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FOUNDATIONAL FACTS AND DOCTRINAL CHANGE

*Suzanna Sherry**

Doctrine is at the center of law and legal analysis. This Article argues that we have fundamentally misunderstood its nature. The conventional approach to legal doctrine focuses on theory and applications: what is the doctrine designed to do and how does it function? But many doctrines cannot be adequately understood or evaluated under the conventional model because they contain an additional, hidden element. They are built on foundational facts: potentially contested factual assumptions embedded in the doctrinal structure itself. Foundational facts are judges' generalized and invisible intuitions about how the world works. Whether a defendant acted in a particular way out of a particular motive are decisional, rather than foundational, facts. But the likelihood of actors in defendant's position acting that way or having that motive are foundational facts, and doctrinal rules—including burdens of proof and standards of review—will be structured differently depending on whether judges assume a high or low likelihood. Foundational facts thus drive doctrine. Without an understanding of a doctrine's foundational facts, we cannot adequately understand the doctrine and its changes over time. Foundational facts only come to light when doctrine shifts, seemingly inexplicably and often without judicial acknowledgment that anything has changed. That doctrinal shift serves as a cue to look for changed foundational assumptions that might be driving the doctrinal change. Identifying those foundational facts, in turn, allows us to better understand and evaluate both the doctrine and its underlying assumptions.

INTRODUCTION

Shifts in the tectonic plates under the Earth's bedrock cause earthquakes. Shifts in the tacit factual assumptions underlying legal doctrine

* Herman O. Loewenstein Professor of Law, Vanderbilt University. I am grateful to Lisa Bressman, Aaron Bruhl, Brian Fitzpatrick, Lonny Hoffman, Rob Mikos, Richard Nagareda, Amanda Rose, Kevin Stack, Jay Tidmarsh, Ron Turner, Don Welch, participants in the Vanderbilt Summer Brown Bag Colloquium Series, and participants in the University of Houston Faculty-Student Colloquium Series for helpful comments.

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can produce equally seismic results. This Article suggests that focusing on these hidden foundational facts—the factual assumptions on which doctrine is based—is a vital but neglected approach to understanding legal doctrine. Just as earthquakes were once the only observable sign of movement in the tectonic plates, sudden and seemingly inexplicable changes in doctrine may alert us to changes in underlying assumptions. Indeed, such shifts may sometimes trigger our first awareness that foundational facts were driving the doctrine in the first place. And because foundational facts are invisible, the judges who alter the doctrine differ from modern scientists studying earthquakes. The judges may be unaware of (or unwilling to acknowledge) either the original assumptions or their replacements. This blindness can yield a jarring discontinuity between old doctrine and new doctrine, accompanied by a denial that the doctrine is changing at all.

This Article uses these doctrinal discontinuities to challenge conventional views of legal doctrine. The usual approach to doctrine focuses on identifying and evaluating its underlying purpose and its applications: what is the doctrine designed to do and how does it function? But some—perhaps many—doctrines cannot be adequately understood or evaluated under the conventional model because they contain an additional, but hidden, element. More specifically, some doctrines are built on foundational facts: potentially contested factual assumptions that are embedded in the doctrine itself and on which the doctrine is based. Without an understanding of a doctrine's foundational facts, we have an inadequate understanding of the doctrine and its changes over time.

Foundational facts, as described in this Article, are judges' generalized, but invisible, intuitions about how the world works. They are distinguishable from judicial values because they are, at least in theory, empirically testable. Foundational facts, however, are more generalized than what might be called the decisional facts specific to each case. Whether a particular defendant acted in a particular way out of a particular motive are decisional facts (and doctrine determines what consequences will follow from those decisional facts). But the *likelihood* of actors in defendant's position acting in a particular way or having a particular motive is a foundational fact, and doctrinal rules—including burdens of proof and standards of review—will be structured differently depending on whether judges assume a high or low likelihood. So, for example, a court's foundational assumptions about whether most employers or government officials harbor racial animus or whether a significant proportion of lawsuits are meritless will determine, respectively, the burdens that antidiscrimination doctrines place on plaintiffs and defendants and the standards that govern how easily lawsuits may be terminated in defendants' favor before trial. Foundational facts thus drive doctrine, and are internal to it.

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These foundational facts come to light only when doctrine shifts, seemingly inexplicably and often without any judicial acknowledgment that anything has changed. When assumptions about foundational facts change, doctrine shifts as well. That doctrinal shift serves as a cue to look for changed foundational assumptions that might be driving the change in doctrine. Identifying those foundational facts, in turn, allows us to better understand and evaluate both the doctrines and the underlying assumptions.

This approach complements the conventional focus on doctrinal theory. Where the theory is not well-explicated by the courts (which is frequently the case), scholars perform a valuable service by providing and elaborating justificatory explanations for doctrine. But jurisprudential theories can rarely explain doctrinal change, and so scholars must look for other sources. Conventional legal scholarship has focused primarily on external forces: changes in societal values or judicial philosophies.[1] Especially when the doctrinal shifts are sudden and unacknowledged, the explanatory power of external forces seems irresistible.[2]

What is missing from this conventional account of doctrinal change is the recognition that shifts can derive from internal as well as external sources. Once we recognize the role of foundational facts, we can see that at least some doctrinal shifts are caused by disruptions internal to the doctrine, that is, by changes in foundational assumptions. And the factors that seem to point so strongly toward an external cause—suddenness, lack of transparency, and lack of apparent explanation—are the very attributes that signal the possibility of shifting foundations. The

1. The current focus seems to be on one aspect of judicial philosophy. Legal scholars have recently jumped on the attitudinalist bandwagon, suggesting that judges' votes are dependent primarily on their ideology. *See, e.g.*, Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004). In particular, there has been a plethora of recent scholarly charges that the Supreme Court is driven by a particular policy agenda. *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (describing the Court as driven by "conservative judicial philosophies"); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (attributing to the Court a hostility to antidiscrimination law); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (attributing to the Court a hostility to litigation). For the classic attitudinalist approach, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995). For critiques of, and alternatives to, attitudinalism in the political science literature, see, for example, RONALD KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY 1953–1993 (1994); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); Anna Harvey & Michael J. Woodruff, Confirmation Bias in the United States Supreme Court Judicial Database (Dec. 16, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1393613.

2. In some—perhaps many—cases, legal sources, including precedent, do not unambiguously dictate a result, and judges must go outside the law. As Judge Richard Posner has explained, when the law runs out, judges must turn elsewhere. RICHARD A. POSNER, HOW JUDGES THINK 202 (2008). But in many cases of sudden unacknowledged doctrinal shifts, the law has *not* run out; instead, the judges seem to be ignoring precedent. It is no wonder that some scholars attribute these cases to politically motivated judges.

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key to my approach, then, is to use doctrinal change as both a diagnostic tool for identifying doctrines that rest on foundational assumptions and an opportunity for reflection on and evaluation of those assumptions.

Identifying underlying factual assumptions thus provides a richer understanding of doctrine by exposing its internal dynamic. Uncovering the factual assumptions behind controversial doctrinal disputes can simultaneously explain doctrinal inconsistencies and provide a means to evaluate competing versions of a doctrine by evaluating their previously invisible underlying assumptions. It can also help us predict future doctrinal changes by locating the fault lines that are causing current movement. And identifying contested factual assumptions might make disputes more tractable by pointing toward resolutions that do not necessarily involve contested policy decisions. In particular, the recognition that foundational facts drive doctrine greatly increases the significance of empirical legal scholarship. Once we identify the change in assumptions that underlies changing legal doctrines, empirical scholarship testing the factual validity of the competing assumptions can serve as a vehicle for doctrinal critique or as a catalyst for further doctrinal change.

My framework thus rests on three related ideas: hidden foundational facts, doctrinal change, and what each of these can teach us about the other (and about doctrine). Studying doctrinal change alerts us to foundational facts (and also tells us something about the doctrines that rest on them), and identifying and evaluating foundational facts helps us understand and evaluate doctrinal change (and the doctrine itself).

The Article proceeds as follows. Part I fleshes out the theoretical framework of hidden factual foundations and their relationship to doctrinal change, especially unacknowledged doctrinal change. Then in Parts II and III, I analyze four instances of doctrinal discontinuities as examples. These sections tie together recent controversial cases with earlier doctrinal developments to uncover the foundational facts underlying the old and new versions of the allegedly unchanged doctrine.

The examples in Part II come from constitutional and statutory antidiscrimination law. The foundational factual question operative in these antidiscrimination doctrines is whether discriminatory motives are the most likely explanation for governmental or employer actions of particular sorts. The Supreme Court originally assumed that discriminatory motives *were* the most likely explanation and thus imposed a high burden on defendants to justify their actions. When the Court's foundational assumptions changed, the doctrines followed suit by lowering the burden. Thus, in *Grutter v. Bollinger*, the Court applied what had traditionally been the most searching level of judicial scrutiny but nevertheless upheld a state university's use of a racial classification in admissions.[3] For clues to the underpinnings and future of this anomalous use of strict scrutiny, I

3. 539 U.S. 306 (2003).

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examine a similar—and similarly unacknowledged—shift in the Court's interpretation of federal employment discrimination law, lowering the burden on defendants in both disparate impact and disparate treatment cases in the 1980s and early 1990s.[4] In none of these cases did the Court acknowledge that it was altering existing doctrine, much less that it was doing so on the basis of a change in underlying assumptions.

The second recent (and controversial) doctrinal shift, explored in Part III, involves the burdens that plaintiffs must satisfy to avoid early termination of their lawsuits. This doctrinal shift derived from a change in foundational assumptions about the prevalence of frivolous or meritless suits. When the Court assumed that such suits were relatively rare, procedural doctrines were structured to make it difficult to terminate suits in defendants' favor prior to trial; again, when the Court's foundational assumptions changed, so did the doctrine. Thus, in *Bell Atlantic Corp. v. Twombly*[5] and *Ashcroft v. Iqbal*,[6] the Court applied what had traditionally been an exceptionally lenient test but nevertheless dismissed complaints for failure to allege a sufficiently plausible claim.[7] Again, I also discuss an analogous change in procedural doctrine from an earlier era: the Court's 1986 reshaping of the standards for obtaining summary judgment.[8] And again, the Court in both eras acknowledged neither the change in doctrine nor the reliance on shifting foundational facts.

Both of the recent doctrinal shifts drew an outpouring of accusations—from opposite ends of the political spectrum—that the Court was manipulating doctrine for ideological or political reasons.[9] That explanation, however, is too simplistic. My contention in this Article is that the doctrinal discontinuities are better explained by shifts in the factual assumptions on which the doctrines rest. These doctrinal changes, in other words, were internally rather than externally driven.

Identifying the tacit factual assumptions operating in these two doctrinal contexts also allows us to see their intersections. Part IV therefore turns to the fault lines exposed by the combination of all four examples and uses them to speculate on possible future doctrinal changes and to suggest further empirical research.

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4. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (disparate treatment); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (disparate impact).

5. 550 U.S. 544 (2007).

6. 129 S. Ct. 1937 (2009).

7. *See id.* at 1954; *Twombly*, 550 U.S. at 570.

8. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

9. *See, e.g.*, Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347 (2003) (arguing that in *Grutter* the Court followed elite opinion); Gail Heriot, *Thoughts on* Grutter v. Bollinger *and* Gratz v. Bollinger *as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137 (2004) (arguing that in *Grutter* the Court followed politics rather than law); *see also* sources cited *infra* note 193 (criticizing *Twombly* and *Iqbal*).

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I. HIDDEN FOUNDATIONAL FACTS AND DOCTRINAL DEVELOPMENT

This Article serves to better expose the basic architecture of doctrine by identifying the role of foundational facts. It argues that the interplay between foundational facts and doctrinal change gives us a new meta-level approach to doctrinal analysis.[10] In order to understand this new approach, we must first understand the nature of foundational facts. This Part, therefore, begins by describing in more detail what I mean by hidden foundational facts and then turns to the theoretical structure of their role in doctrinal development.

I rely on the basic scientific definition of facts as (at least in theory) falsifiable. This is what distinguishes them from values or policy in the context of judicial decision making. But I am not referring to "facts" in the narrow legal sense, as the portion of each case that describes what happened outside the courtroom before the suit was filed. Facts in this narrow sense are the fabric to which judges *apply* doctrine. Whether, when, and how a particular defendant was read his *Miranda* rights, for example, are facts of this kind; once the facts have been established the judge will turn to doctrine to decide what consequences follow.

