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PLAUSIBLE SCREENING: A DEFENSE OF TWOMBLY AND IQBAL'S PLAUSIBILITY PLEADING

*Michelle Kallen**

Today's system of litigation is vastly different than the one envisioned by the 1938 reformers of the Federal Rules of Civil Procedure (the Rules). Instead of quick, simple discovery, the process often subsumes litigation; instead of a culminating trial on the merits, most cases end in settlement.

In light of the changes in today's litigation system, some legal critics suggest an overhaul of the entire system.¹ Others suggest more discrete reforms.² One means of reform is to require more of pleading. *Conley's* notice pleading standard required very little of a complaint, but in the recent cases of *Bell Atlantic v. Twombly*³ and *Ashcroft v. Iqbal*,⁴ the Supreme Court reformed the pleading standard to require a complaint to state a plausible claim for relief. This pleading standard now requires more of a complaint and functions as a screen for unmeritorious suits.

Legal literature has largely criticized these cases arguing, among other things, that (i) the Court is not the right entity to change the pleading standard, (ii) plausibility pleading is contrary to the Rules because it conflates the pleading standard with the summary judgment standard, (iii) it will weed out meritorious cases, and (iv) it provides judges with too much discretion. This article sets forth an account of plausibility pleading that addresses these critiques. Under this new pleading standard, a complaint must contain non-conclusory, factual allegations that, when considered with

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1. See Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2005-2006).

2. See Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165 (2010) (proposing a system in which the judge gives a preliminary judgment on the merits earlier in the litigation and save costly discovery until after the preliminary merits determination); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004) (advocating for mandatory summary judgment).

3. 550 U.S. 544 (2007).

4. 129 S. Ct. 1937 (2009).

the narrative of the complaint as a whole, are not only sufficient to pass summary judgment (if ultimately proven true after discovery), but also tell a realistic story of wrongdoing.

Given the landscape of today's litigation system, plausibility pleading represents a desired effort to bring judicial oversight of pleadings in line with the changing legal conditions since 1938 reforms. Adapting this standard helps preserve the stated goal of the Rules reforms to provide swift resolution of cases on their merits and rids the system of frivolous suits early.

Part I of the article describes the vision of the 1938 reformers and the changes to the litigation landscape since. Part II describes the *Twombly* and *Iqbal* cases in relation to prior pleading standards. Part III builds on *Twombly* and *Iqbal*'s language to set forth an account of plausibility pleadings that addresses the problems with today's system of litigation. Part IV describes some of the major critiques to plausibility pleading and explains why these critiques do not pose a threat to the account of plausibility pleading set forth in Part III.

PART I: THE REALITY OF THE LITIGATION WORLD

The 1938 reformers who brought about the Federal Rules of Civil Procedure sought to cure the procedure-heavy common law system in which meritorious suits were dismissed because of technicalities.⁵ Roscoe Pound and his fellow drafters argued that procedure should not prevent a suit from decision on the merits⁶ and envisioned a process by which the merits of the case would be revealed through broad discovery and ultimately determined in a trial.⁷ The goal was a just, speedy, and inexpensive determination of every action.⁸ One of the underlying assumptions necessitating creation of the Rules was that the major risks in civil litigation emerged from premature dismissal of meritorious claims brought by unsophisticated parties.⁹

The reformers sought broad discovery as a means to facilitate disposition of a case on its merits in which the facts underlying each case would be

5. Tidmarsh, *supra* note 1, at 526.

6. *See id.* at 527 (explaining Pound's ideas and their relationship to the 1938 procedural reforms).

7. *See* Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 498-99 (1910) (an implicit assumption of the Federal Rules is a single culminating trial).

8. FED. R. CIV. P. 1.

9. Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgment*, 25 WASH. U. J.L. & POL'Y 61, 97 (2007).

revealed to both sides. However, the Rules' extreme focus on substance and a case's potential merit has brought its own problems¹⁰ as the landscape of litigation has changed tremendously since 1938.¹¹ The recognition of new rights and the extent and nature of discovery have profoundly changed the litigation process such that the foremost vision of the reformers is no longer realized.

Today, less than two percent of all filed civil cases reach trial¹² and the number continues to drop.¹³ "[F]our-fifths of the claims that enter the litigation system exit through non-litigation processes."¹⁴ "Despite this reality, our procedural system is [still] structured around the belief that a case will be resolved at a culminating, all-issues jury trial."¹⁵

One change since the time of the reformers, and a major reason for the disappearance of trials, is the sheer number of cases in the justice system.¹⁶ The recognition of new rights of action has led to a considerable increase in the volume of litigation seeking access to the federal courts as compared to those in 1938.¹⁷ In the 1960s, powerful political movements strengthened, and public interest organizations began to lobby and demonstrate on behalf of numerous causes.¹⁸ In response to these entities' demand for change,

10. See Tidmarsh, *supra* note 1, at 550 ("[T]he cure has caused other diseases, such as cost, delay, disuniformity in application of procedural rules, perceived variability in outcomes, and the attendant dissatisfaction with our procedural system.").

11. Epstein, *supra* note 9, at 97 ("The current provisions of the Federal Rules of Civil Procedure were designed in an earlier era for litigation that on average has been far simpler than litigation today.").

12. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) ("The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline."); Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002-2003*, BUREAU JUST. STAT. BULL. 3 (Aug. 2005) (reporting an eighty percent decline in federal tort trials between 1985 and 2003); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 616 (2005) (explaining that even though the total disposition of cases has risen tremendously, the absolute number of trials has decreased and "a full trial on the merits has become a rare event.") (internal quotation omitted).

13. Royal Furgeson, *Civil Jury Trials R.I.P.? Can it Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 797 (2009) (arguing civil jury trials have been declining steadily for the last thirty years and may eventually become extinct); see also Galanter, *supra* note 12 at 460.

14. Tidmarsh, *supra* note 1, at 549; see also Resnik, *supra* note 12, at 597 ("The practices of adjudication, however, have shifted . . . alternative dispute resolution (ADR) or dispute resolution (DR) increasingly dominates the landscape of procedure.").

15. Tidmarsh, *supra* note 1, at 549.

16. Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 96 (1988) ("As almost anyone alive during the past decade knows, this is the era of the 'litigation explosion[.]'"); see also Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) (arguing courts are overburdened because parties turn to courts to resolve disputes instead of the institutions to which they turned in the past such as church or family).

17. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW*, 36-7 (Harvard University Press 2001).

18. See *id.*

representatives in Congress and the judiciary created new causes of action.¹⁹ Standing to sue governmental agencies became broader as new legal rights and obligations arose.²⁰

During this time, both state and federal judiciaries implemented major changes to the law. The Supreme Court expanded the legal rights of prisoners, welfare recipients, and criminal defendants with its “due process revolution.”²¹ State courts reformed tort law, making it easier for those injured to sue and obtain substantial damage awards from doctors, landlords, manufacturers, and municipal governments.²² Congressional statutes and judicial decisions also rendered legal services for those who could not afford representation and public defender offices for criminal defendants.²³ From the mid-1960s to the mid-1970s, federal and state legislators enacted numerous regulatory statutes dealing with nondiscrimination in both education and employment, pollution control, land use, and consumer protection. In conjunction with these changes, federal and state governments enacted new approaches to regulatory enforcement that allowed officials and private individuals to enforce the new laws.²⁴

Consequently, dispositions of cases in the United States have risen tremendously from 50,000 in 1962 to 258,000 in 2002,²⁵ and litigation in the United States is now more popular than in any other developed countries.²⁶ Federal appellate cases involving constitutional issues increased sevenfold between 1960 and 1980.²⁷ Even the number of lawyers has doubled between 1960 and 1995.²⁸ The number of judges in the federal system, however, has not kept pace with the increased caseload.²⁹ Thus, the

19. See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-34 (2006); Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2006).

20. See KAGAN, *supra* note 17.

21. *Id.* at 37.

22. *Id.*

23. *Id.*

24. *Id.* at 37–38.

25. Galanter, *supra* note 12.

26. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983) (arguing that the United States has a greater proportion of lawyers and lawsuits than other industrialized countries and suggesting Americans rely too much on litigation to resolve disputes).

27. KAGAN, *supra* note 17, at 36.

28. *Id.*

29. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeal*, 66 BROOKLYN L. REV. 685, 687 (2001) (“[T]he federal bench, both district and appellate, has grown as its caseload has expanded, although the former growth has not matched the latter.”); see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 274 n.3 (1996) (citing materials that document the increase in judicial caseload).

caseload per judge is substantially higher today than it was in 1938, and as a result, courts have sought effective means to lessen their caseload.³⁰ Courts often focus on case management through dispositive pretrial motions, instead of resolution on the merits, in order to manage their dockets. Not only has the number of cases increased, but both criminal and civil trials today are larger in scope and duration than in the 1930s.³¹

Another legal development that added to the breadth of cases since the 1938 reforms is the prevalence of aggregate litigation. The 1966 amendments to the Rules brought about the possibility of class-wide litigation.³² If a class is certified, the suit will likely result in a massive settlement and could cost the defendant hundreds of millions of dollars.³³ Defendants may, therefore, be willing to settle an individual plaintiff's case, whether meritorious or not, to prevent exposure to a potential class action.³⁴

The second major change since the dawn of the Rules is in the extent and nature of discovery.³⁵ At the time of the reformers, typical discovery entailed "... a few interrogatory responses, a file folder (or perhaps a banker's box) of documents, and one or two local depositions."³⁶ In civil litigation of anything beyond the simplest sort of dispute, it is simply no longer the case that discovery involves just a small file of documents.³⁷

30. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, WIS. L. REV. 631, 638 (1994) (Judges are devoting less time to trials and more time to the litigation process); Tidmarsh, *supra* note 1, at 560 (arguing that case management has taken a life of its own, and dismissals for failure to abide by court-imposed scheduling deadlines, issue narrowing requirements, and final pretrial orders are too common); see also Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) (the processes of mediation and arbitration used to be considered "extrajudicial" but have been brought into the courts to deal with the increased caseload and are now considered "judicial").

31. KAGAN, *supra* note 17, at 36.

32. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97, 98 (2009).

33. *Id.* ("With vanishingly rare exceptions, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial. In terms of their real-world impact, class settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restructuring of the defendant's operations.")

34. See Miller, *supra* note 2, at 166 ("Defendants claim they are forced to settle frivolous lawsuits for exorbitant sums in order to avoid burdensome litigation expenditures or to limit their exposure to class actions."); see also Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 892, 901 (2008) (acknowledging "the reality that litigation—especially in complex multi-party or class action cases—has become significantly more expensive[.]").

35. See Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 253 (2010).

36. *Id.*

37. *Id.*

Broad discovery is a unique feature of the American legal system.³⁸ While judges often drive the discovery process in other countries, the American process is lawyer-driven and thus adversarial.³⁹ Rule 26(b)(1) allows any discovery “relevant to the claim or defense of any party,” including material that is inadmissible but “reasonably calculated to lead to... admissible evidence.”⁴⁰ On a showing of good cause, Rule 26(b)(1) also allows additional “discovery of any matter relevant to the subject matter involved in the action.”⁴¹ This broad discovery facilitates a full exchange of information that allows parties to obtain a more accurate estimate of the case’s value and likely outcome.⁴² In *Hickman v. Taylor*,⁴³ the Supreme Court explained that “the deposition-discovery rules are to be accorded a broad and liberal treatment... [m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”⁴⁴

While broad discovery helps parties arrive at the facts underlying a case, it has its costs.⁴⁵ One recent factor that has contributed to the extreme cost of discovery today is the prevalence of electronic discovery (e-discovery).⁴⁶ Almost all information today is available electronically.⁴⁷ E-discovery today requires each side to identify the laptops, smart-phones, memory sticks, network servers, back-up devices, and logs from online service providers that might contain data relevant to the case.⁴⁸ All this information

38. Stephen N. Surbin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV., 299, 306–07 (2002-2003) (“[T]he number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely set [the United States] apart.”); see Samuel Issacharoff, *The Contents of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1266, 1271 (2002) (describing the scope of discovery as the most distinctive feature of American procedure).

39. Surbin, *supra* note 38, at 301 (“[T]wo of the biggest differences between civil law countries and the United States with respect to pretrial discovery are the centrality of the judge . . . and the continuity of the proceedings.”).

40. FED. R. CIV. P. 26(b)(1).

41. *Id.*

42. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 571 (6th ed. 2003).

43. 329 U.S. 495 (1947).

44. *Id.* at 507.

45. See Scott A. Moss, *Litigation Discovery Cannot be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE LAW J. 889, 892 (2009) (“[I]n federal cases, discovery comprises half of all litigation costs.”).

46. *Id.* at 893–94 (describing the extreme cost of electronic discovery and explaining that e-discovery is just a new instance of an old problem—technology facilitating more discovery, increasing existing controversy over discovery costs.); Furgeson, *supra* note 13, at 818 (“[T]he problems of electronic discovery now loom large over America’s civil justice system, with no good answers presently in sight.”).

47. Kourlis et al., *supra* note 35, at 253 (asserting that ninety-nine percent of information generated today is electronic and accessible to those who demand it).

