

ESSAY

PLAINTIPHOBIA IN THE SUPREME COURT

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Through the years, debate has raged over whether the Supreme Court's summary judgment trilogy and Twombly-Iqbal pleading decisions had significant practical effects. To address that question, this Article introduces a new empirical measure: the difference between the pretrial-adjudication judgment rates for the defendant and for the plaintiff. Plotting that difference over time suggests that the cases on summary judgment and pleading, which were far and away the two most major alterations of pretrial disposition during the last four decades or more, had a markedly anti-plaintiff impact.

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INTRODUCTION

The ballyhooed Supreme Court cases on summary judgment and on pleading had palpably negative effects on plaintiffs. That statement of our thesis is perhaps deflating. After all, if the Court's anti-plaintiff signals on matters of general procedural import did not have anti-plaintiff effects, the jobs of legal academics would have no point. That is, if the summary judgment trilogy¹ and *Twombly-Iqbal*² did not

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¹ The trilogy clarified the law on summary judgment, while appearing to encourage the granting of such motions. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986).

² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549 (May 21, 2007) (dismissing an anti-trust complaint that alleged an agreement in conclusory terms based upon information

help defendants and hurt plaintiffs, then changes in law are empty pronouncements not worth studying.

Rescuing our thesis from what some might see as blinding obviousness is the claim to the contrary by a few influential empiricists that these cases had negligible real-world effects, or at least that any effects do not show up in the data.³ We shall try to show that their studies, which are perfectly fine studies, were not addressing the question that most readers think they were addressing. The always valuable lesson is that empirical studies demand careful reading. If one gives those nonintuitive studies that reading, and then seeks out better empirical proof, the truth survives that anti-plaintiff pronouncements induce observable anti-plaintiff effects, just as one would expect.

I

JUDICIALLY TILTING THE PLAYING FIELD

Let us begin with our basic result, summarized in Figure 1. To reach the result, we used the comprehensive data set from the Administrative Office (AO) of the United States Courts⁴ for all district court

and belief, with the lack of detail owing to the fact that the plaintiffs had no proof in hand without discovery); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (May 18, 2009) (clarifying the broad applicability of *Twombly* and the intricate workings of the new plausibility test).

³ On motions to dismiss, see JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21–23 (FJC Mar. 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/motioniqbal.pdf> [hereinafter FJC, MOTION TO DISMISS I]; JOE S. CECIL ET AL., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5 (FJC Nov. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf) [hereinafter FJC, MOTION TO DISMISS II]. On summary judgment, see Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 906 (2007) [hereinafter Cecil, *Summary Judgment I*] (results also reported in JOE S. CECIL ET AL., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 20–26 (FJC 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/trsjpr07.pdf/\\$file/trsjpr07.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/trsjpr07.pdf/$file/trsjpr07.pdf)); Memorandum from Joe Cecil & George Cort to Judge Michael Baylson, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (Aug. 13, 2008), available at <https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf> [hereinafter Cecil, *Summary Judgment II*].

⁴ The data were gathered by the Administrative Office, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research. See Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. 94, 94 (1996). These data convey details of all cases terminated in the federal courts since fiscal year 1970. When any civil case terminates in a federal district court or court of appeals, the court clerk transmits to the AO information about the case, including the names of the parties, the subject matter category (chosen from about a hundred categories, including specific branches of contract, tort, and other areas of law) and the jurisdictional basis of the case, the case's origin in the district as original or removed or transferred, the amount demanded, the dates of filing and termination in the district court or the court of appeals, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached decision, the prevailing party and the relief granted. Thus, the computerized database, compiled from this information, contains all of the millions of federal civil cases over many years from the

civil cases.⁵ We report the data from 1979, when the AO started coding the outcome as judgment for plaintiff or for defendant, through September 2013.

The graph shows the difference between the calendar year's pretrial-adjudication judgment rates for the defendant and for the plaintiff, where the rate is the ratio of the number of terminations that are judgments for the defendant or the plaintiff by pretrial adjudication⁶ divided by the number of terminations in all cases that are initially contested but do not eventually go to trial.⁷ The graph thereby represents the relative advantage of the defendant over the plaintiff in getting a definitive pretrial adjudication. Importance lies not in the height of any line, given that one would expect defendants to obtain more pretrial-adjudication judgments than plaintiffs. Instead, the important observations lie in changes in the height, which would reflect changes in advantage.

whole country. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 127–29 (2002) (more fully describing this database and its strengths and weaknesses). For the latest verification of the AO coding, see Matthew Sag, *Empirical Studies of Copyright Litigation: Nature of Suit Coding* 4–6 (Sept. 24, 2013), available at <http://ssrn.com/abstract=2330256>.

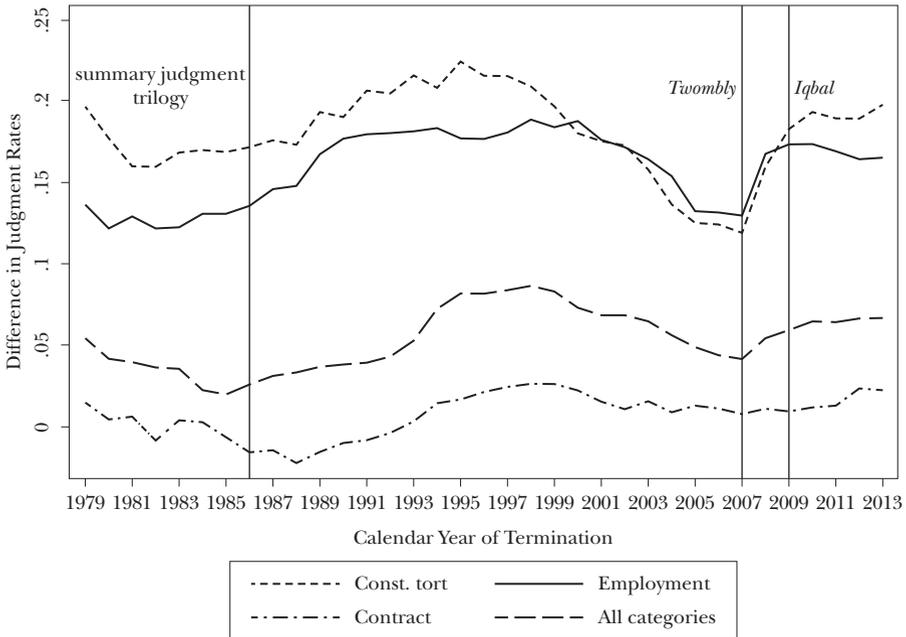
⁵ We dropped duplicate cases. The AO data include information more than once about many cases. So we reduced to one observation those cases that were filed in the same district on the same day and later terminated in that district on the same day and that had the same case category, jurisdictional basis, disposition method, procedural stage at termination, and outcome.