Foundational facts are distinguishable from these narrow case-specific (or *decisional*) facts. Foundational facts are the background facts that are not explicitly at issue in any particular case; they are the meta-facts on which the doctrine itself depends. The likelihood that defendants feel coerced when police officers question them—and the details of the circumstances that tend to increase or lessen that coercion—are background facts that inform the legal doctrines governing police behavior.[11] Facts in this sense actually *drive* doctrine. Doctrine is based on foundational facts but applied to decisional facts. Foundational facts are thus internal to the doctrine itself.

Describing foundational facts as internal to the doctrine allows us to distinguish them from other facts that play a role in adjudication. Some doctrines may instead depend on factual evidence in their applications. For example, the validity of congressional legislation may depend on the

10. My theory of foundational facts thus shares with Fred Schauer's critique of the common-law method a focus on the meta-structure of doctrine. Schauer distinguishes between what he calls "the *this-ness*" of particular cases and the "full array of events" that the doctrine encompasses and argues that the common-law method of case-by-case decision making results in bad law because judges inevitably view the particular case as "representative of the larger array" when it may not be. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884, 894 (2006). What I am suggesting is a different view of doctrinal development: whenever judges consider either the cases before them or the larger array, they depend on their assumptions about facts in the world independent of possible legal disputes.

11. The Court in *Miranda* mandated warnings to "dispel the compulsion inherent in custodial surroundings." Miranda v. Arizona, 384 U.S. 436, 458 (1966). Of course, background facts ultimately give rise to policy questions that also shape doctrine (but which I do not consider in this Article): given what we know, or assume, about how coercion operates and what other consequences might follow from requiring *Miranda* readings in various circumstances, how should we trade off the various costs and benefits to set the legal requirements that police must follow?

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factual question of whether a particular activity has a substantial effect on interstate commerce such that Congress can regulate it under the Commerce Clause[12] or whether there is sufficient evidence of a pattern of state constitutional violations to warrant a congressional response under Section 5 of the Fourteenth Amendment.[13] There, rather than presuming facts, the Court simply demands that Congress produce evidence. The reliance on facts is external rather than internal to the doctrine.

The foundational facts I explore are not only internal, they are also unacknowledged. They are not *assertions* about the state of the world that influence the application of law, but are unacknowledged *assumptions* that underlie legal doctrine.[14] To the extent that the assumptions about such foundational facts are broadly shared, their role in doctrinal development is unremarkable even if they remain hidden.[15] Sometimes, however, important and controversial doctrines rest on disputed foundational assumptions, which come to light only when the doctrine shifts suddenly and inexplicably. The shift itself is the first detectable manifestation of the foundational assumptions, allowing us to critique both the old and new assumptions. In that sense, shifts are both evidentiary and diagnostic: they signal *which* doctrines rest on potentially contested foundational facts and give us a tool with which to evaluate the coherence and validity of the doctrines.[16]

Internally-driven doctrinal shifts based on changes in foundational assumptions can take a variety of forms. The doctrinal shifts that provide the strongest evidence of previously unnoticed foundational facts are those that are unacknowledged and seemingly inexplicable. The doc-

12. *See, e.g.*, David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991) (discussing the Court's use and misuse of empirical evidence); Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 HASTINGS L.J. 1723 (1995) (arguing that the Court had recently begun asking for empirical factual support for legislation enacted under the Commerce Clause).

13. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 638–39 (1999); City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

14. For discussions of factual assertions, see Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366 (2009) (discussing judicial use of contestable factual assertions); Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 273 (1999) ("Judicial opinions are filled with assertions about the state of the world . . . ."); Faigman, *supra* note 12 (discussing judicial use of contestable factual assertions); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003) (discussing judicial use of scientific fact).

15. Larry Lessig, for example, focuses on these sorts of uncontested and widely-shared beliefs about the world, explaining the role of context in constitutional interpretation. Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1393–1400 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 400–02 (1995); *see also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (making a similar argument about how changed contexts produced the shift that culminated in the 1937 doctrinal changes).

16. I leave to one side the interplay between foundational facts and Court dynamics. I therefore do not address the question of how many Justices must change their assumptions in order to work a doctrinal change. Justices might influence each other, especially with regard to unexamined factual assumptions, so what seems to be a change in the whole Court's views might actually be triggered by only one or two Justices.

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trinal change is unacknowledged because the invisible shift in underlying assumptions makes the doctrinal shift itself invisible: the theory and purposes of the doctrine remain the same, so judges sense no change in doctrine. And the more inexplicable the doctrinal shift, the more likely that contested foundational facts are at work. Finally, the most telling changes are those that rest on foundational facts that are themselves unacknowledged and potentially contested. Thus, I focus on unacknowledged doctrinal shifts that derive from unacknowledged and potentially contested facts. In the table below and the paragraphs that follow, I distinguish the shifts of interest from related phenomena.

Table 1

	Unacknowledged doctrinal shift	Acknowledged doctrinal shift
Unacknowledged and (potentially) contested foundational facts	1	2
Acknowledged but (potentially) contested foundational facts	(non-existent)[17]	3
Unacknowledged but uncontested foundational facts	4	5
Acknowledged and uncontested foundational facts	(non-existent)	6

The doctrinal shifts I discuss in this Article are the cases in box 1, which might be called stealth reversals: unacknowledged doctrinal changes based on hidden assumptions of facts about which there is no consensus and, often, no existing data from which to draw a factual con-

17. It is certainly possible for a court to *apply* a doctrine on the basis of contested factual assumptions. *See, e.g.*, Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). Some critics might find the application so controversial as to amount to a change in doctrine. But my focus is on cases that cannot possibly be characterized as applications of existing doctrine, however much the Court insists that that is all it is doing.

clusion. There is often little or no public and scholarly scrutiny of the hidden factual assumptions driving the cases in this box, because the reliance on foundational assumptions is obscured by the Court's denial that any shift has occurred. Thus, the focus tends to be on whether and how the doctrine has changed (and criticism of that change) rather than on the less prominent issue of the hidden assumptions underlying the change. Identifying the hidden background assumptions, however, is crucial for evaluating both the old and the new doctrine. These cases suffer from both transparency and legitimacy problems: the Court is making unacknowledged changes on an undisclosed and potentially unacceptable basis.

The cases in boxes 2 and 3, by contrast, are transparent but arguably illegitimate. The Court is taking sides in a factual dispute that, unlike the decisional facts involved in individual cases, may be characterized as more appropriate for legislative than judicial resolution. These cases are not the focus of this Article and are distinguishable from the cases in box 1 because the doctrinal change is transparent even if the reasons are not.[18] If the Court announces a shift in doctrine and then justifies that shift—explicitly, as in box 3, or even implicitly, as in box 2—by reference to contested background facts, there will be no shortage of critics of that particular case, who will quickly draw attention to both the doctrinal change and the weaknesses in the Court's justification. To the extent that the factual assumptions are contestable, then, they will be contested.

The cases in the remaining boxes are largely unproblematic. The most transparent shift is a straightforward and transparent reversal of earlier cases, based on stated reasons that track documented scientific, social, or other changes—that is, an acknowledged reinterpretation of the law based on an acknowledged and widely accepted change in the circumstances that undergird it (box 6).[19] Somewhat less transparent is an acknowledged shift in doctrine that is not, but could be, justified on such a basis (box 5).[20] Still less transparent is an unacknowledged shift in

18. I also find these cases relatively unproblematic, because I am generally skeptical of the enterprise of assessing the legitimacy of judicial decision making by looking at the legitimacy (or even correctness) of particular outcomes rather than at the legitimacy of the judicial process. As I have written extensively on this skepticism elsewhere, I will not repeat it here. *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 43–52 (2009). The continuum from legislation to adjudication is simply not susceptible to fine enough parsing to allow wholesale condemnation of cases in boxes 2 and 3.

19. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (reversing Bowers v. Hardwick, 478 U.S. 186 (1986)); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (implicitly reversing Plessy v. Ferguson, 163 U.S. 537 (1896)). Most of Lessig's examples are of this type.

20. Perhaps the best example is the overruling of *Swift v. Tyson*, 41 U.S. 1 (1842), by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The Court acknowledged the change in doctrine by explicitly overruling precedent, but rested the decision on two questionable bases; the unsatisfactory nature of the Court's own explanation is what keeps the case out of box 6. The Court relied, first, on Charles Warren's then-recent article about the original meaning of the Rules of Decision Act. *See Erie*, 304 U.S. at 72–73 & n.5. Warren's work, however, showed only that an earlier draft of the statute directed federal courts to follow both state "statute law" and state "unwritten or common law." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 83–88

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doctrine that, if acknowledged, could nevertheless be justified on such a basis (box 4).[21] Boxes 4 and 5, although they might be considered lapses in judicial craft,[22] are not overly problematic because they do not accomplish anything that could not be accomplished by means of a judicial decision fitting into box 6.

This Article thus explores unacknowledged and contested foundational facts that get operationalized in doctrine. With the structure and vocabulary now in place, I turn to the work of exposing particular foundational facts in order to better understand and evaluate doctrine. I focus on two examples of disputed foundational facts: whether invidious discrimination is the most likely motive for a variety of conduct that causes harm to members of one race and whether meritless lawsuits constitute a substantial portion of lawsuits filed. Foundational assumptions about these questions drive doctrine in two different areas, the first in antidiscrimination law and the second in civil procedure. Together, they have the potential to dramatically transform antidiscrimination litigation but also provide opportunities for empirical research to influence doctrinal development.

II. ANTIDISCRIMINATION LAW: ASSUMPTIONS ABOUT INVIDIOUS INTENT

In a variety of contexts, the Supreme Court has structured—and subsequently altered—doctrine to reflect its tacit assumptions about the most likely motive underlying a particular type of conduct. When it believes that prejudice or invidious discrimination is the most likely explanation, its doctrines place a high burden of justification on defendants. When it believes that more benign motives provide the most likely explanation, it reduces that burden.

Imagine a world in which a majority of whites, including many government officials, harbor ill-will and prejudice against African Americans

(1923). The ultimate adoption of language that simply instructed federal courts to follow state "laws" can be interpreted *either* to include both statute law and common law, or as a decision to limit the Act to the common meaning of the plural form of "laws" as a synonym for "statutes" (as the *Swift* Court held). *See Swift*, 41 U.S. at 18. Moreover, Congress's acquiescence in *Swift* for almost a century suggests that Congress did not consider *Swift*'s interpretation incorrect. Secondly, Justice Brandeis's majority opinion also famously held that *Swift*'s interpretation was unconstitutional, because Congress had "no power to declare substantive rules of common law." *Erie*, 304 U.S. at 78. That declaration has been controversial since its utterance—Justice Reed's concurrence specifically denied its validity—and is almost certainly untrue today. *See id.* at 91–92 (Reed, J., concurring). Both bases form a slender reed on which to rest the overturning of a hundred-year-old precedent. Nevertheless, *Erie* fits into box 5 because it could easily be justified on the widespread change in perceptions of what it was that judges did when they decided cases: rather than finding the law, as *Swift* would have it, they declared it.

21. A possible example is *Romer v. Evans*, 517 U.S. 620 (1996). Although it is difficult to square with existing Equal Protection precedent, it may instead rest on the widely accepted notion that the government cannot treat some people as outcasts or pariahs. *See* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).

22. *See* FARBER & SHERRY, *supra* note 18, at 97–104.

and will invidiously discriminate if given the opportunity.[23] Such discrimination, however, is illegal, and the Court is committed to enforcing antidiscrimination laws. What doctrines might it develop? One likely response is to place a high burden of justification on defendants who are accused of acting in violation of antidiscrimination laws. If the defendant has distinguished among individuals on the basis of race, she is presumed to have acted out of a discriminatory motive. Even if the defendant has merely taken an action which disproportionately harms African Americans, she is presumed to have done so in order to accomplish that disproportionate harm. And indeed, during the third quarter of the twentieth century, Equal Protection jurisprudence developed consistent with the first presumption, and federal employment discrimination law developed consistent with both the first and the second.

