly took the modest step of remanding the case to the lower courts to permit pleading in greater detail.⁷

In contrast with *Iqbal*, I believe that an outright dismissal was the proper response in *Twombly*. If the nature of the legal claim is indeed to guide the pleading regime, then courts must be attentive to the context of the claim at issue. In dealing with this task, it is important to recognize that in antitrust litigation, as in other substantive areas, private suits are often parasitic on those brought by the government, which itself has statutory investigative powers that far exceed those given to private parties.⁸ The integration of these private and public investigations becomes a more pressing issue to the extent that *Twombly* restricts the opportunities of private parties to resist final judgments before discovery.

In this Essay, I try to systematize that insight by indicating how the legal system should deal with the sequencing of acquiring information, an issue that arises not only in the antitrust context but in all cases of factual uncertainty. In Part II, I discuss the interaction between pleading and summary judgment rules in the wake of *Twombly* and *Iqbal*. In Part III, I take a closer look at the relationship between *Twombly/Iqbal* and the rules for discovery, chiefly in connection with antitrust claims where the issues are often most acute. In Part IV, I extend the inquiry to deal with government investigations of potential antitrust violations pursuant to the Antitrust Civil Process Act,⁹ where the same types of tradeoffs are

6. See, e.g., *Barr v. Matteo*, 360 U.S. 564, 575 (1959) (affording protection for official conduct done within the “outer perimeter of [the] petitioner’s line of duty”).

7. *Iqbal*, 129 S. Ct. at 1954. For a discussion, see *infra* Part II.

8. See *infra* Part III.A.

9. 15 U.S.C. §§ 1311–1314 (2006).

resolved in ways that give, in my judgment, too much latitude to the government in the conduct of its civil investigative demands (CIDs).

II. THE *TWOMBLY/IQBAL* TRANSFORMATION

Ever since *Conley v. Gibson*, if not earlier, the dominant U.S. rule on pleading has been strongly tilted to allow as many cases to proceed to and through discovery as possible. The basic requirement for pleading, found in Rule 8(a)(2) of the Federal Rules of Civil Procedure, kept pleading requirements to a minimum: a valid complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁰ Note that the word “facts” does not appear in this formulation as one of the elements that shows that the pleader is entitled to relief. The broad language of Rule 8(a)(2) worked to the plaintiff’s advantage in the once-canonical *Conley* decision,¹¹ which made it clear that defendants faced an uphill battle to get a case dismissed just after the complaint had been filed.

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.¹²

The decision surely comported with the general mood that informed the adoption of the Federal Rules of Civil Procedure in 1938, which sought to transform the burden of the pre-trial legal work to the system of discovery that was introduced by the Federal Rules. These discovery rules had as their key feature the decision to allow the parties to initiate and carry out discovery by their private cooperation, without the direct supervision of a judge.¹³ The usual practice gave wide range to the types of evidence that could be collected and left it for the aggrieved party to seek protection from the judge if the requests for discovery were regarded as too oppressive. The system consciously rejected the view that discovery should only be allowed with the prior approval of the district court or a magistrate judge or special master under his or her supervision. In those days, many complaints were standard common law actions brought under diversity jurisdiction, where the fact-gathering tasks were relatively circumscribed. Moreover, most actions brought under federal

10. FED. R. CIV. P. 8(a)(2).

11. 355 U.S. 41 (1957).

12. *Id.* at 45–46.

13. See FED. R. CIV. P. 30(a)(1) (“A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2).”). The exceptions cover cases of ten or more depositions, cases of previous depositions, early depositions, and prisoners. See FED. R. CIV. P. 30(a)(2). Similarly, Rule 31(a)(1) states that “[a] party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2).” FED. R. CIV. P. 31(a)(1); see also FED. R. CIV. P. 31(a)(2) (providing a similar list of exceptions as FED. R. CIV. P. 30(a)(2)).

question jurisdiction were simpler than they became after World War II. In 1938, the added administrative flexibility seemed to more than compensate for the loss of judicial oversight.

One ironic feature of *Conley* is that it appears that the case itself had nothing to do with the relationship between pleading and discovery. As Emily Sherwin recounts in an article aptly entitled *The Story of Conley: Precedent by Accident*,¹⁴ the pleading issues all arose as a sideshow to some very serious questions of how the duty of fair representation in Railway Labor Act cases should be defined.¹⁵ There was no doubt at the time that any case that turned, as this one surely did, on the question of discrimination needed discovery. In *Conley*, however, the pleading objection did not relate to the difficulties evident of proving motivation in a duty of fair representation case. Rather, it was a last ditch technical objection that had, it appears, nothing to do with discovery at all.¹⁶ As Sherwin writes,

The case was not a high-stakes damages action in which unscrupulous lawyers might file conclusory allegations of liability in order to extort a settlement. The complaint was not an incoherent lay narrative inviting judicial imagination. There were no prospects of massive discovery and complex evidence requiring early management by the trial judge.¹⁷

But in an important sense, the past was only prologue, because any discussion of the place of notice pleading in the overall procedural system would have ultimately to address these questions.

The massive expansion of substantive law in countless areas altered the legal landscape in important ways, a point that was highlighted in the academic literature for large antitrust cases as early as 1950,¹⁸ and which in practice had to have been recognized even earlier. This issue has become only more important with the passage of time. Many modern causes of action are heavily dependent upon proof of motive or upon amassing large amounts of data in order to reach a conclusion about the legality of some state of affairs. *Conley* itself was a racial discrimination case in which the plaintiffs were black members of Local Union No. 28 of the Brotherhood of Railway and Steamship Clerks who sued for a breach of the duty of fair representation that had been grafted onto the Railway Labor Act¹⁹ to prevent widespread favoritism of its white members over its black ones.²⁰

14. Emily Sherwin, *The Story of Conley: Precedent by Accident*, in *CIVIL PROCEDURE STORIES* 281 (Kevin M. Clermont ed., 2004).

15. *See id.* at 289–93.

16. *See id.* at 302.

17. *Id.*

18. Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 *HARV. L. REV.* 27, 27–29 (1950).

19. 45 U.S.C. §§ 151–188 (2006).

20. *Conley v. Gibson*, 355 U.S. 41, 42 (1957).

