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Procedural Postures: The Influence of Legal Change on Strategic Litigants and Judges

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by

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Contents

List of Figures

List of Tables

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ABSTRACT OF THE DISSERTATION

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Andrew Martin and James Spriggs II, Chairs

A wealth of scholarship indicates that rational individuals should modify their actions to maximize benefits as conditions change. Participants in litigation are faced with a multitude of opportunities to make decisions regarding if and how they will engage the legal system. Despite this fact, the potential for strategic behavior by litigants is often ignored by researchers due to difficulties in capturing such activity. To the extent that existing studies have focused on outcomes to the exclusion of litigant behavior, they have potentially produced biased results in considering the impact of changes in law, such as Supreme Court decisions. Thus, in order to properly understand the decisions judges make and the impact of such decisions, it is important that we study the extent to which litigants are acting based on goals and expectations in light of changes in the litigation environment. I address these questions in the context of two seminal Supreme Court cases: *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009). These decisions pertain to the pleading standard in federal court: they help define the types of information that plaintiffs must provide in their complaints at the outset of cases to avoid early dismissal and be allowed to proceed to the information sharing stage of litigation and beyond. First, I explore the impact of the cases via qualitative methods based on interviews of federal judges and attorneys practicing in federal court. Their responses identify complex calculations and responses in regards to the decisions. Next, using natural language processing tools and quantitative methods, I test the hypothesis that changes in the federal pleading standards influenced the ways in which litigants pursue and communicate claims. I find evidence that litigants became more specific in

their complaints in torts cases, but not civil rights cases. This pattern is in keeping with concerns that the new standard has unduly impacted litigants who are unlikely to have specific details in the absence of information sharing as part of litigation. Finally, I consider if the generalization of the new standard to all cases via the *Iqbal* decision affected motions to dismiss and the outcomes of such motions in light of the specificity of the allegations. Though my hypotheses are not confirmed, the chapter offers several empirical contributions.

Chapter 1

Introduction

1.1 Theoretical Concerns

Beyond the rather artificial question of *if* law matters, most scholars of judicial politics and law agree that the real concern is *when*, *how*, and *why* law matters (*see, e.g.,* Friedman and Martin, 2011; Lax, 2011; Tamanaha, 2009: 145-49). Unfortunately, for a number of reasons, researchers struggle to capture the effects of law and the impact of judicial decisions. For example, scholars often use blunt measures of case disposition as dependent variables (*see* Fischman and Law, 2009; Lax, 2011; McGuire et al., 2009). This outcome-based approach focuses on the actions of judges to the exclusion of litigant behavior (*see* Baum, 1988; Cross, 2007; McGuire et al., 2009). Additionally, studies tend to focus on the small minority of cases that proceed to high courts after multiple layers of filtration and selection (*see, e.g.,* Friedman and Martin, 2011).

To understand the impact of law and judicial policy, we must look to the effects that legal change has generally (*see, e.g.,* Becker and Feeley, 1973; Canon and Johnson, 1999; Hall, 2010; Wasby, 1984; Wheeler, 2010). Unfortunately, most studies of such impact focus only on lower-court compliance with doctrine (Becker and Feeley, 1973; Canon and Johnson, 1999; Wasby, 1984; Wheeler, 2010). Such a limited view likely misses many important changes in the legal and political environments. Canon and Johnson (1999: 92-93) conceptualize the persons affected,

either directly or indirectly, by a judicial policy as the consumer population. The core of this population are those individuals "who actually engage in acceptance and adjustment behavior" (Canon and Johnson, 1999: 93). It is particularly difficult to identify such consumers and assess their responses: "This deficiency is unfortunate because knowledge about consumption is crucial to understanding the ultimate impact of judicial politics[.]" (Canon and Johnson, 1999: 95-6). Litigants are clearly consumers of judicial policy.

Scholars have an abundance of reasons to believe that changes in law influence underlying behavior among litigants (*see, e.g.,* Baum, 1988; Galanter, 1974; Hall, 2010; McGuire et al., 2009; Priest and Klein, 1984). We begin with the assumption that litigants are rational - that is they wish to maximize utility (*see, e.g.,* Songer, Cameron and Segal, 1995). In the case of civil litigation, rational plaintiffs want to maximize recovery,[1] while defendants want to limit what they pay[2] (*see, e.g.,* Priest and Klein, 1984). Thus, litigants behave strategically - they form expectations about the likely outcomes of actions and choose the course that is most advantageous to them: "Litigation strategy is predicated on prediction" (Singer, Forthcoming: 9). Litigants form their beliefs about potential outcomes based, in part, on how they expect the other parties and the judge in the suit to behave based on what they know about the preferences of these actors (*see, e.g.,* Fox and Birke, 2002; Priest and Klein, 1984; Singer, Forthcoming).

Legal scholars have long focused on the extent to which law engenders stability and predictability, as well as perceptions of fairness and legitimacy (*see, e.g.,* Schauer, 1987). A key assumption in this work is that law allows individuals to order their affairs in light of expected outcomes (*see* Law, 2009*a*). Thus, we would not anticipate that law simply dictates results. Rather, the circumstances in which litigation occurs should influence many types of litigant behavior, such as the decision to pursue a specific claim or settlement. Additionally, political scientists have also long been concerned with the use of power to induce inaction (*see, e.g.,* Bachrach and Baratz, 1962; Cox and McCubbins, 2005).

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[1]This recovery is not limited to monetary damages, it may also include equitable relief, vindication, publicity, etc.

[2]Defendants may pay in the form of money, reputation, etc.

Despite the fundamental expectation that law influences citizens' activities based on changes in expectations, due to the difficulties in capturing such behavior we know relatively little regarding strategic actions by litigants.[3] Although most political science research focuses on judicial behavior, the strongest effects of law likely occur outside the courtroom and among regular citizens. Additionally, due to the systemically non-random selection of cases throughout litigation, we likely do not know the extent to which various aspects of the legal system (such as the changes in statutory and case law) and judicial politics (such as ideology) matter. This is because we expect that participants in litigation will adapt their behavior to maximize benefits, and that such actions will often result in minimal changes in the distribution of specific outcomes (*see, e.g.,* Epstein, Landes and Posner, 2013; Priest and Klein, 1984). Such sorting can bias the results of statistical analyses which rely on an assumption of random selection (Heckman, 1979). Unfortunately, differences in the types of behavior of parties before the court are generally ignored. These lurking problems likely obscure the affect of law.

As part of the attempt to understand the impact of law, which is quintessentially a study of how institutions influence behavior, some researchers have considered the impact of procedural rules (*see, e.g.,* Binder and Smith, 1997; Cox, Thomas and Bai, 2008; Kessler, 1996; McCubbins, Noll and Weingast, 1987; Spiller and Ferejohn, 1992; Yackee and Yackee, 2010; Yoon and Baker, 2006). Unfortunately, such studies have generally focused on differences in outcomes, as have studies of the impact of Supreme Court decisions on lower courts (*see, e.g.,* Gruhl, 1980; Johnson 1987; Songer 1987; Songer and Sheehan, 1990; *but see, e.g.,* Hall 2010; Songer et al., 1994; Spriggs, 1996). We would, of course, anticipate that if procedural rules have meaning and Supreme Court decisions are influential, litigants would adapt their behavior in light of such changes, including their decisions regarding if and how to engage the courts.

Additionally, while judicial proceedings at the trial court level are exceedingly important, as they are the most common type of and often final proceeding, they are generally understudied (*see*

[3] I use the term litigant to refer to the unit formed by the represented party and its lawyer(s) (*see, e.g.,* Wedeking, 2010).

Boyd, 2009; Boyd and Hoffman, 2013; Levin, 2008; Rowland and Carp, 1996). If citizens engage the courts, trial courts are almost always the only courts they ever engage (Boyd, 2010*a*). In the federal system, for example, in the 2012 fiscal year there were 372,563 cases[4] filed in the federal district courts, 57,501 appeals filed in the courts of appeals, and 8,806 cases pending on the Supreme Court docket (with only 77 cases being heard by the Court) (United States Courts, 2013). Thus, the district courts dealt with seven times as many cases as the circuit courts and 42 times more than the Supreme Court.

Inherently, almost all matters heard by appellate courts are a subset of cases in which a trial court has helped shape the case. The factual record in the vast majority of cases is set at the trial court level (Kornhauser, 1994).[5] As a matter of course, appellate courts must rely on the record of testimony and evidence formed in the trial court under the direction of the trial judge. Trial judges and litigants make numerous decisions throughout litigation which shape the contents of this record (Rosenberg, 1970). Additionally, trial courts are essential players in interpreting and implementing judicial policy (Canon and Johnson, 1999). Due to this role the district courts have quite a bit of sway over judicial policy: "Supreme Court decisions mean what district courts say they mean." (Canon and Johnson, 1999: 30, citing Peltason, 1961: 21).

This project focuses on the influence of legal change through the lens of litigant behavior and judicial decision-making in light of such behavior. This work is also part of a re-emerging interest in judicial impact (*see, e.g.,* Hall, 2010; Sweet, 2010); it is related to a larger movement by some scholars to consider and account for selection in the legal system (*see, e.g.,* Lax and Rader, 2010; Kastellec and Lax, 2008). In this project, I consider how changes to the federal pleading standard announced by the Supreme Court in *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009)[6] altered the way in which parties plead. These decisions provide a unique vantage point

[4]Of the filings, 278,442 were civil matters and 94,121 were criminal matters (United States Courts, 2013).

[5]The record may also be formed as part of other types of adjudicatory proceedings, such as administrative hearings (Carp, Stidham and Manning, 2013).

[6]Collectively known as *Twiqbal*.

due to their sweeping nature and prominence.

1.2 Background

The codified standard for federal civil pleadings is that they "must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief" (FED. R. CIV. P. 8(a)). The purpose of the complaint has generally been understood as a means to "give defendants fair notice of its claims and the grounds for them" (Baicker-McKee, Janssen and Corr, 2010). In the absence of such notice, complainants are generally not allowed to pursue related claims. This may include the ability to undertake discovery.[7] Thus, pleaders have an incentive to cover as many claims as possible to maximize flexibility in pursuing redress. So, in the absence of a requirement of specificity, we would expect litigants to plead broadly.[8]

Complainants have an incentive to include all claims in their complaints[9] because the rules create serious risk that claims not brought at the outset may be disallowed (*see Federal Rules of Civil Procedure*, 2013: 15). Otherwise, the party must receive the consent (at least implicitly) of the opposing party or the court in order to amend her pleadings (*Federal Rules of Civil Procedure*, 2013: 15(a)(2)). Furthermore, later amendments may fall outside the statute of limitations unless they are found to relate back to the subject matter of the original filing (*Federal Rules of Civil Procedure*, 2013: 15(c)). Thus, there is strong incentive to assert as many claims as possible from the outset, or, at the very least, during the period of amendment without leave.

Of course, not all claims are equal. Litigants have varying ability to identify wrongdoing on the

[7]Discovery is the formal exchange of information within litigation.

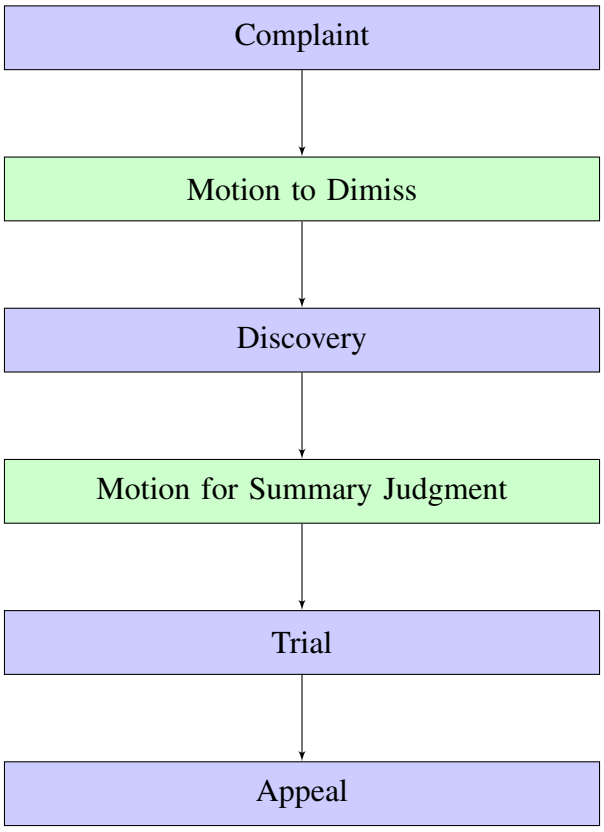
[8]This does not mean that attorneys would never include specific facts. There is an indication that at least some attorneys have included some level of specific facts in complaints for some time (Willging and Lee, 2010). Reasons to include such facts might include signaling strength for settlement negotiations (Hubbard, 2013*a*). But, in the absence of a requirement of specificity, an attorney will generally be broader in her claims as to avoid unduly limiting avenues of recovery for her client (*see, e.g.,* Lee and Willging, 2010*b*; Willging and Lee, 2010).

[9]In federal court, there is a brief window (21 days after service or filing of a responsive pleading) in which a party may amend without leave (*Federal Rules of Civil Procedure*, 2013: 15(a)(1)).

part of defendants due to differences in defendants' culpability and plaintiffs' access to information. Some types of claims are "hard to plead" as discovery is likely necessary to allow the plaintiff sufficient information to set forth specific facts supporting her claim (*see, e.g.,* Gelbach, 2012*b*; Reinert, 2010). Such causes of action potentially include: "antitrust, conspiracy cases, employment discrimination, medical malpractice, eminent domain challenges, and violations of civil rights" (Curry and Ward, 2013: citations omitted). The ability to identify wrongdoing is also affected by the claimant's ability to shoulder the costs of pre-filing investigation (Gordon, 2011). Despite this variation in the complainant's underlying ability to plead with specificity, all claimants have incentives to plead broadly within a permissive environment (*see* Schwartz and Appel, 2010). The biggest difference among litigants is their ability to adapt to a stricter setting (Gordon, 2011; Wasserman, 2012).

Pursuant to Rule 12(b)(6), a party can move the court to dismiss a claim on the basis that there is a "failure to state a claim upon which relief can be granted" (*Federal Rules of Civil Procedure*, 2013). Before 2007, the canonical interpretation of the requirements of Rules 8(a) and 12(b)(6) came from *Conley v. Gibson* (1957) which stood for the proposition that a complaint should only be dismissed for failure to state a claim if no possible set of facts could support it (Hatamyar, 2010; Miller, 2010; Reinert, 2010). This approach was known as the conceivability standard (Stewart, 2010: 169). This was the well-established standard throughout the federal system (*see, e.g.,* Hatamyar, 2010), though some courts may have required more in some cases (Miller, 2010; Schwartz and Appel, 2010). Coyle (2013: 223) aptly described the *Conley* standard as "a very low hurdle designed essentially to keep lawsuits in court, not out." Generally speaking motions to dismiss are filed near the outset of a case and before discovery has been conducted (*see* Gelbach, 2012*b*). Figure 1.1 helps illustrate a common timeline in the the litigation process:

Figure 1.1: Simplified Litigation Process



The conceivability benchmark defined the federal pleading standard for fifty years. In 2007 in *Twombly*, an antitrust case, the Court held that a complaint must state a plausible claim in order for it to be sustained. *Twombly* caught the legal world by surprise (*see, e.g.,* Janssen, 2011; McMahon, 2007; Redish and Epstein, 2008): "*Twombly* was a bombshell" (Hubbard, 2013*b*); "[t]here was certainly no groundswell to reexamine *Conley*, and no one thought that it was in danger of being altered" (McMahon, 2007). After the decision in *Twombly* there was debate within the legal community as to applicability of this plausibility standard beyond antitrust cases[10] and the nature of the standard (*see* Hatamyar, 2010; Redish and Epstein, 2008). Redish and Epstein (2008) undertook an empirical study of district courts' application of the *Twombly* standard and found general incoherence. This is in keeping with some public reactions by judges to the decisions: for example, Federal District Judge Rudolph Randa was reported to have said that when he read the *Twombly* decision that his response was: "What the hell?" (Henthorne, 2010).

Two years later in *Iqbal*, the Supreme Court applied the standard in a civil rights case, thereby dispelling most doubt that it did not apply to all cases (*see* Noll, 2010). In *Iqbal* the Court also attempted to further clarify its rule:

> Two working principles underlie *Twombly*. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. [...] Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. [...] A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Thus, the transition to a general plausibility standard was complete. While the Court took pains to clarify that the plausibility standard did not harken a return to a fact-pleading or specific-fact

[10]District courts applied *Twombly* to cases in a variety of areas, and Redish and Epstein (2008) found no published ruling in which a judge stated that *Twombly* did not apply outside of antitrust cases.

standard, it is clear that the standard requires more factual allegations and specificity than a reading of *Conley* would imply.

1.3 Interest and Prior Research

The legal community and officials have been keenly interested in the ramifications of *Twombly* and *Iqbal* (*see, e.g.,* Gordon, 2011; Gelbach, 2012*b*; Hatamyar, 2010; U.S. Congress, 2009*a*; *"Restoring Access to the Courts."* New York Times, 2009). As noted by two practicing attorneys:

> Few issues are more important in federal litigation than determining whether a case will be dismissed for failure to state a claim or instead slog on into discovery, potential fights over class certification, and beyond. And following the Supreme Court's decisions in *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), few issues have generated as many questions.

(Marshall and Postman, 2010). Though potential impact of the decisions is far-reaching, the decisions have garnered much less attention from political scientists (*but see* Epstein, Landes and Posner, 2013; Yacobucci and McGovern, 2011). Also, despite the relative dearth of media attention to the decisions, the decisions are more widespread in their implications than many higher profile cases (Coyle, 2013: 221). In both the House and Senate there have been proposed bills and committee hearings regarding the apparent changes to the pleading standard (U.S. Congress, 2009*a*, 2011, 2009*b*, 2010). To date, both decisions are among the most cited U.S. Supreme Court cases of all time (*see, e.g.,* Fitzpatrick, 2012). Comparing the number and rate of citations[11] for these decisions to other famous Supreme Court opinions is illuminating:

[11] These citation numbers were obtained from KeyCite via Westlaw.

Table 1.1: Citations to Important Cases as of June 23, 2014

Case	Year	Total Citations	Citations Per Year
Bell Atlantic Corp. v. Twombly	2007	228,023	32,575
Ashcroft v. Iqbal	2009	158,849	31,770
Brown v. Board of Education	1954	20,649	344
Chevron v. N.R.D.C.	1984	67,169	2,239
Marbury v. Madison	1803	22,772	108
Miranda v. Arizona	1966	104,479	2,177
Nat'l Fed. of Ind. Bus. v. Sebelius	2012	2,395	1,198
Roe v. Wade	1973	22,641	552

Figure 1.2: Total Citations

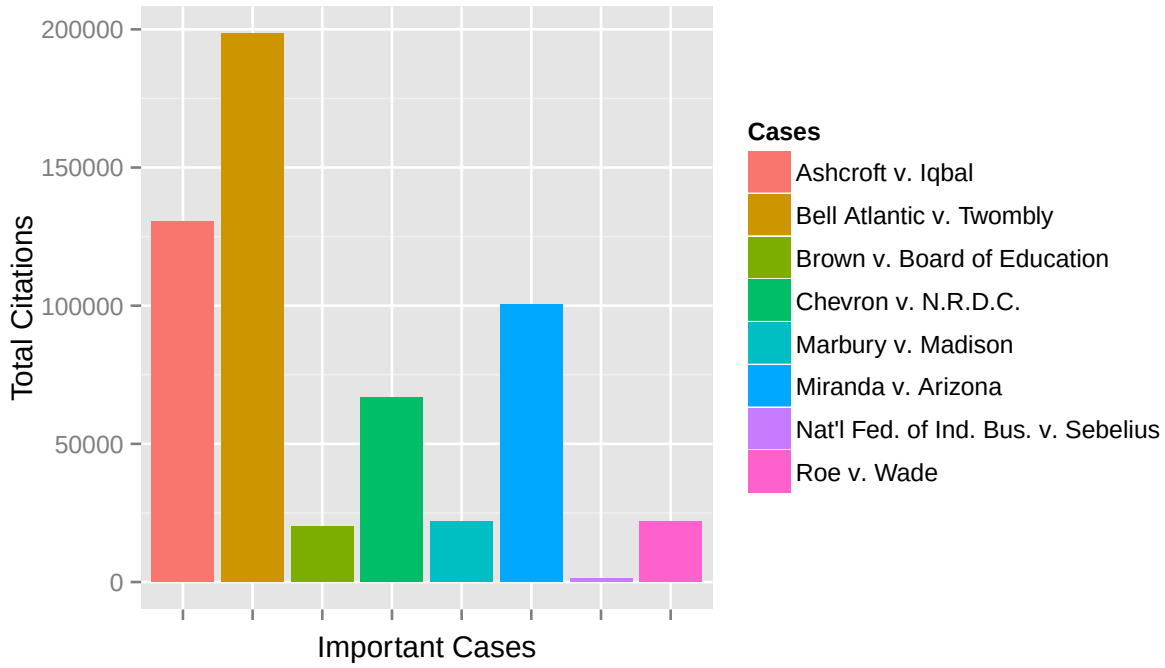


Figure 1.3: Citations Per Year Since Decision

A significant portion of the legal academy believes that the decisions represent an upward shift in the level of specificity that litigants are required to provide in pleadings in order to avoid dismissal for failure to state a claim (a 12(b)(6) dismissal) (*see, e.g.,* Hatamyar, 2010; Miller, 2010; Reinert, 2010; Schwartz and Appel, 2010)(*but see* Garre, 2009; Moller, 2009).[12] Such scholars believe that these precedents have a profound effect on the ability of some parties to seek redress via the federal courts, though they disagree regarding the normative implications (*see, e.g.*, Hatamyar, 2010; *but see, e.g.,* Schwartz and Appel, 2010). Thus, there are potential ramifications as to redress and redistribution, as well as access to courts.

Additionally, there are a number of other concerns. Some have questioned the decisions in terms of the separation of powers and the role of the Court, as substantive changes to the Federal Rules of Civil Procedure are the province of Congress (Miller, 2010). Others have seen the decisions as

[12]Of course, even if the decisions did not alter the standards that were being applied by at least some courts, that does not mean that the decisions did not have an impact. Such decisions could operate to create more consistency across lower courts: in fact, creating such consistency is an important function of the Court (*The Rules of the Supreme Court*, 2010: 10(b)). Furthermore, decisions which are in keeping with existing practices may legitimize and entrench such approaches (Klarman, 2004: 47).

a vote of no confidence in the current system of litigation: an unnamed "veteran Supreme Court litigator" described *Twombly* as "Exhibit A" that the Supreme Court believes that the civil justice system "has become too burdensome, too expensive, too unpredictable, even erroneous in results in cases" (Coyle, 2013: 310). Furthermore, some scholars are concerned that the new standard disproportionately impacts hard to plead causes of action, including civil rights cases (*see, e.g.,* Gelbach, 2012*b*; Hatamyar, 2010; U.S. Congress, 2009*a*; Schneider, 2010).

There have been numerous attempts to capture the impact of these cases empirically (*see, e.g.,* Cecil, Cort, Williams and Bataillon, 2011; Cecil, Cort, Williams, Bataillon and Campbell, 2011; Dodson, 2012; Engstrom, 2013; Epstein, Landes and Posner, 2013; Gelbach, 2012*b*; Hatamyar, 2010; Hannon, 2007; Hubbard, 2013*b*; Janssen, 2011; Martinez, 2009; Seiner, 2009, 2010; Yacobucci and McGovern, 2011). These studies are described in more detail in the following chapters. The majority of these studies have relied on published cases and looked at variations in rulings on motions to dismiss without regard to the potential for selection effects (Engstrom, 2013; Gelbach, 2012*b*; Hubbard, 2013*b*). Generally, such studies show little to no change. Though due to the risk of bias, a handful of scholars have looked beyond judicial orders (Cecil, Cort, Williams and Bataillon, 2011; Boyd et al., 2013; Curry and Ward, 2013; Gelbach, 2012*b*; Hamburg and Koski, 2010; Hubbard, 2013*b*; Lee and Willging, 2010*a*). There are a few studies that have considered if the decisions changed the extent to which plaintiffs are engaging the federal courts (Curry and Ward, 2013; Gelbach, 2012*b*; Hubbard, 2013*b*). To date, there is no significant evidence of such an effect. Additionally, there has been work indicating that motions to dismiss increased after the decisions (Cecil, Cort, Williams and Bataillon, 2011). There have been attorney surveys with varying conclusions as to the overall impact of the cases (Hamburg and Koski, 2010; Lee and Willging, 2010*a*). Other analyses have focused on outcomes from motions to dismiss while attempting to account for litigant selection (Gelbach, 2012*b*; Hubbard, 2013*b*). Such studies have produced mixed results. Finally, one study found evidence, albeit with a non-random sample, that litigants pleadings indicate different topics than before the decisions (Boyd et al., 2013).

Unfortunately, none of these studies have addressed if litigants have adapted to the decisions by becoming more specific in their allegations and if motions to dismiss and dismissals are being seen in cases where, in fact, more information has been provided. The decisions speak directly to the sufficiency of factual allegations, and, thus, it is essential to consider these factual allegations and how they may have changed. These types of changes would represent important effects from the decisions that would otherwise go undetected. Additionally, many of the studies suffer from additional theoretical and methodological problems that indicate that the issue requires further inquiry.

In addition to the need for more quantitative research on this matter, there is a need for additional qualitative research. In light of the potential for many types of litigant selection, it is important to actually consider how litigants may have altered their behavior in addition to considering changes in judicial behavior. One source of information that has generally been underutilized in considering the impact of these decisions, as well as other legal change, is speaking with essential actors in this arena, namely attorneys and judges (*but see* Hamburg and Koski, 2010; Lee and Willging, 2010*a*). Judges obviously are at the heart of judicial decision-making. Attorneys are experts who guide the majority of litigants through the legal system. Not only can each group speak to their own experiences, but they can also give their impressions of changes in behavior of the other group.

Thus, in order to properly understand the decisions judges make and the impact of such decisions, it is important that we study the extent to which litigants are acting based on goals and expectations. I will address these questions in the context of the current federal pleading standard as defined by these two seminal Supreme Court cases. First, I consider the impact of the decisions from the viewpoints of judges and attorneys. Next, I will test the hypothesis that changes in the federal pleading standards influenced the ways in which litigants pursue and communicate claims. I will also analyze if clear application of the new standard to all civil cases affected how litigants bring and judges decide motions to dismiss in light of any such changes in specificity. As part of these analyses, I consider if these changed standards have disproportionately affected civil rights

claims - thereby altering the ability of citizens to seek redress against the government.

Chapter 2

Legal Change and the Perceptions of Key Actors

I begin my investigation regarding the impact of the plausibility standard, as defined by the *Twombly* and *Iqbal* decisions, by considering the impressions of judges and attorneys as to the ramifications of these cases. Judges and attorneys are key actors in federal civil litigation, and, thus, are potential sources of rich information regarding any changes the decisions may have caused in the legal environment. Beyond tallying outcomes, interviewing judges and attorneys allows for a more nuanced investigation of litigant behavior and judicial decision-making. Furthermore, the information from such interviews has many applications. The responses in and of themselves provide us a glimpse into the internal processes and actions of two essential players in the legal system. Furthermore, the information is helpful in carrying out the quantitative research, such as follows in Chapters 3 and 4: the insights from the interviews help inform the theories at the heart of the empirical inquiries, in addition to providing context for interpreting results.

2.1 Literature and Theory

In understanding the impact of judicial policies generally, and Supreme Court decisions specifically, we must look to "the general reactions and changes (or lack thereof) that follow a judicial decision" (Canon and Johnson, 1999: 17). Such impact is by no means limited to compliance by lower courts with higher-court doctrine (Becker and Feeley, 1973; Canon and Johnson, 1999; Wasby, 1984; Wheeler, 2010). In considering impact, attorneys and trial judges are important figures since they are on the front lines of dealing with changes in the legal environment (*see* Canon and Johnson, 1999). This is especially true when the policy at issue pertains to procedural matters that dictate how trial courts are to function (*see generally* Hall, 2010). Such procedural decisions define institutional features, which research indicates affect outcomes (*see, e.g.,* Binder and Smith, 1997; Cox, Thomas and Bai, 2008; Kessler, 1996; McCubbins, Noll and Weingast, 1987; Spiller and Ferejohn, 1992; Yackee and Yackee, 2010; Yoon and Baker, 2006). These rules have the potential to determine the extent to which citizens can access courts and achieve redress (*see generally* Bachrach and Baratz, 1962; Gelbach, 2012*b*). One particularly helpful framework for conceptualizing judicial impact and the roles that attorneys and judges play in shaping such impact was provided by Canon and Johnson (1999) (*see also* Bowen, 1995). In considering the impact of legal change, Canon and Johnson (1999) theorize there are four main populations in considering judicial impact: interpreting, secondary, implementing, and consumer. Lower courts and other officials charged with authoritative interpretation of the policy, such as attorney generals, make up the interpreting population (Canon and Johnson, 1999: 18). Judicial impact research often focuses on the response of the implementing population in that it generally focuses on compliance by lower courts (*see* Wheeler, 2010). The implementing population generally consists of authorities affected by the decision, such as police officers or prosecutors (Canon and Johnson, 1999: 19). Though the implementing population is more rarely studied, there are some notable exceptions (Bond and Johnson, 1982; Hume, 2009; O'Leary, 1989; Spriggs, 1996): for example, Spriggs (1996) investigated the factors influencing administrative agency implementation of Supreme Court decisions. While, the

consumer population represents those individuals who are generally the target of and directly affected, both positively and negatively, by the decision (Canon and Johnson, 1999: 20). The consumer population is more rarely the target of academic research (*but see, e.g.,* Bowen, 1995; Levine, 1973). Everyone else is part of the secondary population (Canon and Johnson, 1999: 22). The secondary population is only indirectly affected by the policy. Research regarding the impact on the secondary population generally takes the form of studies of public opinion regarding Supreme Court decisions (*see, e.g.,* Franklin and Kosaki, 1989; Johnson and Martin, 1998; Hoekstra, 2000; Wasby, 1984).