Now imagine that although the Court's commitment to enforcing antidiscrimination laws remains, its perception of the world has changed. It now assumes that most whites are not prejudiced and do not generally act out of discriminatory motives. How would doctrine change? The Court would no longer presume that every act that distinguished on the basis of race or disproportionately harmed one race derived from invidious discrimination and would consequently lower the burden on defendants accused of discrimination. My argument in this Part is that the Court has been undergoing exactly such a change in underlying assumptions and has been tailoring doctrine accordingly—without admitting that the doctrine or its foundational assumptions are changing, because the continued commitment to the core principle of antidiscrimination has *not* changed. The denial has obscured the change and, worse, deprived observers of the opportunity to evaluate the factual foundations of both the old and new doctrines. Two examples, one constitutional and one statutory, illustrate these changes.

A. Equal Protection: Strict Scrutiny and Affirmative Action

It is black-letter law that when the government draws distinctions based on race, those distinctions must withstand strict scrutiny to be constitutional.[24] Traditional strict scrutiny demands a "searching judicial inquiry" and requires the government to prove that the racial classification is narrowly tailored to achieve a compelling state interest.[25] It has long been viewed as "'strict' in theory and fatal in fact"[26]—almost no racial

23. It should not take much imagination, just a sense of American history.

24. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005).

25. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); *see also* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

26. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). I, like Gunther, limit this conclusion to Equal Protection challenges to discriminatory laws. A recent empirical study examined *all* federal court applications of strict scrutiny (in Equal Protection as well as other areas and in both the Supreme Court and lower courts) and found that the challenged governmental action survived about thirty percent of the

classifications survive. Indeed, for almost sixty years, the only racial classifications upheld under strict scrutiny were race-based remedies for prior racial discrimination by the government.[27]

Despite much controversy, the Supreme Court applies strict scrutiny to all racial classifications, including those that benefit racial minorities as well as those that disadvantage them.[28] But in the context of racial classifications benefitting racial minorities—affirmative action—this is not your father's strict scrutiny. Even a cursory examination of *Grutter v. Bollinger*, in which the Court upheld the University of Michigan Law School's affirmative action program, reveals glaring doctrinal inconsistencies.[29]

In *Grutter*, a rejected white applicant to the law school challenged the law school's affirmative action program, alleging that it unconstitutionally discriminated on the basis of race.[30] The law school conceded that it took race into account in the admissions process.[31] It could hardly have argued otherwise: experts on both sides testified that the LSAT scores and GPAs of admitted students of different races exhibited statistically significant (and possibly quite large) differences.[32] The question before the Court was whether this use of race was constitutionally permissible.[33]

On its face, the scrutiny in *Grutter* was less than searching.[34] Rather than conduct an independent assessment, the Court deferred to the law

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time, including in about twenty-seven percent of the Equal Protection discrimination cases. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006). But ninety-seven percent of the Equal Protection cases in Winkler's study involved classifications benefitting minorities. *Id.* at 834 (eighty-five percent affirmative action, twelve percent racial redistricting). Since my argument is that the doctrinal inconsistencies arose specifically when the Court applied strict scrutiny to an affirmative action program, the study supports, rather than refutes, my conclusion.

27. Between *Korematsu v. United States*, 323 U.S. 214 (1944), and *Grutter*, 539 U.S. 306, the only facially discriminatory racial classifications upheld by the Supreme Court involved remedies for prior discrimination. *See* United States v. Paradise, 480 U.S. 149 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 480 (1986). Lower courts similarly upheld primarily remedial classifications. *See* Winkler, *supra* note 26, at 836–37.

28. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) ("[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.").

29. *See Grutter*, 539 U.S. 306.

30. *Id.* at 316–17.

31. *Id.* at 318.

32. *Id.* at 320; *see also* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 549 (2007) (arguing that subsequent statistical analysis shows that the law school's use of race "may have been more formulaic" than that of the undergraduate affirmative action plan, which was invalidated in the companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003)).

33. *Grutter*, 539 U.S. at 322.

34. Other commentators have made the same observation. *See* Michelle Adams, *Searching for Strict Scrutiny in* Grutter v. Bollinger, 78 TUL. L. REV. 1941, 1943 (2004) (describing *Grutter* as using "relaxed" strict scrutiny); Ayres & Foster, *supra* note 32, at 549 (arguing that the inquiry in *Grutter* was not very probing); Annalisa Jabaily, *Color Me Colorblind: Deference, Discretion, and Voice in Higher Education After* Grutter, 17 CORNELL J.L. & PUB. POL'Y 515, 525 (2008) (calling the *Grutter* standard "strict scrutiny with deference"); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. LAW 945, 974 (2004) (describing *Grutter* as reviving the deferential "*Ko-*

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school on several crucial points. It explicitly deferred to the law school's "educational judgment" that racial diversity was essential to the school's educational mission.[35] It effectively deferred to the law school's assertion that alternative methods of obtaining diversity would have a detrimental effect on the educational mission.[36] It "[took] the Law School at its word" that the law school would "terminate its race-conscious admissions program as soon as practicable."[37] And it accepted without question the testimony of admissions personnel that although they consulted daily reports on the racial composition of each class as it formed during the months-long admissions process, "they never gave race any more or less weight based on the information" in the reports.[38]

If we look more closely, we find many other indications that the Court was less than candid about the level of scrutiny it applied. The law school maintained that it was not implementing a constitutionally forbidden "quota," but was rather seeking to enroll a "critical mass" of minorities in order to provide diversity in the student body without isolating or singling out minority students.[39] Yet the size of this critical mass varied significantly among racial groups: over a six-year period, each class contained fewer than twenty Native Americans, about fifty Hispanics, and about one hundred African Americans.[40] Does it take twice as many African Americans as Hispanics (and five times as many African Americans as Native Americans) to provide a diversity of viewpoints or to prevent isolation? During the six-year period, the percentage of admitted applicants of each race also closely tracked the percentage of applicants of that race.[41] Together, these data suggest that the law school in fact had a firm target—or a soft quota—for each racial group, which corresponded to the percentage of applicants from each group.

All of these deviations from ordinary strict scrutiny were noted by the dissenting opinions.[42] And the dissenters in the companion case of *Gratz v. Bollinger*[43]—which invalidated the University of Michigan's affirmative action program for undergraduate admissions—urged the Court to explicitly apply less strict scrutiny to racial classifications that

rematsu brand of strict scrutiny" and referring to its application of strict scrutiny as a "pretense"). Affirmative action may not be the only context in which the Court applies purportedly strict scrutiny in a deferential manner. *See* Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1570 (2009) (suggesting that the Court will apply "deferential strict scrutiny" in Second Amendment cases).

35. *Grutter*, 539 U.S. at 328; *see also id.* at 377 (Thomas, J., concurring in part and dissenting in part).

36. *See id.* at 340 (majority opinion).

37. *Id.* at 343.

38. *Id.* at 336.

39. *Id.* at 318.

40. *See id.* at 381 (Rehnquist, C.J., dissenting).

41. *See id.* at 383–86.

42. *See supra* notes 40–41; *see also* Ayres & Foster, *supra* note 32, at 519–20, 541–44.

43. 539 U.S. 244 (2003).

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benefit rather than burden minorities.[44] Adopting some form of intermediate scrutiny would not necessarily have changed the results in either case, but it would have avoided the unacknowledged discontinuity in the application of strict scrutiny.

So why did the Court choose the path it did? Because it rejected the foundational assumption of traditional strict scrutiny. Traditional strict scrutiny is based on an underlying assumption that when the government draws racial classifications, it is most likely doing so for invidiously discriminatory reasons. The Court in *Grutter*, however, reasonably believed that government officials are not likely to be motivated by prejudice when they adopt affirmative action programs. At the same time, the Court failed to acknowledge (and perhaps some Justices failed to recognize) that its different intuitions about factual matters influenced its understanding of the same doctrinal test. The divergent assumptions about foundational facts fractured strict scrutiny into two different doctrines, one for traditional discrimination cases and one for cases challenging affirmative action. But the lack of awareness resulted in apparent doctrinal inconsistencies.[45]

Viewing *Grutter* in this light is instructive on several levels. It provides a more honest and candid approach to the question of the constitutionality of affirmative action. More significantly, considering Equal Protection doctrine in light of foundational facts about the prevalence of discriminatory intent helps to resolve issues that divide scholars under more conventional approaches. The first step in evaluating doctrine is understanding it. A foundational-facts approach helps us understand strict scrutiny by illuminating its purpose, currently the subject of great controversy.[46] Equally controversial is the evaluative judgment itself. For doctrines that contain embedded factual assumptions, that evaluation necessarily requires attention to foundational facts as well as theory; the conventional approach ignores these underlying facts.

My approach first helps to resolve the raging scholarly debate about the purposes of strict scrutiny. Scholars disagree about whether strict scrutiny—in the Equal Protection context or elsewhere—is primarily about proportionality or primarily about guarding against illicit governmental motivations.[47] The Court has at various times suggested both jus-

44. *See id.* at 298–302 (Ginsburg, J., joined by Souter and Breyer, JJ., dissenting); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 245–47 (1995) (Stevens, J., dissenting) (urging the adoption of intermediate scrutiny).

45. More recently, the Court struck down race-based assignment plans for elementary and high schools. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). The plans differed in several ways from the law school's affirmative action plan, however, making it difficult to determine whether the Court is moving back toward truly strict scrutiny.

46. *See infra* note 47.

47. *Compare, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330–32 (2007) (strict scrutiny as a proportionality test), *and* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1843–48 (2008) (same), *and* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006) (strict scrutiny as

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tifications.[48] If *Grutter* is properly understood as reflecting a change in tacit factual assumptions, that tends to support motive rather than proportionality as the primary justification for strict scrutiny review, because we would expect motive-based review, but not proportionality review, to vary with changes in underlying factual assumptions.

Proportionality analysis requires the government to give a sufficient justification for its actions to outweigh the harm to individual constitutional rights and thus varies with the importance of the right.[49] It is essentially a form of cost-benefit analysis. A change in foundational facts should have no effect on the importance of a constitutional right, and Equal Protection doctrine thus should have remained static. It did not. Using strict scrutiny to prevent the government from acting on the basis of illicit motives, on the other hand, depends not on the importance of the right at issue but rather on the perceived likelihood of legitimate versus illegitimate motives. A change in tacit factual assumptions *is* likely to have an effect on a motive-based doctrine.

Moreover, if the primary purpose of strict scrutiny (at least in the Equal Protection context) is to smoke out illicit government motives, and if the Court is relying on its intuitions about the likelihood of such motives, we might expect exactly the sort of doctrinal dissonance that we see in *Grutter*. To the extent that the core principle—striking down racial classifications that are based on prejudice—has not changed, the Court might be unable to recognize or unwilling to acknowledge doctrinal inconsistencies. It is much more likely that the Court will do exactly what it did in *Grutter*: apply varying levels of scrutiny while denying that it is doing so. *Grutter*, then, suggests that the Court, at least in the context of race discrimination, uses strict scrutiny primarily as a tool for exposing and excising government actions based on illegitimate motives.

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heightened protection for favored constitutional interests through cost-benefit analysis), *with* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (strict scrutiny as test of illicit motives), *and* Charles Fried, *Types*, 14 CONST. COMMENT. 55 (1997) (same), *and* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1702–03 (2005) (same), *and* Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89 (1984) (same).

48. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (illicit motives); *Adarand*, 515 U.S. at 230 (proportionality); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (illicit motives).

49. If the Court values a particular constitutional right more or less than other (perhaps related) rights, or more or less than its predecessors did, it can explicitly apply a different test. One possibility is to carve out an exception to strict scrutiny. This is what has happened in the context of speech that is considered obscene. *See* Miller v. California, 413 U.S. 15, 24–25 (1973). Strict scrutiny applies to most government restrictions on speech that are based on content, but not to limitations on obscene speech. If, on the other hand, the Court believes that strict scrutiny as proportionality review overstates the importance of the right, it can apply a less strict test. This is what happened in the context of abortion rights, in which the Court changed from strict scrutiny to an undue burden test. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873–74 (1992). It is also what prompts intermediate scrutiny for commercial speech cases. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996). In these cases, the Court openly acknowledges that it is applying a different doctrine, often justifying the doctrinal difference by evaluating the individual right or the governmental response.

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Looking at the foundational assumptions underlying *Grutter*'s distorted application of strict scrutiny is also necessary for a proper evaluation of the doctrine. Although a thorough evaluation of the Court's assumptions about the likelihood of discriminatory motives is beyond the scope of this Article, some preliminary observations might be in order. As John Ely reminded us long ago, a majority discriminating against itself seems less likely to be motivated by prejudice or other illegitimate notions than is a majority discriminating against a powerless minority.[50] But as Bruce Ackerman pointed out, it is not always easy to tell who has more power, a diffuse majority or a discrete and insular minority.[51] Moreover, there are various ways to slice up the population. We might characterize those who implement an affirmative action program as economic elites, rather than as whites, and view the program itself as benefitting economically advantaged minorities at the expense of poor whites. Which of these perspectives most accurately reflects the facts is a question that deserves more attention than it has received—and we might have neglected it in part because the Court's reliance on its own tacit assumptions has obscured the importance of the question.