48. See generally, *id.*

is then indexed and reviewed by lawyers (who typically bill by the hour).⁴⁹ With the use of computers and the Internet, both small and large businesses have the capacity to preserve huge amounts of information.⁵⁰ In fact, almost all cases today involve e-discovery, and cases involving big corporations can require analyzing terabytes of information.⁵¹ The potential extent of civil discovery has expanded commensurately and, with it, the associated cost of billable time spent simply culling through the available information.⁵²

E-discovery has made the already crowded dockets and understaffed courts even busier and will likely continue making things worse.⁵³ The cost of exchanging electronically stored information is so high in some cases that it exceeds the entire amount in controversy in the case.⁵⁴ Justice Breyer expressed the concern that when ordinary cases face e-discovery costs in the millions of dollars, many people are unable to afford litigation and “justice is determined by wealth, not by the merits of the case.”⁵⁵

Even though new Federal Rules took effect in 2006 that provide guidelines for electronic data, they do not change the adversarial nature of American law, which still allows plaintiffs and defendants to seek as much information as they want from each other.⁵⁶ These realities of e-discovery are simply inconsistent with Rule 1’s promise of the “just, speedy, and inexpensive determination of every action.”⁵⁷

The nature of discovery has also changed since the time of the reformers. Discovery used to be a relatively circumscribed search for the facts underlying the case. Until the 1970s, few lawyers complained about expense or delay resulting from abusive discovery.⁵⁸ However, beginning in the mid-1970s it became clear that expense and delay resulting from

49. *The big data dump; Technology, business and the law*, ECONOMIST, August 30, 2008.

50. *Electronic ties that bind; Software that spots hidden networks*, ECONOMIST, June 27, 2009 (describing the exploding volume of electronic communication and estimating that corporate email archives have grown by more than 40% per year).

51. *The big data dump*, *supra* note 49.

52. *Id.* (“In an ordinary case [involving Verizon], 200 lawyers can easily review electronic documents for four months, at a cost of millions of dollars.”); Kourlis et al., *supra* note 35, at 253 (“For many lawyers and potential parties, an astonishing amount of information is technically available, but the cost of completing discovery and moving to summary judgment or trial is simply prohibitive.”).

53. *The big data dump*, *supra* note 49.

54. Kourlis et al., *supra* note 35, at 246.

55. *The big data dump*, *supra* note 49.

56. *Id.*

57. FED. R. CIV. P. 1.

58. William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reforms*, 50 U. PITT. L. REV. 703, 704 (1989).

discovery were prevalent.⁵⁹ Complaints about discovery are even louder today as discovery has become a strategic exercise that contributes to the frustration of the Rules' promise of speedy, inexpensive resolution of cases.⁶⁰

Rises in the cost of discovery and the extreme cost of trials⁶¹ have made litigation prohibitively expensive for some litigants.⁶² These costs have also given parties (even those with weak cases) the power to make a credible threat to impose extreme costs on the opposing party.⁶³ Because settlements take into account the high cost of litigation, a lawsuit may generate a settlement value, even where the expected recovery at trial may have been nothing.⁶⁴ The ability to impose costs on one's opponent thus becomes a strategic move in litigation that can shift the settlement zone in one's favor.⁶⁵ The cost of discovery has also set the stage for the possibility of plaintiffs filing frivolous suits aimed at extracting a settlement from innocent defendants.⁶⁶ Because the upfront costs to the plaintiff are

59. *Id.*

60. *Id.* at 703 ("Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens. Often it is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules.").

61. Furgeson, *supra* note 13, at 823 ("Discovery adds much to the cost of litigation, but it is not the only culprit. Trials themselves can be hugely expensive.").

62. Kourlis et al., *supra* note 35, at 246 ("In many cases – particularly complex cases – discovery and motion practice have become so expensive and burdensome that parties cannot afford adequate trial preparation and instead are forced to settle regardless of merits.").

63. See AM. COLL. OF TRIAL LAW., INTERIM REP. & 2008 LITIG. SURV. OF THE FELLOWS OF THE AM. COLL. OF TRIAL LAW. A-4 (2008) available at

<http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf> (seventy-one percent of respondents to a survey of the American College of Trial Lawyers indicated their belief that counsel use discovery as a tool to force settlement); see also Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636–37 (1989) (in some cases, the threat of discovery itself becomes a settlement tool); Moss, *supra* note 45, at 895–96 (discussing the consensus among most economists, civil proceduralists, and judges that discovery, given the prevalence of abuse, should be limited). *But see* Stephen N. Surbin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 392 (2010) (arguing that most cases do not have an inordinate amount of discovery).

64. Issacharoff, *supra* note 38, at 1272 ("[T]he fact that parties face significant costs in the litigation process expands the potential settlement zone and creates a greater possibility of mutually advantageous settlement[.]"); see also Miller, *supra* note 2, at 167 ("We live in a 'world of settlements,' it is true, but all is not right with this world.").

65. Easterbrook, *supra* note 63, at 637–38 (discussing that parties can take advantage of the exposure of discovery through impositional requests). "[A]n impositional request is one justified by the costs it imposes on one's adversary rather than by the gains to the requester derived from the contribution the information will make to the accuracy of the judicial process." *Id.*

66. Ward, *supra* note 34, at 901 (referencing "the widespread perception that frivolous cases are overwhelming the system and victimizing defendants[.]"); Kourlis et al., *supra* note 35, at 284 ("The potential cost of discovery and motion practice . . . may force defendants who are not at fault to settle because doing so is less expensive than slogging through the broad discovery and motion practice process."). *But see* Stempel, *supra* note 16, at 96 ("Although all agree that the absolute number of

relatively low, but filing a complaint forces response costs on the defendant, the innocent defendant can prevent accruing the costs of continuing with the litigation by settling, even if the suit has no chance of prevailing at trial.⁶⁷ Frivolous litigation has thus increased the prevalence of settlement and decreased the number of cases that actually reach trial.

The landscape of modern litigation is thus vastly different from that reformed by the Rules in 1938. The focus on finding substance through discovery has brought about a system in which frivolous litigation can extract settlement.⁶⁸ The distant possibility that discovery may yield a sliver of substance often prevents cases from being decided on the merits when the cost of discovery and trial bring about settlement. Substance today thus subsumes merit, as crafty litigants have the opportunity to take advantage of the system.⁶⁹

Numerous changes to the Rules have been implemented to help curb wasteful discovery.⁷⁰ One proposed solution aiming to combat some of the problems with discovery is judicial regulation.⁷¹ However, at the point of

lawsuits has increased in virtually every corner of the state and federal court systems, there exists vigorous debate about whether the increase is unusual in relative or historical terms and even more vigorous debate about whether the absolute increase in cases symbolizes the American concern for fairness and justice or represents a surge in frivolous or trivial disputes needlessly clogging the courts.”).

67. Kozel & Rosenberg, *supra* note 2 at 1860 (describing a nuisance value settlement, in which a payoff is extracted by a threat to litigate a meritless claim or defense that both parties know the court would readily dismiss when reviewed on the merits).

68. Epstein, *supra* note 9, at 98 (“Now there is far greater peril of allowing frivolous litigation to go on too long as well as a risk of cutting short meritorious litigation.”).

69. See Tidmarsh, *supra* note 1, at 515 (“[W]e never fully integrated procedure and substance. Instead, we now have a system in which the importance of substance and procedure are inverted. Substance now dominates procedure.”).

70. In the 1970s, the American Bar Association and others campaigned for revisions of the Federal Rules of Civil Procedure. In 1980 Rule 26(f) was adopted to authorize judicially supervised discovery conferences. In 1983, extensive amendments, including to Rules 11, 16, and 26, were passed to provide judicial case management, discovery control, and the imposition of sanctions against discovery abuse and frivolous litigation. The problems of frivolous suits and discovery abuse, nevertheless, persist. See Schwarzer, *supra* note 58, at 704; see also Ward, *supra* note 30, at 913 (describing recent changes to the Rules of Civil Procedure that curb discovery abuses); Surbin, *supra* note 38, at 313 (“[A]most all of the amendments to the federal discovery rules during the past two decades have been in the direction of restraining discovery[.]”).

71. Easterbrook, *supra* note 63, at 639 n.14 (“Rule 26(g), for example, requires the requester to make only appropriate demands on pain of sanctions, and Rule 26(c) allows the court to trim back demands for information on several grounds”).

discovery, judges do not have access to the information sought to truly assess whether a discovery request is abusive or wasteful.⁷² The problems of abusive discovery and inefficient settlements nevertheless persist.⁷³

If these regulations of discovery remain ineffective, the threat of discovery may continue to allow parties with unmeritorious suits to extract settlements. A better means to screen abusive discovery and the extraction of socially inefficient settlements is to regulate cases at their onset. By heightening the pleading standard, courts can bar the advancement of unmeritorious suits such that they do not pose a credible threat of imposing discovery costs.

PART II: *TWOMBLY* AND *IQBAL*

Before the promulgation of the Federal Rules of Civil Procedure, common law dictated pleading.⁷⁴ The former system allowed for successive rounds of pleading that aimed at reducing the dispute to a single issue of fact or law;⁷⁵ however, the common law approach system was not only slow and expensive, but it also became so technical that many parties lost meritorious cases because of small procedural mistakes.⁷⁶ Common law pleading was eventually replaced with code pleading, which emphasized developing facts through the pleadings.⁷⁷ Code pleading required the

72. See Easterbrook, *supra* note 63, at 638 (explaining how judges cannot detect abusive discovery where they lack essential information to determine if a discovery request is abusive); *Bell Atlantic v. Twombly*, 550 U.S. 544, 560 n.6 (2007) (“We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.”).

73. See Mark Herrmann, James M. Beck, & Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 157 (2009) (“As a matter of practice, since broad discovery began, discovery rules have been amended repeatedly (Rule 26 in 1980, 1983, 1987, 1993, 2000, and 2006) without noticeable success[.]”); see also Lee H. Rosenthal, *From Roles of Procedure to How Lawyers Litigate: ‘Twixt the Cup and the Lip*, 87 DENV. U. L. REV., 227, 229-30 (2010) (describing the changes to the rules and their failure to correct the problems of abusive discovery).

74. Ward, *supra* note 34, at 897.

75. *Id.* at 896.

76. See *id.* at 896-97 (“In practice, the system came to be considered a mere series of traps and pitfalls for the unwary—an impediment to justice that must be abolished. The common law pleading system also proved to be excruciatingly slow, expensive, and unworkable and better calculated to vindicate highly technical pleading rules than it was to dispense justice.”) (internal quotations omitted).

77. *Id.* at 897.

plaintiff to plead “ultimate” facts, but did not permit the plaintiff to plead “evidentiary” facts or “conclusions of law.”⁷⁸ This system was also criticized for bringing about great delay and expense.⁷⁹

The 1938 reformers hoped to distance themselves from the earlier systems in which procedure dominated substance,⁸⁰ and instead, bring the focus back to the merit of the suit by simplifying pleading.⁸¹ Rule 1 of the Federal Rules of Civil Procedure states that the goal of the Rules is “to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁸² Charles Clark, the chief drafter of the Rules, envisioned the ultimate goals of the Rules to be a focus on the merits of the suit and quick and efficient resolution of cases.⁸³

Rule 8(a)(2) requires a plaintiff’s complaint to contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁸⁴ The Rules authorize dismissal of a lawsuit where the complaint “fails to state a claim upon which relief can be granted.”⁸⁵ The Rules, however, do not explain how “short” or “plain” the statement may be. Moreover, they do not describe how detailed a complaint must be for a pleader to show that she “is entitled to relief.”⁸⁶

The founders initially understood the sole function of the complaint as giving the defendant fair notice of the general nature of the dispute.⁸⁷ The

78. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 57 (2010); Charles E. Clark, *Simplified Pleadings*, 2 F.R.D. 456, 460 (1943).

79. *Id.* (describing code pleading as “at best wasteful, inefficient, and time-consuming.”).

80. Tidmarsh, *supra* note 1, at 514. In England, and eventually America, the focus was not on the substantive right that was violated but on the procedural attributes that the plaintiff had to assert. *Id.*

81. *Id.* at 515. Roscoe Pound advocated for a system in which “[p]rocedural rules were general, discretionary guidelines placed in the hands of judges whose scientific administration would lead to the just determination of each case.” *Id.* See Ward, *supra* note 34, at 896 (“The stated goal of the Federal Rules was to facilitate reaching the merits of disputes[.]”). See also Conley v. Gibson, 355 U.S. 41, 48 (1957) (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”).

82. FED. R. CIV. P. 1; see Steven S. Gensler, *Justness! Speed! Inexpense!: An Introduction to The Revolution of 1938 Revisited: The Role of the Federal Rules*, 61 OKLA. L. REV. 257, 271 (2008) (arguing that Rule 1 of the Federal Rules of Civil Procedure states the goal of civil procedure reform).

83. Kourlis et al., *supra* note 35, at 284.

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

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

86. FED. R. CIV. P. 8.

87. See Clark, *supra* note 78 at 460-61 (“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 . . . and to tell the court of the broad outlines of the case.”); see also Robert G. Bone, *Plausibility Pleading Revisited and Revised: A*

Supreme Court's initial interpretation of the vague language in Rule 8 reflected this understanding. In *Conley v. Gibson*,⁸⁸ the Supreme Court held that a complaint should not be dismissed "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."⁸⁹ Following the *Conley* decision, this case was understood as prescribing the proper standard for pleading and coined the term "notice pleading."⁹⁰ Because notice pleading required little of a complaint, cases were rarely dismissed at the pleading phase.⁹¹ Notice pleading was brought into question by various scholars and lower courts,⁹² but the Supreme Court did not reconsider it until 2007.