⁶ We define pretrial adjudication as the AO's method-of-disposition codes 6, 15, 17, 19, and 20, plus disposition code 3 for 1991 and later (code 3 switched in usage around FY 1991 from voluntary dismissal to dismissal for lack of jurisdiction). See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1954 n.180 (2009). Code 6, which primarily comprises dispositions by Federal Rules of Civil Procedure 12 and 56, dwarfs the other pretrial codes.

The AO disposition codes are: 0=Transfer/remand: transfer to another district; 1=Transfer/remand: remanded to state court; 2=Dismissals: want of prosecution; 3=Dismissals: lack of jurisdiction; 4=Judgment on: default; 5=Judgment on: consent; 6=Judgment on: motion before trial; 7=Judgment on: jury verdict; 8=Judgment on: directed verdict; 9=Judgment on: court trial; 10=Transfer/remand: multidistrict litigation; 11=Transfer/remand: remanded to U.S. agency; 12=Dismissals: voluntarily; 13=Dismissals: settled; 14=Dismissals: other; 15=Judgment on: award of arbitrator; 16=Judgment on: stayed pending bankruptcy; 17=Judgment on: other; 18=Judgment on: statistical closing; 19=Judgment on: appeal affirmed (magistrate judge); 20=Judgment on: appeal denied (magistrate judge). See INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, STUDY NO. 33622, FEDERAL COURT CASES: INTEGRATED DATA BASE 21–22 (2011). Because of the AO's changing codes and splitting off new codes from time to time, one must be careful in handling disposition codes. Here the most suspicious event was the increases in new disposition code 17 around 1986. But when we recreated Figure 1 without including code 17, the picture did not substantially change.

⁷ That is, from the denominator we excluded all default cases, for which the disposition code is 4, thus treating them as being initially uncontested. We also excluded all tried cases, defined as disposition codes 7, 8, and 9.

FIGURE 1. DEFENDANT PRETRIAL-ADJUDICATION JUDGMENT RATE
MINUS PLAINTIFF RATE, OVER TIME



For “all categories,”⁸ we are graphing 517,437 pretrial-adjudication judgments for defendant, 236,993 pretrial-adjudication judgments for plaintiff, and 5,199,366 nondefault nontrial terminations over the thirty-five years. The shape of the all-categories line shows a tilting of the playing field in the defendants’ favor by the 1986 summary judgment trilogy, which accelerated some recent upswings in summary judgment activity.⁹ Then, the Court more unexpectedly and suddenly retilted the field in *Twombly*. In the means recorded for cases terminated in 2008, *Twombly* already showed its effect, as the opinion’s attitude perhaps resonated with the lower courts’ preexisting but pent-up predilections for more rigorous gatekeeping.¹⁰ In the cases terminated in 2009, *Iqbal* added a mid-year boost. The relative advantage of the defendants kicked in more quickly for the pleading deci-

⁸ We did, however, exclude prisoner cases, which are the six category codes in the range of 510–555, because those cases are numerous and distinctive in many ways. Including them would not much change the shape of the all-categories line in Figure 1 but would shift it considerably higher, near to the lines for civil rights cases. Indeed, prisoner cases alone show the same pattern, with a very pronounced *Twombly* effect. See also Alexander A. Reinert, *Measuring Iqbal* 25–26 (Oct. 23, 2013) (unpublished manuscript) (on file with author) (showing an intense effect of *Twombly* on prisoner cases). Including prisoner cases would thus have fortified our conclusions.

⁹ See *infra* note 22 and accompanying text.

¹⁰ See *infra* note 43.

sions than for the summary judgment decisions because summary judgment requires more case development.

The summary judgment and pleading upticks in defendants' advantage faded in the data over time because plaintiffs adjusted by pursuing stronger cases, that is, cases that could pass the new tests imposed by the Court. Plaintiffs would not file some cases and would settle others on less favorable terms.¹¹ In other words, the selection effect eventually managed to erase most of the pro-defendant decisions' effects appearing in the data, but the process was slow.¹² Of course, the decisions' anti-plaintiff effects in the real world persisted as the plaintiffs could survive the new legal standards only with stronger cases.

The graph thus reflects the invigoration of summary judgment and pleading testing, which were far and away the two most important alterations of pretrial disposition during at least the last four decades.¹³ A similar pattern appears in particular case categories such as constitutional tort, employment, and contract cases.¹⁴ But the defendants' relative advantage is much bigger in those civil rights cases, and the impact of the Court's decisions more pronounced, than in contract cases. In contract cases, the plaintiffs are less stereotypical, and the plaintiff and defendant roles can even be interchangeable. So the contrast among categories drives home that the Court's decisions were putting the stereotypical plaintiff at a disadvantage.

Some of our observed effects could, of course, be owing to factors other than the Court's decisions. A lot more was going on in this

¹¹ See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 145–46 (2009).

¹² In support of this point, filings do not immediately fall off in response to *Twiqbal*. Even in the heavily impacted civil rights categories, and even for pro se cases, filings do not fall off until 2012. It is possible that the increase in the defendants' motions might have come sooner, but signs exist that defendants too were slow to react. Cf. Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH. L. REV. 827, 872 (2013) (finding tentatively no increase in the rate of removal from notice-pleading states over 2005 to 2009).

¹³ Logit regression analysis of defendant's getting judgment by pretrial adjudication (controlling for pro se status, circuit, and district) shows the two upticks to be significant at the .01 level. The same basic pattern prevails in all the circuits, except the Third Circuit lacks an uptick in 2008. Perhaps the Third Circuit courts had anticipated *Twombly*. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 577 (2002) (describing the Third Circuit as the "recognized leader" in the application of heightened pleading). But even the Third Circuit shows the uptick in civil rights cases. Shifting to a district-level analysis, the anti-plaintiff effect predominated among the districts in the period after the trilogy and was especially widespread in the 2007–2010 period.

