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THE PLEADING PROBLEM

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Adam N. Steinman*

Federal pleading standards are in crisis. The Supreme Court's recent decisions in Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *have the potential to upend civil litigation as we know it. What is urgently needed is a theory of pleading that can bring* Twombly *and* Iqbal *into alignment with the text of the Federal Rules of Civil Procedure and a half-century worth of Supreme Court precedent, while providing a coherent methodology that preserves access to the courts and allows pleadings to continue to play their appropriate role in the adjudicative process. This Article provides that theory. It develops a new paradigm—plain pleading—as an alternative to both notice pleading (which the pre-*Twombly *era was widely understood to endorse) and plausibility pleading (which many read* Twombly *and* Iqbal *to endorse). As a functional matter, this new paradigm is largely consistent with notice pleading, but it stands on firmer textual footing and avoids some of the conceptual problems that arise when notice is the exclusive frame of reference.*

This approach is able to reconcile Twombly *and* Iqbal *with pre-*Twombly *authority. Indeed, a careful reading of* Twombly *and* Iqbal *undermines the conventional wisdom that they require a stricter approach to pleading. First,* Twombly *and* Iqbal *did not overrule the most significant pre-*Twombly *authorities. The only aspect of prior case law that these decisions set aside was a misunderstood fifty-year-old phrase whose real meaning was never called into question. Furthermore,* Iqbal*'s two-step analysis confirms that the problematic plausibility standard employed in* Twombly *and* Iqbal *is neither the primary inquiry at the pleadings phase nor a necessary one. The threshold issue is whether a crucial allegation in a complaint may be disregarded as "conclusory"; only then does the "plausibility" of an entitlement to relief become dispositive. While there remains some uncertainty about what conclusory means,*

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*authoritative pre-*Twombly *sources—the Federal Rules, their Forms, and Supreme Court decisions that remain good law—foreclose any definition that would give courts drastic new powers to disregard allegations at the pleadings phase.*

INTRODUCTION

Pleading standards are essential to the character of a civil justice system. If a plaintiff seeking judicial redress is unable to provide an adequate "statement of the claim" at the pleadings phase,[1] then that claim is effectively stillborn. There will be no court-supervised discovery, no ability to present evidence to a judge or jury, and no hope of obtaining any judicial remedy. The complaint will be dismissed, without even an obligation on the part of the defendant to admit or deny the plaintiff's allegations.[2] For all intents and purposes, that initial

1. FED. R. CIV. P. 8(a)(2) (requiring the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

2. *See* FED. R. CIV. P. 12(b)(6) (authorizing a pre-answer motion to dismiss a claim for

pleading is the key to the courthouse door. If pleading standards are too strict, the door becomes impenetrable. But if pleading standards are too lenient, concerns arise that opportunistic plaintiffs without meritorious claims will force innocent parties to endure the burdens of litigation and, perhaps, extract a nuisance settlement from a cost-conscious defendant who would rather pay to make the case go away.

For the first seventy years of the Federal Rules of Civil Procedure, pleading standards were widely viewed as "well established" and "relatively straightforward."[3] But today, federal pleading standards are in crisis, thanks to two recent Supreme Court decisions—*Bell Atlantic Corp. v. Twombly*[4] in 2007 and *Ashcroft v. Iqbal*[5] in 2009. Before these decisions, federal courts followed an approach known as notice pleading, because the plaintiff's complaint must merely "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[6] In *Twombly*, however, the Supreme Court appeared to endorse a new paradigm—plausibility pleading[7]—that would impose higher burdens on plaintiffs at the pleadings phase. *Twombly* involved a massive antitrust class action that hinged on whether the defendants had agreed amongst themselves to restrain competition. The Court dismissed the claim because the complaint lacked allegations "plausibly suggesting" that such an agreement had occurred.[8]

Twombly has been so influential that it is already among the most frequently cited Supreme Court decisions of all time.[9] It has garnered

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"failure to state a claim upon which relief can be granted").

3. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2009) ("The basic principles underlying practice on a Rule 12(b)(6) motion are relatively straightforward and have been well established over the years by the case law.").

4. 550 U.S. 544 (2007).

5. 129 S. Ct. 1937 (2009).

6. Conley v. Gibson, 355 U.S. 41, 47 (1957). Toward the close of the twentieth century, judges in the lower federal courts would occasionally attempt to impose stricter pleading standards. *See, e.g.*, Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (noting the tendency of some lower federal courts to "impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine"); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435 (1986) (noting that "fact pleading . . . seems to be enjoying a revival in a number of areas in which courts refuse to accept 'conclusory' allegations as sufficient under the Federal Rules"). But such efforts by lower courts were consistently rebuffed by the Supreme Court in unequivocal terms. *See infra* note 37 and accompanying text.

7. *See, e.g.*, Robert L. Carter, *Civil Procedure as a Vindicator of Civil Rights: The Relevance of* Conley v. Gibson *in the Era of "Plausibility Pleading,"* 52 HOW. L.J. 17 (2008); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

8. *Twombly*, 550 U.S. at 556-57.

9. As of March 2010, *Twombly* had been cited in nearly 24,000 federal decisions—already number seven of all time. *See infra* app. tbl.1 (ranking the one hundred most-frequently-cited Supreme Court cases in terms of citations by federal courts and tribunals).

considerable scholarly attention as well.[10] The debate over pleading standards that *Twombly* inspired has only intensified after last Term's five-to-four decision in *Ashcroft v. Iqbal*. Relying heavily on *Twombly*, the *Iqbal* majority dismissed a civil rights complaint filed against former Attorney General John Ashcroft and FBI Director Robert Mueller by a Pakistani man who had been detained during the weeks following the September 11th attacks. *Iqbal* held that discriminatory animus on the part of Ashcroft and Mueller was "not a plausible conclusion" in light of the complaint's allegations, emphasizing that the inquiry into plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[11]

Twombly's approach to pleading has been widely criticized as inconsistent with prior Supreme Court decisions, contrary to the text of the Federal Rules of Civil Procedure, and having destructive policy consequences in terms of litigants' access to the federal courts. Concerns about *Twombly* have been exacerbated by *Iqbal*, which eliminated any hope that *Twombly* might be narrowly confined to complex antitrust cases.[12] The current discourse,

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And that figure is increasing at a remarkable rate of nearly 800 new federal citing decisions each month. *See id.* tbl.2. *Iqbal* is not far behind, having cracked the top one hundred most-cited Supreme Court decisions in less than ten months on the books (number seventy-six as of March 2010). *Id.* tbl.1. *Iqbal* is averaging over 500 new federal citing decisions each month, *id.* tbl.2, and has been described as "the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts." Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 (quoting attorney Thomas Goldstein).

10. *See, e.g.*, Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535; Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2010); 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 (2008); 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 FED. RULES DECISIONS 604 (2006); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; Spencer, *supra* note 7; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90 (2009); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); *see also* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135 (2007); Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008); 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).

11. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950, 1952 (2009).

12. For recent critiques of *Iqbal*, see, for example, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); Clermont & Yeazell, *supra* note 10; Suzette M. Malveaux, *Front Loading and*

however, threatens to make *Iqbal*'s (and *Twombly*'s) effect on pleading standards a self-fulfilling prophecy. *Iqbal*'s critics excoriate the Court for discarding the lenient, pre-*Twombly* approach. *Iqbal*'s supporters praise the Court for doing precisely that.[13] But little attention is given to whether this is, in fact, the correct way to read these cases.[14]

Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010); 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); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010); Rakesh Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 STAN. L. REV. 905 (2010); Gregory P. Joseph, *Supreme Court on Federal Practice 2009*, 77 U.S.L. Wk. 2787 (2009); Liptak, *supra* note 9 (quoting Justice Ginsburg's comment that *Iqbal* was dangerous and had "messed up the federal rules" and Professor Stephen Burbank's comment that it "obviously licenses highly subjective judgments" and "is a blank check for federal judges to get rid of cases they disfavor"); Tony Mauro, *Ashcroft Ruling Adds Hurdle for Plaintiffs: U.S. Supreme Court Decision in* Iqbal *Could Make It Easier for Defendants To Dismiss Civil Complaints*, NAT'L L.J., May 25, 2009 (quoting Professor Alan Morrison's comment that *Iqbal* is "very troubling" and attorney Michael Winger's comment that "I fear [*Iqbal*] will keep many victims of governmental discrimination and abuse from ever getting their day in court"); Michael C. Dorf, *The Supreme Court Dismisses a 9/11 Detainee's Civil Lawsuit*, FINDLAW WRIT, May 20, 2009, http://writ.news.findlaw.com/dorf/20090520.html; Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf (Rebuttal and Closing Statement of Professor Burbank); Elizabeth Thornburg, *Law, Facts and Power*, 114 PENN STATIM 1 (2010), *available at* http://www.pennstatelawreview.org/114/114%20Penn%20Statim%201.pdf; *see also* Posting of Scott Dodson to Civil Procedure and Federal Courts Blog, *Beyond Twombly*, http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html (May 18, 2009); Posting of Alexandra D. Lahav to Mass Tort Litigation Blog, *The Plausible Pleading Standard*, http://lawprofessors.typepad.com/mass_tort_litigation/2009/05/the-plausible-pleading-standard.html (May 20, 2009); Posting of Howard Wasserman to PrawfsBlawg, Iqbal *and the Death of Notice Pleading: Part I*, http://prawfsblawg.blogs.com/prawfsblawg/2009/05/iqbal-and-the-death-of-notice-pleading-part-i.html (May 18, 2009).

13. *See, e.g.*, Liptak, *supra* note 9 (stating attorney Mark Herrmann's comment that *Iqbal* will allow for the dismissal of cases that otherwise would have subjected defendants to millions of dollars in discovery costs); Lynn C. Tyler, *Recent Supreme Court Decision Heightens Pleading Standards, Holds Out Hope for Reducing Discovery Costs*, 77 U.S.L.W. 2755 (2009); Herrmann, Beck & Burbank, *supra* note 12 (Opening Statement and Closing Statement of Herrmann and Beck); Posting of Ashby Jones to Wall Street Journal Law Blog, *Why Defense Lawyers Are Lovin' the Iqbal Decision*, http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision/tab/article/ (May 19, 2009 13:07 EST); *see also* Posting of Jim Beck & Mark Herrmann to Drug and Device Law Blog, *In Praise of "Short & Plain" Pleadings After* Twombly *and* Iqbal (May 28, 2009), http://druganddevicelaw.blogspot.com/2009/05/in-praise-of-short-and-plain-pleadings.html.

14. For two thoughtful attempts to reconcile the post-*Twombly* and pre-*Twombly*

This Article challenges the conventional wisdom that *Iqbal* and *Twombly* run roughshod over a half-century's worth of accumulated wisdom on pleading standards. When one reads *Iqbal* and *Twombly* in tandem with their textual and precedential context, two principles emerge. First, the most significant pre-*Twombly* authorities are still good law. The only aspect of prior case law that *Twombly* and *Iqbal* set aside was a misunderstood fifty-year-old phrase whose real meaning was never called into question.[15] Second, the primary inquiry at the pleadings phase is not a claim's "plausibility," but rather whether a necessary element of a plaintiff's claim is alleged in the form of a "mere legal conclusion." Indeed, the plausibility inquiry can be avoided entirely. As long as a complaint contains nonconclusory allegations for every element of a claim for relief, it passes muster regardless of whether the judge might label the allegations implausible. Plausibility comes into play only when an allegation necessary to the planitiff's claim is disregarded as conclusory (or is missing entirely). The inquiry then becomes whether the remaining, nonconclusory allegations make it plausible that an actionable claim exists.[16]

In short, only conclusoriness is a basis for refusing to accept the truth of an allegation; implausibility is not. The key question going forward, therefore, is how to assess whether an allegation may be disregarded as conclusory under the *Iqbal* framework. One answer is to define conclusory in *transactional* terms: an allegation is conclusory only when it fails to identify adequately the acts or events that entitle the plaintiff to relief from the defendant. What made the crucial allegations in *Iqbal* and *Twombly* impermissibly "conclusory" were

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approaches to pleading, see Bone, *supra* note 10, at 883 ("Despite these seemingly contradictory signals, evaluating *Twombly*'s impact on notice pleading is not as difficult as some critics believe. The Court's signals appear conflicting only if one assumes that *Twombly* substantially tightens pleading requirements. But this assumption is incorrect."); Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 474 (2010) ("Rather than decrying *Twombly* as a radical departure and seeking to overturn it, this Article instead emphasizes *Twombly*'s connection to prior law and suggests ways in which it can be tamed."). *But cf.* Bone, *supra* note 12, at 851 (arguing that "*Iqbal*'s version of plausibility is significantly stricter than *Twombly*'s" because "*Iqbal* applies a thick screening model that aims to screen weak as well as meritless suits, whereas *Twombly* applies a thin screening model that aims to screen only truly meritless suits").

15. *See infra* notes 156-60 and accompanying text (discussing *Twombly*'s treatment of the statement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

16. In *Iqbal*, for example, plausibility became relevant only because the allegation at paragraph ninety-six of the complaint—that Ashcroft and Mueller "each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin"—was disregarded as conclusory. *See infra* notes 126-32 and accompanying text. The Court therefore treated the complaint as making *no* allegation of discriminatory motive, and proceeded to inquire whether the remaining allegations—standing alone—plausibly suggested discriminatory intent. But if paragraph ninety-six had not been disregarded as conclusory, it would have been accepted as true, without any inquiry into plausibility. *See infra* notes 138-42 and accompanying text.

legitimate (though certainly debatable) questions about whether those allegations were grounded in a series of real-world events. An allegation cannot, however, be deemed conclusory merely because the truth of that allegation is not suggested by some other allegation in the complaint. Such an approach would essentially require pleadings to contain evidentiary support for the allegations contained therein, which would be flatly inconsistent with pre-*Twombly* precedent and the text and structure of the Federal Rules. It would also be conceptually unworkable, because each new allegation offered to support an earlier allegation would itself require support; if taken to its logical extent, an evidentiary approach imposes on courts an endless cascade of inquiry that can never be satisfied. A transactional-narrative approach, on the other hand, explains why the familiar exemplars of the notice pleading era are permissible,[17] but the complaints in *Iqbal* and *Twombly* arguably fall short.[18] It is therefore able to maintain consistency with both the text of the Federal Rules and the Supreme Court's pre-*Twombly* pleading decisions, while avoiding the unfortunate policy consequences that many critics of *Twombly* and *Iqbal* fear.

These arguments should not be read as praise for the Court's decisions in *Twombly* and *Iqbal*. At best, *Twombly* and *Iqbal* appear to be result-oriented decisions designed to terminate at the earliest possible stage lawsuits that struck the majorities as undesirable.[19] And it was irresponsible for the Court to invite the controversial "plausibility" concept into pleading doctrine in a way that has led to such widespread confusion. Courts should not, however, compound these problems by misreading *Twombly* and *Iqbal* to drastically change federal pleading standards going forward.

Part I of this Article describes federal pleading standards before *Twombly*, and then summarizes the Supreme Court's reasoning in both *Twombly* and *Iqbal*. Part II describes the conventional understanding that *Twombly* and *Iqbal* make "plausibility" the principal inquiry at the pleadings phase, and argues that such an approach would indeed be problematic. Part III argues that properly understood, the post-*Iqbal* pleading framework is not fundamentally in conflict with notice pleading, because the most significant pre-*Twombly* authorities on federal pleading remain good law and because the troublesome plausibility standard is rendered irrelevant when a plaintiff provides nonconclusory allegations for each element of a claim. Part IV focuses on *Iqbal*'s most pressing doctrinal question—how to determine whether a particular allegation

17. Two such examples are the employment-discrimination complaint in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and the negligence complaint in Form 11 of the Federal Rules. As explained *infra* notes 238-42 & 279-86 and accompanying text, these complaints pass muster because they identify the underlying acts or events (the plaintiff's firing in *Swierkiewicz*, the plaintiff being struck by a car in Form 11), even though other characteristics of those events (the employer's discriminatory intent in *Swierkiewicz*, the defendant's negligence in Form 11) are alleged in conclusory fashion.

18. *See infra* notes 245-66 and accompanying text.

19. *See infra* Part III.D.

may be disregarded as "conclusory," i.e., a mere legal conclusion. It argues that defining conclusory in transactional terms would reconcile *Twombly* and *Iqbal* with binding pre-*Twombly* authority, and rejects the idea that allegations are conclusory just because they lack evidentiary support at the pleadings phase. It then proposes a new paradigm—plain pleading—that provides a textual foundation for this approach. While line-drawing challenges will inevitably remain, these challenges would persist even under a traditional notice-pleading framework. Part V develops a deeper theory of the role pleadings ought to play in civil adjudication, and confronts the relationship between pleading standards and discovery costs that drives so much of the contemporary debate.

I. FEDERAL PLEADING STANDARDS BEFORE AND AFTER *TWOMBLY*

The current crisis in federal pleading standards stems in large part from the inability to reconcile the liberal approach that governed during the first several decades of the Federal Rules of Civil Procedure with the seemingly stricter approach the Supreme Court employed in *Twombly* and *Iqbal*. This Part summarizes the notice pleading standard that characterized the pre-*Twombly* era, and then describes in detail the Court's decisions in *Twombly* and *Iqbal*.

A. *Before* Twombly

For more than a half-century, the Federal Rules of Civil Procedure were read as adopting an approach to pleading known as notice pleading. This paradigm was grounded on Rule 8's command that a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[20] In the landmark case of *Conley v. Gibson*,[21] the Supreme Court made clear that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[22] Rather, a complaint is sufficient as long as it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[23]

The Court repeatedly stressed that this approach flows directly from the text of Rule 8. Its unanimous 1993 decision in *Leatherman v. Tarrant County*[24] held: "Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' In *Conley v. Gibson*, we said in effect that the Rule meant what it said."[25] The Forms

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

21. 355 U.S. 41 (1957).

22. *Id.* at 47.

23. *Id.*

24. 507 U.S. 163 (1993) (Rehnquist, C.J., writing for a unanimous Court).

25. *Id.* at 168 (citation omitted). In *Leatherman*, the plaintiffs had claimed that a municipality was liable under § 1983 for the unconstitutional execution of a search warrant, alleging that the municipality had failed to adequately train the officers involved. *Id.* at 165.

provided in the Rules' appendix, which are deemed to "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate,"[26] confirm this lenient approach. One exemplar is Form 11, which provides that a negligence complaint satisfies Rule 8 by alleging: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."[27]

Just five years before *Twombly*, the Supreme Court's unanimous decision in *Swierkiewicz v. Sorema N. A.*[28] provided a full-throated endorsement of this approach. Per Justice Thomas, the Court found it sufficient for an employment discrimination plaintiff to allege that his "age and national origin were motivating factors in [the defendant's] decision to terminate his employment."[29] The inquiry at the pleadings phase is *not* whether the plaintiff will ultimately prevail on its claim.[30] The inquiry is *not* whether the plaintiff has or was likely to uncover evidence to support the allegations in the complaint.[31] Rather, the Court recognized that a plaintiff might need the

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The defendants argued that the complaint was insufficient because the failure-to-train allegation had not been bolstered by additional facts. *Id.* at 167. The unanimous Court rejected this attempt to impose greater burdens on plaintiffs at the pleadings phase, citing *Conley*'s mandate that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Id.* at 168 (quoting *Conley*, 355 U.S. at 47).

26. FED R. CIV. P. 84. Indeed, the chief drafter of the original Federal Rules of Civil Procedure—Judge Charles Clark—believed that the sample complaints provided in these forms were "the most important part of the rules" when it comes to illustrating what Rule 8 requires. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) ("What we require [in Rule 8] is a general statement of the case. . . . We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms.").

27. FED. R. CIV. P. Form 11 ("Complaint for Negligence"), ¶ 2. Before the 2007 restyling of the Federal Rules of Civil Procedure, this form appeared as Form 9 and was drafted slightly differently. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575-76 (2007) (Stevens, J., dissenting) (quoting what was then Form 9: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 n.4 (2002) (same).

28. 534 U.S. 506.

29. Amended Complaint at ¶ 37, Swierkiewicz v. Sorema N. A., No. 99 Civ. 12272 (S.D.N.Y. Apr. 19, 2000) [hereinafter *Swierkiewicz* Amended Complaint]; *see also Swierkiewicz*, 534 U.S. at 514 ("Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA.").

30. *See Swierkiewicz*, 534 U.S. at 515 ("[The federal] pleading standard [is] without regard to whether a claim will succeed on the merits."); *accord* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.").