In the 2007 case of *Bell Atlantic Corp. v. Twombly*,⁹³ the Supreme Court retired the *Conley* standard. The Court considered the sufficiency of a complaint in an antitrust class action alleging that telecommunications providers had entered into an agreement not to compete and to forestall competitive entry in violation of the Sherman Act.⁹⁴ Under Section 1 of the Sherman Act, each Incumbent Local Exchange Carrier (ILEC), regional service monopoly, had an obligation to share its network with competitors known as Competitive Local Exchange Carriers (CLECs).⁹⁵ Antitrust law had long insisted that independent parallel conduct, and even conscious identical conduct, is not illegal when the competitors have no agreement.⁹⁶

The complaint based its allegations of an unlawful agreement on two facts:⁹⁷ (1) that the ILECs did not compete in each other's markets, and (2) that the ILECs' exhibited parallel conduct for purposes of preventing

Comment on Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 853 (2010).

88. 355 U.S. 41 (1957).

89. *Id.* at 45–46.

90. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008) ("Since the enactment of the Federal Rules of Civil Procedure in 1938, notice pleading has been the watchword for the system of pleading in federal civil courts.").

91. See Surbin, *supra* note 38, at 311–12 (describing the difficulty of obtaining a dismissal for failure to state a claim given the dearth of detail required in the complaint); see also Stempel, *supra* note 16, at 98 ("The liberal pleading standards of rules 8 and 9, as interpreted by leading cases made rule 12(b)(6) dismissals difficult to achieve, at least when courts adhere to the letter and spirit of the Supreme Court's pronouncements in the area.").

92. See Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551, 551 (2002) ("Despite [the] clarity [of Rule 8] and the Supreme Court's endorsement of notice pleading in *Conley v. Gibson*, federal courts have embraced heightened pleading burdens in a variety of situations.") (internal citations omitted); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems* 95 IOWA L. REV. 821, 849 (2010) ("Even before *Twombly*, some had criticized notice pleading as excessively lax.").

93. 550 U.S. 544 (2007).

94. 15 U.S.C. § 1 (2006) (prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce[.]").

95. *Twombly*, 550 U.S. at 544.

96. Clermont & Yeazell, *supra* note 92, at 826.

97. *Twombly*, 550 U.S. at 544.

competition from CLECs within their local markets.⁹⁸ In a 7-2 decision, the Court held that the complaint failed to state a claim.⁹⁹ The Court, in an opinion written by Justice Souter, accepted as true the allegations of parallel conduct, but found that parallel conduct alone was inadequate to show that the plaintiffs were entitled to relief because they did not make plausible allegations as to an agreement.¹⁰⁰

The Court reasoned that while the pleading standard announced by Rule 8 does not require “detailed factual allegations,” it demands more than a “formulaic recitation” of the elements of the cause of action.¹⁰¹ Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”¹⁰² The Court found that Rule 8(a)(2)’s “short plain statement” requires the complaint state a plausible claim, not just raise the possibility that the claim has merit.¹⁰³ According to the Court’s interpretation, “[a]sking 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.”¹⁰⁴

The Court explained that a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.¹⁰⁵ When a complaint pleads facts that are merely consistent with a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”¹⁰⁶ The Court thus retired *Conley*’s no set of facts test.¹⁰⁷

98. *Id.* at 551.

99. *Id.* at 548–49.

100. *Twombly*, 550 U.S. at 564 (“[T]he complaint leaves no doubt that the plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILCEs.”).

101. *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

102. *Id.* at 557.

103. *Id.* (“[F]actual allegations must be enough to raise a right to relief above a speculative level.”).

104. *Id.* at 556.

105. *Twombly*, 550 U.S. at 556.

106. *Id.* at 557 (brackets omitted).

107. The Court expressly rejected that it moved to a heightened pleading standard. “[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.” *Id.* at 570. The term “heightened pleading” has been invoked about this topic in various contexts, but remains ambiguous. The Supreme Court here seemed to use the term “heightened” in reference to the Federal Rules— as long as plausibility pleading is consistent with the rules, it is not “heightened” in this sense. Some scholars, however, refer to plausibility pleading as “heightened” in reference to *Conley*; plausibility pleading requires more of a complaint than notice pleading, thus plausibility pleading may be “heightened” in this sense. Because the various meanings for the term have different implications about the permissibility of plausibility pleading, this article will not refer to plausibility pleading as “heightened.”

The Court relied on the writings of Judges Easterbrook and Posner to express its concern over abusing the cost of discovery to bring frivolous claims and emphasized the need to weed out weak claims early.¹⁰⁸ The Court observed that the success of judicial supervision in checking discovery abuse has been “on the modest side,”¹⁰⁹ and summary judgment is inadequate to weed out unmeritorious claims because “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”¹¹⁰

The Court concluded that the allegations in the complaint did not plausibly suggest an illicit accord, because the allegations were not only compatible with, but indeed were more likely explained by, lawful, unchoreographed free-market behavior.¹¹¹ Conspiracy allegations must include evidence tending to exclude the possibility of independent action.¹¹² Contrary to the plaintiff’s argument, the Court reasoned that the behavior of the ILECs could simply be explained by each entity’s rationally competitive nature to act in its own best interests.¹¹³ The conduct alleged was thus exactly what one would expect from a competitive telecommunications market.

In his dissent, Justice Stevens argued that the Court’s concern about the expense of antitrust litigation can be resolved by “careful case management, including strict control of discovery, [and] careful scrutiny of evidence at the summary judgment stage[.]”¹¹⁴ He reasoned that the concerns about the cost of discovery do not merit a rejection of the *Conley* standard.¹¹⁵ Stevens’ dissent looked to the history of the Federal Rules, their aim to limit the barriers blocking litigants from court, and their goal of resolving cases on their merits.¹¹⁶

108. Spencer, *supra* note 90 (arguing that a “troika” of policy concerns—litigation expense, discovery abuse, and overburdened caseloads” underlie *Twombly*’s plausibility standard).

109. *Twombly*, 550 U.S. at 559.

110. *Id.* at 560 n.6 (reasoning that judicial case management will not work because “[a] judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. The judicial officer always knows less than the parties . . . Judicial officers cannot measure the cost and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals . . .”).

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

112. *Id.* at 554.

113. *Id.*

114. *Id.* at 573 (Stevens, J., dissenting).

115. *Id.* at 575 n.13 (Stevens, J., dissenting) (“The potential for ‘sprawling, costly, and hugely time-consuming’ discovery is no reason to throw the baby out with the bathwater.”) (internal citation omitted).

116. *Id.* at 575 (Stevens, J., dissenting).

Justice Stevens quoted Chief Justice Rehnquist's majority opinion in *Leatherman v. Tarrant County*,¹¹⁷ reasoning that motions to dismiss were not the place to combat discovery abuse, and litigants must rely on summary judgment and control of discovery to weed out meritorious claims sooner rather than later. He cited Form 9, Complaint for Negligence, which is included in the Federal Rules of Civil Procedure, and explained how the bare allegations there were sufficient under the standard set forth by the Rules.¹¹⁸ Justice Stevens objected that the majority's standard for the motion to dismiss at hand conflated pleading challenges into the summary judgment standard and imposed an evidentiary standard to evaluate a motion to dismiss.¹¹⁹ According to Stevens, any change to the pleading requirement should be made by the rulemaking process, and thus, not unilaterally by the Court.¹²⁰ Stevens argued that the Court's rejection of the allegations as legal conclusions that do not receive the presumption of truth was a return to code pleading.¹²¹ He expressed concern about cases, like *Twombly*, where much of the evidence is in the defendants' hands, even surviving a motion to dismiss.¹²²

After *Twombly*, it remained unclear whether the plausibility standard applied to all pleadings or only in the antitrust context. Two years later, *Ashcroft v. Iqbal*¹²³ clarified the confusion. In *Iqbal*, a Pakistani immigrant alleged that former U.S. Attorney General John Ashcroft and current FBI Director Robert Mueller unconstitutionally singled out Arab Muslims for harsh confinement after the September 11th attacks based on their religion and ethnicity.¹²⁴

The complaint stated that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff] to harsh conditions of confinement as a matter of policy, solely on account the prohibited factors [religion, race, and/or national origin] and for no

117. 507 U.S. 163, 168–69 (1993).

118. *Twombly*, 550 U.S. at 576 (Stevens, J., dissenting).

119. *Id.* at 580.

120. *Id.* at 579 ("I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process- a rulemaking process- for revisions of that order.")

121. *Id.*

122. *Id.* at 586–87.

123. 129 S. Ct. 1937, 1953 (2009).

124. *Id.* at 1942. The initial complaint named numerous other defendants, but the issue before the Court involved only the allegations against Mueller and Ashcroft.

legitimate penological interest.”¹²⁵ In addition, the claim alleged that “Ashcroft was the policy’s ‘principal architect’ and Mueller was ‘instrumental’ in its adoption and execution.”¹²⁶

The Supreme Court found that most of the factual allegations in the complaint were either “conclusory” or implausible,¹²⁷ and thus the complaint did not state a claim. The Court reasoned that the pleading standard in this rule does not require “detailed factual allegations,” but demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.¹²⁸ Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.¹²⁹ Though *Twombly* determined the sufficiency of an antitrust complaint, the Court explained that the decision was based on its interpretation and application of Rule 8, which governs the pleading standard “in all civil actions and proceedings in the United States district courts.”¹³⁰ Therefore, the Court clarified that the *Twombly* standard applies to all cases.

The Court reasoned that two principles underlie the *Twombly* decision: (1) a court need not accept as true legal conclusions;¹³¹ and (2) only a complaint that states a plausible claim for relief survives a motion to dismiss.¹³² The Court thus determined that a complaint has facial plausibility when the plaintiff pleads sufficient factual content from which the courts may reasonably infer that the defendant is liable for the misconduct alleged.¹³³

Because Mueller and Ashcroft raised the defense of qualified immunity, and the Court refused to find Mueller and Ashcroft responsible for the actions of the lower level officials under *respondeat superior*, Iqbal needed to show that Mueller and Ashcroft themselves violated the Constitution.¹³⁴ The Court found that the allegations in the complaint did not establish wrongdoing by Ashcroft and Mueller. Although purporting that Mueller arrested and detained thousands of Arab Muslim men as part of 9/11 investigations, which were approved by the FBI, demonstrated purposefully

125. *Id.* at 1939.

126. *Id.* at 1939.

127. *Iqbal*, 129 S. Ct. at 1941.

128. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555).

129. *Id.* (quoting *Twombly*, 550 U.S. at 557).

130. *Id.* at 1953 (citing FED. R. CIV. P. 8).

131. *Id.* (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.”).

132. *Id.* (Citing *Twombly*, 550 U.S. at 555-56).

133. *Iqbal*, 129 S. Ct. at 1940.

134. *Id.* at 1939.

designating detainees “of high interest” according to their race, religion, or national origin,¹³⁵ the Court found that because the 9/11 attacks were perpetrated by Arab Muslims, it was not surprising that a legitimate policy of arresting individuals with suspected connections to the attacks would have a disparate, incidental impact on Arab Muslims.¹³⁶

Justice Souter, who wrote the majority opinion in *Twombly*, dissented in *Iqbal*.¹³⁷ His objection stemmed from his rejection of the majority’s determination that there was no supervisory liability in this case and from his disagreement as to which allegations in the complaint were conclusory. Justice Souter argued that the actions of the lower officers (allegedly kicking, punching, and dragging *Iqbal*) were attributable to Mueller and Ashcroft.¹³⁸ Souter, therefore, argued *Iqbal* did not have to plead that Mueller and Ashcroft themselves violated the Constitution. Souter did not disagree with the majority about the appropriateness of plausibility pleading; rather, his objection came from his disagreement about the impact of supervisory liability.¹³⁹

Thus far, *Iqbal* and *Twombly* are the only two Supreme Court decisions explaining the standard for plausibility pleading. While the language in these cases provides some guidance, the exact account of plausibility pleading that courts will adopt remains unclear.

PART III: ACCOUNT OF PLAUSIBILITY PLEADING

Numerous interpretations of plausibility pleading have been put forth after *Twombly* and *Iqbal*. Some take the position that plausibility pleading is a return to code pleading’s emphasis on the distinction between fact and law.¹⁴⁰ Others interpret plausibility pleading as a minimal change that will not make a great difference.¹⁴¹ This section of the article aims to provide an account of plausibility pleading that addresses the concerns of discovery

135. *Id.* at 1951.

136. *Id.* at 1952 (“All [the complaint] plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”).

137. *Id.* at 1954 (Souter, J., dissenting).

138. Justice Souter found it convincing that Mueller and Ashcroft conceded that a supervisor’s knowledge of a subordinate’s unconstitutional conduct are grounds for *Bivens* liability. *Iqbal*, 129 S. Ct. at 1956 (Souter, J., dissenting).

139. *Id.* at 1958.

140. See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 95 IOWA L. REV. 873, 890–91 (2009).

141. See, e.g., Richard A. Epstein, *Twombly, After Two Years: The Procedural Revolution in Antitrust That Wasn’t*, GCP MAGAZINE (July 2009) (on file with author).

abuses and frivolous litigation, but does not fall victim to the concerns critics have raised about *Iqbal* and *Twombly*.

A. The Test

The first prong of the test determines which allegations in the complaint deserve the presumption of truth. In *Iqbal*, the Court stated, “the tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.”¹⁴² Conclusory allegations may be written as factual inferences, but if they simply restate the elements of the cause of action, they are not presumed to be true.¹⁴³ Such allegations are no more than legal conclusions and are not given the presumption of truth.

