

Pleading and Access to Civil Justice: A Response to *Twiqbal* Apologists

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ABSTRACT

Professor Stephen Yeazell once wrote, “A society based on the rule of law fails in one of its central premises if substantial parts of the population lack access to law enforcement institutions.” One apparent threat to access to justice in recent years has been the erosion of notice pleading in the federal courts in favor of a plausibility-pleading system that screens out potentially meritorious claims that fail to offer sufficient specificity and support at the pleading stage. But some have questioned whether this purported threat is more perceived than real. Indeed, this doctrinal shift has been defended in several ways that each suggest—in their own way—that the critical response to *Twombly* and *Iqbal* may be much ado about little or nothing.

These apologies for the doctrinal shift, if you will, generally fall into three categories. The first consists of arguments suggesting that the standard has not really changed at all, which I will refer to as the “consistency” defense. The second group concedes that there has been a change but argues that the change has not had or will not have a substantial impact; I will call this the “inconsequentiality” defense. The final category contains those arguments asserting that the changes are consequential but in a good way, meaning that the strengthening of pleading standards was warranted and will be beneficial to the litigation system. I refer to this type of argument as the “efficiency” defense.

This essay responds to each of these apologies, finding that the consistency defense is doctrinally unsound, that the inconsequentiality defense is doubtful (if not counterfactual), and that the efficiency defense is misguided, given the patent overinclusiveness and subjectivity of the plausibility doctrine.

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*Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 *LOY. L.A. L. REV.* 691, 691 (2006).

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INTRODUCTION

[T]he lawsuit is to vindicate rules of substantive law, not rules of pleading, and the latter must always yield to the former.

—Charles Clark¹

When the U.S. Supreme Court decided *Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*,³ there was quite an uproar.⁴ Not only did the Court sidestep the established rule amendment process to produce a novel rule of pleading⁵ (overturning *Conley v. Gibson*⁶ in the process), but the rule it announced was particularly pernicious for its overinclusiveness,⁷ subjectivity,⁸ and disruptiveness.⁹ Although many commentators have remarked on and studied the effects of these two cases

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1. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 60 (2d ed. 1947).
 2. 550 U.S. 544 (2007).
 3. 556 U.S. 662 (2009).
 4. See, e.g., Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) (“*Ashcroft v. Iqbal* is an embarrassment to the American Judicial System in which a majority of the Supreme Court chose to reject the rule of law.” (footnote omitted)); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 15 & n.52, 16 (2010) (citing examples of those observers who “believe these two cases represent a major departure from the Court’s established pleading jurisprudence”).
 5. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C.L. REV. 431, 453–54 (2008) (criticizing the Court for circumventing the formal rule amendment process, which it has previously suggested was the more appropriate means of redressing concerns with the general pleading standard set forth in Rule 8(a)(2)); see also Crawford-El v. Britton, 523 U.S. 574, 595 (1998) (“To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”).
 6. 355 U.S. 41 (1957).
 7. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 24 (2009) (“It seems, then, that plausibility pleading is overinclusive in that it potentially keeps valid claims from entering the system.”).
 8. See *id.* at 9–11 (describing how the *Twombly* doctrine’s use of imprecise “[c]oncepts such as ‘more than labels and conclusions,’ ‘above the speculative level,’ ‘plausible grounds to infer,’ ‘enough factual matter to suggest,’ ‘reasonable expectation,’ and ‘enough heft’” render the doctrine “too subjective to yield predictable and consistent results across cases”).
 9. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (“The headline need no longer equivocate after two recent U.S. Supreme Court cases: *Pleading Left Bleeding*. The Court has revolutionized the law on pleading. Litigators (and procedure scholars) have taken note of the Court’s fresh pair of decisions, the suggestive *Bell Atlantic Corp. v. Twombly* and the definitive *Ashcroft v. Iqbal*. But these decisions do more than redefine pleading rules. By inventing a new and foggy test for the threshold stage of every lawsuit, they have destabilized the entire system of civil litigation.” (footnotes omitted)).

from critical perspectives, others have responded from less critical or even supportive perspectives. These pro-*Twombly*/*Iqbal* views generally fall into one of three categories.

The first group of supporters maintains that the *Twombly* and *Iqbal* decisions did not fundamentally change pleading doctrine but rather were consistent with the doctrine as traditionally understood or intended.¹⁰ Thus, in their view, *Twombly* and *Iqbal* properly articulated the level of specificity that Rule 8(a) has always required (or intended) of claimants and the two cases (or at least *Twombly*)¹¹ were rightly decided.¹² I will refer to this perspective as the *consistency* defense.

A second set of responses has focused less on the nature of any doctrinal change and more on the impact of these two cases, concluding that the impact is negligible if not nonexistent. This perspective has been buttressed by research on motion to dismiss outcomes pre- and post-*Twombly* and *Iqbal* tending to show little-to-no increase in grant rates in the aggregate.¹³ I will label this position the *inconsequentiality* defense.

Finally, there are those who acknowledge that the Supreme Court's decisions have changed pleading doctrine but argue that the change is for the better. Under this view, the Supreme Court was right to identify discovery expense and

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10. See, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) (“[T]he Supreme Court’s decision in *Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose.”); *id.* at 890 (“[I]t is wrong to condemn *Twombly*’s plausibility standard for being inconsistent with the language of Rule 8(a)(2) or the intent of the 1938 Advisory Committee.”).
 11. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 851 (2010) (“A clear understanding of the differences between *Iqbal* and *Twombly* makes it possible to consider *Twombly*’s virtues without the taint of *Iqbal*’s vices.”); Luke Meier, *Why Twombly Is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709 (2012) (defending *Twombly* while criticizing *Iqbal*). Justice Souter can certainly be described as someone who would defend *Twombly* but criticize *Iqbal*, since this is precisely what he did by authoring the *Twombly* opinion but then filing a dissent in *Iqbal*. See *Ashcroft v. Iqbal*, 556 U.S. 662, 695–99 (2009) (Souter, J., dissenting) (describing his disagreement with the *Iqbal* majority but affirming his commitment to *Twombly*).
 12. See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1299 (2010) (“[P]roperly understood, the post-*Iqbal* pleading framework is not fundamentally in conflict with notice pleading . . .”).
 13. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES vii (2011) [hereinafter 2011 FJC STUDY], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/motioniqbal.pdf> (“There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case.” (citation omitted)).

abuse as real problems arising from loose pleading standards; without the screening that plausibility pleading provides, plaintiffs with unsubstantiated claims will be able to access costly discovery, which could potentially extort undeserved settlements from defendants.¹⁴ Further, this group sees *Twombly* and *Iqbal* as increasing efficiency in the system, by permitting the elimination of invalid claims at the outset before judicial resources and litigant time and expense are taxed.¹⁵ I will refer to this last position as the *efficiency* defense.¹⁶

This essay addresses these *Twombly* and *Iqbal* (or “*Twiqbal*”) apologies, concluding that each has its flaws. The adherents to the consistency defense simply misunderstand (or misstate) the status quo ante. No plausible (pun intended) view of our past under Rule 8(a) as originally written and intended, or as subsequently interpreted and applied, could conclude that *Twombly* and *Iqbal* were in sync with the Rule 8(a) we all came to know and love (or loathe). The inconsequentiality perspective is undercut by the unsoundness of the evaluative methods on which it is based, focusing on facile pre- and post-*Twiqbal* grant rate comparisons without taking into account the larger picture involving litigant behavioral change and how revision of the pleading standard affects the assertion of claims and the incidence of dismissal challenges. Finally, the efficiency view is misguided because (1) it is based on the positing of a problem—discovery abuse—that has not been confirmed to exist, and (2) the remedy that *Twombly* and *Iqbal* have delivered to address the ailments that efficiency proponents lament is poorly calibrated for the task, being grossly subjective and overinclusive in ways that ensnare meritorious claims in their grasp. Each of these responses to *Twiqbal* apologists will be fleshed out more below.