Modern discrimination cases follow the same pattern, insofar as they turn either on questions of both intent and patterns and practices of discrimination, as in disparate treatment cases, or on the distribution of employees in multiple job categories, as in disparate impact cases. In both kinds of cases, the demands in discovery are arduous. They are also asymmetrical. In disparate treatment cases, the plaintiff has to be able to compare his or her treatment with others in the same class. In the disparate impact cases, the plaintiff has to have access to the full range of information that leads to job classifications and overall hiring policy. By comparison, there is much less, especially in disparate impact cases, that a defendant can do in these cases to obtain evidence from a plaintiff through discovery, whether by deposition or interrogatory. But extensive discovery is, of course, the norm against defendants, which may be divisions of larger entities that have operated under multiple managers in the firm. The struggles in these cases are extensive. The plaintiffs in past cases claimed that the information from discovery was indispensable to make out the case; the defendants claimed that discovery was a tool of oppression and abuse. Both claims are surely true in some cases, but each can be exaggerated in others. In general, the tradition of *Conley* survived, even flourished, so that plaintiffs were typically allowed to conduct discovery even if they were unable to plead “specific facts” in such hot-button areas as civil rights.²¹

Yet, at the same time, the countercurrents eventually developed the articulation of a somewhat different standard that did allow for the dismissal of a case when a court concluded that the plaintiff’s allegations were too threadbare to be regarded as complete. That said, it was still something like a bolt out of the blue when Justice Souter treated the once-regnant *Conley* as though it were some type of legal orphan, if not pariah, so that now the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”²² In ways that do not seem consistent with the historical record, Justice Souter attacked *Conley*’s “no set of facts” language by claiming that it “has been questioned, criticized, and explained away long enough.”²³ The upshot was supposed to be that “[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”²⁴

21. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“[I]mposing the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)”); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (regarding a § 1983 civil rights dispute seeking municipal liability) (“We think that it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules.”).

22. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

23. *Id.* at 562.

24. *Id.* at 563.

The transformation that began in antitrust cases in *Twombly* was generalized and affirmed (albeit with Justice Souter in dissent) in *Iqbal*, a national security case in which the plaintiffs claimed that John Ashcroft, then Attorney General, in conjunction with Robert Mueller, director of the Federal Bureau of Investigation, had worked together to wrongly detain Arab Americans under harsh conditions in the wake of the 9/11 bombings. Ashcroft was the “principal architect” of the plan; Mueller played an “instrumental” role in its implementation.²⁵ The case shares with *Twombly* the feature that the plaintiff’s claim alleges cooperation and coordination among the defendants in organizing the government’s policy. The joint actions attacked in *Iqbal* were, of course, hard to prove by direct evidence, but it presents no claim that can be dispelled by the kind of powerful economic theory that proved to be so effective in *Twombly*.²⁶

In light of the different factual backgrounds in the two cases, their judicial dispositions differed. In *Twombly*, it was the end of the road for the plaintiff because there was no way to beef up the complaint by providing more particulars. In *Iqbal*, the decision was remanded to allow the case to be re-pled in ways that added some meat to the bones. There is no question that these cases have made a difference in thinking about judgment on the pleadings prior to discovery. But how much of a difference is a much debated question.²⁷

The critics of *Twombly* and *Iqbal* are not eager to let the new learning play itself out in court. Instead, they have lined up squarely behind legislation that is intended, in so many words, to wipe the slate clean of *Twombly* and *Iqbal*—the Notice Pleading Restoration Act of 2009:

Sec. 2. Dismissal of Complaints in Federal Courts

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).²⁸

One obvious concern with this approach is that neither *Twombly* nor *Iqbal* purported to overrule *Conley*, so that the next Supreme Court decision could just continue on its merry way with its somewhat dubious claim that *Conley* is consistent with a more searching examination of the

25. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–44 (2009).

26. Epstein, *After Two Years*, *supra* note 4, at 8–10.

27. For discussion, see, for example, Robert G. Bone, *Twombly*, *Pleading Rules*, and the *Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Z.W. Julius Chen, Note, *Following the Leader: Twombly*, *Pleading Standards*, and *Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008) (urging states whose law of civil procedure is patterned on the Federal Rules not to deviate from *Conley* solely in the interest of uniformity).

28. S. 1504, 111th Cong. § 2 (2009).

complaint when the defendant seeks to dismiss a case. The House version of the bill, the Open Access to Courts Act of 2009, thus takes after the language in *Twombly* and *Iqbal* more explicitly when it provides:

Sec. 2078. Limitation on dismissal of complaints

(a) A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.²⁹

When the House of Representatives held hearings on the bill, it was clear that sentiments divided strongly along party lines. My NYU colleague, Professor Arthur Miller, noted that the adoption of the Federal Rules in 1938 paved the way for effective private enforcement of new key legislation in such areas as “civil rights, environment, [and] consumerism.”³⁰ In his view, the one dominant value of the Federal Rules is to keep the courts open to all comers so that the heavy work in litigation is done through discovery, summary judgment, and other control devices once the case has passed through the initial pleading hurdles.³¹ Even though the standards of pleading clearly apply in business versus business litigation, the systematic effort to terminate litigation before discovery is viewed as an effort to make sure that Wall Street prospers at the expense of Main Street.³²

That argument was echoed by others who appeared at the hearing in support of the new House bill. Jonathan L. Rubin, an antitrust lawyer, and Professor Joshua P. Davis both noted that the revised pleading rules could crimp plaintiffs in difficult antitrust cases, much as happened in *Twombly*.³³ Professor Eric Schnapper also testified that the *Twombly/Iqbal* line of cases has had a major detrimental effect on civil rights litigation by insisting that the allegation of “facts” meet the more exacting standards of the older code pleading system.³⁴ Without discovery, it becomes far harder to get evidence of invidious intention in a wide range

29. H.R. 4115, 111th Cong. § 2 (2009) (proposing amendment to 28 U.S.C., ch. 131).

30. *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 10 (2009) [hereinafter *Iqbal Hearing*] (prepared statement of Arthur R. Miller, Professor, New York University School of Law).

31. *See id.*

32. *Id.* at 13.

33. *Hearing on H.R. 4115, the “Open Access to Courts Act of 2009,” Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 110, 147 (2009) [hereinafter *H.R. 4115 Hearing*] (statements of Joshua P. Davis, Professor, University of San Francisco School of Law & Jonathan L. Rubin, Partner, Patton Boggs, LLP).

34. *Id.* at 23 (statement of Eric Schnapper, Professor, University of Washington School of Law).

of civil rights cases,³⁵ which, as Schnapper notes, has produced a sense of palpable unease among some trial judges who believe that they are duty-bound to dismiss otherwise meritorious complaints under the *Twombly/Iqbal* standard.³⁶

Mr. Gregory Katsas, a former Assistant Attorney General, Civil Division, in the Department of Justice (DOJ), wrote an equally elegant statement that stressed the opposite side of the coin, identifying the meritless lawsuits that have inflicted serious financial loss and emotional distress on honorable defendants.³⁷ In particular, he noted the distress that the late Edward Levi had as a former Attorney General who had been chased after by over thirty meritless suits.³⁸ His point is no exaggeration, for in private conversations with me in the late 1970s, Levi continually harped on the point with real anger and frustration in his voice, even though he had received legal representation from the DOJ. His limited exposure to litigation, without more, was enough to send him into a tailspin.³⁹

In one sense, both sets of statements are overwrought, and for the same reason: they look at the issue from one side of the litigation process and stress the errors in execution that have prejudiced their clients. The choice of sound processes will never be reached, however, by looking at one side to the exclusion of the other. It is critical that both types of errors be taken into account along with the costs that are needed for their minimization. The somber truth is that as the substantive requirements for liability become ever more complex, the rate of error in both directions is likely to increase, which gives more ammunition to advocates on both sides about the lingering difficulties of the system.