¹⁴ These three categories are, respectively, category codes 440 ("Other Civil Rights"); 442 ("Jobs"), plus 445 ("ADA-Employment"), which was separated out from 442 beginning in FY 2005; and 190 ("Other Contract Actions"). See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 n.4 (2009).

country over this long period. But what are the other candidates for explaining Figure 1? One might be the recent economic downturn, which changed the mix of cases in federal courts. But an economic-downturn explanation would have some trouble, for example, with the fact that the *Twigbal* uptick seems to have skipped contract cases.

We do admit that for constitutional tort and employment cases, the tilt in the calendar year of 2008 supports our point too well, being almost too soon and extreme to be believed. Still, our graph is plotting the means for a whole calendar year that begins more than seven months after the *Twombly* decision, and the stretched y-axis scale does magnify the uptick. Moreover, these civil rights case categories collect the plaintiffs most susceptible to being picked off by defendants with a new weapon.¹⁵ In any event, we are claiming not that the effect shown in our graph was exclusively the product of *Twombly*, but only that *Twombly* contributed to the effect. We shall argue principally that inferring an impact from the Court's key procedural decisions is sounder than accepting the conclusion of no impact pushed by some empirical studies. The data do not support an absence of effect.

A. Summary Judgment

Almost the entire academic community, including not only those who criticized the Court's summary judgment trilogy as an unwarranted expansion of the device,¹⁶ but also those who saw the trilogy as a helpful clarification of doctrine,¹⁷ expected the decisions to have an impact. Decades later, however, Joe Cecil and his colleagues at the Federal Judicial Center (FJC) released the premier study of summary judgment.¹⁸ Its primary message was that the trilogy had at most a small effect in the real world, as it concluded that "we found few changes in summary judgment activity after the Supreme Court trilogy."¹⁹

That study looked at a sample of docket sheets from six districts in federal civil cases (excluding prisoner, Social Security, and benefit repayment cases) terminated during six twelve-month periods from

¹⁵ As we shall show, pro se cases also contributed much to the uptick. See *infra* note 44 and accompanying text.

¹⁶ See, e.g., Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 192 (1988) (criticizing *Matsushita* and *Liberty Lobby*).

¹⁷ See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 787 (1988) (noting that the trilogy has "refocused attention on summary judgment and has made a start on providing a logical framework for deciding how and when it can be used").

¹⁸ Cecil, *Summary Judgment I*, *supra* note 3, at 863. A later study showed that variations in local rules on summary judgment practice had little effect. Cecil, *Summary Judgment II*, *supra* note 3, at 1-3.

¹⁹ Cecil, *Summary Judgment I*, *supra* note 3, at 906.

1975 to 2000.²⁰ While emphasizing that summary judgment practice varies considerably with locale and case type,²¹ it found overall that the percentage of cases involving one or more summary judgment motions increased from 12% in fiscal year 1975 to 20% in calendar year 2000; the court granted such a motion in full or in part in 6% and 12% of all cases in the respective year's sample; and grant of summary judgment resulted in termination of 3.7% and 7.8% of all cases in the respective year's sample.²² The study suggested that the increasing ascendancy of summary judgment dated from the upswing in the late 1970s of judicial case management with an emphasis on motion practice, rather than from the trilogy.²³ But it found that the increase began leveling off after 1988.²⁴ Meanwhile, among all the summary judgment motions over the study's whole time period, viewed on a motion level rather than on a case level, 72% were motions by defendants (the rate of granting in full or in part going up and down without a consistent time trend, ending up at 49% in 2000), while 28% were plaintiffs' motions (with an analogous win rate, ending up at 36% in 2000).²⁵ This picture of the studied time period, in sum, exhibited a somewhat erratically increasing number of summary judgment motions, which steadily were motions in the main by defendants who enjoyed a higher win rate.²⁶

The Cecil study's data are consistent with our data. True, its six districts may not be representative of the nation as a whole at which we look;²⁷ its data show results for six separated periods (1975, 1986, 1988, 1989, 1995, and 2000), thereby masking the ebbs and flows that we see; and it examines summary judgment motions only, while we are looking at all pretrial adjudications. Still, if we combine its result of

²⁰ *Id.* at 861.

²¹ There are serious district- and category-specific differences here. See Clermont, *supra* note 6, at 1944 n.141; Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, in *EMPIRICAL STUDIES OF JUDICIAL SYSTEMS* 2008, at 1, 26–30 (Kuo-Chang Huang ed., 2009).

²² Cecil, *Summary Judgment I*, *supra* note 3, at 883. There is reason to suspect that the Cecil study overstated the increase in the rate of summary judgment terminations over this time period. See Eisenberg & Lanvers, *supra* note 21, at 9–11, 24–26.

²³ Cecil, *Summary Judgment I*, *supra* note 3, at 904.

²⁴ *Id.* at 892.

²⁵ *Id.* at 886–88.

²⁶ *Id.*

²⁷ If we run our measure on the AO data for 1979–2013, but use only Cecil's selection of districts and categories, the results look like our Figure 1 except that 1988 and 1989 show up as having a lower gain in defendants' relative advantage. In fact, Cecil's article revealed a strong uptick in plaintiffs' win rate relative to defendants' win rate for those years in his six districts, which would produce the observed temporary downturn in the defendants' advantage just in those districts. *Id.* at 886, 888. Thus, Cecil's article can say that the parties' relative win rates do not change much over the years, but that is true only because its sample of cases peculiarly denied defendants a bump right after the trilogy.

increasing motions over the years 1975–1988, with its observed variations in plaintiff and defendant win rates over 1975–2000, we get our graph. First, an increasing numbers of motions, in the main by defendants who enjoy a higher win rate, will augment the defendants' relative advantage over the years. Second, the selection effect could mean that plaintiffs eventually began pursuing stronger cases, producing a leveling or descending line that masks a loss in the plaintiffs' true position. Third, even if the plaintiffs' and defendants' win rates each show no consistent time trend over the studied period, their win rates over time can change relatively so as to produce our graph.

Based on consistent data, then, the Cecil study primarily stressed a long-term increase in summary judgment activity, while we go on to stress a tilt in favor of defendants in 1986. The lesson is that the Cecil study's story is accurate, but incomplete. It can say that the trilogy itself had little effect on the increasing number of motions over the longer term, without undermining our conclusion that the trilogy affected the parties' relative positions. Our data thus can and do show that the parties' relative positions shifted after the 1986 trilogy to the plaintiffs' disadvantage.