I. THE CONSISTENCY DEFENSE

The consistency defense of *Twombly* and *Iqbal* has three variants. The first holds that *Twombly* and *Iqbal* track how lower courts were already interpreting

14. The Court itself expressed this perspective when it wrote, “[t]he requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with ‘a largely groundless claim’ from ‘tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (second alteration in original) (citation omitted).

15. Adam Steinman helpfully cites to some of the staunch defenders of *Iqbal* from this perspective in a recent article on post-*Iqbal* pleading doctrine. See Steinman, *supra* note 12, at 1297 n.13.

16. Other groups responding to *Twombly* and *Iqbal* in a sympathetic way could include those who feel it is too soon to evaluate the cases or those who believe that one or both of the cases reached the right result but unnecessarily butchered the doctrine in the process.

and applying Rule 8(a) and thus are consistent with the reality of pleading on the ground.¹⁷ This variant is the easiest to address because it is largely beside the point. The issue is whether the Supreme Court revised pleading doctrine in *Twombly* and *Iqbal*. The mere fact that some lower courts had already moved in such a direction does not speak to where the Supreme Court stood on the matter. Certainly, if there were circuits that could fairly be described as imposing a plausibility pleading standard prior to *Twombly*, then life in those circuits may not have changed radically. But again, the question is whether plausibility pleading is a revision to the Supreme Court's understanding of the requisites of Rule 8(a)(2); no amount of circuit court prescience in moving to such an approach beforehand can supplant the need to address that question directly. To the extent that *Twiqbal* defenders hold that the previous embrace of heightened pleading by lower courts will mitigate the impact of the *Twombly* and *Iqbal* decisions, that point will be addressed in Part II below.

The second version of the consistency defense argues that nothing has changed beyond the language we use to describe the pleading standard.¹⁸ The Court itself included rhetoric suggestive of this position in the *Twombly* and *Iqbal* opinions when it wrote, “[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”¹⁹ However, elsewhere in its opinion the Court confirmed that a meaningful change of some kind had come. For starters, it “retired” the “no set of facts” standard of *Conley v. Gibson*, which had previously held 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

17. See, e.g., Charles B. Campbell, *A “Plausible” Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 2 (2008) (suggesting the *Twombly*'s plausibility showing is consistent with the standard already used in more than half the circuits, that “a complaint . . . contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory” (quoting *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed sub nom.* Weyerhaeuser Co. v. Lyman Lamb Co., 462 U.S. 1125 (1983) (internal quotation marks omitted))).

18. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 484–85 (2010) (“Courts have long held that legal conclusions need not be accepted as true on 12(b)(6) motions, have long insisted that pleaders are not entitled to unreasonable factual inferences, and have long treated ‘legal conclusions,’ ‘unwarranted deductions,’ ‘unwarranted inferences,’ ‘unsupported conclusions,’ and ‘sweeping legal conclusions cast in the form of factual allegations’ as ‘more or less synonymous’ terms. So understood, *Twombly*'s insistence that the inference of conspiracy be ‘plausible’ is equivalent to the traditional insistence that an inference be ‘reasonable.’” (footnote omitted)).

19. *Twombly*, 550 U.S. at 570.

to relief.”²⁰ That was no small thing, given how that standard was ensconced in pleading doctrine.²¹ Were it the case that the Court was not revising the doctrine in a significant way, there would be no need to abrogate the *Conley* approach and supplant it with plausibility. Next, the standard the Court announced—plausibility—had never before been articulated in the Rule 8(a) context; the requirement of a statement showing “plausible” entitlement to relief is undeniably an innovation as much as it was when the concept was inserted into the summary judgment analysis.²² But perhaps most telling is the Court’s articulation of its motivation for the plausibility interpretation—the forestalling of discovery abuse that the *Conley* approach would (in its view) continue to facilitate.²³ Clearly, if *Twombly* simply reflected a change in terminology, the Court would not have needed to refer to these concerns in support of its imposition of the plausibility requirement. The lower courts are certainly acknowledging a change;²⁴ why not the Court? One can only speculate, but conceding a wholesale revision of the meaning of Rule 8(a) and what it requires would run embarrassingly counter to the Court’s own prior unequivocal admonition that such judicial amendment of a rule would be an improper circumvention of the Rules Enabling Act process.²⁵

The third variation of the consistency defense argues that although the Court was changing the prevailing understanding of the general pleading stan-

20. *Id.* at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

21. See Spencer, *supra* note 5, at 436–39 (describing the Court’s unwavering support for the *Conley* decision over a fifty-year period).

22. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986) (“[T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a ‘genuine issue for trial’ exists within the meaning of Rule 56(e).”).

23. *Twombly*, 550 U.S. at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, 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’ to support a § 1 claim.” (second alteration in original) (internal quotation marks omitted)).

24. See, e.g., *Giarratano v. Johnson*, 521 F.3d 298, 304 n.3 (4th Cir. 2008) (“[T]he *Twombly* standard is even more favorable to dismissal of a complaint.”); *Geller v. Von Hagens*, No. 8:10-CIV-1688-EAK-AEP, 2010 WL 4867540, at *2 (M.D. Fla. Nov. 23, 2010) (“At the outset it should be noted that *Iqbal* and *Twombly* significantly changed the pleading standard required previously.”).

25. See *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (“Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002).

dard that had developed over time, it was being true to the original meaning of Rule 8(a), and the plausibility interpretation is wholly consistent with the language and the spirit of Rule 8(a).²⁶ Under this view, Rule 8(a) was written to require a “showing” of “entitlement to relief”—saying nothing of notice—and jurists around the time of its adoption and for years thereafter maintained that specific rather than overly liberal pleading was required under the Rule.²⁷ Two assumptions seem built into this perspective. The first is that the status quo prior to *Twombly* was a pure notice pleading regime in which one could get into court on the barest of allegations;²⁸ the second is that plausibility pleading requires only the offering of a factual narrative that, if assumed true, would entitle the pleader to relief.²⁹ In other words, this iteration of the consistency position requires that pre-*Twombly* pleading doctrine be caricatured into a straw man not reflective of what pleading doctrine really entailed and that post-*Twombly* pleading doctrine be redefined into something less than it truly is—both counterfactual assumptions. No one seriously believed prior to *Twombly* that one could get into court with a bare allegation naming the parties and baldly asserting harm.³⁰ Further, *Twombly*—supplemented by *Iqbal*—can hardly be minimized to having wrought only the need for a factual narrative showing entitlement to relief. Such an

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26. See Bone, *supra* note 10, at 890 (“[I]t is wrong to condemn *Twombly*’s plausibility standard for being inconsistent with the language of Rule 8(a)(2) or the intent of the 1938 Advisory Committee.”); Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. 1053, 1055 (2009) (“[I]t is a decision that is consistent with the text of Rule 8, giving effect to language that in the past had often lain dormant.”).
 27. Bone, *supra* note 10, at 892 (“[Rule 8(a)(2)] does not refer to notice pleading explicitly. . . . Moreover, not everyone agreed that the federal standard should be very liberal notice pleading. . . . [J]urists and politicians sharply divided on the pleading issue, some insisting that specific pleading was essential to properly framing the lawsuit and rendering it manageable.”).
 28. This assumption was apparent in both of the Supreme Court’s decisions. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[T]he pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”); *Twombly*, 550 U.S. at 561 (“On such a focused and literal reading of *Conley*’s ‘no set of facts,’ 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.” (alteration in original)).
 29. Bone, *supra* note 10, at 893 (“What is clear is that the Committee intended to reject the code version of fact pleading and *Twombly*’s pleading standard is a far cry from that. The *Twombly* Court does not insist that every fact essential to liability be alleged clearly and precisely, nor does it insist that the complaint contain only allegations of ultimate fact rather than legal conclusions or evidence.”).
 30. See, e.g., FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 69 (Edward H. Hammond ed., 1939) (“If you were to say, even under these rules, ‘I am suing “X” because he caused me injury by negligence,’ I would say that that is more general than is permitted by these rules.” (remarks of Charles Clark)).

understatement cannot be squared with the Court's insistence that plausibility requires that liability be a more likely explanation than lawful alternatives³¹ and that conclusory allegations be disregarded without any clear explanation of how one might so label allegations in a consistent and principled manner,³² notwithstanding the purported endurance of the assumption-of-truth principle.³³ Add in the Court's direction that judges are now to use their "judicial experience and common sense" to assess the plausibility of allegations in a complaint,³⁴ and you have the makings of a doctrine that not one of the drafters of Rule 8 would recognize as their own creation.