2.1.1 Attorneys

An attorney plays a multifaceted role regarding the impact of Supreme Court decisions (Canon and Johnson, 1999). This varied function arises from the relationship of the attorney to his or her client and beyond: lawyers are expert agents for their clients, but at the same time they are also bound by professional codes of conduct (*see* American Bar Association and the Center for Professional Responsibility, 2013; Pierce, Cornett and Long, 2011; Richmond, Faughnan and Matula, 2011). Canon and Johnson (1999) describe attorneys as acting as quasi-consumers of the decisions when they advise clients regarding decisions. But, attorneys also act to interpret and implement decisions (Canon and Johnson, 1999; Wasby, 1984: 23). Based on the multiple roles of the attorney, they often act as linkages between populations (Canon and Johnson, 1999: 24). In regards to the *Twombly* and *Iqbal* decisions, attorneys representing clients are intricately involved in two fundamentally important acts (among many other important decisions): first, attorneys representing plaintiffs draft complaints and determine what level of factual specificity to include in describing the claims; secondly, attorneys for the defendants decide whether to pursue a dismissal for failure to state a claim (*see generally* Fox and Birke, 2002; Singer, Forthcoming). When an attorney drafts a pleading on behalf of clients, an attorney must act as a consumer, interpreter, and implementer. This complexity also arises when attorneys draft and file motions to dismiss for failure to state a claim on behalf of their clients.

The importance of decisions by attorneys regarding when to engage the court should not be underestimated. Attorneys play an essential role in the formation of law by judges: "[g]reat care is taken to exclude from judicial consideration all matters except those which lawyers introduce." (Peltason, 1955: 25). Certainly, judges rarely act *sua sponte*, but rather act and rule in response to the motions and requests of attorneys due to the adversarial nature of the American legal system (*see* Milani and Smith, 2001; Shannon, 2012). Thus, the attorneys act as gatekeepers regarding when judges will act to interpret and implement decisions.

Furthermore, attorneys act based on strategy formed in light of expectations regarding the judges in front of whom they practice: "In any scenario, predicting what the court is likely to do permits an attorney to organize her strategies and arguments in specific and beneficial ways" (Singer, Forthcoming). In fact, commentators and scholars have identified predicting outcomes and formulating strategy based on those expectations to be among attorneys' most important functions with regard to clients (Singer, Forthcoming: 9, citing Goodman-Delahunty, Granhag, Anders, Hartwig, and Loftus, 2010; *see also* Kritzer, 1997; 1998). As described by, Fox and Birke (2002):

> Litigation is fraught with uncertainty. Clients depend on their lawyers to help them predict what might happen should their case proceed to trial. Lawyers judgments of the likelihood of potential outcomes may be the most important factor underlying clients decisions whether to proceed to trial or pursue settlement, whether or not to drop a case, and whether or not to invest more time and money in discovery.

Therefore, the role of attorney is very much defined by his perceptions of the likely responses of judges, which are at least in part formed by the law and legal precedent.

The complex role of the attorney in litigation is further illustrated by their legal responsibilities: attorneys owe legal duties to both their clients and the courts they practice in (*see* Pierce, Cornett and Long, 2011; Richmond, Faughnan and Matula, 2011). The duties that a lawyer owes to his client include zealous advocacy, loyalty, and competence (American Bar Association and the Center for Professional Responsibility, 2013: 1.1, 1.3, 1.7). A failure to carry out such duties can result in a number of sanctions, including suits for malpractice and bar disciplinary proceedings (*see* American Bar Association, 2002; Leubsdorf, 1995). Furthermore, attorneys who fail to live

up to these standards can harm their professional reputation and ability to attract clients.

At the same time, a breach of duties owed to the court can also result in sanctions. Attorneys are considered officers of the court and are bound by rules of conduct and are subject to discipline, which includes suspension and disbarment, for failure to adhere to such rules (*see* Pierce, Cornett and Long, 2011; Richmond, Faughnan and Matula, 2011). Generally, attorneys are prohibited from bringing frivolous claims: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law" (*see, e.g.,* American Bar Association and the Center for Professional Responsibility, 2013: 3.1). This can be understood as "a duty not to abuse legal procedure" (*see, e.g., Texas Disciplinary Rules of Professional Conduct*, 1995: 3.01, cmt. 1). Furthermore, attorneys have a duty of candor to the court (*see, e.g.,* American Bar Association and the Center for Professional Responsibility, 2013: 3.3). Furthermore, in the federal courts, Rule 11(b) sets forth that:

> By presenting to the court a pleading, written motion, or other paper - whether by signing, filing, submitting, or later advocating it - an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> 1. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> 2. the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> 3. the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> 4. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(*Federal Rules of Civil Procedure*, 2013: 11(b))

Attorneys who violate this rule are subject to sanctions (*Federal Rules of Civil Procedure*, 2013: 11). Therefore, attorneys are likely keenly interested in changes in the pleading standard in order to provide competent representation and avoid sanctions.

Thus, attorneys play an important and complex role in shaping the impact of judicial policy. They have a unique vantage point from which to describe and explain litigant behavior. Additionally, their interactions with judges shape the outcomes we see. Based on their relationships with clients and courts, they are highly incentivized to be aware of and react to changes in the pleading standard.

2.1.2 Judges

Judges obviously also play an essential role in the implementation of judicial policies (Canon and Johnson, 1999). A trial judge is called upon to interpret law and often also fact (Baird, 2007; Carp, Stidham and Manning, 2013: 19). The trial judge inherently must interpret law (*see* Canon and Johnson, 1999). He or she may also be called upon to interpret or weigh facts. Such assessment may occur as part of a bench trial if the parties forego a jury (Christie, 1992). Or, such analyses may happen regarding determining a dispositive motion, such as a motion to dismiss or motion for summary judgment, in which the judge must determine if the allegations or evidence offered meets the applicable legal standard (*see generally* Canon and Johnson, 1999; *Federal Rules of Civil Procedure*, 2013). Furthermore, there are some state and federal judges who publish scholarly works (*see, e.g.,* Edwards, 1998; Veasey and Di Guglielmo, 2005; Wald, 1985), and thereby influence implementation on a wider level. Judge Posner is one prominent example of jurists who have made their mark in academic circles (*see, e.g.,* Posner, 1973, 1993*a*, 2008). Additionally, judges interact with the attorneys in their jurisdictions and sometimes will speak to local bar groups regarding legal developments (*see* Hamermesh, 2006; Henthorne, 2010; LSC, 2013).

Cases involving procedural matters can also require judges to act as implementers (*see generally* Canon and Johnson, 1999). Hall (2010) conceptualizes of cases, such as *Twombly* and *Iqbal*, that rely on lower courts for implementation as involving vertical issues, as opposed to other types of cases in which the Court must rely on other types of political actors to implements decisions (which he describes as lateral issues) (Hall, 2010). Such vertical issues are in no way limited to

procedural rules, but include areas such as abortion, Miranda Warnings, and the right to counsel (Hall, 2010). Therefore, considering how judges operate in such cases has wide import. Because judges play a pivotal role in shaping implementation, their decisions inherently have political ramifications; as aptly described by Peltason (1955: 3):

> A judge is in the political process and his activity is interest activity not as a matter of choice but of function. Judicial participation does not grow out of the judge's personality or philosophy but out of his position. A judge who defers to the legislature is engaging in interest activity as much as the judge who avowedly writes his own preferences into his opinions.

This is not to say that the personality or philosophy of the judge does not influence his or her decisions. An abundance of research indicates that characteristics of a judge, including ideology, can influence his or her decisions (*see, e.g.,* Canon and Johnson, 1999; Epstein and Knight, 2013; George and Epstein, 1992; Gibson, 1978; Segal and Spaeth, 1993; Hettinger, Lindquist and Martinek, 2004; Randazzo, Waterman and Fine, 2006; Boyd, 2009; Rowland and Carp, 1996). Additionally, there are ample theoretical and empirical reasons to believe that judges are seriously influenced by the law (Epstein and Knight, 2013; Landes and Posner, 1976; Schwartz, 1992; Tyler, 1997; George and Epstein, 1992). Also, they, like everyone else, care about their quality of life in terms of workload and reputation (Epstein and Knight, 2013; Posner, 1993*b*, 2008). Gibson (1983) offered this observation: "Judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (*see also* Canon and Johnson, 1999).

Like attorneys, trial judges are central figures in determining the impact of Supreme Court decisions. This is especially true where the policy at issue pertains to the operation of trial courts. In carrying out this role, judges are likely influenced by a number of complicated factors. Furthermore, they make their decisions in the context of an adversarial system in which attorneys are anticipating and strategizing regarding judges' reactions.

2.2 Methods

Some of the seminal works in judicial politics have included interviews of the relevant decision makers, including judges (Gibson, 1978; Perry, 1991) and clerks (Perry, 1991). Additionally, some scholars have interviewed attorneys in powerful positions in government, such as solicitor generals (Perry, 1991) or administrators (Hume, 2009). While studies of law and courts have become increasingly quantitative, we should not lose sight of the potential benefits of interviewing those individuals at the heart of the interactions that we care about. Nor should we consider quantitative and qualitative research to be mutually exclusive routes by which to investigate a matter (King, Keohane and Verba, 1994; Morgan, 2014).

Information from the relevant decisionmakers can spark research questions and help build theory (Kritzer, 1994; Morgan, 2014). They can provide vital context for what is observed (Edwards, 1998; Kritzer, 1994). Judge Edwards, a judge on the D.C. Circuit, has asserted that:

> [S]erious scholars seeking to analyze the work of the courts cannot simply ignore the internal experiences of judges as irrelevant or disingenuously expressed. The qualitative impressions of those engaged in judging must be thoughtfully considered as part of the equation. This is especially true where the data are subject to multiple interpretations" (Edwards, 1998: 1338).

Certainly, Judge Edwards is not alone among judges in feeling that their experiences are important to understanding judicial decision-making. Judge Posner of the Seventh Circuit noted that: "[m]any judges think that academics do not understand the aims and pressures of judicial work and that as a result much academic criticism of judicial performance is captious, obtuse, and unconstructive" (Posner, 2008: 205).

Furthermore, interviews of private attorneys, the individuals at the heart of strategic decisions by litigants, are relatively rare - though exceptions exist (*see, e.g.,* Heinz et al., 1997; Kritzer, 1998; Schorpp, 2012). Lawyers are experts regarding the legal environment in which they practice. Generally, attorneys guide their clients through litigation based on their experience and perceptions (*see* Fox and Birke, 2002; Goodman-Delahunty et al., 2010; Korobkin and Guthrie,

1997; Kritzer, 1998; Singer, Forthcoming). Moreover, much of the work these attorneys do and the strategies they employ are not reflected in the official records.[1]

Additionally, considering the perceptions of both judges and attorneys together is important in light of the interdependent nature of their beliefs and actions in litigation. Judges generally only decided matters when asked to do so by attorneys acting on behalf of their clients. Attorneys, on the other hand, advise and assist clients based on their expectations regarding judges. And, attorneys must not only interpret Supreme Court decisions in determining how to proceed, but must assess how judges will interpret those same decisions.

2.2.1 Research Design

In order to probe further regarding the impact of the plausibility standard, I conducted semi-structured elite interviews with federal district judges serving on the bench and attorneys who represent plaintiffs and defendants in federal court since at least 2005. The semi-structured interview form is ideal in that it allows sufficient structure to ensure consistent data collection while avoiding serious omissions (Aberbach and Rockman, 2002; Leech, 2002; Perry, 1991). Per Goldstein (2002), advance communications to potential subjects outlining the research and the interviews were sent out. The first letter or email of introduction was sent by members of my dissertation committee and professional contacts. Three days later, I mailed a letter to those same contacts further outlining my research and providing contact information. In order to promote involvement and frankness, the respondents were assure that their identities would remain confidential (*see* Peabody, R.L. and Hammond, S.W. and Torcom, J. and Brown, L.P. and Thompson, C. and Kolodny, R., 1990).

There is no readily available list of attorneys who have practiced in federal district court and have done so since 2005. Thus, I asked contacts in the legal community and law schools to identify

[1]For example, much of the evidence that is exchanged in discovery does not become part of the official record, especially in the majority of cases that do not end in trial. In another example, settlements between private parties are generally confidential.

eligible attorneys and send letters of introduction. Letters were sent to forty-two attorneys by five contacts. Eight attorneys expressed a willingness to speak with me. I was unable to schedule one interview. In another instance, the interview revealed that the attorney did not have the required background. Ultimately, I interviewed six lawyers who were collectively licensed to practice in over a dozen states and were admitted to practice in a little over fifteen district courts. There were attorneys from both the plaintiff and defense sides of the bar: two attorneys generally represented plaintiffs, while the remaining four primarily (but not exclusively) represented defendants.[2] One of the attorneys who generally represented plaintiffs practiced primarily in appellate work.

For the attorneys, the focus of the interviews was on the strategic decisions regarding drafting pleadings and filing 12(b)(6) motions, and the extent to which these strategies changed in light of the decisions. The questions also focused on their understandings of and reactions to the decisions, as well as their observations regarding the responses of other attorneys (including opposing counsel). I also inquired into the attorneys' perceptions regarding if and how the opinions affected judges' rulings on motions to dismiss. The interview protocol for the attorneys can be found in Appendix 2.5.1.[3] Attorneys were randomly assigned tree names as pseudonyms. The attorney interviews took place during the summers of 2013 and 2014.

The sampling frame for the judges was based on the *History of the Federal Judiciary* (2014). The database includes all Article III federal district judges who have served on the bench. Based on the database, I was able to identify those judges who had been serving since at least 2005 and were still active judges on the bench. I assigned each judge a random number and sent out letters in numeric order. The mailing addresses were identified from publicly available websites for the courts. Letters were sent to 310 federal district judges.[4] Fifty-six judges responded in total. Thirty-five judges agreed to be interviewed, but due to resource constraints I was only able to

[2]These defense attorneys also tended to occasionally represent plaintiffs in commercial litigation.

[3]Where required by time limits, interviewees were asked a subset of the questions.

[4]In two instances, judges forwarded the letters to other federal judges they believed would be interested in speaking with me, who in turn contacted me. I interviewed one of these judges.

interview the first 25 judges who responded. One of the judges who initially agreed to speak with me had to cancel the interview due to conflicts. In two other instances, the interviews were never scheduled despite multiple attempts. Ultimately, I conducted interviews with 22 federal judges from 22 different district courts over 10 geographic circuits and 19 states.[5]

My interview with the judges also focused on their perceptions and responses to the decisions, as well as any changes in their decision-making, and the decision-making of other federal judges that resulted from the decisions. Also, I inquired about their perceptions regarding the impact of the decisions on litigant behavior in the form of drafting pleadings and filing motions to dismiss. The protocol for the judge interviews is included in Appendix 2.5.2.[6] Judges were randomly assigned the names of colors as pseudonyms. These interviews were conducted during the summer of 2013. I recorded the interviewees responses via handwritten notes that I took during and immediately after the interviews. I did not electronically record the responses in order to promote participation and candor (*see* Peabody, R.L. and Hammond, S.W. and Torcom, J. and Brown, L.P. and Thompson, C. and Kolodny, R., 1990). Based on the notes, I coded the responses to the questions into general categories[7] to allow me to more easily assess the patterns in responses (*see* Aberbach and Rockman, 2002). Although the number and nature of the interviews makes the responses inappropriate for quantitative analysis, the coding helped me understand the overall picture regarding responses and more accurately describe and analyze them. The results I report below are based on these groupings and a detailed review of my notes.

Based on the nature of these interviews [8], I did not seek to draw inferences regarding the behavior of all attorneys and judges from these interviews. Rather, I used them as a means of learning about the experiences of some attorneys and judges, and as a means of investigating potential

[5]The judges also varied in their political backgrounds in terms of appointment, a little over one-third Republican and the rest Democrat.

[6]Interviewees were asked only a subset of the questions if time constraints existed.

[7]These categories were identified inductively by reviewing the notes.

[8]In the case of the attorneys, the sampling is not random. Additionally, there was a relatively low response rate for both types of interviews. Finally, the small number of observations makes quantitative analysis very difficult.

ramifications of these decisions. Attorneys and judges are uniquely qualified to provide information regarding the impact of legal change as they are involved in many decisions and acts that take place in private or involve internal processes.

2.3 Results

Overall, the judges and attorneys with whom I spoke indicated that the introduction of the plausibility standard announced in the *Twombly* and *Iqbal* decisions did have an impact on the decisions that litigants and judges make in civil cases in federal court. While the interviewees generally identified at least moderate changes in their own practices or the practices of other attorneys or judges, not all interviewees agreed. Also, there were differences in opinion regarding the exact nature and extent of the impact. The respondents painted a complex picture regarding the effects of decisions. Furthermore, the view points of the interviewees also differed on the normative implications of the plausibility standard to the extent that they expressed such opinions.

2.3.1 Before *Twiqbal*

The Standard

I began my inquiries regarding the decisions by asking about the state of the law before either decision: specifically, I asked attorneys and judges to describe the pleading standard before the *Twombly* decision. Beyond a recitation of the relevant case law and the impressions of scholars, I wanted to understand how these judges and attorneys had thought about the standard. Generally, both attorneys and judges described a rather liberal or lenient standard. Overall, the judges I interviewed also described the pleading standard before *Twombly* as being a permissive standard in terms of the requirements for pleadings: of the 22 judges I spoke with, seventeen spoke of the standard in terms of its leniency. Many judges discussed the *Conley* decision by name. Most attorneys I spoke with described the federal pleading standard before *Twombly* as liberal notice pleading.

Many respondents defined the pre-*Twombly* pleading standard in terms of other pleading standards, either the plausibility standard or state standards. Four judges conceptualized of the *Conley* era standard in terms of what came after. While stating the requirements varied by the type of case, two of the judges indicated that the previous standard generally required fewer factual allegations than the standard after the decisions. Another judge spoke in terms of relatively fewer motions to dismiss under the old standard. Additionally, though one judge had no clear memory of the exact nature of the pleading standards before *Twiqbal*, he implicitly understood them to differ from the standard after the decisions because he believed the decisions required him to be more skeptical of claims. One judge described the pre-*Twombly* federal pleading standard as having been more lenient than the state pleading standard in the state in which his court sits. Similarly, one attorney, working primarily in defense, described the standard as superior to fact-pleading standards which he found too demanding and resource consuming. Some interviewees gave more ambiguous responses. The pleading standard was relatively unimportant before *Twombly* according to one judge: he felt that the motion for summary judgment standard[9] had been far more important. This response implies that the standard was likely lenient. Additionally, the mere fact that a judge did not clearly remember the standard before *Twombly*, similarly might imply it was a lax standard. One attorney simply explained that there was variation in how the old standard was applied, though he noted that there was less variance in the application of the pleading standard before the decisions than after. The standard was also described as variable by an attorney. Finally, two judges defined the standard before *Twombly* as being the same or very near to the same as after.

In order to ensure that I was understanding how the standard operated in practice and not just theory, I also asked how specific a complaint would have had to be to avoid dismissal before *Twombly*. Again, the majority of responses, from both judges and attorneys, suggested a lenient

[9] A motion for summary judgment is a motion to dismiss the matter before trial that generally integrates evidence and involves fact-finding, which is in theory unlike a motion to dismiss for failure to state a claim (*see* Thomas, 2010). Motions to dismiss generally occur later than a 12(b)(6) motion and after discovery has been conducted (*see* Thomas, 2010).

standard. All but one of the attorneys stated that a complaint could have been very broad and avoided dismissal under the pre-*Twombly* standard.[10] Similarly, a little over two-thirds of the judges responded that a complaint could have been quite broad and survived a motion to dismiss. Many judges elaborated on the liberal nature of the standard in regards to the specificity of factual allegations. Rather sparse pleadings were allowed according to Judge Red; he gave an example that for a car accident case based on diversity jurisdiction it would have been enough for the plaintiff to have said that there had been an accident and the defendant had caused the plaintiff's injuries. According to Judge Orange, the *Conley* standard was very easy to apply with the exception of a few very unusual cases, such as cases with outlandish claims. In her estimation the prior pleading standard required very little for a claim to survive a motion to dismiss. Similarly, Judge White stated that only a bare statement was required; before *Twombly*, she erred on the side of finding that the pleader has stated a claim and would only have dismissed a cause of action where the plaintiff had plead his or herself out - in other words, the plaintiff had included specific facts that revealed there was not a cognizable claim. Judge Silver indicated that notice pleading had been construed quite liberally before *Twiqbal*, and it could sometimes be very difficult to understand the nature of the claims brought under the *Conley* regime.

Not all judges described the standard before *Twombly* in such permissive terms. Judge Black stated that she understood the old standard to be the plausibility standard or something very close to it. Other judges gave more vague answers. Two other judges simply, if not tautologically, replied that a complaint would have had to have been "specific enough" to survive dismissal. Four judges explicitly stated that they could not quantify or describe the specificity requirement. There was no response from one judge.

Finally, in order to get a sense of the application of the pleading standard generally, I asked the judges and attorneys a series of questions regarding whether application of the old standard had varied across judges. All of the attorneys practicing primarily in trial courts reported variation in how the dismissal standard was applied before the plausibility standard. Attorney Pine noted that

[10]The other attorney only stated that the level of specificity varied.

judges decided cases in light of their experiences before coming to the bench and their world views. Furthermore, he noted the indeterminacy of law and inevitability of variation in the application of standards based on ideologies and perceptions.

The attorneys, perhaps unsurprisingly, seemed to have more information about how overall judges applied the standard than the judges themselves. While several judges acknowledged that judges vary in their approaches, many indicated that they had little information regarding how their colleagues in the district and beyond applied pleading standards before and after the decisions. Several judges noted how they were very busy and had little time to monitor other trial judges, especially in light of the fact that the decisions of federal trial judges are not precedent. Another judge wryly explained that dismissals aren't what judges want to talk to each other about when they see each other at conferences. More than one judge described themselves as isolated. Regardless, most indicated that they believed there was likely variation in the ways other district judges applied the dismissal standard. Only one jurist stated there was not variation in her district.

Litigant Status Quo

Due to concerns about litigant selection, I also asked judges and attorneys about litigant behavior before the decisions. First, I asked the interviewees questions about how specific complaints were before *Twombly*. Judges were asked about complaints filed in their courts. While attorneys were asked if they included specific facts in pleadings in federal court before the decision. As for individual attorneys, their pleading practices varied somewhat in this early period. Two attorneys, one plaintiff-oriented and and the other defendant-oriented, said they would sometimes include specific facts in complaints before *Twombly*. It depended on the strategic demands of the situation, such as the identity of the judge, according to one of the attorneys. The plaintiff's attorney noted that being too detailed carried risk, and that he generally did not provide more detail than necessary. On the other hand, two other attorneys, both defense attorneys, reported commonly including specific facts in pleadings.[11] The remaining attorneys did not have practices

[11]Pleadings can include answers and other types of documents filed with the court.

where they regularly drafted pleadings.

Attorneys Oak and Ginkgo noted that pleading practices among attorneys varied before and after the decisions. They provided some potential general explanations for variation. Attorneys who file more broad complaints may have a number of motivations: they may not be detail oriented; many trial lawyers prefer to be vague because surprise can be an asset; and, there is a risk that in being too specific you might plead yourself out of court. Those attorneys who filed more detailed complaints likely see the complaint as a means of encouraging settlement or educating the audience. Generally, Attorney Oak noted that plaintiffs' attorneys are acting as investors and are looking to make returns on their investments.

Judges impressions of how specific complaints were before the decisions paint a similar picture: when asked to describe how specific complaints were before the *Twombly* decision, the modal answer was that it varied. Only nine of the judges provided some description as to the specificity: three described the complaints as relatively specific; three described the complaints as broad; and, finally, another three judges described the complaints as broader than after the decisions. Interestingly, there are reasons to believe that judges do not see all or even a random sampling of the complaints filed in their courts: as Judge Olive pointed out, she generally does not see complaints. Very likely many federal judges generally do not read a complaint in a case unless there is a specific reason, such as a motion to dismiss, to do so. This seems particularly likely based on how busy many judges report being.

I also asked the attorneys about how often they filed motions to dismiss before *Twombly*. Among the four attorneys who represented defendants, their pre-*Twombly* motion to dismiss practices varied. One attorney who was involved in complex matters noted that he has almost always filed in the cases he was involved in due to the nature of the suits. Another only filed where he found the complaint to be too broad. The remaining two attorneys discussed strategic decisions regarding when to file a motion to dismiss. The first of these attorneys would only file if it was a problem that the plaintiff could not fix, otherwise the motion was not worthwhile. While the other of these attorneys only filed if he thought they were likely to prevail: he would not file a motion

that his client was very unlikely to win not just because of the costs to his client but also his own desire not to waste time. Furthermore, such loses can harm a lawyer's reputation (*see* Goodman-Delahunty et al., 2010; Kritzer, 1998). Overall, the attorneys provided somewhat vague descriptions implying the strategic nature of the decision to file a motion to dismiss.

2.3.2 After *Twiqbal*

Next, we turn to considering if and how attorneys and judges responded to the decisions in *Twombly* and *Iqbal*. Many of the attorneys who I spoke with reported tending to think of or describe the *Twombly* and *Iqbal* decisions as one decision. This is not surprising given the nature of the cases and the intervening years. (*Twombly* was decided in 2007 and *Iqbal* was decided in 2009.) Given this conflation, I will describe the responses to the decisions generally and discuss impressions regarding the separate decisions to the extent that the respondents were able to provide them.

The Standard

When asked about the holdings in the cases, attorneys and judges generally provided their broad impressions of the plausibility standard. The majority of attorneys conceived of the pleading standard after the decisions as being stricter than before, but their responses revealed intricacies in their understandings. The majority of attorneys described the plausibility standard, as set forth in the holdings of the decisions, as stricter than the prior standard. Several attorneys noted the need for more detailed factual allegations. More than one attorney described the plausibility standard as being more like a fact-pleading standard than more liberal pleading standards they had encountered in various state courts or the previous standard in federal court.[12]

When asked about the decisions, judges generally described the holdings in terms of change. Half of the judges described the *Twombly* standard as representing a stricter standard than before or

[12]Attorneys often used the pleading standard in the state courts they also practiced in as a point of comparison. Also, several indicated that federal practice in their state should be understood in terms of such standards.

one that required additional factual allegations. Another judge simply identified the holding in *Twombly* as easy to apply, whereas she had identified the previous standard as difficult to implement. In two instances, judges described having understood the *Twombly* decision to represent an actual or possible change in the standard but did not elaborate on the nature of any such change. Similarly, another judge simply described the holding as broadly applicable. The decision was confusing to two other judge respondents. It was unclear to Judge White how the standard differed from the heightened pleading standard that is applied to fraud allegations (*Federal Rules of Civil Procedure*, 2013: 9). Additionally, Judge Orange found the holding to be difficult to interpret. Finally, despite having no clear memories of before *Twombly*, one judge felt like the plausibility standard has raised the bar, albeit rather moderately.

Finally, two judges did not describe the holdings in terms of change at all.[13] For example, Judge Black felt the judgment confirmed her existing practices. Interestingly, though she felt that the standard had not changed, Judge Black did note some changes in litigant behavior before and after the decisions. She speculated that some attorneys began including more facts in recognition that the standard was getting somewhat tighter. Also, she identified causes of action that are particularly susceptible to dismissal after the decisions. Another judge felt that little, if anything changed, based on the introduction of the plausibility standard.