31. *See Swierkiewicz*, 534 U.S. at 511-12 (rejecting as "incongruous" with notice pleading a requirement to allege facts raising an inference of discrimination, because "direct

discovery process to obtain the evidence he will ultimately use to support the allegations in the complaint. Therefore, a plaintiff's lack of supporting evidence at the time the complaint is filed was not fatal—such evidence could be obtained through discovery.[32] The *Swierkiewicz* Court was fully aware that this liberal pleading standard could permit unmeritorious claims to survive the pleadings phase and trigger the pretrial discovery process.[33] But it held that this approach was mandated by the language of Rule 8; a stricter pleading standard "'is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[34]

Before *Twombly*, it was clear that this approach to pleading governed all actions in federal court, except for a discrete number of issues for which a stricter standard was explicitly imposed by statute or rule.[35] Toward the close of the twentieth century, judges in the lower federal courts would occasionally attempt to read Rule 8's general pleading standards more strictly,[36] but such efforts were consistently rebuffed by the Supreme Court in unequivocal terms.[37] Then came *Twombly*.

B. *The* Twombly *Decision*

The Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly* involved an antitrust class action of gargantuan proportions. The plaintiffs alleged that America's largest telecommunications firms (the so-called "Baby Bells" or "ILECs"[38]) had violated § 1 of the Sherman Antitrust Act by engaging in anticompetitive "parallel conduct"—refusing to compete against

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evidence of discrimination" might be unearthed during discovery even though the plaintiff was concededly "without direct evidence of discrimination at the time of his complaint").

32. *See infra* notes 228-32 and accompanying text.

33. *Swierkiewicz*, 534 U.S. at 514-15 (recognizing that this approach to pleading would "allow[] lawsuits based on conclusory allegations of discrimination to go forward" but concluding that "[w]hatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits").

34. *Swierkiewicz*, 534 U.S. at 515 (quoting Leatherman v. Tarrant County, 507 U.S. 163, 168 (1993)).

35. *See, e.g.*, FED. R. CIV. P. 9(b) (requiring that a complaint alleging fraud or mistake "state with particularity the circumstances constituting fraud or mistake"); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) (applying the Private Securities Litigation Reform Act's special pleading standards for certain securities law claims (codified at 15 U.S.C. § 78u-4(b)(2)), which require the complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind").

36. *See supra* note 6.

37. *See, e.g.*, *Swierkiewicz*, 534 U.S. at 510-15 (2002) (rejecting lower court's imposition of heightened pleading standard for employment discrimination claims); *Leatherman*, 507 U.S. at 167-68 (rejecting lower court's imposition of heightened pleading standard for civil rights claims against government officials).

38. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549 (2007). ILEC stands for "Incumbent Local Exchange Carrier." *Id.*

one another in their respective regional markets—and by restraining other potential competitors (the non-Baby Bells or "CLECs"[39]) wishing to access those markets.[40] The markets affected by these alleged violations were so vast that the plaintiff class would have comprised over ninety percent of everyone in America who had subscribed to either local telephone or high-speed internet service.[41]

A § 1 Sherman Act claim exists only when the defendants' anticompetitive behavior is pursuant to a "contract, combination, or conspiracy."[42] As to this element, the *Twombly* complaint stated: "Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another."[43] The defendants moved to dismiss the complaint, challenging the adequacy of the plaintiffs' conspiracy allegations.[44] The district court granted the motion and dismissed the case,[45] but the Second Circuit reversed.[46] With Justice Souter writing for the majority, the Supreme Court ruled seven-to-two that the plaintiffs' complaint was insufficient and must be dismissed.[47]

The Court recognized the complaint's allegations that there had, in fact, been a "contract, combination, or conspiracy,"[48] but it held that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct.[49] More was required to comply with federal pleading standards. The complaint must contain "allegations plausibly suggesting (not merely consistent with) agreement"[50] or, phrased slightly differently, "facts that are suggestive enough to render a § 1 conspiracy plausible."[51] The "[f]actual allegations must be enough to raise a right to relief above the speculative level."[52]

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39. CLEC stands for "competitive local exchange carrier." *Id.*

40. *See id.* at 550-51.

41. *Id.* at 559.

42. *Id.* at 548 ("Liability under § 1 of the Sherman Act requires a 'contract, combination, or conspiracy, in restraint of trade or commerce.'" (citation and ellipses omitted)).

43. *Id.* at 551 (quoting ¶ 51 of the plaintiffs' complaint).

44. *See* Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 176, 178 (S.D.N.Y. 2003).

45. *Id.* at 189.

46. Twombly v. Bell Atl. Corp., 425 F.3d 99, 119 (2d Cir. 2005).

47. *See Twombly*, 550 U.S. 544, 570 (2007).

48. *Id.* at 551.

49. *Id.* at 564; *see also id.* ("[T]he complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs.").

50. *Id.* at 557.

51. *Id.* at 556.

52. *Id.* at 555.

Measured by these metrics, the *Twombly* complaint was insufficient. The Court gave particular attention to the plaintiffs' allegations that the defendants had engaged in a "parallel course of conduct"[53] to restrain competition, such as by "making unfair agreements" with CLECs wishing to access their networks; by "providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers"; and by their "common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages."[54] The Court noted, however, that antitrust law does *not* forbid such parallel conduct that is the product of each actor's "independent decision" rather than "an agreement, tacit or express," between competitors.[55] Furthermore, such parallel conduct is "a common reaction of firms in a concentrated market" and entirely consistent with "a wide swath of rational and *competitive* business strategy unilaterally prompted by common perceptions of the market."[56]

The Court also expressed concern about the discovery costs that would result if the plaintiffs' claim in *Twombly* were allowed to proceed past the pleadings phase,[57] noting that "antitrust discovery can be expensive" and worrying that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases."[58] It added that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence."[59] In addition, the Court critiqued and "retire[d]"[60] its statement from the landmark 1957 decision in *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[61] It declared this phrase to be "best forgotten,"[62] fearing that "a focused and literal reading" of it would mean that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings

53. *Id.* at 551 (quoting plaintiffs' complaint).

54. *Id.* at 550-51 (internal quotation marks omitted).

55. *Id.* at 553 (quoting Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)); *see also id.* at 553-54 ("Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful." (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (internal quotation marks omitted))).

56. *Id.* at 553-54 (emphasis added) (internal citations and quotation marks omitted).

57. *Id.* at 558 (noting that "proceeding to antitrust discovery can be expensive").

58. *Id.* at 559.

59. *Id.* (internal quotation marks omitted).

60. *Id.* at 563.

61. 355 U.S. 41, 45-46 (1957).

62. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007).

left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery."[63]

The Court thus concluded that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."[64] Rather, "further factual enhancement" was required to cross "the line between possibility and plausibility of entitlement to relief."[65] The Court's final sentence echoed this notion: "Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[66]

C. *Initial Uncertainty Following* Twombly

The dismissal of a complaint based on the plaintiffs' failure to "nudge[] their claims across the line from conceivable to plausible" sent shockwaves throughout the legal community—for academics,[67] practitioners,[68] and judges[69] alike. Many sought ways to confine *Twombly* to its particular facts. One theory was that *Twombly*'s approach applied only to complex antitrust claims, while the more lenient notice pleading approach continued to apply more generally.[70] Another was that *Twombly* applied only when the plaintiff had pled itself out of court by resting its claim on an impermissible theory.[71]

The idea that *Twombly* might be narrowly confined gained added purchase when the Supreme Court issued a per curiam decision in *Erickson v. Pardus*[72]

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63. *Id.* at 561 (internal quotation marks omitted).

64. *Id.* at 556.

65. *Id.* at 557 (internal quotation marks omitted).

66. *Id*. at 570.

67. *See, e.g.*, Hoffman, *supra* note 10, at 1224 ("[F]ollowing *Twombly*'s thundering arrival in 2007, academic interest in the subject [of pleading standards] has been rekindled."); Spencer, *supra* note 7, at 431 (describing *Twombly* as "a startling move by the U.S. Supreme Court").

68. *See, e.g.*, Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track?*, LITIG., Summer 2008, at 5, 62 ("The Supreme Court also rewrote federal pleading requirements in 2007, without even amending the pleading rules, by issuing its decision in *Bell Atlantic Corp. v. Twombly* . . . .").

69. *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (noting that "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*" and that "[s]ome of [*Twombly*'s] signals point toward a new and heightened pleading standard"), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

70. *See, e.g.*, Kersenbrock v. Stoneman Cattle Co., No. 07-1044-MLB, 2007 WL 2219288, at *2 n.2 (D. Kan. July 30, 2007) ("[*Twombly*] deals *only* with pleading requirements in the highly complex context of an antitrust conspiracy case. It does not announce a general retreat from the notice pleading requirement of FED. R. CIV. P. 8(a).").

71. *See* Ides, *supra* note 10, at 631-32 ("[T]he problem confronting the [*Twombly*] plaintiffs was a self-inflicted wound. In essence, they pled themselves out of court by filing a complaint that alleged a claim unrecognized by the Sherman Act, namely, a claim of anticompetitive parallel conduct.").

72. 551 U.S. 89 (2007) (per curiam).

just two weeks after *Twombly*. The *Erickson* opinion used standard pre-*Twombly* pleading principles to reverse a lower court's dismissal of a prisoner's Eighth Amendment claim based on improper medical treatment, without any inquiry into the "plausibility" of the plaintiff's allegations.[73] Some surmised that the Court had deliberately "held" the *Erickson* decision so that it would come out after *Twombly* and thereby serve "as a reassurance that [*Twombly*] had not altered Rule 8(a)(2) pleading principles."[74]

Any hope that *Erickson* signaled the Supreme Court's willingness to restrict the scope of *Twombly* did not last long, however.[75] In 2009, three days shy of *Twombly*'s second anniversary, the Court decided *Ashcroft v. Iqbal*.[76] As the next Subpart describes, *Iqbal* removes any doubt that *Twombly* reflects the generally applicable pleading standard in federal court.

D. *The* Iqbal *Decision*

The Court in *Ashcroft v. Iqbal* divided sharply over the impact of *Twombly* on a civil rights lawsuit brought by a Pakistani man whom federal officials had detained in New York City during the weeks following the September 11th attacks.[77] Designated as a "person 'of high interest'" in the September 11th investigation, Iqbal alleged that he had been held under harsh and highly restrictive conditions of confinement at the Administrative Maximum Special Housing Unit (ADMAX SHU) of the Metropolitan Detention Center in Brooklyn.[78] Iqbal's *Bivens* action challenged several aspects of his detention and named many government officials as defendants, but the only claims before the Supreme Court were Iqbal's claims against former Attorney General John

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73. *Erickson* emphasized that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint" and that "[s]pecific facts are not necessary." *Id.* at 93-94.

74. Ides, *supra* note 10, at 638-39 ("[F]rom the available records, it appears that *Erickson* was 'held' pending the decision in *Bell Atlantic*. One gets the sense, given *Erickson*'s relative lack of 'certworthiness,' that the rapidly prepared and issued *Erickson* opinion was written as a reassurance that the *Bell Atlantic* decision had not altered Rule 8(a)(2) pleading principles.").

75. As a per curiam decision issued without oral argument or merits briefing, it is not clear how strong *Erickson*'s precedential effect would be in any event. *See* EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 305 & n.94 (9th ed. 2007) (noting that "decisions explained in a written opinion but rendered without full briefing and argument" are "entitled to some weight, but to less than fully articulated decisions" and that "[t]his may mean . . . no more than that the Justices will follow such holdings when they agree with them, but not otherwise"); *see also id.* at 349 ("The most controversial form of summary disposition is a per curiam opinion that simultaneously grants certiorari and disposes of the merits at some length . . . . The parties are given no opportunity to file briefs on the merits or to argue orally before the Court.").

76. 129 S. Ct. 1937 (2009).

77. *Id.* at 1942.

78. *Id.* at 1943.

Ashcroft and FBI Director Robert Mueller.[79] These claims were based on a theory that Ashcroft and Mueller had "adopted an unconstitutional policy that subjected [Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin."[80] In a five-four decision, the Court held that Iqbal's claims against Ashcroft and Mueller did not satisfy federal pleading standards.[81]

The majority began by describing the substantive elements of a *Bivens* claim like the one pursued against Ashcroft and Mueller. It clarified that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Because vicarious liability is inapplicable . . . , a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[82] For a constitutional claim based on invidious discrimination, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose."[83] Such discriminatory purpose "requires more than 'intent as volition or intent as awareness of consequences.'"[84] Rather, the defendant must act "because of, not merely in spite of, [the action's] adverse effects upon an identifiable group."[85]

Turning to general pleading requirements, the *Iqbal* majority began by generously quoting *Twombly*: "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[86] Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

79. *Id.* at 1942.

80. *Id.* Iqbal's other claims against Ashcroft and Mueller—including claims for violation of procedural due process—were dismissed on qualified immunity grounds by the lower courts. *See* Iqbal v. Hasty, 490 F.3d 143, 167-68 (2d Cir. 2007) (directing dismissal of procedural due process claims).

81. *Iqbal*, 129 S. Ct. at 1943 ("We hold respondent's pleadings are insufficient.").

82. *Id.* at 1948 (citations omitted).

83. *Id.*

84. *Id.* (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

85. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Feeney*, 442 U.S. at 279). Writing for the four dissenters in *Iqbal*, Justice Souter argued that the majority's analysis overlooked a crucial concession that Ashcroft and Mueller made on the issue of supervisory liability, under which Ashcroft and Mueller agreed "that they would be subject to supervisory liability if they 'had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being "of high interest" and they were deliberately indifferent to that discrimination.'" *Id.* at 1956 (Souter, J., dissenting) (quoting Brief for the Petitioners at 50, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015)). Justice Souter argued that in light of "the parties' agreement as to the standard of supervisory liability," the majority should not have "*sua sponte* decide[d] the scope of supervisory liability here." *Id.*

86. *Id.* at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)) (alteration in original) (citation omitted).

face.'"[87]

For the *Iqbal* majority, there was a critical distinction to be drawn between two types of allegations that might appear in a complaint. On one hand are "legal conclusions" or "mere conclusory statements."[88] Such allegations may be ignored when assessing the sufficiency of a complaint.[89] As the majority explained, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions";[90] therefore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[91] On the other hand are "factual allegations" or "well-pleaded facts."[92] These allegations must be assumed true at the pleading phase.[93] The dispositive question is then whether those "well-pleaded factual allegations"—accepted as true—"plausibly give rise to an entitlement to relief."[94]

Turning to the plaintiff's claims against Ashcroft and Mueller, the *Iqbal* majority focused on the following allegations in the complaint:

(1) Paragraph forty-seven's allegation that "[i]n the months after September 11, 2001, the Federal Bureau of Investigation ('FBI'), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."[95]

(2) Paragraph sixty-nine's allegation that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001."[96]

(3) Paragraph ninety-six's allegation that Ashcroft and Mueller "each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest."[97]

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87. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

88. *Id.*

89. *Id.* at 1950.

90. *Id.* at 1949.

91. *Id.*

92. *Id.* at 1950.

93. *Id.* ("When there are well-pleaded factual allegations, a court should assume their veracity . . . .").

94. *Id.*

95. Second Amended Complaint and Jury Demand ¶ 47, Elmaghraby v. Ashcroft, No. 04-CV-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub. nom.* Iqbal v. Hasty, 490 F.3d 143 (2d. Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) [hereinafter *Iqbal* Complaint]; *see also Iqbal*, 129 S. Ct. at 1944, 1951 (quoting paragraph 47 of the *Iqbal* Complaint).

96. *Iqbal* Complaint, *supra* note 95, ¶ 69; *see also Iqbal*, 129 S. Ct. at 1944, 1951 (quoting *Iqbal* Complaint, *supra* note 95, ¶ 69).

97. *Iqbal* Complaint, *supra* note 95, ¶ 96; *see also Iqbal*, 129 S. Ct. at 1944, 1951

(4) Paragraphs ten and eleven's allegations that Ashcroft "is a principal architect of the policies and practices challenged here" and Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here."[98]

The majority found the last two of these allegations (paragraphs ninety-six and ten through eleven) were "not entitled to the assumption of truth" because they were "bare assertions, much like the pleading of conspiracy in *Twombly*, [that] amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[99] It then turned to the other allegations (paragraphs forty-seven and sixty-nine) "to determine if they plausibly suggest an entitlement to relief."[100] The majority concluded that the mere fact that many Arab Muslims had been arrested did not plausibly suggest that those arrests were the result of "purposeful, invidious discrimination."[101] It wrote:

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims . . . .[102]

The *Iqbal* majority added that Iqbal's claims against Ashcroft and Mueller "rest solely on their ostensible 'policy of holding post-September-11th detainees' in the ADMAX SHU once they were categorized as 'of high interest.'"[103] The complaint contained no allegation at all that Ashcroft or Mueller adopted this policy for discriminatory purposes.[104] And the mere

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(quoting *Iqbal* Complaint, *supra* note 95, ¶ 96). The harsh conditions of confinement were described earlier in the complaint. *See Iqbal* Complaint, *supra* note 95, ¶¶ 82-95 (alleging that Iqbal and others had been "kept in solitary confinement, not permitted to leave their cells for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to humiliating and unnecessary strip and body-cavity searches, denied access to basic medical care, denied access to legal counsel, [and] denied adequate exercise and nutrition").

98. *Iqbal* Complaint, *supra* note 95, ¶¶ 10-11; *see also Iqbal*, 129 S. Ct. at 1944, 1951 (quoting *Iqbal* Complaint, *supra* note 95, ¶¶ 10-11).

99. *Iqbal*, 129 S. Ct. at 1951 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1952 (quoting *Iqbal* Complaint, *supra* note 95, ¶¶ 69-70); *see also id.* ("But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC.").

104. *Id.* ("[T]he complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national

adoption of a policy "approving 'restrictive conditions of confinement' for post-September-11 detainees until they were 'cleared by the FBI'"[105] did not plausibly suggest purposeful discrimination. Therefore, Iqbal's complaint was insufficient.

In reaching these conclusions, the *Iqbal* majority effectively put an end to arguments that might have cabined the *Twombly* approach to pleading. Most significantly, it rejected the notion that *Twombly* should be "limited to pleadings made in the context of an antitrust dispute."[106] The majority wrote:

> This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts."[107]

It concluded: "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[108]

II. PLAUSIBILITY'S PROBLEMS

The conventional wisdom is that *Twombly* and *Iqbal* herald a new era for federal pleading standards; they have discarded the liberal, notice-pleading paradigm that prevailed for over a half-century in favor of a new paradigm of plausibility pleading.[109] In this regime, a judge may dismiss a claim just because the allegations strike him or her as implausible—not based on any testimony or other evidence, but merely by drawing on his or her "judicial experience and common sense."[110] The continued vitality of classic pre-*Twombly* authorities (e.g., Form 11[111] and *Swierkiewicz*[112]) is in doubt.

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origin.").

105. *Id.* (quoting *Iqbal* Complaint, *supra* note 95, ¶ 69).

106. *Id.* at 1953.

107. *Id.* (citations omitted) (quoting FED. R. CIV. P. 1) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-56 & n.3 (2007)).

108. *Id.*

109. *See, e.g.*, Spencer, *supra* note 7, at 431 ("Notice pleading is dead. Say hello to plausibility pleading." (footnote omitted)); *see also* Bone, *supra* note 10, at 875 ("Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice . . . .").

110. *Iqbal*, 129 S. Ct. at 1950.

111. *See, e.g.*, Ides, *supra* note 10, at 633 ("[I]t is difficult if not impossible to distinguish between the supposedly sufficient 'negligently drove' allegation in [former] Form 9 [now Form 11], where no specific facts of negligence are alleged, and the supposedly inadequate, 'fact-deficient' allegation of an antitrust conspiracy (or any other type of conspiracy) . . . ."); *see also Twombly*, 550 U.S. at 576 (Stevens, J., dissenting) (noting that although current Form 11's "asserted ground for relief—namely, the defendant's negligent driving—would have been called a 'conclusion of law' under the code pleading of old[,] . . . . that bare allegation suffices under a system that 'restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role

The apparent consensus about the effect of *Twombly* and *Iqbal* on federal pleading standards does not, to say the least, entail a broad accord on their normative desirability. *Twombly* and *Iqbal* have earned both high praise and deep scorn, reflecting the sharp divide over whether, as a policy matter, courts ought to be able to scrutinize allegations more closely at the pleadings phase. At the core of this consequentialist debate over pleading standards is a struggle to balance the costs and benefits of pre-trial discovery. If pleading standards are too lenient, plaintiffs without meritorious claims could force innocent defendants to endure the costs of discovery and, perhaps, extract a nuisance settlement from a defendant who would rather pay the plaintiff to make the case go away.[113] The need to avoid this situation is a commonly asserted policy justification for stricter pleading standards.[114] The *Twombly* majority itself expressed concern that "the threat of discovery expense" could encourage "cost-conscious defendants to settle even anemic cases before reaching those proceedings."[115]

To use the plausibility inquiry employed by *Twombly* and *Iqbal* as a pre-discovery screening device is deeply problematic, however. First, it can thwart meritorious claims by plaintiffs who, without the discovery process, cannot obtain the information needed to satisfy the plausibility requirement.[116] For

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in the preparation for trial'" (alterations in original) (citation omitted)).