Certainly, it is true that—as some argue—the concept of "notice pleading" itself is not found in Rule 8(a) but rather was suggested in *Conley v. Gibson*, a Supreme Court decision interpreting Rule 8: "[Rule 8(a)(2)] does not refer to notice pleading explicitly. The term 'notice pleading' was in common use at the time to refer to the most liberal pleading standard, so if notice pleading were intended, one might have expected the text of the Rule or the Committee Note to say so."³⁵ Thus, the argument goes, the Supreme Court was not only within its rights to abandon the concept, but the concept itself has no claim to representing the original intent of the Rule.³⁶ Although it is correct to say that Rule 8 does not mention notice pleading, the term is merely shorthand for what the drafters intended the Rule to accomplish in contradistinction to the functions of pleading under prior regimes. There is no indication that Rule 8 was intended to serve as a screening mechanism; original rules committee reporter Charles Clark expressly

31. *Twombly*, 550 U.S. at 557 ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.")

32. *Iqbal*, 556 U.S. at 699 (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.")

33. A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 192 (2010) ("*Iqbal* is a clear challenge to the continuing vitality of the assumption-of-truth rule given the Court's poorly explained rejection of what were undeniably allegations that were non-conclusory and factual in nature.")

34. *Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.")

35. Bone, *supra* note 10, at 892; *id.* at 893 ("Rule 8(a) came to stand clearly for notice pleading mainly through judicial interpretations of the Rule.")

36. *Id.* at 893 ("If notice pleading is best understood as a judicial interpretation of Rule 8(a)(2), then it is hardly illegitimate for the Court to revisit this earlier interpretation and qualify or revise it.")

disclaimed such a purpose as inappropriate³⁷ and indicated that other rules were designed to fulfill that function.³⁸ Initiating the case and informing one's opponent of the nature of the purported controversy in a manner sufficient to form a response—a notification function—is what the concept of notice pleading describes.³⁹ The more important point, however, is not whether notice pleading is the proper label for what Rule 8 requires but rather whether the Court post-*Twombly* and *Iqbal* is requiring of a complaint more than what Rule 8 originally required. The answer to that question is clearly yes. Distinguishing between factual and legal allegations and assessing the plausibility of a set of allegations in light of one's "judicial experience and common sense" find their heritage—if

37. Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46–47 (1957) ("I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally and antitrust cases in particular. Much time and expense, waste motion and injustice have gone into the attempt, but experience is wholly clear that such quickie justice always breaks down . . .").

38. Charles E. Clark, *Simplified Pleading,* 2 F.R.D. 456, 467 (1943) ("If a claim or defense is legally stated, then the matter of particularization should be foregone. The parties are protected by discovery, pre-trial, and summary judgment."). The Supreme Court itself has shared this view:

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513–14 (2002) (alterations in original) (citation omitted).

39. Clark described "the notice function of pleading[]" as follows:

[Notice] cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance. The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case. Thus it serves the purposes referred to above of routing the case through proper court channels for the choice of jury or other form of trial and the like, and, ultimately, for the application of *res judicata* to the final judgment rendered.

Clark, *supra* note 38, at 460–61.

anywhere—in pleading under the codes,⁴⁰ not in Rule 8’s language or intended meaning.

Even if the original drafters were open to the concept of heightened pleading as a means of merits screening, they clearly did not infuse Rule 8(a) with that purpose; Rule 9(b) was the vehicle through which they imposed particularized pleading.⁴¹ Thus, as the Court itself has acknowledged, by singling out fraud and mistake allegations for particularized pleading, the drafters clearly indicated that such pleading was not expected elsewhere.⁴² To now claim that generalizing heightened pleading across all claim types is consistent with Rule 8(a)(2) thus makes little sense. In short, although the drafters, if resurrected, might consent to a reform such as the one that *Twombly* and *Iqbal* have imposed as a proper and pragmatic response to the realities of modern litigation, that in no way means they would endorse the notion that the words they placed within Rule 8(a) meant such things all along. Procedural rules “should be continually changed and improved,”⁴³ but through the established process for amending the Rules formally.⁴⁴

II. THE INCONSEQUENTIALITY DEFENSE

A second theme among apologists is that the effects of the revision to pleading standards ushered in by *Twombly* and *Iqbal* have been negligible, meaning that concern over the change is much ado about little or nothing. Here again we confront multiple variants of this defense.

40. Code pleading refers to the procedural regime in state courts beginning in the mid-nineteenth century and was the successor to common law pleading. See CLARK, *supra* note 1, at 21–31. Code pleading was exemplified by the Field Code, N.Y. CODE PROC. (1848). See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

41. FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

42. On this point, the Court wrote as follows:

“[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*.” Just as Rule 9(b) makes no mention of municipal liability . . . neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Swierkiewicz, 534 U.S. at 513 (first alteration in original) (citation omitted).

43. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 304 (1938).

44. *Swierkiewicz*, 534 U.S. at 514–15 (“Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’” (citation omitted)).

A. Inconsequentiality Version 1: Aligning Doctrinal Change With Preexisting Lower Court Heightened Pleading Approaches Means That Impact Will Be Minimal

The first version is the claim that *Twombly* and *Iqbal* are in line with what lower courts were doing already,⁴⁵ making change at the Supreme Court level inconsequential for most litigants. As an initial matter, there are legitimacy concerns about how the Court made this change that are overlooked by this version of the inconsequentiality defense. Although it is certainly true that lower courts had continually imposed heightened pleading for some time in certain types of cases,⁴⁶ the Supreme Court had rebuffed these efforts and indicated their impropriety with a unanimous voice.⁴⁷ For the Court now to acquiesce to lower court disobedience in this area simply rewards their insubordination. Seeing what happened in *Twombly*, lower courts may be encouraged to persist in delinquent interpretations with the hope that the Court will one day follow their lead as it did in that case. More importantly, if trying to rewrite Rule 8(a) was lawlessness when done by the lower courts—as the Supreme Court said it was—then it is no more legitimate at the hands of the Court itself, notwithstanding its authority over the rule promulgation process.⁴⁸ The rulemaking process exists for a reason, and the Court should adhere to it in order to give notice of an impending

45. Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1622 (2012) (“*Twombly* and *Iqbal* may not be nearly as revolutionary as first meets the eye; as a practical matter, lower federal courts long ago elevated pleading standards in the face of the exponential increases in discovery costs faced by corporate defendants.”).

46. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (“Notwithstanding its foundation in the Federal Rules and repeated Supreme Court imprimatur, notice pleading is a myth. From antitrust to environmental litigation, conspiracy to copyright, substance specific areas of law are riddled with requirements of particularized fact-based pleading. To be sure, federal courts recite the mantra of notice pleading with amazing regularity. However, their rhetoric does not match the reality of federal pleading practice.” (footnote omitted)).

47. See *Swierkiewicz*, 534 U.S. at 512 (holding, by a unanimous opinion, that “imposing the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)”; *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (“We think that it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules.”)).