Viewing *Grutter* as an example of how tacit factual assumptions can create doctrinal discontinuities has a final benefit. It alerts us to potential future changes. Strict scrutiny was born, and saw its heyday, in an era in which the Court believed (and it was plausible to believe) that it was more likely than not that any given racial classification was based on illegitimate motives. What if the Court were to reassess its foundational assumptions? The lesson of *Grutter* is that the Court would continue to apply strict scrutiny as a formal matter, but would in fact relax its review. Will that ever happen? The next Section explores an analogous context in which just such a change in tacit assumptions led to an unacknowledged doctrinal change. Then, after discussing another set of assumptions in Part III, I return in Part IV to a consideration of what we might learn about possible future trends from my various examples.

B. Employment Discrimination Law

The Equal Protection Clause is not the only federal protection against discrimination. Numerous statutory provisions also outlaw discrimination by both public and private entities. One advantage of looking at foundational facts as a necessary part of doctrinal analysis is that it

50. *See* ELY, *supra* note 47, at 170–72.

51. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718–24 (1985). At least one current Supreme Court Justice has operationalized this insight for one minority group. *See* Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting) ("[Because] those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide." (citations omitted)).

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can be useful in both constitutional and statutory contexts. The Court and Congress do not necessarily share the same foundational assumptions, but unless Congress includes the relevant factual underpinnings in the statute or its legislative history the Court will be left to its own devices. In particular, antidiscrimination statutes, like the Equal Protection Clause, encompass broad norms that can accommodate any number of foundational facts. And it will be those foundational assumptions that give specificity to the implementing doctrines.[52]

In this Section, I explore how changing foundational assumptions about the likelihood of discriminatory motives created doctrinal discontinuities in the Court's interpretation of Title VII of the 1964 Civil Rights Act. That Act prohibits employers from "discriminat[ing]" or taking actions that "adversely affect" an individual (whether an employee or an applicant for employment) "because of such individual's race, color, religion, sex, or national origin."[53] In 1971, in *Griggs v. Duke Power Co.*, the Court interpreted this language to mean that facially neutral employment practices with a disparate impact on a protected group are unlawful unless they are justified by "business necessity."[54]

In the abstract, reading into Title VII a prohibition on neutral practices with a disparate impact seems odd. The language of the statute prohibits employers only from discriminating "because of" the various prohibited traits.[55] Five years after *Griggs*, the Court held that the Equal Protection Clause does not prohibit the government from taking neutral actions that have a disparate impact,[56] famously describing the Clause as barring only actions taken "'because of,' not merely 'in spite of,' [their] adverse effects upon an identifiable group."[57] The Court seems to recognize that the natural meaning of "because of" implies intent. Why, then, did it extend Title VII to practices that are not intentionally discriminatory but have a discriminatory effect? Additional aspects of the *Griggs* case shed some light on this question and help illuminate the Court's tacit assumptions.

When the 1964 Civil Rights Act took effect, a number of employers who had previously refused to hire African Americans for any positions above the most menial found an alternative way to discriminate. They imposed new job requirements (which often became effective the same day the new federal law did) that few, if any, of their African American employees or applicants could meet, and the employers grandfathered in

52. In some statutory schemes, Congress may be more specific about its factual assumptions. Those might present more complicated cases than the ones I describe here and in Part III.

53. 42 U.S.C. § 2000e-2(a)(1) & (2) (2006).

54. 401 U.S. 424, 431 (1971).

55. 42 U.S.C. § 2000e-2(a)(1) & (2).

56. *See* Washington v. Davis, 426 U.S. 229 (1976).

57. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); *see also* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (using dictionary definition of "because of": "by reason of: on account of").

the white employees holding those jobs.[58] The requirements, which included high school diplomas or obtaining a certain score on an intelligence test, were not necessarily related to job performance; white employees who lacked the requirements but had been grandfathered in continued to perform the same jobs and were even promoted.[59]

The circumstances surrounding Duke Power's imposition of its facially neutral requirements hinted—though only weakly—at such an intent to evade Title VII.[60] But the district court found that the requirements were imposed "without any intention or design to discriminate against Negro employees."[61] Rather than question this finding, the Court made clear that the employer's intent is irrelevant: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[62]

The *Griggs* Court also held that the employer bears the burden of proving business necessity: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[63] Business necessity, in other words, is an affirmative defense to a showing that a particular practice has a disparate impact. The Court reaffirmed this holding in later cases.[64]

All of this information suggests that the Court tacitly assumed that employers who adopt neutral practices with a disparate impact are, more likely than not, doing so for discriminatory reasons.[65] The assumption is

58. *See, e.g.*, *Griggs*, 401 U.S. at 427.

59. *See, e.g.*, *id.* at 427–29.

60. *See id.*

61. Griggs v. Duke Power Co., 292 F. Supp. 243, 248 (M.D.N.C. 1968), *aff'd in relevant part* 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971). The district court judge had been nominated by President Johnson in April 1964, less than three months before Title VII was enacted. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., http://www.fjc.gov/servlet/nGetInfo?jid=887&cid=999&ctype=na&instate=na (last visited Oct. 1, 2010). His finding that Duke Power lacked discriminatory intent might further our intuition that such intent is especially difficult to prove in the context of neutral employment practices.

62. *Griggs*, 401 U.S. at 432.

63. *Id.*

64. *See* Connecticut v. Teal, 457 U.S. 440, 446–47 (1982) ("*Griggs* and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination." (alteration in original) (quoting *Griggs*, 401 U.S. at 432)); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) ("[Court's] cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" (alteration in original) (quoting *Griggs*, 401 U.S. at 432)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (explaining what happens after "the employer does then meet the burden of proving that its tests are 'job related'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973))).

65. Attributing to the Court a tacit *assumption* that practices with a disparate impact were adopted in order to discriminate goes further than suggesting that the *purpose* of disparate impact is to

consistent with what the Court knew: many employers were quite obviously using facially neutral practices to circumvent Title VII, and Duke Power may have done so as well. Attributing such an assumption also explains why the Court did not care about discriminatory intent. If it believed that intent was likely to be present (but difficult to prove), the simplest course was to make intent irrelevant. In contrast, the Court might have been more reluctant to attribute malevolent intent to government entities than to private employers, leading it to reject disparate-impact theory under the Equal Protection Clause.

Making job relatedness an affirmative defense and placing the burden on the employer is the most telling evidence that the Court tacitly viewed practices with a disparate impact as many employers' substitute for intentional discrimination. As I argued earlier, the doctrine of strict scrutiny reflects the Court's assessment that facial racial classifications are, more likely than not, based on illegitimate motives; the doctrine therefore places on the government a high burden of justifying the discrimination. Similarly, if the Court believes that neutral practices with a disparate impact are—at least when adopted by private employers—more likely than not a cover for discriminatory intent, it makes sense to demand that employers prove such practices are justified by business necessity.[66]

Attributing disparate impact doctrine to tacit assumptions about the likelihood of discrimination by employers also fits well with another aspect of Title VII jurisprudence, not at issue in *Griggs*. Two years after *Griggs*, in *McDonnell Douglas Corp. v. Green*, the Court laid out the structure for cases in which a plaintiff alleges disparate treatment—intentional discrimination—rather than disparate impact.[67] In such cases, the plaintiff may establish a prima facie case (which switches the burden of production to the defendant) by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[68] The burden then shifts to the employer "to arti-

make it easier to ferret out deliberate discrimination. On the latter, see, for example, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 520–23 (2003) and sources cited therein.

66. For an analogous argument—in the First Amendment context—suggesting a link between burdens of proof, substantive doctrines, and the difficulty of ferreting out impermissible motives, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 442 (1996).

67. 411 U.S. 792 (1973).

68. *Id.* at 802. In *McDonnell Douglas*, the allegedly discriminatory action was a failure to hire. *Id.* at 801. In later cases, the Court adapted this test, with the same basic elements, to other adverse employment actions. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (applying the *McDonnell Douglas* test to an employer's alleged failure to re-hire an employee due to a disability); Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987) (applying the *McDonnell Douglas* framework to an employer's denial of promotion on the basis of race).

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culate some legitimate, nondiscriminatory reason for the employee's rejection."[69] If the employer does so, the plaintiff is then given an opportunity to show that the articulated reason is pretextual.[70]

In most employment discrimination cases, then, the plaintiff does not initially have to demonstrate discriminatory intent. The intent is instead presumed from the four elements of the prima facie case. Why? It must be because the Court believes that the four elements give rise to an inference of discrimination. If the plaintiff is a member of a racial minority and meets the qualifications for the position, it is more likely than not that his rejection is the result of discrimination. *McDonnell Douglas* essentially applies the doctrine of res ipsa loquitur to employment discrimination: merely failing to hire (or firing) speaks for itself as evidence of discriminatory intent. The burden then falls to the defendant to provide some other explanation.[71]

The driving force of the foundational facts is also apparent in the Court's description of what happens if the defendant *does* produce some other explanation. In *McDonnell Douglas*, the Court stated that the plaintiff must be given the opportunity "to demonstrate that [defendant's] assigned reason" for the action "was a pretext *or* discriminatory in its application."[72] As the Court described it in *Texas Department of Community Affairs v. Burdine* in 1981, at this stage, the plaintiff has the burden of showing that "the proffered reason was not the true reason for the employment decision," which "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[73] This burden may be met "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[74] Again, this suggests that unless the employer comes forth with a *credible* explanation for the action, the court will presume—and indeed find—that it was motivated by discrimination.

The allocation of burdens in disparate treatment cases, the requirement that the employer demonstrate a business necessity for practices with a disparate impact, and strict scrutiny for racial classifications by the government all suggest a Court tacitly relying on its own intuitions about the prevalence of discriminatory motives. When it believes that discrimination is the most likely explanation for defendants' actions, it structures doctrine to reflect that belief.

It is reasonable to suppose, however, that the passage of time might lessen the likelihood that employers are deliberately discriminating, es-

69. *McDonnell Douglas*, 411 U.S. at 802.
70. *Id.* at 804.
71. The Court acknowledged this inference in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).
72. *McDonnell Douglas*, 411 U.S. at 807 (emphasis added).
73. 450 U.S. 248, 256 (1981).
74. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804–05).

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pecially in the context of disparate impact. By the late 1980s, was it still more likely than not that any employer who adopted an employment practice with a disparate impact had a covert discriminatory intent?

The Court apparently thought not. In 1989, in *Wards Cove Packing Co. v. Atonio*, the Court altered the *Griggs* doctrine but denied that it was doing so.[75] The court of appeals in *Wards Cove* had based its finding of disparate impact on a statistical comparison between two parts of the employer's workforce, one skilled and primarily white, the other unskilled and primarily non-white.[76] The Supreme Court reversed, holding that the lower courts should have compared the skilled workforce to the qualified labor pool, not to the unskilled workforce.[77] It remanded the case for the lower courts to determine whether the correct statistical comparison showed a disparate impact.[78]

The Court did not stop there, however. In what might be characterized as dicta, it addressed what should happen if a disparate impact were to be validly demonstrated. If so, the Court stated, "the employer carries the burden of *producing* evidence of a business justification," but "[t]he burden of *persuasion* . . . remains with the disparate-impact plaintiff."[79] The Court explained the line of cases holding otherwise by noting that "to the extent those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden."[80] Thus, as with *Grutter*, the Court significantly changed the doctrine but denied that it was doing so.[81]

Switching the burden of proof from the employer to the plaintiff reflects a change in the tacit assumption about the most likely reason for the adoption of an employment practice with a disparate impact. Just as *Griggs* and its progeny suggest that the Court originally believed discriminatory intent to be the most likely motive for adopting such practices, *Wards Cove* suggests that by 1989 the Court believed that discriminatory intent was not the most likely explanation. It therefore lowered the burden on employers seeking to justify practices with a disparate impact.

Similarly, in 1993, the Court's changing assumptions about the likelihood of discriminatory motives led the Court to backtrack from the

75. 490 U.S. 642 (1989).

76. *See id.* at 650.