I also asked the interviewees direct questions regarding how the decisions changed the pleading standard, if at all. Again, while most responses indicated there was change, the answers varied. In responding, only two judges stated flatly that the standard did not change, though four additional judges responded that they were unsure if anything had changed. One judge did not provide an answer. The remaining thirteen judges described a stricter standard and requirement for additional specific facts. Judge Orange described the post-*Twiqbal* regime as a fact-pleading standard. Whereas Judge Olive believed we are very slowly approaching fact pleading, but are not there yet. Most judges described the changes in relatively moderate terms.

More than one judge mentioned that they believed that the reaction of plaintiffs' attorneys or legal

[13] A third judge was unsure if the *Twombly* decision specifically had changed the pleading standard.

scholars to the decisions had been overblown. Judge Ochre joked about the pain that civil procedure professors seemed to be experiencing based on the loss of the *Conley* standard. This more dismissive view was not shared by all judges. For example, multiple judges expressed concern that the decisions negatively impacted access to courts.

As described above, the attorneys generally defined the holdings in terms of change in the pleading standard. Attorney Oak described the decisions as changing the perceptions of attorneys and judges regarding what was required to avoid dismissal for failure to state a claim. He wouldn't describe the decisions as having changed the pleading standard per se but rather having clarified it and altered the focus of the relevant players. Two of the attorneys described the impact of the decisions in mixed terms: sometimes they described the decisions as driving change, while at other points they noted that the decisions changed little to nothing. When asked directly if the decisions changed the pleading standard, the majority of attorneys reported that it had increased the threshold to avoid dismissal.

Again, in order to make sure I understood the full impact of the decisions, I asked judges if they had applied a higher pleading standard in response to the cases. Similarly, I asked attorneys if they had encountered judges applying a higher pleading standard. Interestingly, when the judges were asked if they applied a higher pleading standard when they decided motions to dismiss, fewer judges indicated clear differences before and after the decisions. The majority of judges did indicate that they apply at least a somewhat higher standard in deciding these cases. Judge Orange described the decisions as changing one's reflexes towards dismissals. Even a few judges who reported misgivings about the decisions indicated that it had changed the standard they applied. Many judges, however, described changes or possible changes in the pleading standard as relatively modest. Thus, most judges did indicate that the decisions influenced their decision-making in at least some cases. Many judges brought up that it is standard to allow litigants opportunities to amend their complaints if they are lacking, often multiple times. Attorneys also noted this fact.

Multiple judges believed the impact of the decisions varied greatly across types of cases. Judge

Silver felt that they generally impacted complex cases based on economic theories, such as securities fraud and antitrust. He did not believe they impacted car accident or discrimination cases. Another judge indicated that after *Twiqbal* he was less likely to infer discriminatory actions in the workplace. Several judges indicated that the decisions have primarily had an impact regarding pro se cases. These judges indicated that the decisions made them feel more justified in dismissing matters with unrepresented parties that would otherwise clog the courts with no real chance of success on the part of plaintiffs. Many of the judges I interviewed noted how busy they were. To the extent that some judges understood the decisions as tools to increase control over their caseload and dismiss frivolous lawsuits, they seemed grateful.

The responses from the judges did not, however, uniformly indicate a change in decision-making. Four of the judges were unsure but thought it was likely very similar to the standard they applied before. Two judges reported a temporary increase in the standard they applied. One of the judges noted that at first he believed the plausibility standard required a stricter approach to pleadings, but that over time he concluded the standard was effectively the same as before. Two judges reported applying the same standard as before, but for very different reasons. Judge Black, who generally favored early dismissal of cases that appeared weak, reported feeling vindicated by the decisions. While another judge who felt that the *Conley* standard was appropriate and consistent with the rules at large, simply continued his prior practices despite the decisions. Judge Silver noted that most cases do not proceed to trial, and, thus, the benefit of granting a motion to dismiss may be outweighed by doing a good job drafting the decision.

Attorneys, who deal with multiple judges, generally observed a change in approach. All of the attorneys reported that at least some judges began applying a higher standard after the decisions. One attorney, who gave mixed responses as to the impact of the decisions, noted that a motion to dismiss was more viable in federal court than state court, and that the plausibility standard had a lot to do with that. Additionally, five of the attorneys were asked about variation in approaches to pleading standards and noted variation among judges.

I also asked the judges if they believed other federal judges applied a higher standard due to the

decisions. As noted above, most judges claimed little knowledge of other judges' practices in regards to dismissals for failure to state a claim. Those judges with opinions regarding how other judges were ruling generally believed that others were applying a higher standard, as they were. Judge White expressed a hope that she was not unusual in her approach. A couple of other judges mentioned a belief that some other judges would use the decisions to ease workload. Certainly, several judges mentioned the high caseloads with which they must contend.

Normative and Broad Impressions

In responding to my questions regarding the impact of the cases, some respondents offered opinions as to the normative or broader theoretical implications of the decisions. The normative responses were mixed. Two attorneys offered such reactions: one described the change as needed, while another attorney felt the decisions created the potential for wrong decisions in the hands of some judges. Unsurprisingly, the attorney who appreciated the decisions primarily practices on the defense side of the bar, and the disapproving attorney generally represents plaintiffs. Judges' responses, when offered, were similarly mixed. Some judges adamantly oppose the decisions and believe they represent an aggressive narrowing of access to justice. A few judges expressed concern that the Supreme Court had amended the Rules of Civil Procedure without following the proper procedure for doing so, which would have required Congressional action and allowed for public notice and comment. At least one judge believed that the decisions primarily benefitted defense attorneys who had increased justification for filing a motion to dismiss and billing for such. While some others, such as Judge Black, heralded the decisions as important checks against run away litigation. Most judges did not express strong normative opinions on the matter.
Other respondents commented on the broad meaning of the cases. Attorney Oak noted more generally that the plausibility standard is fundamentally about when we want juries to decide cases and how to determine which cases they should decide. Attorney Pine described the opinions as properly understood as just one part of a larger movement within the federal courts towards more disclosure and reduced uncertainty. This movement importantly included Rule 26 disclosure

requirements and Rule 16 conferences. Relatedly, Judge Ochre believes there has been a long term general trend away from filing in federal court that predates the decisions due to the requirements of Rule 26.

Litigant Adaptation

I also asked the interviewees about changes in litigant behavior due to the decisions. On the whole, the responses indicated there were changes. First, the interviewees indicated that litigants altered the complaints they filed due to the decisions. Judge Blush provided a particularly interesting analogy regarding the impact of the plausibility standard, he compared it to a joke regarding building the border fence: on one side there is a 20-foot border fence being erected, while on the other side there is a shop selling 21-foot ladders opening (Trever, Sept. 24, 2006): in other words, there is adaptation. Overwhelmingly, the judges reported some changes in the pleadings practices of attorneys. Most judges indicated that at least some plaintiffs' attorneys included more factual allegations. Judge White believed pleadings have gotten longer. Two judges actually expressed concern at the increase in terms of it creating burden. One of these judges indicated that he has required complainants to replead on the grounds that the petitions contained too much detail and were simply too long. One judge was unclear if pleadings had changed but noted that if he was an attorney practicing in federal court, he would have begun adding more factual details.

Likely based on the varying roles of the attorneys I spoke with, there were mixed responses regarding changes in the lawyers' own pleading habits. In response to the decisions, the plaintiffs' attorney who regularly filed complaints reported including more specific facts after the decisions. Two of the defense attorneys indicated a little more in the way of detailed allegations, while one defense attorney stated he had not changed his practice. Thus, attorneys who practice primarily in defense reported little to no change in their pleading practice. One of these attorneys, who noted that he was generally more specific in his pleadings than most attorneys, attributed this, in part, to the culture of practice in which he was trained. Also, the attorney noted that lawyers who practice

in states with fact-pleading standards are more likely to be specific in federal court. The other attorneys denied sufficient knowledge to respond.

When I asked attorneys about changes in the practices of other attorneys, there was more indication of a change in pleadings. This is unsurprising given that most of the attorneys I spoke with did not engage in much complaint drafting. Though the defense attorneys generally did not change their own pleading practices (which are outside of the direct aim of the *Twombly* and *Iqbal* decisions), two defense attorneys noticed an increase in the factual allegations included in complaints by plaintiffs. One defense attorney believed that complaints grew in length seven to ten fold in his areas of practice.[14] The other attorney reported much more modest increases.

There are also indications of some changes in the rate of defense attorneys filing motions to dismiss, though the evidence is not as strong as with the indication of changes in pleadings. Most (eighteen), but not all, of the judges believed the cases have resulted in an increase in the numbers of motions to dismiss. Though five of these judges noted that there was a surge in motions after the decisions that declined over time. Judge White believed the motions increased after each decision with the greatest increase occurring after *Iqbal*. Judge Orange was unsure because she perceived that defense attorneys had used motions to dismiss for tactical means, such as delay, since before the decisions. Similarly, Judge Ochre was unsure if the number had increased because defense attorneys seemed to have always overestimated their chances of winning such motions. One judge who reported a bump in motions to dismiss that subsided stated that litigants learned he wasn't going to grant such motions, and, thus, they stopped filing them.

Of the defense attorneys, one reported filing more motions to dismiss after the decisions, while the remaining attorneys did not. This attorney reported that upon learning of the plausibility standard, he immediately began looking to file motions to dismiss. Additionally, he made liberal use of motions to dismiss for less than all of the claims after the decisions. Two defense attorneys reported not filing more motions to dismiss because of the decisions, but both felt the decisions

[14]He also explained that in cases where there is a premium on being the first to file, the first plaintiff can still get by with a placeholder complaint and deal with providing details later. He did, however, reported that overall plaintiffs are filing much longer complaints.

provided them with better ammunition. Interestingly, one of these attorneys indicated that while judicial behavior matters quite a bit in assessing his strategy, he had almost always filed motions to dismiss even where the judge dislikes them due to the nature of his training and and his practice area. When asked about changes in the litigation practices of other attorneys, the two plaintiff attorneys and one defense attorney reported noticing more motions to dismiss. Additionally, a few attorneys noted other potential litigant responses. Attorney Ginkgo speculated that the standard might keep a firm from taking a case and noted the importance of case screening generally. He also discussed the importance of pre-filing investigations. Attorney Sycamore noted that generally defendants prefer to be in federal court than state court and that about half of that effect is the pleading standard, though the other half has to do with perceived pro-plaintiff biases in many states. In Attorney Pine's estimation the principle that the decisions stand for provided defense attorneys with a tool to get additional information from plaintiffs. He indicated that in his practice these requests rarely take the form of formal motions.[15]

Many judges thought that the response to the decisions appeared to vary based on attorney characteristics. Judge Fuchsia believed that the decisions have particularly influenced the practices of younger attorneys. Similarly, Judge Blush noted that his younger law clerks seemed to be most influenced by the opinions. In both cases, the judges believed that the lack of prior context influenced how the decisions were interpreted. Many judges believed that responses to the decisions by attorneys were conditional upon the quality of the attorney and the nature of the attorney's practice. They perceived that better attorneys adapted to the new standards more readily than less-skilled attorneys. Though, Judge Silver posited that the decisions only matter in elite cases involving economic theories where the best attorneys are involved. Thus, there are endogeneity issues with sorting out adaptation issues.

[15] Attorney Pine also noted that it is rare that defendants do not understand the nature of a claim even in light of rather vague pleadings because in the cases with injuries or claims of discrimination there have generally been investigations before suit and various filings with government agencies. Thus, even in light of broad claims, defendants generally understood the basis of the suit.

Surprise

In the literature, the announcement of the *Twombly* decision is generally described as having caught the legal world unaware. I asked the interviewees if they had been surprised by the decision. Slightly over half of the judges reported being surprised by the decision. Judge Orange remembers being shocked by the decision. The most common reasons cited for surprise included the age of the *Conley* standard and seeming break from precedent. Three of these judges were confused by the decision. Judge Fuchsia was astonished by the breakdown of the justices votes, but did not explain further. A few judges noted the big reaction in the legal community to the decision as a source of great interest.

On the other hand, seven judges said they were not surprised by the decision. Some of these unruffled judges felt the decision was consistent with prior Supreme Court decisions or goals, or that it represented a reasonable choice. For example, Judge Silver indicated the decision was foreseeable because he felt that the Supreme Court had been looking for a solution to nuisance suits. For some of the judges, there was no indication that they anticipated the decision, but rather they were reticent to describe it in terms of surprise: a few judges directly stated that they were unsure of the use of the word surprised; also, a few judges asserted that no Supreme Court decision would surprise them. Many judges were unsure if other judges and attorneys were caught unaware by the decisions, but of those judges who voiced opinions, the majority believed there was at least some surprise. For example, one judge reported that his clerk brought the decision to him and told him that it was important.

Similarly, half of the attorneys reported being surprised by the *Twombly* decision, noting that they did not anticipate the decision. One attorney explained that while he had not been aware that a decision on the matter would be coming down, he was not shocked by the outcome based on the ideological positions of the majority of the justices. An additional two attorneys reporting that they were unsure if they were surprised. The attorney who was nonplussed in the face of the *Twombly* decision stated that his lack of surprise stemmed from the fact that he believe the decision applied, at least primarily, to antitrust cases where a high standard brought it in line with

the pleading standard for securities. Most attorneys were unsure or did not provide an opinion regarding if other attorneys and judges in the district experienced surprised when they learned of the ruling, but the two attorneys who did voice an opinion stated that there was surprise or they assumed there was.

Scope of *Twombly*

Based on the literature, there was confusion as to the scope of *Twombly* after it was decided. I asked the attorneys and judges about their understanding of the decision when it was decided. The responses of the judges reflected both uncertainty and disagreement, though more judges reported believing the decision had broad implications than those stating they thought it was limited. Nine judges reported being confused as to scope, with three of those judges leaning towards a narrow construction and three leaning towards a broad approach. For example, Judges Orange and White reported that when *Twombly* was decided it was very unclear if it applied outside of antitrust cases; similarly other judges noted that the scope of the *Twombly* decision was uncertain before *Iqbal*. Unsurprisingly, this uncertainty resulted in different behavior by different judges. Judge Orange did not apply the plausibility standard when considering the pleading standard outside of antitrust matters until the Iqbal decision made it clear that it applied across the board. Judge White, on the other hand, assumed that more factual allegations were required and did her best to apply the decision. She began to demand more specific facts. (After the second decision, even more so.) One additional judge reported believing the decision was limited in scope. Seven judges reported believing it had broad implications, though the judges did not always define such breadth. Judge Olive dismissed speculation that *Twombly* only applied to antitrust cases as silly. The remaining judges either could not remember what they thought or did not provide a response. Understanding of the scope of the *Twombly* decision was also split among attorneys, of the four attorneys who remembered their beliefs as to the scope of the case, half believed it applied broadly and half believed it was limited.

I also asked attorneys and judges about their understanding of the scope of the decision in the

broader legal world. When asked about consensus as to the scope of the decisions in the district, circuit, and beyond, most judges did not respond. Five judges did provide opinions as to consensus within their districts. Four of these judges reported at least some variation in understanding of the scope of the opinion. For the five attorneys who were asked about consensus regarding the scope of the *Twombly* decision, all reported that there was not a consensus in the district, circuit, and wider judiciary regarding the scope of the decision.

Reactions to Iqbal

Some judges and attorneys had distinct memories of *Iqbal*. The overall impression of the decision was that it laid to rest the question of the scope of *Twombly*. Even those judges who were surprised by *Twombly* were generally not surprised by *Iqbal*. Judge Orange noted that there was confusion and the opinion was a clarifying one. Those judges with distinct memories of the *Iqbal* decision overwhelming reported that it generally ended disagreement over the broad applicability of the plausibility standard. One judge, however, noted that it did not entirely end the conversation pointing to decisions by Judge Posner indicating that the plausibility standard applies only in complex cases. Additionally, one attorney was surprised by the *Iqbal* decision, because he had believed that the plausibility standard only applied in antitrust cases. He noted that *Iqbal* had raised the bar for pleadings and that previously you could be rather broad in your filings. He contrasted the new regime with the pre-*Twombly* world in which one could file very broad pleadings if confronted by the statute of limitations for a claim - the implication being that the attorney would not have very many facts at the time of filing. The other attorneys either did not remember their response to the *Iqbal* decision or were not surprised.

Appeals

Additionally, when asked about circuit court responses to the decisions, the judges gave mixed responses. Many noted that they had not had cases taken up on appeal. Additionally, the majority of judges reported that dismissals are very rarely appealed generally. No judge expressed concern

regarding reversal. As several judges noted, most judges grant multiple opportunities for amendment before dismissing a case. One judge noted that when such leave is allowed and the party does not amend, there are generally no appeals. Furthermore, Judge Orange noted that if the entire case is not dismissed, the decisions generally cannot be appealed until the resolution of the case at the trial court level, which might take years.

Hard to Plead

Due to concerns that the decisions may have disproportionately affected certain types of cases, I asked the interviewees questions regarding pleading across issue areas. First, I asked if in their experience certain types of cases were harder to plead than others. The majority of judges believed that some types of cases are inherently harder to plead than others, though the judges did not all provide the same examples. Run of the mill tort or car accident cases were examples of easy to plead cases that at least three judges raised. Examples of hard to plead cases generally fell into the following categories: civil rights, employment discrimination, complex commercial litigation, economic theory claims (antitrust, securities, etc.), fraud, and statutory causes of action. The majority of attorneys also thought that some types of cases were harder to plead than others. In addition to some of the examples provided above, attorneys also listed: statutory claims, state claims, and complex multi-party litigation.

I also asked directly if certain types of cases are more susceptible to dismissal after *Twombly* and *Iqbal*. A few judges were unsure if certain types of cases were mores susceptible to dismissal under the *Twiqbal* standard. In three cases the question was not reached. While four additional judges did not think that any particular types of cases were more susceptible. A few of these judges noted that flexibility in the standard kept such uneven application from happening. One judge simply stated that only bad cases are more susceptible. But thirteen judges did offer examples that included civil rights claims, employment discrimination claims, and antitrust cases. One judge stated that cases in which the defendant held the vital information were more susceptible to dismissal after the decisions. Several judges also identified cases regarding

mortgage foreclosures brought by plaintiffs as a new type of case that has arisen since the decisions that is often dismissed. According to one of these judges, these types of cases are generally brought as a means of delay and have little to no basis in law. Three attorneys also thought that certain cases were more susceptible to dismissal after the decisions. Additional examples from attorneys included statutory claims and state claims.

Empirics

Some of the interviewees themselves pointed to the need for empirical research in this area. More than one judge noted that questions regarding the impact of the cases represented empirical inquiries that they could not answer with certainty based on the information at hand. Even a judge who looked over previous cases in preparation for the interview expressed uncertainty if there had been changes. A few judges suggested that I look at dockets on the PACER system for more information. Another judge thought considering changes in complaints length would be fruitful. An attorney also suggested comparing the relative length of complaints.

2.4 Discussion

The responses I elicited in my interviews paint a complex picture of the aftermath of plausibility standard that can help inform quantitative research in this area. Overall, the judges and attorneys indicated that the pleading standard has become more stringent as a result of the *Twombly* and *Iqbal* decisions. Though based on their reports the changes may be relatively moderate. The respondents were not, however, uniform in their perceptions of the impact of these decisions. There is evidence of variation across judges and types of cases. There are strong indications that litigants have altered their strategies based on these decisions. Thus, it is important in considering these cases to be careful about controlling for issue area and judge and district characteristics. Furthermore, the interviewees' responses indicated that the potential for litigant selection should be taken seriously. The interviews helped paint a picture of where any changes due to the

decisions are most likely being expressed. Overall, the attorney responses revealed that strategy is at the heart of the decisions that attorneys make in litigation. There is evidence from both judges and attorneys that litigants altered their behavior in light of the decisions. Overall, the respondents indicated that plaintiffs are filing more detailed claims and defendants are likely bringing more motions to dismiss.

Litigant selection may also explain some interesting patterns in the responses. For example, judges broadly reported seeing signs of litigant selection, specifically in terms of the contents of complaints and the rate at which motions to dismiss were filed. Generally judges reported seeing such changes even where they believed or were unsure the standard had changed. Also, judges were quicker to identify changes in the pleading standard than their application of the standard even though, save for rare instances, the judges gave no indication that they were not applying the standard. (Though, it should be noted that a majority of judges still reported applying a higher standard, and attorneys reported at least some judges applying a higher standard.) Similarly, a few attorneys gave very mixed responses regarding whether the decisions had much of an impact. All of these patterns could be explained by litigant selection. It may be that some of the interviewees perceive the impact of these cases as being relatively moderate because litigants have adjusted their behavior regarding the ways in which they engage judges and courts. Therefore, it is important to consider the factual allegations in the complaints. Also, in addition to grant rates, the motion filing rate is important.

The interviews, however, also leave open many questions that require further inquiry. Based on the variation in responses and limitations of the interviews, it is unclear to what extent the decisions have had an impact. Though the majority of respondents indicated that the cases did change the legal environment, we can not gauge the extent to which these experiences were typical. Furthermore, the knowledge of the interviewees is inherently limited to their experiences, perceptions, and memories. Interestingly, some respondents, both judges and attorneys, noted that certain answers regarding the impact of the cases required empirical research. A handful suggested inquiries I could undertake, such as looking at the length of complaints or relative

number of filings of motions to dismiss. These responses help highlight how quantitative research does not lie in opposition to seeking information from individuals with substantive knowledge. With these suggestions, and a wealth of insights, in combination with the existing theory and literature in mind, I undertake quantitative inquiries in Chapters 3 and 4.

2.5 Appendix

2.5.1 Interview Questions - Attorneys

Below is the list of questions and topics that will be covered in interviews with attorneys who practice in the federal courts. The interview questions are designed to take approximately one hour for a full interview.

I would like to learn about whether the *Twombly* and *Iqbal* decisions changed federal litigation and the nature of any such changes. Based on your position as an attorney practicing in federal court, you are in a unique position to understand any such changes. These questions are intended to ask about your general experience and impressions and not about specific cases in which you may have been involved.

I would like to consider the effect of both decisions. Therefore, I am going to ask you about the decisions separately. First, I would like to learn about the *Twombly* decision:

1. Would you please tell me about the pleading standard before *Twombly*.
2. Would you please tell me about the holding in *Twombly*.

I would like to ask you about civil litigation practice before *Twombly*:

3. Before *Twombly*, would you include specific facts in pleadings? Why?
4. Before *Twombly*, how specific would a claim have to be to avoid dismissal under a 12(b)(6) motion? Did it vary by judge?
5. Before *Twombly*, under what circumstances would you file a 12(b)(6) motion? Other attorneys in your district?
6. Before *Twombly*, do you think there was variation in the dismissal standard applied in your district? Your circuit? The federal judiciary?

Next, I would like to ask you about civil litigation practice after *Twombly* (but before *Iqbal*):

7. Were you surprised by the *Twombly* decision? Why?

8. Do you think judges and attorneys in your district were surprised by the *Twombly* decision?

9. How do you think that the *Twombly* decision changed the pleading standard, if at all?

10. After *Twombly*, what, if any, changes did you make in how you drafted pleadings in federal court? Why did you make these changes?

    a. Were these changes lasting? Why?

11. After *Twombly*, what, if any, changes did you make in regards to filing motions to dismiss in federal court? Why did you make these changes?

    a. Were these changes lasting? Why?

12. After *Twombly*, what, if any, changes did you notice regarding the litigation practices of other attorneys (opposing counsel, etc.)?

    a. Were these changes lasting? Why?

13. What was your understanding of the scope of the *Twombly* standard?

14. Do you think there was consensus as to the scope of the *Twombly* standard in your district? Your circuit? The federal judiciary?

15. After the *Twombly* decision but before *Iqbal*, do you think judges were applying a higher pleading standard when deciding motions to dismiss for failure to state a claim (12(b)(6) motions)?

Now, I would like to ask you about the *Iqbal* decision:

16. Would you please tell me about the holding in *Iqbal*.

Next, I have questions about civil practice after *Iqbal*:

17. Were you surprised by the *Iqbal* decision? Why?

18. Do you think judges and attorneys in your district were surprised by the *Iqbal* decision?

19. How do you think that the *Iqbal* decision changed the pleading standard, if at all?

20. After *Iqbal*, what, if any, changes did you make in how you drafted pleadings in federal court? Why did you make these changes?

    a. Were these changes lasting? Why?

21. After *Iqbal*, what, if any, changes did you make in regards to filing motions to dismiss in federal court? Why did you make these changes?

    a. Were these changes lasting? Why?

22. After *Iqbal*, what, if any, changes did you notice regarding the litigation practices of other attorneys (opposing counsel, etc.)?

    a. Were these changes lasting? Why?

23. After the *Iqbal* decision, do you think judges apply a higher pleading standard when deciding motions to dismiss for failure to state a claim (12(b)(6) motions)?

Finally, I would like to ask you about pleadings and different types of claims:

24. In your experience, are some types of cases harder than others to plead? If so, which ones? Why are they hard to plead?

25. What, if any, types of claims that are particularly susceptible to dismissal under the current standard that were not prior to *Twombly*? *Iqbal*? Why are these types of cases particularly susceptible?

2.5.2 Interview Questions - Federal Judges

Below is the list of questions and topics that will be covered in interviews with former and/or current federal district court judges who have been on a federal bench since at least 2007. The interview questions are designed to take approximately one hour for a full interview.

I would like to learn about whether the *Twombly* and *Iqbal* decisions changed federal litigation and the nature of any such changes. Based on your position as a federal district judge, you are in a unique position to understand any such changes. These questions are intended to ask about your general experience and impressions and not about specific cases in which you may have been involved.

I would like to consider the effect of both decisions. Therefore, I am going to ask you about the decisions separately. First, I would like to learn about the *Twombly* decision:

1. Would you please tell me about the pleading standard before *Twombly*.
2. Would you please tell me about the holding in *Twombly*.

I would like to ask you about civil litigation practice before *Twombly*:

3. Before *Twombly*, on average, how specific were litigants in their pleadings in your court?
4. Before *Twombly*, how specific would a claim have to be to avoid dismissal under a 12(b)(6) motion in your court?
5. Before *Twombly*, do you think there was variation in the dismissal standard applied in your district? Your circuit? The federal judiciary?

Next, I would like to ask you about civil litigation practice after *Twombly* (but before *Iqbal*):

6. Were you surprised by the *Twombly* decision? Why?
7. Do you think judges and attorneys in your district were surprised by the *Twombly* decision?

8. Before *Iqbal*, how do you think that the *Twombly* decision changed the pleading standard, if at all?

9. After *Twombly* but before *Iqbal*, how did the decision change how attorneys drafted pleadings, if at all?

    a. Were these changes lasting? Why?

10. After *Twombly* but before *Iqbal*, how did the decision change the frequency and content of 12(b)(6) motions, if at all?

    a. Were these changes lasting? Why?

11. Before *Iqbal*, what was your understanding of the scope of the *Twombly* standard?

12. Before *Iqbal*, do you think there was consensus as to the scope of the *Twombly* standard in your district? Your circuit? The federal judiciary?

13. After *Twombly* but before *Iqbal*, did you apply a higher pleading standard when deciding motions to dismiss for failure to state a claim (12(b)(6) motions)? Why?

14. After *Twombly* but before *Iqbal*, were other federal judges more likely to dismiss claims for failure to state a claim? Why?

15. After *Twombly* but before *Iqbal*, do you think circuit panels in your circuit were less likely to overturn a dismissal for failure to state a claim? Why?

Now, I would like to ask you about the *Iqbal* decision:

16. Would you please tell me about the holding in *Iqbal*.

Next, I have questions about civil practice after *Iqbal*:

17. Were you surprised by the *Iqbal* decision? Why?

18. Do you think judges and attorneys in your district were surprised by the *Iqbal* decision?

19. How do you think that the *Iqbal* decision changed the pleading standard, if at all?

20. After *Iqbal*, how did the decision change how attorneys drafted pleadings, if at all?

    a. Were these changes lasting? Why?

21. After *Iqbal*, how did the decision change the frequency and content of 12(b)(6) motions, if at all?

    a. Were these changes lasting? Why?

22. After the *Iqbal* decision, do you apply a higher pleading standard when deciding motions to dismiss for failure to state a claim (12(b)(6) motions)? Why?

23. After the *Iqbal* decision, do you think that other federal judges are more likely to dismiss claims for failure to state a claim? Why?

24. After the *Iqbal* decision, do you think circuit panels in your circuit are less likely than before the decision to overturn a dismissal for failure to state a claim? Why?

Finally, I would like to ask you about pleadings and different types of claims:

25. In your experience, are some types of cases harder than others to plead? If so, which ones? Why are they hard to plead?

26. What, if any, are the types of claims that are particularly susceptible to dismissal under the current standard that were not prior to *Twombly*? *Iqbal*? Why are these types of cases particularly susceptible?