48. Professor Fitzpatrick makes this point, suggesting that the Court’s authority to approve or reject amendments to the Rules means that the Court was not usurping authority in any meaningful way. Fitzpatrick, *supra* note 45, at 1636 n.92 (“[N]othing prevents the political branches from overruling *Twombly* and *Iqbal* now; thus, to the extent *Twombly* and *Iqbal* usurped some power of the political branches, it was a relatively minor one: the power to overrule a change before (rather than merely after) the change takes effect.”).

change, enable commenters and empirics to influence the change, and permit experts to weigh in on how the proposed change might affect the system as a whole, all points that Professors Stephen Yeazell and Kevin Clermont have made previously.⁴⁹ Plus, the amendment route is more honest, because it confesses that a change is taking place, something the Court has yet to acknowledge respecting its *Twigg* jurisprudence.

Further, endorsing plausibility pleading at the Supreme Court level has been disruptive to the Federal Rules system because Rule 8(a) and its previous interpretation were part of a carefully calibrated system of rules designed to address the concerns that lower courts and now the Supreme Court have smuggled into the pleading phase. Rule 8(e) calls for construing pleadings to do justice,⁵⁰ Rule 9(b) calls for the “general[.]” pleading of allegations of malice, intent, knowledge, and conditions of the mind,⁵¹ Rule 11(b)(3) contemplates and permits allegations that lack factual support to be made if so labeled and if discovery is likely to fill in the gaps,⁵² Rule 12(e) permits a motion for a more definite statement when the statement of the claim is insufficiently precise to provide the requisite notice that would permit the defendant to form a response,⁵³ and Rule 84 approves of a set of forms that indicate factual specificity is not required to support legal allegations such as a “negligent” collision.⁵⁴ Indeed, then-Justice Rehnquist cited the existence of notice pleading as buttressing and necessitating his reinterpretation of the Rule 56 summary judgment standard in *Celotex*.⁵⁵ *Twombly* and *Iqbal* destabilized this system by creating a dissonance

49. Clermont & Yeazell, *supra* note 9, at 850 (“[B]efore discarding the pleading system that has been in place for many years, we ought to discuss its virtues and failures soberly and with the relevant information before us. The rulemaking bodies should have hosted that discussion. *Twombly* and *Iqbal* short-circuited any such discussion. These cases worked their reform by a process—adjudication—that is hardly the preferred path to design change.”).

50. FED. R. CIV. P. 8(e). Formerly, the rule required that courts do “substantial” justice; this word was eliminated during the 2007 restyling of the Rules. FED. R. CIV. P. 8(e) (2006) (repealed 2007).

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

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

53. FED. R. CIV. P. 12(e).

54. FED. R. CIV. P. 84; FED. R. CIV. P. Form 11.

55. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Id. at 327.

between Rule 8(a)'s new meaning and other rules continuing to support a liberal pleading regime. This tension will have to be resolved through litigation or through efforts by the rulemakers to amend the Rules to eliminate the dissonance.⁵⁶

More to the point, however, this iteration of the inconsequentiality defense is flawed because although lower courts may have been imposing heightened pleading in certain cases, they were not doing it in all cases and they were not doing it the way that *Twombly* and *Iqbal* now require. Heightened pleading was restricted to certain “disfavored” actions, including civil rights, employment discrimination, antitrust, and RICO claims.⁵⁷ As *Iqbal* made clear, *Twombly*'s plausibility standard applies to all cases.⁵⁸ Indeed, there are lower courts that are applying the *Twiqbal* standard to the pleading of affirmative defenses.⁵⁹ Further, no lower court had gone beyond requiring fact pleading⁶⁰ toward the monstrosity that is plausibility pleading. Under *Twombly* and *Iqbal*, judges are to use their experience and their common sense to determine whether a claim is “plausible,” after setting aside allegations deemed conclusory according to some undefined

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56. For example, at its November 2012 meeting, the Advisory Committee on Civil Rules had “Rule 84: Proposal to Abrogate” on its agenda, citing the tension between the official forms and the *Twombly* and *Iqbal* decisions. ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 7, 407 (2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf>.
57. Christopher M. Fairman helpfully reviewed this phenomenon in *Heightened Pleading*, 81 TEX. L. REV. 551 (2002). Early in that piece, footnote 6 lists a few examples of types of actions that have been held to require heightened pleading standards: *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995) (qui tam); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (antitrust); *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 900 (D. Mass. 1991) (CERCLA); *North Jersey Secretarial School, Inc. v. McKiernan*, 713 F. Supp. 577, 584 (S.D.N.Y. 1989) (conspiracy); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1303 (D. Colo. 1984) (RICO); *Cimijotti v. Paulsen*, 219 F. Supp. 621, 622 (N.D. Iowa 1963) (defamation). *Id.* at 551 n.6.
58. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’ . . .”).
59. See, e.g., *Smithville 169 v. Citizens Bank & Trust Co.*, No. 4:11-CV-0872-DGK, 2012 WL 13677, at *1 (W.D. Mo. Jan. 4, 2012) (“This Court, like a majority of district courts, has held that the *Iqbal* standard applies to affirmative defenses.”); *Burns v. Dodeka, LLC*, No. 4:09-CV-19-BJ, 2010 WL 1903987, at *1 (N.D. Tex. May 11, 2010) (“[T]he Court concludes the defendant’s affirmative defenses of proximate cause and failure to mitigate are wholly conclusory and fail to plead any facts that demonstrate the plausibility of such defenses as required by *Bell Atlantic Corp. v. Twombly* and its progeny.” (citation omitted)).
60. See, e.g., *McKiernan*, 713 F. Supp. at 584 (“[T]he complaint fails to allege facts which show injury to competition, as distinct from injury to a competitor. No violation of Section 1 of the Sherman Act is possible absent proof of anti-competitive effect beyond the injury to plaintiffs, and facts must be pleaded from which such effect can be inferred.” (quoting *Jarmatt Trucking Leasing Corp. v. Brooklyn Pie Co.*, 525 F. Supp. 749, 750 (E.D.N.Y. 1981))).

standard.⁶¹ This level of subjectivity was foreign to the pre-*Twombly* heightened pleading approaches and will yield a level of unpredictability that assures inconsistent results while encouraging increased motion practice as more defendants attempt to obtain a dismissal under these ill-defined standards.⁶² Such a result was borne out by the Federal Judicial Center's (FJC's) recent motion to dismiss study, which found a general increase since *Twombly* and *Iqbal* in the incidence of filing motions to dismiss for failure to state a claim.⁶³

A district court case decided after *Iqbal* illustrates this point. *Branham v. Dolgencorp, Inc.*⁶⁴ was a slip-and-fall case removed from Virginia state court to the U.S. District Court for the Western District of Virginia. The plaintiff alleged in her complaint that she "fell due to the negligence of the Defendants . . . who negligently failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn the Plaintiff of the wet floor."⁶⁵ The defendant moved to dismiss the complaint for failure to state a claim and the court granted the motion.⁶⁶ In doing so, the court wrote:

In this case, the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred. Without such allegations, the Plaintiff cannot show that she has a "right to relief above the speculative level." While consistent with the possibility of the Defendant's liability, the Plaintiff's conclusory allegations that the Defendant was negligent because there was liquid on the floor [sic], but that the Defendant failed to remove the liquid or warn her of its presence are insufficient to state a plausible claim for relief.⁶⁷

Two things are clear. First, prior to *Twombly*, not one single court would have treated this plaintiff's complaint as insufficient under the *Conley* inter-

61. *Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

62. This point has been suggested by Professors Yeazell and Clermont: "In merely describing the Supreme Court's new test, we all but established that its meaning is very unclear. At a minimum, the foggy mess warns that any defendant's lawyer . . . commits legal malpractice if he or she fails to move to dismiss with liberal citations to *Twombly* and *Iqbal*." Clermont & Yeazell, *supra* note 9, at 840.