In this procedural setting, it is important not to let one's views of the substantive law influence attitudes toward the procedural issues. For these purposes, the policies of all civil rights, environmental, and consumerist legislation should be treated as though fixed in stone. But false positives—in other words, findings of liability where there are none under existing law—still count as serious errors that have to be factored into the social calculus. Indeed, false imputations of liability on discrimina-

35. *Id.*

36. See, e.g., *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at *8–11 (N.D. Cal. July 27, 2009) (discussed in *H.R. 4115 Hearing*, *supra* note 33, at 36–37 (prepared statement of Professor Eric Schnapper)).

37. *H.R. 4115 Hearing*, *supra* note 33, at 67 (prepared statement of Gregory G. Katsas, Partner, Jones Day).

38. *Id.* at 91–92.

39. Levi's overall involvement was in fact quite limited. In many cases, the Justice Department did not even inform him of the suits; and in no case was he deposed. At most he was required to file only an affidavit to show his limited involvement. See *Has the Supreme Court Limited Americans' Access to Court?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (Stephen B. Burbank's Answers to Senator Arlen Specter's Post-Hearing Questions), available at <http://www.pennstatelawreview.org/content/iqbal/burbank%27s-answers-to-specter.pdf> (citing and quoting BENNETT BOSKEY, *SOME JOYS OF LAWYERING* 113, 114 (2007)). One can only wonder how Levi would have responded to any more intensive involvement in the case.

tion cases could carry with them huge, undeserved reputational losses. The situation is even more serious because a bad set of legal rules also leads to bad settlements. As a general matter, these settlements reflect the probable outcomes of cases that go to final judgment. Any errors in the overall procedural rules, therefore, are likely to be embedded in the settlements. The key objective, therefore, is to develop a set of comprehensive procedures in order to reduce the occurrence rate for both types of error, even if it requires increasing the costs of correction. In this situation, we look, first and foremost, for solutions that reduce both error rates and administrative rates simultaneously. Thereafter, once these gains are achieved, there should be a willingness to increase the costs of running the system until the last dollar spent on that produces one dollar of benefit in the reduction of error costs. The question is how best to achieve that result.

In dealing with that issue, I have previously defended both *Twombly* and *Iqbal* on relatively narrow grounds. These two cases, especially the former, are situations in which a judgment at the pleading stage reduces both error and administration costs. Professor Miller took issue with this approach in his statement, noting, “Some even have argued that under *Twombly* the motion to dismiss has become a disguised summary judgment motion, attacking not only the legal sufficiency of the pleading, but striving for a resolution by appraising the facts and then characterizing the complaint as conclusory.”⁴⁰

I think that his restatement of my position is inaccurate in one key respect. The point of the disguised summary judgment motion was not to appraise the facts in each and every case, but to empower courts to determine whether some claims were factually implausible in light of the evidence available to the court at the outset of the litigation. In practice, this approach would allow district courts to identify a narrow subset of cases where it makes no sense to bear the heavy costs of discovery when its massive dislocation and expense is manifestly unlikely to produce any evidence of value. In my own view, this exercise will be applicable only in a limited number of cases with special circumstances, like *Twombly*, which is why I was unhappy with Justice Souter’s (mistaken) across-the-board condemnation of *Conley*.

In general, my own review of the cases indicates that it will be possible to find some cases in which the courts will tighten up pleading at the

40 *Iqbal Hearing*, *supra* note 30, at 19–20 (statement of Professor Arthur Miller) (citing Epstein, *(Disguised) Summary Judgments*, *supra* note 4, at 66, 98). Note that his assessment of my views was not shared by all of those who testified. *See, e.g.*, Stephen Burbank, who in testifying against *Twombly* and *Iqbal* noted that “a number of judges and scholars not known for bleeding hearts appeared to agree” that the Supreme Court rewrote the Federal Rules by judicial interpretation. *Has the Supreme Court Limited Americans’ Access to Court?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 102 (2009) (prepared statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School). The non-bleeding hearts were Judge Richard A. Posner and myself.

margins but not by all that much.⁴¹ Clearly, this study could not cover any cases that are not brought out of fear of an early dismissal, on which it is impossible to get any data. Indeed, the impact of the *Twombly/Iqbal* rule could vary across different classes of cases. But the reported cases in antitrust, however, do not indicate any undue shift in favor of defendants.⁴² For the most part, in that context, the rule has worked more or less as intended: the cases that are taken out of the system tend to be those whose bare-bones complaints do not reveal some wrongful conduct (or some workable defense) in a way that makes the account “plausible.”

Exactly what that elusive word means is still up for grabs, but it does appear at the very least that this much is true: standards have stiffened. It is at this point that Professor Miller’s inaccurate characterization of my view matters. In dealing with these cases, I am not advocating that one must look through facts that arise in the context of a particular case. Rather, in antitrust cases, it is sometimes true that what might be termed *generic facts*—those about how general economic theory applies to a particular class of cases—tend to weigh heavily against the complaint. That is certainly true in the antitrust area in cases of predatory pricing, where it is simply hard to articulate any strategy where the practice is likely to be successful and thus difficult to imagine why any rational economic actor would be prepared to deploy it. Thus, the decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁴³ took the summary judgment route only after the parties had accumulated roomfuls of documents to determine whether the Japanese defendants had engaged in these practices.⁴⁴ The motion for summary judgment was granted in a decision in which Justice Powell cited not a single document to justify his conclusion.⁴⁵ The entire argument rested on the difficulty to conceive of any strategy that would justify massive losses in the present in the vain hope of recouping these losses in the future. For a case of that sort, a judgment on the pleadings for factual insufficiency seems to be well worth granting.

As I have described earlier, *Twombly* involved a somewhat different fact pattern than *Matsushita*. Nonetheless, it was not (and is not) possible to concoct any coherent antitrust theory that would explain why the various defendants in that distinctive institutional setting would have to collude in order to adopt a strategy in which they all independently sought to defend their own shrinking local monopoly against incursions by new entrants into the telecommunications industry (the so-called competitive local exchange carriers (CLECs)), rather than take aim at a rival’s strong home base position as the statutory local exchange, know-

41. For my discussion of that point, see Epstein, *After Two Years*, *supra* note 4.

42. For some recent cases, see *infra* Part III.A.

43. 475 U.S. 574 (1986).

44. *Id.* at 577–79.

45. *Id.* at 595–98.

ing that in those costly offensive maneuvers they would have no systematic advantage over the dozens of new rivals, CLECs, that sought to make good in that space. The plaintiff made several feeble efforts to find additional facts that could support the claim of conspiracy, but a statement in a public interview by one irritated and confused CEO, Richard Notebaert, is not sufficient evidence to swing the balance.⁴⁶ There are at least some cases in which *Twombly* leads courts in the right direction.