Chapter 3

Complaints

Now I turn to the task of considering litigant selection in terms of the factual allegations contained in the complaints that plaintiffs file. The federal pleading standard is the guidepost for the sufficiency of such allegations. The plausibility standard announced in *Twombly* and clearly generalized to all civil cases by *Iqbal*, appears to represent a tightening of the standard as compared with the previous standard of conceivability which was first established in *Conley*. Based on theory, research, and interviews (as described in Chapters 1 & 2), we would anticipate that litigants, as advised and assisted by attorneys, would adapt to such changes. I expect that attorneys, in providing competent legal representation to their clients, responded to changes in the federal pleading standard by including more detailed allegations in complaints, where additional facts were available to them. Such changes are important to analyze and measure as they could effect our understanding of dismissals and the effect of the plausability standard.

3.1 Literature and Theory

As described in Chapter 1 and discussed in detail in Chapter 4, there have been no lack of empirical studies concerning dismissals before and after the decisions (*see, e.g.,* Cecil, Cort, Williams and Bataillon, 2011; Cecil, Cort, Williams, Bataillon and Campbell, 2011; Dodson, 2012; Engstrom, 2013; Epstein, Landes and Posner, 2013; Gelbach, 2012*b*; Hatamyar, 2010;

Hannon, 2007; Hubbard, 2013*b*; Janssen, 2011; Martinez, 2009; Seiner, 2009, 2010; Yacobucci and McGovern, 2011). Unfortunately, overall these studies have generally ignored the potential for selection or have suffered from problems related to the data sources, such as relying on electronically available orders or combining potentially incomparable data sets (Chapter 4). Far less work has been done on considering litigant selection before the rulings stage. There have been, however, a handful of promising studies that move us away from ignoring selection bias and consider earlier adaptations. Gelbach (2012*b*) and Hubbard (2013*b*) both considered the effect of the decisions on filings in federal district courts. Hubbard (2013*b*) analyzed whether filing rates have changed post-*Twombly* by comparing filings in the district/month from 2001 to 2008. He found no significant difference in filings generally or in civil rights cases specifically. Gelbach (2012*b*) additionally presented data from the Federal Judiciary Center that indicated little, if any, change overall and no decreases in filing rates in civil rights cases from before and after *Iqbal* (*see also* Caseload Statistics Archive; Cecil, Cort, Williams and Bataillon, 2011).[1] Also, a survey of employment attorneys found that only a small percentage of attorneys (less than eight percent of attorneys who had filed an employment discrimination claim after *Twombly*) reported that they had changed their case screening practices due to the decision(s) (Hamburg and Koski, 2010). Relatedly, Curry and Ward (2013) considered if the decisions have changed where plaintiffs are filing suit. They hypothesized that a heightened pleading standard in federal courts would encourage plaintiffs to file in state courts that apply a more lenient notice standard. Defendants, on the other hand, would be encouraged to remove these cases to federal court to take advantage of the federal pleading standard. Thus, they anticipated an increase in removals from notice pleading states after the change in the standard. They compared removal rates before and after the decisions between states with notice pleading and fact pleading standards. They found that "[t]here was no systematic increase in the rate of removal from state to federal courts after *Twombly* and *Iqbal* and the effect was not more pronounced in notice pleading states compared to

[1]Of course, the lack of an obvious decrease in filings does not preclude the possibility that plaintiffs have chosen not to file due to the change in pleading standards (*see* Gelbach, 2012*b*).

fact pleading states." The inverse nature of change in incentives for plaintiffs and defendants likely explains the fact that a change in where plaintiffs are filing has not been detected: in diversity cases, the plaintiff can only maintain the lawsuit in state court if the defendant does not remove the case. The very cases where a plaintiff would want to be in state court rather than federal court are the same cases in which the defendant is highly motivated to litigate the case in federal court. Because the defendant can force the suit into federal court, the anticipated payoff to a plaintiff for initially filing in state court is very low, if not negative, due to added complexity resulting from removal.

Most (if not all) of the prior studies implicitly assume that claimants filed the same types of complaints before and after these landmark cases. For example, Cecil, Cort, Williams, Bataillon and Campbell (2011) acknowledged that: "we [were not] able to take into account changes in pleading practice, or the fact that recent complaints are more likely to include a recitation of facts that support the claim." Curry and Ward (2013: 851, citation omitted) noted that studies involving case analysis often suffer because the analysis is "dependent on the underlying strength of the complaint as well." The assumption of consistent complaints is troubling based on theory and empirical evidence.

In one survey in which attorneys practicing in the area of employment law were asked about the influence of the decisions on their pleading practices, seventy percent of attorneys reported that the decisions had influenced how they structured complaints (Hamburg and Koski, 2010; Lee and Willging, 2010*a*). Ninety-four percent of those respondents who reported changing their pleading practices stated that they included more factual allegations (Hamburg and Koski, 2010; Lee and Willging, 2010*a*). Additionally, Boyd et al. (2013) offered one means of measuring the differences in complaints before and after *Twombly* - they considered the number of distinct causes of action using topic modeling. They found some evidence that plaintiffs asserted fewer causes of action after *Twombly*, though they cautioned that the results may not be reliable because they used a non-random sample. This study helps further our understanding of the decisions in a way the other studies do not, and complaints deserve additional attention (Engstrom, 2013).

No known attempt has been made to investigate changes in dismissals in light of differences in the specificity of complaints.[2] Further consideration of selection is warranted; in the case of a change in pleading standards we must consider how incentives regarding pleading may have changed and what effect we would expect. We need to consider how the pleadings themselves have changed. Ignoring the content of the pleadings could potentially obscure the true effect of the decisions. While the task of measuring specificity is a difficult one, the potential benefits of developing such a measure are vast. Such a measure would help us understand the extent to which litigants have altered their behavior in light of the decisions. It may be that the rulings encouraged litigants to be more specific in their pleadings, leaving only the weakest cases vulnerable to dismissal. Or, the change may have dissuaded litigants from filing if they could not state their claims with specificity.[3] Either effect of this change in law, or some combination thereof, could be very difficult to detect if we fail to consider the actual pleadings. One of the major concerns with the existing empirical research regarding the impact of *Twombly* and *Iqbal* is that complaints likely vary in nature before and after the decisions in ways that are not captured by any covariate.[4] A measure of specificity would also allow us one means of comparing rulings before and after the decisions even where selection bias may have changed the mix of complaints. It is with these goals in mind that I developed a measure of specificity.

The decisions are understood by many scholars to have raised the bar regarding which cases would be allowed to remain in federal court, at least through the stage of a formal exchange of information among the parties (discovery), by changing the requirements for how detailed allegations must be to avoid dismissal. The pleading standard before these decisions were made

[2]In this realm, Willging (1989) did a small analysis of circuit court rulings based on a coding of the sufficiency of factual allegations in 42 complaints.

[3]Though the available empirical evidence indicates that changes in the way that claims are stated, as opposed to filings, represent the bulk of any effect (Hamburg and Koski, 2010; Lee and Willging, 2010*a*).

[4]This is not the only concern. Gelbach is also concerned with the affect on pre-litigation settlement. This measure and my analyses do not address those issues. Thus, my work does not attempt to capture all the ways that *Twombly* and *Iqbal* have affected litigants. Rather, I attempt to provide a new means of considering the influence on filings and dismissals.

was generally considered to be a liberal approach which allowed for rather broad claims. This more lenient benchmark, combined with procedural rules that incentivize maximizing potential avenues of recovery, created circumstances that favored relatively broad pleadings. Furthermore, based on the nature of different types of claims, there is variation in the amount of information that is available to litigants before they file suit. To the extent that the Supreme Court's decisions represent a heightened pleading standard, we would anticipate that litigants would respond to them by altering the ways they assert and state claims. Specifically, litigants should become more narrow and specific in their claims. I anticipate this shift will be most pronounced for types of claims where information is readily available to the plaintiff before filing.

Using hand coding and machine coding based on a supervised model of complaint specificity, I find evidence that litigants changed the level of specificity they included in pleadings in cases where information is more readily accessible (torts cases). I do not find evidence of a significant change in cases that are considered hard to plead (civil rights cases). This change in pleading behavior likely accounts for many of the findings that these landmark decisions have little to no impact on filings and dismissals: to the extent that the bulk of change brought about by the cases occurred in the claim-stating stage, the change has not been detected or fully appreciated because complaint content is difficult to quantify and, thus, generally ignored. Where litigants change their approach to pleading, an even rate of dismissals before and after the change does not mean the standard for dismissal has not changed. One must consider the nature of the allegations in conjunction with motion and dismissal rates.

The differences in the changes in filings may also indicate that litigants who need discovery the most, such as plaintiffs claiming conspiracy or official misconduct, are less able to adapt than other litigants. Thus, the Supreme Court's decisions may have altered the standards and consequently the allocation of judicial resources without the benefit of Congressional action (which is required for a change in procedural rules), and in a way that may change the ways in which courts are involved in monitoring the other branches. The measure and related findings provided a strong basis for continuing work in understanding the impact of these decisions and

considering the consequences of selection for our understanding of legal change and judicial impact.

This chapter proceeds in seven sections. First, I discuss the background regarding federal pleading standards and the *Twombly* and *Iqbal* decisions. Building from this background, I then survey the relevant literature and develop my theory regarding strategic litigant behavior with regard to pleading. Next, I set forth the logistic classifier that I have developed to measure the specificity of the complaints and the analyses of filings and dismissals that I will undertake using this measure. Finally, I discuss the implications and limitations of this research.

Hypotheses

I theorize that litigants, guided by their attorneys, began drafting and filing more detailed complaints in light of the higher standard defined by *Twombly* and *Iqbal*. This increase in specificity was a result of the anticipated costs of broadness. These costs include: having to defend against a motion to dismiss for failure to state a claim, which includes the loss of valuable time to draft responses and amend petitions and to prepare for and carry out hearings; the time and fees associated with redrafting and refiling the petition if it were dismissed with leave to refile; and, finally, the rare chance that a petition could be dismissed without leave to amend and the party would face either having to abandon the cause or take on the costs of appeals (*see, e. g.* Hamburg and Koski, 2010; Lee and Willging, 2010*a*).[5]

I anticipate that overall the level of specificity in complaints rose after each of the decisions increased the likelihood that a stricter pleading standard would be applied by a judge. Furthermore, I hypothesize that the most significant increase occurred after *Iqbal* because that decision quelled most doubts as to the general applicability of the plausibility standard. Whereas,

[5]In practice, the latter two events, a petition being dismissed with or without leave to amend, generally occur only after opportunities to amend. Furthermore, a dismissal without leave to amend is very rare. Regardless, these are long term costs that the litigants would consider, though the litigants likely do not weigh these possibilities very heavily. It should be noted, however, that in the periods directly after the decisions, litigants had greater uncertainty about the possibility of either of those outcomes.

in the period between *Twombly* and *Iqbal* there was still a fair amount of uncertainty as to the applicability of the new standards to different types of cases. (Furthermore, even when the plausibility standard was applied during this period, it was often done so in a chaotic fashion.) Additionally, I anticipate that this increase in specific allegations will be more pronounced within issue areas that are not considered hard to plead (such as tort cases) as compared to those types of cases in which pleading is inherently more challenging (such as civil rights cases), as additional facts are more readily available to complainants in such easy to plead cases.

3.2 Methods

Text analytical tools are offering new avenues of research in the social sciences (Grimmer and Stewart, 2013; Hopkins and King, 2010). In my project,[6] I use natural language processing (NLP) tools to consider the specificity of the complaints with the ultimate goal of including these measures in analyses of the effect of the decisions on the dismissal rate. In the following subsections, I detail the data that I collected, the classifier that I developed, and my results.

3.2.1 Data

The unit of analysis is the factual allegations section in complaints filed in federal district courts by attorneys.[7] The factual allegations are from complaints filed six months before and after each

[6]This project builds on a previous pilot study. An outline of that study can be found at: `https://www.elssociety.org/faculty/programs/colloquium/politicaleconomy`.

[7]The reasons for focusing on complaints filed by attorneys were multifold. First, if we wish to measure the impact of legal change, we need to look at cases in which the litigants are aware of the change in order to react (or not) to it. The conduit for this information is generally counsel. Pro se litigants are unlikely to be aware of such change or understand the implications of it for their calculations. Additionally, a different standard applies in pro se cases (*Erickson v. Pardus*, 551 U.S. 89 (2007); *Harris v. Mills*, 572 F.3d 66, 72 (2011); Cecil, Cort, Williams, Bataillon and Campbell, 2011b). Furthermore, pro se cases represent a very distinct group of matters. A large number of pro se litigants asserting civil rights claims are prisoners. Also, many pro se litigants appear to suffer from mental illness. The complaints are often handwritten. Additionally, prisoner litigation is concentrated in specific districts due to the locations of prisons. This is not to imply that pro se cases are not of interest. Patricia Hatamyar Moore has expressed concern that excluding pro se plaintiffs from studies of *Iqbal* and *Twombly* obscures the true effects of the decisions because many civil rights claims are brought by pro se individuals (Moore, 2011). Such cases are however outside the scope of my theory and study.

decision in non-ADA[8] civil rights cases (which are hard to plead) and torts cases involving injury (which are relatively easy to plead) from eleven federal district courts. I randomly sampled one district court from each geographic circuit from the relevant district courts from which I obtained exemptions from fees.[9] My sampling resulted in the selection of the following courts:

Table 3.1: Federal District Courts in Sample

Circuit	Court
1	District of Rhode Island
2	Western District of New York
3	District of New Jersey
4	Southern District of West Virginia
5	Western District of Texas
6	Western District of Kentucky
7	Southern District of Illinois
8	District of South Dakota
9	Eastern District of California
10	District of Colorado
11	Southern District of Alabama

Sampling from each court was carried out via the sampling scheme detailed in Appendix 3.5.2. My choice to focus on distinct causes of action enables me to narrow the moving parts for these analyses and avoid common types of omitted variable bias (*see* Friedman and Martin, 2011). I chose civil rights cases since much of the intellectual debate regarding the effect of the decisions has centered on these types of cases. I also looked at torts cases involving injuries because they are an area for which scholars have not voiced concerns regarding a disproportionate impact from the decisions, and, thus, allow for comparison. Furthermore, civil rights and torts are areas of law where heightened pleading standards generally do not apply.[10]

Additionally, only allegations from original complaints were considered. These original

[8] I, like Gelbach (2012*b*), exclude ADA cases due to the liberalization that occurred in 2008. Such changes could bias my results.

[9] A list of district courts from which I had exemptions may be found in Appendix 3.5.1.

[10] Some areas, such as fraud, have always required more detailed allegations (see FED. R. CIV. P. 9).

complaints represent the litigants' initial statement of their claims. They encapsulate the litigant's first calculated statement aimed at leaving as many claims open as possible, while still meeting a minimum threshold for those claims. It is also the statement they make before they know which judge the case has been assigned to and what the defendant has stated in its answer, both of which could influence the content. Therefore, it is the appropriate group of complaints to consider.

I also only considered complaints that were initially filed in federal court. Cases can be filed by the plaintiff in federal court or removed by a defendant from a state court to the federal court when a ground for such removal exists. Complaints initially filed in state court were outside the scope of my consideration as they were drafted to comply with state, rather than federal, rules of civil procedure. Furthermore, such complaints are not readily accessible.

Using the Search Dockets functions in the Bloomberg Law database,[11] I then identified the population of civil rights and relevant torts cases filed in each district between six months before and after *Twombly* and *Iqbal* respectively. To identify civil rights cases, I narrowed my search to those cases assigned one of the following Nature of Suit codes[12]:

440 Other Civil Rights
441 Voting
442 Employment
443 Housing/Accommodations
444 Welfare
448 Education

Likewise, torts cases involving injury were identified using the following codes:

310 Airplane
315 Airplane Product Liability
320 Assault
330 Federal Employers Liability
340 Marine
345 Marine Product Liability
350 Personal Injury: Motor Vehicle

[11] Bloomberg Law is a legal research system akin to Westlaw or LEXIS. In addition to the legal research capabilities of these other research systems, Bloomberg Law has integrated the PACER system into its own system. This allows users much greater ability to search through these entries.

[12] There are well-known limitations associated with using the Nature of Suit codes (Boyd et al., 2013). It remains, however, the only feasible means of a priori identifying a type of case within the federal filing system.

355 Motor Vehicle Product Liability
360 Other
362 Personal Injury: Medical Malpractice
365 Product Liability
367 Health Care/Pharmaceutical Personal Injury/Product Liability
368 Asbestos

Using the CM/ECF systems, the original complaints in the actions were identified from the docket sheets. Each docket sheet was also reviewed to determine if the matter had been filed pro se or removed from state court. If the docket sheet did not indicate that the matter was pro se or a removed case, the complaint was reviewed to ensure that it was eligible. If so, the original complaint was downloaded. The complaints were converted to plain text format (.txt).[13]
The analyses reported in the next section were run on the factual allegations. This excludes the text of the caption, jurisdictional and venue statements, party information, prayer for relief, and signature block. Luckily, most complaints contain fairly consistent headings that allowed the process of trimming the complaints to be mostly automated. Where automated tagging was not possible, research assistants tagged the factual allegations by hand and made other necessary changes[14]. Additionally, some documents incorporated exhibits or other complaints by reference or attachment. The text of those documents is not included.

3.2.2 Classifier

For this project, I developed a logistic regression classifier to measure the specificity of the factual allegations in the complaints. A classifier is simply a model that helps one classify text into categories (Bird, Klein and Loper, 2009). In my case, I used logistic regression to build the model. My classifier is a supervised model that is trained on a set of hand-coded complaints. A research

[13]Conversion of the complaints to .txt was a multi-staged process. First, many of the complaints were in .pl format and had to be converted to .pdf via Adobe Acrobat Pro X. From there the documents were converted to Word documents again using Adobe Acrobat. This was because after quite a bit of experimentation it was discovered that this step resulted in better conversions. The documents were then opened in Word and converted to text documents with special care taken to preserve the lines.

[14]For example, some attorneys list a separate prayer for relief after each cause of action. In such cases, the separate prayers were stripped from the text to allow for consistent information to be compared.

team, consisting of myself and law student research assistants, classified the factual allegations of twenty percent of civil rights and torts-injury cases we sampled as to specificity, based on the scale in Appendix 3.5.3 and truncated to a binary format. The hand-coded specificity variable was the dependent variable in a logistic regression, with features of the texts, described below, as independent variables. The coefficient and covariance estimates from the logistic regression were used to generate predicted probabilities regarding specificity of the complaints that were not coded. These predicted probabilities serve as the measure of specificity (*see generally* Louis and Nenkova, 2011; Genkin, Lewis and Madigan, 2007; Hopkins and King, 2010).

Elements of the Classifier

This classifier is based on one developed by Louis and Nenkova (2011) to consider the specificity of sentences in news summaries.[15] I used the the Louis and Nenkova (2011) classifier as a basis for my classifier as they have a proven track record in distinguishing between general and specific text. The features of my adapted classifier are:

Word Count

Length generally indicates specificity (Huber and Shipan, 2002; Louis and Nenkova, 2011). In fact, the potential relationship between the length of complaints and the specificity demanded by *Twombly* and *Iqbal* has been identified by judges and attorneys. For example, Judge Posner

[15]Many components of my classifier are the same as Louis and Nenkova's classifier. There are, however, some differences. First, my unit of analysis is the factual allegations section of the complaint rather than a sentence in a news summary. I also consider two additional types of language that I believe are relevant in pleadings: causation and certainty language. A count for the number of claims is also included (Boyd et al., 2013). Additionally, I use the target words for negative and positive emotions in the Linguistic Inquiry and Word Count (LIWC), a commercially available text analysis program, to help identify polar words.[16] Louis and Nenkova (2011) also use measures based on the General Inquirer (Stone, Dunphy and Smith, 1966) and MPQA Subjectivity Lexicon (Wilson, Wiebe and Hoffmann, 2009). The General Inquirer (Stone, Dunphy and Smith, 1966) is currently unavailable. I have made several inquiries regarding obtaining access, but have been unable to do so. The MPQA Subjectivity Lexicon (Wilson, Wiebe and Hoffmann, 2009), on the other hand, is accessible and available for further development of the classifier. Furthermore, I will only use the WordNet scores for nouns, not nouns and verbs, as these scores are most useful for nouns (Hazelton, Hinkle and Spriggs, 2010). I do not include all measures of NE+CS. Specifically, dollar signs and plural nouns are not obviously related to specificity in complaints due to the nature of legal drafting. Finally, they use other syntax features that apply to news summaries that I do not believe carry over to legal writing. Therefore, I do not use those measures. Finally, Louis and Nenkova (2011) include language models based on unigrams, bigrams, and trigrams, which I do not, due to the unavailability of corpus of relevant text upon which to build the dictionary.

recently noted: "Since a plaintiff must now show plausibility, complaints are likely to be longer – and legitimately so – than before *Twombly* and *Iqbal*."[17] A complaint littered with vague claims, however, may be long due to the number of causes of action (Boyd et al., 2013). Therefore, I included a measure for the length of the complaint and the length divided by the number of claims. The word count was obtained via the Linguistic Inquiry and Word Count (LIWC), a commercially available text analysis program. The number of claims was hand coded by research assistants.

Polarity

Louis and Nenkova (2011) find that non-neutral words, such as negative and positive words, are associated with general statements. This is not surprising as such language is generally associated with subjective rather than objective description. To capture polarity, I measured the number of these polar words normalized by word count based on LIWC target words for negative and positive emotion (Pennebaker et al., 2007).

Word Specificity

In order to capture the specificity of the individual words, I utilized five measures:

WordNet Depth

The first measure is based on the publicly available content-analytic algorithm WordNet. The WordNet lexical database provides groups of words (synsets) that share a common meaning (i.e., synonyms) (Miller, 1995). These synsets are linked to other synsets through semantic relationships. All synsets are ultimately linked to the root synset, which is the word with the broadest meaning within the group. Thus, the distance of a word from the root synset provides a measure of specificity: the closer a word is to the root synset, the broader the meaning (*see* Hazelton, Hinkle and Spriggs, 2010; Louis and Nenkova, 2011).[18] Using the algorithm via

[17] *Kadamovas v. Stevens*, No. 12-2669 (7th Cir. 2013).

[18] Like Hazelton, Hinkle and Spriggs (2010) and Louis and Nenkova (2011), I use the length of the distance of the words as an indication of the rarity of the words. Unlike Hazelton, Hinkle and Spriggs (2010), but like Louis and Nenkova (2011), I do not include the standard deviation of the nouns. The goal in Hazelton, Hinkle and Spriggs (2010) was to measure the breadth of a legal rule. For this purpose, it made sense to include the standard deviation. In considering specificity, however, there is not a theoretical reason to include it.

Python, I measured the longest distances between each recognized noun in the complaint to a root synset. Then I calculated the mean distances for each factual allegation. This measure indicates the average specificity of the words used in the complaint.

Inverse Document Frequency

Additionally, the classifier includes measures based on inverse document frequencies ("IDF") to capture how many complaints the word appears in, out of all relevant complaints (Louis and Nenkova, 2011: citing Joho and Sanderson, 2007). I measured the IDF of the words in complaints by each cause of action using the NLTK Toolkit in Python. The IDF for the 50th percentile and 95th percentile of the distributions are used in the classifier.[19] This allowed me to capture how rare the median words are in addition to the rarest set of the words. The more unusual the words, the more likely the document is specific.

Specific Types of Words

Finally, a normalized count of the appearance of numbers in the text[20] and a count of proper nouns[21] are also included in the measure to capture specificity. The use of both numbers and proper nouns indicate detailed descriptions. The numbers measure was calculated via LIWC. Proper nouns were identified using logical statements in Python.

Causation

Establishing how a defendant caused harm to the plaintiff is a defining feature of civil claims in the American legal system (Hart and Honoré, 1959). Thus, the percentage of causation words found in factual allegations is an important marker of a specific claim. The measure is based on the LIWC dictionary for causation language. To the extent that litigants are describing casual mechanisms, they should be more likely to be specific in their allegations.

Certainty

[19]There is insufficient variation in the 5th percentile to warrant its inclusion.

[20]The measure is based on those numbers that are spelled out in the text. Including numbers represented by numerals is a more complicated process due to the inclusion of docket numbers, paragraph numbers, etc.

[21]Proper nouns are identified as words tagged as nouns that are capitalized and not at the beginning of a sentence.

Additionally, the new pleading standard was crafted to deal with speculative claims. Speculative claims tend to be housed in more tentative language to avoid potential sanctions. Thus, the percentage of language reflecting certainty is potentially an important measure of the type of specificity the Supreme Court sought. This measure was calculated via LIWC.

Number of Claims

One way of conceptualizing complaint specificity is the number of causes of action (Boyd et al., 2013). When a plaintiff is pleading broadly, he will often use a shotgun effect - pleading many claims that do little more than restate the elements (*See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3rd Cir. 2009)). More specific complaints should contain fewer causes of action. Therefore, I include the count of claims in the classifier. Where the drafting attorney included headers identifying claims, the count was based on those demarcations. Where the attorney did not identify separate claims, the research team read the claims and counted the distinct claims based on common elements of a cause of action.

3.3 Analyses & Results

To consider the affect of the decisions on complaint specificity, I undertook three types of analyses. First, I simply considered how specificity varied among the periods in the hand-coded complaints. Next, I built the logistic regression classifier and tested its validity. Finally, I used the estimates from the classifier to consider specificity over the periods, which allows for a much larger number of observations.

Subjective Coding

First, I considered only those complaints that were hand coded (*n*=552.).[22] I estimated the differences in specificity over the four periods using a logit with a binary indicator of specificity.[23] I analyzed the extent to which there is evidence that the specificity of the complaints varied in relation to the Court's decisions. The main independent variable of interest is the period in which the complaint was filed: pre-*Twombly* (the six months before the opinion); post-*Twombly* (the six months after the opinion); pre-*Iqbal* (the six months before the opinion); and post-*Iqbal* (the six month after the opinion). I ran analyses with controls for issue area, including interactions with issue area, as there is likely to be variation by area in the detail required to state a claim even under the most lenient standards. This is particularly important in light of the theory that the change in the pleading standard matters more in some issue areas, such as civil rights, than others. My interviews with judges and attorneys indicated that practices vary across the federal judiciary and that local legal culture, such as state court practices, had an influence on judges and attorneys. Thus, fixed effects for courts were included in order to deal with variation in circuit precedents, as well as local rules and cultures.

Litigants do not know the identity of the judge they will be in front of before they file their complaints, but they do have information as to the general ideological make-up of the district. As we have evidence that ideology influences judges' decisions (*see, e.g.,* Carp et al., 1992; Rowland and Carp, 1996), I assume that the ideology of a district influences the extent to which litigants feel the need to justify their claims and protect themselves from dismissal under any standard. Specifically, I anticipate that attorneys will file more specific complaints when they are in front of

[22]The distribution of complaints by period was: pre-*Twombly* - 113; post-*Twombly* - 122; pre-*Iqbal* - 149; and post-*Iqbal* - 168.

[23]The binary indicator was used, in part, due to limited number of hand-coded cases available with which to estimate the classifier. There were not enough observations for some coding levels to estimate the model. The dependent variable was coded as specific if specificity was coded as a 6 or above based on the coding instructions that were provided and for purposes of symmetry. This truncated version of the coding is simple and, thus, least susceptible to small variances in coding. The model based on the hand-coded observations reported in Table 3.1 was also run as an ordinal logit with the ten-point coding (reported in Appendix 3.5.5) and all the results were consistent. The major distinction is that the differences between the post-*Twombly* and post-*Iqbal* periods is statistically significant when the 10-point scale is used.

conservative judges, who are generally considered to be disposed towards defendants and their insurers, who tend to be businesses (*see, e.g.,* Carp et al., 1992; Spaeth et al., 2011). In federal court, however, plaintiffs generally do not know the identity of the judge they will be in front of before they file due to random assignment (Federal Judicial Center, 2014*b*). Thus, I calculated and included the median Judicial Common Space (JCS) score[24] for Article III judges in the district at the time the complaint was filed. For the first set of models, the baseline category for the periods was the post-*Iqbal* period and for the courts it was the Southern District of Alabama. The results are found in Table 3.2,[25] along with predicted probabilities based on simulations in Tables 3.3 and 3.4. [26] The differences are illustrated in Figure 3.1.

[24]Like Boyd (2010*b*), I calculated JCS scores for district judges based on the approach created by Giles, Hettinger and Peppers (2001) and extended by Epstein et al. (2007). The underlying data for these scores was obtained from *History of the Federal Judiciary* (2014) and Poole (2012). The methodology used by Poole (2012) to create the legislator common space scores is set forth in Poole (1998). The JCS score takes into account the political conditions surrounding the nomination of the judge. If the senators in the state the judge was being appointed in are of the same party as the nominating president, it is assumed that their preferences governed the appointment and the mean common space scores for the senators was used. If only one senator was of the same party as the president, that senator's common space score was assigned to the judge. If no senators are from the same party, then the President's score became the judge's score. JCS scores can range from -1 (the most liberal) to 1 (the most conservative).