63. 2011 FJC STUDY, *supra* note 13, at vii ("There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim . . .").

64. No. 6:09-CV-00037, 2009 WL 2604447 (W.D. Va. Aug. 24, 2009).

65. The entirety of the plaintiff's complaint is reproduced in the Appendix.

66. *Branham*, 2009 WL 2604447, at *3.

67. *Id.* at *2 (citations omitted).

pretation of Rule 8(a). Second, even courts that had embraced heightened pleading previously would not have considered applying such a standard to a basic slip-and-fall negligence case. To the extent more stringent pleading now permeates across all case types, such is a change that will shift the pleading landscape among the lower courts beyond where they stood before *Twombly*.

B. Inconsequentiality Version 2: Studies Show That There Has Been No Practical Adverse Impact

The second version of the inconsequentiality argument is based on a set of empirical studies purporting to demonstrate how little *Twombly* and *Iqbal* have impacted litigation outcomes. The most prominent study along these lines was conducted by the Federal Judicial Center, which demonstrated that overall motion to dismiss grant rates had not risen significantly in the period following the decisions,⁶⁸ leading the researchers to conclude that *Twombly* and *Iqbal* were not having the impact on outcomes supposed by many.⁶⁹ This conclusion was reached notwithstanding the researchers' findings that the rate at which motions to dismiss were being filed had increased.⁷⁰ There are several problems with this conclusion.⁷¹

68. See 2011 FJC STUDY, *supra* note 13, at vii ("There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case . . .").

69. See *id.* at 16 ("[I]f the district courts were interpreting *Twombly* and *Iqbal* to significantly foreclose the opportunity for further litigation in the case, we would expect to see an increase in cases terminated soon after the order. However, . . . we found no statistically significant increase in 2010 in the percentage of cases terminated in 30 days, 60 days, or 90 days after the order granting the motion. Nor did we find differences in termination rates across individual types of cases.")

70. See *id.* at 21 ("The data show a general increase in the rate at which motions to dismiss for failure to state a claim were filed in the first 90 days of the case."). For a useful analysis of the FJC's data, see Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2326–27 (2012), stating, "Among total other cases, the filing rate increased from 3.1% to 5.0%. For employment discrimination and civil rights cases, the 12(b)(6) MTD filing rate increased from 6.9% to 9.0 percent, and from 10.8% to 12.1%, respectively."

71. One problem that I do not address here has been extensively treated by Professor Lonny Hoffman, who criticized the FJC study from a technical/statistical perspective. See Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. COURTS L. REV. 1, 7 (2011) ("The problem with this interpretation of the study's findings is that it is greatly, if unintentionally, misleading. By summarily announcing that the observed increases were not statistically significant, but not explaining what that technical terminology means (and, as importantly, what it does not mean), the study confuses readers into thinking that it demonstrated the Court's decisions had no impact on dismissal practice.")

It is worth pointing out that to the extent that an increase in the incidence of motions to dismiss is the product of the raising of pleading standards, more plaintiffs are having to respond to such motions than before, with a larger raw number of plaintiffs not surviving the motion to dismiss stage. Thus, one potential consequence worth taking into account is the impact of *Twombly* and *Iqbal* on motion to dismiss filing rates, not just grant rates. Were it the case that an increase in motion to dismiss filing rates could be connected with the new pleading standard, that itself would be a sufficient cause for concern, as an increase in motions raises costs (expense and delay) for those plaintiffs and expands the number of plaintiffs who fail to gain access to discovery and to a resolution on the merits.⁷²

More importantly, grant rate comparisons are inadequate because that measure neglects the impact that the doctrinal change has had on party behavior, which can have a major impact on aggregate motion to dismiss outcomes that may not be apparent in grant rates alone. Jonah Gelbach has done some of the most useful analysis on this point. As Gelbach notes, changes to legal rules not only can implicate judicial behavior but can affect party behavior,⁷³ meaning that an increase in the cost of litigation can deter some plaintiffs from bringing their cases because of the impact that change has on the expected net benefit associated with their claims.⁷⁴ Similarly, changes to the pleading standard will result in more defendants choosing to file motions to dismiss (rather than answering or settling) because the expected benefit from doing so has increased.⁷⁵ So when we look at

72. Were we able to have confidence that these disaffected plaintiffs had meritless claims, then this result would not be lamentable. However, as will be discussed below in Part III, the plausibility standard does not screen out meritless claims or even doubtful claims but simply claims that have unanswered questions.

73. Gelbach, *supra* note 70, at 2305 (“Simple comparisons of adjudicative results, like how often plaintiffs win at trial, tend to mix together (i) the effects of changes in legal rules on cases that would be litigated regardless of the choice of legal rules and (ii) changes in case composition that result from the change in legal rules. Party selection thus lurks beneath the empirical surface, laying a trap for researchers who try to measure the effects of changes in legal rules using before-and-after comparisons of variables that seem to measure outcomes of interest.” (footnote omitted)).

74. *Id.* at 2306–07 (“Such plaintiff selection occurs in cases where a switch to heightened pleading increases a plaintiff’s perceived probability that a motion to dismiss would be granted against her complaint. The plaintiff’s net expected gains from litigating will fall if she thinks the defendant might file an MTD. Some plaintiffs will choose not to file their cases in the first place as a result of this reduction in net expected gains from litigating.”).

75. As Gelbach writes:

Suppose that a change in procedural rules increases each party’s perceived probability that a motion to dismiss would be granted—as many observers, and virtually all critics, think *Twombly* and *Iqbal* do. Defendants will believe their returns to filing MTDs have risen. As a result, under *Twombly/Iqbal* they will file MTDs

the grant rates under current pleading standards compared with prior to *Twombly*, current rates could be the product of changed judicial behavior, party selection, or both.⁷⁶ As a result, “the simple possibility that party selection exists renders comparisons of [motion to dismiss] grant rates across pleading regimes an unreliable measure of judicial behavior effects.”⁷⁷ The existing empirical literature does not and cannot measure the impact that plausibility pleading has on plaintiffs’ (and their lawyers’) decisions to file a lawsuit in the first place or defendants’ decisions to file a motion to dismiss.

Nevertheless, Gelbach has attempted to calculate the lower bound on the share of claims that have been negatively impacted by *Twombly* and *Iqbal*. To do this, Gelbach constructs a correction factor that takes into account selection effects, reaching the conclusion that at least 18.1 percent of civil rights cases, 15.4 percent of employment discrimination cases, and 21.5 percent of all other cases were negatively affected by *Twombly* and *Iqbal*, meaning at least those percentages of claimants would not have had motions to dismiss granted against them had the pleading regime not changed.⁷⁸ As a mere lawyer, I am not qualified to assess the strength of Gelbach’s statistical analysis. What is clear, however, is that we need better studies designed to capture that which we can know regarding the impact of *Twombly* and *Iqbal* on judicial and party behavior. Looking at motion to dismiss grant rates alone certainly cannot give us an

against some complaints that they would answer under *Conley*—there will be some defendant selection.

Id. at 2306.

76. Gelbach explains this as follows: Were we able to say that a motion to dismiss granted post-*Twiqbal* may have been denied under *Conley*, that would reveal the judicial behavior effects of the two cases. *Id.* at 2301. However, changes in party behavior must be taken into account as well, meaning that some defendants will file motions to dismiss post-*Twiqbal* that they would not have filed previously; when this happens, a certain proportion of those additional motions will be granted, adding to the total dismissals faced by plaintiffs. *Id.* at 2311–13. If the motions that would not have been filed under *Conley* but are now filed have a lower success rate, the overall grant rate would actually *go down*. *Id.* at 2313. For example if 5 out of 10 motions were granted before *Twombly*, but after *Twombly* 3 additional motions are filed that would not have been with a 1 out of 3 success rate, the pre-*Twombly* grant rate would be 50 percent and the post *Twombly* rate would be 6 out of 13, 46 percent. *See id.* at 2312–14 (using different numbers to illustrate the point). Thus, as Gelbach notes, “Without more information about party behavior, neither the direction nor the magnitude of the difference in MTD grant rates across pleading regimes tells us anything about the magnitude of any judicial behavior effects. On its face, then, the existing empirical literature on *Twombly/Iqbal* cannot tell us much about judicial behavior effects.” *Id.* at 2314.