The failure to presume conclusory allegations as true is by no means radical. If such allegations were given the presumption of truth, any complaint simply restating the elements of the cause of action would be sufficient.¹⁴⁴

The second prong of the test asks if the complaint as a whole – taking into account which allegations merit the presumption of truth and which do not – asserts a plausible cause of action. If a complaint does not assert a plausible cause of action, making it unlikely that discovery will yield any information to validate the plaintiff’s claim, there is no reason for the parties to incur the extreme costs of discovery.¹⁴⁵ There are two ways for a complaint to fail this plausibility prong: first, a claim is implausible if the non-conclusory facts alleged, assuming they are shown to be true with discovery, would be insufficient to pass a summary judgment motion;¹⁴⁶ and second, even if the facts could survive a summary judgment motion, the claim may be implausible if the judge finds that the complaint alleges unreasonable facts.¹⁴⁷

142. *Iqbal*, 129 S. Ct. at 1940 (citing *Twombly*, 550 U.S. at 555).

143. BLACK’S LAW DICTIONARY 329 (9th ed. 2009) (defining “conclusory” as “expressing a factual inference without stating the underlying facts on which the inference is based.”); see also Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 491–92 (2010) (defining conclusory as alleging the claim’s legal elements).

144. Hartnett, *supra* note 143, at 488–89 (“[S]o long as there is a motion designed to test the legal sufficiency of a plaintiff’s claim, courts cannot be bound to treat a plaintiff’s legal conclusions as true.”).

145. Epstein, *supra* note 141, at 2–3.

146. *Id.*

147. *Id.*

Scholars have observed that plausibility pleading, as set forth in *Twombly* and *Iqbal*, resembles the summary judgment standard.¹⁴⁸ If a goal of pleading is to minimize unmeritorious actions, then some relationship between the summary judgment and pleading standards makes sense. A complaint does not plausibly set forth a cause of action where there is no reason to believe that its allegations would ever survive summary judgment. If there is no reason to believe that discovery will bring about the necessary evidence to survive summary judgment, the defendant should not be compelled to face the expense and inconvenience of discovery. Allowing such a complaint to continue would simply be a waste of the court's already limited resources.¹⁴⁹

The second way a complaint may not be plausible, even if the alleged facts establish the elements of the cause of action, is when reason and common sense dictate that the necessary factual inferences are totally unreasonable.¹⁵⁰ If, despite the factual allegations, the only reasonable explanation would be that the defendant acted in conformance with the law, then the complaint should not survive a motion to dismiss.¹⁵¹

Even though they are not given the presumption of truth, *Iqbal* does not necessitate ignoring the legal conclusions altogether at this stage. In fact, the Court acknowledged that "legal conclusions can provide the complaint's framework."¹⁵² In determining plausibility, the judge must thus review the complaint as a whole.¹⁵³ The *Iqbal* Court emphasized that a determination of plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."¹⁵⁴ Whether or not a

148. See Clermont & Yeazell, *supra* note 92, at 15 (reasoning that the *Twombly* and *Iqbal* plausibility standard "appears equivalent to the standard of decision for summary judgment.").

149. See Epstein, *supra* note 141, at 3 ("[T]he court concludes that there is no reason to incur the heavy costs of discovery when there are good theoretical reasons to believe that it will turn up empty."); see also *Twombly*, 550 U.S. at 558 ("[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.") (internal quotations omitted).

150. *Iqbal*, 129 S. Ct. at 1949 ("[A] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); see also Hartnett, *supra* note 143, at 474 ("[T]he plausibility standard of *Twombly* can be understood as equivalent to the traditional insistence that factual inference be reasonable").

151. It is important to note that this approach toward plausibility pleading does not ask a judge to make factual determinations. That is, the judge does not determine what actually occurred, rather, given the complaint as a whole (including the context surrounding the complaint), she determines whether the complaint tells a reasonable story. *Iqbal*, 129 S. Ct. at 1952.

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

153. This is the approach the Court used in *Twombly*. The Court reasoned that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitled to relief plausible." *Twombly*, 550 U.S. at 569 n.14.

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

complaint sets for a plausible claim for relief will vary depending on the context of the complaint and the different substantive areas of the law.¹⁵⁵

This second part of the test involves a cost-benefit analysis in which the judge, accepting the non-conclusory allegations as true, weighs the likelihood of the plaintiff finding evidence of wrongdoing during discovery against the costs of proceeding with the claim. If the allegations tell a reasonable story of wrongdoing, then the cost of proceeding is worthwhile; conversely, if after accepting the non-conclusory allegations as true, the most reasonable explanation for the defendant's actions is perfectly legal behavior, then there is no reason to expect discovery to be fruitful, and the cost of proceeding to discovery outweighs the distant possibility that the plaintiff will discover a "smoking gun."

The final part of this article's approach toward plausibility pleading is not directly discussed in *Iqbal* and *Twombly*, but helps assure that meritorious cases are not lost under this standard. If a plaintiff reasonably believes she will be unable to meet the plausibility requirements because she does not have access to necessary information, the court can conduct early discovery.

There are two points at which time limited early discovery can take place. One point is after the judge decides the complaint is lacking. The plaintiff, who truly believes she has a cause of action, can explain to the judge why the complaint lacks relevant information and how she can obtain that information. For example, she may assert that the information is exclusively in the defendant's hands. The judge can then choose to conduct limited, judicially guided, discovery in areas where the complaint is lacking and allow the plaintiff to amend her complaint in the event that missing facts are discovered.¹⁵⁶

The second point at which presuit discovery can take place occurs prior to filing the complaint. Under this approach, a plaintiff suspecting her complaint is lacking plausibility may ask the court for limited, pretrial discovery in order to complete her complaint.¹⁵⁷ Such a request requires the

155. Hartnett, *supra* note 143, at 496 (Plausibility "will depend on what facts the substantive law makes material and the appropriate inferential connections between the facts.").

156. This judge-guided discovery would be similar to the system used in many European courts. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985) (describing the German approach to discovery where the court takes responsibility for gathering and sifting evidence).

157. See Dodson, *supra* note 78 ("A carefully limited and structure framework of 'pre-discovery discovery' . . . will allow all parties, for a relatively cheap price tag, to determine whether a weak case is truly meritless and thereby avoid the more expensive price tag of full-fledged litigation."); Kourlis et al., *supra* note 35, at 247 ("[P]re-suit discovery [is] a tool designed to preserve initial court access in fact-

plaintiff to explain to the judge which facts are missing and why she cannot obtain them, and then show that the methods by which she plans to conduct limited discovery will be minimally invasive and cost-effective. If the judge believes discovery is necessary to validate the complaint, and the manner by which the plaintiff will conduct discovery is appropriate, then the judge can approve presuit discovery. Numerous states that require more specific pleading than notice pleading allow for similar discovery.¹⁵⁸

While the Rules do not specifically discuss the availability of discovery pending a motion to dismiss,¹⁵⁹ they do not prohibit discovery before the filing of a 12(b)(6) motion.¹⁶⁰ The Rules do permit a stay of discovery,¹⁶¹ but stays of discovery are not routine.¹⁶² Therefore, presuit discovery is possible to achieve without amending the Rules.

This approach is preferable to judge-guided discovery following the conditional grant of the motion to dismiss, because it deters plaintiffs with weak claims from filing their cases in the first place. Moreover, once the judge grants the motion to dismiss under the presuit discovery approach, the decision is final; whereas under the first model, the plaintiff may continually attempt to amend the complaint.

One concern that might arise from the use of presuit discovery is that it simply injects the discovery abuses earlier in the life of the lawsuit. However, presuit discovery would be issue specific and judicially guided, thus avoiding those risks posed by an all-encompassing discovery process after a complaint survives the motion to dismiss. Because the judge will be

based pleading jurisdictions by allowing a putative plaintiff to seek limited discovery before the filing of a lawsuit if she would otherwise be unable to plead sufficient facts in her complaint.”).

158. See PA. R. CIV. P. 4001(c) (giving trial courts discretion to allow the plaintiff to conduct early discovery where the information the plaintiff seeks is material and necessary to the filing of her complaint); *Berger v. Cuomo*, 644 A.2d 333, 337 (Conn. 1994) (allowing “. . . an independent action in equity for discovery . . . designed to obtain evidence for use in an action other than the one in which discovery is sought.”); ALA. R. CIV. P. 27 (allowing for pre-action investigative discovery after a petition in which the plaintiff shows she is unable to bring the cause of action and identifying the key facts she expects to discover with the proposed discovery); see also Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM, 218 (2007) (examining the widespread use of Texas’ broad authority permitting litigants to pursue presuit discovery).

159. Dodson, *supra* note 78 (explaining that the drafters probably did not expect the need for such discovery under their conception of pleading and discovery).

160. Hartnett, *supra* note 143, at 513 (“[A] district court retains considerable discretion, even after *Twombly* and *Iqbal*, to allow discovery prior to deciding a 12(b)(6) motion.”).

161. Under Rule 26, discovery is available unless it is stayed for good cause. Rule 26(c) allows a stay of discovery pending a motion to dismiss for good cause. FED R. CIV. P. 26.

162. Hartnett, *supra* note 143, at 507 (“The mere filing of a motion to dismiss does not trigger a stay of discovery. “[D]iscovery need not cease during the pendency of a motion to dismiss.”) (citing *SK Hand Tool Corp. v. Dresser Indus.*, 852 F.2d 936, 945 n.11 (7th Cir. 1988)).

familiar with the confined issues approved for discovery, she can more closely monitor the process, whereby the judge may end discovery if it proves too expensive or too invasive. Additionally, considering that presuit discovery will be confined to the specific issues suspected of presenting an implausible allegation¹⁶³ and the methods of discovery will be directly approved by the judge, the risks that arise from adversarial, minimally supervised discovery will not be present.

B. Application to the Cases

Iqbal and *Twombly* both happened to be cases with especially high bars to establish plausibility,¹⁶⁴ but not all cases would require such specific factual allegations to establish plausibility.¹⁶⁵ The complaints in *Conley* and *Swierkiewicz*, two cases critics incorrectly argue were overturned by *Iqbal* and *Twombly*, would allege a plausible cause of action under this approach.

Twombly had a high plausibility bar because it was an antitrust case and required a showing of an actual agreement of conspiracy.¹⁶⁶ The complaint in *Twombly* had two allegations: (1) it alleged agreements by the ILECs to refrain from competing against one another inferred from ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages;"¹⁶⁷ and (2) the complaint alleged that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of the upstart CLECs.¹⁶⁸ The complaint concluded that the common motivation to thwart the CLECs' competitive efforts led the ILECs to form a conspiracy.¹⁶⁹

In following step one of plausibility pleading, the Court did not presume true allegations that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry... and ha[d] agreed

163. In *Twombly*, for example, the missing issues were the allegation of collusion (as distinct from mere parallelism). In *Iqbal*, the missing issues were the allegation of intentional discrimination (as distinct from mere disparate impact).

164. See *Smith v. Duffey*, 576 F.3d 336, 339 (7th Cir. 2009) (suggesting *Twombly* and *Iqbal* were special cases because of the impact of qualified immunity in *Iqbal* and the class action in *Twombly*).

165. See Hartnett, *supra* note 143, at 497 (arguing that some cases have a lower bar for plausibility "because the substantive law ultimately determines what is necessary to prevail, and some things are more readily inferred than others.").

166. See *Clermont & Yeazell*, *supra* note 92, at 826 (stating that mere allegations of parallel conduct are not sufficient to show illegal conduct under § 1 of the Sherman Act).

167. *Twombly*, 550 U.S. at 551.

168. *Id.* at 550.

169. *Id.* at 550–51.

not to compete with one another.”¹⁷⁰ Because this language directly mirrored case law setting out the standard for anticompetitive conduct,¹⁷¹ the Court reasoned this assertion was a “legal conclusion” and thus not entitled to the assumption of truth.¹⁷²

Once the legal conclusions were not given the presumption of truth, the Court found the remaining factual allegations established nothing more than parallel conduct. The Court reasoned that common sense dictated assuming the existence of a conspiracy from the parallel actions alleged was unreasonable. Plaintiff’s conspiracy theory did not make any economic sense because the ILECs had reason to resist facilitating competition without any agreement or conspiracy.¹⁷³ Furthermore, an earlier Department of Justice investigation found no evidence of a conspiracy.¹⁷⁴ It was, therefore, highly unlikely that discovery would reveal evidence of a conspiracy. Because an assumption of conspiracy was not reasonable from the allegations in the complaint and because parallel conduct alone was insufficient to establish a violation of the Sherman Act,¹⁷⁵ there was no reason to believe that, even with discovery, the case would survive summary judgment. Therefore, it was not worth the cost of discovery and use of the justice system’s already strained resources.

Another consideration underlying *Twombly* is the cost of error. The pressures at hand were beyond those of a typical suit—where a defendant might be pressured to settle with a single plaintiff. Given the ease with which antitrust classes are certified, the cost of error in *Twombly* would be much worse; the defendants would have unusual settlement pressure because of the class-wide nature of the proceeding. Moreover, if the Court allowed a frivolous suit to proceed in this antitrust case, the strategy used by the *Twombly* plaintiffs could later be deployed against other heavily regulated industries.

The high bar for plausibility in *Iqbal* stemmed from the impact of qualified immunity in the case. To overcome the qualified immunity defense, a plaintiff must prove a conscious or reckless disregard for the

170. *Id.* at 551.

171. *See* *Copperwelt Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984) (Section 1 of the Sherman Act enjoins only anticompetitive conduct “effected by a contract, combination, or conspiracy”) (internal citations omitted).