112. *See Twombly*, 550 U.S. at 584-86 (Stevens, J., dissenting) ("[I]n *Swierkiewicz*, we were faced with a case more similar to the present one than the majority will allow." (citation omitted)); Ides, *supra* note 10, at 634 ("[A] 'naked' allegation of conspiracy would appear to be on the same footing as the 'naked' allegation of illicit motive as in *Swierkiewicz*."); Spencer, *supra* note 7, at 477 (arguing that *Twombly* "promulgate[d] the very class of pleading standard that it only recently rejected in *Swierkiewicz*"); *see also* Beck & Herrmann, *supra* note 13 ("[W]e have to conclude (and we're not alone) that *Swierkiewicz* was impliedly overruled [by *Iqbal*]."); Dodson, *supra* note 12 ("[*Iqbal*] did not cite to *Swierkiewicz v. Sorema N.A.*, a discrimination case that may now be effectively overruled.").

113. *See, e.g.*, Epstein, *supra* note 10, at 72 (arguing that notice pleading "allows the plaintiff to extort a positive settlement in a worthless case, by inaugurating extensive discovery proceedings").

114. *See, e.g.*, Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989) (noting that the filing of "a sketchy complaint" is sufficient to launch potentially "abusive discovery"); Epstein, *supra* note 10, at 71 ("The effort to handle the problem of too much discovery boils down in practice to the delicate issue of whether Rule 8, which is directed toward securing the sufficiency of the pleadings, can be brought to bear in cases where the challenge is to the adequacy of the underlying facts."); *see also* AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 1, 5 (2009) (expressing "concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense" and arguing that "[n]otice pleading should be replaced by fact-based pleading"); Beck & Herrmann, *supra* note 13 ("Liberal discovery is what killed liberal pleading.").

115. *See Twombly*, 550 U.S. at 559; *see also* Bone, *supra* note 10, at 919 ("[*Twombly*] assumes that the cause of meritless filings is asymmetry of discovery costs and the settlement leverage it confers.").

116. *See, e.g.*, Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 589 (1997) (noting that a strict pleading standard "risks screening out meritorious cases when

many kinds of claims, the crucial information needed to confirm a claim's "plausibility" will be in the hands or mind of the defendant and, therefore, can realistically be obtained only through the pretrial discovery process. A plausibility paradigm would dismiss a claim precisely for lack of such information and, thereby, prevent that information from ever being uncovered.[117] Indeed, a defendant could obtain such a dismissal without even having to deny the truth of the plaintiff's allegations.[118]

Relatedly, the argument that stricter pleading standards are needed to avoid incurring high discovery costs on meritless claims presumes that stricter pleading standards are, in fact, well-suited to identifying which claims are meritorious enough to justify the costs of the discovery process.[119] This premise is especially subject to question in light of the guidance the Supreme Court has so far provided on how courts ought to apply the plausibility standard—under one articulation, a judge is merely to read the complaint and

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investigation costs are too high for plaintiffs to obtain the necessary information before filing"); Hoffman, *supra* note 10, at 1263 ("[B]ecause of information asymmetries, when a heightened pleading standard is imposed, some meritorious cases will not be filed and, further, some that are filed will be dismissed (or settled for marginal value)."); Spencer, *supra* note 7, at 481 ("[P]lausibility pleading rejects potentially valid, meritorious claims.").

117. *See Twombly*, 550 U.S. at 586-87 (Stevens, J., dissenting) ("'[I]n antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" (quoting Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976)) (citation omitted)); Hoffman, *supra* note 10, at 1261 ("It is not uncommon for information that is needed to demonstrate the existence of a viable claim to lie solely within the exclusive knowledge and control of another."); Marcus, *supra* note 6, at 468 (noting that a plaintiff may be "unable to provide details because only the defendant possesses such information" and that, therefore, "[t]o insist on details as a prerequisite to discovery is putting the cart before the horse"); Spencer, *supra* note 7, at 471 ("[R]equiring plaintiffs to offer factual allegations that plausibly suggest liability is a particular burden when key facts are likely obtainable only through discovery . . . ."); Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 293 (2008) (arguing that plaintiffs might "not have access to the factual information needed to comply with [stricter] pleading standards" because "[i]n many instances, the primary conduct that is the basis for the lawsuit generates a situation where factual details . . . are purely in the hands of the defendant").

118. *See Twombly*, 550 U.S. at 572 (Stevens, J., dissenting) (noting that the *Twombly* complaint was dismissed "without so much as requiring [the defendants] to file an answer denying that they entered into any agreement").

119. As Charles Clark, the chief drafter of the original Federal Rules of Civil Procedure, put it: "we cannot expect the proof of the case to be made through the pleadings" because "such proof is really not their function." 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); *see also* Spencer, *supra* note 7, at 483 ("[P]lausibility pleading assigns to complaints a function they cannot truly fulfill. . . . Among the functions that pleadings are most ineffective at fulfilling is providing courts the ability to determine whether the plaintiff's claims are meritorious or can be proved.").

then "draw on its judicial experience and common sense" to determine whether a claim is sufficiently "plausible."[120] On its own terms, this inquiry places few constraints on judges and embraces a dangerous amount of subjectivity.[121] The odds of this plausibility test yielding accurate results seem particularly low when the information needed to firmly gauge a case's merit is in the defendant's possession and, therefore, inaccessible without recourse to the discovery process.[122]

Given the problems inherent in a pleading paradigm fixated on plausibility, one must ask whether the potentially high costs of discovery can be contained by other means. They can. As Justice Stevens explained in his *Twombly* dissent, federal district courts are endowed with a significant "case-management arsenal," such that the mere potential for expensive discovery "is no reason to throw the baby out with the bathwater."[123] The Federal Rules explicitly allow courts to restrict discovery in order to balance its likely costs and benefits,[124] although defenders of stricter pleading standards question whether federal judges are willing to employ these tools.[125]

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120. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

121. As Professor Steve Burbank argued in his recent testimony before the Senate Judiciary Committee, this approach invites the same form of "cognitive illiberalism" that scholars have identified elsewhere in the adjudicative process. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Judiciary Comm.*, 111th Cong. 12-13 (2009), *available at* http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf (Statement of Steven Burbank (citing Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009))). In their article coining this term, Professors Kahan, Hoffman, and Braman critique the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), which granted summary judgment against a plaintiff who had sued police officers after their pursuit of his vehicle ended in a crash that caused him serious injuries. Kahan, Hoffman & Braman, *supra*, at 838-41. Because the *Scott* Court based its reasoning on its viewing of a video recording of the car chase, Kahan, Hoffman, and Braman showed the same video to 1350 individuals. *Id*. They concluded that "the Court in *Scott* was wrong to privilege its own view" of the video, *id*. at 841, based on their data showing that a viewer's perception varied significantly depending on the viewer's personal background, experiences, ideology, values, and sociodemographic characteristics. *Id.* at 864-81. So too is a judge's perception of a claim's plausibility likely to be shaped by these predispositions, which may not match those of the litigants affected. Statement of Stephen B. Burbank, *supra*, at 12-13.

122. *See supra* notes 116-17; *see also* Hoffman, *supra* note 10, at 1261-63 ("Why should we trust our judgment as to the . . . 'implausibility' of the plaintiff's claims when we have denied the claimant any opportunity to gather additional facts of wrongdoing that may otherwise be hidden from view?").

123. *Twombly*, 550 U.S. at 593-94 n.13 (2007) (Stevens, J., dissenting).

124. *See* FED. R. CIV. P. 16(c)(2)(F) (authorizing the court to "take appropriate action on . . . controlling and scheduling discovery"); FED. R. CIV. P. 26(b)(2) (authorizing the court to order limitations on discovery).

125. Easterbrook, *supra* note 114, at 638 ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."); *see also Twombly*, 550 U.S. at 560 n.6 (noting that "the hope of effective judicial supervision is slim").

Thus, a tremendous amount is at stake in the struggle to define federal pleading standards after *Twombly* and *Iqbal*. The remainder of this Article explores this question. Fortunately, a careful reading of *Twombly* and *Iqbal* reveals that plausibility is not in fact the primary inquiry at the pleadings phase. It is not even a necessary one. When one looks closely at the analytical structure of the *Twombly* and *Iqbal* decisions, along with the textual and precedential landscape in which they arose, an approach to pleading emerges that does not create the problems just described.

III. AFTER *IQBAL*: FIRST PRINCIPLES

Read carefully, *Twombly* and *Iqbal* support two core principles that, given the conventional reaction to these decisions, may seem surprising. First, the justifiably criticized "plausibility" inquiry is not in fact the primary inquiry at the pleadings phase. Under *Iqbal*'s two-step framework, the plausibility inquiry becomes irrelevant if a plaintiff provides nonconclusory allegations for each element of a claim for relief. Second, the most significant pre-*Twombly* authorities on federal pleading standard are still good law in the post-*Iqbal* era. These two principles confirm that *Iqbal*'s framework is not in fundamental conflict with notice pleading. Although many infer from *Twombly* and *Iqbal* a desire by the Court to impose a stricter pleading standard, this Part explains why the *Twombly* and *Iqbal* majorities might have been inclined to dismiss those particular complaints without abandoning the approach to pleading that had prevailed for more than a half-century.

A. *Beyond Plausibility*

Iqbal's analytical structure reveals that plausibility is not the primary issue when evaluating the sufficiency of a complaint. Rather, plausibility is a secondary inquiry that need not be undertaken at all if a complaint provides nonconclusory allegations for each element of a claim for relief.

1. *Taking* Iqbal*'s two steps seriously*

Iqbal's two-step framework for evaluating the sufficiency of a complaint proceeds as follows:

(1) Identify allegations that are conclusory, and disregard them for purposes of determining whether the complaint states a claim for relief.

(2) Determine whether the remaining allegations, accepted as true, plausibly suggest an entitlement to relief.[126]

This framework confirms that a judge is *not* supposed to make a freeform inquiry into whether the allegations in the complaint are "plausible" or

126. *See supra* notes 88-94 and accompanying text.

otherwise comport with his or her "judicial experience and common sense."[127] Rather, the threshold issue is to identify allegations that may be disregarded because they are "conclusory."

The Court's treatment of Iqbal's complaint confirms this approach. The crucial allegation was paragraph ninety-six, which alleged that Ashcroft and Muller "each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin."[128] According to *Iqbal*, the problem with this allegation was its "conclusory nature," not its lack of plausibility.[129] Plausibility came into play only because the *Iqbal* majority—by disregarding paragraph 96 as conclusory—excised from the complaint the allegation of Ashcroft's and Mueller's discriminatory motive. It therefore treated the complaint as making *no* allegation of discriminatory motive, and proceeded to inquire whether the remaining allegations were not merely "consistent with" but affirmatively suggestive of discriminatory intent.[130] Under the majority's analytical structure, it was as if the plaintiff had *solely* alleged that "thousands of Arab Muslim men"[131] had been detained following 9/11, and had *never* alleged discriminatory motive. From this perspective, the *Iqbal* majority concluded that the "disparate, incidental impact on Arab Muslims"—with no valid allegation of actual discriminatory intent—was not sufficient to "plausibly establish" invidious discrimination.[132]

A careful reading of *Twombly* reveals the same analytical structure.[133] *Twombly* held that "an allegation of parallel conduct and a *bare* assertion of conspiracy will not suffice."[134] Because "a *conclusory* allegation of agreement at some unidentified point does not supply facts adequate to show illegality,"[135] *Twombly* disregarded the complaint's conspiracy allegation.[136]

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127. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

128. *Iqbal* Complaint, *supra* note 95, ¶ 96; *see also supra* note 97.

129. *Iqbal*, 129 S. Ct. at 1951 ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

130. *Id.* ("We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. . . . Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.").

131. *Id.* (quoting *Iqbal* Complaint, *supra* note 95, ¶ 47).

132. *Id.* at 1951-52.

133. *See id.* at 1950 (2009) ("Our decision in *Twombly* illustrates the two-pronged approach.").

134. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (emphasis added).

135. *Id.* at 557 (emphasis added).

136. *See Iqbal*, 129 S. Ct. at 1950 ("[*Twombly*] first noted that the plaintiffs' assertion of an unlawful agreement was a 'legal conclusion' and, as such, was not entitled to the assumption of truth."). *But see* Ides, *supra* note 10, at 635 (arguing that the *Twombly* holding

Only then did *Twombly* proceed to inquire whether what remained—namely, the "allegations of parallel conduct"—had been "placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[137]

Thus, the key allegations in both *Iqbal* and *Twombly* were not disregarded because they were implausible. They were disregarded because they were conclusory. This forced the Court to inquire whether the allegations that remained—standing *alone*—plausibly suggested the existence of a discriminatory motive (*Iqbal*) or a conspiracy (*Twombly*). As long as an allegation is *not* conclusory, however, it must be accepted as true for purposes of determining whether the complaint states a claim for relief, without any inquiry into whether the allegation itself is "plausible," and without any opportunity for a judge to override the allegation merely by drawing on his or her "judicial experience and common sense."[138]

It follows that when a complaint contains nonconclusory allegations on every element of a claim for relief, *the plausibility issue vanishes completely*. Recall that step two of the *Iqbal* framework is to determine whether the nonconclusory allegations, accepted as true, plausibly suggest an entitlement to relief.[139] A complaint that *fails* to provide nonconclusory allegations on every element might nonetheless pass muster if it contains enough to plausibly suggest an entitlement to relief. But a complaint that *does* provide nonconclusory allegations on every element of a claim, by definition, exceeds the threshold of *plausibly* suggesting an entitlement to relief for purposes of *Iqbal* step two. *Iqbal* made clear that, at the second step, the court must "assume the[] veracity" of such nonconclusory allegations.[140] If such

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"did not in any manner depend on the plaintiffs having stated a 'naked' allegation of conspiracy").

137. *Twombly*, 550 U.S. at 557.

138. *Iqbal*, 129 S. Ct. at 1950.

139. *See supra* note 126 and accompanying text.

140. *Iqbal*, 129 S. Ct. at 1950 (2009). This Article generally uses the term "nonconclusory" to describe the category of allegations that must be accepted as true at the pleadings phase after *Iqbal*. *Twombly* and *Iqbal* at times use other terms such as "well-pleaded" or "factual." *See, e.g.*, *id.* (noting the *Twombly* complaint's "well-pleaded, nonconclusory factual allegation of parallel behavior"). One danger with the term "factual," however, is that it could misleadingly suggest a return to what is often known as "fact pleading." As explained *infra* note 283 and accompanying text, *Twombly* and *Iqbal* should not be read as imposing a traditional fact-pleading or code-pleading regime. The term "factual" could also transplant onto pleading doctrine the problematic "law-fact distinction" that has bedeviled other areas of law. Thornburg, *supra* note 12, at 5 (criticizing *Iqbal* as hinging on "label[ing] various issues as law or fact" and noting that "[t]he Supreme Court itself, in other contexts, has confessed that the law-fact distinction is problematic, calling it 'elusive,' 'slippery,' and 'vexing'"); *see also* Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of fact' and 'conclusions of law.'"). That said, the choice of labels is not ultimately dispositive; the terms "nonconclusory," "well-pleaded," and "factual" do not by

allegations address each element that would be needed to ultimately prove the plaintiff's claim, then they do more than make an entitlement to relief "plausible"—they *confirm* an entitlement to relief, at least for purposes of the pleadings phase.[141]

To illustrate this point, assume that (1) a viable claim depends on establishing X, and (2) the complaint contains nonconclusory allegations that X happened. In this situation, the step-two inquiry becomes "Assuming X is true, is it plausible that X happened?" As a matter of logic, the answer to that question is always yes. It is more than just *plausible* that X happened; it is conclusively established that X happened, albeit by the assumption that step two itself requires.[142]

The idea that *implausibility* (rather than *conclusoriness*) is grounds for disregarding allegations in a complaint is further belied by the numerous allegations that the *Twombly* and *Iqbal* majorities accepted as true at the pleadings phase. In *Twombly*, the Court accepted the allegations that the defendants had indeed engaged in parallel conduct,[143] without any inquiry into whether it was plausible that such parallel conduct had in fact occurred. The *Iqbal* majority accepted allegations that "the [FBI], under the direction of [Mueller], arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,"[144] and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of

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themselves shed much light on what precisely is required for an allegation to be sufficiently "nonconclusory," "well-pleaded," or "factual." What is needed, rather, is a deeper conceptual understanding of the characteristics an allegation must have in order to be accepted as true at the pleadings phase. This Article confronts this question in Part IV.

141. It is no surprise that the *Iqbal* majority never says this explicitly, because it concluded that Iqbal had *failed* to make nonconclusory allegations on each element of his claim. But Justice Souter's dissent, which follows precisely the same doctrinal structure as the majority, illustrates this idea perfectly. He found that Iqbal's allegations were *not* "confined to naked legal conclusions" and that those allegations, if true, "are sufficient to make [Ashcroft and Mueller] liable." *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting). He concluded: "Iqbal's complaint therefore contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In other words, when nonconclusory allegations "are sufficient to make [defendants] liable," the complaint "therefore contains 'enough facts to state a claim for relief that is plausible on its face.'" *Id.* No secondary inquiry into the plausibility of those nonconclusory allegations is required. Justice Kennedy's majority opinion does not suggest otherwise; again, the difference is simply that the majority found the crucial allegations to be conclusory and thus had to turn to the plausibility inquiry to see whether the claim could nonetheless proceed.

142. Put another way, a court that disregards nonconclusory allegations on plausibility grounds would be disobeying *Iqbal* step two, because it would not be accepting such allegations as true.

143. *See Twombly*, 550 U.S. at 565-69; *see also Iqbal*, 129 S. Ct. at 1950 (noting the *Twombly* complaint's "well-pleaded, nonconclusory factual allegation of parallel behavior").

144. *Iqbal* Complaint, *supra* note 95, ¶ 47; *see also Iqbal*, 129 S. Ct. at 1951 (quoting the same language from the complaint and describing it as a "factual allegation[]" to be "[t]aken as true").

confinement until they were 'cleared' by the FBI was approved by [Ashcroft and Mueller] in discussions in the weeks after September 11, 2001."[145] Yet the *Iqbal* majority made no inquiry at all into the plausibility of those allegations. The Court's treatment of these allegations confirms this Article's understanding of *Iqbal*'s two-step framework. The Court accepted these allegations as true because they were nonconclusory,[146] not because they satisfied the Court's newfound plausibility test.

Finally, making *Twombly* and *Iqbal*'s plausibility inquiry a basis for disregarding allegations would be conceptually unworkable. The plausibility inquiry *accepts* a certain set of allegations as true, and then asks whether those allegations "plausibly suggest" an entitlement to relief.[147] To say that an allegation is implausible under *Twombly* and *Iqbal* is just to say that the allegation is not plausibly suggested by other allegations in the complaint that are presumed to be true.[148] Because the plausibility inquiry *itself* presumes the truth of some allegations, plausibility cannot *also* be the ex ante method for determining which allegations do and do not need to be accepted as true. To do so would create an endless cascade of inquiry that, if taken seriously, can never be satisfied. Each allegation that might be offered to "plausibly suggest" some other allegation would itself require support, and so on and so on.[149]

2. *The irony of the plausibility inquiry*

For the reasons described above, *Iqbal*'s two-step framework contradicts

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145. *Iqbal* Complaint, *supra* note 95, ¶ 69; *see also Iqbal*, 129 S. Ct. at 1951 (quoting the same language from the complaint and describing it as a "factual allegation[]" to be "[t]aken as true").

146. *See supra* notes 143-45.

147. *See supra* notes 92-94 and accompanying text.

148. *See, e.g.*, *Twombly*, 550 U.S. at 566 ("[N]othing *contained in the complaint* invests either the action or inaction alleged with a plausible suggestion of conspiracy. . . . [N]othing *in the complaint* intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance." (emphasis added)).

149. To illustrate the fallacy of making "implausibility" a basis for disregarding allegations in a complaint, recall the complaint in *Twombly*. *Twombly* was dismissed for lack of sufficient allegations showing that the Baby Bells had agreed not to compete with one another. *See supra* Part I.B. Imagine, however, that the complaint had alleged that the CEOs of each of the Baby Bells reserved a private room at a high-priced restaurant in Bermuda in January 1996, and then alleged a second-by-second transcript of exactly what was said by whom at the meeting as they hatched their conspiratorial regime. Surely such allegations, if accepted as true, would plausibly suggest the existence of a conspiracy. But an open-ended plausibility inquiry could permit the Court to require further allegations to "plausibly suggest" the truth of those allegations, and further allegations to "plausibly suggest" the truth of any additional allegations. This is an unworkable approach. If the plausibility inquiry is what the *Twombly* and *Iqbal* majorities say it is—an assessment of whether certain accepted allegations raise a sufficient inference of some other condition's truth—then it cannot also be the test for determining which allegations must and must not be accepted as true.

the common view that the "plausibility" inquiry gives courts license to disregard allegations in a complaint. Only conclusoriness is grounds for *refusing* to accept an allegation as true (*Iqbal* step one). Plausibility is grounds for *assuming as true* something that is *not* validly alleged in the complaint (*Iqbal* step two). Conclusoriness is destructive; it justifies disregarding an allegation. Plausibility is generative; it justifies creating an allegation that is not validly made in the complaint itself (perhaps because it was alleged only in a conclusory manner).