77. *Id.* at 2311; *see also id.* at 2329 (“[I]n the presence of defendant selection, even such a null finding need not contradict the hypothesis that *Twombly* and *Iqbal* have harmed plaintiffs or reduced discovery access.”).

78. *Id.* at 2331.

accurate picture, although there are emerging studies that show that if one analyzes grant rates properly, a post-*Twigbal* increase can indeed be detected, contrary to the findings of the FJC.⁷⁹ Surveys of district judges might provide some insight into at least whether judges believe they are evaluating pleadings differently under those two cases than under *Conley*. Attorney surveys might similarly reveal whether *Twombly* and *Iqbal* have impacted case intake decisions and motion to dismiss filing decisions.

More broadly, we also need to recognize the limits of empirics. Given what we cannot know—the actual judicial behavior and party selection effects under the two competing regimes⁸⁰—our evaluation of the merits and of the impact of the doctrinal revision cannot be based solely on such methods. The impact on litigation cost, outcomes, and decisionmaking must be considered alongside normative concerns, including the propriety of judicial revision of the standard, the efficacy of the new standard in relation to its stated objectives, and the policy implications behind a plausibility-based screening mechanism vis-à-vis our ultimate objectives for the procedural system. This wider array of consequences will be discussed in Part III below.

III. THE EFFICIENCY DEFENSE

The last in this review of the *Twigbal* apologia are those defenders that not only recognize the change—they laud it. The suggestion here is that the reality and the threat of discovery abuse, or at least its enormous expense, empower tenuous or meritless claims to yield extortionate settlements.⁸¹ Thus, from this perspective, a corrective was in order to prevent such claims from accessing

79. Professor Alex Reinert is in the process of completing such a study, which will soon be published. Alexander A. Reinert, *Measuring Iqbal* (unpublished manuscript) (on file with author).

80. Gelbach labels this conundrum the “fundamental evaluation problem.” Gelbach, *supra* note 70, at 2295 (“[W]e cannot know what would have happened to cases that actually have MTDs filed under *Conley* had *Twombly/Iqbal* actually been in place, and so on. This quandary boils down to the observation that it is impossible to observe what would happen to the same unit of study in multiple mutually exclusive states of the world—a challenge known in the evaluation methodology literature as the fundamental evaluation problem.”).

81. See, e.g., Bone, *supra* note 10, at 887 (“If meritless plaintiffs in a large treble-damages class action are able to get past the pleading stage and use the threat of discovery to leverage a large settlement, the result might disrupt competition in the telecommunications market, which would be directly contrary to antitrust goals.”); see also, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (“The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with ‘a largely groundless claim’ from ‘tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” (alteration in original)).

discovery until they can pay the new price of admission—a demonstration of factual support sufficient to render their claims plausible. Perhaps Professor Douglas Smith best expressed this view when he wrote:

The Court's recent pleading decisions recognize that, as the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases. It is neither efficient nor fair to allow claims of dubious merit to proceed when doing so may lead to settlements that are not based on the underlying merits, but rather the potential costs associated with defending a lawsuit in our modern civil justice system. *Iqbal* thus presents a further evolution in the pleading standard that is likely to increase the efficiency and fairness of modern civil practice.⁸²

First, the Court has not established that the discovery abuse about which it is concerned is a real problem in actual cases, or at least in a significant number of cases. In support of its theory of discovery abuse, the Court indicated that discovery costs were “unusually high” in antitrust cases⁸³ and that discovery accounts for “as much as 90 percent of the litigation costs in the cases where discovery is actively employed.”⁸⁴ The former point was based on a citation to a student law review note that itself did not cite or engage in any study to back up the claim of higher discovery costs in antitrust cases.⁸⁵ However, even if it turned out that the statement was accurate, that would establish a problem for antitrust claims, not all types of claims. Thus, if antitrust discovery abuse is the problem, the solution should be tailored to that specific context. The latter point the *Twombly* Court made about the costs of discovery, of course, tells us nothing: If discovery accounts for 90 percent of litigation costs, that does not mean that the costs are high as an absolute matter. Further, there is no clarity in what the Court meant by limiting the figure to cases in which discovery is “actively employed.” The source of the Court's figure, a memorandum from the Chair of the Advisory Committee on Civil Rules to the Chair of the Standing Committee, stated:

[T]he Committee learned that in almost 40% of federal cases, *discovery is not used at all*, and in an additional *substantial percentage* of

82. Smith, *supra* note 26, at 1055.

83. *Twombly*, 550 U.S. at 558 (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003)).

84. *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)).

85. See Wagener, *supra* note 83, at 1898–99 (“[C]ourts typically permit antitrust discovery to range further (and costs to run higher) than in most other cases.”).

cases, only about *three hours of discovery* occurs. In short, the discovery rules are relevant to only a limited portion of cases in which discovery is actively employed by the parties. In these cases, however, discovery was often thought to be too expensive, and concerns about undue expense were expressed by both plaintiffs' and defendants' attorneys. The Committee learned that the cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed.⁸⁶

So the very source cited by the Court in support of its claim of a discovery problem itself admits that discovery is nonexistent in 40 percent of the cases and is limited to three hours in a substantial additional percentage of cases; the 90 percent figure represents what might be taking place at the margins.⁸⁷ Using that information to generalize an assertion of a discovery abuse problem warranting system-wide revision to pleading standards is dubious to say the least. Although Professor Linda Mullenix famously debunked what she called "The Pervasive Myth of Pervasive Discovery Abuse,"⁸⁸ the myth clearly continues to hold sway.

86. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure, *supra* note 84, at 357 (emphasis added). The Federal Judicial Center engaged in a study of discovery practices ahead of the cited Advisory Committee report in which it stated the following:

Empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast to this picture of discovery, empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally—but with notable exceptions—yields information that aids in the just disposition of cases. The results of the FJC study reported in this Article are, for the most part, consistent with those findings.

Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998) (footnotes omitted).

87. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure, *supra* note 84, at 357; see also Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 683 (1998) ("[T]he studies reaffirm our common sense notions about discovery—that complex, high-stakes litigation, handled by big firms with corporate clients, are the cases most likely to involve the problematic discovery that skews the discovery debate.").

88. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) ("[T]he massive discovery reform agenda unleashed simultaneously through the Advisory Committee on Civil Rules, the CJRA, and executive branch orders is based on questionable social science, 'cosmic anecdote,' and pervasive, media-perpetuated myths." (footnote omitted)).