172. *Twombly*, 550 U.S. at 564–66.

173. Epstein, *supra* note 141, at 6 (“It makes perfectly good sense, unilaterally, for each LEC to act defensively in its own territory”).

174. *Id.*

175. *See* *Clermont & Yeazell*, *supra* note 92, at 826.

law.¹⁷⁶ The *Iqbal* majority rejected the notion that Mueller and Ashcroft had supervisory liability over the actions of their subordinates or that a supervisor must share in the subordinate's unconstitutional purpose. *Iqbal*'s complaint, therefore, had to provide sufficient specific factual allegations supporting the position that Ashcroft and Mueller shared in the unconstitutional purpose.

The complaint alleged, "the [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"¹⁷⁷ and that Mueller and Ashcroft approved the policy of holding the detainees in restrictive conditions until they were cleared.¹⁷⁸ The complaint named Ashcroft as the "principal architect" of the policy and identified Mueller as "instrumental in [its] adoption, promulgation, and implementation."¹⁷⁹ *Iqbal* contended that Mueller and Ashcroft "each knew of, condoned, and willfully and maliciously agreed to subject' [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."¹⁸⁰

The Court first explained which allegations were legal conclusions that did not merit the presumption of truth.¹⁸¹ First, the Court reasoned that allegations that Ashcroft was the "principal architect" and that Mueller was "instrumental" in adopting and executing the policy of confining people "solely on account of [their] religion, race, and/or national origin" was simply a recitation of the elements of the cause of action.¹⁸²

The Court treated as non-conclusory the allegations that after September 11th, the FBI arrested and detained thousands of Arab Muslim men as part of their investigations under Mueller's direction. The Court also did not consider the allegations that Mueller and Ashcroft approved the policy of holding post-September 11 detainees in highly restrictive conditions of confinement for clearing by the FBI conclusory.¹⁸³ These allegations did not merely track the language in the complaint and thus merited the presumption of truth.

176. See *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993).

177. *Iqbal*, 129 S. Ct. at 1944 (2009).

178. *Id.* at 1941.

179. *Id.* at 1944.

180. *Id.*

181. *Id.* at 1951.

182. *Id.*

183. *Id.*

The Court reasoned that allegations entitled to the presumption of truth were consistent with a discriminatory policy; however, considering the context of the actions, it was unreasonable to assume simply from the disparate impact on Arab Muslims that Mueller and Ashcroft implemented the policy with a discriminatory purpose. From the allegations in the complaint, Arab Muslims were the primary subjects of the detention. The Court reasoned there was no reason to think a discriminatory policy was any more likely than the nondiscriminatory reaction one might expect following the September 11th attacks.¹⁸⁴ Given that Arab Muslim men perpetrated the acts, it was unsurprising that mostly Arab Muslim men were confined due to suspected participation in the events.

The Court emphasized its “rejection of the careful-case-management approach is especially important in suits where government-official defendants are entitled to assert the defense of qualified immunity.”¹⁸⁵ The Court was concerned about the costs of litigation to officials and especially the intrusiveness of discovery where officials must expend valuable time and resources that might otherwise be directed to the proper execution of government work. The Court explained that these concerns are even more extreme when the government officials are responding to “a national and international security emergency unprecedented in the history of the American Republic.”¹⁸⁶ Although the potential return from proceeding to discovery may have been higher than in *Twombly*,¹⁸⁷ given the more reasonable explanation for the allegations that Arab Muslims were the primary detainees and the concerns underlying qualified immunity, the risks of continuing the case – subjecting Mueller and Ashcroft to invasive discovery – outweighed the harms of dismissing the case. The qualified immunity analysis, therefore, holds a great deal of significance in the Court’s holding in *Iqbal*.¹⁸⁸

184. *Iqbal*, 129 S. Ct. at 1952 (“All [the complaint] plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”).

185. *Id.* at 1953.

186. *Id.* at 1945.

187. *Iqbal* may have found some document or evidence from a deposition that Mueller and Ashcroft had discriminatory intent, whereas, given the economic incentives and the past Department of Justice investigation, it was unlikely that discovery in *Twombly* would yield evidence of a conspiracy.

188. Hartnett, *supra* note 143, at 497.

[I]t is easier to infer that a supervisor knew about a subordinate’s constitutional violation but did nothing about it (perhaps because he thought other matters of higher priority and the costs of discipline to exceed the benefit) than to infer that a supervisor shared the subordinate’s unconstitutional purpose. For this reason, the *Iqbal* Court’s insistence that

In retiring the *Conley* “no set of facts” standard, the Court was careful to not overrule the holding in *Conley*. This makes sense because the *Conley* complaint states a plausible cause of action. In *Conley v. Gibson*,¹⁸⁹ African-American union members sued their union leaders under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Under this law and previous Supreme Court precedent,¹⁹⁰ the union had an obligation not to discriminate. The *Conley* complaint charged the white union leadership with removing black employees from favorable jobs and thus giving the jobs to white union members.¹⁹¹

This case was different from *Twombly* and *Iqbal* because the potential returns for discovery in this case were large. The defendants in *Conley* had every incentive to hide their discriminatory purpose. Unlike *Twombly* where the more reasonable explanation was mere parallel action, or *Iqbal* where the more reasonable explanation for Mueller and Ashcroft’s policy was national security, the reasonable explanation for the alleged action in *Conley* was discrimination. Given the allegations in the complaint and the context of the suit (a time when discrimination was prevalent in the United States), the most reasonable explanation for the white union representatives replacing black employees with white employees was a discriminatory purpose. Because the complaint in *Conley* stated a plausible cause of action, the complaint would survive a motion to dismiss even under the plausibility standard: *Iqbal* and *Twombly*, therefore, did not overrule *Conley*.

Critics often cite *Swierkiewicz v. Sorema N.A.*¹⁹² as a case in conflict with *Twombly* and *Iqbal*.¹⁹³ However, the *Swierkiewicz* complaint would survive under plausibility pleading. *Swierkiewicz* was an employment discrimination action in which the plaintiff alleged he was terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964. The plaintiff, a 53-year-old Hungarian native, alleged that after working for the defendant for six years, he was demoted and his position was transferred to a less experienced, younger employee who, like

‘supervisory liability’ is a ‘misnomer’ in the context of a *Bivens* action and that ‘purpose rather than knowledge is required to impose *Bivens* liability’ is a crucial step in concluding that the *Iqbal* complaint was insufficient.

Id.

189. 355 U.S. 41 (1957).

190. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 207 (1944).

191. *Conley*, 355 U.S. at 42–43.

192. 534 U.S. 506, 514 (2002).

193. See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 141–42 (2007).

the president of the defendant corporation, was of French origin.¹⁹⁴ The plaintiff's complaint alleged that after attempting to discuss his concerns with his employer, he was fired. Unlike the allegations in *Twombly* and *Iqbal*, the allegations in *Swierkiewicz* did not simply track the cause of action and consequently, would be entitled to the presumption of truth. Moreover, given the allegations, there was no reason to think there was some other, more reasonable explanation for the actions. If the plaintiff was more qualified and had more experience than the French national with whom he was replaced, the reasonable conclusion for the president's actions was a discriminatory purpose.

This analysis of *Conley* and *Swierkiewicz* shows most complaints will not face as high a bar for plausibility as needed to survive the motion to dismiss in *Iqbal* and *Twombly*.

C. Benefits of Plausibility Pleading

Contrary to the views of some strident critics, plausibility pleading may not be far off from the reformers' vision of the 1938 Rules. Perhaps the most important feature the reformers hoped to bring about in the Rules was a focus on the merits of the case. Notice pleading may have initially been consistent with that vision back when discovery was simple and trial not prohibitively expensive. The realities of the discovery process today, however, have taken litigation far from the initial goals of the 1938 reformers.¹⁹⁵ For example, the 1938 reformers envisioned a legal system where most suits culminated in a trial on the merits, but today, most cases result in settlement.¹⁹⁶

Consistent with the 1938 reformers' intentions, plausibility pleading helps return the focus of suits from cost to merit. The Rules were designed, "to secure the just, speedy and inexpensive determination of every action."¹⁹⁷ From the beginning, the Rules recognized that allowing

194. *Swierkiewicz*, 506 U.S. at 508.

195. Schwarzer, *supra* note 58, at 703 (arguing that the vision of the reformers is largely unfulfilled because "[t]he staggering increase in the volume and complexity of cases has thrust case management on judges and has involved them deeply in controlling the scope and pace of litigation.").

196. See Bruce L. Hay & Kathryn E. Spier, *Settlement of Litigation*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442, 442 (Peter Newman ed. 1998) (explaining that over 90% of filed lawsuits in America settle); Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?* (UCLA-RAND Ctr. for Law & Pub. Policy, forthcoming 2010) (manuscript at 5–6), available at <http://ssrn.com/abstract=1161343> (explaining that of about 17 million civil claims filed annually, about 60% will settle—totaling about \$50 billion); see also Resnik, *supra* note 30, at 597 (explaining that the initial version of the Federal Rules of Civil Procedure did not use the word "settlement" in the entire text, but today, the word appears four times).

197. *Celotex v. Catrett*, 477 U.S. 317, 327 (1986). See also FED. R. CIV. P. 1.

unmeritorious suits to proceed to trial was undesirable.¹⁹⁸ The reason the reformers advocated for broad discovery was to preserve the merits of the suit and allow the parties the opportunity to gather maximal evidence that will ultimately raise the chances of reaching a just result. Today, however, discovery frustrates the very purpose it was meant to further by dominating litigation and imposing burdens on parties disproportionate to its benefits.¹⁹⁹ Under code pleading, too many plaintiffs suffered from facing dismissals of meritorious suits. Today, by overprotecting meritorious cases, defendants are too often harmed by frivolous litigation.²⁰⁰ To restore focus on the merits important to the 1938 reformers, we may have to deviate from the reformers' specific ideas of discovery. The plausibility dismissal standard provides a procedural means by which judges can dispose of cases on their merits more efficiently than the current system allows.²⁰¹ Plausibility pleading returns the focus from the cost of litigation to the merit of the suit and thus better reflects the reformers' values.

The major reason why closer case management is often unsuccessful in limiting the cost of discovery is because the judge often has insufficient information about the case to determine what discovery is necessary.²⁰²

198. See CHARLES E. CLARK, *PROCEDURE THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES E. CLARK* 85, 146 (Charles Alan Wright & Harry M. Reasoner eds., 1965) ("A court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.").

199. See Epstein, *supra* note 9, at 98.

The current provisions of the Federal Rules of Civil Procedure were designed in an earlier era for litigation that on average has been far simpler than litigation today. The Rules operated on an assumption that the greater risks in civil litigation came from the premature dismissal of meritorious cases brought by ordinary people of little means or sophistication. Now there is a far greater peril of allowing frivolous litigation to go on too long as well as a risk of cutting short meritorious litigation.

Id.; Schwarzer, *supra* note 58, at 703 ("Often [discovery] is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules"); Kourlis et al., *supra* note 35, at 253 ("[T]he discovery process may prevent parties from even getting to the facts that lie at the heart of their dispute.").

200. See Schwarzer, *supra* note 58.

201. See Tidmarsh, *supra* note 1, at 550 ("In a procedural world attuned to resolutions other than trial, the identification of sticking points and of each party's needs and concerns, and the tailored development of information to address these matters, would take center stage. Pleadings might need to be fuller, and discovery narrower in its early stages.").

202. See *Twombly*, 550 U.S. at 560 n.6 (finding that judges "cannot define 'abusive' discovery except in theory, because in practice [they] lack essential information."); Easterbrook, *supra* note 63, at 638 ("A magistrate supervising discovery does not— cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown"); Kourlis et al., *supra* note 35, at 279 ("Under a notice pleading regime, it is more difficult to ascertain whether a disproportionate discovery request was motivated by an innocent effort to collect all relevant facts or a more sinister desire to drive up the cost of responding and force a settlement.").

Requiring a plaintiff to allege more facts in a complaint narrows the issues in dispute and gives the judge more information about the case that will help facilitate stricter judicial control over discovery.²⁰³

Plausibility pleading also preserves judicial resources. Instead of wasting resources on conducting discovery, summary judgment, or other motions that may arise before a sure-loser is dismissed, plausibility pleading allows for the screening of unmeritorious claims before the expense of discovery. This saves both the innocent defendants' and the courts' resources. Furthermore, by weeding out the wholly unmeritorious suits, plausibility pleading allows judicial resources to focus on meritorious cases.²⁰⁴

Another benefit of plausibility pleading is that it may restore some control to appellate judges. In a world where most cases end in settlement, there is little opportunity for appellate judges to review cases. Authority has thus moved from the hands of appellate and trial judges to the litigants.²⁰⁵ Because granting a motion to dismiss is a final judgment, parties can appeal a successful 12(b)(6) motion. A pleading standard that imposes stricter requirements of complaints will most likely result in a greater number of successful motions to dismiss. This approach, in turn, will give appellate judges the opportunity to review dismissed cases that, under the previous system, would likely have resulted in settlement and never afforded judicial review on appeal.

Requiring complaints to contain more facts also provides better notice to the defendants as to which claim they may have to defend against. While skeletal pleadings give notice to the defendant as to the existence of the suit, they may not provide sufficient detail to allow the defendant to prepare an appropriate response or defense strategy. Without more details in the complaint, the defendant has no way of knowing what is important in the suit and what is not.²⁰⁶

Disposing of unmeritorious claims early in the litigation process also better regulates behavior in society. Litigation serves more of a regulatory

203. See Kourlis et al., *supra* note 35, at 279. ("A requirement to plead facts from the outset would remove many of the 'innocent' excuses associated with excessive discovery, and would make truly malicious efforts to overuse discovery easier to spot and sanction.")