There is a profound irony in all of this. Properly understood, the plausibility aspect of *Twombly* and *Iqbal* makes the pleading standard *more* forgiving, not less. Imagine if the Court had just said: mere legal conclusions need not be accepted at the pleadings phase; if that eliminates a crucial element of the claim, then the complaint must be dismissed—*even if* other allegations plausibly suggest an entitlement to relief. This would not have been unprecedented. Lower federal appellate courts had long embraced the idea that mere legal conclusions need not be accepted as true.[150] By definition, this approach would be a stricter one than *Iqbal*, because it would remove entirely the possibility that the plausibility inquiry could *salvage* complaints that *otherwise* rested on mere legal conclusions. Yet by inviting the term "plausibility" into the pleading lexicon, the Court has opened the door to a stricter pleading standard, with all of the problems described above.[151]

It is crucial, therefore, to read the *Twombly* and *Iqbal* decisions carefully. As explained above, those decisions cannot faithfully be read to make a lack of "plausibility" grounds for disregarding a complaint's allegations.[152] The real

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150. *See* Achtman v. Kerby, McInerney & Squire, LLP, 464 F.3d 328, 337 (2d Cir. 2006) ("[C]onclusory allegations or legal conclusions . . . will not suffice to defeat a motion to dismiss." (citation omitted)); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) ("[T]he court is not required to accept legal conclusions . . . ."); *see also* Moya v. Schollenbarger, 465 F.3d 444, 455 (10th Cir. 2006) (describing "the normal standard we apply to dismissals generally" as one that "accept[s] as true all well-pleaded facts, as distinguished from conclusory allegations" (quoting Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998))); Rivera-Powell v. N.Y. City Bd. of Elections, 470 F.3d 458, 470 (2d Cir. 2006) (rejecting a "conclusory" allegation).

151. *See supra* Part II.

152. Even if allegations may not be disregarded for lack of "plausibility" as that concept is used in *Twombly* and *Iqbal*, some allegations may be so patently ridiculous that they should not be presumed true at the pleadings phase. Justice Souter alluded to this idea in his *Iqbal* dissent:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The *sole exception* to this rule lies with allegations that are *sufficiently fantastic to defy reality as we know it*: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting) (emphasis added) (citations omitted). Any such rule, however, would be a separate aspect of pleading doctrine, not one derived from *Iqbal*'s two-step conclusory/plausibility analysis. Justice Souter's point

impact of *Twombly* and *Iqbal* will be a function of how courts distinguish "mere legal conclusions" (whose truth need not be accepted) from nonconclusory allegations that are entitled to the presumption of truth. This Article will confront that question shortly.[153] But first, it challenges another myth—the idea that *Twombly* and *Iqbal* must be read as casting aside pre-*Twombly* authority.

B. *The Most Significant Pre-*Twombly *Authorities Remain Good Law*

The conventional reading of *Twombly* and *Iqbal* assumes that they have essentially overruled pre-*Twombly* authorities on federal pleading standards.[154] This view cannot withstand close scrutiny, however. First, the pre-*Twombly* regime is founded upon the text of the Federal Rules of Civil Procedure, and the Court has repeatedly stated that changes to the Rules "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[155] Nothing in the reasoning of either *Twombly* or *Iqbal* suggests that the Court has now claimed for itself the power to amend the Rules via its adjudicative decision making.

Second, even if the Rules could be reasonably interpreted to support the

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about "little green men" was not that such allegations should be disregarded as implausible under *Twombly* and *Iqbal*; it was to indicate a possible exception to the principle that nonconclusory allegations must be accepted as true. To Souter, the crucial allegations in *Iqbal* were more than "naked legal conclusions," *id.* at 1960, and thus should have been accepted as true *unless* they were of the "little green men" variety (which they weren't). The *Iqbal* majority's reasoning confirms that such outlandish allegations were not the Court's concern in *Twombly* and *Iqbal*:

> To be clear, we do not reject [Iqbal's] bald allegations on the ground that they are *unrealistic* or *nonsensical*. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation . . . because it thought that claim *too chimerical* to be maintained. It is the conclusory nature of [Iqbal's] allegations, rather than their *extravagantly fanciful* nature, that disentitles them to the presumption of truth."

Id. at 1951 (majority opinion) (emphasis added). Courts could potentially deal with allegations that are indeed "unrealistic," "nonsensical," "too chimerical to be maintained," or "extravagantly fanciful," *id.*, via the rules governing judicial notice. *See* Clermont & Yeazell, *supra* note 10, at 836 & n.57 (arguing that "[d]ismissing a complaint composed of such allegations would not have been controversial" because "[a] court will disregard an allegation in a pleading that contradicts a proposition judicially noticed"); *see also id.* at 857 n.133 (quoting Professor David Shapiro's proposal to legislatively overrule *Iqbal* that would retain courts' power to disregard allegations when "the rules governing judicial notice require a determination that the allegation is not credible").

153. *See infra* Part IV.

154. *See supra* notes 109-12 and accompanying text.

155. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993). It follows that there is no power to "overrule" the Federal Rules' Forms (including, for example, Form 11), because these Forms are binding as a matter of positive law via the Federal Rules of Civil Procedure. *See supra* note 26 and accompanying text (explaining how the Rules themselves provide that the Forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate").

stricter pleading standard that many find in *Twombly* and *Iqbal*, neither decision purports to overrule the most important aspects of the Court's pre-*Twombly* case law. There is only a single instance where either *Twombly* or *Iqbal* explicitly abrogates earlier precedent; *Twombly* put into "retirement" the statement from *Conley v. Gibson*[156] that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[157] The *Twombly* majority read this "beyond doubt . . . no set of facts" language as precluding dismissal "whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery."[158] Read this way, *Conley*'s phrase is indeed problematic. As Professor Richard Marcus once asked, "How can a court ever be *certain* that a plaintiff will prove no set of facts entitling him to relief?"[159] If that were truly the test, a complaint that alleged nothing more than "The planet Earth is round" would survive, because any number of actionable facts *might* be consistent with the Earth being round. That the *Twombly* majority "retire[d]" this view should not be cause for concern.[160]

To be fair to Justice Black and his *Conley* opinion, this now-discredited phrase was subject to a far more sensible reading.[161] It did not preclude dismissal as long as *any* set of facts could entitle the plaintiff to relief (the straw man that *Twombly* purported to strike down). Rather, this phrase merely confirmed that speculation about the *provability* of a claim is typically not a proper inquiry at the pleadings phase; provability is relevant only when it appears "beyond doubt" that the plaintiff cannot prove her claim.[162] But the

156. 355 U.S. 41 (1957).

157. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546, 563 (2007) (quoting *Conley*, 355 U.S. at 45-46); *see also id.* at 563 ("The phrase is best forgotten . . . ."); Spencer, *supra* note 7, at 463 (stating that *Twombly* "attempted to isolate and discredit only [*Conley*'s] 'no set of facts' language while simultaneously purporting to retain the notice pleading system largely intact").

158. *Twombly*, 550 U.S. at 561 (internal quotation marks omitted). The *Twombly* Court's analysis of *Conley*'s "no set of facts" phrase further confirms that, as discussed above in Part III.A, the principal concern is "conclusory" allegations, rather than not implausible ones. *See id.* ("On such a focused and literal reading . . . a *wholly conclusory* statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." (emphasis added)).

159. Marcus, *supra* note 6, at 434 (emphasis added).

160. *See also* Ides, *supra* note 10, at 629 (calling *Twombly*'s treatment of the no-set-of-facts language a "sensible 'revision' of *Conley*").

161. *Cf. Twombly*, 550 U.S. at 577 (Stevens, J., dissenting) ("If *Conley*'s 'no set of facts' language is to be interred, let it not be without a eulogy.").

162. *See Twombly*, 550 U.S. at 583 (Stevens, J., dissenting) ("*Conley*'s statement that a complaint is not to be dismissed unless 'no set of facts' in support thereof would entitle the plaintiff to relief is hardly 'puzzling.' It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process." (citation omitted)).

Twombly majority *itself* endorsed this idea; it wrote that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."[163] The dispositive question is—and always has been—what makes a complaint "well-pleaded"?[164] *Conley* and *Twombly* provide precisely the same answer: "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant *fair notice* of what the plaintiff's claim is and the grounds upon which it rests."[165] *Twombly* not only endorsed this crucial "fair notice" language from *Conley*; it also relied on many of the Court's other pre-*Twombly* cases, including the unanimous *Swierkiewicz* decision from just five years earlier.[166]

One federal appellate court has reasoned that *Twombly*'s disavowal of *Conley*'s "no set of facts" language effectively overrules pre-*Twombly* decisions, including *Swierkiewicz*, that had relied on *Conley*.[167] This logic is deeply flawed, however, and misunderstands the Court's reasoning in both *Swierkiewicz* and *Twombly*. Although *Swierkiewicz* did cite a post-*Conley* case that paraphrased *Conley*'s "no set of facts" language,[168] it did not read this phrase in the overly "focused and literal" way that *Twombly* rejected.[169] In fact, the phrase played no role at all in the Court's application of the federal pleading standard to Swierkiewicz's complaint. Rather, *Swierkiewicz* based its holding explicitly on *Conley*'s fair-notice principle[170]—the same principle that

163. *Id.* at 556 (majority opinion) (citation omitted).

164. *Id.*

165. *Conley*, 355 U.S. at 47 (emphasis added) (citing FED. R. CIV. P. 8(a)(2)); *see also Twombly*, 550 U.S. at 555 ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47) (alteration in original)).

166. *See Twombly*, 550 U.S. at 555-56 & n.3 (citing prior Supreme Court pleading decisions, for example, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). The Court's *Swierkiewicz* decision is described *supra* notes 28-34 and accompanying text.

167. Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (noting that "*Swierkiewicz* is based, in part, on *Conley*" and concluding: "because *Conley* has been specifically repudiated . . . so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*"). Despite this conclusion, the Third Circuit ultimately reversed the lower court's dismissal of the *Fowler* complaint. *Id.* at 211-14. In fact, *Fowler*'s application of *Twombly* and *Iqbal* shows a remarkable sensitivity to the principles underlying *Swierkiewicz* and other aspects of the pre-*Twombly* regime. *See infra* notes 300-04.

168. *See Swierkiewicz*, 534 U.S. at 514 (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

169. *Twombly*, 550 U.S. at 561.

170. *See Swierkiewicz*, 534 U.S. at 514 ("[P]etitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims."); *id.* ("The[] allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. *See Conley*, [355 U.S.] at 47.").

Twombly itself endorsed.[171] *Twombly*'s rejection of *Conley*'s "no set of facts" language, therefore, cannot possibly constitute a rejection of the entire *Conley* decision and all decisions that rely on it.[172]

Nonetheless, one might argue that the reasoning in *Twombly* and *Iqbal* is in such profound conflict with prior precedent that lower courts ought to deem the earlier cases to have been implicitly overruled.[173] But this reading would flout the Supreme Court's repeated instruction that only *it* has "the prerogative of overruling its own decisions."[174] The upshot is that lower courts have, essentially, a duty to reconcile *Twombly* and *Iqbal* with pre-*Twombly* case law. To do otherwise would be to overrule pre-*Twombly* Supreme Court decisions and, thereby, usurp the Supreme Court's "prerogative."[175]

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171. *See supra* note 165 and accompanying text.

172. To accept the logic that *Twombly* repudiated any decision that relied on *Conley* would lead to the paradoxical conclusion that *Twombly* repudiated itself, because *Twombly* also relied on *Conley*.

173. *See supra* notes 109-12 and accompanying text.

174. Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); *see also id.* at 238 (noting that the district court was "correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent"); Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1018 (7th Cir. 2002) (Posner, J.) ("[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court's current thinking the decision seems."); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 58 (1st Cir. 1999) ("Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion."), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); *cf.* Ides, *supra* note 10, at 635 ("Of course, the Court is free to overrule any line of cases, but in the absence of an express overruling one should at least be circumspect in concluding that the execution has occurred.").

175. Stare decisis would also require the *Supreme* Court to try to reconcile its prior decisions if it were to revisit this issue in a later case. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 99-100 (1990) (White, J., concurring) ("[T]he doctrine of *stare decisis* demands that we attempt to reconcile our prior decisions rather than hastily overrule some of them."); *Ex parte* Harding, 219 U.S. 363, 369-70, 378 (1911) (noting an "apparent conflict between certain decided cases" and concluding that "[w]e must . . . reconcile the cases [unless] this cannot be done"). Although "*stare decisis* is not an inexorable command," Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (citation omitted), to deviate from the holdings in pre-*Twombly* cases (for example, *Swierkiewicz* and *Leatherman*) in some future case would require a justification more compelling than "a present doctrinal disposition to come out differently from the [earlier] Court," *id.* at 864. The need to respect stare decisis is especially strong in cases where the precedent is based on the interpretation of sub-constitutional law such as the Federal Rules of Civil Procedure. *See* Hilton v. S.C. Pub. Rys. Comm'n, 501 U.S. 197, 202 (1991) (noting that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," especially in a case where "Congress has had almost 30 years in which it could have corrected our [earlier] decision . . . if it disagreed with it, and has not chosen to do so" (internal quotations omitted)); *see also* Spencer, *supra* note 7, at 462 (arguing that the justifications for strong stare decisis with respect to judicial interpretation of statutes "apply with like force" to judicial interpretation of the Federal Rules).

C. *Is Notice Pleading Dead, or Merely Recast?*

The two previous Subparts show why (a) key notice-pleading precedents remain good law after *Iqbal*, and (b) the "plausibility" of a plaintiff's allegations becomes irrelevant where the complaint provides nonconclusory allegations on each element of a valid claim. Although *Twombly* and *Iqbal* recognize a judge's power to disregard "conclusory" allegations at the pleadings phase, this does not necessarily constitute a drastic shift from notice pleading. Even before *Twombly*, the notice-pleading paradigm gave judges *some* power to disregard allegations in a complaint. An allegation that "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief" would not have been accepted as true before *Twombly*; nor would allegations stating merely that "the defendant violated the plaintiff's rights under Title VII of the 1964 Civil Rights Act" or that "the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff."

Under a notice-pleading framework, the problem with such allegations is that they fail to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[176] But that begs the question of what constitutes "fair notice." This ambiguity is precisely why Charles Clark never warmed to couching his pleading standard in terms of notice. He wrote:

> The usual modern expression, at least of text writers, is to refer to the notice function of pleadings; notice of the case to the parties, the court, and the persons interested. This is a sound approach so far as it goes; but *content must still be given to the word "notice."* It cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance.[177]

Judge Clark's observation confirms that a notice-pleading framework is not inherently a lenient one. It depends on what "content [is] given to the word 'notice.'"[178] Likewise, a pleading standard that allows courts to disregard conclusory allegations is not inherently a strict one. It depends on how "conclusory" is defined.

Accordingly, *Iqbal*'s recognition that conclusory allegations need not be accepted as true does not necessarily mean the end of notice pleading.[179] It

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176. Conley v. Gibson, 355 U.S. 41, 47 (1957).

177. Charles E. Clark, *Simplified Pleading*, 2 FED. RULES DECISIONS 456, 460 (1943) (emphasis added).

178. *Id.*

179. *See* Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009) (rejecting the argument "that *Twombly* had repudiated the general notice-pleading regime of Rule 8"). The *Brooks* court concludes:

> This court took *Twombly* and *Erickson* together to mean that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.
>
> This continues to be the case after *Iqbal*.

Id. (internal quotations and citations omitted).

merely cloaks the notice inquiry in different doctrinal garb. *Any* approach to pleading that permits a court to disregard allegations that lack some information the court deems necessary can be couched in terms of notice. To say that an allegation is "conclusory" because it lacks X is no different than saying that "fair notice" requires the defendant to be informed of X.

The need to define "conclusory" in the post-*Iqbal* era forces courts to confront the crucial question: what, exactly, must a complaint contain in order for a particular allegation to be accepted as true? But that question was always lurking in the uncertainty surrounding what *Conley*'s "fair notice" standard actually required.[180] Thus, *Iqbal*'s two-part test does not necessarily entail a stricter approach, even though it explicitly recognizes the ability of courts to disregard conclusory allegations. Again, *Twombly* itself endorsed *Conley*'s fair notice standard.[181]

D. *An Explanatory Theory of* Twombly *and* Iqbal

To some, the argument that *Twombly* and *Iqbal* should be read to preserve a lenient approach to pleading will sound naïve. One reason the conventional reading of *Twombly* and *Iqbal* has gained such solid purchase is that it fits the recent tendency of the federal judiciary (and the Supreme Court in particular) to favor defendants, especially corporate and business interests, in civil litigation.[182] From this perspective, *Twombly* and *Iqbal* appear to be more of the same: the Court gave defendants one more tool for thwarting civil accountability by discarding the long-established, liberal pleading framework that was among the most notable aspects of the original Federal Rules of Civil Procedure.

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180. Some empirical studies reveal an increase in dismissal rates in the years since *Twombly* and the months since *Iqbal*, but they also reveal a remarkably high dismissal rate under the ostensibly lenient pre-*Twombly* pleading regime. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (presenting data suggesting that the dismissal rate was forty-six percent during the two years prior to *Twombly*, forty-eight percent during the two years between *Twombly* and *Iqbal*, and fifty-six percent after *Iqbal*). This suggests that even *Conley*'s "fair notice" standard was sufficiently malleable to permit frequent dismissals at the pleadings phase. *See supra* note 6.

181. *See supra* note 165 and accompanying text.

182. *See, e.g.*, Steinman, *supra* note 117, at 297 & 302 n.307 (noting "the conventional wisdom that plaintiffs fare better in state court and defendants fare better in federal court" and citing authority that the Roberts Court "has quickly gained a strong pro-business reputation"). For empirical data, see Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 596 (1998) (noting a very low percentage of plaintiff win rates in removed cases and a significantly higher plaintiff win rate in cases adjudicated originally in federal courts); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 638-40 (2006) (describing higher median recoveries and attorneys fees in state court class actions than in federal court class actions).

One should proceed with caution, however, before translating the Court's recent pro-defendant leanings into a desire to wholly overturn the pre-*Twombly* approach to pleading, especially given the Court's decision to leave the core precedents of the notice-pleading era in place.[183] The composition of the *Twombly* and *Iqbal* Court was largely the same as the one that unanimously, per Justice Thomas, decided *Swierkiewicz* just five years earlier. The *Twombly*/*Iqbal* Court's failure to challenge such pre-*Twombly* cases is particularly notable because this Court was in an overruling mood—it was perfectly willing to "retire[]" *Conley v. Gibson*'s "no set of facts" language, declaring it to be "best forgotten."[184] That the Court did not similarly retire either *Swierkiewicz* or *Conley*'s "fair notice" principle speaks volumes.

An alternative narrative—to the extent one is necessary[185]—would emphasize the precise facts of *Twombly* and *Iqbal* rather than a broader doctrinal agenda. Indeed, *Twombly* and *Iqbal* were each rather exceptional cases. *Twombly* presented a monstrously large class action that, in the Supreme Court's own words, pitted "a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States" against "America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years."[186] Moreover, the plaintiff class in *Twombly* was represented by the Milberg Weiss law firm,[187] which had been indicted by federal prosecutors just one month before the Supreme Court granted certiorari.[188] *Iqbal* involved an action by a Pakistani man convicted of immigration-document fraud who was seeking not merely injunctive relief but monetary damages against the two highest-ranking law enforcement officials in the land—the Attorney General and the FBI Director. And it challenged their efforts on behalf of the federal government in response to, as the Court put it, "a national and international security emergency unprecedented in the history of the American Republic."[189]

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183. *See supra* notes 156-66 and accompanying text.

184. *See supra* notes 156-57 and accompanying text.

185. Speculation about whether a broader agenda might motivate the Court to make future changes in any given area of law cannot constitute a binding aspect of the Court's case law. The Court's *current* decisions are binding, not anticipated future decisions or a general sense of the Court's underlying motivations. The principle that lower courts must not decide for themselves that earlier Supreme Court decisions have been implicitly overruled confirms this. *See supra* notes 173-75 and accompanying text.

186. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

187. *Id.* at 547.

188. *See* Julie Creswell, *U.S. Indictment for Big Law Firm in Class Actions*, N.Y. TIMES, May 19, 2006, at A1. *See generally* Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153 (2008).

189. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (quoting Ashcroft v. Iqbal, 490 F.3d 143, 179 (2007) (Cabranes, J., concurring)); *see also* Richard Bernstein, *Threats and*

One can legitimately question whether any of this ought to matter from a jurisprudential standpoint. But it would not be surprising that some jurists might lean toward dismissing cases like *Twombly* and *Iqbal* without also wanting to upend pleading standards generally.[190] The Court's own language reflects the extraordinary nature of those cases.[191] The upshot is that the Supreme Court might indeed be receptive to an approach that brings *Twombly* and *Iqbal* into alignment with the pre-*Twombly* regime.[192] In any event, from the lower courts' perspective, speculation about whether the Court might overrule significant pre-*Twombly* precedents in the future is improper. As explained above, only the Supreme Court has the prerogative of overruling its own decisions.[193]

Responses: Pieces of a Puzzle; On Plotters' Path to U.S., a Stop at bin Laden Camp, N.Y. TIMES, Sept. 10, 2002, at A1 (calling the 9/11 attacks "the deadliest foreign attack on American soil").