B. Pleading

The recent years' headline event for civil procedure was the *Twiqbal* tandem on pleading. The great majority of academics lamented what they saw as an unjustifiable revolution.²⁸ But some defended the two decisions as a beneficial policy change in the pursuit of efficiency—or even as a pronouncement representing no real doctrinal or practical change, with a few backing up their position by saying that they could empirically show the real-world effects to have been inconsequential.²⁹ Most prominently among the latter, the Federal Judicial Center reported that the Court's cases had no discernible effect on outcomes.³⁰

The FJC's studies looked at the electronic records in federal civil cases (excluding prisoner and pro se cases) from twenty-three of the busiest districts dispersed across the country in search of motions filed

²⁸ See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (criticizing the new regime); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1339 (2010) (exploring the new regime).

²⁹ See A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1725–28 (2013) (discussing empirical defenders, after categorizing *Twiqbal* defenders); see also *id.* at 1714–25 (rebutting the view that *Twiqbal* changed nothing doctrinally).

³⁰ See FJC, MOTION TO DISMISS I, *supra* note 3, at 21–23. A later study confirmed the FJC's earlier results; after separating out the increasingly frequent grants with leave to amend and tracking down what later happened in those cases, the researchers were able to say that the dismissal rate stayed steady. FJC, MOTION TO DISMISS II, *supra* note 3, at 4.

promptly, or decided, during two sets of multi-month periods around 2006 and 2010.³¹ Not unlike the summary judgment study, the FJC's new studies showed, on a case level, a substantially increased number of defendants' motions to dismiss for failure to state a claim, the percentage of cases that involved one or more such motions having shot up by more than half from 4.0% in 2006 to 6.2% in 2010.³² After some manipulation of the data, the studies showed, on a motion level, no statistically significant change in the rate of granting dismissal or in the rate of giving grants that terminated the case.³³

That finding of more or less steady dismissal rates—in a study with a narrow time focus on a purely defensive weapon, prepared during intense controversy over *Twigbal*—has generated an inference that goes beyond the summary judgment discussion and that marks the spot where the pleading debate goes off the tracks: the inference being that plaintiffs were not hurt by *Twigbal*. But that inference is simply implausible. The Court's decisions aimed at kicking some plaintiffs out of court. Major anti-plaintiff signals of general procedural import emanating from the nation's highest court should have some effect. It could be that judicial output data would show little or no impact because of the selection effect, with the affected plaintiffs never filing or quickly settling cases. Still, an effect of hurting plaintiffs has to be out there.

One could counterargue that plaintiffs have always tended to plead considerable detail, doing so in reaction to all the litigation incentives to state a strong case; *Twigbal* would thus have no impact on

³¹ FJC, MOTION TO DISMISS I, *supra* note 3, at 5; FJC, MOTION TO DISMISS II, *supra* note 3, at 3.

³² On the one hand, regressions indicated that the increase in motions actually was a doubling. See FJC, MOTION TO DISMISS I, *supra* note 3, at 9–10. On the other hand, the percentages for motions made might appear lower than what one would expect; but recall that the denominator is a sample of all cases, not just cases in which a motion was a viable possibility, and among all cases are many that terminate with little or no judicial involvement. See THOMAS E. WILLGING, USE OF RULE 12(b)(6) IN TWO FEDERAL DISTRICT COURTS 8–9 (1989) (finding that the percentage of federal cases terminated in FY 1988 involving one or more Rule 12(b)(6) motions was 13% of the sample supposedly drawn from all docket sheets; the court decided such a motion in 10%, and granted it in 6%, of all cases in the sample; and grant of the motion resulted in termination of 3% of the sample); cf. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 47–49 (2009) (finding that 15% of federal cases terminated in FY 2005 involved one or more motions to dismiss of any kind, of which 54% were granted in whole or part).

³³ A report by the Administrative Office, based on its data covering all motions under Federal Rule of Civil Procedure 12(b) and (c), supports an increasing number of motions made, as well as a steady grant rate. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, MOTIONS TO DISMISS: INFORMATION ON COLLECTION OF DATA (Mar. 15, 2011), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/NOS-Motions%20Quarterly%20December_031611.pdf.

the majority of plaintiffs.³⁴ That is obviously true. For us, the interesting question remains whether the data reveal that raising the pleading standard negatively affects a certain subset of plaintiffs: those who without discovery cannot plead enough detail to meet a new requirement that is applied subjectively on a preliminary record.

Just as for summary judgment, our pleading data are consistent with the FJC's data. Again, the FJC's story of increasing numbers of motions, with a steady win rate, will by itself augment the defendants' advantage. And again, factors that the FJC did not consider would produce our graph.

Although the FJC's studies suggesting no effect are fine studies, their story is incomplete on the defendants' relative advantage after *Twiqbal*. The reason for incompleteness lies in the FJC's focus on the dismissal rate, which is the ratio of motions granted over motions made. Change in the rate of granting motions to dismiss constitutes a measure of tangential and limited import. It simply does not address the question to which it may seem to imply an answer. It will not reveal the impact of *Twiqbal*. Writers right from the beginning of the *Twiqbal* era have questioned dismissal rate studies as telling us little of relevance.³⁵ Professor David Engstrom has since systematized the questioning.³⁶

Dismissal rate studies have plenty of problems, as evidenced by the fact that they permit many researchers to find a change and a few others to say no change,³⁷ doing so perhaps in line with the result desired.³⁸ We can summarize the problems as falling into three major groupings:

³⁴ See, e.g., Jason A. Cantone, Joe S. Cecil & Dhairya Jani, *Whither Notice Pleading?: Pleading Practice in the Days Before Twombly* 45–46 (Sept. 10, 2014), available at <http://ssrn.com/abstract=249440> (arguing that fact-heavy pleading has long been a common practice); William H.J. Hubbard, *A Theory of Pleading, Litigation, and Settlement* 24 (U. Chi. Pub. L. & Legal Theory, Working Paper No. 446, 2013), available at <http://ssrn.com/abstract=2360723> (arguing that pleading rules have no great practical importance). But see CORINA D. GERETY & BRITTANY K.T. KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013, at 4–5 (2014) (reporting attorney surveys that attest to an increase in the pleading of factual detail).

³⁵ See Clermont & Yeazell, *supra* note 28, at 839 n.66, 848 n.98; Clermont, *supra* note 28, at 1366 n.140.