77. *Id.* at 650–51.

78. *Id.* at 655.

79. *Id.* at 659 (emphasis added). This part of *Wards Cove* was overruled by the Civil Rights Restoration Act of 1991, codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (stating that a disparate impact case is established if the plaintiff demonstrates a disparate impact "and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"). Congress's action shows that where it disagrees with the Court's foundational facts, it can interpose its own.

80. *Wards Cove*, 490 U.S. at 660 (citation omitted).

81. Twenty years later, Justice Ginsburg noted that *Wards Cove* "significantly modified" *Griggs*. Ricci v. DeStefano, 129 S. Ct. 2658, 2698 (2009) (Ginsburg, J., dissenting).

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strong *McDonnell Douglas* presumption in disparate treatment cases. In *St. Mary's Honor Center v. Hicks*, the Court held that once the defendant proffers *any* non-discriminatory reason for its action, the plaintiff was required to prove not simply that the reason was "unworthy of credence" but that the defendant was motivated by race.[82] Prior to *St. Mary's*, the lack of a plausible explanation led to a conclusion that the real reason must be discrimination; after *St. Mary's*, the lack of a plausible explanation led to no conclusion at all. The change was due to the Court's changing evaluation of the likelihood that an adverse employment decision was motivated by discrimination. And, as in *Wards Cove*, the Court denied that it was making any change in the law.[83]

Between 1971 and 1989, then, the Court changed its mind about the overall prevalence of racially discriminatory motives among American employers. That in turn led to an unacknowledged change in the jurisprudence of Title VII. Understanding this internal dynamic gives us a deeper understanding of the doctrine and also opens up avenues of evaluation. As with racial classifications that benefit rather than disadvantage minorities, we can ask which of the Court's foundational factual assumptions, old or new, is more likely to be accurate in the contemporary United States.

Finally, pointing out the similar dynamic driving the unacknowledged doctrinal changes in the statutory and constitutional contexts gives us some predictive traction. The alteration of the strict scrutiny standard in *Grutter* is so far limited to the affirmative action context, but the example of *Wards Cove* and *St. Mary's* gives us some idea of what the Court might do if it concludes that government classifications or distinctions based on race are less likely than before to reflect invidious discrimination. One difference between employment law and Equal Protection doctrines is that, so far, the Court seems not to have abandoned its assumption that when the *government* (qua government) draws racial classifications, its motives are suspect. Given the different influences on and incentives of government actors and private employers, it is plausible to make a distinction between them; we can assume that discrimination is not the most likely explanation for actions of market participants like employers while still assuming that governmental classifications based on race are, more likely than not, invidiously motivated. But if the Court is moving toward a more generalized change in beliefs about the prevalence of discrimination in our society, it might be on the verge of extending the weakened strict scrutiny of *Grutter* to all racial classifications.

82. 509 U.S. 502, 519 (1993).

83. *See id.* at 512 ("Only one unfamiliar with our case law will be upset by the dissent's alarum that we are today setting aside 'settled precedent' . . . ."). For a critique of the Court's change of perception, see Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994). For an argument that the Court did not change the law in *St. Mary's*, see Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995).

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Even if the Court does not weaken antidiscrimination protections directly, it may do so indirectly, by adding procedural hurdles that disparately affect plaintiffs alleging discrimination. The latter seems increasingly possible given recent shifts in procedural doctrines, to which I now turn before considering future developments in both antidiscrimination law and procedure in Part IV.

III. CIVIL PROCEDURE: ASSUMPTIONS ABOUT LITIGANTS AND LITIGATION

The Court's reliance on hidden foundational facts is not limited to substantive law. Just as changes in Equal Protection and employment discrimination law reflect unacknowledged changes in the Court's assumptions about the prevalence of discrimination, similarly unacknowledged changes in procedural doctrines can reflect changes in the Court's assumptions about the litigation process. If one assumes that most plaintiffs have plausible claims and that few meritless cases are filed, doctrine will place few pre-trial hurdles on plaintiffs. If, however, one assumes that plaintiffs have incentives to file meritless cases, then it makes sense to impose higher burdens on plaintiffs to justify their claims early in the litigation.

Again, let us imagine two different worlds. In the first, most lawyers refuse to bring cases that they believe to be meritless. It is the world of Elihu Root, the distinguished lawyer and statesman, who said: "About half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop."[84] What would a rational litigation regime look like in such a world? It would be the world of the Federal Rules of Civil Procedure from their inception in 1938 until some time in the 1980s: claims would be easy to bring and difficult to dismiss. The pleading burden would be low, and judges—presuming that most claims have some merit—would allow cases to settle or go forward to trial.

Now imagine instead that a high proportion of claims brought are of such low merit that a rational litigation regime would not allow them to go forward.[85] That is, they impose such a high cost on the defendant and promise such a low benefit to the plaintiff that they either force a settlement for more than the claim is worth or clog up the system to the detri-

84. SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 4 (1994).

85. Of course, it is possible that the minimal nature of the pleading and summary judgment standards under the 1938 Rules might have contributed to an increase in the filing of meritless suits, eventually leading to changes in judicial perception that lead to changes in doctrine. The stricter pleading and summary judgment standards might in turn decrease the number of meritless suits, leading to yet another change in perception and, eventually, doctrine. The pendulum thus might continue to swing. For a different take on such a pendulum, see Richard A. Nagareda, *1938 All Over Again? Pre-Trial on Trial in Complex Litigation*, 60 DEPAUL L. REV. (forthcoming 2011).

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ment of meritorious claims.[86] One need not assume that such suits are brought for their extortion value; as others have shown, informational asymmetry,[87] cognitive biases,[88] and rational behavior when facing sequential options[89] might all lead lawyers in good faith to pursue meritless claims. How would a rational judiciary respond to such a world? It would likely make it harder to bring claims and easier to terminate them prior to trial. And, as in the discrimination context, the courts might not view this as a change in doctrine, because the underlying principle—allow as many potentially meritorious suits to go forward without imposing undue costs on defendants or on the system—has not changed.

In this Section, I explore two doctrinal discontinuities, two decades apart. Each is the culmination of a gradual alteration—implemented suddenly—in the Court's tacit assumptions about the prevalence of meritless suits.

A. Summary Judgment

Federal Rule of Civil Procedure 56 provides that summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[90] When the Rules were adopted in 1938, summary judgment was a limited (albeit necessary) piece of the overall project. The drafters of the Rules believed that the combination of notice pleading and generous discovery would lead to the early abandonment of meritless claims, making summary judgment useful only in cases that turned on disputed legal doctrine or in which the claims or, more commonly, defenses were obviously spurious.[91]

86. One could alternatively define meritless suits as those in which the plaintiff has a zero probability of winning. *See, e.g.*, Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1855 n.9 (2004). But that definition will likely include very few suits; in particular, it will not include suits in which the expected value of the suit is negative because the plaintiff has a very low probability of prevailing (compared to the cost of litigating). *Id.* If we believe—and in the world I am imagining we do believe—that the reason the probability is low rather than zero is because of differences in juries that are *extrinsic* to the merits of the claim, then those suits should not be brought. For an elaboration of different meanings of probability in this context, see Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327 (2002). For purposes of this Article, exactly how we define "meritless" is not significant. I assume only that however we define it, the perception of how many cases fit the definition has changed.

87. *See, e.g.*, Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519 (1997).

88. *See, e.g.*, Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000).

89. *See, e.g.*, Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006).

90. FED. R. CIV. P. 56(a).

91. *See, e.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 318–19 (1938); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 864–65 (1933); *see also* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 602 & n.48 (2004) (characteriz-

Experience proved otherwise. By the 1970s, litigation, especially in complex cases, was perceived as an expensive quagmire.[92] Defendants complained that plaintiffs pursued meritless claims and abused discovery to extort settlements.[93] Plaintiffs complained that defendants used discovery and other procedural mechanisms to drag out litigation and exhaust plaintiffs' resources.[94] A 1979 study found that forty-nine percent of lawyers surveyed complained that there was too much discovery, and forty percent specifically complained about the use of discovery to harass opponents.[95] One scholar claimed that by 1983 litigation under the Federal Rules of Civil Procedure was "a system so indulgent of dubious claims, defenses, and behavior that it fell prey to adversarial ethics, crowded dockets, rising litigation costs, abusive discovery, and holdup litigation."[96] The Rules' attempt to focus litigation on substance rather than procedure merely focused lawyers' efforts on procedural gambits.

Beginning in 1983, a series of amendments to the Rules—including changes to discovery and to Rule 11 governing ethical obligations—were adopted to respond to these perceived inadequacies.[97] But complaints, especially about meritless or improbable claims, continued.[98] The com-

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ing both Clark and the Rules Advisory Committee as viewing summary procedure as being useful primarily in "routine" cases); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 319 (1986) (stating that the drafters envisioned summary judgment as a response to the "occasional recalcitrant litigant [who] refused to accept the results of discovery voluntarily"); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 529 (2006) ("[Roscoe Pound believed] in his characteristically optimistic way, that a procedural orientation toward merits-based decisions, together with judicial discretion that policed sharp procedural practices, would be sufficient to let lawyers' better natures emerge.").

92. *See generally* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440–44 (1986) (describing history of expensive litigation brought on after the adoption of the Federal Rules); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 33–35 (1984) (describing problems associated with the adversarial system). Some disputed the claim that a "litigation explosion" existed at all. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 9–10, 61–65 (1983).

93. *See, e.g.*, Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 809 (1980) (stating that lawyers whose cases involve the most discovery are the "most likely to complain that the discovery process . . . is seriously infected by tactical machinations"); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203–04 (1976); Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 106–08 (1976).

94. *See, e.g.*, Brazil, *supra* note 93, at 802 (showing that plaintiffs' attorneys are only "slightly more positive" about discovery than defendants' attorneys); Shalom L. Kohn, *Discovery Made Simpler (and Cheaper)*, 6 LITIG., Winter 1980, at 3, 3 ("[T]he effect [of discovery] in smaller cases may render the litigation so prohibitive as to preclude it completely."); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1031 (1989) (describing complaints that defendants use discovery and other motions to "wear down the opposition"); Maurice Rosenberg et al., *Expenses: The Roadblock to Justice*, 20 JUDGES J., no. 4, 1981, at 16, 17 ("There is sound evidence that the expense of litigating . . . in some cases, essentially bars the courthouse door.").

95. *See* Brazil, *supra* note 93, at 825, 830–32.

96. Louis, *supra* note 94, at 1028–29; *see also* Tidmarsh, *supra* note 91, at 560–61 & n.203 (describing the "drumbeat" of calls for change from the mid-1970s).

97. *See generally* Tidmarsh, *supra* note 91, at 585–86 (describing amendments).

98. *See, e.g.*, Elliott, *supra* note 91, at 320–21.

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mitment to truly minimal notice pleading[99] meant that the Rules lacked an effective device for weeding out factually unsupported claims. In its absence, claims supported by little or no evidence settled or went to trial.

Rule 56, as applied, did not serve the purpose. In 1962, the Supreme Court called it "[t]rial by affidavit" and suggested that it was "no substitute for trial by jury."[100] As late as 1979 the Court continued to disparage summary judgment, holding that it was inappropriate for a variety of issues.[101] Lower courts were notoriously reluctant to take cases away from the jury.[102] One district court judge called summary judgment "an extreme and treacherous remedy,"[103] and a scholar labeled it "a chimera, a theoretical possibility often unattainable in practice."[104] A sign in one federal courthouse read: "No spitting. No Summary Judgments."[105]

Then, in 1986, the Supreme Court decided three cases that made summary judgment substantially easier to get.[106] Taking a whole new view of the availability of summary judgment, the Court in one of the cases, *Celotex Corp. v. Catrett*, announced that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole."[107] Despite this radical shift, the Court claimed not to be making any new law and neither overruled nor adequately distinguished its earlier precedents.[108] The summary judgment trilogy seems to be another example of an unacknowl-

99. *See* Conley v. Gibson, 355 U.S. 41 (1957), discussed *infra* Part III.B.

100. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962).

101. *See* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157–60 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); *Poller*, 368 U.S. at 473; *see also* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 770, 772–73, 779 (1988) (describing some of these cases as "crippl[ing]" the use of summary judgment).

102. For scholarly confirmation of the rarity of summary judgment, see, for example, Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 183–84 (1987); David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 76–78 (1977); Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612, 614 (1971); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77–78 (1990); Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 746 (1974); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1993–94 (2004); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1904–06 (1998).