190. This is precisely why it is often said—per Justice Holmes—that "hard cases make bad law." N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). A corollary to this maxim might be that one should not read a hard case to make bad law (or to overrule prior case law) if that reading can be avoided. *See also supra* Part III.B (explaining why lower courts should not read *Twombly* and *Iqbal* as implicitly overruling the Supreme Court's pre-*Twombly* pleading precedent).

191. *See supra* notes 186 & 189 and accompanying text. Indeed, the Court's concerns about the burdens of discovery in *Twombly* and *Iqbal* are closely tied to the factual context of those cases. *See Iqbal*, 129 S. Ct. at 1953 (noting that avoiding the burdens of "disruptive discovery" is "especially important" in a case where the "Government officials are charged with responding to . . . a national and international security emergency unprecedented in the history of the American Republic" (citation and internal quotation marks omitted)); *id.* at 1954 (noting that the lower court's "promise[] [of] minimally intrusive discovery. . . . provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties"); *Twombly*, 550 U.S. at 558 (noting that "proceeding to *antitrust discovery* can be expensive" (emphasis added)); *id.* at 559 (emphasizing that the *Twombly* defendants in particular have "many thousands of employees generating reams and gigabytes of business records").

192. An analogy might be drawn to two blockbuster constitutional-law opinions from last decade—*Lopez* and *Morrison*—that appeared to place new limits on Congress' power to legislate under the Commerce Clause. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). *Lopez* and *Morrison* were thought to reflect a paradigm shift in the Supreme Court's view of Congressional power. *See, e.g.*, Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11-13 (2003) (describing a federalism "revival" under the Rehnquist Court that included Commerce Clause decisions such as *Lopez* and *Morrison*). But when the Court revisited the issue a few years later, its approach seemed far more consistent with the long-standing pre-*Lopez* view. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress' power to criminalize the possession of marijuana for medicinal purposes); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 889-90 (2009) (noting that *Lopez* and *Morrison* "left the door open for the Court to retreat—as it arguably did, in *Gonzales v. Raich*"); *see also* Lino A. Graglia, Lopez, Morrison, *and* Raich*: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 780-85 (2008) (arguing that the Court's decision in *Raich* had "halted, if not reversed" the "*Lopez* revolution").

193. *See supra* note 174 and accompanying text.

IV. TOWARD A NEW PARADIGM: PLAIN PLEADING

The question that has consistently plagued pleading standards is simple to state but hard to answer: when may a court disregard allegations in a complaint that, if accepted as true, would show that the plaintiff is entitled to relief? In doctrinal terms, this now boils down to how to define the term "conclusory" for purposes of *Iqbal* step one.[194] This Part begins to confront this question. It first considers and rejects a common misreading of the Court's approach in *Twombly* and *Iqbal*, that is, the idea that a complaint must somehow provide evidentiary support for its allegations. It then argues that conclusory should be defined in transactional terms, as explained in greater detail below, and that this understanding reconciles *Twombly* and *Iqbal* with equally authoritative texts and precedents. This Part also provides a textual foundation for this approach—a paradigm called "plain pleading" that is grounded in Rule 8's requirement of a "short *and plain* statement of the claim showing that the pleader is entitled to relief."[195]

A. *Misreading* Twombly *and* Iqbal*: Allegations Do Not Require Evidentiary Support at the Pleadings Phase*

One common misreading of *Twombly* and *Iqbal* is that they require a complaint to contain evidentiary support for its allegations. This view would allow a court to disregard an allegation just because its truth is not suggested by some other allegation. This approach may reflect the misperception that allegations may be disregarded for lack of "plausibility." It is certainly fair to describe the plausibility test that occurs at *Iqbal* step two as a kind of evidentiary-sufficiency inquiry.[196] As explained above, however, a lack of plausibility is *not* grounds for disregarding a complaint's allegation.[197] Only conclusory allegations may be disregarded. Although courts in other contexts suggest that what makes an assertion "conclusory" is a lack of supporting

194. *See supra* note 126 and accompanying text (describing *Iqbal*'s two steps).

195. FED. R. CIV. P. 8(a)(2) (emphasis added).

196. *See Iqbal*, 129 S. Ct. at 1951-52 ("On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that obvious alternative explanation for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." (internal quotations and citations omitted)); *Twombly*, 550 U.S. at 554 (noting that "we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence"); *id.* at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence."); *id.* at 566 ("[T]here is no reason to infer that the companies had agreed among themselves to do what was only natural anyway.").

197. *See supra* Part III.A.

evidence,[198] transplanting this attitude to the pleading phase would be problematic for several reasons.

The most damning indictment of such an approach comes from the Court's own reasoning in *Twombly* and *Iqbal*. As explained above,[199] those decisions accepted *some* allegations without regard to whether their truth was suggested by additional allegations in the complaint. In *Twombly*, the Court deemed sufficiently nonconclusory the complaint's allegations that the defendants had indeed engaged in parallel conduct,[200] without any inquiry into whether additional allegations supported their truth. The problem, according to the *Twombly* majority, was merely that those allegations failed to plausibly suggest the existence of a conspiracy.[201] Similarly, the *Iqbal* majority accepted as nonconclusory the complaint's allegations that "the [FBI], under the direction of . . . Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,"[202] and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by . . . Ashcroft and Mueller in discussions in the weeks after September 11, 2001."[203] In doing so, the *Iqbal* majority made no inquiry at all into whether additional allegations supported the truth of these allegations.

Under the Federal Rules, the very nature of a complaint makes it conceptually unworkable to insist that allegations be buttressed by supporting evidence at the pleadings phase. A complaint's "statement"[204] contains merely "allegations"[205] listed in "numbered paragraphs"[206]—not the underlying evidence in support of each allegation. In this sense, *every* allegation in a complaint could be deemed conclusory for lack of supporting evidence, because by definition the complaint contains *solely* allegations. If a court were to take seriously the idea that allegations may be disregarded because the complaint does not also provide evidentiary support for them, then supporting an allegation with more allegations will never be enough.[207] Each new

198. *See, e.g.*, Klein v. Ryan, 847 F.2d 368, 374 (7th Cir. 1988) ("[W]e need not accept conclusory allegations completely lacking evidentiary support.").

199. *See supra* notes 143-49 and accompanying text.

200. *See Twombly*, 550 U.S. at 565-69; *see also Iqbal*, 129 S. Ct. at 1950 (noting the *Twombly* complaint's "well-pleaded, nonconclusory factual allegation of parallel behavior").

201. *See supra* notes 53-56 and accompanying text.

202. *Iqbal* Complaint, *supra* note 95, ¶ 47; *see also Iqbal*, 129 S. Ct. at 1951 (quoting same and describing it as a "factual allegation" to be "[t]aken as true").

203. *Iqbal* Complaint, *supra* note 95, ¶ 69; *see also Iqbal*, 129 S. Ct. at 1951 (quoting same and describing it as a "factual allegation" to be "[t]aken as true").

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

205. FED. R. CIV. P. 8(b)(1)(B); *accord* FED. R. CIV. P. 8(d)(1) ("Each allegation must be simple, concise, and direct.").

206. FED. R. CIV. P. 10(b).

207. This conceptual problem does not arise for heightened pleading standards like the Private Securities Litigation Reform Act (PSLRA), which requires supporting allegations

allegation offered to support an earlier allegation would itself require support, and so on and so on. Thus, the existence of evidentiary support for any given allegation cannot be the test for determining whether an allegation should be accepted as true. At some point, a court must be able to accept the allegations in a complaint at face value, and leave the presence or lack of evidentiary support for later in the proceedings.[208]

Reading Rule 8's general pleading standard as mandating an evidentiary approach would confound the text and structure of the Federal Rules in other ways as well. First, it would conflate the distinction between a Rule 12(b)(6) motion to dismiss and a Rule 56 motion for summary judgment. As the Supreme Court has made clear for decades, a summary judgment motion is the device for testing pretrial whether the plaintiff has sufficient evidence to support its claims.[209] But if we graft an evidentiary requirement onto the pleadings phase, a Rule 12(b)(6) motion would force a plaintiff, before any opportunity for discovery, to present supporting evidence that ordinarily would not be needed until a summary judgment motion was filed.[210] Imposing on plaintiffs a Rule 56 burden to oppose a Rule 12(b)(6) motion is textually problematic given the distinct roles that the Rules anticipate for these motions.[211]

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only for certain types of allegations. *See supra* note 35. Under the PSLRA, the targeted allegation that the defendant "acted with the required state of mind" must be supported by other allegations that "giv[e] rise to a strong inference," 15 U.S.C. § 78u-4(b)(2) (2006), but the supporting allegations must themselves be accepted as true. To require evidentiary support for *every* allegation, however, is inherently unworkable.

208. The hypothetical complaint discussed *supra* note 149 also confirms the fallacy of requiring a complaint to provide evidentiary support for the allegations contained therein. Imagine that the plaintiff in *Twombly* had alleged that the CEOs of each of the Baby Bells reserved a private room at a high-priced restaurant in Bermuda in January 1996, and then alleged a second-by-second transcript of exactly what was said by whom at the meeting as they hatched their conspiratorial regime. If we truly define conclusory in evidentiary terms, not even such very detailed allegations would be sufficient. They do not, after all, provide any evidentiary support that such a meeting in fact occurred. They are just allegations that, under an evidentiary approach, would *themselves* require some further allegations to suggest their truth.

209. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

210. *See, e.g.*, Epstein, *supra* note 10, at 62 ("In reality, *Twombly* . . . was a disguised motion for summary judgment."); Hoffman, *supra* note 10, at 1240 ("It is now plain—if it was not already—that Rules 12(b)(6) and 56 are hinged together doctrinally. As [*Twombly*] saw it, if an antitrust plaintiff's complaint cannot survive summary judgment . . . then why delay the inevitable?"); Spencer, *supra* note 7, at 487 ("*Twombly* endorses parity between the level of scrutiny applied to claims at the Rule 12(b)(6) and Rule 56 stages."); Thomas, *supra* note 10, at 1857 (noting that *Twombly* "established [a] standard[] for dismissal at the motion to dismiss stage that [is] similar to the standard for summary judgment").

211. *See, e.g.*, Hoffman, *supra* note 10, at 1256 ("[T]reating a rigorous pleading sufficiency standard congruently with summary judgment—that is, as nothing more than an earlier but similar stage of judicial gatekeeping—is misguided."); Spencer, *supra* note 7, at 488 ("[I]t is inappropriate to apply the type of scrutiny applied at the summary judgment

Second, Rule 11 undermines the idea that a complaint must identify evidentiary support for its allegations. Under Rule 11, the filer of any document certifies that, among other things, "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[212] Arguably, requiring evidentiary support at the pleadings phase would contravene Rule 11 by mandating immediate dismissal of a complaint without the opportunity Rule 11 envisions to use discovery to obtain the needed evidentiary support.[213] Rule 11 explicitly recognizes that a complaint may contain factual allegations that *presently* lack evidentiary support but "will likely have evidentiary support *after* a reasonable opportunity for further investigation or discovery."[214]

One response to this critique could be that a stricter pleading standard would just require the complaint to confirm a sufficient "likel[ihood]" of obtaining evidentiary support in the future.[215] But this view is based on the mistaken premise that a Rule 12(b)(6) motion to dismiss—which seeks to test merely whether the complaint provides the "short and plain statement of the claim showing that the pleader is entitled to relief" required by Rule 8—is the proper vehicle for testing Rule 11's requirement that factual allegations "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 11 *itself* provides the procedural vehicles for challenging an attorney's failure to comply with Rule 11(b)—either a motion for sanctions by another party,[216] or an order to show cause issued on the court's own initiative.[217] A motion to dismiss a pleading for "failure to state a claim upon which relief can be granted"[218] targets the "statement of the claim"[219] itself, not whether the attorney has undertaken the required reasonable inquiry into the likelihood of obtaining evidentiary support. Using Rule 11 as a basis for requiring supportive allegations at the pleadings phase would, therefore, conflate two separate procedural issues, contrary to the text

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stage to the pleadings of litigants that have yet to have access to discovery."). *But cf.* Epstein, *supra* note 10, at 82 (arguing that "treat[ing] the [*Twombly*] defendant's motion to dismiss as though it set up a 'mini-summary judgment'" was a desirable result given the nature of the claim presented in *Twombly*).

212. FED. R. CIV. P. 11(b)(3).

213. *See* Spencer, *supra* note 7, at 470-72.

214. FED. R. CIV. P. 11(b)(3) (emphasis added).

215. *See* Hoffman, *supra* note 10, at 1253-54 ("[I]mposing a plausibility requirement at Rule 8(a)(2) is probably close—if not (at least sometimes) equivalent—to the Rule 11(b)(3) proscription against asserting claims for which there is no evidentiary support and no likelihood of evidentiary support after a reasonable opportunity for further discovery.").

216. FED. R. CIV. P. 11(c)(2).

217. FED. R. CIV. P. 11(c)(3).

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

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

and structure of the Federal Rules.[220]

Third, Form 11's model negligence complaint—which "suffice[s] under [the Federal Rules] and illustrate[s] the simplicity and brevity that these rules contemplate"[221]—would seem to preclude any attempt to infer a requirement that the complaint contain supporting evidence for its allegations. Form 11 alleges merely: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."[222] It does not require any level of evidentiary support suggesting that the defendant was, in fact, driving negligently.[223] It requires nothing more than an *allegation* that the defendant was driving "negligently" when he struck the plaintiff.[224] Other forms also undermine the evidentiary approach. Form 18's complaint for patent infringement, using the example of electric motors, deems it sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention."[225] Form 18 does not require any level of evidentiary support suggesting that the defendant's electric motors, in fact, embody the plaintiff's invention. It requires nothing more than an *allegation* that the defendant's motors embody the patented invention.

Finally, an evidentiary theory cannot be reconciled with other Supreme Court decisions that, as explained above, must be assumed to remain good law.[226] *Swierkiewicz*—the most recent example—squarely confronts and rejects such an evidentiary approach. Swierkiewicz had alleged that he was fired based on his age and national origin, but the lower court dismissed the complaint for failing to "adequately allege[] circumstances that support an inference of discrimination."[227] The Supreme Court reversed the dismissal, instructing that federal courts "must accept as true all of the factual allegations contained in the complaint"—including the allegation of discriminatory

220. *See* Hoffman, *supra* note 10, at 1254 ("Rule 11 is a certification and sanctioning rule and not normally the vehicle for dismissing insufficient claims."). Tellingly, the defendant in *Leatherman* attempted to justify a heightened pleading standard as "consistent with a plaintiff's Rule 11 obligation to make a reasonable prefiling inquiry into the facts," but a unanimous Supreme Court rejected that argument. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167 (1993).

221. FED. R. CIV. P. 84.

222. FED. R. CIV. P. Form 11, ¶ 2.

223. *But cf.* Bone, *supra* note 10, at 886 (arguing that the mere fact a car collided with a pedestrian raises the specter of negligence because "drivers do not usually strike pedestrians when driving with reasonable care, so the probability of negligence conditional on a pedestrian being struck should be quite high"); Spencer, *supra* note 10, at 27 (arguing that "the surrounding fact of the collision itself creates a presumption of impropriety").

224. *See* Bone, *supra* note 10, at 886; Spencer, *supra* note 10, at 27.

225. FED. R. CIV. P. Form 18, ¶ 3.

226. *See supra* notes 156-75 and accompanying text.

227. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 509 (2002) (citation and internal quotation marks omitted).

intent.[228] This obligation is "without regard to whether a claim will succeed on the merits. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."[229] Consistent with this observation, the unanimous Court in *Swierkiewicz* rejected the idea that the complaint must indicate the availability of supporting evidence or facts suggesting that the allegations might be proven indirectly. The Court noted that the discovery process might reveal evidence of discrimination that was not yet known.[230] It therefore found it "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered"[231] *even where* the plaintiff is "without direct evidence of discrimination at the time of his complaint."[232]

For all these reasons—conceptual, textual, and precedential—*Iqbal* and *Twombly* cannot be read to allow a court to disregard an allegation just because its truth is not suggested by some other allegation. Such an inquiry may be proper at step two of the *Iqbal* framework, but it is not grounds for refusing to accept the truth of an allegation at *Iqbal* step one.[233]

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228. *Id.* at 508 n.1.

229. *Id.* at 515 (internal quotation marks omitted).

230. *Id.* at 511.

231. *Id.* at 511-12.

232. *Id.* at 511. *Twombly* professed consistency with *Swierkiewicz*, but it also noted that the *Swierkiewicz* complaint had "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The *Twombly* majority did not, however, indicate that such information provided evidentiary support for Swierkiewicz's allegation of discriminatory intent. *Id.* If that had been *Twombly*'s intention, it is hard to see how the *Swierkiewicz* complaint passes muster simply by "detail[ing] the events leading to his termination, provid[ing] relevant dates, and includ[ing] the ages and nationalities of at least some of the relevant persons involved with his termination," *id.*, yet it is not sufficient in *Iqbal* to describe the enormous impact that Ashcroft and Mueller's policies had on Arab Muslim men. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

233. Admittedly, *Twombly* and *Iqbal* at times emphasize the likelihood that the plaintiff's allegations will be supported by evidence. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1949 ("The *plausibility* standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." (emphasis added)); *Twombly*, 550 U.S. at 556 ("Asking for *plausible* grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." (emphasis added)). But such language addresses the *plausibility* of a claim *after* some crucial allegation is disregarded as conclusory; that language does not shed light on what makes an allegation conclusory in the first instance. As explained above, the distinction between the conclusory inquiry and the plausibility inquiry is vital. *See supra* Part III.A. Indeed, there is a good reason why courts would be more concerned about supporting evidence when assessing "plausibility" than when assessing "conclusoriness." A nonconclusory allegation is subject to Rule 11's requirement that "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3); *see also supra* note 140 (noting how *Iqbal* equates "factual" with

B. *A Transactional Approach*

One way to reconcile *Twombly* and *Iqbal* with authoritative pre-*Twombly* texts and precedents is to define "conclusory" in transactional terms. A plaintiff's complaint must provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff's claim. When an allegation fails to concretely identify *what* is alleged to have happened, that allegation is conclusory and need not be accepted as true at the pleadings phase.[234] This approach is to be contrasted with the approach considered in the previous Subpart, which would require the complaint to provide an evidentiary narrative, that is, information suggesting that the allegations will indeed be proven true (under whatever probability threshold).

To illustrate the transactional approach, consider first some rather extreme examples that were alluded to earlier. Imagine a complaint that alleges merely that "the defendant violated the plaintiff's legal rights in a way that entitles the plaintiff to relief." This allegation is conclusory in the transactional sense because it does not indicate what actually happened; it provides only the legal conclusion that the plaintiff's rights were violated. The same might be said of hypothetical complaints alleging merely that "the defendant violated the plaintiff's rights under Title VII of the 1964 Civil Rights Act" or that "the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff." These scenarios all state a claim for relief, in the sense that the plaintiff would prevail if these allegations were ultimately proven true. But they fail to provide an adequate transactional narrative, because they do not identify the acts or events underlying those allegations.

Another good illustration of a transactionally conclusory complaint is *Dura Pharmaceuticals, Inc. v. Broudo*,[235] a Supreme Court decision issued during the five-year interval between *Swierkiewicz* and *Twombly*. The complaint in *Dura* alleged that because of the defendant's misrepresentation, the plaintiffs

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"nonconclusory"). Thus, Rule 11's enforcement mechanism can police nonconclusory allegations that lack a sufficient likelihood of evidentiary support. But where a crucial element of a claim is alleged in a solely conclusory fashion, the plaintiff has arguably made no "factual contention" that would be subject to Rule 11's requirement that there is or is likely to be supporting evidence. If so, a court must assure for itself—via the plausibility inquiry—that the complaint's nonconclusory allegations "raise a reasonable expectation that discovery will reveal [supporting] evidence." *Twombly*, 550 U.S. at 556.

234. Other scholars have recognized that pleadings ought to identify the events or transactions underlying the plaintiff's claim. *See* Ides, *supra* note 10, at 607-09 (arguing that federal pleading standards include a "Transactional Sufficiency" component that "requires that the pleading contain a factual narrative sufficient to move the underlying claim from the abstract assertion of a right to an assertion that is premised on an actual, identifiable event"); *see also* 5 WRIGHT & MILLER, *supra* note 3, § 1202 ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon . . . .").

235. 544 U.S. 336 (2005).