The Federal Judicial Center has since conducted a more recent study of discovery in civil litigation, yielding remarkably similar results failing to demonstrate a discovery cost or abuse problem across all or even most cases.⁸⁹ One commentator recounted the FJC's presentation of its results at a 2010 Duke Civil Litigation Conference:

The Duke Civil Litigation Conference opened with a panel presenting the empirical data that had been compiled expressly to shed light on the conference's concerns with electronic discovery, cost, and delay. Yet when the researchers from the Federal Judicial Center (FJC) took their seats that morning, their findings were not as expected. To the disbelief of many at this venerable gathering, the FJC reported that the median cost of litigation for defendants was \$20,000, including attorneys' fees. For plaintiffs, the median cost was even less, at \$15,000, with some reporting costs of less than \$1600. Only at the ninety-fifth percentile did reported costs reach \$280,000 for plaintiffs and \$300,000 for defendants. The median estimate of stakes in the litigation for plaintiffs was \$160,000, with estimates ranging from \$15,000 at the tenth percentile to almost \$4 million at the ninety-fifth percentile. The median estimate of the stakes by defendants' attorneys was \$200,000, with estimates ranging from \$15,000 at the tenth percentile to \$5 million at the ninety-fifth percentile. Furthermore, the discovery costs that animated the Duke Conference organizers and participants did not appear to be, in the vast majority of cases, significant or disproportionate. The FJC study found that the median percentage of litigation costs incurred in discovery was twenty percent for plaintiffs and twenty-seven percent for defendants. Perhaps most surprising was the finding that, at the median, the reported costs of discovery, including attorneys' fees, constituted 1.6% of the reported stakes for plaintiffs and 3.3% of the reported stakes for defendants.⁹⁰

These numbers speak for themselves; pleading reform in the interest of combating discovery cost and abuse looks like a solution in search of a problem.

Moving beyond whether the concerns identified by the Court are real or imagined, the efficiency argument that plausibility pleading is a good thing also fails because the doctrine as articulated is poorly designed to achieve the

89. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

90. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012) (footnotes omitted).

screening goal it espouses.⁹¹ As I said at the outset of this piece and as I have written before, plausibility pleading is overinclusive⁹² and hopelessly subjective.⁹³ A complaint that has enough facts to make entitlement to relief a possibility but not enough to render it plausible is not one that anyone can rightly label frivolous, meritless, or even dubious, at least not solely on the basis of the plausibility analysis. Indeed, the fact that liability is possible is acknowledged under the standard; possibility, however, no longer suffices.⁹⁴ After seeing *Iqbal* and not liking the result, Professor Robert Bone—a *Twombly* defender—acknowledged that plausibility pleading “risks screening meritorious suits”⁹⁵ and that the policy case for doing so, at least in cases like *Iqbal*, is “uncertain.”⁹⁶ Perhaps arguments can be made that raising the pleading bar to block potentially meritorious claims is justifiable under certain circumstances. But neither the Court nor any commentator has made the case that the costs to defendants, to the litigation system, or to substantive legal concerns of permitting such claims to go forward are so great as to warrant denying a prospective litigant meaningful access to the courts, either in particular substantive contexts or across all cases generally. And as Professor Bone has suggested, there are better ways to protect these interests: “[E]ven in *Iqbal*, strict pleading might not have been the best way to achieve an optimal policy balance. The lower courts offered a promising alternative: thin screening followed by limited access to discovery before subjecting the case to a more aggressive screening approach.”⁹⁷ Professors Yeazell

91. Professor Fitzpatrick has been critical of the *Twombly/Iqbal* solution to the discovery problem. See Fitzpatrick, *supra* note 45, at 1643 (“This is not to say, however, that the regulatory mechanism the Court selected to tighten the spigot on discovery—pleading standards—is the best one. Pleading standards empower judges who have neither the information nor the incentives to make wise decisions about which cases are worthy of discovery.”).

92. See *supra* note 7.

93. See *supra* note 8.

94. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545–46 (2007) (“A parallel conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility.”).

95. Bone, *supra* note 11, at 879 (“[S]trict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.”).

96. *Id.* at 881.

97. *Id.* at 878–81; see also *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (“Rule 26 [of the Federal Rules of Civil Procedure] vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.”). This is the approach the district court proposed to take in *Iqbal*. See *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *21 (E.D.N.Y. Sept. 27, 2005) (“The personal involvement, if any, of the non-MDC defendants should be the subject of the initial stage of discovery. Accordingly, discovery concerning Ashcroft, the FBI Defendants (Mueller, Maxwell, and Rolince), and the BOP Defendants (Sawyer,

and Clermont have alluded to the possibility of beefed-up enforcement of Rule 11 as an alternative.⁹⁸ Justice Stevens was not short of ideas beyond pleading stringency in his *Twombly* dissent.⁹⁹ To target pleading standards—the very front end of the system—as the solution to a perceived problem with discovery seems misguided.

Additionally, the subjectivity of the plausibility standard cannot be denied. What does plausibility mean? All we know is that it means more than possibility and less than probability,¹⁰⁰ if even that much is clear.¹⁰¹ As the understanding of this amorphous term will vary from judge to judge, inconsistent and inappropriate applications of the doctrine are inevitable.¹⁰² Further, the plausibility determination depends on having judges apply their own understanding of what is “normal” or “ordinary” behavior for various actors—using, in Justice Kennedy’s words, their “judicial experience and common sense”¹⁰³—as the lens through which they determine whether a plaintiff’s allegations describe a factual scenario

Cooksey, and Rardin) will be generally limited to inquiries into their involvement in the alleged denials of due process.”).

98. See Clermont & Yeazell, *supra* note 9, at 849 (“[O]ne could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.”).
99. *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting) (“Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking.”).
100. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”); *Twombly*, 550 U.S. at 556 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage . . .”).
101. Judge Posner has opined that there is no clarity in the Court’s possibility-plausibility-probability trichotomy, writing as follows:

The Court said in *Iqbal* that the “plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as “preponderance of the evidence” connote.

- In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010) (citation omitted).
102. Clermont & Yeazell, *supra* note 9, at 841–42 (“The second step of measuring plausibility seems even more obviously unclear. This measure lies entirely in the mind of the beholder. And the multitude of beholders, wearing judicial robes, has precious little interpretive guidance given the measure’s novelty in the law.” (footnote omitted)).
103. *Iqbal*, 556 U.S. at 679.

suggestive of wrongdoing.¹⁰⁴ This is, by definition, a subjective assessment because it is based on opinion rather than fact. In other words, given the concession by the Court in both *Twombly* and *Iqbal* that the allegations were consistent with liability on the part of the defendants, the Court applied its opinion preferring lawful explanations above unlawful ones based solely on its own speculation regarding which of the two was more likely. Were the described events flatly inconsistent with liability, that would have been an objective determination that would have legitimately supported dismissals in those cases. But a pronouncement that “this could have been unlawful but we’re not convinced because what you describe is more often the product of normal, lawful conduct” is not the blocking of unmeritorious claims, but the blocking of merely questionable ones.

What is wrong with screening out merely questionable claims? Once we make normalcy in the eyes of the judge the standard against which allegations of wrongdoing are evaluated, we perversely disadvantage challenges to the very deviance our laws prohibit. A civil claim is all about deviation from the norm, which has happened many times in history—even at the hands of good capitalist enterprises and high-ranking government officials. While businesses and government officials may normally not do the wrong thing, sometimes (or perhaps often) they do.¹⁰⁵ When that happens, they certainly are not going to leave clear breadcrumbs for outsiders to expose them. All we may see are the fruits of their wrongdoing, which in turn will be all that can be alleged in a complaint. Without the opportunity to initiate an action that asserts deviance in the context of seemingly normal behavior, such wrongdoing will go undiscovered and unpunished. Allowing such claims to move forward does not have to mean that the floodgates to abusive discovery are opened. Courts can and should force plaintiffs with questionable claims to identify the narrow areas that they would need to

104. Bone describes this as comparing plaintiffs’ claims against a “baseline of normality.” Bone, *supra* note 10, at 878 (“[T]he Court’s plausibility standard . . . requires no more than that the allegations describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type.”). I have described *Twombly* as requiring “the presentation of a factual scenario that possesses a presumption of impropriety based on objective facts and supported implications.” Spencer, *supra* note 7, at 18.