204. See *id.* at 262 ("[A]llowing issues to be narrowed earlier in the litigation would streamline the litigation process, reduce cost, and thereby allow a *greater* number of meritorious claims to be filed.")

205. See Yeazell, *supra* note 30 (arguing that because of the decreasing access to trials control has shifted out of the hands of appellate judges and into the hands of litigants).

206. See Kourlis et al., *supra* note 35, at 246 (arguing for stricter pleading requirements at the onset of cases).

role in the United States than in any other country.²⁰⁷ Therefore, it is important that the regulation efficiently compensates plaintiffs who have been harmed and deters defendants who have engaged in undesirable behavior, while not deterring defendants who behaved properly. This can be done by dismissing unmeritorious suits at their onset and thus investing judicial resources in the meritorious suits.

The problem with a reality in which most cases end in settlement is that, without proper regulation of settlements, the litigation system may fail to perform its functions of compensating victims and deterring law-breakers. When a defendant settles at a value that still makes the bad behavior worthwhile, the settlement will not deter the defendant from engaging in the undesirable behavior; furthermore, it may not sufficiently compensate the plaintiff for her loss. On the other hand, settlements of unmeritorious cases or that are too high may discourage socially beneficial activities.²⁰⁸ Low merit lawsuits will target those who complied with the law just as much as, if not more than, injurers who did not comply with the law. Therefore, law-abiding defendants will be discouraged from engaging in certain unharmed, and even potentially beneficial, behaviors altogether if they fear that such actions may result in litigation.²⁰⁹

Low merit suits will also fail to provide a strong incentive for tortfeasors to comply with the law, because their likelihood of facing litigation does not follow from their compliance; low merit suits thus lead to under-deterrence of undesirable behavior.²¹⁰ Early dismissals that accurately

207. See Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1938 (2008)

The 1960s rulemaking was part of a larger story aimed at using the federal courts for regulatory enforcement of federal rights. The relevant players included the Supreme Court, Congress, and the rule drafters, all of whom were interested in facilitating access to federal courts for litigants to enforce newly articulated national rights.

Id.

208. Hay & Spier, *supra* note 197, at 447.

209. Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 S. CT. ECON. REV. 39, 46–47 (2008).

Faced with the risk of being held liable whether or not he complies with the law, a potential defendant may choose to avoid the activity that might give rise to liability. This is an example of a type of over-deterrence. To the extent such litigation-induced decisions deprive society of the benefits of productive activity, low merit litigation is costly to society.

Id.

210. *Id.* at 45.

dismiss unmeritorious suits and maintain the meritorious suits have the potential to increase the average merit of lawsuits, thus enhancing incentives to comply with the law.²¹¹

Aside from dismissing unmeritorious suits, plausibility pleading will help limit the number of unmeritorious suits brought in the first place. One reason why it is worthwhile for plaintiffs to bring claims of lower value is because the upfront costs are very low. If the plaintiff can file her suit at a cheaper cost than the defendant faces in defending the suit, there would be a settlement zone even if the case is obviously unmeritorious.²¹² If the upfront costs to the plaintiff increased, there would be less cases where the cost of filing the suit is significantly lower cost than that of defending the suit.²¹³

In his article, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgment*, Richard Epstein observed that “the 1938 Federal Rules of Civil Procedure are not well situated to the complexities of modern litigation.”²¹⁴ To account for the changes in the litigation landscape since the time of the reformers, we may need to deviate from the earlier understandings of pleading to return to the underlying principles of the Rules. A pleading standard that weeds out unmeritorious suits from the onset helps return the focus of litigation to the merits of a suit instead of the costs of discovery.

PART IV: CRITIQUES OF PLAUSIBILITY PLEADING

After *Twombly* and *Iqbal*, numerous critiques arose opposing plausibility pleading. This section describes and responds to some of the major critiques to plausibility pleading.

A. Plausibility Pleading is Contrary to the Federal Rules

One critique of plausibility pleading is that the standard the Supreme Court adopted in *Iqbal* and *Twombly* is contrary to the Federal Rules of Civil Procedure. These critics argue that the founders of the Rules did not

211. *Id.* at 41.

212. Kozel & Rosenberg, *supra* note 2, at 1856.

213. It seems that *Iqbal* is already increasing upfront costs to plaintiffs and is, therefore, probably deterring frivolous suits. See *Alleging Damage to Plaintiffs' Cases, Critics Seek to Overturn Iqbal Ruling*, 78 U.S.L.W. 2304, at 2306 (Nov. 24, 2009) [hereinafter *Alleging Damage*] (explaining that many members of the plaintiffs' bar are spending more time and resources putting more factual information into their complaints to survive an *Iqbal* motion to dismiss).

214. Epstein, *supra* note 9, at 66.

envision a pleading's function as narrowing issues in a case²¹⁵ and plausibility pleading is thus contrary to the intent of the founders.²¹⁶

A sponsor of the critique that plausibility pleading is contrary to the Rules is A. Benjamin Spencer in his article *Plausibility Pleading*.²¹⁷ Spencer argues the plausibility standard is inconsistent with the liberal pleading created by the Rules,²¹⁸ and

[r]equiring factual allegations that make a 'showing... of entitlement to relief' runs counter to the understanding of the original drafters of the rules that in order to state a claim of liability, conclusory legal allegations coupled with skeletal, contextual facts would suffice and detailed fact pleading would no longer be required.²¹⁹

Ever since *Conley*, it was long understood—both by the Supreme Court and by the Federal Rules Advisory Committee—that the Rules set out a liberal standard for pleading.²²⁰ According to Spencer, *Twombly* and *Iqbal* improperly changed this standard. Under the Rules, the pleading phase is not the appropriate point to screen cases for merit.²²¹

Spencer also argues that plausibility pleading conflicts with other federal rules that are linked to Rule 8(a).²²² According to Spencer, plausibility pleading is incompatible with Rule 11. Under Rule 11, attorneys certify that the claims presented in a complaint are warranted by the law and that

215. Clermont & Yeazell, *supra* note 92, at 835 ("The motivating theory [behind the Federal Rules of Civil Procedure] was that the stages subsequent to pleading—disclosure, discovery, pretrial conferences, summary judgment and trial—could more efficiently and fairly handle functions such as narrowing issues and revealing facts, and thus the whole system could better deliver a proper decision on the merits.").

216. *Id.* at 838 ("The design principles of the Rules did not contemplate probing the allegations at the pleading stage.").

217. Spencer, *supra* note 90.

218. *Id.* at 461 ("The Supreme Court's interpretation of Rule 8(a) (2) in *Twombly* rankles because it is inconsistent with the liberal pleading regime established by the Federal Rules and previously embraced by the Court itself.").

219. *Id.* at 442.

220. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) ("If any rule in federal civil procedure deserves the label 'blackletter,' it is notice pleading."); see also *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

221. See Spencer, *supra* note 90, at 484.

[I]dentifying claims suspected of having shaky or insufficient factual support is not the proper role of pleadings in our system. Rather, the Federal Rules assign the function of screening out unsupported claims to later stages in the litigation. Specifically, the Court has isolated the summary judgment device found in Rule 56 as the appropriate mechanism for such screening.

Id.

222. *Id.* at 460 ("[T]he *Twombly* opinion can be faulted for propounding an untenable interpretation of Rule 8(a) that is wholly inconsistent with Supreme Court precedent and at odds with other rules of pleading and procedure applicable in the federal courts.").

the allegations “have evidentiary support or, if specifically so identified, *are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.*”²²³ Spencer explains this allowance is directly linked to the liberal pleading standard. By moving from notice pleading to plausibility pleading, Spencer argues “the Court seems to be precluding the very types of complaints contemplated and permitted by Rule 11(b).”²²⁴ Spencer also argues that plausibility pleading is inconsistent with a Rule 12(e) motion for a more definite statement. Under Rule 12(e), a party can move for a more definite statement of a pleading when the pleading is so vague that the opposing party cannot prepare a response.²²⁵ Spencer argues that a necessary implication of this Rule is that a complaint lacking sufficient detail does not fail to state a claim, but states a claim without offering the defendant enough information to respond.²²⁶

Spencer argues that Rule 9(b) also provides evidence that plausibility pleading is inconsistent with the Federal Rules. Rule 9(b) requires a party alleging fraud or mistake to “state with particularity the circumstances constituting fraud or mistake.”²²⁷ It then states that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”²²⁸ Spencer argues that if allegations of fraud or mistake require more of pleading than typical claims, and plausibility pleading requires “particularity,” it implies that complaints not alleging fraud or mistake need not be alleged with the same particularity.²²⁹ If Rule 8(a)(2) set the pleading standard as high as Rule 9(b), then Rule 9(b) would be superfluous. Habeas Rule 2(c) requires a petition “state the facts supporting each ground” for relief.²³⁰ Spencer argues this suggests that Rule 8(a)’s requirements are less demanding than Habeas Rule 2(c).²³¹

Spencer finally argues that plausibility pleading is contrary to the Federal Rules because the sample forms in the Federal Rules endorse the use of conclusory allegations that would not suffice under plausibility pleading.²³² Form 11, for example, states “[o]n [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff. As a result, the

223. FED. R. CIV. P. 11 (emphasis added).

224. Spencer, *supra* note 90, at 477.

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

226. Spencer, *supra* note 90, at 477.

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

228. *Id.*

229. Spencer, *supra* note 90, at 473.

230. *Id.* at 477.

231. *Id.*

232. *Id.* at 442; *see also* Clermont & Yeazell, *supra* note 92, at 836 (arguing that the sample forms in the Federal Rules allow plaintiffs to plead with conclusory allegations).

plaintiff was physically injured, lost wages or income, suffered physical and mental pain and incurred medical expenses of \$[amount].”²³³ A complaint with these allegations would not form an adequate claim under plausibility pleading.

It is undeniable that plausibility pleading is a departure from *Conley*’s articulation of notice pleading. However, *Conley*’s “no set of facts” standard is not necessitated by Rule 8’s requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief.” A reinterpretation of this language is, therefore, not necessarily a departure from the rule. In fact, we have been moving in the direction of pleadings stricter than pure “notice” pleadings for a while. The *Conley* standard itself required more than mere notice of a suit’s existence. In *Conley*, the Supreme Court stressed that the Rules require the complaint to give the defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”²³⁴ Moreover, amendments to the Rules and court decisions over the years have made it clear that the pleading standard requires more of parties than just notifying one’s opponent of the existence of the suit.²³⁵ Even when applying the *Conley* standard, courts often required a complaint do more than just give notice.²³⁶ Furthermore, there have been more demanding pleading requirements in certain kinds of claims. For example, Rule 9(b) requires that “a party must state with particularity the circumstances constituting fraud or mistake.”²³⁷

Spencer is wrong in his account of Rule 8 as it compares to the other Rules. Stricter pleading may set the bar slightly higher for Rule 11 in that the bar for frivolousness may have been lowered; that is, if a lawyer knows he does not have sufficient information to file a plausible complaint, it may be deemed frivolous. This result, however, is not contrary to the language of Rule 11. Plausibility pleading is not contrary to Rule 12(e) because even a complaint that meets the plausibility standard may not give the defendant

233. FED. R. CIV. P. Form 11.

234. *Conley*, 355 U.S. at 47.

235. Federal Rule of Civil Procedure 11, for example, requires attorneys or parties to certify there is a good faith basis for allegations made in pleadings, which has contributed to more detailed pleadings. FED. R. CIV. P. 11(b); *see also* Ward, *supra* note 34, at 900 (“[V]arious Federal Rules amendments, court decisions, and legislative initiatives have sent subtle and not so-subtle signals to parties that more detailed pleadings might be required.”).

236. Ward *supra* note 34, at 900 (“Courts ‘talk’ of notice pleading, but often require more[.]”); *see also* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (noting a trend toward stricter pleading in reported federal cases).

237. FED. R. CIV. P. 9 (b). Rule 9 lists other allegations that require special pleadings such as special damages (9(g)), challenges to a party’s capacity in (9(a)), and performance of occurrence of a condition precedent in (9(c)).

sufficient detail to respond. Even if the story the complaint tells is reasonable, it may fail to mention key facts the defendant may need to formulate her response.

Spencer is probably correct in assuming some of the sample forms may no longer suffice under plausibility pleading. Simply stating that the defendant “negligently drove a motor vehicle against the plaintiff” merely tracks the language of the cause of action. Plausibility pleading would probably require the plaintiff to plead how the defendant was negligent (for example, allege the defendant was not looking at the road or was talking on her cell phone). However, simply because some of the forms may no longer be good samples does not necessarily show that plausibility pleading is contrary to the Rules.²³⁸ Changing the sample forms may be a necessary consequence of reforming the pleading standard to better reflect today’s litigation landscape.