103. Croxen v. U.S. Chem. Corp. of Wis., 558 F. Supp. 6, 7 (N.D. Iowa 1982).

104. Louis, *supra* note 94, at 1041.

105. Steven Alan Childress, *Standards of Review in Federal Civil Appeals: Fifth Circuit Illustration and Analysis*, 29 LOY. L. REV. 851, 854 (1983).

106. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

107. *Celotex*, 477 U.S. at 327.

108. *Celotex* failed to adequately distinguish *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and *Matsushita* failed to adequately distinguish *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Many legal scholars have noted the discontinuity. *See, e.g.*, Childress, *supra* note 102, at 185–89; Issacharoff & Loewenstein, *supra* note 102, at 79–87; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1333 (2005); Wald, *supra* note 102, at 1907–15.

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edged doctrinal change, and once it is recognized as such, it is easy to identify the shift in underlying factual assumptions.

The decision about how freely summary judgment ought to be granted obviously turns on one's views of the trade-off between the harm of premature termination of meritorious cases and the benefit of efficient disposal of meritless cases. And although some part of the choice rests on a pure policy judgment—how many meritless cases we will tolerate to ensure that no meritorious cases are dismissed—part of it rests on the distribution between meritless cases that survive to the summary judgment stage and potentially meritorious cases that are only weakly supported at that stage. If one believes that the relative percentage of meritless cases is large, one will be more favorable towards summary judgment than if one believes that the percentage is small.[109]

Although other factors may have influenced the Court's change in doctrine, those factors alone cannot explain it. Others have argued, for example, that a desire to control dockets[110] or hostility to litigation[111] played a role. But a desire to reduce the number of cases litigated will predictably produce random or irrational results if few of the overwhelming number of cases are meritless. To suggest that the Court favored summary judgment without changing its views on the relative percentage of meritless cases is to suggest that the Court did not care which cases were jettisoned, as long as the total number was reduced. It is only if we believe that large numbers of the docket-clogging cases do not belong in court at all that it makes sense to increase the availability of summary judgment.

Exposing the foundational factual assumption, then, is important even if the Court's more immediate motivation was to reduce the amount of litigation or increase its efficiency. The change in assumptions explains the change in doctrine, and the fact that the assumptions remained tacit explains why the doctrinal change was not acknowledged. The accuracy of the different assumptions might be tested by empirical study. Finally, the Court's shifting views on the distribution of cases suggests further doctrinal changes to allow the easy resolution of cases whose merits are suspect—and, indeed, as the next Section shows, those changes have recently occurred.

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109. Shortly after the trilogy, one lower court judge recognized the changing factual assumptions, although he did not explicitly link the change to summary judgment doctrine. *See* Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 27 (1988) ("[O]ur faith in the pool of plaintiffs—the conviction that they probably have meritorious claims else they would not come to court—is weakening."); *see also* Louis, *supra* note 94, at 1034 (predicting in 1989 that we would "soon be engulfed by a resurgent anticlaimant bias fueled by a desire to make the judicial system efficient and claimants accountable").

110. *See, e.g.*, Issacharoff & Loewenstein, *supra* note 102, at 73.

111. *See generally* Siegel, *supra* note 1.

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B. Dismissal Before Discovery: Pleading Standards

According to most accounts, increasing the availability of summary judgment did result in the earlier termination of many cases, for good or for ill.[112] But summary judgment as a means for disposing of meritless cases has a major drawback: it is almost never available prior to discovery. The primary procedural device for pre-discovery termination is instead the motion to dismiss under Rule 12(b)(6). Rule 12(b)(6) allows a judge to dismiss a case for "failure to state a claim upon which relief can be granted."[113] This standard incorporates the notice-pleading standard of Rule 8(a)(2), which requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief."[114]

In replacing code pleading with notice pleading, the drafters of the Federal Rules intended to place minimal burdens on the complainant. All they expected from their new pleading regime was "a general statement distinguishing the case from all others."[115] The illustrative Forms accompanying the Federal Rules provide an indication of how little is required: Form 11 states only that on a particular date at a particular place, "defendant negligently drove a motor vehicle against the plaintiff," and as a result the plaintiff was injured.[116] In *Conley v. Gibson* in 1957, the Supreme Court confirmed that very little was required to withstand a motion to dismiss, holding that the motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[117] Further, in ruling on a motion to dismiss, the court must "accept as true all of the factual allegations contained in the complaint."[118]

The standard for granting a motion to dismiss, then, is much more stringent than the standard for granting summary judgment. The judge must take the factual allegations of the complaint as true and dismiss only if there is no possibility that the plaintiff could win at trial—keeping in mind that the plaintiff will have an opportunity to discover other facts.[119]

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112. *See, e.g.*, Redish, *supra* note 108, at 1334. Although early commentators suggested that the 1986 Supreme Court trilogy *caused* the increase in summary judgments, more recent research suggests that the trilogy only *confirmed* what lower courts had already begun. *See* Burbank, *supra* note 91, at 620; Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007). Either way, however, it does not affect my thesis that the Supreme Court's own change of doctrine rested on a shift in tacit factual assumptions.

113. FED. R. CIV. P. 12(b)(6).

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

115. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

116. FED. R. CIV. P. Form 11 (formerly Form 9, until the December 2007 restyling of the Rules).

117. 355 U.S. 41, 45–46 (1957).

118. Swierkiewicz v. Sorema N.A., 534 US. 506, 508 n.1 (2002); *see also* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993).

119. *See Swierkiewicz*, 534 U.S. at 508; *Conley* 355 U.S. at, 45–46.

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As the Court held in *Scheuer v. Rhodes*, "it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."[120] Notice pleading, therefore, is not meant to weed out meritless claims; instead, as the Supreme Court has noted, the "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to . . . dispose of unmeritorious claims."[121]

Despite clear precedent, however, some lower court judges used Rule 12(b)(6) more aggressively as a way to terminate cases prior to discovery.[122] While many commentators described this practice as requiring "heightened pleading" or "fact pleading," it might be more appropriately viewed as a form of pre-discovery summary judgment: judges were making a determination, based on the facts alleged and the facts they thought were likely to be demonstrated, about the viability of the plaintiff's claims.[123]

The Supreme Court repeatedly disapproved the practice as inconsistent with the letter and spirit of the Federal Rules. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*[124] in 1993 and again in *Swierkiewicz v. Sorema N.A.*[125] in 2002, the Court unanimously reversed lower court dismissals of discrimination complaints, rejecting the imposition of heightened pleading requirements.[126] In those and many other cases the Court explicitly reaffirmed the *Conley* standard.[127] As late as 2004, one pair of commentators could write: "Plaintiffs still enjoy a liberal standard of notice pleading, as efforts by judges to impose heightened pleading requirements have been soundly rejected by the Supreme Court."[128] Thus the Court still believed that summary

120. 416 U.S. 232, 236 (1974).

121. *Swierkiewicz*, 534 U.S. at 512.

122. For descriptions of the phenomenon, see, for example, Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) [hereinafter Fairman, *The Myth of Notice Pleading*]; Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Marcus, *supra* note 92, at 444–51; David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980); Wald, *supra* note 102, at 1930–33, 1937–38; C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back*, 49 MO. L. REV. 677, 679–83 (1984).

123. One contemporary commentator explicitly made this connection. *See* Wald, *supra* note 102, at 1937–38 (lamenting the "unseemly rush to summary judgment"). Other commentators made the same connection later, after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), discussed *infra* notes 129–66 and accompanying text. *See* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1240–41 (2008); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 47–48 (2008).

124. 507 U.S. 163 (1993).

125. *Swierkiewicz*, 534 U.S. 506.

126. *See Leatherman*, 507 U.S. at 168–69; *see also Swierkiewicz*, 534 U.S. at 515.

127. *See* cases cited in *Twombly*, 550 U.S. at 577 n.4 (Stevens, J., dissenting); *see also* Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) (citing *Conley* for liberal pleading standard and reversing lower court dismissal).

128. Subrin & Main, *supra* note 102, at 1997.

judgment, as reinvigorated in 1986, could do the work of weeding out meritless cases.

But in cases decided in 2007 and 2009, the Court made an abrupt about-face and only partially acknowledged that it was doing so. To put the two cases into perspective, let us recap the three well-established principles discussed so far. First, plaintiffs need only allege their claims with sufficient specificity to allow the opposing party to prepare a reply; no detailed factual allegations are necessary. Second, all of the plaintiff's factual allegations must be accepted as true for purposes of a motion to dismiss. And, third, no complaint can be dismissed unless it is clear beyond doubt that the plaintiff will be unable to support the claims. In *Bell Atlantic Corp. v. Twombly*, the Court disavowed the third principle—explicitly overruling that part of *Conley*—and undermined the first while denying that it was doing so.[129] Two years later in *Ashcroft v. Iqbal*, the Court reaffirmed and extended *Twombly* and additionally (again without acknowledging the doctrinal shift) drastically limited the second principle.[130]

Twombly was an antitrust case in which the plaintiffs specifically alleged that the defendants had conspired to refrain from competing with one another and to work in concert to prevent entry into the market by other competitors.[131] The plaintiffs provided no direct evidence of the agreement but did allege that the defendants had engaged in parallel conduct consistent with the existence of such an agreement.[132] Parallel conduct by itself does not violate the antitrust laws unless it is the result of an agreement,[133] and the parallel conduct by the defendants in *Twombly* was consistent with either an anticompetitive agreement or rational independent behavior.[134] The district court dismissed the suit, and the court of appeals reversed.[135]

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129. Many scholars noted the Court's unacknowledged change from earlier doctrine. *See, e.g.*, Epstein, *supra* note 123, at 64 ("[*Twombly*] can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases."); Randal C. Picker, Twombly, Leegin, *and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 172; Robert E. Shapiro, *Advance Sheet*, LITIG., Fall 2007, at 67, 67; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1851–53 (2008); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 305 (2007). *But see* Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 474 (2010) (describing *Twombly*'s "connection to prior law"); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010) (arguing that *Twombly* is reconcilable with earlier precedent).

130. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). Again, scholars noted (and criticized) the further change rendered by *Iqbal*. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010). *But see* Steinman, *supra* note 129, at 1293, 1298 (arguing that *Iqbal* is reconcilable with earlier precedent).

131. *See Twombly*, 550 U.S. at 550–51.

132. *See id.*

133. *See* Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–41 (1954). Prior to *Twombly*, some lower courts had required more specific or detailed pleading to show conspiracy in antitrust cases. *See* Fairman, *The Myth of Notice Pleading*, *supra* note 122, at 1011–21.

134. *See Twombly*, 550 U.S. at 564.

135. *Id.* at 552–53.

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The Supreme Court, by a vote of seven to two, reversed the court of appeals and upheld the dismissal.[136] It held that in order to withstand a motion to dismiss, the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level"[137] and must allege enough factual detail to make claims "plausible" rather than merely "conceivable."[138] Because the plaintiffs' allegation of parallel conduct was consistent with the absence of a conspiracy, the Court held, greater factual specificity was needed to make the claim of conspiracy plausible.[139] And the explicit allegations of the existence of a conspiracy were insufficient, because those allegations consisted only of "a few stray statements" that were "merely legal conclusions resting on . . . prior allegations [of parallel conduct]."[140] As for *Conley*'s "no set of facts" language, the Court held that it had been "questioned, criticized, and explained away long enough" and thus had "earned its retirement."[141]

The Court thus imposed on the plaintiffs a requirement that they plead more, or more specific, facts than had previously been required. At the same time, however, the Court explicitly denied that it was applying a heightened standard of pleading[142] and distinguished *Swierkiewicz* on the ground that there the allegations of discriminatory intent by the defendant employer were sufficiently detailed to show an entitlement to relief.[143]

Two questions remained after *Twombly*: was it limited to the antitrust context (either because of the size and complexity of antitrust cases or because of the unique situation that parallel conduct could be either legal or illegal depending on other facts), and how much higher was the new standard?

The Court answered both questions in *Iqbal*, which involved a claim that in the wake of the terrorist attacks of September 11, 2001, former Attorney General John Ashcroft and FBI Director Robert Mueller adopted and implemented an unconstitutional policy that subjected the plaintiff (a Pakistani Muslim) to harsh conditions of confinement on account of his race, religion, or national origin.[144] The complaint described the facts of Iqbal's ordeal and alleged that Ashcroft was the "principal architect" of the policy and that Mueller had been "instrumental in [its] adoption, promulgation, and implementation."[145] Both the district court and the court of appeals denied the defendants' motion to dismiss.[146]

136. *Id.* at 570.
137. *Id.* at 555.
138. *Id.* at 570.
139. *See id.* at 545.
140. *Id.* at 564.
141. *Id.* at 562–63.
142. *Id.* at 569 n.14.
143. *See id.* at 569–70.
144. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).
145. *Id.* at 1944.
146. *Id.* at 1942.