The harder cases are those in which an understanding of institutional arrangements supplies no evidence against an antitrust charge. Price-fixing is, of course, always a live possibility in a concentrated industry that provides a relatively homogenous commodity. So the question is whether it is sufficient, for example, for plaintiffs to invoke pure arm-chair empiricism to allege that ten parties engaged in a conspiracy to fix prices for wheat over a ten-year period throughout the United States. My basic view is that this ought not to suffice in the absence of at least some effort to supply some evidence for the connection based on meetings, statistical evidence of price movements, testimony of third parties, or something else. It took me thirty seconds to dream up this hypothetical complaint. It would take another hour or two to put together, at trivial cost, a set of interrogatories and document requests that could take millions of dollars to satisfy, even if under the narrowest view on relevance.

Similar issues can easily arise in connection with other types of section 1 complaints, such as with divisions of territory. Here, too, the choices can be hard. A bare set of allegations that five companies decided to operate in exclusive territories over the past ten years bears a striking resemblance to claims of price-fixing among those same firms. The evidentiary question, however, could prove more difficult because price movements may be more difficult to detect in this setting. But again, the risk of a fishing expedition is equally great, and it may be possible in many of these cases to look at other kinds of public information. Does a company close down its outlets in one or another region, so that we can detect higher levels of concentration by firm *A* in territory *I* at the same time that firm *B* has a higher concentration in territory *2*? Those patterns of increased separation are not themselves sufficient to establish an illegal territorial division. Each firm could contract to bring itself closer to its base of supply. Yet even that question may be answered from public information. But for these purposes, radical shifts in territorial allocations may be insufficient to withstand a summary judg-

46. The offending passage by Richard Notebaert, then CEO of Qwest, one of the alleged conspirators, observed that entering the territory of another Bell company "might be a good way to turn a quick dollar but that doesn't make it right." *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 184–85 (S.D.N.Y. 2003) (quoting Jon Van, *Ameritech Customers Off Limits: Notebaert*, CHI. TRIB., Oct. 31, 2002, § 3, at 1) (internal quotation marks omitted); see also Epstein, (*Disguised*) *Summary Judgments*, *supra* note 4, at 90–91.

ment after discovery, but they should be sufficient to allow the case to go forward, at least on a limited basis.

In those cases where evidence of the types just mentioned is not forthcoming, striking down of an ethereal complaint with no earthbound connections could not be regarded as appropriate on a motion to dismiss as that term is understood, because there is nothing about such a complaint that does not meet the traditional standard of notice pleading—even though it does not contain a single fact of note. The types of complaints just mentioned identify the parties, give a time frame for their action, and state the place where the supposed conspiracy took place. The functional question is whether these allegations sufficiently allow a plaintiff to commence discovery against a dozen defendants over a ten-year period for both documents and interrogatories. Try as I might, I cannot see the logic of postponing a final determination of this law until discovery has run its course. The basic inclination behind this decision bears only a marginal relationship to the formal distinctions between a judgment on the pleadings of the sort that was granted in *Twombly* and a summary judgment that yields the same result but only after discovery. To put the point into stark functional terms, the hard question is whether the information that could be gleaned from discovery is likely to be of sufficient probative value to justify the additional costs that would be expended. It was for that reason that I hit on the use of the term “disguised summary judgment.”⁴⁷

III. PLEADINGS AND DISCOVERY

Clearly, much depends on the relationship between these motions for judgment on the pleadings for factual insufficiency and the organization of the discovery system. Note that by the standards outlined above, *Conley* easily survives any motion to dismiss for factual insufficiency at the close of the pleadings. There may be no direct evidence on intent, which is an issue that is critical to the basic cause of action. There is easy and complete documentation, however, of the shift in occupational classifications between black and white workers under the Railway Labor Act, which is consistently supportive of the claim of discrimination. Additionally, there are undoubtedly other public statements made by union officials that could be mentioned to bolster the claim.

The relationship between public and private facts, however, does not always play out that way. To see why, return to *Twombly* to ask how discovery should take place in the event that the motion to dismiss is denied, even though generic facts about the telecommunications industry suggest powerful explanations as to why no incumbent carrier has an incentive to seek to enter the home base of one of its rivals. Justice Stevens in his *Twombly* opinion thinks that the right way to approach the

47. Epstein, (*Disguised*) *Summary Judgments*, supra note 4.

Notebaert quotation was to allow some limited discovery before making any dispositive motions.⁴⁸ After all, Justice Stevens is not the first to note “Notebaert’s curious statement that encroaching on a fellow incumbent’s territory ‘might be a good way to turn a quick dollar but that doesn’t make it right.’”⁴⁹ That honor belongs to Judge Lynch, who read the statement in its larger context of the whole interview and concluded that it was absurd to read this as a public admission of some vast conspiracy.⁵⁰

In principle, there is no question that in many cases limited and staged discovery of the sort Justice Stevens envisioned is preferable to dismissing on the pleadings. But in this case, an able district court judge in the exercise of sound discretion can surely make that judgment better than anyone at the Supreme Court level. Just ask how, given what is known from the context of the full column, which suggests Notebaert’s unhappiness with government pricing models, the discovery should proceed.⁵¹ The answer is: not in ways that are likely to prove productive. The first question is what the extent of the discovery should be. Let us assume, for the moment, that the trial judge in this instance wants to keep litigation on a tight leash, so an initial discovery order puts aside all of the other requests for documents and interrogatories and allows the plaintiffs only to examine Notebaert to see if there is any reason to press this inquiry further.

At this point, it is possible to imagine multiple scenarios. The first is that the entire deposition is on the newspaper statement, at which point the well-coached Notebaert could say that he was irritated at the irrational pricing rules that come out of the FCC. But now suppose the plaintiff lawyer goes to the judge to ask for more information about Notebaert’s general orientation on this matter, which could only be determined by examining copies of all documents and emails of all meetings that he attended on pricing matters while he was the head of Qwest. It is easy to see that this expands the potential for substantial discovery, and that one or another of those documents could need some explanation, which in turn requires that the discovery apparatus be directed toward all of the parties who were communicating with Notebaert on pricing issues—or perhaps on anything.

It is easy to see how the entire exercise could easily mushroom to envelop the world. It is also easy to see how some trial judges would follow what Judge Lynch did, which was to read the full column himself and toss out the case at that stage,⁵² which is in my view the better approach.

48. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 591–93 (2007) (Stevens, J., dissenting).

49. *Id.* at 591.

50. *Twombly*, 313 F. Supp. 2d at 184–85. Just as a matter of rhetorical style, Judge Lynch introduces the quotation above with the words “competing as a CLEC,” which is a bit less explosive than Justice Stevens’s use of the term “encroaching.” For discussion, see Epstein, (*Disguised*) *Summary Judgments*, *supra* note 4, at 90–92.

51. *See Twombly*, 313 F. Supp. 2d at 188–89.