105. See *Twombly*, 550 U.S. at 591 (Stevens, J., dissenting) (“Many years ago a truly great economist perceptively observed that ‘[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.’” (alteration in original) (quoting 1 ADAM SMITH, *THE WEALTH OF NATIONS* 117 (J. M. Dent & Sons ed. 1960) (1776))).

explore to make their claims more tenable before further discovery is permitted.¹⁰⁶ Judges could also use their authority to shift the costs of such discovery to minimize the burden on defendants at this stage.¹⁰⁷ But shutting down such claims *ab initio* is not the right approach. And doing it through judicial reinterpretation just makes it even worse, given the legitimacy and disruption concerns outlined above.¹⁰⁸

CONCLUSION

Both the substance of the plausibility doctrine and the means by which it has been imposed are indefensible, assuming one cares about enabling private litigants to vindicate substantive law violations through the courts. Certainly, as Professor Bone reminds us, defendants have a right “to be free from liability when the substantive law so provides,” and that can serve as a counterweight to the rights of plaintiffs to have legitimate claims vindicated.¹⁰⁹ However, no one can seriously claim that requiring an answer to a complaint—and perhaps some limited discovery—is the equivalent of imposing liability on innocent defendants. Thus, invoking pleading doctrine as a means to protect such defendants is undeniable overkill.

To the extent that *Twiqbal* defenders have faith in plausibility pleading as something that will be useful in helping to weed out unmeritorious claims, they refuse to learn the lessons of the past, just as Charles Clark predicted and lamented.¹¹⁰ The combination of requiring facts raising the prospect of liability

106. See Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 69 (2010) (“Although courts should continue to guard against ‘fishing expeditions,’ they should also be open, upon receipt of a Rule 12(b)(6) motion, to allowing plaintiffs some initial discovery focused on those discrete facts necessary to show a plausible claim. This way, discovery would be loaded towards the front end of the lawsuit, and would be doing heavy lifting of a different kind—determining the lawsuit’s *viability* rather than its underlying *merits*.”).

107. FED. R. CIV. P. 26(b).

108. See *supra* Part II.A.

109. Bone, *supra* note 10, at 913; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.”).

110. Clark, *supra* note 37, at 46–47 (“I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally and antitrust cases in particular.

beyond the speculative level to that of plausibility and empowering judges to disregard what they deem to be legal conclusions rather than factual assertions, makes plausibility pleading no better than the very fact-based code pleading system the Federal Rules replaced.¹¹¹ If the abandoned code pleading system can be described as “nineteenth-century judges [who] applied the code rules in a hyper-technical fashion, insisting on ‘strict and logical accuracy’ and drawing hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts,”¹¹² how is pleading post-*Iqbal* much different? Justice Kennedy saw conclusions (the allegation of policy design and approval) where Justice Souter saw facts;¹¹³ Justice Souter saw conclusions (the allegation of an agreement) where Justice Stevens saw facts.¹¹⁴ Who is right? What will the judge in your next case see?¹¹⁵

It is interesting that as one looks across the landscape of *Twigg* apologies, *Twombly* and *Iqbal* are simultaneously downplayed as inconsequential but defended as necessary to fight discovery abuse and extortionate settlements. They can't be both. But such duplicity, in truth, is telling. The liberal ethos of the Rules is an important part of their legitimacy. Overt and honest efforts to ratchet back their open-access orientation are difficult to achieve; this may be because it is very difficult to sell procedural revisions that explicitly move in an access-restricting direction and that do so unapologetically in the interest of defendants at the expense of aggrieved prospective plaintiffs. Thus, the most substantial antiaccess procedural reforms have occurred through judicial reinterpretation of the Rules, reliably combined with assurances that (1) nothing has changed doctrinally and (2) there will be or has been no impact of the interpretation in

Much time and expense, waste motion and injustice have gone into the attempt, but experience is wholly clear that such quickie justice always breaks down . . .”).

111. See Miller, *supra* note 4, at 20 (describing the pleading standard established by *Twombly* and *Iqbal* as “[i]n reality . . . a form of fact pleading by another name”).

112. Bone, *supra* note 10, at 891.

113. Ashcroft v. Iqbal, 556 U.S. 662, 681, 698 (2009).

114. Bell Atl. Co. v. Twombly, 550 U.S. 544, 557, 590 (2007).

115. Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 10 (2012) (“[L]ower courts have disagreed as to whether allegations which fail to distinguish among defendants are by definition conclusory or not.”).

question,¹¹⁶ while the rhetoric behind the reinterpretation roots itself in the need to protect defendants against frivolous or doubtful claims.¹¹⁷

As I have written previously, *Twombly* and *Iqbal* are part of a series of cases moving civil procedure in a restrictive direction.¹¹⁸ From summary judgment,¹¹⁹ to pleading, to personal jurisdiction,¹²⁰ to class action doctrine,¹²¹ the Court has reinterpreted procedural rules in ways that protect corporate or government defendants against suits by individual plaintiffs. Some may believe that is a good thing. I tend to disagree. But if restrictiveness is the chosen course, those who espouse it should be decent and courageous enough to clearly articulate that vision and advance it through the rulemaking and legislative process on those terms, so that the rationale and approach can be publicly defended and debated. I, for one, would pursue the abandonment of plausibility pleading by urging the rulemakers to restore notice pleading¹²² and revise other complementary Rules—such as Rules 9(b) (particularity requirement), 11 (certification requirement), 12(e) (motion for a more definite statement), 16 (judicial case management), 26 (discovery in general), 37 (discovery sanctions), and the Official Forms—to develop a more thoughtful, comprehensive, and effective approach to controlling initiation of actions and access to discovery.

At the outset of this Conclusion, I noted that plausibility pleading is indefensible, “assuming one cares about enabling private litigants to vindicate substantive law violations through the courts.” Ultimately, it may be that some defenders

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116. See, e.g., JOE S. CECIL ET AL., FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 23–24 (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/trsjpr07.pdf/\\$file/trsjpr07.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/trsjpr07.pdf/$file/trsjpr07.pdf) (finding that the rate of filing and granting summary judgment motions “generally changed very little after the [*Celotex*] trilogy”).
 117. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses . . .”).
 118. E.g., A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 475–78 (2013) (describing this trend); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010).
 119. *Celotex*, 477 U.S. at 323; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).
 120. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (denying personal jurisdiction over a defendant who indirectly shipped a product causing harm to the plaintiff in the forum state).
 121. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (interpreting the “common questions” requirement of Rule 23(a) to require common questions that are central to the litigation).
 122. A possible way to do this would be to amend Rule 8(a)(2) to read “a short and plain statement of the claim showing the possibility of relief.” Note that such a revision would have to be accompanied by changes to the other rules enumerated in the text.

of *Twombly* and *Iqbal* simply do not fully embrace that goal. My hope is that this goal can at least be kept in mind as the Supreme Court and others who influence federal civil procedure interpret and apply plausibility pleading going forward.

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF AMHERST

HOLLY BRANHAM,

Plaintiff,

v.

DOLGEN CORP, INC.
d/b/a/ Dollar General Store
a Kentucky Corporation
SERVICE REGISTERED AGENT
Corporation Service Company
11 South 12th Street
Richmond, Virginia 23219

0 9 0 0 7 4 4 9

Defendant.

COMPLAINT

1. On June 8, 2007, the Plaintiff, was severely and permanently injured when she fell at Dollar General Store at 171 Ambriar Plaza in Amherst County, Virginia. The store was owned and operated by the Defendant and employees and agents of the Defendant.
2. The Plaintiff fell due to the negligence of the Defendants agents and employees who negligently failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn the Plaintiff of the wet floor. The Defendants thru its employees breached their duty to warn the Plaintiff of the dangerous wet floor.
3. As a direct result of the negligence of the Defendants agents and employees, acting in the scope of their employment, the Plaintiff was severely and permanently injured. She lost many of the pleasures of life. She suffered pain. She has incurred medical and hospital bills. Her ability to earn an income was dissipated.
4. The Plaintiff seeks a judgment in the amount of Three Hundred Thousand Dollars (\$300,000.00) against the Defendant.

HOLLY BRANHAM



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