[25]All directional hypotheses are tested for significance at the .05, one-tailed level. The fixed effects for courts are assessed at the .05, two-tailed level, as I have no hypotheses as to their direction.

[26]I take advantage of simulation to illustrate the impact of interactions with the other variables held at central values (Imai, King and Lau, 2008; King, Tomz and Wittenberg, 2000; Zelner, 2009). The simulation is based on 10,000 draws from a multi-variate normal distribution defined by the point estimates and variance-covariance matrix of the parameters. The point estimates are the median of the distribution, with confidence intervals defined by the .05 and .95 quantiles of the distribution.

Table 3.2: Logit: Hand-Coded

Variable	**Coefficient** (Std. Error)	**p-value**
Pre-*Twombly* (Torts)	-1.14**	0.01
	(0.50)	
Post-*Twombly* (Torts)	-0.73	0.08
	(0.51)	
Pre-*Iqbal* (Torts)	-0.89**	0.01
	(0.40)	
Civil Rights	-0.64	0.06
	(0.40)	
Pre-*Twombly* $\times$ Civil Rights	1.59	0.99
	(0.67)	
Post-*Twombly* $\times$ Civil Rights	0.52	0.78
	(0.65)	
Pre-*Iqbal* $\times$ Civil Rights	1.16	0.98
	(0.57)	
California Eastern	1.81*	0.01
	(0.70)	
Colorado	-0.10	0.40
	(0.40)	
Illinois Southern	-3.92*	0.03
	(1.97)	
Kentucky Western	-4.91*	0.00
	(1.72)	
New Jersey	1.40*	0.03
	(0.72)	
New York Western	-1.17	0.06
	(0.74)	
Rhode Island	-2.29	0.07
	(1.54)	
South Dakota	-3.22	0.04
	(1.84)	
Texas Western	-0.84*	0.02
	(0.41)	
West Virginia Southern	0.52	0.17
	(0.54)	
District Median Ideology	-5.59	0.99
	(2.27)	
Intercept	3.30*	0.00
	(1.13)	

*Indicates significant at the .05 two-tailed level; **Indicates significant at the .05, one-tailed level.

Table 3.3: Simulation: Pre-*Twombly* vs. Post-*Iqbal*, Civil Rights v. Torts, Hand Coded

	Civil Rights	Torts	Differences
Pre-*Twombly*	.63 [.45, .8]	.40 [.23, .6]	.23** [.02, .42]
Post-*Iqbal*	.52 [.36, .68]	.68 [.52, .8]	-.15 [-.30, .01]
Differences	.11 [-.07, .27]	-.27** [-.44, -.08]	.38** [.12, .62]

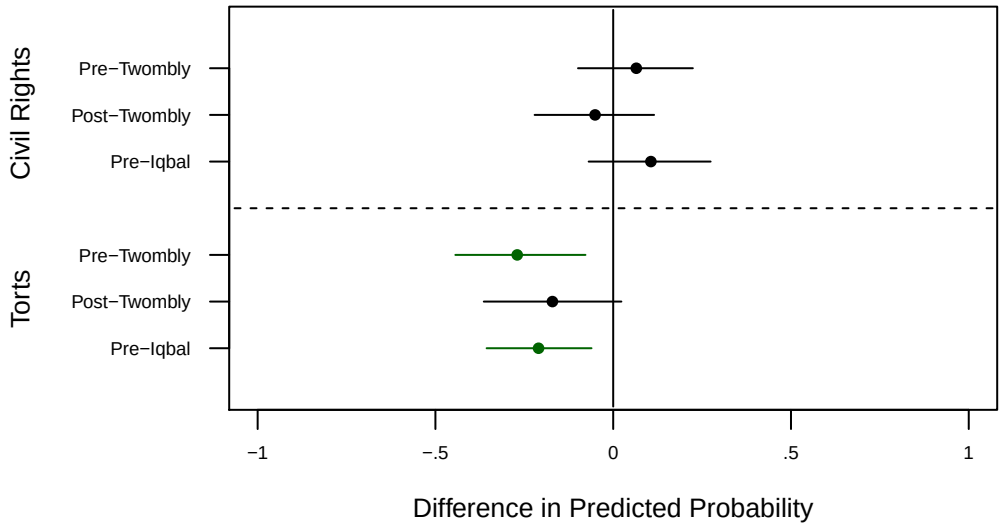
**Indicates significant at the .05, one-tailed level.

Table 3.4: Simulation: Pre-*Iqbal* vs. Post-*Iqbal*, Civil Rights v. Torts, Hand Coded

	Civil Rights	Torts	Differences
Pre-*Iqbal*	.59 [.43, .73]	.46 [.31, .62]	.13 [-.03, .28]
Post-*Iqbal*	.52 [.26, .61]	.68 [.56, .88]	-.15 [-.55, -.06]
Differences	.07 [-.1, .22]	-.21** [-.36, -.06]	.27** [.05, .5]

**Indicates significant at the .10, two-tailed level.

Figure 3.1: Differences in Probability of Specific Complaint, Hand Coded



The results indicate that the level of specificity seen in complaints within a district was significantly higher in torts cases in the post-*Iqbal* period than in the pre-*Twombly* and pre-*Iqbal* periods. Whereas for civil rights cases, the level of specificity does not significantly vary over the periods. Simulations, reported in Tables 3.3 and 3.4, indicate that the differences between pre-*Twombly* and post-*Iqbal* periods and the pre-*Iqbal* and post-*Iqbal* periods across the models for torts and civil rights are statistically significant from each other. These results indicate that complaints in the post-*Iqbal* period were more specific than in the periods immediately before either of the decisions. The difference between the post-*Twombly* and post-*Iqbal* periods is not significant, but the estimate is in the anticipated direction. We do see some significant fixed effects by court, which is unsurprising given reports of variation. The influence of median district ideology within the districts is in the opposite direction than anticipated: the more conservative the median judge in the district, the less specific the complaint is while holding period and court constant. These results are encouraging and interesting, but ultimately rest on relatively few observations given the fixed effects by period and court. The classifier will allow us to expand the number of available observations without having to hand code thousands of complaints.

Classifier

Next, I turn to the fitting of the classifier and its use. The model was estimated using two-thirds of the hand-coded data (n=362) that was randomly selected. The results are displayed in Table 4:

Table 3.5: Logit: Classifier

Variable	**Coefficient** (Std. Error)	**p-value**
Word Count	0.002**	0.001
	(0.001)	
Positive Emotion	0.210	0.106
	(0.168)	
Negative Emotion	0.043	0.329
	(0.097)	
Word Count by Claim	0.001	0.068
	(0.001)	
WordNet Depth	1.065**	0.011
	(0.466)	
Inverse Document Frequency 50%	2.354	0.113
	(1.945)	
Inverse Document Frequency 95%	-0.774	0.970
	(0.357)	
Numerals	0.136	0.148
	(0.130)	
Proper Nouns	-0.002	0.772
	(0.003)	
Causation	0.171	0.150
	(0.165)	
Certainty	-0.011	0.485
	(0.296)	
Claims	-0.052	0.340
	(0.126)	
Intercept	-10.611**	0.002
	(3.683)	

**Indicates significant at the .05, one-tailed level.

Ultimately, the role of the classifier is to create accurate classifications, as opposed to confirming or denying hypotheses regarding the use of language. Regardless, the estimates are interesting. The roles of Word Count and WordNet Depth are significant and operated as anticipated. Inverse Document Frequency for the 95% of the complaint operated in the opposite way than anticipated: the rarer these words are, the less likely the complaint is to be specific holding all other variable constant. This unexpected estimate is likely the results of the inclusion of the Inverse Document Frequency for the 50% of the complaint. Holding the rarity of the words in the middle of the distributions constant, those complaints with exceedingly rare words near the tail tend to be less specific.

The remaining one-third of the data (n=190) was held in reserve to test and validate the model. Comparing the fitted values for the unseen data to the hand-coded values reveals a recall of a little over 83%. That is, around 83% of the observations were predicted correctly. This represents an approximately 60% proportional reduction in error. The classification rates over the periods and discussion of those patterns is provided in Appendix 3.5.6.

Furthermore the classifier produced results that are facially valid. For example, the classifier identified the following set of factual allegations as being very likely to be broad: "Each of the Defendants owed one or more common law duties of care to Plaintiffs. Defendants breached those duties, proximately causing damages to Plaintiffs." These allegations are a textbook example of doing more than stating the elements of a cause. On the other end of the spectrum, the classifier identified the complaint that following extract is from as being very likely to be specific:

> On March 9 and March 10, 2008, and at all times material, the Defendant, the Office of the Sheriff of Crawford County, owned, operated, and maintained the Crawford County Jail, for purposes of housing inmates and pretrial detainees, and, as such, was acting under the color of State Law. On March 9 and March 10, 2008, Plaintiffs' decedent, Corbin Turner, was a detainee in the care, custody, and control of the Office of the Sheriff of Crawford County. On March 9 and March 10, 2008, and at all time material, the Office of the Sheriff of Crawford County, by and through its agents and employees, knew that Corbin Turner was a detainee who was under the influence of alcohol and drugs, and was suffering from acute physical problems. [...]
>
> On March 9 and March 10, 2008, notwithstanding the duties and obligations described above, the Defendant, Office of the Sheriff of Crawford County, by and

> through its agents and employees, committed one or more of the following acts of utter indifference or conscious disregard: A. Had no policies or procedures in place to ensure that Corbin Turner was closely monitored for signs of alcohol or drug overdose; or B. Failed to provide or intentionally deprived Mr. Turner of the medicine that he needed upon his arrival when it first knew, or should have known, that he had ingested alcohol and drugs; or C. Failed to provide or intentionally deprive Mr. Turner of necessary medical attention throughout his incarceration when it knew, or should have known, that he was suffering from cocaine intoxication; [...]

Clearly these allegations provide much richer factual allegations regarding the claims being presented.

Classified Observations

Next, I used a binary variable[27] based on the fitted values from the classifier to consider specificity over the periods considering the period, issue area, court, and the median JCS score for the district. The analysis was run on 2,629 observations (civil rights complaints accounted for 1,348 of the observations; torts cases accounted for 1,281 observations).[28] Table 3.6 contains the results, Tables 3.7 through 3.9 provided the simulated predicted probabilities, and Figure 3.2 illustrates the differences in predicted probabilities:

[27]The variable is coded as 1 where the predicted probability is greater than .5, it is coded 0 otherwise.

[28]The distribution of complaints by period was: pre-*Twombly* - 542; post-*Twombly* - 576; pre-*Iqbal* - 712; and post-*Iqbal* - 799.

Table 3.6: Logit: Classified

Variable	**Coefficient** (Std. Error)	**p-value**
Pre-*Twombly* (Torts)	-0.42**	0.02
	(0.21)	
Post-*Twombly* (Torts)	-0.53**	0.01
	(0.21)	
Pre-*Iqbal* (Torts)	-0.51**	0.01
	(0.18)	
Civil Rights	-0.20	0.14
	(0.18)	
Pre-*Twombly* $\times$ Civil Rights	0.36	0.90
	(0.29)	
Post-*Twombly* $\times$ Civil Rights	0.54	0.97
	(0.28)	
Pre-*Iqbal* $\times$ Civil Rights	0.46	0.96
	(0.26)	
California Eastern	0.85*	0.00
	(0.22)	
Colorado	0.60*	0.00
	(0.19)	
Illinois Southern	2.26*	0.00
	(0.60)	
Kentucky Western	0.88	0.10
	(0.54)	
New Jersey	-0.01	0.96
	(0.26)	
New York Western	1.42*	0.00
	(0.28)	
Rhode Island	2.63*	0.00
	(0.53)	
South Dakota	0.66	0.26
	(0.58)	
Texas Western	0.19	0.31
	(0.19)	
West Virginia Southern	-0.73*	0.02
	(0.30)	
District Median Ideology	1.57*	0.02
	(0.68)	
Intercept	-0.69*	0.05
	(0.35)	

*Indicates significant at the .05 two-tailed level; **Indicates significant at the .05, one-tailed level.

Table 3.7: Simulation: Pre-*Twombly* vs. Post-*Iqbal*, Civil Rights v. Torts, Classified

	Civil Rights	Torts	Differences
Pre-*Twombly*	.44 [.32, .52]	.40 [.32,.5]	.04 [-.05,.13]
Post-*Iqbal*	.46 [.38, .54]	.51 [.44, .58]	-.05 [-.13, .03]
Differences	-.01 [-.09, .06]	-.10** [-.23, -.04]	.09 [-.03, .20]

**Indicates significant at the .05, one-tailed level.

Table 3.8: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Civil Rights v. Torts, Classified

	Civil Rights	Torts	Differences
Post-*Twombly*	.46 [.38, .54]	.38 [.3, .47]	.08 [-.01,.16]
Post-*Iqbal*	.46 [.38, .54]	.51 [.44, .58]	-.05 [-.13, .03]
Differences	-.00 [-.07, .07]	-.13** [-.21, -.05]	-.13** [-.24, -.02]

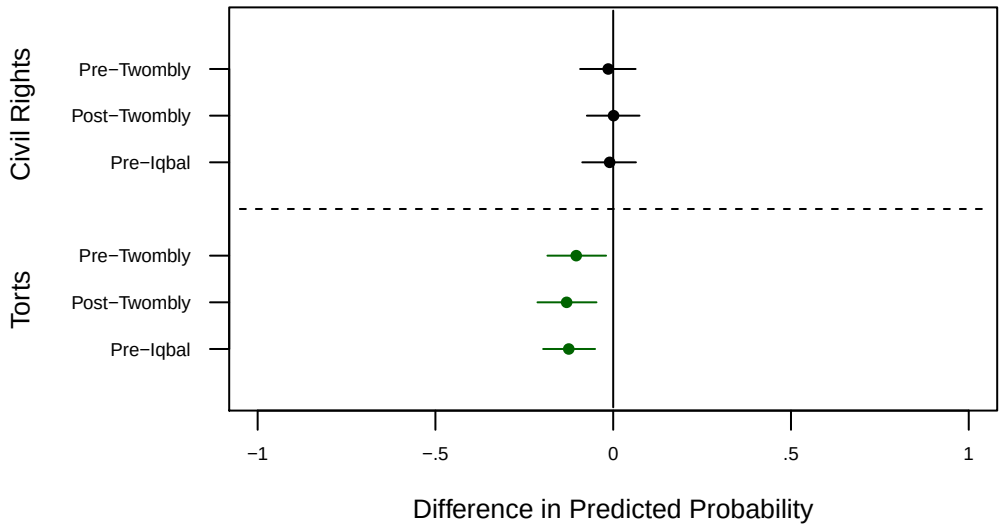
**Indicates significant at the .05, one-tailed level.

Table 3.9: Simulation: Pre-*Iqbal* vs. Post-*Iqbal*, Civil Rights v. Torts, Classified

	Civil Rights	Torts	Differences
Pre-*Iqbal*	.45 [.37, .53]	.38 [.31, .46]	.06 [-.01,.14]
Post-*Iqbal*	.46 [.38, .54]	.51 [.44, .58]	-.05 [-.13, .03]
Differences	-.01 [-.09, .06]	-.13** [-.2, -.05]	-.11** [-.22, -.01]

**Indicates significant at the .05, one-tailed level.

Figure 3.2: Differences in Probability of Specific Complaint, Classified



A comparison of the estimates over the time periods reveals some similarities and differences

with the earlier analyses.[29] [30] In both the hand-coded and classified analyses, the results indicate that the level of specificity seen in complaints was significantly higher in torts cases in the post-*Iqbal* period than in the pre-*Twombly*. Whereas for civil rights cases, the level of specificity does not vary significantly over the periods. The differences between the estimates by issue area are not significantly different from each other based on simulations.[31] The differences between the post-*Twombly* and post-*Iqbal* and pre-*Iqbal* and post-*Iqbal* periods for torts cases are also significant. And the differences between torts and civil rights cases between these periods are significant. Overall, there is evidence of a post-*Iqbal* effect, but not so for *Twombly*. This is likely a result of uncertainty surrounding the applicability of the pleading standard after *Twombly*. Thus, there is evidence that *Iqbal* had an impact on the specificity found in torts complaints. Additionally, there is an indication that this effect was significantly different in torts cases than in civil rights cases, as hypothesized. Additionally, the district median ideology has the anticipated effect: where litigants anticipate being in front of a conservative judge, they file more specific complaints. Finally, we again see significant court effects.

3.4 Discussion

The findings of this project have substantive and methodological implications regarding the impact of *Twombly* and *Iqbal* specifically and the study of legal change generally. I seek to understand the impact of the introduction of the plausibility standard via two landmark Supreme Court decisions. More precisely, the goal of this project is to measure if litigants altered their pleading behavior based on the *Twombly* and *Iqbal* decisions. These results indicate that some

[29] A GLM model using the binomial family and logit link with the fitted values as the dependent variables yielded consistent results. Results tables for theses analyses are found in Appendix 3.5.7.

[30] I also specified a regression model with word count as the dependent variable. Results of those analyses are also found in Appendix 3.5.7. For civil rights cases, the differences between post-*Iqbal* and post-*Twombly* are statistically significant. For torts cases, the differences between post-*Iqbal* and all other periods are statistically significant.

[31] The differences between the pre-*Twombly* and post-*Twombly* periods and the post-*Twombly* and pre-*Iqbal* periods are also not significant for torts cases.

plaintiffs, those in torts cases involving injuries, did change their pleading practices. There is not, however, significant evidence of such changes in civil rights cases. Additionally, the differences in the changes in specificity between civil rights and torts cases are generally statistically significant. These results are consistent with commentators and scholars who have expressed concerns that plaintiffs in some issue areas may be unable to adapt to a higher pleading standard. Finally there is evidence that litigants file more specific complaints where they are likely to be before conservative judges.

While these results are promising, as with any research, limitations should be considered. Though these results indicate change and strategic behavior, the exact nature of this change is unclear. A significant increase in the specificity of the language in the complaints could result from strategic decisions regarding filing or pleading. It could be that the pool of litigants stayed the same after the change but changed the way in which they stated factual allegations or the pool of litigants may have changed after the decision. Likely, both types of behavior took place to some extent and reflect strategic behavior on the part of the litigant. Though the existing evidence, discussed above, indicates that the vast majority of such changes appear to have occurred in how claims are stated, as opposed to if cases are brought at all.

At the very least, these findings call into question the assumption that specificity among complaints was unaltered by the Supreme Court's decisions and that such changes are consistent across issue areas. Additionally, the results indicate that at least in some areas, such as torts cases involving injuries, the majority of existing studies likely underestimate the impact of the decisions. Further consideration of such dismissals in light of the specificity of the complaint, and made possible by the development of the measure and this study, will help shed light on these issues. Such analysis follows in the next chapter.

The apparent inability of plaintiffs in civil rights cases to increase the level of specificity with which they plead is in keeping with the concerns of many legal scholars. Hard to plead issue areas include core constitutional issues, such as civil rights, and thus, these results indicate that government abuses may go unchecked to the extent that judges are applying a heightened pleading

standard due to the inability of litigants to obtain additional facts in the absence of discovery in the course of litigation. While this study provides some evidence that a lack of information keeps civil rights claimants from being able to adapt to the new pleading standard in comparison with torts cases, further research should be done to verify that differences in specificity in complaints in fact are the result of differences in the available information. A more detailed study could be done by looking at the specificity of claims within issue areas and comparing the pleadings with variables capturing the likelihood that such information is available, such factors include: if the plaintiff inherently was present for the wrongful acts, if the claim pertains to covert acts, etc.

There are other important implications of these findings. The change in specificity found in torts complaints indicates that litigants have understood these decisions to represent a change in the applicable standards for pleadings. Generally, such changes to the Federal Rules of Civil Procedure must be made by Congress, as they are legislative in nature. These findings can help inform the ongoing debate among legal scholars as to whether the rules have been amended in effect and the normative implications of any such amendment.

The potential for strategic litigant behavior must be considered when we seek to understand the impact of legal change and decisions in general. This project provides further evidence that litigants do adapt in light of legal change. Such adaptation means that special care must be taken in considering cases before and after a change in law. This adaptation calls into question earlier empirical work that assumed that the content of complaints remained constant before and after the decisions. This is a common assumption not only in studies of *Twombly* and *Iqbal*, but in studies through political science regarding legal change and judicial impact. We need to use new tools and approaches to help understand selection in the legal system.

These results also help highlight the potential pitfalls in conducting research without special attention to potential variation across issue areas. Though the Rules of Civil Procedure apply to all civil matters, the impact of the same rule can vary across issue areas due to differences in the nature of the claims and the available information. Thus, cross-issue area studies of the impact of *Twombly* and *Iqbal* specifically and judicial impact generally may provide misleading pictures of

legal change and judicial impact. Additionally, the presence of differences in specificity that are area specific, calls into question interpretations of prior empirical work in this area.

This research also has implications beyond pleading standards. It touches on how litigants and citizens adapt to changes in law in subtle and complex ways. Furthermore, it relates to greater issues of information sharing and certainty. Moreover, tests regarding the measure of specificity indicate that it is effective in capturing specificity in complaints. This classifier could be used in other studies implicating the specificity in filings. It also could easily be adapted to consider other legal and political texts. For example, with minor adaptations, it could be used to consider the effect of specificity on the use of Supreme Court precedent by the lower courts. Additionally, an adapted version could be used to consider the specificity of legislation and regulations in considering questions of delegation.

3.5 Appendix

3.5.1 Fee Exemptions from Federal District Courts

Table 3.10: Fee Exemptions from Federal District Courts

1st Circuit	*2nd Circuit*	*3rd Circuit*	*4th Circuit*	*5th Circuit*	*6th Circuit*
D. Me.	D. Conn.	D.N.J.	D. Md.	W.D. La.	E.D. Ky.
D. Mass.	N.D.N.Y.	E.D. Pa.	D.N.C.	S.D. Miss.	W.D. Ky.
D.N.H.	W.D.N.Y.	M.D. Pa.	D.S.C.	E.D. Tex.	E.D. Mich.
D.R.I.	D. Vt.	W.D. Pa.	W.D. Va.	N.D. Tex.	W.D. Mich.
			S.D.W. Va.	W.D. Tex.	N.D. Ohio
					W.D. Tenn.

7th Circuit	*8th Circuit*	*9th Circuit*	*10th Circuit*	*11th Circuit*	*D.C. Circuit*
C.D. Ill.	E.D. Ark.	E.D. Cal.	D. Col.	M.D. Ala.	D.D.C.
S.D. Ill.	N.D. Iowa	N.D. Cal.	D. Kan.	S.D. Ala.	
N.D. Ind.	S.D. Iowa	S.D. Cal.	D.N.M.	M.D. Fla.	
S.D. Ind.	E.D. Mo.	D. Mont.	N.D. Okla.	N.D. Fla.	
W.D. Wis.	D. Neb.	D. Or.	W.D. Okla.	N.D. Ga.	
	D.S.D.	E.D. Wash.	D. Utah		
		W.D. Wash.			

3.5.2 Sampling

There were a total of 15,329 cases that I identified over the relevant time periods and courts. Due to resource constraints, my goal was to sample approximately 7,665 with the understanding that a significant portion of these complaints would be ineligible (a determination that could not be made before the sampling). I stratified the sampling by issue area, time period, and court. The sampling was done to attempt to obtain one-half of the cases available by issue area in each of the time periods. Within this issue/period strata, I sampled with the following scheme: I divided the target number of observations by eleven (the number of district courts). I then automatically included all cases in districts with fewer observations than this number. I then calculated how many potential observations were left within the strata and divided by the number of remaining courts. I continued doing this until there were no courts with fewer observations than their potential share. Among these courts, I divided the remaining observations equally and sampled based on the share that remained. Thus, the districts were sampled with uneven probability. Finally, I identified and oversampled cases in which a motion to dismiss pursuant to Rule 12(b)(6) had been filed. In order to account for this non-random sampling, I used appropriate probability weights in all analyses.

3.5.3 Specificity Scale for Complaints

1. **Broadest possible pleading** - simply names the causes of action the plaintiff is claiming without discussing elements or facts.

2. **Very broad pleading** - names the causes of action the plaintiff is claiming and the elements of the claims but no specific facts.

3. **Broad** - provides basic factual information regarding the parties and nature of the claims.

4. **Somewhat broad** - provides a few specific factual details regarding the causes of actions.

5. **Middle, broad** - provides some specific factual allegations regarding the causes of actions generally.

6. **Middle, specific** - provides some specific factual allegations regarding some elements of the causes of action.

7. **Somewhat specific** - provides some specific factual allegations regarding most elements of the causes of action.

8. **Specific** - provides detailed specific factual allegations regarding most elements of the causes of action.

9. **Very specific** - provides detailed factual allegations regarding most elements of the causes of action.

10. **Most specific possible** - provides detailed factual allegations covering all elements of the causes of action.