Not only is plausibility pleading consistent with the intent of the founders, it restores their ultimate goal of deciding cases on their merits. It is clear that the founders wanted some specificity in complaints.²³⁹ It is equally clear the founders did not believe a complaint that simply stated legal conclusions stated a proper cause of action.²⁴⁰

Even if a critic were to successfully show that an aspect of plausibility pleading is contrary to the original intention of the reformers with regard to a particular Rule, it may be an acceptable cost. The reformers’ vision of pleadings was informed by their understanding of the legal system at the time. Even if their vision of pleadings was to set a low bar so that most cases proceed to discovery, it was on the understanding that cases would go to trial and be decided on their merits. Had they known how today’s system functions (in which the threat of discovery itself often makes defendants pay without any consideration of the merits) they may have reconsidered lenient pleadings. Habeas Rule 2(c), for example, was written with notice

238. See Hartnett, *supra* note 143, at 496 n.108 (“[C]ompliance with the forms . . . does not guarantee that the complaint will survive a 12(b)(6) motion because deciding such a motion depends on the substantive law. Imagine that a state were to abolish the tort of negligence regarding automobile accidents (including with pedestrians) and substitute a compensation scheme. Under this substantive law, a complaint that tracked Form 11 would nevertheless be properly dismissed.”).

239. See generally Dodson, *supra* note 78 and accompanying text.

240. Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45 (1957);

No rule of thumb is possible, but in general it may be said that the pleader should not content himself with alleging merely the final and ultimate conclusion which the court is to make in deciding the case for him. He should go at least one step further back and allege the circumstances from which this conclusion directly followed.

Charles E. Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259, 266 (1926) [hereinafter *The Complaint*].

pleading in mind. Had plausibility pleading been the standard from the beginning, there may be no need for the stricter pleading requirements of Habeas Rule 2(c).

Spencer, along with other critics, argues it is the role of summary judgment, not pleading dismissals, to screen unmeritorious suits.²⁴¹ However, given the expense of discovery, screening at the summary judgment phase is too late. By then, most cases have either faced the extreme cost of discovery (thus clearly obtaining neither a “just” nor “speedy” resolution of the case) or the parties have settled, even though the case may not have merit.²⁴² It is interesting to note that critics of the summary judgment trilogy made the similar argument that the Court rewrote Rule 56 without an official change to the Rules.²⁴³

Another critique, specific to *Iqbal*, comes from Robert Bone. Bone argues that, unlike *Twombly*, *Iqbal* uses a two-pronged approach toward pleading that filters legal conclusions before applying the plausibility standard to factual allegations.²⁴⁴ According to Bone, this approach is a return to code pleading’s emphasis on the distinction between factual and legal allegations, which the 1938 reformers sought to eliminate. Given this history, such fact pleading is directly contrary to the goals of the Rules and thus inconsistent with Rule 8.²⁴⁵ Bone explains the focus on the distinction between factual and legal allegations is problematic due to the difficulty in attempting to distinguish the two. Under Bone’s account of the *Iqbal* standard, the court must look at each allegation individually to filter out the legal conclusions.²⁴⁶

241. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (“In the absence of such an amendment [of Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”).

242. Kourlis et al., *supra* note 35, at 255 (“[S]ummary judgment is not a particularly efficient or cost-effective way to separate the strong claims from the weak.”).

243. *See* Stempel, *supra* note 16, at 157 (arguing that in the summary judgment trilogy “the Court effectively rewrote rule 56 to create a summary judgment doctrine that went beyond what even the reformers had urged.”).

244. Bone, *supra* note 140, at 877.

245. *Id.* at 890; *see also* Allen Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 633 (2007) (arguing that *Twombly*’s standard could be read as “return[ing] pleading to a pre-FRCP regime in which courts were required to distinguish among many facts and conclusions of law, and in which conclusory allegations were suspect and often inadequate as a matter of law.”).

245. Spencer, *supra* note 90, at 431–33.

246. Bone, *supra* note 140, at 877.

Bone's understanding of *Iqbal*, however, may not be accurate. Throughout *Iqbal*, the Court specifically states it is applying *Twombly*'s standard. *Iqbal* can be read as doing just so. It is hard to understand exactly how the *Iqbal* Court applies *Twombly* because a large degree of its analysis encompasses qualified immunity.²⁴⁷ Once the Court established that *Iqbal* cannot attribute discriminatory motives from lower to senior ranking officials, it held that the complaint must include specific allegations as to those higher officials. As a matter of the qualified immunity doctrine, therefore, the Court's understanding made it hard to sue the higher officials for discrimination. Taking this aspect of the case into account, one can easily read *Iqbal* to apply *Twombly*'s version of plausibility pleading.

The *Twombly* Court found *Twombly*'s complaint deficient because the actions alleged were precisely the legal actions one would expect in a competitive telecommunications market; therefore, the more reasonable explanation that follows from the allegations in the complaint is that the defendants behaved lawfully. Similarly, even given the allegations in *Iqbal*'s complaint – disregarding the language quoting the elements of the cause of action – the actions that Mueller and Ashcroft took were exactly what one would expect from the government when reacting to the events of September 11th attacks in a non-discriminatory manner. That is, one would expect there to be a disparate impact on Arab Muslims because the perpetrators of the September 11 attacks were Arab Muslims. *Iqbal*'s complaint, therefore, did not raise a reasonable expectation that Ashcroft or Mueller acted with a discriminatory purpose (as opposed to acting in spite of a disparate impact). It is thus possible to take the Court at its word as following *Twombly* and not setting forth a new test focused on fact pleading versus legal allegations.²⁴⁸

Moreover, the Court's refusal to presume legal conclusions as true is neither new nor a return to code pleading. Code pleading required facts to be laid out in a great amount of detail.²⁴⁹ Only the ultimate material objective facts that made up the cause of action were to be alleged, while

247. See *supra* notes 185–89 and accompanying text.

248. If Bone is correct that *Iqbal*'s version of plausibility pleading requires a distinction between factual and legal conclusions, then perhaps the standard is indeed inconsistent with the goals of the 1938 reformers, and *Twombly*'s standard should apply instead. The plausibility pleading standard this article endorses is not one that requires strict distinctions between factual and legal allegations; rather, it only necessitates the court not presume pure legal conclusions as true.

249. STEPHEN C. YEAZELL, *CIVIL PROCEDURE*, 333–44 (7th ed. 2008) (describing the code pleading regime and its demand for great detail).

conclusions of law and evidential facts were not supposed to be pleaded.²⁵⁰ Refusing to presume legal conclusions that track the elements of a cause of action as true is by no means a return to this standard.²⁵¹

The founders' desire to distance their approach from code pleading does not necessitate a rejection of all distinctions between law and fact.²⁵² Just as the founders did not consider reiterating the elements of a claim to establish a cause of action, so too does plausibility pleading require a plaintiff to allege more than just the elements of a cause of action without any factual substance.²⁵³

The founders may have intentionally left Rule 8 ambiguous.²⁵⁴ Although the founders wished to break away from code pleading, it is uncertain that they intended to bury the distinction between law and fact entirely.

B. The Court is Not the Right Entity to Change the Pleading Standard

Another popular objection to *Twombly* and *Iqbal* is that the Supreme Court is not the right entity to implement a reinterpretation of the Rules.²⁵⁵ Proponents of this critique argue that the Supreme Court is not the right entity to change the pleading standard and that an amendment to the Rules is necessary to change the pleading standards from notice to plausibility pleading.²⁵⁶ According to supporters of this argument, *Conley* had been the long accepted standard and a change to such an accustomed standard should come from the rulemaking process, not unilaterally from the Court.²⁵⁷

250. *The Complaint*, *supra* note 241, at 259–60.

251. Identifying an allegation as conclusory is easy because one can look to the language of the cause of action to determine if the allegation in the complaint essentially copies or tracks that language. No analysis of the distinction between law and fact is necessary in identifying an allegation as conclusory.

252. *See Hartnett*, *supra* note 143, at 487 (“[T]he Federal Rules’ rejection of the code’s insistence that conclusions of law not be plead does not entail a wholesale rejection of the distinction between allegations of fact and legal conclusions[.]”).

253. If legal conclusions were given the presumption of truth, any complaint could just quote from the standard and pass the motion to dismiss, rendering the motion to dismiss phase essentially meaningless, because even a complaint that does not give notice as to what the complaint is about can merely track the elements of the cause of action.

254. *See Herrmann et al.*, *supra* note 77, at 142. *But see Epstein*, *supra* note 141, at 15 (“There is little doubt that the original conception behind the 1938 Federal Rules of Civil Procedure strongly favored the adoption of notice pleading- a reaction to the somewhat technical pleading requirements that existed under the earlier system of Code Pleading[.]”).

255. *See Bone*, *supra* note 87, at 850 (arguing that the Supreme Court is not institutionally well-equipped to decide whether strict pleading is desirable; a change to pleading should come through rulemaking process, or, through Congress).

256. *See Spencer*, *supra* note 90, at 494 (“Amending the rules had been the means used to address such concerns and it is unclear why the Supreme Court acted outside of the amendment process to effect this most recent change.”).

257. The Court, as recently as 2002, continued to endorse the *Conley* standard; *see Swierkiewicz*, 534

These critics argue that the amendment process for the Rules is more democratic, transparent, and accountable than the decision of nine justices.²⁵⁸

The formal amendment process requires the Civil Rules Advisory Committee to notify the legal community of the proposed changes and provide an opportunity for the community to comment on the proposed changes.²⁵⁹ It also requires a great deal of research before implementing a change to the Rules.²⁶⁰ Insofar as the Court rested its new standard on the premises that the costs of discovery are too high and cannot be solved by judicial regulation, these premises should be tested. While a committee dedicated to changing the rules will engage in this research, the Court does not have the capacity to elicit such information.

Some critics have gone so far as to label *Iqbal* and *Twombly* judicial activism.²⁶¹ It is interesting to note, however, that this same criticism arose when the Court passed the summary judgment trilogy.²⁶² Jeffrey Stempel argued that the “nine justices of the Supreme Court, quite removed from daily trial court activities, ordinary litigation, and the public in general, are an especially ill-equipped group to conduct alone the cost-benefit analysis that should have preceded any substantial change in summary judgment jurisprudence.”²⁶³

A large coalition of civil rights groups, trial lawyers, and public interest advocates is encouraging the passage of legislation to overturn *Twombly* and *Iqbal*.²⁶⁴ In July of 2009, Senator Arlen Specter introduced the Notice Pleading Restoration Act that aimed to bar federal courts from dismissing any case except under the standards established by the Supreme Court in *Conley*.²⁶⁵ Another piece of legislation aiming to reverse *Twombly* and

U.S. at 512 (2002) (holding that Rule 8(a)(2) requires a complaint simply give the defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests”) (quoting *Conley*, 355 U.S. at 47).

258. Spencer, *supra* note 90, at 454; *see also* Clermont & Yeazell, *supra* note 92, at 847 (“[T]his process guarantees that notice, comment, and a good deal of consultation among bench and bar will precede significant (and even insignificant) procedural change.”).

259. Stempel, *supra*, note 16 at 182.

260. Clermont & Yeazell, *supra* note 92, at 848 (arguing more research should have been done before changing the pleading standard).

261. Rep. Jerrold Nadler (D-N.Y.) called the *Iqbal* and *Twombly* decisions “judicial activism at its worst.” *Alleging Damage*, *supra* note 214, at 2305.

262. *See* Stempel, *supra* note 16, at 185–86 (arguing that the changes to summary judgment should have been made by a change to Rule 56 under the Rules Enabling Act).

263. *Id.* at 191.

264. *Alleging Damage*, *supra* note 214, at 2305.

265. The Notice Pleading Restoration Act provides in full: “Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the enactment of this Act, a Federal court shall not dismiss a complaint under Rule 12(b)(6) or (e) of the

Iqbal is the Open Access to Courts Act that seeks to restore the *Conley* standard by incorporating specific language that a complaint shall not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.”²⁶⁶

It seems odd, however, to argue that an official amendment to the Rules is required when the Court updated its own standard. In retiring the *Conley* standard and adopting a standard that seeks to dismiss unmeritorious suits before discovery, the Court simply revised the standard it previously created in light of changes to the realities of litigation. It is widely accepted that the Supreme Court can overturn or deviate from its own precedent. In fact, that is precisely what the Court did with the summary judgment trilogy.²⁶⁷ Given that the *Conley* standard is not required by Rule 8’s language, it seems strange to argue that once it interprets a rule, the Court is bound by that interpretation and the only way to change the interpretation would be to reform the Rules.

The argument that the Supreme Court is too removed from the day-to-day experiences of litigation is weak as well. The alternative for which these critics advocate is an official amendment by the Rules Committee, an entity also removed from the day-to-day experience of litigants. Moreover, even with an official amendment to the Rules, the Supreme Court must approve of the change.²⁶⁸ If critics believe the Court is too removed from day-to-day litigation to reinterpret pleading, there is no reason to believe it has sufficient understanding of day-to-day litigation to approve or disapprove of the proposed changes by the Committee. Furthermore, it would be odd to request the Court to approve an amendment that came about only to overrule a Supreme Court decision.

C. Plausibility Pleading Conflates the Standards for Motions to Dismiss and Summary Judgment

In his dissent in *Twombly*, Justice Stevens objected that the majority’s standard for the motion to dismiss at hand conflated pleading challenges into the summary judgment standard and imposed an evidentiary standard

Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).” Notice Pleading Restoration Act of 2009, S. 1504, 111 Cong. § 2 (2009).

266. *Alleging Damage*, *supra* note 214, at 2306.

267. *See* Stempel, *supra* note 16, at 115 (explaining that before the summary judgment trilogy, courts viewed their role in a summary judgment motion as ascertaining whether the record showed a dispute of factual interpretation of the existence of a non-frivolous fact).