52. *Id.*

In this situation, it is not sufficient to say that there is some possibility that intensive discovery would turn up information that would be relevant to the prosecution of the case, which was Justice Stevens's point of view.⁵³ But again, he was asking the wrong question if all he wanted to know was whether there was some possibility that the discovery process would yield information that would tend to establish a claim of liability, which would justify some further inquiry. Set the probability of finding information that is probative of liability low enough, and the proposition that cases should always proceed through discovery becomes a truism. Rather, the analysis is better phrased in terms of conditional probabilities: given what is known already about the case, is the expected value of getting new and reliable information large enough to justify the additional expenditure of resources? In *Twombly*, the answer to that question on this point is no. Read the full article in context and it is painfully clear that there is no inadvertent admission of a gigantic price-fixing conspiracy. The case should come to a halt. I am not quite so sure that the same should be said about the bare-bones allegation of a conspiracy in setting the price of grain.

At this point, it is important to rethink two of the key assumptions that lie behind the account of the Federal Rules insofar as they govern pleading and discovery. The first of the often implicit assumptions that needs reevaluation is that pleading should always precede discovery. In one sense, this proposition is tautological because there is no way to activate the discovery process without filing a complaint. But in a second sense it is profoundly false. The correct way to look at the question is to ask what kinds of public information the plaintiff should be required to examine and unearth prior to bringing suit. The second question has to do with the operation of the discovery system, with its general assumption that discovery proceeds by the joint efforts of the parties who turn to the district court for assistance only when they have some squabble between themselves.⁵⁴ The question is whether this system of bilateral skirmishing is better than a discovery process that is judicially controlled from the outset on a wide range of issues, including the extent and sequencing of discovery, and compensation for the costs of complying with a discovery order. Let me take up these points in order.

53. *Twombly*, 550 U.S. at 592–93.

54. See FED. R. CIV. P. 26(b)(1):

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

Rules 30(a)(1), dealing with depositions, and 31(a)(1), dealing with written interrogatories, both allow parties to routinely proceed without first getting leave from the court. FED. R. CIV. P. 30(a)(1) & 31(a)(1). The exceptions to those rules deal with such matters as discovery of multiple parties or a second round of discovery against particular parties. See FED. R. CIV. P. 30(a)(2) & 31(a)(2).

A. *Pre-discovery Investigation*

As was clear from the facts in *Twombly*, much of the information that was relevant to the ultimate disposition of that case was publicly available to both parties at the outset of the litigation. For example, the Antitrust Division of the DOJ did an extensive investigation of the alleged conspiracy and issued a clean bill of health.⁵⁵ It is, of course, the case that the investigation by the government does not have any preclusive effect, but that is beside the point. The key question is whether the additional discovery, with its additional costs, is likely to yield information that makes the inquiry worthwhile. In light of the huge investigative power of the government (on which more later), the balance of advantage switches further away from allowing discovery in any kind of a phased case. Note again the difference in approach. The plaintiff sought to take into account the fact that Congress called for an investigation, while ignoring the fact that this investigation came up empty. That conscious disregard of useful information represents all that is wrong with these cases.

Arguments of this sort are easily generalizable. There are many government investigations that find some evidence of an antitrust violation, and that evidence weighs heavily in allowing the case to go forward.⁵⁶ Even if the government focuses on structural or injunctive relief, the determinations on matters of liability are surely relevant to any private cause of action for damages. In such cases, the pendulum swings far in the opposite direction, and discovery should be allowed. One example of a recent decision from the Second Circuit shows how this approach can be turned to the benefit of the plaintiff.⁵⁷ In *Starr v. Sony BMG Music Entertainment*, the Second Circuit reinstated the plaintiffs' cause of action under section 1 of the Sherman Act against a group of firms for fixing prices in the sale of digital movement.⁵⁸ What was clear was the amount of public evidence that could be arrayed against the defendants prior to discovery. The record companies in question had organized their distribution through two separate firms that cooperated with each other.⁵⁹ The cost of their product went down owing to the elimination of many of the costly practices for selling CDs, including the disk, its packaging, and the cost of its distribution.⁶⁰ The prices charged were higher than those of fringe companies and the restrictions on use were more severe. The court rightly noted that in competitive markets prices tend to

55. *Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the H. Comm. on the Judiciary*, 108th Cong. 7–8, 37–38, 70 (2003) (statement of R. Hewitt Pate, Assistant Att'y Gen., Department of Justice).

56. *See infra* Part IV.

57. *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2d Cir. 2010).

58. *Id.* at 317.

59. *See id.* at 318.

60. *See id.*

drop with costs, but in this situation the sellers managed to eke out price increases.⁶¹ In addition, the key players signed secret most-favored-nation clauses that they knew would, if made public, attract antitrust scrutiny.⁶² The case presented none of the peculiar institutional arrangements found in both *Matsushita* and *Twombly*, so the decision seems clearly correct and in line with general antitrust principles applicable in other cases.

In making that decision the court in *Starr* distinguished a suit brought against Visa and MasterCard and the major banks for their alleged rigging of the interchange rates, which merchants have to pay in order to fund the payment systems for credit and debit cards.⁶³ Here the institutional framework differs, as both credit and debit cards operate in a two-sided market in which the middlemen have to make efforts to line up cardholders in order to line up merchants. The only way in which this system can work is for the intermediates to set an overall interchange fee and then to allocate it to the merchant's bank for its services and to the cardholder bank for its services. Therefore, there is necessarily some coordination of price information within each chain so that the antitrust violation necessarily depends on some showing of coordination of prices across networks, which means between Visa and MasterCard. Mere parallel conduct does not make out that case, and the discovery undertaken revealed no greater collaboration than needed to make the network run.⁶⁴ The case is distinguishable from *Starr*, as was a similar case, *Rick-Mik Enterprises Inc. v. Equilon Enterprises, LLC*,⁶⁵ for the lack of any concrete suggestion as to how a franchisor was able to collude with unidentified banks whose services were necessary to process these interchange transactions.

Indeed, even prior to *Twombly*, it is possible to find cases in which courts dismissed antitrust cases after discovery even when all sorts of other public forms of information about the movements of price and quantity correlated with other events that were evidence of some antitrust violation. In what I still regard (as losing counsel) as the single most atrocious antitrust decision on summary judgment, the Eighth Circuit en banc in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*⁶⁶ granted a summary judgment notwithstanding the copious evidence that pointed to some improper evidence. But in *Blomkest* there was advance evidence of market concentration that is conducive to cartelization from external evidence of sudden price increases that take place after high se-

61. *Id.* at 318–19.

62. *See id.* at 319.

63. *Id.* at 324; *see* *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008).

64. *Kendall*, 518 F.3d at 1046–48.

65. *Rick-Mik Enters. Inc. v. Equilon Enters., L.L.C.*, 532 F.3d 963 (9th Cir. 2008).

66. 203 F.3d 1028 (8th Cir. 2000). For a justly negative assessment of the weak opinion, see HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 134–36 (2005), which tracks the analysis in the text.

nior officials from one company took over the operation of one of its competitors.⁶⁷ All that evidence should, in my judgment, have been sufficient to create a genuine issue of fact needed to prevent a summary judgment. It must surely then be sufficient to allow discovery to take place to see if there were any communications among the parties that bolstered that connection.