3.5.4 LIWC2007 Target Words

LIWC2007 Cause Target Words [32]

activat* affect affected affecting affects aggravat* allow* attribut* based bases basis because boss* caus* change changed changes changing compel* compliance complie* comply* conclud* consequen* control* cos coz create* creati* cuz deduc* depend depended depending depends effect* elicit* experiment force* foundation* founded founder* generate* generating generator* hence how hows how's ignit* implica* implie* imply* inact* independ* induc* infer inferr* infers influenc* intend* intent* justif* launch* lead* led made make maker* makes making manipul* misle* motiv* obedien* obey* origin originat* origins outcome* permit* pick produc* provoc* provok* purpose* rational* react* reason* response result* root* since solution* solve solved solves solving source* stimul* therefor* thus trigger* use used uses using why

[32] LIWC2007 Dictionary Poster

LIWC2007 Certainty Target Words [33]

absolute absolutely accura* all altogether always apparent assur* blatant* certain* clear clearly commit commitment* commits committ* complete completed completely completes confidence confident confidently correct* defined definite definitely definitive* directly distinct* entire* essential ever every everybod* everything* evident* exact* explicit* extremely fact facts factual* forever frankly fundamental fundamentalis* fundamentally fundamentals guarant* implicit* indeed inevitab* infallib* invariab* irrefu* must mustnt must'nt mustn't mustve must've necessar* never obvious* perfect* positiv* precis* proof prove* pure* sure* total totally true truest truly truth* unambigu* undeniab* undoubt* unquestion* wholly

[33]LIWC2007 Dictionary Poster

LIWC2007 Negative Emotions Target Words [34]

partie* abandon* abuse* abusi* ache* aching advers* afraid aggravat* aggress* agitat* agoniz* agony alarm* alone anger* angr* anguish* annoy* antagoni* anxi* apath* appall* apprehens* argh* argu* arrogan* asham* assault* asshole* attack* aversi* avoid* awful awkward* bad bashful* bastard* battl* beaten bitch* bitter* blam* bore* boring bother* broke brutal* burden* careless* cheat* complain* confront* confus* contempt* contradic* crap crappy craz* cried cries critical critici* crude* cruel* crushed cry crying cunt* cut cynic* damag* damn* danger* daze* decay* defeat* defect* defenc* defens* degrad* depress* depriv* despair* desperat* despis* destroy* destruct* devastat* devil* difficult* disadvantage* disagree* disappoint* disaster* discomfort* discourag* disgust* dishearten* disillusion* dislike disliked dislikes disliking dismay* dissatisf* distract* distraught distress* distrust* disturb* domina* doom* dork* doubt* dread* dull* dumb* dump* dwell* egotis* embarrass* emotional empt* enemie* enemy* enrag* envie* envious envy* evil* excruciat* exhaust* fail* fake fatal* fatigu* fault* fear feared fearful* fearing fears feroc* feud* fiery fight* fired flunk* foe* fool* forbid* fought frantic* freak* fright* frustrat* fuck fucked* fucker* fuckin* fucks fume* fuming furious* fury geek* gloom* goddam* gossip* grave* greed* grief griev* grim* gross* grouch* grr* guilt* harass* harm harmed harmful* harming harms hate hated hateful* hater* hates hating hatred heartbreak* heartbroke* heartless* hell hellish helpless* hesita* homesick* hopeless* horr* hostil* humiliat* hurt* idiot ignor* immoral* impatien* impersonal impolite* inadequa* indecis* ineffect* inferior* inhib* insecur* insincer* insult* interrup* intimidat* irrational* irrita* isolat* jaded jealous* jerk jerked jerks kill* lame* lazie* lazy liabilit* liar* lied lies lone* longing* lose loser* loses losing loss* lost lous* low* luckless* ludicrous* lying mad maddening madder maddest maniac* masochis* melanchol* mess messy miser* miss missed misses missing mistak* mock mocked mocker* mocking mocks molest* mooch* moodi* moody moron* mourn* murder* nag* nast* needy neglect* nerd* nervous* neurotic* numb* obnoxious* obsess* offence* offend* offens* outrag* overwhelm* pain pained painf* paining pains panic* paranoi* pathetic*

[34]LIWC2007 Dictionary Poster

peculiar* perver* pessimis* petrif* pettie* petty* phobi* piss* piti* pity* poison* prejudic* pressur* prick* problem* protest protested protesting puk* punish* rage* raging rancid* rape* raping rapist* rebel* reek* regret* reject* reluctan* remorse* repress* resent* resign* restless* revenge* ridicul* rigid* risk* rotten rude* ruin* sad sadde* sadly sadness sarcas* savage* scare* scaring scary sceptic* scream* screw* selfish* serious seriously seriousness severe* shake* shaki* shaky shame* shit* shock* shook shy* sicken* sin sinister sins skeptic* slut* smother* smug* snob* sob sobbed sobbing sobs solemn* sorrow* sorry spite* stammer* stank startl* steal* stench* stink* strain* strange stress* struggl* stubborn* stunk stunned stuns stupid* stutter* submissive* suck sucked sucker* sucks sucky suffer suffered sufferer* suffering suffers suspicio* tantrum* tears teas* temper tempers tense* tensing tension* terribl* terrified terrifies terrify terrifying terror* thief thieve* threat* ticked timid* tortur* tough* traged* tragic* trauma* trembl* trick* trite trivi* troubl* turmoil ugh ugl* unattractive uncertain* uncomfortabl* uncontrol* uneas* unfortunate* unfriendly ungrateful* unhapp* unimportant unimpress* unkind unlov* unpleasant unprotected unsavo* unsuccessful* unsure* unwelcom* upset* uptight* useless* vain vanity vicious* victim* vile villain* violat* violent* vulnerab* vulture* war warfare* warred warring wars weak* weapon* weep* weird* wept whine* whining whore* wicked* wimp* witch woe* worr* worse* worst worthless* wrong* yearn*

LIWC2007 Positive Emotions Target Words [35]

accept accepta* accepted accepting accepts active* admir* ador* advantag* adventur* affection* agree agreeab* agreed agreeing agreement* agrees alright* amaz* amor* amus* aok appreciat* assur* attachment* attract* award* awesome beaut* beloved benefic* benefit benefits benefitt* benevolen* benign* best better bless* bold* bonus* brave* bright* brillian* calm* care cared carefree careful* cares caring casual casually certain* challeng* champ* charit* charm* cheer* cherish* chuckl* clever* comed* comfort* commitment* compassion* compliment* confidence confident confidently considerate contented* contentment convinc* cool courag* create* creati* credit* cute* cutie* daring darlin* dear* definite definitely delectabl* delicate* delicious* deligh* determina* determined devot* digni* divin* dynam* eager* ease* easie* easily easiness easing easy* ecsta* efficien* elegan* encourag* energ* engag* enjoy* entertain* enthus* excel* excit* fab fabulous* faith* fantastic* favor* favour* fearless* festiv* fiesta* fine flatter* flawless* flexib* flirt* fond fondly fondness forgave forgiv* free free* freeb* freed* freeing freely freeness freer frees* friend* fun funn* genero* gentle gentler gentlest gently giggl* giver* giving glad gladly glamor* glamour* glori* glory good goodness gorgeous* grace graced graceful* graces graci* grand grande* gratef* grati* great grin grinn* grins ha haha* handsom* happi* happy harmless* harmon* heartfelt heartwarm* heaven* heh* helper* helpful* helping helps hero* hilarious hoho* honest* honor* honour* hope hoped hopeful hopefully hopefulness hopes hoping hug hugg* hugs humor* humour* hurra* ideal* importan* impress* improve* improving incentive* innocen* inspir* intell* interest* invigor* joke* joking joll* joy* keen* kidding kind kindly kindn* kiss* laidback laugh* libert* like likeab* liked likes liking livel* LMAO LOL love loved lovely lover* loves loving* loyal* luck lucked lucki* lucks lucky madly magnific* merit* merr* neat* nice* nurtur* ok okay okays oks openminded* openness opportun* optimal* optimi* original outgoing painl* palatabl* paradise partie* party* passion* peace* perfect* play played playful* playing plays pleasant* please* pleasing pleasur* popular* positiv* prais* precious* prettie* pretty pride privileg* prize* profit* promis* proud* radian* readiness

[35] LIWC2007 Dictionary Poster

ready reassur* relax* relief reliev* resolv* respect revigor* reward* rich* ROFL romanc* romantic* safe* satisf* save scrumptious* secur* sentimental* share shared shares sharing silli* silly sincer* smart* smil* sociab* soulmate* special splend* strength* strong* succeed* success* sunnier sunniest sunny sunshin* super superior* support supported supporter* supporting supportive* supports suprem* sure* surpris* sweet sweetheart* sweetie* sweetly sweetness* sweets talent* tehe tender* terrific* thank thanked thankf* thanks thoughtful* thrill* toleran* tranquil* treasur* treat triumph* true trueness truer truest truly trust* truth* useful* valuabl* value valued values valuing vigor* vigour* virtue* virtuo* vital* warm* wealth* welcom* well* win winn* wins wisdom wise* won wonderf* worship* worthwhile wow* yay yays

3.5.5 Alternative Specifications: Hand-Coded

Table 3.11: Ordinal Logit: Hand-Coded

Variable	**Coefficient** (Std. Error)	**p-value**
Pre-*Twombly* (Torts)	-1.02**	0.01
	(0.42)	
Post-*Twombly* (Torts)	-0.92**	0.04
	(0.50)	
Pre-*Iqbal* (Torts)	-1.04**	0.01
	(0.38)	
Civil Rights	-0.84*	0.01
	(0.34)	
Pre-*Twombly* $\times$ Civil Rights	1.48	0.99
	(0.53)	
Post-*Twombly* $\times$ Civil Rights	0.79	0.91
	(0.59)	
Pre-*Iqbal* $\times$ Civil Rights	1.48	0.99
	(0.51)	
California Eastern	0.80*	0.02
	(0.39)	
Colorado	0.01	0.99
	(0.37)	
Illinois Southern	-0.64	0.56
	(1.11)	
Kentucky Western	-2.95*	0.01
	(1.11)	
New Jersey	0.45	0.35
	(0.48)	
New York Western	-0.28	0.56
	(0.48)	
Rhode Island	-0.09	0.92
	(0.90)	

continued . . .

*Indicates significant at the .05, two-tailed level; **Indicates significant at the .05, one-tailed level

continued . . .

Variable	**Coefficient** (Std. Error)	**p-value**
South Dakota	-1.15	0.26
	(1.01)	
Texas Western	-0.73*	0.03
	(0.33)	
West Virginia Southern	0.76	0.14
	(0.51)	
District Median Ideology	-1.91	0.11
	(1.21)	
Cutpoint 1		
Intercept	-6.16*	0.00
	(0.82)	
Cutpoint 2		
Intercept	-3.53*	0.00
	(0.72)	
Cutpoint 3		
Intercept	-2.57*	0.00
	(0.71)	
Cutpoint 4		
Intercept	-1.79*	0.01
	(0.70)	
Cutpoint 5		
Intercept	-1.10	0.12
	(0.70)	
Cutpoint 6		
Intercept	-0.18	0.80
	(0.70)	
Cutpoint 7		
Intercept	2.45*	0.00
	(0.75)	
Cutpoint 8		
Intercept	4.99*	0.00
	(1.00)	

*Indicates significant at the .05, two-tailed level; **Indicates significant at the .05, one-tailed level.

3.5.6 Classification Rates by Period

Table 3.12: Proportion Correctly Classified by Period

Period	Total	Broad	Specific
Pre-*Twombly*	.73	.71	.75
Post-*Twombly*	.79	.83	.76
Pre-*Iqbal*	.89	.93	.85
Post-*Iqbal*	.88	.92	.87

There are some differences by period. The overall proportions of classification are nearly identical for the pre-*Iqbal* and post-*Iqbal* periods. The rates are lower in the pre-*Twombly* and post-*Twombly* periods, with the greatest differences in the pre-*Twombly* period. This pattern is likely a result of noise in the data due to lower quality documents in the earlier periods. I am aware of no reason to believe that the differences in classification between broad and specific complaints by period are not random. If they are not, the results indicate that I may overall be underestimating hypothesized effects: more broad complaints are misclassified more often than specific complaints in the pre-*Twombly* period, whereas specific complaints are misclassified more often in the other periods. The differences for the post-*Twombly* and pre-*Iqbal* periods are a little more than for the post-*Iqbal* period, but the differences are relatively small, two to three percent: thus, any differences should not change the direction or significance between the post-*Iqbal* period and the post-*Twombly* and pre-*Iqbal* periods.

3.5.7 Alternative Specifications: Classified

Table 3.13: Binomial Logit: Fitted Values

Variable	**Coefficient** (Std. Error)	**p-value**
Pre-*Twombly* (Torts)	-0.34**	0.02
	(0.16)	
Post-*Twombly* (Torts)	-0.49**	0.00
	(0.17)	
Pre-*Iqbal* (Torts)	-0.44**	0.00
	(0.14)	
Civil Rights	-0.19	0.08
	(0.13)	
Pre-*Twombly* Civil Rights	0.25	0.88
	(0.21)	
Post-*Twombly* Civil Rights	0.45	0.98
	(0.21)	
Pre-*Iqbal* Civil Rights	0.38	0.98
	(0.18)	
California Eastern	0.65*	0.00
	(0.15)	
Colorado	0.43*	0.00
	(0.12)	
Illinois Southern	1.74*	0.00
	(0.42)	
Kentucky Western	0.48	0.20
	(0.37)	
New Jersey	0.09	0.62
	(0.18)	
New York Western	0.97*	0.00
	(0.18)	
Rhode Island	2.00*	0.00
	(0.38)	

continued . . .

*Indicates significant at the .05, two-tailed level; **Indicates significant at the .05, one-tailed level.

continued . . .

Variable	**Coefficient** (Std. Error)	**p-value**
South Dakota	0.41	0.30
	(0.39)	
Texas Western	0.27*	0.04
	(0.13)	
West Virginia Southern	-0.92*	0.00
	(0.21)	
District Median Ideology	1.00*	0.03
	(0.47)	
Intercept	-0.22	0.37
	(0.24)	

*Indicates significant at the .05, two-tailed level; **Indicates significant at the .05, one-tailed level.

Table 3.14: Regression: Word Count

Variable	**Coefficient** (Std. Error)	**p-value**
Pre-*Twombly* (Torts)	-785.25**	0.00
	(255.23)	
Post-*Twombly* (Torts)	-1009.94**	0.00
	(259.15)	
Pre-*Iqbal* (Torts)	-580.83**	0.01
	(249.80)	
Civil Rights	-884.15**	0.00
	(226.76)	
Pre-*Twombly* $\times$ Civil Rights	655.07	0.97
	(329.44)	
Post-*Twombly* $\times$ Civil Rights	775.98	0.99
	(314.47)	
Pre-*Iqbal* $\times$ Civil Rights	545.40	0.94
	(338.52)	
California Eastern	746.90*	0.00
	(238.42)	
Colorado	44.65	0.81
	(183.49)	
Illinois Southern	932.44	0.13
	(611.31)	
Kentucky Western	-497.97	0.35
	(531.83)	
New Jersey	932.43*	0.00
	(302.64)	
New York Western	309.83	0.26
	(274.67)	
Rhode Island	830.26*	0.09
	(491.15)	

continued . . .

*Indicates significant at the .05, two-tailed level; **Indicates significant at the .05, one-tailed level.

continued . . .

Variable	**Coefficient** (Std. Error)	**p-value**
South Dakota	-956.45*	0.08
	(550.98)	
Texas Western	168.95	0.46
	(226.94)	
West Virginia Southern	-1403.11*	0.00
	(269.56)	
District Median Ideology	-186.75	0.78
	(670.93)	
Intercept	2843.78*	0.00
	(361.09)	

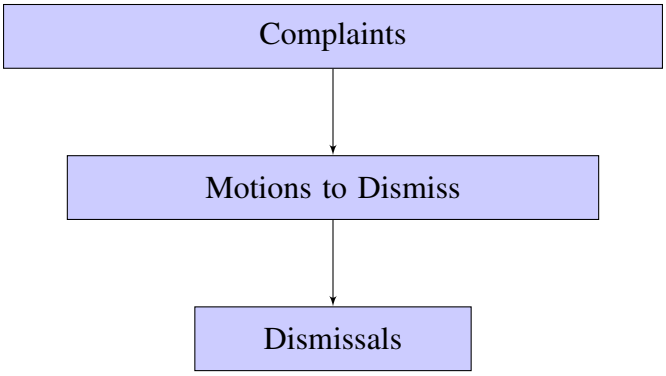
*Indicates significant at the .05, two-tailed level; **Indicates significant at the .05, one-tailed level.

Chapter 4

Motions and Outcomes

Finally, I turn to an empirical investigation regarding whether the plausibility standard has changed the rate at which defendants are bringing motions to dismiss for failure to state a claim, and the outcomes they obtain from judges on such motions. In preparation for this inquiry, I first spoke with attorneys and judges to consider the ways in which litigants and judges may have responded to changes in the pleading standard (Chapter 2). Based on concerns regarding litigant selection, I developed a measure of specificity in factual allegations from complaints and found evidence that specificity of allegations increased after the *Iqbal* decision (Chapter 3). Now I am able to use this measure of specificity to consider the extent to which the plausibility standard changed the circumstances under which defendants file motions to dismiss pursuant to Rule 12(b)(6) and how those motions are resolved. Thus, I am concerned with litigant behavior across three levels in litigation, as represented in Figure 4.1:

Figure 4.1: Simplified Model of Selection



It is with the goal of better understanding the decisions that litigants and judges make in light of legal change that I now turn to considering motions and outcomes.

4.1 Literature and Theory

4.1.1 Motions, Outcomes: Judicial Preferences and Attorney Strategies

As discussed in Chapter 2, I anticipate that attorneys will file motions to dismiss on behalf of their defendant clients when the benefits outweigh the costs (*see* Fox and Birke, 2002; Singer, Forthcoming). Factors that increase the likelihood of success should result in more motions being filed. Therefore, attorneys should be more likely to file motions to dismiss when the preferences and goals of the presiding judges are aligned with defendants and dismissals (*see* Epstein and Knight, 1998). Based on theory and prior research, I would anticipate that judges' decisions are shaped by a multitude of factors including both law and ideology (Epstein and Knight, 2013). Scholars have identified a number of factors that likely motivate judges' decisions (Epstein and Knight, 2013). One very important such factor is leisure or workload (*see, e.g.,* Cohen, 1992; Epstein and Knight, 2013; Klein and Hume, 2003; Posner, 1993*b*, 2008). Judges, like all individuals, have limited time and mental resources to dedicate to the cases before them. Furthermore, the resources they dedicate to cases could be spent pursuing other, likely more

enjoyable, endeavors (Epstein and Knight, 2013; Posner, 1993*b*, 2008). Additionally, workload influences the ability of judges to dedicate time to cases and decisions that they about more (*see, e.g.,* Law, 2009*b*, 2010).[1]

The relative strictness of the federal pleading standard should influence the rate of motions to dismiss due to several important factors: the adjustment of the costs and benefits associated with granting a motion to dismiss, the advantages of relying on precedent, and adherence to the law. Despite a desire for reduced workload, judges cannot simply dismiss all or most of the cases before them without threatening the legitimacy of their position (*see, e.g.,* Tyler, 1997) and invoking the ire of higher courts and political institutions (*see, e.g.,* Randazzo, 2008). Reversals can harm the reputation and promotion chances for district judges (Epstein, Landes and Posner, 2013). Orders that are overturned on appeal also create more work for such judges (Epstein, Landes and Posner, 2013) and potentially embed unfavorable precedent (*see generally* McGuire et al., 2009; Yates and Coggins, 2009; Hume, 2007, 2009). Thus, they are likely to take advantage of dismissals primarily where they are granted wider leeway in doing so. The plausibility standard is generally understood to provide judges with quite a bit of latitude in determining if a case should be dismissed: "Under the *Iqbal* standard, federal courts have much discretion to dismiss lawsuits at the very beginning of a case if they think the allegations are not plausible–whatever "plausible" means to the particular judge" (Coyle, 2013: 223). Furthermore, precedent generally allows judges to make more efficient decisions by allowing them to "simplify work" by taking advantage of heuristics (Epstein and Knight, 2013: 22). Adherence to precedent can further the ideological goals of other judges as it creates value in precedent generally, including their own (Epstein and Knight, 2013; Landes and Posner, 1976; Schwartz, 1992). While generally the concerns about the value of precedent are less pronounced at the trial-court level, where judges do not make precedent, trial judges are well incentivized to promote the overall value of the system: the ability of a judge to have his or her orders carried out

[1] Judges may have strong preferences in a case because they have strong preferences over the immediate outcome or the general matters of law that the cases are related to (*see* Carrubba et al., 2011).

rests primarily on the perceived legitimacy of the system (*see, e.g.,* Tyler, 1997).

Additionally, there is evidence that judges likely derive utility from applying doctrine. This benefit can stem from establishing a reputation as an adept applier of legal doctrine (Epstein and Knight, 2013; Shapiro and Levy, 1994). It could also flow from applying legal doctrine based on a judge's view of his or her role due to the socialization and professionalization that lawyers and judges undergo (Gibson, 1978). Though many of the judges I interviewed acknowledged political aspects of judicial decision-making, many also noted a desire to do their job by applying the law correctly (Chapter 2). Though ideology certainly could color how a judge understands the correct application of the law, the range of responses does not appear to be unlimited (*see, e.g.,* Black and Owens, 2009). In the context of federal pleading standards, the extent to which specific factual allegations are included in the complaint should influence whether or not the judge dismisses the claim.[2]

Finally, considering the role of ideology in judicial decision-making is a major focus in the study of judicial politics in political science and beyond (*see, e.g.,* de Figueiredo, 2005; Epstein and Knight, 1998; Segal and Spaeth, 1993). The influence of ideology is generally apparent at the level of Supreme Court decision-making (*see, e.g.,* Hansford and Spriggs, 2006; Segal and Spaeth, 2002). There is strong evidence of its influence at the Court of Appeals (*see, e.g.,* Hettinger, Lindquist and Martinek, 2004; Randazzo, Waterman and Fine, 2006). At the district court level, however, the picture tends to be a little murkier (*see* Pinello, 1999): some studies of district court decision-making have failed to find evidence of a strong effect for ideology (*see, e.g.,* Boyd, 2009), while others have revealed evidence of such relationship (*see, e.g.,* Rowland and Carp, 1996). There are an abundance of reasons to believe that ideology influences the decisions trial judges make, including the inherent value of achieving political outcomes (Segal and Spaeth, 2002), the relationship between ideology and one's view of the proper meaning of law and good policy (Tamanaha, 2009) and job satisfaction (Epstein and Knight, 2013).

[2]This is not to say that only specificity matters in dismissals, but all else held equal decreased specificity should result in increased motions and dismissals.

Generally, conservative ideology is considered pro-defendant: conservative are more protective of business interests (who tend to be defendants or paying for the representation of defendants) and wary of large damage awards (*see, e.g.,* Carp et al., 1992; Spaeth et al., 2011). Liberal ideology is generally associated with favoring plaintiffs who tend to be individuals and less resourced (*see, e.g.,* Carp et al., 1992; Spaeth et al., 2011).

Thus, there are an abundance of reasons to believe that the *Iqbal* decision, which made clear that the plausibility standard first introduced in *Twombly* applied to civil cases generally, would create circumstances under which judges would be more likely to grant motions to dismiss in cases with less specific allegations and that attorneys representing defendants would understand this shift and change their practice with regards to filing motions (*see, e.g.,* Epstein, Landes and Posner, 2013). Many scholars and commentators believe that application of the plausibility standard to all cases resulted in an increased number of motions to dismiss filed by defendants (*see* Cecil, Cort, Williams and Bataillon, 2011; Epstein, Landes and Posner, 2013; Gelbach, 2012*b*). For example, Coyle (2013: 223-24) describes the reaction to the *Iqbal* decision as: "[t]he decision was considered a boon to corporate defendants, who wasted no time in raising *Iqbal* as a defense to consumer, civil rights, and other lawsuits." Additionally, many of the judges and attorneys I spoke to perceived that that were more motions to dismiss for failure to state a claim (Chapter 2). Also, as described in previous chapters, many legal scholars and commentators believe the plausibility standard represents a stricter standard that disadvantages plaintiffs.

4.1.2 Hypotheses

Table 4.1 provides the general patterns that I anticipated in the rates of motions to dismiss and granted motions for the post-*Twombly* and post-*Iqbal* periods when taking specificity into account.[3] First, I expected that in both periods motions and grants would be more likely where the complaint is broad: in other words, I will be larger than II and III will be larger than IV. I

[3]In this table, for the differences, a plus sign indicates that I anticipate that the cells to the left or top will be greater than the cells to the right or bottom. A minus sign indicates the opposite.

hypothesized that for both broad and specific complaints, filings and dismissals increased after *Iqbal*: therefore, III should be larger than I and IV should be larger than II. Finally, I anticipate that the difference between I and II will be greater than the difference between III and IV because the previous standard was far more restrictive.

For motions, of course, the rate for each period should begin at relatively low levels: the rate at which motions to dismiss are filed is generally estimated to be below 5% in torts - injury cases and around 10% in civil rights cases Cecil, Cort, Williams and Bataillon (2011).[4] For outcomes, the intercepts will start much higher. Based on prior estimates approximately 60% of motions are granted (Cecil, Cort, Williams and Bataillon, 2011).[5]

Table 4.1: Hypotheses

	Broad	Specific	Differences
Post-*Twombly*	I	II	+
Post-*Iqbal*	III	IV	+
Differences	-	-	

Furthermore, based on previous research, I expected that more motions to dismiss would be filed in civil rights cases than in torts cases.[6] Also, defense attorneys should be more likely to bring

[4]It should be noted that my means of identifying a motion varies from Cecil, Cort, Williams and Bataillon (2011).

[5]Of course, Cecil, Cort, Williams and Bataillon (2011) and my study are not considering identical outcomes. Cecil, Cort, Williams and Bataillon (2011) only considers the grant rate compared with denials. I consider the grant rate compared with all other outcomes.

[6]Beyond noting this empirical fact, scholars have yet to address why this is (*see* Cecil, Cort, Williams and Bataillon, 2011; Epstein, Landes and Posner, 2013). One theory discussed at length in this project is the availability of information. Another explanation is that civil rights cases are often brought by prisoners and represent weak cases (*see generally* Epstein, Landes and Posner, 2013: 231). But this rate of higher filings persists even when *pro se* cases (the vast majority of prisoner cases are in this category) are excluded (*see* Cecil, Cort, Williams and Bataillon, 2011). Other likely explanations include the more individually and politically complex nature of the wrongs that are being

motions to dismiss before conservative judges who are more likely to be favorable to their cause. Even where the presiding judge is not conservative, I hypothesized that a conservative district culture would be associated with more filings - as attorneys are more accustomed to filing such motions. I believed that attorneys are aware of the pressures on judges and thus would anticipate that busy judges will be more likely to grant a motion to dismiss. Therefore, I anticipated that caseload would be positively correlated with motions to dismiss and dismissals. In parallel, judges should be more likely to grant motions to dismiss when they are conservative and suffer under large caseloads.

4.1.3 Prior Research

A number of empirical studies have been undertaken to determine if the Court's adoption of the plausibility standard has resulted in more cases being dismissed (*see, e.g.,* Cecil, Cort, Williams and Bataillon, 2011; Cecil, Cort, Williams, Bataillon and Campbell, 2011; Dodson, 2012; Engstrom, 2013; Epstein, Landes and Posner, 2013; Gelbach, 2012*b*; Hatamyar, 2010; Hannon, 2007; Hubbard, 2013*b*; Janssen, 2011; Martinez, 2009; Seiner, 2009, 2010; Yacobucci and McGovern, 2011). The majority of these studies have simply looked at the differences in dismissal rates and numbers before and after the decisions and ignored the potential for selection bias (*see* Engstrom, 2013; Gelbach, 2012*b*; Hubbard, 2013*b*,*a*). Generally, the results of this type of study have been mixed, and there is not strong evidence that these cases have had much of an impact (*but see* Dodson, 2012, finding a significant effect, but without accounting for interdependence among claims in the same complaint). Unfortunately, due to limitations in the available data and measures, the bulk of these studies are potentially unreliable. The majority, but not all (*see* Cecil, Cort, Williams and Bataillon, 2011; Cecil, Cort, Williams, Bataillon and Campbell, 2011; Engstrom, 2013; Gelbach, 2012*b*), of these studies are based on published opinions. Concerns regarding bias that could be caused by using published cases are well

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alleged.

documented (*see* Keele et al., 2009; Law, 2005; Merritt and Brudney, 2001; Songer, 1989; Swenson, 2004). Attorney surveys on the subject have also yielded a mixed picture regarding dismissals (*see* Hamburg and Koski, 2010; Lee and Willging, 2010*b*,*a*; Willging and Lee, 2010). Cecil, Cort, Williams and Bataillon (2011) from the Federal Judicial Center (FJC) carried out one particularly interesting study regarding the effect of the plausibility standard. This study is unique because the researchers were able to analyze published and unpublished rulings via their access to the federal courts' Case Management/Electronic Case Filing (CM/ECF) system for 23 courts. Cecil, Cort, Williams and Bataillon (2011) looked at filings in 2006 and 2010 exclusively. Cecil, Cort, Williams and Bataillon (2011) collected two data sets from the courts: a motions data set and an orders data set. These data sets are independent of each other: the same cases are not necessarily included (Cecil, Cort, Williams and Bataillon, 2011). The findings were rather mixed. The FJC data set includes motions brought in the first 90 days after a case was filed, for cases filed in 23 districts between October 2005 and June 2006, and October 2010 and June 2011 (5). The 90-day cut off was used due to limitations in resources. A probit model of whether motions to dismiss were brought before or after the 90-day mark with the same explanatory variables as used in my outcomes model reveals statistically significant results estimating that in civil rights cases there were fewer late period motions to dismiss in the post-*Iqbal* period than in the post-*Twombly* period. They did find some significant increases in the number of motions to dismiss that were filed in the first 90 days. The orders data set was based on orders on motions decided in January through June of 2006 and 2010 in the same districts (Cecil, Cort, Williams and Bataillon, 2011). This data set was not limited to orders based on motions brought in the first 90 days of a case. The analysis of the orders data also revealed a statistically significant increase in the overall portion of motions granted with leave to amend, as well as in civil rights cases. Cecil, Cort, Williams and Bataillon (2011) also released an updated report in which they analyzed the ultimate outcomes of these cases, including cases in which a motion was granted with leave to amend (Cecil, Cort, Williams, Bataillon and Campbell, 2011). As Gelbach (2012*b*) points out, the numbers indicate that movants are more likely to ultimately prevail where a motion has been

granted with leave than before the decisions.

The outcome studies generally ignore the possibility of selection effects among litigants in the form of differences in the decision to file suit, file a motion to dismiss, and settle (*see* Gelbach, 2012*b*; Hubbard, 2013*b*). As Gelbach (2012*b*) notes:

> Simple comparisons of adjudicative results, like how often plaintiffs win at trial, tend to mix together (i) the effects of changes in legal rules on cases that would be litigated regardless of the choice of legal rules and (ii) changes in case composition that result from the change in legal rules.

Thus, merely considering grant rates does not provide us with reliable information regarding judicial decision-making in the face of litigant selection (Engstrom, 2013; Gelbach, 2012*b*; Hubbard, 2013*b*). Political scientists studying the impact of judicial decisions and policies, like judicial politics scholars as a whole, have tended to focus solely on the actions of officials - judges, executives, legislatures, and bureaucrats (*see, e.g.* Becker and Feeley, 1973; Canon and Johnson, 1999; Gruhl, 1980; Hall, 2010; Klein and Hume, 2003; Spriggs, 1996). These approaches neglect the well-theorized role of law in shaping the behavior of individuals (*see, e.g.,* Baum, 1988; Galanter, 1974; Hall, 2010; McGuire et al., 2009; Priest and Klein, 1984; Schauer, 1987).

A few scholars, however, have considered selection and dismissal rates. For example, due to concerns about selection bias, Hubbard (2013*b*) looked at cases where a 12(b)(6) motion was filed before *Twombly* was handed down but the court did not rule on the motion until after the announcement. Hubbard (2013*b*) did not find a significant difference in the dismissals either in overall dismissal rates based on administrative data or a data set based on cases reported on Westlaw. Unfortunately, the administrative data only covers cases where the entire case was dismissed due to a "Judgment on Motion Before Trial" (Hubbard, 2013*b*). These figures also include cases disposed of by summary judgment and potentially other types of motions to dismiss (Hubbard, 2013*b*). In an attempt to avoid potential problems, Hubbard (2013*b*) only considered cases pending between 45 and 225 days for which the prevailing party was the defendant or unknown. I am aware of no theoretical or empirical evidence that such restrictions would cleanly

identify Rule 12(b)(6) motions. In Hubbard (2013*c*), the analysis was extended to *Iqbal* decision using only updated administrative data. He did not find significant differences in either study. Despite his very principled and clever research design, the results may not be reliable. The failure to find an effect for *Twombly* may have been due to uncertainty in the legal community regarding whether the standard was broadly applicable. The second study regarding *Iqbal* relies only on very coarse data and a limited conception of what the impact of the plausibility standard could be (only full dismissal). In both studies, Hubbard's null results may be due to the failure to account for the specificity in the petitions and the limited nature of the data sources. Furthermore, as pointed out by Engstrom (2013), Hubbard's study does not and can not address any chilling effect the cases may have had.