³⁶ See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1206 (2013) (explaining the difficulties in gauging the size of that impact on filed and unfiled cases—and in determining whether the benefit of heading off unworthy plaintiffs outweighs the costs of the new pleading test).

³⁷ See *id.* at 1204 n.7, 1231, 1245–48.

³⁸ Compare Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 653 (2012) (“But let us not overlook the fact that it was conceived by and completed at the direction of—although not directly performed by—federal judges. I respectfully suggest that in attempting to study what they themselves are doing, they may not be completely impartial.”), and Lonny Hoffman, *Twombly and*

- *Ignored selection.* A big problem with dismissal rate studies is the selection effect, which involves both cases not pursued by today's plaintiffs and additional motions now made by defendants. Plaintiffs not only will gather and plead more facts, but also will sometimes choose not to pursue cases that would fall to *Twiqbal*. Defendants will make a lot more motions (and the data support this happening). In a perfect world for theory, decisions like *Twombly* or *Iqbal* would have no effect on the number of motions or the number of dismissals, leaving the dismissal rate unmoved as both plaintiffs and defendants immediately adjust to the new pleading regime. In our imperfect world, unfiled or settled cases by potential plaintiffs and more motions by defendants still mean that one would not see a major increase in the dismissal rate. Thus, dismissal rate studies can reveal judicial behavior in deciding an uncontrolled set of motions, with little insight into the litigants' behavior in response to *Twiqbal*. The most one can say about litigants' behavior is that upon any reasonable set of assumptions, the change in dismissal rate will understate the effect of *Twiqbal* in raising the pleading standard.
- *Inaccurate measure.* Even if one were interested in the dismissal rate among the motions selected for decision, the dismissal rate is hard to measure. Four traps hide in the dismissal rate's numerator (motions granted) and denominator (motions made), each trap tripped in some but not all prior studies:
 1. In the numerator, the researcher should focus on fatal grants, ignoring grants made with the possibility of amendment or better yet tracking down what happens in those cases. The real policy concern is not whether extra pleading steps are necessary but whether *Twiqbal* has affected access to justice.
 2. The focus in the numerator should be on fatalities to the plaintiff's case, not merely particular claims knocked off. Many cases get a trimming without denying relief to the plaintiff.
 3. In the denominator, the researcher should consider only *Twiqbal*-like motions attacking the case's factual sufficiency, excluding the many motions to dismiss made on the basis of legal insufficiency, various defenses, or other grounds. The

Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 FED. CTS. L. REV. 1, 7 (2011) (arguing that the FJC studies are "greatly, if unintentionally, misleading"), with Joe S. Cecil, *Of Waves and Water: A Response to Comments on the FJC Study: Motions to Dismiss for Failure to State a Claim After Iqbal* 3 (Mar. 19, 2012), available at <http://ssrn.com/abstract=2026103> (reaffirming the argument that the studies are accurate).

sea of all motions to dismiss will mask the true bite of *Twiqbal*, which involves only those cases that would have succeeded under notice pleading but that now fail definitively under the new regime.

4. Assembling the motions that make up the denominator requires the effort of drawing a random sample from all cases and not just reported cases, and then coding all features needed to permit adequate covariate controls. Many effects that leap out at first glance do fall upon more rigorous examination.
- *Inappropriate question.* Even if one could untangle the selection effect and accurately measure the dismissal rate, it would tell us almost nothing that we want to know. After all, the dismissal rate is just a number that tells us how far the system departs, for obscure reasons, from the equilibrium rate that selection effect predicts in the abstract. True, a sudden change in dismissal rate might be informative. But that change would still be distant from the real concern: What were the costs and benefits of the Court's imposing the *Twiqbal* pleading test? Did any resultant denial of access to justice plus the costs of administering the new test outweigh the benefits of extinguishing weak cases early in the litigation process?

II

ACADEMICALLY IMPROVING THE METHODOLOGY

A. Considering the Selection Effect

To untangle the selection effect, one would have to look at a sample of cases unfiled and filed, and either settled or adjudicated. That would let us see what cases that would have been pursued pre-*Twiqbal* are no longer pursued. Then one would have to segregate out from the motions made those unrealistic ones that represent only the defendants' post-*Twiqbal* exuberance. Then, the dismissal rate would let us perceive the change in the pleading standard.

Moving forward from the impossibility of that program of research, one could use some statistical technique like a matching study to create pairs of very similar cases pre- and post-*Twiqbal*,³⁹ or employ post-stratification weighting that would weight more heavily those cases post-*Twiqbal* that resemble the case mix pre-*Twiqbal*.⁴⁰ The prob-

³⁹ See Engstrom, *supra* note 36, at 1241–42 (proposing studies using the method). For an example, see Stephen J. Choi, Karen K. Nelson & A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 56–64 (2009).

⁴⁰ See R.J.A. Little, *Post-Stratification: A Modeler's Perspective*, 88 J. AM. STAT. ASS'N 1001, 1002 (1993) (describing the method).

lem then is that one needs to know a very great deal about the nature and merits of each case.

Jonah Gelbach used a more practical method to account for the selection effect.⁴¹ He calculated a rough correction term to add to the observed change in the dismissal rate, yielding a minimum percentage of plaintiffs now facing a motion to dismiss who are hurt by *Twiqbal*.⁴² The correction term, however, accounts mainly for the fact that there are more motions to dismiss after *Twiqbal*, while accounting for plaintiffs' self-restraint would push the percentage of hurt plaintiffs above his minimum percentage. Still, that correction term alone converts the FJC's observed change in dismissal rates into a considerably bigger number.⁴³

Our effort to account for the selection effect instead involves looking at a measure other than the dismissal rate. By looking at all cases that go to judgment by pretrial adjudication over a long time period, we minimize any effect of defendants' changing their preferences from one pretrial vehicle to another. Also, by comparing the plaintiffs' and defendants' judgment rates, we manage to account somewhat for the selection effect: we take off the table selection by defendants, because the judgment rate is unaffected by any increase in the rate of unsuccessful motions; and our graph conveys a sense of magnitude for selection by plaintiffs, doing so by graphing our measure over time and showing the size of the defendants' edge removed

⁴¹ Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2315–16 (2012) [hereinafter Gelbach Note]; see Engstrom, *supra* note 36, at 1225–29, 1234 (discussing and recalculating Gelbach's results); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 STAN. J. COMPLEX LITIG. 223 (2014) (defending his approach).