The same is true in many cases where the alleged wrong is committed by a defendant who is in constant contact with an individual plaintiff or members of a plaintiff class. To mention but one recent case, in *American Dental Ass'n v. Cigna Corp.*,⁶⁸ the plaintiffs in a RICO action sought to claim discovery on the ground that “they were at an ‘informational disadvantage’ as to exactly how Defendants’ software bundled and downcoded submitted procedures.”⁶⁹ The court rightly shrugged off that contention. The plaintiffs had received a detailed “Explanation of Benefits” but never bothered to see from their own records whether they could show some disparity between the stated procedures and their own reimbursement rates, even though they had all the relevant transactional information in their own files.⁷⁰ As a matter of theory, each company, moreover, has a dominant strategy to keep its rates as low as possible, consistent with maintaining its business. After all, lower rates, *ceteris paribus*, mean higher profits. The case is yet another example of why it makes sense in many complex cases to put the burden on plaintiffs of getting some information on their own before coming to the court for assistance. It would be incorrect to allow the plaintiff access to the discovery system, which operates on a highly adversarial basis, when unilateral action of this sort fills the gap for the critical first step.

In response, it cannot be said that this system forces the plaintiff to incur uncompensated costs prior to filing suit, which should be treated as a barrier to entry to the open legal system that Professor Miller, for example, envisions. The key question to ask is not whether this obligation imposes a burden; of course it does. But the right analysis is comparative. Is this additional burden on the plaintiff greater than the one that an astute plaintiff can place on a defendant by taking the common expedient of filing, at very little cost and inconvenience to itself, all the ordinary discovery demands on the defendant, knowing full well the huge expenditures that the defendant will have to make to comply? In many cases, the answer to that question should be no. In such circumstances, the legal response is not to dismiss the case, but to require the plaintiff to flesh out the factual allegations before proceeding to the next stage of litigation. That approach could be used in the case of wheat, where all price movements are publicly available.

67. *Blomkest*, 203 F.3d at 1039–40.

68. 605 F.3d 1283 (11th Cir. 2010).

69. *Id.* at 1292.

70. *Id.* at 1291–92.

The ultimate question is whether the cases that have fallen under the *Twombly/Iqbal* axe are cases that should be allowed to go forward as a matter of right. My own survey of that problem indicates, especially in the area of antitrust, that these changes are real but not hugely significant or badly conceived. In response it could be said, of course, that this judgment is necessarily imperfect because it does not include those cases that might have been brought, but which were not. In the antitrust area, however, this objection is less than compelling because the published decisions that go in both directions offer reasonable guidelines as to which types of cases are likely to succeed and which are not. There are few garden variety price-fixing cases that do not have overt price movements or some indication of market structure. The decided cases after *Twombly* are suggestive. Indeed, in one recent empirical finding, William Hubbard found that after the decision of the Eighth Circuit in *Blomkest*, there was a suggestive fall in the filing of new claims in the Eighth Circuit because of its highly restrictive summary judgment rule which in no way depended on *Twombly*.⁷¹ Whatever the overall angst about *Twombly* and *Iqbal*,⁷² there is no compelling case that in the antitrust arena they have made matters worse in any systematic way. It has certainly not called into question cases with solid evidentiary foundations. At most, it has moved the balance a bit in favor of defendants. The ultimate impact of that decision depends at least in part on the techniques that are used to deal with the vast majority of cases that cannot be dismissed for factual insufficiency before taking depositions. It is to those issues of case management that I now turn.

B. Case Management

In many instances, the problem of pre-complaint investigation never arises. Astute plaintiffs in command of the facts do not treat pleading as a form of minimalist art. Rather, they often veer to the other extreme, which is to tell their story in exhaustive detail in order to win over the sympathies of the trial judge and to put fear into the heart of the defendant. Unless they are utterly devoid of content, these dense complaints will withstand arguments based on *Twombly/Iqbal*. Because few of these cases are subject to dismissal for legal insufficiency, they will raise another question of far greater importance: what should be done to organize litigation for the huge bulk of cases that pass over the initial motion to gain final judgment at the pleading stage?

The first point to make is that the rules of discovery, as articulated in 1938 and developed thereafter, are not scalable. What works well for small cases does not work well for big ones. Most of the model com-

71. Share of Federal Civil Cases Filed in the Eighth Circuit, preliminary findings by William Hubbard, University of Chicago Law School (on file with author).

72. Epstein, *After Two Years*, *supra* note 4, at 11–15.

plaints in the Federal Rules are for relatively simple causes of action in which most of the interactions between the parties take place at a specific location in a relatively narrow time frame. There are only so many questions that can be asked about the lead-in to the typical intersection commission, for example. But move over to the new torts on drug interactions in duty to warn cases, and the horizon gets far wider. The willingness to allow the parties to manage discovery on their own may make sense in little cases. But it makes little or no sense in larger matters, including most major antitrust litigation, which can extend to multiple parties, over multiple decades, in multiple locations and under multiple theories of liability that are often unclear at the outset of litigation.

The single most important reform, therefore, is to make sure that district (or more likely magistrate) court judges exercise a strong hand over how the process is operated. The following are some of the key practices that should in principle be followed. In urging these, I do not pretend to have made any survey of the way in which discovery is covered today across the federal system. Rather, my concern is with the standards that should be used to measure either present practices or proposed reforms. All of these proposals require, of course, that trial judges exercise some degree of sound discretion, which I believe that they can so long as the applicable rules give them greater control over discovery in complex litigation.

With these caveats, here are some practices that should make sense in the bulk of cases. First, stagger the discovery load so that the initial round of discovery covers those targeted points of controversy that are most salient to the litigation in question. It is one thing to demand that the defendant supply all exchange of price information between *A* and *B* in some named period of greatest interest, but it is quite another thing to ask the defendant to supply all correspondence related to the sale of any and all products sold that occupy the same market niche as does *B*, *C*, and *D*. Once the original responses are collected, a sensible discovery judge should be able to decide whether the case goes forward for another round of discovery and, if so, for how much. At some point, the dry holes should lead to the termination of litigation, knowing full well that the result will be wrong in some small fraction of cases. The greater the effectiveness of limited discovery, the more willing district courts should be in letting a complaint that is close to the line survive a *Twombly* motion. On this point at least, Justice Kennedy in *Iqbal* was far too cavalier in refusing to consider any alternative scheme that allows for limited or gradual discussion before opening up the case to a full scale inquiry.⁷³

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

Indeed, one striking impression from *Iqbal* is that the reasons Justice Kennedy offers for denying staged discovery read like a case for the return to absolute immunity by covert means.⁷⁴

Whatever the arguments for absolute immunity, they have little to deal with any information acquired either prior to or through discovery. Moreover, it is important to update prior information and also to compel parties to consider the huge costs of answering a discovery motion by calling for explicit reimbursement of at least some of the expenses that the moving party imposes on the opposite side. Done in both directions, the cash payments may cancel out in the end. But the key difference lies in the decision of both parties to cut back in the collection of information in response to the financial incentives. The demand for information declines as the cost of its acquisition increases.