"paid artificially inflated prices for Dura['s] securities and suffered damages."[236] The Court refused to accept as true the allegation that the plaintiffs had "suffered damages." It noted that an "'artificially inflated purchase price' is not itself a relevant economic loss" and that the complaint had failed to allege that the "share price fell significantly after the truth became known."[237] For the plaintiffs in a case like *Dura* to have "suffered damages," a distinct event must have occurred, namely, the movement of prices *after* the misrepresentation was revealed. But the *Dura* complaint did not identify that event in concrete terms. Thus the allegation that the plaintiffs had "suffered damages" was transactionally conclusory.

The reasoning of *Twombly* and *Iqbal* support this understanding of what makes an allegation impermissibly conclusory. The Court stated in those cases that "a formulaic recitation of the elements of a cause of action will not do"[238] and that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[239] What makes an allegation a mere "formulaic recitation of the elements," or "an unadorned, the-defendant-unlawfully-harmed-me accusation," is precisely the fact that it does not identify the underlying events that give rise to liability. By contrast, consider some of the pre-*Twombly* exemplars of liberal pleading. As cursory as Form 11 is, it concretely identifies the liability-generating event: the defendant negligently driving his car against the plaintiff.[240] Form 18 does the same, identifying the plaintiff's receipt of a patent for electric motors and alleging that the defendant is "making, selling, and using electric motors that embody the patented invention."[241] *Swierkiewicz* also provides a straightforward transactional narrative: the plaintiff was employed by the defendant and he was fired because of his age (fifty-three) and national origin (Hungarian).[242]

As elaborated in greater detail below, there might not be a precise formula for distinguishing between an adequate and an inadequate identification of the underlying events.[243] It would have been perfectly defensible if the Court had drawn that line differently than it did in *Twombly* and *Iqbal*, and had instead

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236. *Id.* at 346-47 (alteration in original) (internal quotation marks omitted).

237. *Id.* at 347.

238. *Twombly*, 550 U.S. at 555.

239. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

240. *See* FED. R. CIV. P. Form 11, ¶ 2 ("On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff.").

241. *See* FED. R. CIV. P. Form 18, ¶¶ 2-3.

242. *See Swierkiewicz* Amended Complaint, *supra* note 29, ¶ 12 ("Mr. Swierkiewicz is a native of Hungary."), ¶ 13 ("Mr. Swierkiewicz is 53 years old."), ¶¶ 17, 19 (describing the positions the plaintiff held with the defendant), ¶ 37 ("Plaintiff's age and national origin were motivating factors in [the defendant's] decision to terminate his employment."); *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA.").

243. *See infra* Part IV.F.

deemed the allegations in those cases nonconclusory and accepted their truth at the pleadings phase. That said, the complaints in *Twombly* and *Iqbal* were—in transactional terms—qualitatively different from Form 11, Form 18, and *Swierkiewicz*.[244]

Take first the crucial paragraph in the *Iqbal* complaint. Paragraph ninety-six alleged that Ashcroft, Muller, and *nine other* defendants "each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin."[245] The problem is not the cursory allegation of discriminatory animus.[246] The problem is the murkiness surrounding what Ashcroft and Mueller actually did *vis-à-vis* Iqbal. Given the Court's understanding of what was required for *Bivens* liability—that "each Government-official defendant, through the official's own individual actions, has violated the Constitution"[247]—Ashcroft's and Mueller's individual conduct was crucial as a matter of substantive law.[248] Yet it is difficult to square paragraph ninety-six's generic allegation with the series of real-world events identified in the complaint. The "General Background" section of the complaint[249] identified a number of high-level decisions and policies, including the policy of "holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI" that was allegedly approved by Ashcroft and Mueller.[250] The complaint did not allege that any of these policies were adopted or approved for invidious reasons.[251] The next section of the complaint then described Iqbal's

244. This Article's attempts to distinguish the *Twombly* and *Iqbal* complaints are not at all intended to find fault with Twombly's or Iqbal's attorneys. In both cases, the complaints were drafted before the Supreme Court's *Twombly* decision. And the *Iqbal* complaint was drafted before the *Iqbal* majority restricted supervisory *Bivens* liability.

245. *Iqbal* Complaint, *supra* note 95, ¶ 96 ("ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest.").

246. *See infra* Part IV.D.

247. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009).

248. This is an important distinction between *Iqbal* and *Swierkiewicz*. Because respondeat superior governs employment discrimination claims like those in *Swierkiewicz*, *see, e.g.*, 42 U.S.C. § 2000e(b) (2006) (defining the term "employer" to include any "person engaged in an industry affecting commerce . . . and any agent of such a person"), the fact that a plaintiff has been fired for invidious reasons is sufficient to establish a claim against the company, regardless of which person at the company did the firing. This is in contrast to the *Bivens* claim at issue in *Iqbal*, for which the individual defendant's liability depended on that individual's own conduct. *See Iqbal*, 129 S. Ct. at 1948.

249. *Iqbal* Complaint, *supra* note 95, ¶¶ 47-76.

250. *Id.* ¶ 69; *see also Iqbal*, 129 S. Ct. at 1944, 1951 (quoting *Iqbal* Complaint, *supra* note 95, ¶ 69).

251. Indeed, the *Iqbal* majority emphasized that the complaint did not at any point allege that the hold-until-cleared policy was adopted "'because of,' not merely 'in spite of,'

confinement.[252] Up until this point in the complaint, Ashcroft's and Mueller's role in Iqbal's confinement seemed to be their approval of the hold-until-cleared policy, which was never alleged to have been adopted for invidious reasons. At paragraph ninety-six, however, the complaint alleged that Ashcroft, Muller, and others "each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin."[253]

From a transactional narrative standpoint, the *Iqbal* complaint potentially raises a red flag. The "agree[ment]"[254] in which Ashcroft and Mueller were allegedly involved was a distinct event or transaction that, chronologically, preceded the conditions of confinement that were imposed on Iqbal as a result. Yet the allegation of this invidious agreement appears *after* the conditions of confinement are described, and in a completely different section from other decisions and policies that played a role in Iqbal's confinement. Is paragraph ninety-six meant to allege that Ashcroft and Mueller, with discriminatory intent, made a special agreement about Iqbal's detention distinct from the hold-until-cleared policy? Is it meant to allege that Ashcroft and Mueller, with discriminatory intent, adopted a generally applicable policy that targeted individuals who shared Iqbal's religion, race, or national origin? Or is it meant to allege for the first time that the hold-until-cleared policy referred to twenty-seven paragraphs earlier was itself adopted for discriminatory reasons? A judge might legitimately question whether paragraph ninety-six is truly grounded in a real-world event or transaction, or is rather "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[255]

The *Twombly* complaint has similar problems. It alleged several examples of "parallel conduct" by the defendants, including that they refrained from competing "head-to-head" in each other's incumbent territories,[256] failed to provide non-Baby-Bell competitors the same quality of service and quality of connection to the network,[257] used billing methods that blocked these competitors from auditing the bills they received from the defendants,[258] and negotiated agreements with these competitors on unfair terms.[259] The

its adverse effects upon an identifiable group." *Iqbal*, 129 S. Ct. at 1951 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 254, 279 (1979)).

252. *See Iqbal* Complaint, *supra* note 95, ¶¶ 80-95.

253. *Id.* ¶ 96.

254. *Id.* The allegations that Ashcroft and Mueller "knew of" and "condoned" Iqbal's harsh treatment would likely fail as a matter of law in light of *Iqbal*'s restrictions on supervisory *Bivens* liability. *See supra* notes 82-85 and accompanying text.

255. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

256. Consolidated Amended Class Action Complaint ¶ 39, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220) [hereinafter *Twombly* Consolidated Amended Complaint].

257. *Id.* ¶ 47(a),(e).

258. *Id.* ¶ 47(d),(i).

259. *Id.* ¶ 47(f),(*l*).

complaint then alleged in the crucial paragraph fifty-one:

> In the absence of any meaningful competition between the [defendants] in one another's markets, and *in light of the parallel course of conduct* that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[260]

The phrasing and placement of paragraph fifty-one raise questions about whether the alleged "contract, combination or conspiracy" is grounded in any real-world acts or events. By definition, the agreement to engage in parallel conduct must come before the parallel conduct itself. Yet the *Twombly* complaint places the conspiracy allegation after the parallel conduct allegations. And it phrases the allegation in a way that suggests that the conspiracy derives from the parallel conduct, rather than the other way around. The *Twombly* majority emphasized this fact in concluding that while "a few stray statements [in the complaint] speak directly of agreement, on fair reading these are merely *legal conclusions* resting on the prior allegations."[261] Justice Souter wrote:

> [T]he complaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "*in light of*" *these*, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another."[262]

Read this way, the *Twombly* plaintiffs had merely "rest[ed] their § 1 claim on descriptions of parallel conduct and not on any *independent* allegation of *actual* agreement among the ILECs."[263] Accordingly, the majority concluded that the assertion of such an agreement in paragraph fifty-one was nothing more than "a formulaic recitation of the elements of a cause of action."[264]

One can certainly dispute the Court's view that paragraph fifty-one was transactionally inadequate. The placement and phrasing of paragraph fifty-one could be explained as an attempt by the plaintiff to indicate, consistent with Rule 11, that the conspiracy allegation was one that did not *currently* have evidentiary support but "will *likely* have evidentiary support after a reasonable

260. *Id.* ¶ 51 (emphasis added).

261. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007) (emphasis added) (footnote omitted).

262. *Twombly*, 550 U.S. at 564-65 (alterations in original) (emphasis added).

263. *Id.* at 564 (emphasis added).

264. *Id.* at 555.

opportunity for further investigation or discovery."[265] The Court's failure to consider this possibility is unfortunate, but that potential mistake should not obscure the fact that the *Twombly* majority's concern with paragraph fifty-one was whether it constituted an "*independent* allegation of *actual* agreement" rather than a mere "legal conclusion[] *resting* on the prior allegations."[266] Had the complaint provided such an "independent allegation of actual agreement," it would have been accepted as true without regard to its "plausibility."

C. *Rule 8 and the "Plain Statement" Requirement*

This transactional understanding of what "conclusory" means can be situated in a new pleading paradigm: plain pleading. This approach finds support in Rule 8's requirement that the complaint contain a "short *and plain* statement of the claim showing that the pleader is entitled to relief."[267] One definition of the term "plain" is "free of impediments to view,"[268] as in the phrases, "in plain sight" or "plain as day." The problem with the allegations that the Court disregarded as "conclusory" in *Twombly* and *Iqbal* is that a key act or event underlying the plaintiff's claim is obscured by the use of mere conclusory language; that conclusory language fails to identify what real world events are alleged to have occurred.[269]

More specifically, the plain-pleading paradigm breaks down Rule 8(a)(2) as follows:

(1)A *statement of the claim* means an identification of the acts or events that give rise to the plaintiff's claim. The statement does not need to provide any kind of evidentiary support. The statement does not need to justify why the plaintiff believes the events occurred as characterized in the complaint. It must merely provide an adequate transactional narrative, that is, it must identify what acts or events are alleged to have occurred.

(2)This statement of the claim must be *plain*: that is, "free of impediments to view."[270] This means that the operative acts or events must not be obscured by mere conclusory language. The complaint's failure to provide evidentiary support for its allegations does not make them conclusory. An allegation is impermissibly conclusory when it is necessary to establish a viable claim but fails to identify a tangible, real-world act or event.

(3)The statement of the claim must *show that the pleader is entitled to relief*, meaning that if the acts and events that are plainly identified occurred as

265. FED. R. CIV. P. 11(b)(3) (emphasis added) (requiring that such factual contentions be "specifically so identified").

266. *Twombly*, 550 U.S. at 564 (emphasis added).

267. FED. R. CIV. P. 8(a)(2) (emphasis added).

268. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 947 (11th ed. 2003).

269. *See supra* notes 245-66 and accompanying text.

270. COLLEGIATE DICTIONARY, *supra* note 268, at 947.

characterized in the complaint, then the plaintiff would be legally entitled to the remedy requested.[271] If the plainly identified acts and events are insufficient by themselves (perhaps because some conclusory allegations were disregarded for lack of plainness), then Rule 8 is satisfied only if the plainly identified acts and events plausibly suggest an entitlement to relief. As explained above, however, this plausibility inquiry makes the pleading standard *more* lenient, not less; it allows a complaint to pass muster *even if* crucial elements of a claim for relief are couched in mere legal conclusions.[272] The plausibility inquiry cannot legitimately be read as allowing judges to reject allegations just because they perceive them to be implausible.

This understanding of Rule 8 captures the two-part pleading framework the Court employed in *Iqbal*: first, identify allegations that are conclusory and disregard them; second, determine whether the remaining allegations, accepted as true, plausibly suggest an entitlement to relief.[273] Conclusory allegations are not "plain" and, therefore, cannot count toward "showing that the pleader is entitled to relief." But all nonconclusory allegations must be accepted as true. By defining conclusory in transactional terms, this taxonomy is able to reconcile the apparent conflict between *Twombly* and pre-*Twombly* authority on federal pleading.[274]

The plain-pleading approach might even be couched as an attempt to further refine what "notice" a defendant is entitled to at the pleadings phase.[275] As an organizing framework, however, it has a number of advantages over the notice-pleading paradigm that prevailed during the decades before *Twombly*. From a textual standpoint, notice pleading is an awkward fit with the text of the Federal Rules. While the requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief"[276] provides the defendant some notice of the claim against it, Rule 8(a) does not suggest that notice about

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271. The textual theory proposed here uses this phrase in precisely the same way as *Twombly* and *Iqbal*. Both decisions confirm that Rule 8's requirement that the complaint "show[] that the pleader is entitled to relief" comes into play only at *Iqbal* step two. *See Twombly*, 550 U.S. at 557 ("The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" (alteration in original) (quoting FED. R. CIV. P. 8(a)(2))); *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (alteration in original) (quoting FED. R. CIV. P. 8(a)(2))). These quotes do not indicate that this phrase plays any role at *Iqbal* step one, which is the only aspect of the *Iqbal* test that allows a court to disregard a complaint's allegations at the pleadings phase. *See supra* Part III.B.

272. *See supra* Part III.A.2.

273. *See supra* notes 88-94 and accompanying text.

274. *See supra* Part IV.B.

275. *See supra* Part III.C.

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

any particular aspect of the claim is necessary.[277] The plain-pleading paradigm, on the other hand, is textually grounded in Rule 8(a)(2)'s requirement that the statement of the claim be "short *and* plain." To be sure, the requirement that the complaint identify the acts and events underlying the plaintiff's claim will perform a valuable notice-giving function.[278] But the plain-pleading paradigm is able to support that function without the textual problems of one that is fixated on notice *per se*.

D. *Some "Conclusory" Language Is Not Necessarily Fatal*

A corollary to the transactional approach proposed here is that an allegation may contain some language that, in isolation, might be characterized as conclusory without the allegation being deemed "conclusory" for purposes of *Iqbal* step one. One might say, for example, that Form 11's allegation that the defendant was driving *negligently* is a conclusory allegation.[279] Similar arguments could be made about Form 18's allegation that the defendant's electric motors *embodied the patented invention*,[280] or the allegation that the defendant terminated Swierkiewicz *because of his age and national origin*.[281]

These allegations are not transactionally conclusory, however, because they provide a basic identification of the liability-generating events or transactions. Form 11 states that the defendant drove his car against the plaintiff. Form 18 states that the defendant was making, selling, and using electric motors. The *Swierkiewicz* complaint states that the defendant terminated the plaintiff's employment. Once that transactional core is adequately identified, certain qualities or characteristics of those events can permissibly be described with what one might call conclusory language. Under a transactional approach, a complaint need not further explain *how* or *why* an event is alleged to have a particular quality or characteristic.[282] Form 11 does

277. *See* Clark, *supra* note 177, at 461 ("[W]hile a useful rule may perhaps be framed in terms of notice, I think the Federal Rules follow a wiser course of stating a still more general and, if you please, more *legal* requirement—'a short and plain statement of the claim showing that the pleader is entitled to relief.'" (citation and footnote omitted)).

278. *See infra* notes 310-13 and accompanying text (arguing that notice-giving is one purpose of pleadings and that this Article's proposed pleading standard serves that purpose).

279. *See* FED. R. CIV. P. Form 11, ¶ 2 ("On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff.").

280. *See* FED. R. CIV. P. Form 18 ¶¶, 2-3.

281. *See Swierkiewicz* Amended Complaint, *supra* note 29, ¶ 37 ("Plaintiff's age and national origin were motivating factors in [the defendant's] decision to terminate his employment."); *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA.").

282. In a product liability case, for example, this distinction suggests that a complaint is not deficient if it alleges in conclusory terms that an injury-causing product was "defective." Assuming that the complaint identifies the event by which the product caused the injury (e.g., an accident involving the product), the fact that the product was defective is

not need to explain *how* the defendant was driving negligently.[283] Form 18 does not need to explain *how* the defendant's motors embodied the patented invention. Swierkiewicz did not need to explain *why* he believed the defendant fired him for invidious reasons.[284] This distinction is the key to explaining why the unanimous Court in *Swierkiewicz* so candidly acknowledged that its approach would "allow[] lawsuits based on conclusory allegations of discrimination to go forward."[285] It is permissible to allege a *characteristic* of a transaction in conclusory terms, as long as the complaint identifies the core content of the transaction itself.[286] The complaint in *Swierkiewicz* provided a

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merely a characteristic of something that was involved in that alleged event.

283. Accordingly, *Twombly* and *Iqbal*'s insistence on "factual" allegations, *see supra* note 140, should not be read to impose what was traditionally known as "fact pleading" or "code pleading." *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting) (describing how "the [1848] Field Code and its progeny required a plaintiff to plead 'facts' rather than 'conclusions'"). Form 11, for example, would fail under a traditional fact-pleading regime because it does not provide facts to support the allegation that the defendant was indeed driving negligently. *Id.* at 576 (describing how the earlier version of Form 11 (what was then Form 9) illustrated a break from fact pleading). But Form 11 clearly provides some "facts." It alleges that the defendant drove a vehicle against the plaintiff at a particular time and place. By providing this real-world transactional narrative, Form 11 thus provides sufficient "factual" allegations that it must be accepted as true under *Twombly* and *Iqbal*, even though one aspect of the collision (that the defendant was driving "negligently") is described with what "would have been called a 'conclusion of law' under the code pleading of old." *Id.*

284. This approach is reflected in Rule 9(b)'s command that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b). Yet it also explains why the mere ability to allege intent or state of mind "generally" does not mean that every such allegation passes muster. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8."). The allegation must still be sufficiently tethered to an adequately identified transaction in order to be accepted as true at the pleadings phase. *See id.* ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

285. *Swierkiewicz*, 534 U.S. at 514.

286. This line between an event's core content and its qualities or characteristics may not be crystal clear in all cases, but the distinction is not an arbitrary or uncommon one. Indeed, it is fundamental to basic preclusion principles. Res judicata typically bars any future lawsuit that is based on the same events or transactions, irrespective of how those transactions are characterized or what legal theory is used to justify recovery. *See, e.g.*, Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 n.22 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes."); 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982) ("[T]he claim extinguished includes all rights . . . with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."). This rule reflects the difference between the core content of an event and its qualities or characteristics. If the plaintiff in Form 11 loses his case when he proceeds on a negligence theory, preclusion would bar him from filing a second lawsuit based on an intentional tort theory. If Swierkiewicz loses his case when he proceeds on a theory of age and national-origin-based discrimination, preclusion would bar him from filing a second lawsuit based on a theory that he was fired in

straightforward transactional narrative, even though the allegation of discriminatory intent—viewed in isolation—could be labeled conclusory.[287]

E. *A Complaint Need Not Provide Extensive Details About the Underlying Events*

Although the transactional approach proposed here would require the complaint to identify the real-world events that give rise to liability, it would be a mistake to construe this standard as requiring extensive details about the acts or events that are alleged to have occurred—for example, exact dates, times, locations, or which particular employees or officers of an institutional or corporate party were involved. Those who believe that a complaint must contain such details in order to pass muster might point to Form 11, which identifies the date and location of the accident,[288] or the complaint in *Swierkiewicz*, which identified the dates on which particular events occurred and some of the corporate agents and officers involved.[289] But it should not be assumed that such information is always necessary in order for an allegation to be accepted as true at the pleadings phase.[290] Other form complaints provided in the Federal Rules confirm this.[291] As mentioned above, Form 18's complaint

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retaliation for protected activity under Title VII. *See, e.g.*, Manego v. Orleans Bd. of Trade, 773 F.2d 1, 5, 7 (1st Cir. 1985) (applying a "'transactional' approach to claim preclusion" and holding that res judicata barred an antitrust claim that arose out of the same facts as an earlier claim alleging violations of federal civil rights laws).