⁴² Gelbach Note, *supra* note 41, at 2323.

⁴³ An alternative approach, which tries to neutralize the selection effect of nonfiling (but not settlement), appears in William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 55–57 (2013). Professor Hubbard uses selective AO data to show that the chance of dismissal (defined as a very prompt decision, other than for plaintiff, within disposition code 6) in cases filed before *Twombly* did not significantly rise for those dismissals coming after the *Twombly* opinion. However, many things affect the number of dismissals, so his result would be more pertinent if he had looked at defendants' success relative to plaintiffs' success in disposition code 6 or otherwise controlled for trends in the number of dismissals. In any event, according to our calculations, his result depends on his choice to exclude the great mass of dismissals that come more than 224 days after filing. The exclusion was an understandable effort to eliminate summary judgments, but that time frame seems unrealistically short for motions to dismiss that are granted, in contrast to denied, especially in the period of some uncertainty right after *Twombly* came down. When we use his approach as to selecting data and as to defining dismissal, but without that time constraint, there emerges a sizable increase in dismissals for his cases filed just before and thus decided after the unanticipated *Twombly*, a change significant at the .01 level. Thus, his empirical approach delivers good support for our thesis, and for the immediate and considerable impact of *Twombly*.

as the plaintiffs come to react to new procedural barriers by selecting stronger cases.

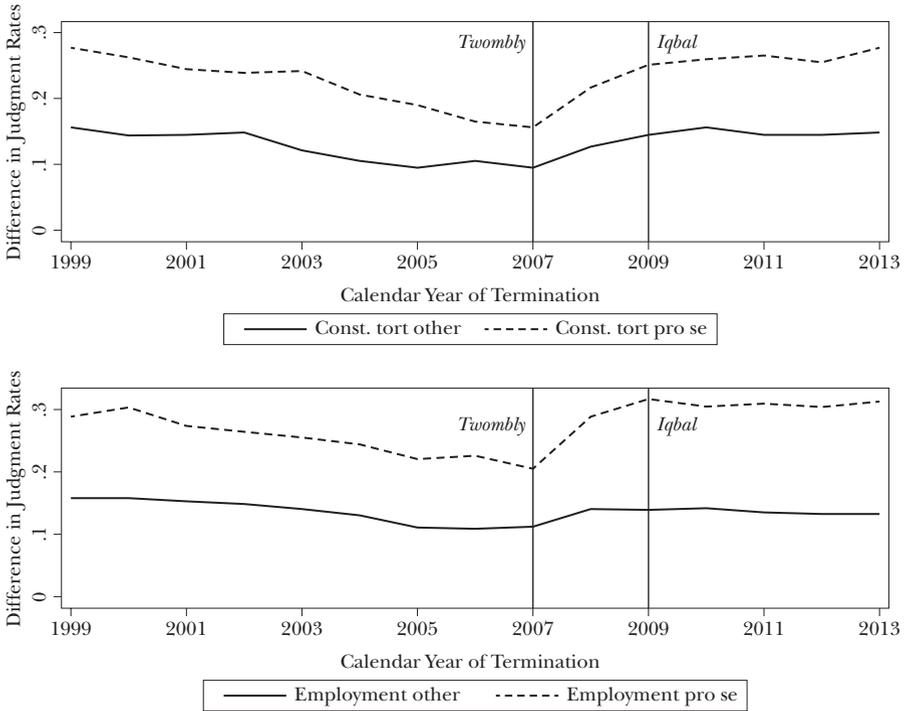
Admittedly, it remains arguable to what extent potential plaintiffs choose not to pursue previously viable cases after the Supreme Court raised barriers to the district court. But going beyond Figure 1, our measure does afford an additional way to assert that there is such an effect. We can do so by separately graphing pro se plaintiffs who go against counseled defendants, although we can do so only beginning in 1999, when the AO started coding for pro se status. It turns out that pro se cases contribute mightily to the *Twombly* effect.⁴⁴

Figure 2 shows the pro se effect in two case categories heavily impacted by *Twiqbal*. The line for the pro se cases being higher means that counseled defendants do better against pro se plaintiffs than otherwise. More to the point, looking beyond the line's height, we find telling the sharp uptick after *Twombly*. It appears that *Twombly* affected the cases with pro se plaintiffs against counseled defendants even more heavily than the other cases in these case categories. Furthermore, those pro se plaintiffs showed a slower reaction to *Twombly*, particularly in employment cases. That is, those pro se plaintiffs act as a control group that is comparatively immune to selection effect, because those plaintiffs more slowly adjust by ceasing to pursue some of the cases that could not surmount the new barrier.⁴⁵ Eventually, however, they join the ranks of potential plaintiffs who select only stronger cases to pursue.

⁴⁴ The FJC excluded cases with pro se parties from its studies, doing so on the supposition that *Twiqbal* does not apply to those cases. See FJC, MOTION TO DISMISS I, *supra* note 3, at 6 n.10. That supposition rested on an overreading of *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam). See Clermont, *supra* note 28, at 1368–70. Our results show an impact on pro se cases, as does Reinert, *supra* note 8, at 23–29, in accordance with case holdings. See, e.g., *Khor Chin Lim v. BMO Fin. Grp.*, 497 F. App'x 621, 625 (7th Cir. 2012) (“Although pro se complaints are construed liberally, Mr. Lim cannot escape the essential requirement that he plead a claim that is ‘plausible on its face.’”).

⁴⁵ Mixed effects logit regression analysis of defendant's getting judgment by pretrial adjudication in the cases filed during the year before or the year after the day of the *Twombly* decision (controlling for circuit, for district by use of random intercepts, and for changed docket load measured by each district's change in mean time to disposition in the year before and after *Twombly*) shows these upticks to be significant at the .01 level. As the focus shifts to pro se, the employment coefficient for a post-*Twombly* dummy variable goes from .111 in 22,397 cases to .241 in the 5,225 different pro se cases, and constitutional tort goes from .136 in 17,693 cases to .304 in the 10,076 different pro se cases.

FIGURE 2. DEFENDANT PRETRIAL-ADJUDICATION JUDGMENT RATE MINUS PLAINTIFF RATE, OVER TIME, SEPARATING OUT PRO SE PLAINTIFFS AGAINST COUNSELED DEFENDANTS



Again, other factors could be at work in producing the upticks, like the economic downturn suddenly prompting weaker pro se cases. But at least the graphs represent another piece of evidence of *Twombly*'s impact. Plaintiffs are no longer pursuing some of the cases they would have pursued before that decision.