Similar rules can apply with respect to depositions. The initial rounds should be limited in time, both for fact and for expert witnesses, as is now standard federal practice.⁷⁵ Experts could be required to state all contentions that they are prepared to make at the end of the deposition if they did not come up earlier. At each point, the goals would be to stop the information-gathering process when the marginal gains from new information are too low relative to the costs of its collection and to offset the ability of one side to use requests for deposition to disrupt the operations of the other.

In much of the business versus business litigation, these financial pressures and disclosure obligations are equally burdensome to both sides. But in all sorts of antitrust litigation, virtually all the information resides in the files of a defendant and not with the class members who purchase their products, which makes it imperative for trial judges to recognize that rules of formal parity could often have a disparate impact. The precise details are beyond the scope of a short paper, but the basic blueprint for big-ticket litigation must depart from the dominant 1938 model—as indeed is, by degrees, slowly becoming the case.

IV. GOVERNMENT ANTITRUST INVESTIGATIONS

The great challenge of *Twombly* and *Iqbal* is how to reengineer the entire system of pleading and discovery to avoid putting the plaintiff in the position where the extraction of information becomes inefficient relative to the costs that it imposes. Antitrust, and indeed many other fields of litigation, are more complex than this simple account because all sorts of modern statutory schemes create dual tracks, one of which is private litigation and the other of which is government investigation that could

74. See *id.* (“If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed.”).

75. See FED. R. CIV. P. 30–31.

lead to litigation against a private party. There is no question that the government should be able to begin an investigation before it has sufficient information to file a complaint. Nor is there any serious dispute that it can look further into private activities than a private plaintiff.

Precisely because the government has such extensive powers, it is important that the risks associated with overuse of the discovery system are not magnified under legal practices that authorize government officials to make investigations long before the complaint stage. The point has real urgency because whenever these investigations turn up nothing, the party investigated gets no compensation for its compliance costs. In addition, it may well suffer reputational losses, again without recompense in its market niche, especially if the investigation extends to its business partners.

In this context, I shall look only at one such scheme, CID, which is authorized under the Antitrust Civil Process Act,⁷⁶ under which the government is entitled to investigate private firms with few, if any, of the safeguards that should be built into private litigation. In undertaking this investigation, suitable caveats are needed. I am looking only at the legal framework in which these investigations take place to determine the extent of the government's right. In all these settings it is always possible that state agents will not press their claims through to the end, preferring to adopt more modest procedures, which allow them to terminate investigations more quickly. Nor am I speaking here about the soundness of the choice of market behaviors to investigate. The current administration has made it clear as of late that it is uneasy about the 1992 Merger Guidelines,⁷⁷ which had previously enjoyed widespread approval. Republican administrations tend to be uneasy about section 2 monopolization claims, and that basic orientation did much to shape the recommendations in its 2008 report, *Competition and Monopoly*.⁷⁸ I share that general orientation.⁷⁹ These rules, however, were promptly withdrawn by the Obama Administration, without prior hearing⁸⁰—a decision with which I disagreed.⁸¹

76. 15 U.S.C. §§ 1311–1314 (2006).

77. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), <http://www.ftc.gov/os/2010/08/100819hmg.pdf>; see also *Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines*, FEDERAL TRADE COMMISSION (Aug. 19, 2010), <http://www.ftc.gov/opa/2010/08/hmg.shtm>.

78. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), <http://www.justice.gov/atr/public/reports/236681.pdf>. Like many others from both parties, I participated on one of the panels that led to its publication.

79. See generally Richard A. Epstein, *Monopolization Follies: The Dangers of Structural Remedies Under Section 2 of the Sherman Act*, 76 ANTITRUST L.J. 205 (2009).

80. Press Release, U.S. Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), http://www.justice.gov/atr/public/press_releases/2009/245710.pdf.

81. Richard A. Epstein, *A Giant Step Backward in Antitrust Law: The Dangerous New World of Christine Varney*, FORBES (May 19, 2009, 12:01 AM), <http://www.forbes.com/2009/05/18/christine-varney-antitrust-opinions-columnists-law.html>.

The question of civil investigations is, however, orthogonal to the soundness of the substantive rules. The key issue is to evaluate these rules in relationship to the standards appropriate for ordinary private litigation. It is important to note at the outset that these government investigations necessarily precede any civil litigation. Under the current law, moreover, the definition of what constitutes an investigation is suitably broad:

The term “antitrust investigation” means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation⁸²

It is odd for Congress to build in this imbalance in favor of a party that faces none of the resource constraints of the private targets of investigation. Indeed, within large government bureaucracies, the incentives may be to expand, not economize on legal expenses, if only to persuade higher-ups within the Justice Department and Congress that larger appropriations are needed given the number of investigations filed.

With that said, government investigators enjoy real benefits, relative to private litigations, on a number of critical dimensions. First, the level of investigation is not constrained by the need for the government to announce the theory on which it intends to pursue a particular case. The investigation could be concerned with anything from price-fixing to exclusive dealing to tie-in arrangements. These discoveries would, in most cases, be thrown out if demanded by private parties under *Twombly*. My own sense is that in private litigation, these requests would be vulnerable as well because they do not commit to any theory. The return could be required in as little as twenty days, which is hard to organize from scratch. If the initial round of information turns up blank, nothing prevents the DOJ from amending the old CID or introducing another that takes the inquiry off into a different direction, such as for violations of the monopolization provisions of section 2 instead of the territorial division or price-fixing claims under section 1.

Second, there is no obvious limitation on the production of documents—including emails—that can be demanded at any stage of the investigation. It is, of course, possible to file an objection to the extent of the discovery by the DOJ, and under § 1314 of the Antitrust Civil Process Act, targets of investigations may go before a judge in order to limit the scope of discovery.⁸³ Most critically, the investigated party faces risks that are not found in ordinary civil litigation. In litigation, a party knows that he is the target of a suit and seeks to reduce exposure. The target of an investigation that files a motion to limit discovery could find

82. 15 U.S.C. § 1311(c) (2006).

83. *Id.* § 1314(c).

that the Antitrust Division could broaden the scope of investigation to undermine this motion, or, worse, initiate a lawsuit that changes the complexion of the game in this case, or initiate government action in some unrelated arena. There is little reported litigation under this provision that relates to CIDs, and that relates to the demands that other litigants impose on the United States, not the other way around.⁸⁴

Third, the scope of these investigations is particularly risky because they can be directed to multiple firms in a given industry who have ongoing business relations with each other. These investigations could easily disrupt the private trust needed to maintain effective business relationships. Thus, suppose the question is whether a distributor of widgets has worked as the cat's paw for a conspiracy among retailers to raise prices in a given market. The investigation need not start in a staged way with an inquiry of the distributor. Clearly any aggressive government investigator could prize the element of surprise, so that similar CIDs could issue not only to the distributor, but also to all the retailers with whom that distributor does business.