287. This recognition explains why the Court reached different results in *Iqbal* and *Swierkiewicz*, even though both involved seemingly "conclusory" allegations of discriminatory motive. *Iqbal* did not conclude that allegations of invidious motive are inherently conclusory unless other allegations in the complaint support the allegation. Rather, *Iqbal* found the whole of paragraph ninety-six of the complaint (which contained the allegation of invidious motive) to be conclusory. The problem with the *Iqbal* complaint, as explained above, was uncertainty about Ashcroft and Mueller's individual involvement in a willful and malicious agreement to subject Iqbal to harsh conditions of confinement. *See supra* notes 245-55 and accompanying text. The *Swierkiewicz* complaint, by contrast, provided a clear transactional narrative: the plaintiff worked for the defendant, the plaintiff was fired by the defendant, and the plaintiff's age and national origin were motivating factors in his termination. The fact that respondeat superior governs in employment-discrimination claims like *Swierkiewicz* (unlike the *Bivens* claim at issue in *Iqbal*) means that liability does not hinge on the conduct of any one particular individual. *See supra* note 248 and accompanying text.

288. *See* FED. R. CIV. P. Form 11, ¶ 2.

289. *Swierkiewicz* Amended Complaint, *supra* note 29, ¶¶ 19, 31, 33.

290. *See, e.g.*, Fowler v. UPMC Shadyside, 578 F.3d 203, 211-12 (3d Cir. 2009) (reversing lower court's dismissal despite the *Iqbal* decision and even though "Fowler's complaint is not as rich with detail as some might prefer"); *id.* at 213 ("Fowler is not required, at this early pleading stage, to go into particulars about the life activity affected by her alleged disability or detail the nature of her substantial limitations. Her complaint identifies an impairment, of which UPMC allegedly was aware and alleges that such impairment constitutes a disability under the Rehabilitation Act.").

291. With respect to Form 11, it should also be noted that the Forms provide what

for patent infringement deems it sufficient to allege that "defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention."[292] No details are required about precisely when or where the making, selling, and using occurred, or which of the defendant's officers or employees were involved.[293] In Form 17's complaint for breach of a contract to convey land, the breach is adequately pleaded merely by alleging that "the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance."[294] No details are required about precisely when or how these events transpired.

There is another textual problem as well. If Rule 8 were construed to require additional details about events alleged in a complaint, then what purpose would Rule 9(b) serve? Rule 9(b) requires, among other things, that fraud allegations must "state with particularity the circumstances constituting fraud."[295] Thus, under Rule 9(b), a complaint must allege "the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation,"[296] such as by specifying each statement alleged to have been misleading, identifying the speaker, and explaining the reason or reasons why the statement is misleading.[297] To read *Iqbal* and *Twombly* as rejecting allegations that lack additional details would, essentially, import these same requirements into Rule 8.

F. *The Line-Drawing Challenge*

The line between allegations that do and do not adequately identify the underlying acts or events may not always be clear. One could reasonably disagree with the Court's holdings that the crucial allegations in *Twombly* and

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"suffice[s]" under the Federal Rules, not what is *necessary* under the Federal Rules. FED. R. CIV. P. 84.

292. FED. R. CIV. P. Form 18, ¶ 3. Form 18 suggests that a complaint in a product liability case should not have to identify with precision each step in a product's chain of distribution. Just as it is sufficient to allege that a patent infringement defendant has been "making, selling, and using electric motors that embody the patented invention," *id.*, it should likewise be sufficient to allege that a product liability defendant made or sold the product in question.

293. This may reflect the entirely sensible notion that the information required to adequately allege a particular occurrence can vary depending on whether that information is likely to be in the plaintiff's possession. *See supra* note 117. A plaintiff can be expected to know at the time of filing when and where she was struck by an automobile (Form 11), but ought not be expected to know precise details about a defendant's internal production or distribution practices (Form 18).

294. FED. R. CIV. P. Form 17, ¶ 3.

295. FED. R. CIV. P. 9(b).

296. Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007).

297. ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336, 350 (5th Cir. 2002).

Iqbal were conclusory.[298] But uncertainty about how the federal pleading standard will apply to particular complaints is nothing new. Such uncertainty was also inherent in *Conley*'s fair-notice standard, insofar as the Supreme Court was never pushed to further define what "fair notice" meant.[299] Ultimately, the line-drawing challenge is unavoidable. As long as we agree that a complaint cannot just allege that "defendant violated plaintiff's rights in a way that entitles plaintiff to relief," courts will need to police what is and is not an adequate identification of the events underlying a plaintiff's claim.

There are, however, encouraging signs that some federal appellate courts are approaching this issue along the lines that this Article suggests. One example is the recent decision in *Fowler v. UPMC Shadyside*,[300] a disability discrimination case. The Third Circuit squarely rejected the idea that a complaint must somehow suggest the truth or provability of the allegations contained therein. As to the allegation that Fowler was disabled, the court wrote:

> At this stage of the litigation, the District Court should have focused on the appropriate threshold question—namely whether Fowler *pleaded* she is an individual with a disability. The District Court and UPMC instead focused on what Fowler can "prove," apparently maintaining that since she cannot prove she is disabled she cannot sustain a *prima facie* failure-to-transfer claim. A determination whether a *prima facie* case has been made, however, is an evidentiary inquiry—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination.[301]

The *Fowler* court also accepted the plaintiff's allegations that "she was 'terminated *because she was disabled*' and that UPMC discriminated against her by failing to 'transfer or otherwise obtain vacant and funded job positions' for her."[302] It held that these were "'more than labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'"[303] and concluded: "[w]e have no trouble finding that Fowler has adequately pleaded a claim for relief under the standards announced in *Twombly* and *Iqbal*."[304]

A transactional approach has also been employed in post-*Iqbal* decisions where the court ultimately deemed an allegation to be conclusory. The Seventh Circuit's decision in *Brooks v. Ross*[305] involved the following allegation:

> Plaintiff is informed, believes and alleges that the Defendants while acting in

298. *See supra* note 243-44 and accompanying text.

299. *See supra* Part III.C. As described above, this uncertainty permitted lower courts to dismiss complaints at a remarkably high rate even before *Twombly*. *See supra* note 180.

300. 578 F.3d 203 (3d Cir. 2009). Ironically, this is the same decision that read *Twombly* and *Iqbal* as overruling *Swierkiewicz*. *See supra* note 167 and accompanying text.

301. *Fowler*, 578 F.3d at 213; *see also id.* at 214 ("As we have stated before, standards of pleading are not the same as standards of proof.").

302. *Id.* at 212 (emphasis added).

303. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

304. *Id.*

305. 578 F.3d 574 (7th Cir. 2009).

> concert with other State of Illinois officials and employees of the Attorney General's Office, Department of Corrections and Prisoner Review Board did knowingly, intentionally and maliciously prosecute Plaintiff and Ronald Matrisciano in retaliation for Plaintiff and the said Ronald Matrisciano exercising rights and privileges under the Constitutions and laws of the United States and State of Illinois.[306]

In refusing to accept this allegation as true, the court emphasized the complaint's failure to identify what happened, *not* its lack of supporting evidence and *not* its cursory allegation of retaliatory motive. The court wrote: "[T]his paragraph fails under *Iqbal*, because it is merely a formulaic recitation of the cause of action and nothing more. It therefore does not put the defendants on notice of *what exactly they might have done* to violate Brooks's rights under the Constitution, federal law, or state law."[307]

While reasonable judges may disagree over how to draw this line in particular cases,[308] it is crucial that the inquiry focuses on whether the complaint provides an adequate transactional narrative, not whether it provides evidentiary support for its allegations. And courts must remain cognizant of their obligation to avoid conflicts with either binding positive law (such as the Federal Rules and their Forms) or precedent that has yet to be overruled (such

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306. *Id.* at 582.

307. *Id.* (emphasis added). The Second Circuit's en banc decision in *Arar v. Ashcroft* also seems to reflect this approach:

> Arar alleges that "Defendants"—undifferentiated—"denied Mr. Arar effective access to consular assistance, the courts, his lawyers, and family members" in order to effectuate his removal to Syria. But he fails to specify any culpable action taken by any single defendant, and does not allege the "meeting of the minds" that a plausible conspiracy claim requires. He alleges (in passive voice) that his requests to make phone calls "were ignored," and that "he was told" that he was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed.

585 F.3d 559, 569 (2d Cir. 2009) (en banc). The *Arar* dissenters, however, disputed the majority's characterization of Arar's complaint as failing to identify culpable action taken by particular defendants. *See id.* at 616 (Parker, J., dissenting) ("[Arar] also alleges . . . that the defendants were personally involved in his mistreatment both in the United States and abroad."); *id.* at 594 (Sack, J., dissenting) ("[T]he facts of Arar's mistreatment . . . were pleaded meticulously and in copious detail. The assertion of relevant places, times, and events—and names when known—is lengthy and specific.").

308. It is likely that further refinement of the federal pleading standard cannot meaningfully occur in the abstract, but must rather be done in the context of particular kinds of acts or events and particular claims. *Cf.* Seiner, *supra* note 10, at 1041-53 (proposing what complaints in employment discrimination cases ought to contain). Developing such standards on a claim-specific basis might create some tension with the idea that the Federal Rules are "transsubstantive." *See generally* Burbank, *supra* note 10 (criticizing "transsubstantivity rhetoric" and arguing that "the foundational assumption [of] transsubstantive rules" limits courts' flexibility in applying the Federal Rules in particular substantive contexts). But even if one continues to insist on a transsubstantive pleading standard, any such standard must ultimately be applied to specific cases and specific claims. What is required to state a claim will naturally depend, at the very least, on what the elements of that claim are. Such an approach would not render the pleading standard fundamentally non-transsubstantive, any more so than the Federal Rules' numerous form complaints undermine the idea of transsubstantivity.

as *Swierkiewicz*).[309] These basic principles, if faithfully observed, will provide a significant check on the ability of courts to overassert their power to disregard allegations as failing to adequately identify the underlying events or transactions. Going forward, courts might promote greater predictability and certainty if, when they dismiss a complaint, they specify as precisely as possible what is missing from a complaint's identification of the underlying events. This practice would make transparent a court's expectations in the case before it, so that a plaintiff may make an informed decision whether and how to amend the complaint. It would also provide better guidance for future courts and litigants who might look to that dismissal as precedent.

V. SITUATING PLEADING STANDARDS IN THE POST-*IQBAL* ERA

This Part provides a deeper theory of the role pleadings ought to play in civil adjudication, and explains how this Article's approach allows pleadings to continue to play their appropriate role in the adjudicative process. It then confronts the relationship between pleading standards and discovery costs that drives so much of the contemporary debate. It identifies some often-overlooked considerations and suggests some alternative methods for managing discovery more effectively.

A. *The Purpose of Pleadings*

Scholars have broken down the purpose of pleadings in a number of different ways, but they might broadly be characterized as: notice-giving, process-facilitating, and merits-screening.[310] No approach to pleading will

309. *See supra* Part III.B. Not all courts have heeded this obligation. One example is *Hensley Manufacturing v. ProPride, Inc.*, 579 F.3d 603 (6th Cir. 2009), which upheld the dismissal of a trademark infringement action because "the complaint does not allege facts sufficient to show that ProPride's use of the 'Hensley' name creates a likelihood of confusion as to the source of its products." *Id.* at 610. This reasoning seems in conflict with Form 18, which permits a patent infringement complaint that alleges nothing more than that the defendant's product "embod[ies] the patented invention." *See supra* note 225 and accompanying text. An example from the product liability realm is *Frey v. Novartis Pharmaceuticals Corp.*, 642 F. Supp. 2d 787 (S.D. Ohio 2009), which refused to credit plaintiffs' allegation of a design defect because "[t]hey have not alleged any facts that would permit the Court to conclude that there was a defect in the design or formulation of Trileptal." *Id.* at 795. This reasoning appears to rest on the sort of evidentiary approach to pleading criticized above. *See supra* Part IV.A.

310. Professor Richard Marcus, for example, describes the three purposes of pleading as (1) "to assure the defendant of notice of the basis for the suit"; (2) to "set the parameters for the ensuing litigation of the case"; and (3) "disposition on the merits," although for "only a small percentage of cases." Richard Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1755-56 (1998). Professor Benjamin Spencer describes pleadings as serving an "instigation function," "framing function," and "filtering function." Spencer, *supra* note 7, at 490. *But cf.* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554-57 (2002) (arguing that common law and code pleading systems

perform all of these functions perfectly; they invariably involve trade-offs with one another and with other systemic and societal values.[311] That said, this Article's proposal would advance all three of these goals by requiring the complaint to plainly identify the acts or events that form the basis of the plaintiff's claim. Consider first the notice-giving purpose. The obligation to provide a "statement of the claim" that is "plain"—i.e., not obscured by mere conclusory labels—has the effect of informing defendants of the acts or events that are the basis of the claim against them. Although the notice a defendant must be given at the pleadings phase was an uncertain issue before *Twombly* and remains so today,[312] notice remains a valuable function of the pleadings phase from a policy standpoint. The plain-pleading concept better defines what sort of notice is required—notice about the acts or events that, according to the plaintiff, entitles him or her to relief from the defendant.[313]

The plain-pleading approach also serves the process-facilitation function of pleadings. Under the Federal Rules of Civil Procedure, many procedural issues hinge on the "transaction or occurrence" that is the subject of the plaintiff's claim: whether multiple parties may be joined together in a single lawsuit,[314] whether a defendant's counterclaim is compulsory,[315] whether a crossclaim is

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served a number of functions, but under the Federal Rules the "only function" of pleadings is to provide notice).

311. One could even imagine a system that has no meaningful scrutiny at all at the pleadings phase. It could allow a plaintiff to begin a lawsuit merely by notifying a defendant "I'm suing you," and then rely on other pretrial processes to perform the notice-giving, process-facilitating, and merits-screening functions. Such a system would not be fundamentally irrational, but its desirability would depend on how that post-pleading process is structured and implemented.

312. *See supra* notes 177-80 and accompanying text.

313. To determine whether this quantum of notice is optimal would require considering more than just the notice function. Arguments based on notice alone can be quite slippery. One might even argue that the notice function justifies precisely the kind of strict pleading standard that many attribute to *Twombly* and *Iqbal*. The statement that a complaint must "give the defendant fair notice of what the plaintiff's claim is *and the grounds upon which it rests*," Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added), is not implausibly read as requiring the complaint to detail what evidentiary support the plaintiff has for the key allegations. *Cf.* Bone, *supra* note 10, at 900-09 (arguing that *Twombly*'s plausibility standard might be justified under a "process-based theory of fairness as reason-giving" that "treats notice as a matter of political morality not contingent on other elements of the system"). Conversely, even a complaint that would fail under this Article's more lenient standard (for example, one that alleges only that "the defendant violated the plaintiffs' rights under Title VII of the 1964 Civil Rights Act") still provides some notice, particularly given the defendant's ability to glean more information from the plaintiff through the disclosure and discovery process. *See, e.g.*, FED. R. CIV. P. 26(a) (initial disclosure requirements); FED. R. CIV. P. 26(b)(1) (allowing discovery into "any nonprivileged matter that is relevant to any party's claim"). Ultimately, then, other purposes of pleading—such as process-facilitation and merits-screening—may do more work in justifying any particular pleading standard as a policy matter.

314. *See* FED. R. CIV. P. 20.

315. *See* FED. R. CIV. P. 13(a).

permitted,[316] whether a third-party defendant may bring a claim against the plaintiff,[317] and whether a claim added by amendment relates back to the date of the original complaint.[318] Because these examples are all issues that must be addressed at the pleadings phase, it makes sense to require the complaint itself to identify the acts and events—the "transactions or occurrences"—underlying the plaintiff's claim. The plain-pleading paradigm also enables the complaint to shed light on the preclusive effect of whatever judgment is ultimately reached in the case.[319] Because res judicata typically bars future lawsuits that are based on the same events or transactions as an earlier one,[320] requiring the complaint to identify the underlying events helps determine the scope of preclusion.

By contrast, consider what would happen if courts were forced to accept allegations that were transactionally conclusory, in that they fail even to identify the acts or events underlying the plaintiff's claim. Imagine a complaint that alleges merely that "the defendant violated the plaintiffs' legal rights in a way that entitles the plaintiffs to relief." Or allegations that "the defendant violated the plaintiffs' rights under Title VII of the 1964 Civil Rights Act" or that "the defendant breached a duty owed to the plaintiffs under state law and this breach proximately caused damages to the plaintiffs." How could a court or litigant assess (for example) whether joinder of parties is appropriate or whether a counterclaim is compulsory, when the complaint fails to identify the acts or events upon which the plaintiffs' claims are based? The failure to plainly identify the underlying acts or events would also complicate the application of preclusion principles when a final judgment is reached.

Finally, the plain-pleading paradigm serves the purpose of enabling the court to undertake preliminary merits-screening. If a court were forced to accept as true even transactionally conclusory allegations—for example, that "the defendant violated the plaintiffs' rights under Title VII of the 1964 Civil Rights Act"—it would be impossible to determine whether the acts or events that the plaintiff hopes to prove would even establish a viable claim. The plaintiff may believe, for example, that Title VII protects him from being fired for wearing an obscenity-laden T-shirt to his job as a Walmart checkout clerk. If forced to identify the real-world event of his firing and the alleged reason for it, the court could easily determine that the complaint "fail[s] to state a claim

316. *See* FED. R. CIV. P. 13(g).

317. *See* FED. R. CIV. P. 14(a)(2)(D).

318. *See* FED. R. CIV. P. 15(c)(1).

319. *See, e.g.*, WRIGHT & MILLER, *supra* note 3, § 1202 (arguing that pleadings should "provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel"); Spencer, *supra* note 7, at 490 (arguing that pleadings should "identify the nature and contours of the dispute for purposes of . . . res judicata"). As Charles Clark wrote, the complaint ought to "sufficiently differentiate the situation of fact which is being litigated from all other situations to allow of the application of the doctrine of res judicata, whereby final adjudication of this particular case will end the controversy forever." Clark, *supra* note 177, at 456-57.

320. *See supra* note 286.

upon which relief can be granted"[321]—Title VII, after all, would forbid the firing only if it is "because of such individual's race, color, religion, sex, or national origin."[322] But if the allegation that the defendant violated his rights under Title VII must be accepted at the pleadings phase, that opportunity for preliminary merits-screening is lost.[323]

One should ask, of course, whether these same three purposes might also be served by imposing a stricter pleading standard, such as one that would require a complaint to contain evidentiary support for the allegations made therein. From a notice standpoint, one could argue that such information would serve the purpose of notifying the defendant of the evidentiary basis for the lawsuit against it.[324] One could also argue that requiring the plaintiff to identify evidentiary support is valuable for merits-screening purposes, because it could enable the court to inquire at the earliest possible stage whether the plaintiff has sufficient evidence to prevail on the merits.

This enhanced notice and screening, however, would significantly interfere with the third function of pleadings—to facilitate the adjudicative process. There is perhaps no greater affront to the process-facilitation value than preventing meritorious claims from ever seeing the light of day.[325] Yet for claims that depend on the discovery process to obtain supporting evidence, a standard that requires such evidence at the pleadings phase would do precisely that.[326] Moreover, requiring evidentiary support at the pleadings phase is of little benefit given the post-pleading pretrial process that the Rules set forth. Details about how a plaintiff plans to support its allegations are the domain of pretrial orders, disclosure requirements, and the discovery process.[327] To

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

322. 42 U.S.C. § 2000e-2(a)(1) (2006).

323. This is not to say that the transactional approach proposed here will perfectly weed out unsustainable legal theories at the pleadings phase. If the Form 11 plaintiff were relying on a legally incorrect view of what constitutes "negligent[]" driving (for example, that wearing a green shirt constituted negligence per se), that would not be revealed until the disclosure/discovery phase. *See* FED. R. CIV. P. Form 11 (deeming it sufficient to allege "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff").

324. *See supra* note 313; *cf.* Clark, *supra* note 177 ("[R]efer[ring] to the notice function of pleadings . . . . is a sound approach so far as it goes; but . . . . [i]t cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance.").

325. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 228 (2004) (arguing that "the system of pleading should not unduly interfere with decisions on the merits").

326. *See supra* notes 116-17 and accompanying text; *infra* Part V.B.

327. *See, e.g.*, FED. R. CIV. P. 16(c)(2) (authorizing the court to, among other things, "take appropriate action on . . . formulating and simplifying the issues . . . [and] identifying witnesses and documents"); FED. R. CIV. P. 26(a)(1) (requiring parties to provide "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses" and "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its

impose a strict pleading standard that prevents plaintiffs with potentially meritorious claims from reaching that phase would undermine rather than facilitate the adjudicative process set forth in the Federal Rules.

More fundamentally from a process-facilitation standpoint, to require the complaint to contain evidentiary support for its allegations may be conceptually unworkable. As described earlier, a complaint can never truly provide evidentiary support for the allegations contained therein, because even the most detailed, particularized allegations are *themselves* just allegations.[328] If courts take seriously the idea that all allegations are conclusory when they are not bolstered by evidentiary support, then *every* allegation will be deemed conclusory, because any allegation offered to add additional support is merely another allegation.