B. Constructing an Accurate Measure

A dismissal rate study could avoid the four traps in constructing the measure, even if the selection effect still risks masking any observable effect on dismissal rate. Professor Alex Reinert has recently tried to do so.⁴⁶ For his numerator, (1) he coded for dismissals with leave to amend and followed those cases to learn the ultimate outcome, and (2) he coded for partial grants and denials.⁴⁷ For the denominator, (3) he made the first real effort to narrow the focus to *Twiqbal*-like motions that attack the case's factual sufficiency, and (4) he sought out, using PACER and not Westlaw or Lexis, all such contested mo-

⁴⁶ Reinert, *supra* note 8, at 19–22.

⁴⁷ *Id.* at 20.

tions decided during 2006 and 2010 in twelve of the FJC studies' twenty-three districts (about 3,650 decisions, of which about 950 involved pro se plaintiffs).⁴⁸ The results, supported by regression analysis, showed a significant jump after *Twiqbal* in dismissal rate from 42% to 55% for counseled plaintiff cases, and from 75% to 87% in pro se plaintiff cases.⁴⁹

His are important results. First, they confirm the majority of dismissal rate studies, which had found by less rigorous means a *Twiqbal* effect of increasing the dismissal rate.⁵⁰ Second, by addressing the FJC studies in their own terms but coding with more detail, he managed to refute them. The FJC's failure to detect a change in the dismissal rate apparently stemmed from its failure to burrow down to the actual ground for deciding the motion to dismiss.⁵¹ Third, and most important, he proved that *Twiqbal* raised the pleading standard, albeit to an indeterminate degree.⁵² It is true that he failed to account for the selection effect of party behavior. But recall that the change in dismissal rate will understate the *Twiqbal* impact on the pleading standard. In other words, although a study showing no change in the dismissal rate would prove nothing, a study showing an increase in the dismissal rate proves that *Twiqbal* raised the pleading standard. Frustratingly, though, a raised pleading standard does not prove unjustified detriment to plaintiffs. It might mean no more than that *Twiqbal* is achieving its aim of tossing unworthy plaintiffs.

By contrast, we come at the goal of constructing an accurate measure by switching to an alternative measure. Our alternative measure based on the rates of judgment by pretrial adjudication is certainly still imperfect, but it improves on dismissal rate studies. First, we avoid the numerator problems in treating partial wins by looking instead at final judgments. Comparing defendants' and plaintiffs' judgment rates, rather than just tracking defendants' judgments, neutralizes exogenous influences on the yearly number of judgments. Second, we avoid the denominator problems in selecting an appropriate set of motions by looking at all pretrial adjudications in all district court cases, while coding enough variables to permit meaningful statistical analysis. Grouping all the means of pretrial adjudication also moots any shift from summary judgment to dismissal as the means of disposition. Third, by stressing the parties' relative positions, our measure allows us to shift the discussion of the Court's impact from a

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 23–24.

⁵⁰ Engstrom had already amassed a number of those studies to support their general thrust in favor of a single-digit *Twiqbal* effect on dismissal rate. Engstrom, *supra* note 36, at 1230–34.

⁵¹ See Reinert, *supra* note 8, at 29–30.

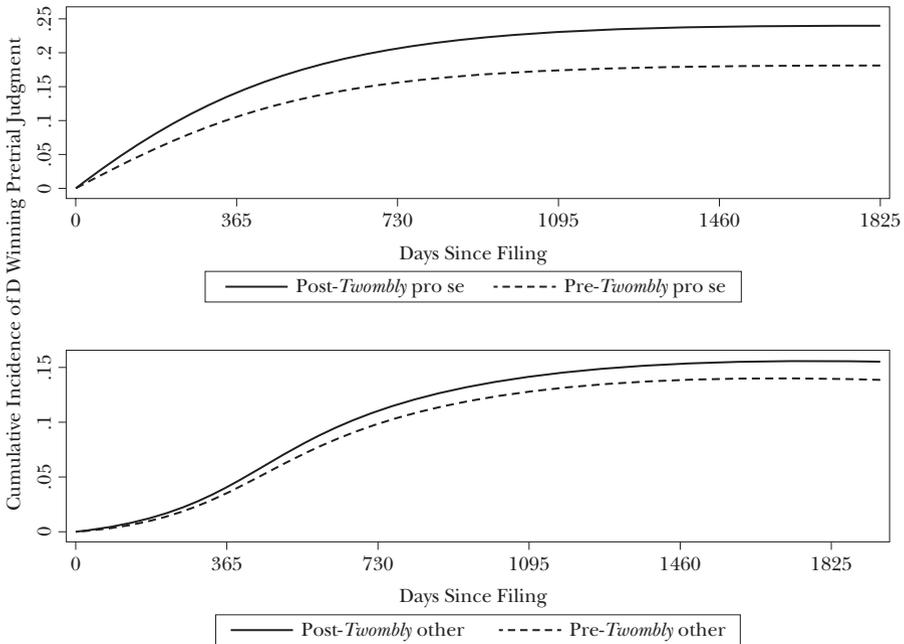
⁵² *Id.* at 46.

raising of the decision standard to a harm to the plaintiffs as a class. It shifts us slightly closer to answering a relevant question.

An example of the possible statistical analysis enabled by our new measure appears as Figure 3. It shows a competing risk regression model, a form of survival analysis, by plotting the growing likelihood of a dismissal having been ordered as time from filing increases. We look at the cases filed just before and just after the *Twombly* decision. We here show only the case category of constitutional torts, choosing it because it exhibited a less dramatic effect than did employment cases in Figure 2. Still, constitutional torts significantly exhibits the anti-plaintiff effect of *Twombly* and, further, shows its substantially greater impact on pro se plaintiffs going up against counseled defendants.⁵³

⁵³ Hazard ratio analysis (controlling for circuit and changed docket load measured by each district's change in mean time to disposition in the year before and after *Twombly*, and clustering standard errors by district) shows for 18,271 cases a 14% increase in the instantaneous risk of the defendant's winning by pretrial-adjudication judgment after *Twombly*, significant at the .02 level, and a 36% increase for the 9,666 different cases with a pro se plaintiff going up against a counseled defendant, significant at the .001 level. The survival analysis framework allows us to account for censored cases: those still pending as of September 2013 and those not followed to conclusion due to transfer or remand. However, competing risk models assume that the risks are separable and independent. The various methods of case disposition do not satisfy that assumption. Accordingly, as a check on our model, we ran a multilevel logistic regression model in which the dependent variable was whether the defendant obtained a pretrial-adjudication judgment (and in which districts were treated as random effects). The *Twombly* effects were consistent with those in the competing risk model.