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The Court held that the complaint failed to state a claim for relief.[147] Three aspects of the majority opinion are noteworthy. First, the Court made clear that *Twombly* applies to all civil cases and not just to antitrust complaints.[148] Most lower courts had already reached that conclusion, but a few courts and commentators had suggested that *Twombly* was limited to antitrust cases.[149]

Second, *Iqbal* fleshed out *Twombly*'s "plausibility" standard. *Twombly* involved the telecommunications industry, which had long been regulated and divided into market territories and which, as a network, required some level of cooperation among the various companies.[150] It can be argued, therefore, that economically rational actors would be very likely to engage, independently, in the very actions that were challenged as anticompetitive. In other words, the allegation of a conspiracy was not only not plausible, it was—or at least could be viewed as—decidedly implausible.[151] And the *Twombly* Court was careful to note that its requirement of plausibility was not equivalent to probability: a judge should not dismiss a complaint even if he or she believes that proof of the factual allegations is improbable and recovery unlikely.[152]

Iqbal seemed to raise the bar even higher. The plaintiff had alleged that Ashcroft and Mueller singled out Arab Muslims for harsh conditions of confinement out of discriminatory intent.[153] The Court, however, in a single paragraph that cited no evidence other than the Muslim Arab identities of the September 11th hijackers and Osama Bin Laden, concluded that invidious discrimination was "not a plausible conclusion."[154]

147. The Court remanded the case to the lower courts for a determination of whether Iqbal should be permitted to amend his complaint. *Id.* at 1954. Only two Justices dissented in *Twombly*, whereas *Iqbal* was a five to four decision. That difference could be the result of the intersection of the two sets of foundational facts I discuss. *Iqbal*, unlike *Twombly*, involved discrimination, and perhaps the additional dissenters in *Iqbal* still believed discriminatory motives were such a likely explanation as to make the plaintiff's claims extremely plausible. It is also possible that, faced with the facts of *Iqbal*, the two additional dissenters examined their assumptions more closely.

148. *Id.* at 1953.

149. *See, e.g.*, Kersenbrock v. Stoneman Cattle Co., No. 07-1044-MLB, 2007 WL 2219288, at *2 n.2 (D. Kan., July 30, 2007); John H. Bogart, *The Supreme Court Decision in* Twombly*: A New Federal Pleading Standard?*, UTAH BUS. J., Sept.–Oct. 2007, at 20, 22; Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 122 (2007); Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 634–35 (2007).

150. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549–50 (2007).

151. The Court itself came close to suggesting this. *See id.* at 566; *see also* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 900–09 (2009); Epstein, *supra* note 123, at 84–90. Nevertheless, *Twombly* is a long way from the pre-1986 case of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), in which the Court reversed a grant of *summary judgment* because it agreed with the plaintiff's argument that "although she had no knowledge of an agreement . . . the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses." *Adickes*, 398 U.S. at 157.

152. *See Twombly*, 550 U.S. at 556.

153. *Iqbal*, 129 S. Ct. at 1942.

154. *See id.* at 1951–52.

Legitimate law enforcement purposes provided a "more likely explanation[]" for the challenged policies.[155] On one reading, then, *Twombly* might require merely that a plaintiff allege enough facts to turn an implausible claim into a plausible one, while *Iqbal* instead allows a court to assess probabilities—a long way from *Scheuer v. Rhodes*'s caution that unlikeliness of recovery is not the appropriate test.

Finally, the *Iqbal* Court backed away from the long-established doctrine that at the motion to dismiss stage a court must accept the plaintiff's factual allegations as true. Instead, the Court held the doctrine "inapplicable to legal conclusions" or to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[156] The allegations that the Court rejected as "not entitled to the assumption of truth" under this standard included allegations that the defendants "knew of, condoned, and willfully and maliciously agreed to" the implementation of the discriminatory policy, that Ashcroft was the "principal architect" of the policy, and that Mueller was "instrumental" in executing it.[157] It is difficult to see how such statements are different from the allegation in Form 11 that the defendant drove "negligently" or the routine allegation in employment discrimination cases such as *Swierkiewicz* that the defendant took adverse action against the plaintiff "because of" race, gender, or other prohibited factors.

In addition to raising the standard of plausibility and construing more broadly the scope of "conclusory" statements, the Court established a two-step test that arguably changes the way judges should look at complaints.[158] Instead of looking at the complaint as a whole, the Court in *Iqbal* broke it into individual allegations and then asked whether each individual allegation—standing on its own—was "conclusory."[159] This allegation-by-allegation consideration will further ratchet up the scrutiny that judges accord to complaints.

Despite these shifts in established doctrine, the Court in *Iqbal*, as in *Twombly*, purported to apply the standard interpretation of Rule 8(a).[160] Again, then, we have an unacknowledged discontinuity in doctrine. Although some might attribute the shift to hostility to antitrust or civil rights plaintiffs, the Court seems insistent that the new doctrine applies in all civil cases.[161] Moreover, the fact that the Court is unwilling—or perhaps unable—to acknowledge that it is doing anything more than applying its own precedents suggests that perhaps something else is going on.

155. *Id.* at 1951.

156. *Id.* at 1949. A plaintiff's legal assertions were never entitled to be taken as true; what *Iqbal* changed was the breadth of what counted as a legal (or quasi-legal) assertion.

157. *Id.* at 1951.

158. *See id.* at 1950–51.

159. *See* Bone, *supra* note 130, at 868–69.

160. *See Iqbal*, 129 S. Ct. at 1953–54.

161. *Id.* at 1953.

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I contend that what is going on is further updating of the Court's tacit factual assumptions about the litigation process. First, the Court seems more skeptical than ever about the percentage of meritorious cases. Rather than presuming that most plaintiffs have at least a colorable case, it seems to be requiring that plaintiffs demonstrate a probability of wrongdoing.[162] It might also have come to believe what lower courts had apparently believed for some time—that meritless cases can impose a significant burden on defendants well before a motion for summary judgment can be effective, because of the costs of discovery. Indeed, both *Twombly* and *Iqbal* mentioned the burden of discovery as a reason for not allowing inadequate complaints to proceed.[163] Other recent decisions also indicate that the Court is concerned generally about how burdensome litigation has become.[164]

Is discovery likely to be unduly burdensome in most cases? Did the pre-*Twombly* standard allow too many nonmeritorious complaints, leading to unwarranted settlements or overly expensive discovery? The problem with the Court's reliance on tacit assumptions is that we do not know the answer to questions like these, nor does the Court. As in the other doctrinal contexts I have identified, exposing the tacit assumptions might encourage further research.[165]

Finally, it is no coincidence that *Iqbal* involved a claim of discrimination. As noted earlier, the Court's elaboration of the plausibility standard included a conclusion that a non-discriminatory motive was a more plausible explanation for the government's actions than was racial, religious, or ethnic discrimination. Thus, the recent skepticism about discrimination—described in Part II of this article—combined with the Court's emerging views on the distribution of meritorious and meritless complaints to produce what is, with hindsight, a predictable result. That insight might also help us predict what is coming next. In the next Part, I explore some possible future developments.

162. One commentator has suggested that the post-*Twombly* pleading regime requires plaintiffs to "describe events about which there is a *presumption of impropriety*." A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 5 (2009). This formulation seems accurate but does not delve into the broader question of whether and when the Court seems to find universal presumptions of impropriety.

163. *See Iqbal*, 129 S. Ct. at 1953–54; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007). Other scholars have also noticed the *Twombly* Court's concern with abusive discovery in nonmeritorious cases. *See, e.g.*, Hoffman, *supra* note 123, at 1231–34.

164. *See* Hoffman, *supra* note 123, at 1220 & n.15 (citing cases).

165. For some preliminary but not comprehensive assessments, see, for example, Epstein, *supra* note 123; Fairman, *The Myth of Notice Pleading*, *supra* note 122, at 1060–61; Issacharoff & Loewenstein, *supra* note 102; Tonya Jacobi, *The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States*, 38 J. LEGAL STUD. 205 (2009).

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IV. THE FUTURE OF ANTIDISCRIMINATION LITIGATION

A. Substantive Law: Relaxing Strict Scrutiny

A number of commentators, noting the discrepancy between *Grutter* and its strict-scrutiny predecessors, have recently suggested that strict scrutiny—and tiered Equal Protection analysis generally—is on its way out.[166] But if I am right about the underlying factual assumptions that drive the analysis in *Grutter*, then the future of strict scrutiny will depend largely on the Court's (and the lower courts') intuitions about the prevalence of prejudice in twenty-first-century America. I have argued that the Court in *Wards Cove* and *St. Mary's* changed direction as it perceived that covert discrimination was no longer the most likely explanation for various employer actions, and in *Grutter* it altered doctrine as a result of its conclusion that racial prejudice was not the most likely explanation for the adoption of an affirmative action plan.[167] There are signs that the Court is once again contemplating a possible shift in antidiscrimination doctrine based on changing factual assumptions about discrimination. If it concludes that discrimination is no longer the most likely explanation for government classifications based on race, the watered-down strict scrutiny of *Grutter* might become the norm—including in cases involving such things as racial profiling, race-based prison policies, and other traditionally disfavored governmental policies.

The Court has plenty of data from which it might conclude that race discrimination is waning. The election of an African American president, the decline of racially polarized voting at the state and local level,[168] and the fact that high-ranking military leaders submitted an amicus brief in favor of affirmative action in *Grutter*[169] and *Gratz* all bespeak the progress that has been made since the Court first began striking down racial classifications in the middle of the twentieth century. "[S]urveys consistently report that expressed attitudes of racism and sexism have declined substantially over the years."[170] As one commentator has noted, the enactment of numerous antidiscrimination laws at various levels of government suggests that under the Court's own indicia of the powerlessness that triggers strict scrutiny for certain classifications, racial minorities are considerably more powerful than other minorities who are

166. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 493–94 (2004); Massey, *supra* note 34, at 970–80.

167. *See supra* notes 45, 75–83 and accompanying text.

168. *See, e.g.*, Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209 (1999); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002); Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2216–19 (2003).

169. Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

170. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5 & n.13 (2006) (citing sources).

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not protected by strict scrutiny.[171] And the virtually universal adoption of affirmative action plans by every state and federal entity—including the use of alternative schemes to produce similarly racially balanced results in those localities that have banned consideration of race[172]—demonstrates that many white Americans seek more than an end to racial discrimination and are looking further for ways to combat racial subordination.[173]

Indeed, the Supreme Court has recently signaled that it has noticed these factual developments and that its perception of the prevalence of racial discrimination has shifted. In *Ricci v. DeStefano*,[174] the Court refused to allow a city to deliberately jettison the results of a police-promotion test that would have led to the promotion of "too many whites and not enough minorities."[175] The Court held that the city could not make such an explicitly race-based decision unless it could provide a "strong basis in evidence" to suggest that it would be subject to disparate impact liability for using the test.[176] Compare this to the *Griggs* Court's tacit assumption that employers who adopt practices with a disparate im-

171. *See* Goldberg, *supra* note 166, at 504–05.

172. Developments in Texas and California provide illustrative examples of the achievement of racial balance despite prohibitions on affirmative action. In response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), a case which invalidated affirmative action programs at the University of Texas, the state legislature enacted the Top Ten Percent Rule, which guarantees admission to the top ten percent of the graduating class from each high school in Texas. *See* TEX. EDUC. CODE ANN. § 51.803 (West 2009). A survey conducted by the Office of Admissions at the University of Texas at Austin concluded that since the passage of the Top Ten Percent Rule, "diversity levels for entering freshman classes since the fall of 1998 have met or exceeded diversity levels of the fall of 1996, the last year in which a class admissions model involving affirmative action was used." Gary M. Lavergne & Cindy Hargett, *Perceptions and Opinions of University of Texas Entering Freshmen: The Impact of the Texas Top 10% Automatic Admissions Law*, THE UNIV. OF TEX. AT AUSTIN, 1 (Sept. 10, 2006), http://www.utexas.edu/student/admissions/research/HB588survey.pdf; *see also* Fisher v. Univ. of Tex., 645 F. Supp. 2d 587, 591 (W.D. Tex. 2009) (finding a slight increase in the level of minority enrollment at the University of Texas at Austin under the post-*Hopwood* Top Ten Percent Rule).