Additionally, Gelbach offered a conceptual model of litigant behavior to help account for the types of selection bias scholars anticipate exist (Gelbach, 2012*b*). He then used this conceptual model to estimate the lower bound of negatively affected claims due to the change in the pleading standard based on data from Cecil, Cort, Williams and Bataillon (2011). Gelbach (2012*b*) calculated the lower bounds of negatively affected cases using this dismissal data in conjunction with rulings data; he also based his estimates of the standard errors of the lower bounds based on the assumption that the two data sets are independent (Gelbach, 2012*a*). His results indicated that the change in pleading standards had a significant affect on plaintiffs. There have been, however, challenges to the results (*see, e.g.,* Engstrom, 2013). Some have expressed concern that the motions and orders data should not be used together because they do not represent the same cohort of cases (Engstrom, 2013; Gelbach, 2012*b*). Gelbach (2012*b*) has generally dismissed these concerns; he assumes that the data sets are independent of each other and that using them together will not bias his results despite the concerns (Gelbach, 2012*b*).

Analyses based on my data (which is a cohort study) provides evidence that this assumption may not be warranted. From the data I collected the average days between filing and the first motion to dismiss for failure to state a claim in the population is estimated to be approximately 121 days.[7]

[7]The 90% Confidence Interval for this estimate is [110.34, 132.44].

A probit model of whether motions to dismiss were brought before or after the 90-day mark for both causes of action did not yield statistically significant differences regarding when motions were filed, but estimates indicate there were fewer late period motions to dismiss in the post-*Iqbal* period than in the post-*Twombly* period. With the larger Cecil, Cort, Williams and Bataillon (2011) sample, these differences may be significant. Also, an analysis regarding outcomes in these cases indicated that motions to dismiss filed after the 90-day mark were more likely to end with orders granting at least part of the motion than those filed in the first 90 days. The results of these analyses can be found in Appendix 4.5.1. There are, of course, differences in the two studies that make comparison imperfect, but the evidence at hand indicates that the estimates may overstate the lower bounds or understate the standard errors in at least some cases.

There are some other concerns regarding the Gelbach (2012*b*) study. Unfortunately, the FJC data has been recently discovered to include cases from different relevant periods - specifically it includes cases filed before and after the *Iqbal* decision was handed down but were decided after (Engstrom, 2013).[89] Additionally, Gelbach's results may misstate the lower bounds to the extent that there has been instability or growth in the underlying types of cases.

There are a number of reasons that further investigation is warranted. Looking at dismissal rates without accounting for the specificity of the factual allegations could obscure the effects of legal change: the core of the plausibility standard and the debate surrounding it is the information that a plaintiff is required to provide in order to be allowed to remain in federal court. There is evidence that in at least some types of cases, the complaints have become more specific. Thus, simply looking at filing and dismissal rates could provide misleading information. Additionally, there are concerns regarding previously collected data sets.

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[8]This is of course a complicating factor because scholars anticipate and my study shows that litigants appear to have adapted to the decision.

[9]Engstrom (2013) also finds that when one uses data regarding entire cases, as opposed to specific claims, within the Gelbach (2012*b*) model that the estimates are generally much lower and in one instance (employment discrimination cases) the effect is no longer significant. As Engstrom (2013) notes, there is debate and many open questions as to the appropriate unit of analysis for considering dismissals - claims vs. cases (*see also, e.g.,* Dodson, 2012).

4.2 Methods

4.2.1 Research Design

4.2.2 Data

The focus of this aspect of the project is to consider differences regarding motions to dismiss for failure to state a claim and judges' decisions on those motions in light of the *Iqbal* decision.[10] The population of relevant cases were those complaints originally filed in federal courts which granted me an exemption by an attorney in the six month periods immediately after *Twombly* and *Iqbal*. These periods cover almost exactly the same time of year and, thus, help control for any cyclical effects. Furthermore, the approximately two-year gap between the decisions allows for sufficient time for motions to dismiss to be filed and resolved after *Twombly* but before the *Iqbal* decision.[11] The sample of cases was drawn in the manner described in Chapter 3.

I identified cases with the relevant type of motion to dismiss using a multi-stage process. First, using the search engine on Bloomberg Law, I searched the dockets from the population of cases of the sampled districts over the relevant timeframe for terms associated with motions to dismiss pursuant to FRCP 12(b)(6).[12] The dockets for each case were analyzed to determine if the case could have such a motion.[13] For cases where it was determined that a 12(b)(6) might be at play,

[10]Ideally, I would be able to also compare cases decided before *Twombly*, as the post-*Twombly* cases may be partially treated, in that some judges and scholars believed the plausibility standard applied broadly. At this time, resources do not allow me to collect the relevant data. My results from Chapter 3, as well as previous research (*see, e.g.,* Epstein, Landes and Posner, 2013; Hubbard, 2013*b*) indicate that the bulk of any effect occurred after the *Iqbal* decision. At worst, using the post-*Twombly* and post-*Iqbal* data would cause me to underestimate the effects of the application of the plausibility standard.

[11]As noted above, artificial limitations - such as only considering motions to dismiss filed in the first 90 days could bias results. Once a case is filed and the defendant answers, the rules of civil procedure do not provide a deadline for motion to dismiss for failure to state a claim.

[12]These terms were "motion to dismiss", "MTD", "failure to state a claim", "12(b)(6)", and "12b6". Searches within the population cases for the four periods analyzed in Chapter 3 resulted in approximately 11,600 entries in a little under 4,000 cases.

[13]In order to find all the relevant cases, I used broad search terms that flagged many cases in which there was not a 12(b)(6) motion. In order to avoid excessive fees, cases were pre-screened using the dockets to eliminate any cases

motions were pulled from CM/ECF systems for the courts in order of filing and analyzed; once a 12(b)(6) motion was identified, no further motions were pulled.[14] Where the motion was unclear as to the grounds for such motion, the memorandum in support of the motion which contains legal arguments, was also pulled where available.

All such motions that were filed by a defendant against a plaintiff[15] were explicitly stated to be based, at least in part, on Rule 12(b)(6) were included.[16] Where attorneys did not identify the precise basis for the motion, motions were included when they explicitly alleged a failure to state a claim or substantially similar allegations. Partial motions and grants are both important to understanding the impact of the generalization of the plausibility standard. Concentrating on full grants, while simple, misses most cases in which a motion to dismiss is at play. As pointed out by Gelbach (2012*b*), the *Iqbal* decision itself pertained to a partial motion.

I also calculated measures for specificity, judicial ideology, and caseload. The specificity measure is a binary measure of specificity based on the method described in detail in Chapter 3. The specificity scores are drawn from the original complaint in the case.[17] I also calculated the JCS score for the presiding judge in each case.[18] In some cases, the parties have consented to having their cases heard by a magistrate judge. Magistrate judges are not Article III judges like their

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there were obviously a false positive and identify the relevant entries within the docket.

[14]The first motion was used to provide a consistent standard across cases with differing numbers of parties and due to resource constraints.

[15]Motions to dismiss by intervenors and third parties were not included. Motions to dismiss affirmative defenses were also excluded. In all such cases, the motions to dismiss are unrelated to the complaint being considered.

[16]The line between what constitutes a failure to include allegations of relevant facts and including facts which indicate that the claim fails is not clear. Often these concepts are two sides of the same coin and framing the issue as one or another can be a matter of style and one that is likely to have changed over time among attorneys based on *Twombly* and *Iqbal*. Thus, I included all motions.

[17]The original complaint was used since it is a consistent marker across all cases. Otherwise, in considering the influence of specificity on whether a motion is filed, it is entirely unclear which version of the complaint should be measured in cases without motions to dismiss with amended complaints. Also, it allows for use of selection models for comparison with probit results as the specificity measure does not change across stages. Finally, use of amended complaints would greatly expand the resources needed.

[18]See Chapter 3, for a full description of the methodology.

district judge colleagues: instead, they are appointed by a majority of district court judges in the district (Boyd and Sievert, 2013).[19] To assess judicial ideology for magistrate judges, I used the median JCS score for the district at the time the magistrate was first appointed.[20] I also calculated the median value for active Article III judges in the district at the time the complaint was filed. Caseload was calculated based on the data from sources from the Federal Judiciary Center (Federal Judicial Center, 2014*a*) for the date the case was filed. The number of pending cases was drawn from Federal Judicial Center (2014*a*). The number of cases was divided by the number of active duty Article III judges serving in the district for the relevant time period, as calculated based on the FJC's biographical database (*History of the Federal Judiciary*, 2014). Then this number was divided by 100 to allow for an easier to read coefficient.

4.2.3 Research Design

To consider the influence of the *Iqbal* decision on motions to dismiss, I used a probit model that included interaction terms for the interplay among era, issue area, and specificity,[21] along with important control variables in the form of ideology and caseload. To consider outcomes, I used selection models in addition to a probit model, as I anticipated an increase in the standard could be obscured by litigant selection in terms of the inclusion of factual details and the related circumstances under which motions are filed. In each analysis, the standard errors are clustered on the court in which the cases were pending. The outcome variable for the motions analysis is whether or not a motion to dismiss was filed. The motions model is based on 1,662 observations. For outcomes, the outcome variable is whether the judge granted a motion to dismiss, in whole or

[19]Candidates for the position are selected by a community panel, but the panel is selected by the district judges (Boyd and Sievert, 2013): thus, I assume the panel recommendations are in keeping with the preferences of the district judges.

[20]Magistrates serve eight year terms (Boyd and Sievert, 2013).

[21]Interactions for each combination were included in the analysis, but data constraints did not allow me to include a triple interaction of the three factors. The non-linear nature of the probit model allows me to capture at least some of any interactive nature at this level (*see generally* Gill, 2001).

in part, or did not.[22] The outcomes analysis is on 357 outcomes.

At the heart of this project is a concern regarding selection mechanisms and the bias they may produce. There is concern that the selection of cases by defendants for motions to dismiss biases our understanding of grant rates. Thus, a selection model is likely warranted. Unfortunately, these models can themselves induce bias (Brandt and Schneider, 2007; Freedman and Sekhon, 2010).[23] Thus, I report the results of a Heckman Probit Model along with a simple probit model and a Heckman regression model.

4.3 Results

4.3.1 Motions

First I consider the results of the motions analysis:

[22]The baseline category for this variable includes denials and dismissals of motions, as well as instances where the judge did not rule on the motion. Often judges held motions for quite sometime and in some cases issued a ruling to that effect. Waiting to rule on a motion represents a decision and one that does not grant the motion. Thus, activity is included.

[23]First, the ultimate outcome variable for outcomes is binary. Therefore, a binary model is appropriate. Unfortunately, the Heckman probit has been found to produce biased results under all but the most "delicate" of conditions (Freedman and Sekhon, 2010). Thus, using a Heckman regression model to create a linear probability model is a good option, but only to the extent that the predicted probability do not fall outside of the range of probability ([0, 1]) (*see* Horrace and Oaxaca, 2006). Furthermore, to avoid the risk of biasing ones results by using a selection model generally (for either the regression or probit model), one must have one or more selection criteria that are included in the selection model but are not properly included in the outcome model (Brandt and Schneider, 2007).

Table 4.2: Probit: Motions to Dismiss

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	-0.29	0.10
	(0.23)	
Specificity	0.00	0.50
	(0.21)	
Civil Rights	0.82**	0.00
	(0.15)	
Specificity x Post-*Iqbal*	0.16	0.11
	(0.13)	
Specificity x Civil Rights	0.15	0.18
	(0.21)	
Civil Rights x Post-*Iqbal*	0.25	0.16
	(0.25)	
Judicial Common Space Score	-0.16	0.09
	(0.11)	
Caseload	0.26**	0.01
	(0.10)	
District Median Ideology	0.11	0.20
	(0.13)	
Intercept	-1.86	0.00
	(0.22)	

**Indicates significant at the .05, one-tailed level.

The presence of interaction terms in a non-linear model makes interpretation of individual coefficients from the table impossible. Thus, to illustrate the estimated relationship between the specificity scores and motions to dismiss by issue area and period, I have produced estimates based on the predicted probabilities.[24] Figures 4.5 and 4.6 illustrate the estimates:

[24] All control variables were held at their median values.

Table 4.3: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Broad v. Specific, Civil Rights

	Broad	Specific	Differences
Pre-*Twombly*	.18 [.15, .22]	.23 [.19, .27]	-.04 [-.1, .01]
Post-*Iqbal*	.17 [.13, .22]	.27 [.21, .33]	-.09 [-.14, -.04]
Differences	.01 [-.05, .06]	-.04 [-.09, .01]	.05 [-.01, .10]

**Indicates significant at the .05, one-tailed level.

Table 4.4: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Broad v. Specific, Torts

	Broad	Specific	Differences
Pre-*Twombly*	.04 [.02, .07]	.04 [.02, .07]	-.00 [-.03, .03]
Post-*Iqbal*	.02 [.01, .04]	.03 [.01, .07]	-.01 [-.04, .01]
Differences	.02 [-.05, .01]	.01 [-.04, .03]	.01 [-.01, .03]

**Indicates significant at the .05, one-tailed level.

These results are not in keeping with my hypotheses. For civil rights cases, the estimates of filings in the specific cases is higher than in broad cases in both periods and the differences are in the opposite direction than my hypotheses. The differences in motions between broad and specific complaints are not statistically different between the periods. Also, the differences in motions across the periods are also not statistically significant across the periods. I also fail to find evidence that the differences across specificity were greater before *Iqbal*. For tort cases, the differences are slight and none of the differences are significant.

I next considered the relationship between the filings of motions across the issue areas by each level of specificity:

Table 4.5: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Civil Rights v. Torts, Broad

	Civil Rights	Torts	Differences
Pre-*Twombly*	.18 [.15, .22]	.04 [.02, .07]	.14** [.11, .17]
Post-*Iqbal*	.17 [.13, .22]	.02 [.01, .04]	.15** [.11, .02]
Differences	.01 [-.05, .06]	.02 [-.05, .01]	.01 [-.05, .08]

**Indicates significant at the .05, one-tailed level.

Table 4.6: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Civil Rights v. Torts, Specific

	Civil Rights	Torts	Differences
Pre-*Twombly*	.23 [.19, .27]	.04 [.02, .07]	.18** [.15, .22]
Post-*Iqbal*	.27 [.21, .33]	.03 [.01, .07]	.23** [.17, .3]
Differences	-.04 [-.09, .01]	.01 [-.05, .01]	.05 [-.00, .10]

**Indicates significant at the .05, one-tailed level.

As expected, motions to dismiss are significantly more likely in civil rights cases then in torts - injury cases: in the post-*Twombly* period, a motion to dismiss was 14% and 15% more likely in a civil rights case, and in the post-*Iqbal* period, a motion to dismiss was approximately 18% and 23% more likely.

The coefficient for caseload is significant, but an assessment of the first difference in predicted probabilities reveals that the effect is substantively small: the simulated difference in probability of a motion to dismiss between one standard deviation above the median value for caseload (.18) and one standard deviation above (.7) is .007 with a 90% Confidence Interval of $[.002, .016]$.[25] There is not significant evidence of differences by period, however. Neither ideology variable, JCS Score of the presiding judge, or Median JCS Score for the district, are statistically significant.

[25]The other variables were held at median or modal values.

4.3.2 Outcomes

I now turn to an analysis of the outcomes of these motions to dismiss:

Table 4.7: Heckman Probit Selection Model

Variable	**Coefficient** (Std. Error)	**p-value**
Outcomes		
Post-*Iqbal*	-0.12	0.39
	(0.43)	
Specificity	-0.35	0.13
	(0.32)	
Civil Rights	0.03	0.49
	(1.27)	
Specificity x Post-*Iqbal*	0.57	0.12
	(0.49)	
Specificity x Civil Rights	-0.21	0.26
	(0.31)	
Civil Rights x Post-*Iqbal*	-0.36	0.10
	(0.28)	
Judicial Common Space Score	0.12	0.17
	(0.13)	
Caseload	0.23	0.36
	(0.63)	
Intercept	1.25	0.32
	(2.62)	

continued . . .

** Indicates significant at the .05, one-tailed level.

continued . . .

Selection: Motions

Variable	**Coefficient** (Std. Error)	**p-value**
Motions		
Post-*Iqbal*	-0.15	0.24
	(0.21)	
Specificity	0.09	0.35
	(0.22)	
Civil Rights	0.83**	0.00
	(0.17)	
Specificity x Post-*Iqbal*	0.01	0.48
	(0.12)	
Specificity x Civil Rights	0.17	0.24
	(0.23)	
Civil Rights x Post-*Iqbal*	0.24	0.17
	(0.25)	
Judicial Common Space Score	-0.15	0.09
	(0.11)	
Caseload	0.22**	0.01
	(0.10)	
District Median Ideology	0.11	0.17
	(0.12)	
Intercept	-1.94**	0.00
	(0.22)	
ρ	-.83	0.63

** Indicates significant at the .05, one-tailed level.
Wald Test: χ^2=.23, Prob $\geq \chi^2 = 0.63$

To understand the effects of specificity and period by issue area, I again take advantage of simulation:

Table 4.8: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Broad v. Specific, Civil Rights

	Broad	Specific	Differences
Pre-*Twombly*	.85 [.69, .95]	.81 [.62, .91]	.03 [-.00, .07]
Post-*Iqbal*	.79 [.62, .92]	.82 [.64, .92]	-.03 [-.1, .01]
Differences	.05 [.02, .09]	-.02 [-.04, .00]	.07 [.03, .12]

**Indicates significant at the .05, one-tailed level.

Table 4.9: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Broad v. Specific, Torts

	Broad	Specific	Differences
Pre-*Twombly*	.85 [.53, .97]	.81 [.51, .95]	.03 [-.03, .09]
Post-*Iqbal*	.83 [.47, .98]	.86 [.54, .98]	-.02 [-.11, .02]
Differences	.01 [-.1, .03]	-.04 [-.1, .00]	.06 [.02 , .11]

**Indicates significant at the .05, one-tailed level.

My concern, of course, is that selection effects could obscure a change in judicial behavior based on the plausibility standard. To the extent that factual allegations and motions might change in light of the decisions, simply looking at outcomes could miss the big picture. We could fail to see an increase in dismissals that occurred within each level of specificity if we fail to account for such differences and any increase in motions to dismiss. In light of my results regarding the motions to dismiss across the periods, theoretically we are unlikely to see changes in outcomes. It is still worth considering if we see a difference in grant rates with this data which is not plagued by many of the problems which affected earlier studies.

As noted above, there are concerns regarding potential bias with Heckman Probit models and selection models generally.[26] The results of the probit and Heckman regression models are found in the Appendix at 4.5.3.[27] The results are that the models are not identical. For the Heckman

[26]Theoretically and empirically the median ideology of the district does not appear to be the type of strong instrument I would desire for a selection model. Also, predictions from the Heckman regression model fell outside of the range of probability; thus, there is the potential for biased results (*see* Horrace and Oaxaca, 2006). Furthermore, the coefficients for the Wald Test for Independent Equations do not rise to the level of statistical significance in the the models. (Though this does not, of course, obviate all concerns regarding selection.)

[27]These analyses were run on smaller sets of data than the probit. In nine instances, a motion to dismiss was filed

Probit model, there were no significant differences across eras and levels of specificity regarding civil rights cases. For the simple probit and Heckman regression models, however, there are significant differences in civil rights cases. Specifically, both of those models revealed that grants were significantly less likely in specific cases than in broad cases in the post-*Twombly* period. They also indicate that there were fewer motions granted in broad cases after *Iqbal*. I have also included the analyses using word count and continuous as the measure of specificity instead of the binary fitted values of the classifier for comparison - there are no significant differences using word count and the continuous fitted values resulted in mixed results (Appendix 4.5.2 & 4.5.4). Neither ideology not caseload exerted a significant effect on grant rates in either issue area, though the estimates are in the anticipated direction. There are no significant differences in the torts cases across all models. Additionally, my hypothesis regarding the relative differences across broad and specific cases between the eras was not confirmed. Furthermore, there are no significant differences between probability of dismissal in torts and civil rights cases.

4.4 Discussion

Overall, I failed to find the patterns of litigant behavior that I anticipated.[28] Generally, I also did not find evidence of an increase in dismissals after the *Iqbal* decision as compared with the time period immediately after *Twombly*. Despite this fact, this study offers a number of empirical contributions. These findings are based on data that avoided issues that plagued earlier studies: I collected and analyzed cohort data regarding motions and outcomes in cases before and after the *Iqbal* decision from the CM/ECF systems and did not limit my analysis of motions to dismiss to those filed in the first 90 days. Therefore, I avoided potential issues with relying only on cases found in an electronic database or combining separate data sets. To date, I am aware of no other

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before *Iqbal* but decided after the decision; thus, these observations had to be removed to avoid biasing the results.

[28]These results do not, of course, preclude the possibility that litigant selection began post-*Twombly* and that my hypotheses might not be confirmed using data that includes the pre-*Twombly* period.

project in which this has been accomplished.

Although my analyses in Chapter 3 indicated that litigants adapted to the heightened pleading standard by filing more specific complaints, the estimates fail to show that motions are more likely to be filed in cases with broad complaints. In fact the predictions, which overall not significant, indicate that such motions are more likely where the complaint is specific. The juxtaposition of these results, the expected increase in specificity and failure to find evidence of a relationship between specificity and motions to dismiss may indicate that there may be additional selection bias, between the filing of suit and the filing of a motion to dismiss, that I have been unable to capture.

Although the results regarding the filing of motions to dismiss do not reveal evidence of litigant selection based on specificity in cases originally filed in federal court from before and after *Iqbal*,[29] the results do indicate some factors that influence this decision. Motions to dismiss are also more likely, albeit only to a small extent, in districts where judges carry heavy caseloads. This is some evidence of a strategic interaction between the attorney and judge: busier judges should be more inclined to grant motions to dismiss and litigants appear to respond, if ever so slightly, to this perception. Also, I found evidence that the decision whether to file a motion to dismiss is influenced by the issue area. The evidence that motions to dismiss are more likely to be filed in civil rights cases compared to other issue areas, such as torts - injuries is consistent with prior research. The cause of this disparity has been understudied and merits further research. Civil rights cases tend to be based on statutes, while torts cases tend to rely on causes of action originating in common law. Statutory claims tend to be based on more modern conceptions of wrong, such as discrimination. Furthermore, these more recently recognized wrongs tend to be more societally contentious. Thus, the filing rates may indicate societal uncertainty around the extent to which certain causes of action should exist and the extent to which damages should be

[29]Prior research (Cecil, Cort, Williams and Bataillon, 2011) has indicated that changes in motions filings were more pronounced in removal cases which are outside of the purview of my research. This difference is likely a result of the differing rules that many states have regarding pleading standards. Curry and Ward (2013) did not find evidence that the plausibility standard has encouraged plaintiffs to file in state court as opposed to federal court (Curry and Ward, 2013).

recoverable in those cases. There is a much higher rate of disagreement generally as to normative desirability of allowing recovery in civil rights cases and when such recovery is warranted, such as employment discrimination and Bivens claims. This stands in contrast to more universal agreement as to the desirability of recovery for run-of-the-mill torts cases, such as car accident cases. Thus, future research could consider the role of the nature of the claim, statutory or common law, and variance in the perceptions of wrongs[30] in explaining differences in the extent to which motions to dismiss are filed.

Generally, I also do not find evidence of an increase in dismissals after the *Iqbal* decision as compared with the time period immediately after *Twombly*. My alternative models indicated that dismissals were previously more likely in cases with broad complaints than in cases with specific complaints in civil rights cases. This is in keeping with my expectations. However, the results also indicate that there may be fewer dismissals in broad cases than before *Iqbal* in these same cases. These results are not confirmed by the Heckman Probit analysis though. My research indicates that dispositive motions warrant further research.

[30]Measures of such variance could be measured by public opinion polls, experimental vignets, or evidence of partisan division regarding the type of claim.

4.5 Appendix

4.5.1 Relationship Between Timing of Motions and Outcomes

Table 4.10: Probit: Later Motion to Dismiss

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	-0.09	0.28
	(0.15)	
Civil Rights	-0.12	0.24
	(0.18)	
Post-*Iqbal* x Civil Rights	-0.11	0.21
	(0.14)	
Intercept	-0.15	0.24
	(0.22)	

**Indicates significant at the .05, one-tailed level.

Table 4.11: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Torts v. Civil Rights, Outcomes Considering Timing of Motions

	Torts	Civil Rights	Differences
Post-*Twombly*	.44 [.31, .58]	.39 [.30, .48]	.05 [-.06,.16]
Post-*Iqbal*	.41 [.29, .53]	.32 [.27, .37]	.09 [-.03, .22]
Differences	-.03 [-.09, .06]	-.07 [-.15, -.03]	-.04 [-.04, .13]

**Indicates significant at the .05, one-tailed level.

Table 4.12: Probit: Grants with Later Motions to Dismiss

Variable	**Coefficient** (Std. Error)	**p-value**
Post 90 Days	0.20** (0.07)	0.00
Post-*Iqbal*	0.25 (0.34)	0.24
Civil Rights	0.55** (0.26)	0.02
Post-*Iqbal* x Civil Rights	-0.27 (0.39)	0.25
Intercept	-0.46 (0.28)	0.05

**Indicates significant at the .05, one-tailed level.

4.5.2 Alternative Specifications: Fitted Values

Motions

Table 4.13: Probit: Motions to Dismiss

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	-0.11	0.32
	(0.23)	
Specificity	0.25	0.16
	(0.26)	
Civil Rights	0.70**	0.00
	(0.21)	
Specificity x Post-*Iqbal*	-0.17	0.22
	(0.22)	
Specificity x Civil Rights	0.32	0.16
	(0.32)	
Civil Rights x Post-*Iqbal*	0.27	0.15
	(0.26)	
Judicial Common Space Score	-0.14	0.10
	(0.11)	
Caseload	0.23**	0.02
	(0.10)	
District Median Ideology	0.09	0.25
	(0.13)	
Intercept	-1.97**	0.00
	(0.25)	