B. *Pleading Standards and Discovery Costs*

The previous Subpart does not discuss the reduction of discovery costs as a potential purpose of pleading standards. It is a hotly contested issue whether pleading standards should be tasked with performing that function. Discovery costs are, however, a crucial part of the debate over how strict or lenient federal pleading standards ought to be.[329] From the litigants' standpoint, access to discovery may present a zero-sum game. Stricter pleading standards help defendants at the expense of plaintiffs, and more lenient pleading standards help plaintiffs at the expense of defendants.[330] In this sense, the plain-pleading paradigm proposed in this Article is unlikely to please those who saw *Twombly* and *Iqbal* as an opportunity to tighten pleading standards significantly, which would facilitate the early dismissal of lawsuits and avoid the discovery burdens those lawsuits entail.[331]

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claims or defenses"); FED. R. CIV. P. 26(b)(1) (allowing discovery into "any nonprivileged matter that is relevant to any party's claim"); FED. R. CIV. P. 26(f)(2) (requiring parties to "consider the nature and basis of their claims and defenses" when conferring and developing a proposed discovery plan).

328. *See supra* notes 204-07 and accompanying text. Again, this is not an indictment of *all* pleading standards that require additional details or supporting evidence. Heightened pleading standards that are directed at discrete issues (such as the PSLRA, *see supra* note 35) can be sensibly applied; but fatal conceptual problems arise if one seeks to apply such a standard to *every* allegation in a complaint. *See supra* note 207.

329. *See supra* notes 113-22 and accompanying text.

330. As Professor Robert Bone framed the issue, a lenient pleading rule "reduces the risk of an erroneous denial of relief—a false negative—by making it easier for meritorious cases to be brought. But it also increases the risk of an erroneous grant of relief—a false positive—by making it easier for frivolous suits to be filed." Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 911 (1999) (citation omitted). A strict pleading rule, on the other hand, "reduces the risk of false positives by increasing the filing burden for frivolous suits, but it also increases the risk of false negatives by making filing harder in meritorious suits." *Id.*

331. Although it is beyond the scope of this Article, stricter pleading requirements

Discovery costs are a serious and legitimate concern, however. This Subpart offers a few observations on the relationship between pleading standards and discovery costs. Any attempt to justify stricter pleading standards on the basis that they avoid discovery costs will be fundamentally incomplete unless it considers (1) the benefits of discovery (and hence the costs of dismissing cases before discovery); (2) alternative measures—other than pleading standards—for mitigating discovery costs; and (3) the added costs that stricter pleading standards might impose on the pleadings phase.

As to the first point, access to the discovery process can allow a plaintiff to uncover evidence confirming that a case is, in fact, meritorious. For many kinds of claims, the information a plaintiff would need to satisfy a stricter pleading standard is in the hands or mind of the defendant and, therefore, can be meaningfully gathered only through the pretrial discovery process.[332] As discussed earlier, heightened pleading standards place such plaintiffs in the Catch-22 of needing court-supervised discovery to uncover the factual and evidentiary details that would be required to get past the pleadings phase *to* discovery.[333] The end result would be the dismissal of such claims before there has been any opportunity to confirm their merit.[334] To measure accurately the costs and benefits of stricter pleading standards, one must include the costs of thwarting such meritorious claims—costs that are suffered not only by the unsuccessful plaintiff but also by society at large, given that civil judgments promote deterrence more broadly.

The danger that stricter pleading standards will prevent meritorious claims from seeing the light of day makes it crucial to consider alternative ways to balance the costs and benefits of access to discovery.[335] One such alternative is

might also be applied to defendant's filings, such as answers or notices of removal. *See, e.g.*, Hoffman, *supra* note 10, at 1246 (recognizing "the possibility that judicial interpretations of pleading and removal could bear relevance to one another"). *But see* Romantine v. CH2M Hill Eng'r, Inc., No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009) (rejecting plaintiff's argument that the language of *Twombly* "requires that a defendant must set forth more than labels and conclusions in its list of defenses").

332. *See supra* notes 116-17 & 122 and accompanying text.

333. *See id.*

334. It is particularly troubling that such dismissals would occur before the defendant has been required to take a factual position on whether the plaintiff's allegations are true. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 572 (2007) (Stevens, J., dissenting) (criticizing the majority for dismissing the *Twombly* complaint "without so much as requiring [the defendants] to file an answer denying that they entered into any agreement"). This concern implicates more than just abstract fair play. A defendant who merely challenges the adequacy of a plaintiff's complaint via Rule 12(b)(6) makes neither "factual contentions" nor "denials of factual contentions" regarding the plaintiff's claim and, therefore, is not subject to Rule 11's obligations (and potential sanctions) regarding such factual issues. *See* FED. R. CIV. P. 11(b)(3), (4).

335. *See* Bone, *supra* note 10, at 876 ("[S]creening more aggressively at the front door by demanding more from the complaint is just one approach, with its own costs and benefits, and should be evaluated relative to other alternatives.").

for judges to take advantage of the tools that the Federal Rules already give them for managing the discovery process.[336] Such tools allow judges to restrict discovery where its costs are likely to exceed its benefits.[337] This more nuanced approach avoids the sledgehammer of dismissal at the pleadings phase, which denies *all* access to discovery, in favor of allowing courts to mitigate discovery's costs while preserving its potential benefits.

Those who favor stricter pleading standards respond that, in practice, courts are unwilling to adequately manage the discovery process.[338] Thus the dangers of abusive discovery remain. Defendants who cannot get a case dismissed on the pleadings have no choice but to endure costly discovery, and plaintiffs may opportunistically file meritless claims in the hopes of a nuisance settlement. The difficulty in obtaining appellate review of district-court discovery orders exacerbates this problem by allowing judges to evade correction when they fail to manage discovery adequately.[339]

This argument deserves careful consideration, but it has its share of problems. If a federal judge is willing to dismiss suspicious cases outright under a heightened pleading standard, he or she should be willing to take the more moderate step of imposing limits—perhaps even very strict limits—on discovery as the Rules explicitly allow.[340] Conversely, it is hard to imagine that a judge who would refuse to consider limitations on discovery despite a defendant's concerns about undue costs would vigorously dismiss claims under a strict pleading standard like the one many attribute to *Twombly* and *Iqbal*. And such a judge could just as easily evade higher-court scrutiny; the decision to deny a defendant's motion to dismiss a complaint is an interlocutory order that typically may not be appealed (if at all) until after a final judgment is reached.[341] Thus, the argument that strict pleading standards are needed because judges are failing to use the Federal Rules' discovery-management tools proves too much. For *any* legal standard to be effective, judges must faithfully apply it. Pleading and discovery-management principles are no different in this regard.[342]

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336. *See supra* note 123 and accompanying text.

337. *See supra* note 124 (quoting FED. R. CIV. P. 16(c)(2)(F) and FED. R. CIV. P. 26(b)(2)).

338. *See supra* note 125 and accompanying text.

339. *See* WRIGHT & MILLER, *supra* note 3, § 3914.23; *see also* Transcript of Oral Argument at 50, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015) [hereinafter *Iqbal* Oral Argument], *available at* http://supremecourtus.gov/oral_arguments/argument_transcripts/07-1015.pdf (comment of Justice Alito noting that discovery-management orders are "interlocutory discretionary decision[s] by the trial judge").

340. Admittedly, a judge who is motivated principally by a desire to reduce his or her workload (rather than by an assessment of the likely merits of a particular claim) might have a different preference ordering. Such a judge would be inclined to dismiss a case outright but, failing that, would be unlikely to expend time and energy managing discovery.

341. *See generally* WRIGHT & MILLER, *supra* note 3, § 3914.1.

342. *See Iqbal* Oral Argument, *supra* note 339, at 61 (comment of Justice Breyer

In any event, it is worth considering whether alternative procedural devices might encourage courts to take a more active role in managing discovery. One potential problem with the usual process by which parties seek, and courts consider, ex ante limitations on discovery is that it can operate too much in the abstract.[343] Rightly or wrongly, judges figure that they can always deal with objections to particular discovery requests on a case-by-case basis. But that attitude can lead discovery costs to spiral out of control. Unrestrained parties have an incentive to serve the broadest, most burdensome discovery requests they can, knowing that the initial formulation is just the "opening bid." The ultimate scope of discovery will be finalized through either negotiation with opposing counsel (in which case making broad initial requests gives the party more room to make concessions) or the intervention of a district or magistrate judge (who may "split the difference" and, in doing so, implicitly reward parties who make broad initial requests). The time and expense of litigating these discovery disputes only add to the costs.

A better process might be one that enables defendants to target particular issues in a complaint and have the court confront as a threshold matter the appropriate quantum of discovery to allow on each issue. One way to accomplish this under the current rules would be via Rule 12(d), which empowers defendants to present "matters outside the pleadings" when seeking to dismiss a complaint.[344] A defendant in a case like *Swierkiewicz*, for example, could present affidavits showing that the true motive for firing the plaintiff was legitimate and non-discriminatory. Rule 12(d) would then require the court to treat the defendant's motion as one for summary judgment under Rule 56 and to give all parties "a reasonable opportunity to present all the material that is pertinent to the motion."[345] Rule 12(d), therefore, spurs the court to consider how much discovery as to this particular issue is appropriate *before* allowing discovery to proceed more generally. If the evidence the plaintiff obtains during that first phase is insufficient, then that motion should

noting that the application of pleading requirements "and every other legal question" depend on judges faithfully implementing the relevant standard).

343. *See, e.g.*, FED. R. CIV. P. 16(c) (authorizing the court to issue orders regarding numerous pretrial matters including "controlling and scheduling discovery"); FED. R. CIV. P. 26(f) (obligating the parties to confer and develop a plan that sets forth the parties' views on how discovery should proceed before the initial scheduling conference with the court).

344. FED. R. CIV. P. 12(d).

345. *Id.*; *see also* FED. R. CIV. P. 56(f)(2) ("If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken."). Rule 12(d) currently gives judges discretion to refuse to consider matters outside the pleadings; if a judge "exclude[s]" such matters, then he or she is no longer obligated to treat the motion "as one for summary judgment under Rule 56." FED. R. CIV. P. 12(d). Rule 12(d) might be a more robust tool for mitigating discovery costs if appellate courts developed principles to cabin this discretion and thereby require trial judges in more cases to implement what is essentially a form of phased discovery in response to a Rule 12(d) motion.

be granted—all before an answer has been filed, but after a limited opportunity for the plaintiff to seek discovery on that particular issue.[346]

Finally, the argument that a stricter pleading standard is needed to control discovery costs overlooks the costs that heightened pleading standards can add to the pleadings phase itself. First, a stricter pleading standard can encourage costly, time-consuming litigation over pleading sufficiency. The perception that *Twombly* and *Iqbal* raised the bar for federal pleading standards seems to have had precisely this effect.[347] *Twombly* has been cited nearly 24,000 times in less than three years on the books, and *Iqbal* is being cited at a remarkable clip as well.[348] This result should come as no surprise. Because a complaint by definition contains only "allegations"—not evidentiary support for those allegations—it is hard to imagine a case where a defendant could *not* colorably argue that additional "enhancement" or "heft" is required.[349] There is very little downside for a defendant who files such a Rule 12(b)(6) motion, and the potential upside—immediate dismissal of the complaint—is huge.

This dynamic leads to a second problem. If required to bolster a complaint's allegations with evidentiary support, plaintiffs will be encouraged to pack the complaint full of "factual enhancement" in the hopes of satisfying that uncertain (and arguably unworkable) requirement. Federal courts have already expressed frustration with excessively lengthy complaints,[350] but one can hardly fault plaintiffs who are up against *Twombly* and *Iqbal* as they are conventionally understood. Yet the costs of requiring such information in the complaint are likely to far outweigh the benefits.[351] Although there may be

346. In this sense, the Rule 12(d) method parallels an idea that has been suggested for dealing with the Catch-22 that plaintiffs face under the heightened-pleading reading of *Twombly*. Some courts have considered whether to allow limited discovery before ruling on a *Twombly*-based 12(b)(6) motion in order to give the plaintiff an opportunity to discover the information that such a pleading standard would require. *See, e.g.*, *In re* Graphics Processing Units Antitrust Litig., No. C 06-07417 WHA, 2007 WL 2127577 (N.D. Cal. July 24, 2007); *see also* Malveaux, *supra* note 12, at 68 ("[T]he plausibility pleading standard may require that parties take some limited, preliminary discovery at the pleading stage . . . .").

347. *See* Hoffman, *supra* note 10, at 1222-23 (noting the frequency with which *Twombly* was cited during its first nine months and concluding that "it is not altogether inappropriate to assume defendants are now more regularly urging judges to intercept complaints at the pleading stage"); Spencer, *supra* note 10, at 11 (arguing that under *Twombly* "defendants will be emboldened to challenge the sufficiency of claims").

348. *See infra* app. tbls.1 & 2.

349. *See supra* notes 204-07 and accompanying text.

350. *See, e.g.*, Presidio Group, LLC v. GMAC Mortg., LLC, No. 08-05298 RBL, 2008 WL 2595675 (W.D. Wash. June 27, 2008) (dismissing plaintiff's 465-page complaint as violating Rule 8(a) and noting that "'[b]revity is the soul of wit.' [It] is also the soul of a pleading" (quoting WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2)).

351. Consider the complaint in *Twombly*. The plaintiffs alleged that an agreement to restrain competition existed, but they also included a separate paragraph stating:

> Richard Notebaert[,] . . . who currently serves as the Chief Executive Officer of Defendant Qwest, was quoted in a *Chicago Tribune* article as saying it would be fundamentally wrong to compete in the SBC/Ameritech territory, adding "it might be a good way to turn a quick

some value in revealing the kind of evidence that the plaintiff might use to prove its case, the disclosure/discovery process already obligates plaintiffs to disclose the evidence they intend to use to support their claims.[352] Forcing the plaintiff to cram such information into the complaint, therefore, seems unnecessary. It can also impose added costs on defendants. Assuming a complaint contains enough "enhancement" to survive a stricter pleading standard, each of those peripheral allegations must then be admitted or denied by the defendant in its answer.[353]

For these reasons, concern about the high costs of the federal discovery process is not by itself sufficient to justify stricter pleading standards as a policy matter. To be sure, discovery expense is one area that pleading standards can impact. But the countervailing considerations detailed here confirm that one should proceed with caution before letting the specter of discovery burdens and nuisance settlements wipe out more than a half-century of liberal pleading standards in federal court.[354]

CONCLUSION

The Supreme Court's recent decisions in *Twombly* and *Iqbal* have generated fundamental questions about federal pleading requirements. Because these decisions have emboldened defendants to seek dismissal of claims at the pleadings phase even more aggressively than before, finding adequate answers to these questions is crucial. This Article's solution reconciles prior authority, fits with the text of the Federal Rules, and accomplishes the purposes that pleadings ought to serve in the broader context of civil adjudication.

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dollar but that doesn't make it right."

Consolidated Amended Class Action Complaint, *supra* note 256, ¶ 42. The *Twombly* majority, of course, concluded that this allegation was not sufficient factual enhancement. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 568-69 & n.13 (2007). But assume for the moment that this sort of allegation, perhaps in combination with other "enhanc[ing]" snippets, might be enough to satisfy the conventional reading of *Twombly*/*Iqbal*. What is accomplished by requiring the complaint to contain such information? Not much. The operative fact for a § 1 Sherman Antitrust Act claim is whether an agreement to restrain competition existed, not whether a defendant's CEO made a comment like this to a newspaper.

352. *See supra* note 327.

353. *See* FED. R. CIV. P. 8(b)(1)(B). Using the example *supra* note 351, it is hard to see what is gained by requiring the defendant to admit or deny whether its CEO "*was quoted* in a *Chicago Tribune* article" as saying what the plaintiff alleges. Even if the defendant were to admit such an allegation, that would only establish what the article said, *not* what the CEO actually said or, more importantly, whether the CEO had in fact engaged in an illegal agreement with fellow telecommunications providers.

354. Even if courts adopt this Article's reading of *Twombly* and *Iqbal* (which would preserve the fairly lenient pre-*Twombly* pleading regime, albeit in a new doctrinal context) the argument that pleading standards must be tightened in order to mitigate discovery costs may simply shift to the federal rulemaking process, *see* 28 U.S.C. § 2072 (2006), or to Congress.

APPENDIX

The following chart lists the one hundred most-frequently cited Supreme Court decisions of all time, in terms of citations by federal courts and tribunals, according to the Shepard's citation service (as of March 17, 2010).[355]

Table 1: Most Frequently Cited by Federal Courts and Tribunals

Rank	Case	Federal Citing References
1	Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	126,661
2	Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	121,456
3	Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	59,238
4	Conley v. Gibson, 355 U.S. 41 (1957)	46,882
5	McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	37,137
6	Strickland v. Washington, 466 U.S. 668 (1984)	36,980
7	***Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)***	***23,872***
8	Haines v. Kerner, 404 U.S. 519 (1972)	23,735
9	Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)	23,238
10	Thomas v. Arn, 474 U.S. 140 (1985)	22,168
11	United States v. Booker, 543 U.S. 220 (2005)	21,700
12	Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)	20,647
13	Estelle v. Gamble, 429 U.S. 97 (1976)	18,288
14	Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	17,705
15	Neitzke v. Williams, 490 U.S. 319 (1989)	17,593
16	Scheuer v. Rhodes, 416 U.S. 232 (1974)	17,266
17	Williams v. Taylor, 529 U.S. 362 (2000)	17,116
18	Harlow v. Fitzgerald, 457 U.S. 800 (1982)	16,896
19	Slack v. McDaniel, 529 U.S. 473 (2000)	16,850
20	Richardson v. Perales, 402 U.S. 389 (1971)	16,818
21	Jackson v. Virginia, 443 U.S. 307 (1979)	14,822
22	Farmer v. Brennan, 511 U.S. 825 (1994)	14,300
23	Apprendi v. New Jersey, 530 U.S. 466 (2000)	13,918
24	Anders v. California, 386 U.S. 738 (1967)	13,746
25	Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	13,593

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26	United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	12,787
27	Hishon v. King & Spalding, 467 U.S. 69 (1984)	12,544
28	Coleman v. Thompson, 501 U.S. 722 (1991)	12,418
29	Miller-El v. Cockrell, 537 U.S. 322 (2003)	12,050
30	Brady v. Maryland, 373 U.S. 83 (1963)	11,747
31	Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)	11,725
32	Miranda v. Arizona, 384 U.S. 436 (1966)	11,697
33	Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)	10,930
34	Foman v. Davis, 371 U.S. 178 (1962)	10,624
35	Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)	10,249
36	Hensley v. Eckerhart, 461 U.S. 424 (1983)	10,050
37	Heck v. Humphrey, 512 U.S. 477 (1994)	9748
38	St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)	9738
39	United States v. Diebold, Inc., 369 U.S. 654 (1962)	9333
40	Anderson v. Creighton, 483 U.S. 635 (1987)	9070
41	Blakely v. Washington, 542 U.S. 296 (2004)	9017
42	Terry v. Ohio, 392 U.S. 1 (1968)	8956
43	Wolff v. McDonnell, 418 U.S. 539 (1974)	8880
44	Bd. of Regents v. Roth, 408 U.S. 564 (1972)	8674
45	Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)	8402
46	Murray v. Carrier, 477 U.S. 478 (1986)	8374
47	Saucier v. Katz, 533 U.S. 194 (2001)	8338
48	Estelle v. McGuire, 502 U.S. 62 (1991)	8305
49	Welch v. Helvering, 290 U.S. 111 (1933)	8117
50	Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941)	8081
51	Rose v. Lundy, 455 U.S. 509 (1982)	8028
52	United States v. U.S. Gypsum Co., 333 U.S. 364 (1948)	7916
53	West v. Atkins, 487 U.S. 42 (1988)	7742
54	Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993)	7735
55	Denton v. Hernandez, 504 U.S. 25 (1992)	7709
56	Graham v. Connor, 490 U.S. 386 (1989)	7557
57	Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)	7527
58	Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	7327
59	Lindh v. Murphy, 521 U.S. 320 (1997)	7284
60	Sandin v. Conner, 515 U.S. 472 (1995)	7265
61	Parratt v. Taylor, 451 U.S. 527 (1981)	7257

95	Schlup v. Delo, 513 U.S. 298 (1995)	5454
96	Chapman v. California, 386 U.S. 18 (1967)	5416
97	Hill v. Lockhart, 474 U.S. 52 (1985)	5409
98	United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	5328
99	Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	5306
100	Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)	5294

The following chart ranks Supreme Court decisions in terms of their rate of new citing decisions by federal courts and tribunals. It measures the period from June 30, 2009, through March 17, 2010.

Table 2: Fastest Rates of Citations By Federal Courts and Tribunals

Rank	Case	Fed. Citation Rate (per month)
1	***Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)***	***769***
2	Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	757
3	Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	737
4	***Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)***	***512***
5	Thomas v. Arn, 474 U.S. 140 (1985)	448
6	Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	385
7	Strickland v. Washington, 466 U.S. 668 (1984)	327
8	Haines v. Kerner, 404 U.S. 519 (1972)	272
9	Williams v. Taylor, 529 U.S. 362 (2000)	267
10	Slack v. McDaniel, 529 U.S. 473 (2000)	229