In California, the adoption of Proposition 209 banned "preferential treatment" in the operation of public employment and public education. CA. CONST. art. I, § 31(a). An article published a decade after the passage of Proposition 209 concluded that "minorities have maintained their levels in the public work force, including those with jobs at higher salary levels. . . . [A]nd their labor market position has remained relatively unchanged compared to pre-Proposition 209 levels." Eryn Hadley, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. PUB. L. 103, 120 (2005). Similarly, the proportion of African American, Hispanic, and Native American persons admitted to the University of California rose from approximately seventeen to eighteen percent in the two years immediately preceding the passage of Proposition 209, to nearly twenty-three percent in 2007. *See* UC OFFICE OF THE PRESIDENT, STUDENT AFFAIRS DIV., OFFICE OF ADMISSION, UNIV. OF CAL. NEW CAL. FRESHMAN ADMITS, FALL 1997 THROUGH 2007, UNIV. OF CAL. OFFICE OF THE PRESIDENT, Table A (2007), http://www.ucop.edu/news/factsheets/2007/fall_2007_admissions_table_a.pdf.

173. On the difference between discrimination and subordination, see, for example, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004). Siegel argues that the Court since *Brown* has changed its interpretation of the Equal Protection Clause from one embodying a principle of antisubordination to one embodying a principle of anticlassification. *See id.* But the widespread adoption of affirmative action suggests that *other* actors value antisubordination.

174. 129 S. Ct. 2658 (2009).

175. *Id.* at 2673.

176. *Id.* at 2678.

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pact do so for intentionally discriminatory reasons: by prohibiting employers from acting on the basis of a disparate impact alone, the *Ricci* Court seems to assume that employers are more likely to discriminate in favor of minorities than against them. Justice Scalia went even further, suggesting that Title VII's ban on disparate impact might itself violate the Equal Protection Clause.[177]

Similarly, in *Northwest Austin Municipal Utility District Number One v. Holder*, the Court suggested that "dramatic improvements" in voter registration, voting rates, election practices, and the success of minority candidates gave rise to "serious constitutional questions" about the contemporary constitutionality of the Voting Rights Act.[178] The Court questioned whether there is sufficient evidence of electoral discrimination to warrant the breadth of remedial authority Congress exercised in extending the Act in 2006.[179]

Finally, recent scholarly commentary that seeks to redefine "discrimination" in order to prohibit more types of discrimination may have the unanticipated consequence of instead persuading the Court that race discrimination has lessened significantly enough to warrant another unacknowledged doctrinal change.

Beginning with Charles Lawrence's seminal article in 1987,[180] a growing number of scholars have argued that while conscious racial discrimination may be fading, unconscious discrimination is pervasive. These scholars suggest that a large percentage of whites (and many minorities) unconsciously act on the basis of stereotypes and negative assumptions about members of minority groups. This prejudice is so deeply buried that it is invisible even to those who harbor it—they sincerely believe themselves to be unbiased.[181] The scholars in this genre seek to persuade courts to make explicit changes in antidiscrimination doctrine, primarily expanding its reach to include disparate impact as a constitu-

177. *See id.* at 2682–83 (Scalia, J., concurring); *see also* Primus, *supra* note 65.

178. 129 S. Ct. 2504, 2511–13 (2009). Justice Thomas went even further in his partial dissent, finding section 5 of the Voting Rights Act unconstitutional because "[t]he extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Id.* at 2525 (Thomas, J., dissenting in part).

179. *Id.* at 2511–12 (majority opinion).

180. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

181. *See, e.g.*, LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE (2006); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829 (2001); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Symposium, *Unconscious Discrimination Twenty Years Later: Application and Evolution*, 40 CONN. L. REV. 927 (2008).

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tional violation[182] or to make actionable under Title VII employment practices that "facilitate" unconscious discrimination.[183]

But to the extent that the most robust empirical support they provide is for the notion that overt discrimination is disappearing,[184] these efforts may backfire. The literature, to the extent it is influential on courts at all, may simply convince courts that their prior assumptions about the prevalence of discrimination were wrong. It may therefore contribute to a judicial perception that doctrines such as strict scrutiny (or even the *McDonnell-Douglas* structure for employment discrimination cases) that presume the explanatory power of discriminatory motive are no longer useful. Especially given the breadth of the scholars' recommendations and the radical effect they would have on our understanding of law, government authority, and individual autonomy,[185] judges are more likely to tacitly accept the finding that intentional discrimination is waning but reject the corollary that unconscious discrimination needs remedying.

B. Procedural Law: Tightening Pleading Requirements

One can make similar predictions in the context of the new pleading requirements. In altering the standard of pleading in *Twombly* and *Iqbal*, the Court purportedly left intact the prior cases, including the most recent, *Swierkiewicz v. Sorema N.A.*[186] *Swierkiewicz* involved a claim of age and nationality discrimination in employment, and the Court unanimously found the complaint sufficient to withstand a motion to dismiss.[187] But the allegations in the complaint were little more than conclusory statements—with an occasional anecdote suggesting possible animus—that the plaintiff had been demoted and then fired because of his age and nationality.[188] As in *Iqbal*, the plaintiff offered no more than circumstantial evidence of the motive for the defendant's actions.

To the extent that the Court has come to believe both that invidious discrimination is no longer the most likely explanation for adverse em-

182. *See, e.g.*, Chamallas, *supra* note 181, at 749–55; Kang, *supra* note 181, at 1593.

183. *See* Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851 (2007); *see also* Krieger, *supra* note 181, at 1245–46.

184. For a critique of the empirical basis of the literature on unconscious discrimination, see Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). For empirical support for the proposition that unconscious bias need not translate into biased actions, see Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

185. *See* Bagenstos, *supra* note 170 (suggesting strong judicial and political resistance to restructuring antidiscrimination law along these lines).

186. 534 U.S. 506 (2002).

187. *Id.* at 515.

188. *See id.* at 514.

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ployment actions,[189] and that litigation is too burdensome to trust the judgment of plaintiffs and their lawyers, *Swierkiewicz* is clearly in the crosshairs. Lower courts may have already taken the hint: one study found that in the first seven months after *Twombly* was decided, in civil rights cases the percentage of motions to dismiss that were granted jumped by eleven points.[190] And *Iqbal* rejected as implausible claims that the defendants were motivated by discriminatory animus against Muslims and Arabs.[191] It would not be surprising if, within a few years, the Court consigns *Swierkiewicz* to the same earned retirement to which it relegated *Conley*. Thus, whether or not the Court's changing views on the prevalence of discrimination lead it to change substantive antidiscrimination law, those views may combine with its perception of the prevalence and cost of meritless suits to produce a shift in pleading standards that is equally detrimental to plaintiffs in discrimination cases.

C. *Now What?*

Once we have noted the existence of foundational facts and identified them in these two contexts, what should discrimination-law or civil-procedure scholars do next? They should critique or support the factual assumptions behind doctrinal changes just as they do the theoretical underpinnings of doctrinal development. Thus scholars—especially those with an empirical bent—might ask whether invidious discrimination is the most likely explanation for government classifications, or for adverse employment actions. Is it at least more likely than the Court thinks it is? Answers to those questions might educate the Court and change its assumptions about foundational facts. Urging the Court to broaden its definition of discrimination, on the other hand, for all of its purportedly em-

189. Because *Swierkiewicz* involved age and nationality discrimination rather than race discrimination, it might be possible that the factual assumptions differ depending on the type of discrimination alleged.

190. Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008). Because "civil rights" cases in this study included only cases brought under 42 U.S.C. §§ 1981, 1982, and 1983 and cases brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), it is hard to know how Title VII and other employment discrimination cases were affected. *See id.* at 1836 n.161. Another, less comprehensive study shows that *Twombly* appears to have had some effect on employment discrimination cases. *See* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 145–49 (2008); *see also* Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 974 (11th Cir. 2008) (dismissing complaint that alleged plaintiffs were "denied promotions . . . and treated differently than similarly situated white employees solely because of . . . race"); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (anecdotal evidence). A more recent study also found a statistically significant rise in dismissals of civil rights cases. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556–57 (2010). Preliminary results from a study by the Administrative Office of United States Courts suggest a less dramatic rise, but that study looks at all 12(b) motions and thus might understate the rise in 12(b)(6) grants. ADMIN. OFFICE, MOTIONS TO DISMISS (2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_060110.pdf.

191. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950–51 (2009).

pirical underpinnings, is likely to be received as just so much ivory-tower theorizing and is therefore likely to fall on deaf judicial ears.[192]

Similarly, rhapsodizing over notice pleading and railing against the betrayal of the original spirit of the Federal Rules of Civil Procedure[193] are unlikely to move the Court. Instead, those who wish to stem the tide of increased pleading standards must attack its underlying factual assumptions. Whether focusing on employment cases, discrimination cases generally, or all cases, empirical work might profitably attempt to measure the relative meritoriousness of complaints that survive to the motion-to-dismiss stage. Scholars might also conduct further research into the costs of discovery generally or for particular cases; it may be that employment discrimination cases are relatively inexpensive.[194] Further information might persuade courts to revise their factual assumptions regarding the likely merit of (or cost of litigating) discrimination claims, and thus shape both substantive and procedural doctrines.

CONCLUSION

Conventional discussions of legal doctrine, focused on theory and application, do not fully understand the dynamics of doctrinal development. The conventional view fails to recognize the existence of foundational facts: hidden factual assumptions embedded *within* doctrines. But the Supreme Court often structures and develops doctrine in ways that

192. *See, e.g.*, Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119 (1995); David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761 (2005); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986). Advocates, too, might benefit from understanding the hidden factual assumptions at issue in various doctrines and might resurrect the idea of the "Brandeis brief." For more on Brandeis briefs, see MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 215–17 (2009).

193. *See, e.g.*, *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School); Bone, *supra* note 130; Edward D. Cavanagh, Twombly: *The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1 (2008); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135 (2007); Brian Thomas Fitzsimons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 206 (2007); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); *see also* Hoffman, *supra* note 123, at 1236 ("[Critics have] primarily couched their arguments against overregulation at the pleading stage by reference to the long-standing pleading standard from *Conley* and/or to the related conception that a heightened judicial pleading power is inconsistent with the 'liberal ethos' of the federal rules.").

194. The most recent empirical research on discovery suggests that it does not impose undue burden or expense. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY 35–45 (2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

reflect its unstated assumptions about these foundational facts, and changes in these hidden factual assumptions may lead to unacknowledged changes in doctrine. We can use the part we see—a sudden, unacknowledged, and apparently inexplicable change in doctrine—to uncover the foundational assumptions hidden within the doctrine.

In this Article, I have demonstrated this new approach in two different contexts: substantive antidiscrimination law and procedural hurdles imposed on plaintiffs. The Court once believed that, as a matter of fact, discriminatory motives were the most likely explanation for governmental or employer actions; as a result, it placed a high burden of justification on defendants. When its perception of the prevalence of discriminatory motives changed, it relaxed that burden—but denied that it was doing so, specifically because it did not acknowledge (and was perhaps unaware of) the change in foundational factual assumptions. The same effect can be seen in the context of judicial authority to terminate lawsuits in favor of defendants, through summary judgment or prediscovery dismissals. To the extent that the Court had faith that most claims are, as a matter of fact, at least arguably meritorious, it structured procedural doctrines to allow a jury to reach the merits of the claim. But as it came to believe that meritless cases are prevalent (as well as costly), it changed procedural doctrines to allow judges to terminate cases more easily. And again, the shift was accompanied by denials of any change in doctrine because the factual assumptions underlying the change—and thus the doctrinal shift itself—were invisible.

Doctrinal discontinuities often signal the existence of hidden foundational facts, and identifying and exposing those facts can explain doctrinal anomalies and help us predict future doctrinal changes. More importantly, exploring foundational facts gives us a richer understanding of the meaning of doctrine by focusing on its internal aspects. And that in turn allows us to evaluate the soundness of doctrinal change by evaluating the accuracy of its underlying factual assumptions. In short, just as scholars have traditionally moved law forward by focusing on theory, they can move it forward by focusing on foundational facts. In other words, broadening our understanding of doctrine gives us a better tool for doing what legal scholarship has always aspired to do.

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