At this point, the entire dynamics of the business relationships change. Retailers now have to bear compliance costs that could prove exceedingly high, which in turn could lead them to defect from the distributor, withhold payments for goods or services already rendered, demand indemnities, or caution new retailers against joining a network that is under the gun. Smaller distributors could easily find that the costs of compliance, for which there is no reimbursement from the government, can take away needed funds for innovating new products or preserving and developing customer relationships. Nor can anyone overestimate the psychological toll of even those investigations that end with receipt of a government clearance. There is, of course, the possibility of limiting discovery in these cases, but it is subject to all of the objections raised above. The result looks like a nonstarter.

Finally, the standard CID has stringent conditions for compliance with all discovery requests. Section 1312(g) thus provides:

The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.⁸⁵

84. See, e.g., *United States v. Witmer*, 835 F. Supp. 201, 207 (M.D. Pa. 1993); *Associated Container Transp. (Austl.) Ltd. v. United States*, 502 F. Supp. 505, 508 (S.D.N.Y. 1980).

85. 15 U.S.C. § 1312(g).

Worse still, the standard CID contains provisions that could be read to set up a possible case for criminal prosecution under this Section. It reads in full:

I/We have read the provisions of 18 U.S.C. § 1505 and have knowledge of the facts and circumstances relating to the production of documentary material and have responsibility for answering the interrogatories propounded in Civil Investigative Demand No. _____. I/We do hereby certify that all documentary material and all information required by Civil Investigative Demand No. _____ which is in the possession, custody, control or knowledge of the person to whom the demand is directed has been submitted to a custodian named therein.⁸⁶

Note the initial linkage in Title 18, § 1505 raises the stakes because that section imposes *criminal* sanctions on any person who intentionally flouts a CID concealing or destroying data—one becomes subject to criminal sanctions of up to five years of imprisonment.⁸⁷ These sanctions are rather more severe, to say the least, than any sanctions that are involved under Rule 37 for Failure to Make Disclosures or to Cooperate in Discovery. Under the Federal Rules, the initial set of sanctions simply calls for an order to compel discovery or cooperation. If that is not followed, the next round of sanctions could involve contempt of court, an order to admit certain facts, or an order barring a defendant from offering witnesses or introducing evidence before a jury.⁸⁸ The district court also has the option to demand that the non-cooperating party reimburse the opposing party for various expenses.⁸⁹ Criminal sanctions are not on the list.

With CIDs, it is highly unlikely that any routine investigation will turn into a criminal prosecution. But mixing criminal and civil elements from the opening bell can surely influence the way in which all interactions between the two sides take place. Section 1312 contains no explicit statement of what the sanctions might be or whether they are similar to those that are found in the Federal Rules of Civil Procedure. Even though there is no provision of the Antitrust Civil Process Act that authorizes the use of this form, the reference to a criminal statute (which is not described as a criminal statute in this paragraph) raises the ante for any signed sworn certificate. Under the signed statement, the forced admission of knowledge of the facts could be deployed as a potent lever

86. See, e.g., 31 U.S.C. § 3733(a)(2).

87. 18 U.S.C. § 1505:

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so . . . [s]hall be fined under this title [or] imprisoned not more than 5 years . . .

88. FED. R. CIV. P. 37(a)–(b).

89. FED. R. CIV. P. 37(b)–(c).

to settle a civil investigation in order to stay out of the clutches of a criminal investigation. Unfortunately, the large but vague sanctions could create huge risks for large corporations with multiple accounts subject to the control of many corporate officials. It is of course possible to ask the party in charge of the CID for further information about what is wanted, but this will only reduce the risk, not eliminate it, so that the entire provision creates a profound sense of unease.

It may well be that most investigations do not inspire these Orwellian possibilities. But if so, why then the threat to impose these sanctions when lesser sanctions have worked in ordinary private litigation? The analogous problems of inaccurate or incomplete answers in discovery are commonplace in civil litigation. In dealing with these issues, Rule 26(e) calls for “Supplementing Disclosures and Responses,” which requires updating answers that have become obsolete and correcting answers that are later learned to be wrong.⁹⁰ There is no reason why this same duty could not be imposed on parties to CID demands that are far broader and far less grounded than individual suits. Justice Holmes once said that “[m]en must turn square corners when they deal with the [g]overnment.”⁹¹ But not that square. This last provision should be removed from the Antitrust Process Act. The purpose of investigative provisions is not to make life easy for government officials. Rather, the purpose is to strike the right balance between the public need to know and the individual protection against oppressive government actions. Once again the proper approach requires some external supervision whereby a judge can allow for an initial round of discovery, which can then set the stage for further rounds of discovery if need be. In so doing, it should be incumbent on the government to also give some sense of the legal theory that underlies the request for further information. These rules are not novel; they are just an effort to reduce the level of discretion available to public officials. To repeat, the government’s investigative power is never reduced to the size that applies to private parties. After all, it is surely proper for the government to investigate the allegations of collusion raised in *Twombly*. Nonetheless, the gap here seems too broad on the simple ground that the risk of abuse seems too high relative to the potential gains in public enforcement.

V. CONCLUSION

This discussion of both the private and public sides of procedure has achieved its purpose if it shows the huge policy issues that lurk behind what all too many people think are arid procedural disputes. The use of litigation is a use of force by one party to either satisfy a claim or to resist satisfying that claim. Coercion is necessarily a part of the overall picture,

90. FED. R. CIV. P. 26(e).

91. *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920).

and that coercion has to be regulated in a sensible fashion. The standard model of the Federal Rules of Civil Procedure worked well for simple collision and collection cases. But, as the aspiration has emerged to bring law into virtually every area of human life, the theories of liability have become more complicated, and the demands that they impose on the procedural system have become ever more complex.

In this new environment, the old model that holds off all serious judicial intervention on fact collection until the completion of discovery no longer makes sense. The traditional weapons of litigation are too strong for their own good. Just as boxing could no longer survive bare-knuckle fighting, so, too, does civil litigation need at some point to ask the question of whether the cost of going forward with a given claim is worthwhile in light of all the information, both public and private, that has been accumulated to that date. In many instances the answer is no. What is needed, therefore, is an explicit realization of two fundamental propositions. First, there is no violation of fundamental principles of justice to require a plaintiff to avail himself of public information prior to suit to ground a complaint. Second, the process of discovery in large cases needs extensive management to regulate the flow of information between the parties and to allocate the cost of its production.

What is true for civil litigation is, if anything, truer for the inquiries that take place outside the Federal Rules in connection with government investigations. At this point, the rules need anxious reconsideration. Huge discretion, with criminal sanctions lurking in the background, may not matter in most cases. But since the entire history of due process starts with the proposition that external constraints and a strong sense of professionalism in office are *both* needed to make any administrative state run well, the rules for civil investigative demands should be updated to prevent mishaps before they occur. As a strong defender of limited government in all areas of endeavor, I think that it is wise to update the old maxim of Chief Justice Marshall: unless properly cabined, the power to investigate is the power to destroy.