**Indicates significant at the .05, one-tailed level.

Figure 4.2: Probability of Motion by Period, Civil Rights

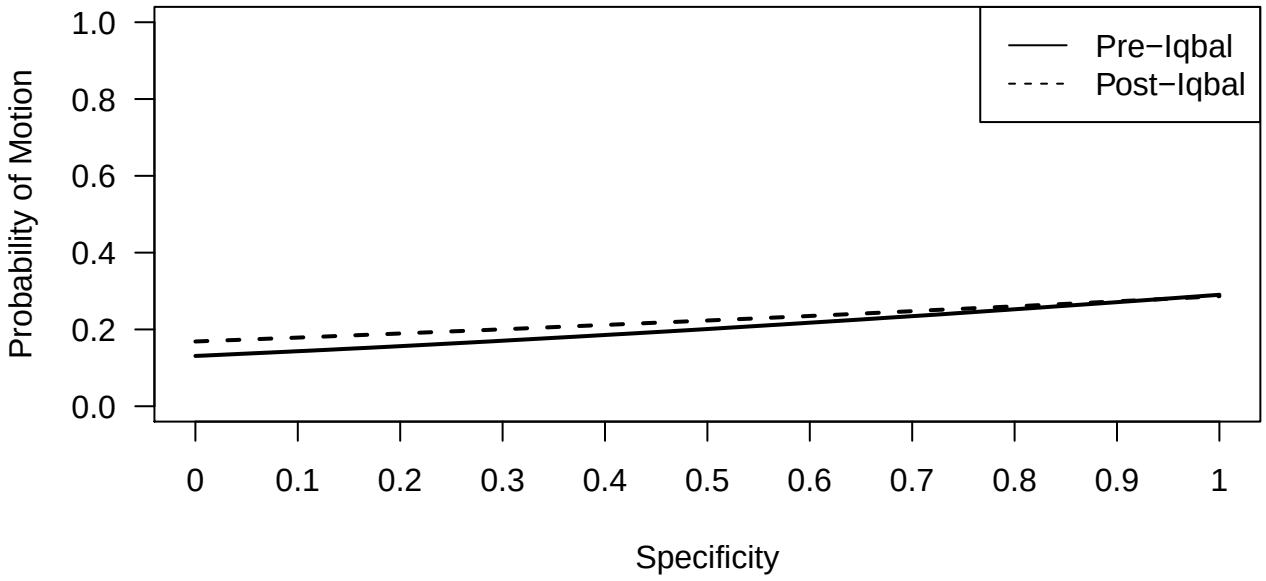

Figure 4.3: Probability of Motion by Period, Torts

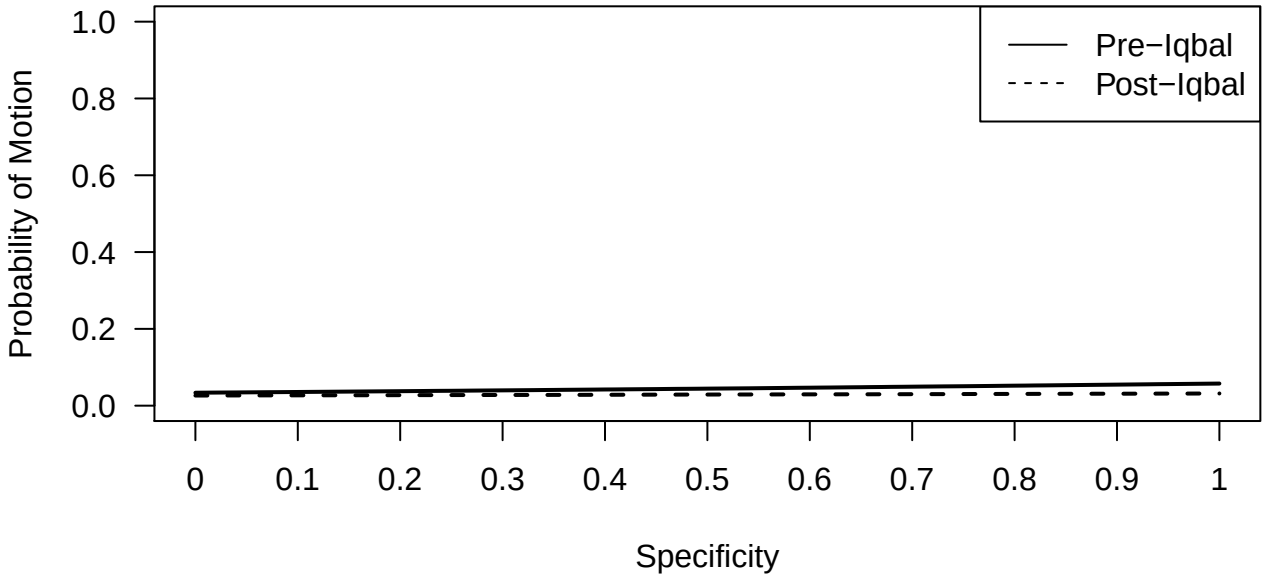

Table 4.14: Simulation: Post-*Twombly* vs. Post-*Iqbal*, Torts v. Civil Rights, Motion Rates

	Torts	Civil Rights	Differences
Post-*Twombly*	.05 [.03, .06]	.21 [.19, .23]	.16** [.14,.18]
Post-*Iqbal*	.03 [.02, .05]	.32 [.23, .27]	.2** [.15, .25]
Differences	-.02 [-.09, .06]	.02 [-.15, -.03]	-.04 [-.1, .02]

**Indicates significant at the .05, one-tailed level.

Figure 4.4: Probability of Dismissal by Period, Civil Rights

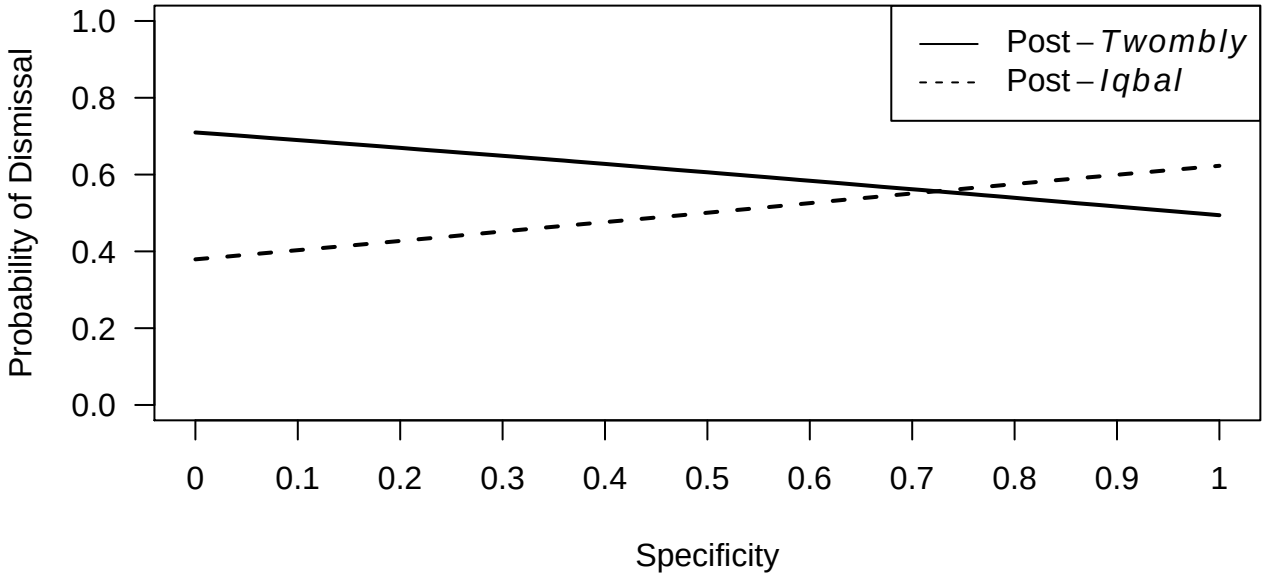

Table 4.15: Probit: Outcomes

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	-0.46	0.12
	(0.38)	
Specificity	-1.00**	0.02
	(0.45)	
Civil Rights	0.32	0.26
	(0.49)	
Specificity x Post-*Iqbal*	1.18**	0.00
	(0.25)	
Specificity x Civil Rights	0.44	0.21
	(0.54)	
Civil Rights x Post-*Iqbal*	-0.40	0.18
	(0.43)	
Judicial Common Space Score	0.06	0.29
	(0.10)	
Caseload	0.31	0.11
	(0.25)	
Intercept	0.04	0.47
	(0.54)	

**Indicates significant at the .05, one-tailed level.

Figure 4.5: Differences in Probability of Dismissal Between Periods, Civil Rights

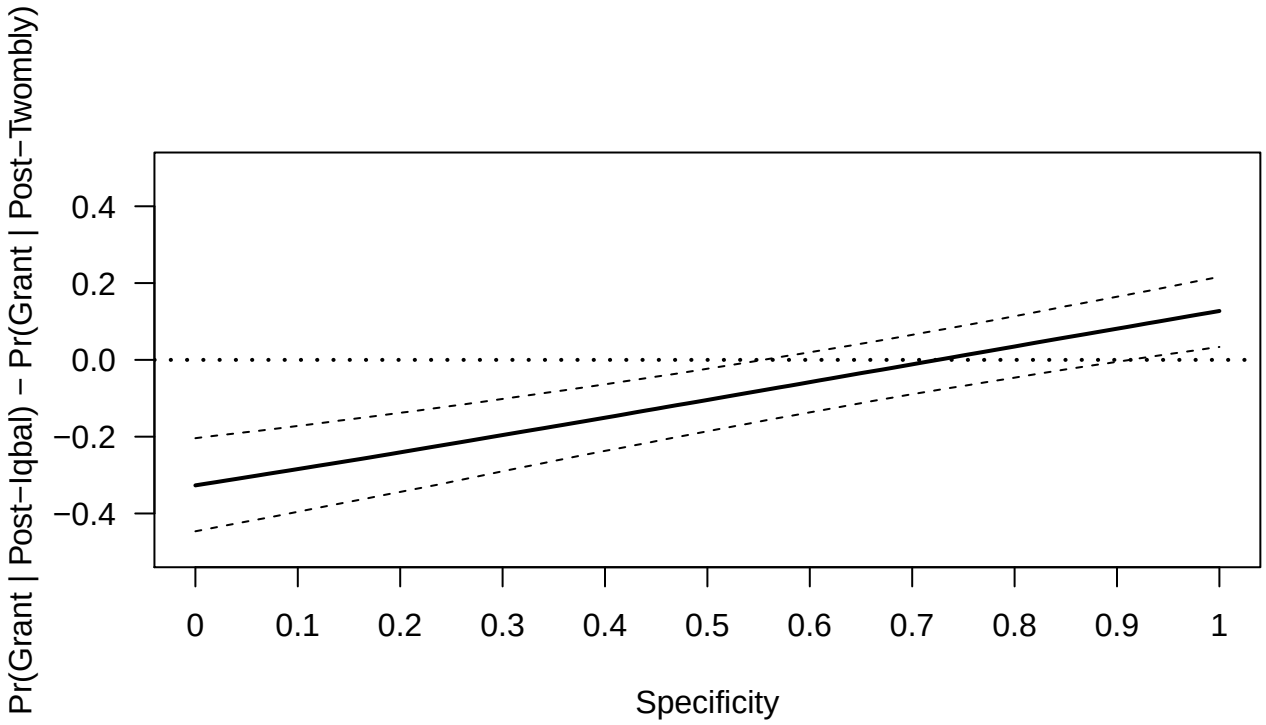

Figure 4.6: Differences in Marginal Effects Between Periods, Civil Rights

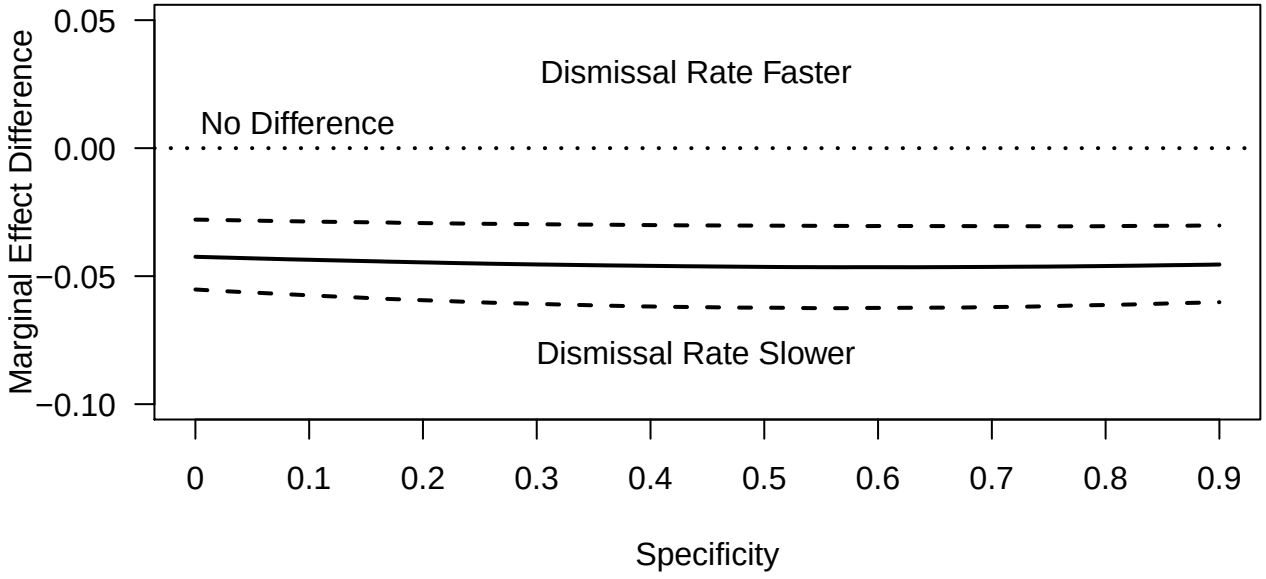

Figure 4.7: Probability of Dismissal by period, Torts

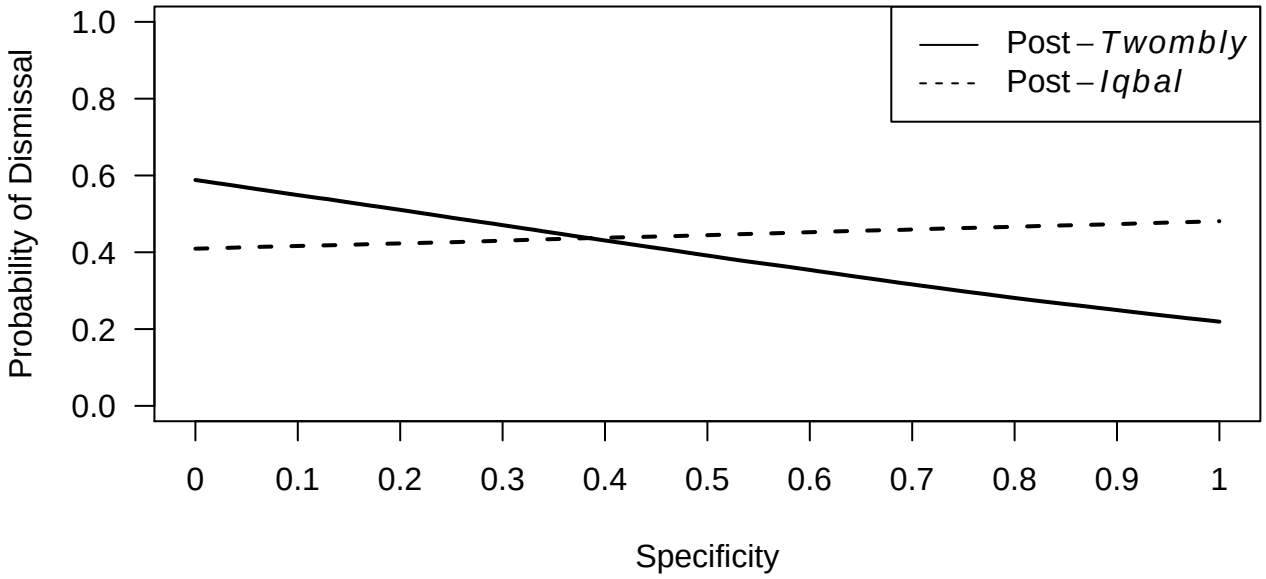

Figure 4.8: Differences in Probability of Dismissal Between Periods, Torts

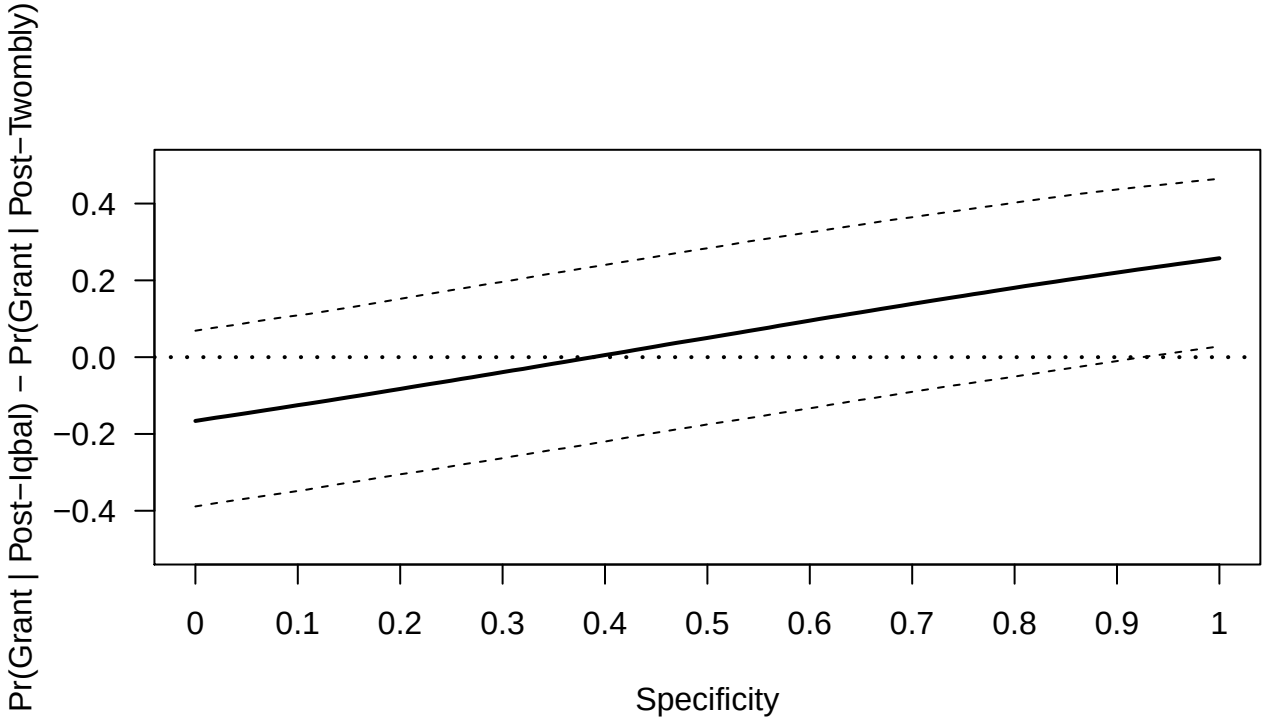

Figure 4.9: Differences in Marginal Effects Between Periods, Torts

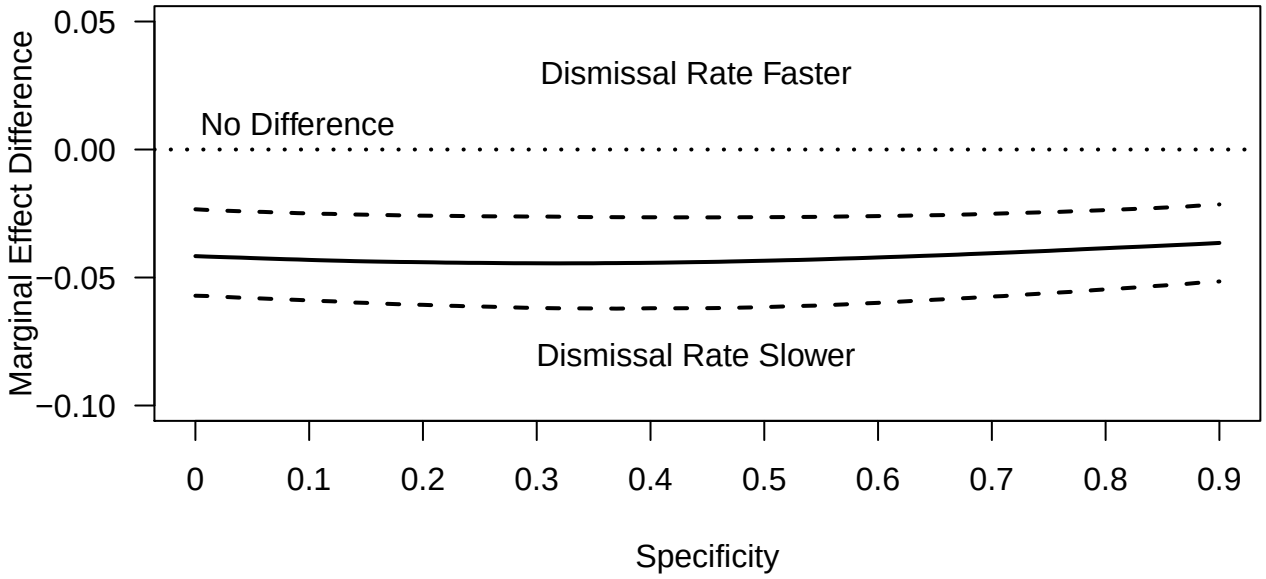

Table 4.16: Heckman Selection Model

Variable	**Coefficient** (Std. Error)	**p-value**
Outcomes		
Post-*Iqbal*	-0.22	0.07
	(0.15)	
Specificity	-0.42**	0.03
	(0.22)	
Civil Rights	-0.03	0.46
	(0.32)	
Specificity x Post-*Iqbal*	0.54**	0.00
	(0.13)	
Specificity x Civil Rights	0.05	0.42
	(0.22)	
Civil Rights x Post-*Iqbal*	-0.17	0.16
	(0.17)	
Judicial Common Space Score	0.04	0.25
	(0.06)	
Caseload	0.10	0.24
	(0.14)	
Intercept	1.17	0.06
	(0.73)	

continued . . .

**Indicates significant at the .05, one-tailed level.

continued . . .

Selection: Motions

Variable	**Coefficient** (Std. Error)	**p-value**
Motions		
Post-*Iqbal*	-0.03	0.45
	(0.22)	
Specificity	0.29	0.16
	(0.29)	
Civil Rights	0.73**	0.00
	(0.22)	
Specificity x Post-*Iqbal*	-0.20	0.13
	(0.21)	
Specificity x Civil Rights	0.32	0.17
	(0.33)	
Civil Rights x Post-*Iqbal*	0.25	0.17
	(0.26)	
Judicial Common Space Score	-0.14	0.11
	(0.11)	
Caseload	0.19**	0.04
	(0.11)	
District Median Ideology	0.10	0.20
	(0.12)	
Intercept	-2.04**	0.00
	(0.25)	
ρ	-0.53	0.34
σ	0.55	0.1
λ	-.29	0.24

**Indicates significant at the .05, one-tailed level.
Wald Test: χ^2=1.57, Prob $\geq \chi^2 = 0.21$

Table 4.17: Heckman Probit Selection Model

Variable	**Coefficient** (Std. Error)	**p-value**
Outcomes		
Post-*Iqbal*	-0.34	0.18
	(0.36)	
Specificity	-0.76**	0.03
	(0.39)	
Civil Rights	-0.39	0.29
	(0.71)	
Specificity x Post-*Iqbal*	0.90**	0.03
	(0.48)	
Specificity x Civil Rights	-0.02	0.48
	(0.38)	
Civil Rights x Post-*Iqbal*	-0.34	0.10
	(0.27)	
Judicial Common Space Score	0.10	0.17
	(0.11)	
Caseload	0.08	0.40
	(0.34)	
Intercept	2.12**	0.02
	(1.02)	

continued . . .

**Indicates significant at the .05, one-tailed level.

continued . . .

Selection: Motions

Variable	**Coefficient** (Std. Error)	**p-value**
Motions		
Post-*Iqbal*	-0.04	0.44
	(0.22)	
Specificity	0.29	0.16
	(0.29)	
Civil Rights	0.72**	0.00
	(0.22)	
Specificity x Post-*Iqbal*	-0.20	0.18
	(0.22)	
Specificity x Civil Rights	0.32	0.17
	(0.34)	
Civil Rights x Post-*Iqbal*	0.25	0.16
	(0.26)	
Judicial Common Space Score	-0.13	0.11
	(0.11)	
Caseload	0.19**	0.04
	(0.10)	
District Median Ideology	0.09	0.22
	(0.12)	
Intercept	-2.03**	0.00
	(0.25)	
ρ	-.90	0.34

**Indicates significant at the .05, two-tailed level.

Wald Test: χ^2=.63, Prob $\geq \chi^2 = 0.43$

4.5.3 Alternative Specifications: Outcome Models

Table 4.18: Probit: Outcomes

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	-0.46	0.12
	(0.38)	
Specificity	-1.00**	0.02
	(0.45)	
Civil Rights	0.32	0.26
	(0.49)	
Specificity x Post-*Iqbal*	1.18**	0.00
	(0.25)	
Specificity x Civil Rights	0.44	0.21
	(0.54)	
Civil Rights x Post-*Iqbal*	-0.40	0.18
	(0.43)	
Judicial Common Space Score	0.06	0.29
	(0.10)	
Caseload	0.31	0.11
	(0.25)	
Intercept	0.04	0.47
	(0.54)	

**Indicates significant at the .05, one-tailed level.

Table 4.19: Heckman Selection Model

Variable	**Coefficient** (Std. Error)	**p-value**
Outcomes		
Post-*Iqbal*	-0.06	0.33
	(0.14)	
Specificity	-0.16	0.14
	(0.15)	
Civil Rights	0.07	0.39
	(0.24)	
Specificity x Post-*Iqbal*	0.28**	0.00
	(0.07)	
Specificity x Civil Rights	-0.09	0.26
	(0.14)	
Civil Rights x Post-*Iqbal*	-0.16	0.16
	(0.16)	
Judicial Common Space Score	0.05	0.21
	(0.06)	
Caseload	0.12	0.21
	(0.14)	
Intercept	0.94	0.08
	(0.65)	

continued . . .

* Indicates significant at the .05, one-tailed level.

continued . . .

Selection: Motions

Variable	**Coefficient** (Std. Error)	**p-value**
Motions		
Post-*Iqbal*	-0.15	0.24
	(0.21)	
Specificity	0.09	0.35
	(0.22)	
Civil Rights	0.83**	0.00
	(0.17)	
Specificity x Post-*Iqbal*	0.01	0.48
	(0.12)	
Specificity x Civil Rights	0.17	0.24
	(0.23)	
Civil Rights x Post-*Iqbal*	0.24	0.17
	(0.25)	
Judicial Common Space Score	-0.15	0.09
	(0.11)	
Caseload	0.22**	0.01
	(0.10)	
District Median Ideology	0.12	0.17
	(0.12)	
Intercept	-1.94**	0.00
	(0.23)	
ρ	-0.53	0.34
σ	0.54	0.1
λ	-.26	0.24

**Indicates significant at the .05, one-tailed level.
Wald Test: χ^2=1.42, Prob $\geq \chi^2 = 0.24$

4.5.4 Alternative Specifications: Word Count

Table 4.20: Probit: Motions to Dismiss - Word Count

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	-0.12	0.30
	(0.23)	
Word Count	0.00	0.32
	(0.00)	
Civil Rights	0.79**	0.00
	(0.14)	
Word Count x Post-*Iqbal*	-0.00	0.22
	(0.00)	
Word Count x Civil Rights	0.00	0.09
	(0.00)	
Civil Rights x Post-*Iqbal*	0.24	0.16
	(0.24)	
Judicial Common Space Score	-0.15	0.10
	(0.12)	
Caseload	0.25**	0.02
	(0.11)	
District Median Ideology	0.09	0.24
	(0.13)	
Intercept	-1.90**	0.00
	(0.23)	

**Indicates significant at the .05, one-tailed level.

Table 4.21: Probit: Grants - Word Count

Variable	**Coefficient** (Std. Error)	**p-value**
Post-*Iqbal*	0.08	0.85
	(0.44)	
Word Count	-0.00	0.71
	(0.00)	
Civil Rights	0.45	0.26
	(0.40)	
Word Count x Post-*Iqbal*	0.00	0.29
	(0.00)	
Word Count x Civil Rights	0.00	0.76
	(0.00)	
Civil Rights x Post-*Iqbal*	-0.29	0.49
	(0.42)	
Judicial Common Space Score	0.08	0.41
	(0.10)	
Caseload	0.31	0.23
	(0.25)	
Intercept	-0.47	0.35
	(0.50)	

**Indicates significant at the .05, one-tailed level.

Chapter 5

Conclusions

The broader implications of this project are far-reaching and significant. Considering anticipatory behavior by litigants enriches scholarly understanding of the role of courts in society and the political system. This project broadens our knowledge regarding the factors that influence engagement of the legal system by shedding light on the ramifications of procedural rules. Thus, it speaks to the question of access to and gatekeeping by courts and the ability of citizens to pursue claims against the government. It also has bearing on the role of uncertainty and information exchange in litigation because it addresses the role of institutional features in shaping the level of detail with which claims are described and defined. This research engages means of capturing the second face of power: that is how anticipation of governmental responses influences if and how citizens act. Embracing such approaches will help improve research regarding courts and judicial ideology. The methods and results from this project have the potential to inform research in a number of areas where strategic behavior is undoubtedly occurring, including studies of Congress and the Executive Branch. For example, strategic calculations should inform the extent to which individuals engage agencies.

My three chapters considered the potential for strategic litigant behavior from three different approaches. The interviews with federal judges and attorneys practicing in civil litigation in the federal courts revealed a complex and nuanced picture regarding responses to legal change. The

interviewees identified considerations that have generally been ignored in the literature, such as factors influencing the drafting of pleadings. Next, my analysis of the factual allegations in complaints indicated that litigants responded to the change in strategic ways, but that the ability of some litigants to adapt to such changes appears to have been constrained by a lack of access to information and need for discovery: as predicted by legal scholars, there is evidence that plaintiffs with greater access to information were able to respond to the introduction of the plausibility standard by becoming more specific in their factual allegations. Finally, my hypotheses regarding the impact of the *Iqbal* decision on motions to dismiss and the outcomes of these were not supported by the results. Despite these findings, the project offered analyses accounting for potential selection with cohort data. This had not been achieved before. Furthermore, the unexpected result highlights the need for further judicial impact research that focuses on the consumer level.

Despite the difficulties in studying the impact of judicial policies on citizens, including litigants, it is a worthwhile goal. New tools, such as natural language processing techniques, are expanding our ability to investigate ground-level responses to judicial decisions. Additionally, access to court documents, including dockets, via the internet has the potential to greatly increase our understanding of litigation and the courts. Finally, in conjunction with these technological advances, more work should be done to use qualitative research in conjunction with quantitative methods.

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