FIGURE 3. CUMULATIVE INCIDENCE OF PLAINTIFF'S SUFFERING PRETRIAL-ADJUDICATION JUDGMENT IN CONSTITUTIONAL TORT CASES FILED IN THE YEAR BEFORE OR IN THE YEAR AFTER *TWOMBLY*, SEPARATING OUT PRO SE PLAINTIFFS AGAINST COUNSELED DEFENDANTS



C. Asking the Appropriate Question

The difficulty with all empirical work in this area is that it has not addressed the real question, which is whether the benefit of the Court's procedural innovation is worth its costs.⁵⁴ An affirmative answer rests on satisfying this formula:

$$B_S > C_E + C_D$$

The benefit of screening out unworthy cases early as by summary judgment or dismissal, B_S , includes the savings to society and to the parties by not having to litigate the case farther plus the savings to society and to the defendant by not eventually imposing a liability wrongfully. The error costs, C_E , include the costs to society and to the plaintiff of throwing out worthy cases, with worthiness best read to mean cases that should otherwise win under the system's litigation scheme. The direct costs, C_D , include the additional out-of-pocket costs incurred by society and the parties in administering the new screening test.

Obviously, this formula comprises only unknowables. With herculean efforts, researchers can acquire some circumstantial evidence

⁵⁴ See KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 469–71 (3d ed. 2012).

on one piece of the puzzle or another. Consider all the work on dismissal rate. That measure does not even appear in the formula. But if the rate increases, we have tangible evidence leaning toward $C_E > 0$, which is rhetorically useful even if the conclusion probably was already obvious. Still, because of the selection effect, we get no sense of the size of cost. So, we remain very distant from solving the formula.

Why, then, has dismissal rate received so much attention? The reason is that it might be the key to a trick solution of the formula. Because intuitively $B_S > C_D$, on the idea that money saved by throwing out cases exceeds the administrative costs of the expedited process, one can argue that a procedural reform is desirable as long as $C_E = 0$. Hence, the Supreme Court's summary judgment trilogy and *Twombly-Iqbal* pleading decisions both are affirmative reforms as long as plaintiffs as a class do not suffer under them. A steady dismissal rate sort of suggests no suffering, so proponents of the Court's decisions have lovingly embraced the FJC studies and declared the debate over.

Careful analysis of the FJC data, however, confirms that C_E is likely sizable. Our Article has established that plaintiffs are not filing some cases that would have succeeded under the prior procedural regime, plaintiffs are settling their cases on less favorable terms, and in the aftermath of the Court's decisions plaintiffs are losing more cases by pretrial adjudication.

Our establishing an anti-plaintiff impact might embolden opponents of the Court's decisions to flip the trick of solving the formula without performing the virtually impossible task of measuring its components. If $B_S = 0$, then of course the Supreme Court's summary judgment trilogy and *Twombly-Iqbal* pleading decisions are deleterious innovations because $C_E + C_D$ exceeds zero. Already some research preliminarily suggests that $B_S = 0$. Professor Reinert has shown that cases surviving a motion to dismiss in 2010 do not have a noticeably greater rate of plaintiffs' ultimate success than cases surviving a motion to dismiss in 2006.⁵⁵ Thus, he infers that *Twiqbal* seems not to be yielding a stronger body of surviving cases.⁵⁶ Professor Gelbach has shown the rate of granting summary judgments to defendants in employment discrimination and contracts cases did not significantly decline after

⁵⁵ See Reinert, *supra* note 8, at 39.

⁵⁶ See *id.* at 38–42; see also Alex Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014) (arguing more generally that judges cannot deliver the benefits promised by *Twiqbal*).

Twiqbal.⁵⁷ Thus, he infers that the body of surviving cases seems no more meritorious.⁵⁸

Nonetheless, we suspect that such efforts to show no benefit will fail, for the same reasons that the FJC's efforts have failed. The no-benefit findings share the shortcomings of dismissal rate studies, including the confounding effect of selection.⁵⁹ If the parties have adjusted to the new pleading regime, then the cases remaining in the system will exhibit, at least after a while, the same attributes as the pre-*Twiqbal* caseload.

In all likelihood, both B_S and C_E exceed zero, and so there is no trick for sidestepping the formula. The route to addressing the formula is an arduous, but familiar, one for legal scholars. Drawing on what empirical research is available (*e.g.*, on the seriousness of the problem of nonmeritorious complaints), scholars must rely on hunches (*e.g.*, a pleading procedure is unlikely to screen the merits accurately) and presumptions (*e.g.*, deciding cases on the merits constitutes a superior process) in arguing for the best procedure. The scholars must grapple with getting a rough sense of whether quickly screening unworthy cases out of the system justifies the accompanying denial of access and the difficulties of administering complicated screening tests.⁶⁰ That is, there is no avoiding the issue of whether the benefits of the trilogy and *Twiqbal* exceed their costs.

CONCLUSION

If the Supreme Court wanted to help out defendants through its summary judgment trilogy and *Twombly-Iqbal* pleading decisions, the data indicate that the Court has succeeded. Whether its moves were wise ones, however, remains an open question.

⁵⁷ See Jonah B. Gelbach, Material Facts in the Dispute over *Twombly* and *Iqbal*: Using Defense Summary Judgment Win Rates to Measure the Quality of Cases Affected by Heightened Pleading 2 (July 26, 2012) (unpublished manuscript) (on file with author).

⁵⁸ See *id.*; Engstrom, *supra* note 36, at 1207, 1235 n.99 (praising and criticizing Gelbach's results).

⁵⁹ Cf. Choi, Nelson & Pritchard, *supra* note 39, at 35–38 (conducting a matching study that puts in doubt the screening benefits of the Private Securities Litigation Reform Act).

⁶⁰ See, *e.g.*, Clermont, *supra* note 28, at 1365–70 (discussing the difficulties faced in the wake of *Twombly-Iqbal*).