268. *See id.* at 185 (explaining that after the Advisory Committee solicits comments, “the Court has the opportunity to review the committee product and further revisit any rule changes.”).

to evaluate a motion to dismiss.²⁶⁹ This argument represents a third major objection to *Twombly* and *Iqbal*'s plausibility standard: plausibility pleading conflates the motion to dismiss and summary judgment.²⁷⁰ These critics argue that the problem with conflating the summary judgment standard with the pleading standard is that the plausibility standard requires plaintiffs to provide evidence that goes beyond mere allegations or circumstantial evidence before they conduct any discovery.²⁷¹ They argue that while it is not troublesome to require plaintiffs to make such a showing after discovery for summary judgment, it is troublesome to insist plaintiffs provide such evidence to survive a motion to dismiss.²⁷²

This objection, however, is not problematic for plausibility pleading. While it is true that the plausibility standard resembles the summary judgment standard, simply pointing out the similarity does not itself challenge the legitimacy of the plausibility standard.²⁷³ Indeed it makes sense that the two standards are related. It is a waste of the courts' and society's resources to allow a case to proceed through discovery if it is clear from the complaint that, even with discovery, the case will not pass summary judgment.

The pleading standard should take into account the costs and benefits of allowing the suit to proceed.²⁷⁴ In assessing the standard applicable to cases similar to *Twombly*, Richard Epstein reasons that "standard expected utility calculations suggest that litigation should be allowed to go forward only when the likelihood of a positive case is high enough to justify what both the Court of Appeals... and the Supreme Court... recognized as the

269. *Twombly*, 550 U.S. at 586 (Stevens, J., dissenting) ("[I]t should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage.").

270. Spencer, *supra* note 90, at 486 ("By requiring plaintiffs to offer factual allegations that report the factual basis for their assertions of liability and to do so in a way that makes liability plausible, the *Twombly* Court effectively has moved the summary judgment evaluation up to the pleading stage."); Ward, *supra* note 34, at 916–17 ("The *Twombly* opinion engages in a bit of sleight-of-hand to the extent that the effect is to conflate the standards for motions to dismiss, summary judgments, and directed verdicts."); Epstein, *supra* note 9, at 81 ("[*Twombly*] should be framed as a mini-summary judgment case, conducted at the close of pleadings, and not as a pointless verbal disquisition on the contested meanings of 'plausible' and 'conceivable.'"); Clermont & Yeazell, *supra* note 92, at 833–34 n.47 ("[T]he *Twombly-Iqbal* Court seems to have collapsed the Rule 12(b)(6) and Rule 56 standards of convincingness into one.").

271. Ward, *supra* note 34, at 917.

272. *Id.*

273. A similar standard was brought critiquing the now accepted summary judgment trilogy in light of the directed verdict standard. See Stempel, *supra* note 16, at 108 (arguing *Liberty Lobby* of the summary judgment trilogy equated summary judgment with directed verdict).

274. Epstein, *supra* note 9, at 66–67 ("In general, as the costs of discovery mount, the case for terminating litigation earlier in the cycle gets even stronger[.]").

enormous costs of discovery in class action antitrust suits.”²⁷⁵ Epstein explains that in “public information cases,” like *Twombly*, where the dispute does not arise from what the defendants did, but from conclusions drawn from their actions, a motion to dismiss on the pleadings can and should operate as an early “disguised” motion for summary judgment.²⁷⁶ He, therefore, supports the position that the convergence between the pleading standard and the summary judgment standard makes perfect sense in the domain of public information cases.²⁷⁷

Iqbal legitimately takes this reasoning a step further. The enormous cost of discovery is a concern in almost all cases; it justifies expanding Epstein’s approach beyond public information cases. In most cases, the cost of discovery is sufficiently high to invite settlement even in unmeritorious cases. Thus even if the plaintiff does not “win” at trial, she walks away with relief (whether deserved or not). The pleading standard should account for this problem. Not only should courts dismiss cases where public information shows that discovery will probably be fruitless, they should also dismiss cases where common sense and reason dictate that any interest in proceeding to discovery is significantly outweighed by the harms of allowing the suit to proceed. If, from the non-conclusory allegations in a complaint, reason dictates that discovery is highly unlikely to yield evidence that supports the plaintiffs’ claim, and the case presents an unusually high cost with proceeding to discovery – such as was evident from the influence of qualified immunity in *Iqbal* or the class-wide nature of *Twombly* – the case should be dismissed at the pleading phase.

D. Plausibility Pleading Bars Meritorious Suits

A fourth major objection to *Iqbal* and *Twombly*’s plausibility standard is that plausibility pleading screens too aggressively at the pleading phase.²⁷⁸ These critics argue it is too early to determine which are the meritorious and

275. *Id.* at 81; see also Hylton, *supra* note 209, at 54 (arguing the plaintiff’s complaint should, at the very least, plead sufficient facts to survive a summary judgment motion; otherwise the court has no basis to assess the probability that the case will survive summary judgment).

276. Epstein, *supra* note 9, at 81–82.

277. *Id.*

278. See Spencer, *supra* note 90, at 483.

which are the unmeritorious suits at the pleading phase.²⁷⁹ Screening for meritless suits at this stage in the litigation may bar legitimate claims that would have continued but for *Twombly* and *Iqbal*.²⁸⁰

The best version of this critique is that certain cases, even when meritorious, will be especially prone to dismissal.²⁸¹ For example, where claims rely on information that is within the defendant's exclusive knowledge or involve actions taken in private, a plaintiff may not be able to plead facts sufficient to pass a motion to dismiss under the plausibility standard.²⁸² In such cases, the plaintiff will have great difficulty obtaining this information before filing.²⁸³ Critics argue plausibility pleading creates a sort of Catch-22 in which the plaintiff must allege more detail before discovery, but the detail cannot often be obtained before discovery.²⁸⁴

279. *See id.* (“[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.”); *see also Swierkiewicz*, 534 U.S. at 512 (holding that “[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case.”).

280. *See Ward*, *supra* note 34, at 911 (“Using motions to dismiss as a mechanism to control litigation costs, however, is an inefficient approach that may have the effect of barring legitimate, meritorious claims that would have continued—at least through discovery—pre-*Twombly*.”).

281. It is interesting to note that after the summary judgment trilogy, critics made the similar argument that the new understanding of the summary judgment standard would favor defendants and prevent meritorious cases from reaching trial. *See Samuel Isaacharoff & George Loewenstein, Second Thoughts About Summary Judgment*, 100 *YALE L. J.* 73, 75 (1990) (“[S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants.”); *see also Stempel*, *supra* note 16, at 159 (arguing that courts will grant summary judgment to “trim weak or otherwise disfavored cases from the trial docket” and that certain classes of plaintiffs will feel the brunt of the effects).

282. Bone, *supra* note 87, at 878–79 (“In cases like *Iqbal*, where the defendant has critical private information, the plaintiff will not get past the pleading stage if she cannot ferret out enough facts before filing to get over the merits threshold for each of the elements of her claim. As a result, strict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evidence at the pleading stage before access to discovery.”); Spencer, *supra* note 90, at 481 (“It is a greater shame that discovery is foreclosed for such complainants in circumstances where the needed supporting facts lie within the exclusive possession of the defendants, which can be the case in antitrust cases lacking direct evidence of a conspiracy.”); Marcus, *supra* note 237, at 468.

[W]here the plaintiff is unable to provide details because only the defendant possesses such information, no such confidence is possible. To the contrary, it may be that the defendant has so effectively concealed his wrongdoing that the plaintiff can unearth it only with discovery. To insist on details as a prerequisite to discovery is putting the cart before the horse.

Id.

283. *See Ward*, *supra* note 34, at 912 (“[I]f plaintiffs' claims have merit, defendants will resist providing evidence of their own wrongdoing, at least to the extent that procedural rules permit them to do so. A Rule 12(b)(6) dismissal permits defendants to avoid the discovery process entirely.”).

284. 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) (“Where the primary activity that is the basis for a lawsuit is likely to create a situation where the plaintiffs do not have access to the factual information needed to comply with such pleading standards, those standards effectively foreclose a plaintiff's ability to enforce its substantive rights.”).

Certain categories of cases, such as civil rights cases, antitrust violations, product liability, consumer credit violation, and intellectual property infringements are especially vulnerable to dismissal.²⁸⁵ For instance, in civil rights cases, critics argue that there has been a disparate impact on motions to dismiss.²⁸⁶

The critiques described above argue that plausibility pleading screens both meritorious and unmeritorious claims. At this stage, most of the critiques of plausibility pleading are theoretical. *Twombly* was decided only three years ago, and *Iqbal* was decided a year ago. Critics do not yet have sufficient data of cases interpreting *Iqbal* and *Twombly* to properly establish that the plausibility standard adopted actually screens meritorious suits in practice. The decisions are simply too new to establish that the standard has yielded a problematic implementation. To determine whether plausibility pleading does, in fact, screen meritorious suits, a survey must first be conducted to observe how courts apply this test. Therefore, while this objection may eventually be legitimate, it is premature at best as studies on the issue have yielded varied results.

A preliminary study by the Judicial Conference of the United States, based on a search of Westlaw cases, suggests that motions to dismiss and grants of such motions have not increased appreciably.²⁸⁷ Another study by Andrea Kuperman, a law clerk for Judge Lee H. Rosenthal of the United States District Court for the Southern District of Texas (who chairs the Conference Standing Rules Committee), reviewed both district and appellate cases and concluded that there was little evidence to date that courts were dismissing meritorious claims under the *Iqbal/Twombly* standard.²⁸⁸

The best evidence to support the argument that courts dismiss more meritorious cases under the *Iqbal/Twombly* standard comes from a study by Patricia Hatamyar, who reported on over 1,000 cases filed in federal district court after *Twombly* and *Iqbal*.²⁸⁹ She concluded that it appears district courts are granting motions to dismiss at a higher rate under *Iqbal* than they

285. *Alleging Damage*, *supra* note 213.

286. Ward, *supra* note 34, at 915 (“The recent spike in the number of Rule 12(b)(6) motions to dismiss in civil rights actions raises serious questions about disparate impact of applications of *Twombly* to situations and cases not directly contemplated by the Supreme Court and echoes the concerns that were raised about the application of Rule 11 to civil rights cases after the 1983 amendment to that rule.”).

287. *Alleging Damage*, *supra* note 213, at 2305.

288. *Id.* at 2305–06.

289. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. REV. 553, 555 (2010).

did under *Conley* or even *Twombly* in certain categories of cases.²⁹⁰ Her study shows *Iqbal* and *Twombly* appear to have the greatest impact in six broad categories of cases: contracts, torts, civil rights (including constitutional violations and employment discrimination suits), intellectual property, labor, and “statutory actions” (including antitrust, RICO, environmental cases, and consumer credit claims).²⁹¹ In tort cases, successful motions to dismiss increased from 40% under *Conley*, to 46% after *Twombly*, to 52% after *Iqbal*.²⁹² The percentage of civil rights cases dismissed rose from 50% under *Conley* to 53% under *Twombly*, to 58% after *Iqbal*.²⁹³ Most significantly, dismissal of statutory actions fell from 53% under *Conley*, to 50% under *Twombly*, then rose to 72% after *Iqbal*.²⁹⁴

Although the studies above do not show consistent results, it would not be surprising if studies eventually showed courts granted motions to dismiss more readily under the more demanding new standard than under the more lenient old standard. In fact, this is exactly what happened after the summary judgment trilogy came down.²⁹⁵ However, such a finding does not itself show that plausibility pleading is problematic. Without evidence that the dismissed suits were meritorious, such results may simply mean that the plausibility standard is doing its job; that is, even if it is true that a greater percentage of cases are dismissed at this stage, it is unclear that the cases dismissed are meritorious. Kuperman’s report, for example, concluded, “while it seems likely that *Twombly* and *Iqbal* have resulted in screening out some claims that might have survived before those cases, it is much more difficult to determine whether meritorious claims are being screened under the framework or whether the new framework is effectively working to sift out only those cases that have no plausible basis for proceeding.”²⁹⁶ One means of determining the effectiveness of plausibility pleading would be to assess how many of the marginal complaints (that were not dismissed under *Conley*, but would have been dismissed under plausibility pleading) later failed at the summary judgment stage. If this

290. *Id.* at 597–603.

291. *Id.* at 605 fig.4.

292. *Id.* at 607.

293. *Id.*

294. *Id.* at 603–10.

295. See Brooke D. Coleman, *The Celotex Initial Burden Standard and an Opportunity to “Revivify” Rule 56*, 32 S. ILL. U. L. J. 295, 295 (2008) (“The percentage of federal cases ended by summary judgment increased from 3.7% in 1975 to 7.7% in 2000.”). But see Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007) (concluding that the Court’s summary judgment trilogy confirmed a trend toward more aggressive use of summary judgment already prevalent in lower federal courts).

296. *Alleging Damage*, *supra* note 213, at 2306.

number is high, then plausibility pleading provides an efficient screening mechanism.

Given that there is no consistent data showing the *Iqbal/Twombly* standard actually screens out more meritorious cases than notice pleading, the best critique of plausibility pleading is that, in theory, plausibility pleading *may* screen some meritorious suits. However, some minimal reforms to plausibility pleading can end the concern.

The first concern with the argument that plausibility pleading will bar suits in which certain information is within the defendant's exclusive knowledge is the fact that a plaintiff with a legitimate case (who is not bringing suit just to extort a settlement) at the very least believes she has a case. Moreover, if her attorney is in compliance with the federal rules and the rules of ethics, the attorney believes that, based on the information provided, the plaintiff's case has merit.²⁹⁷ Thus, even if the precise details are in the defendant's exclusive knowledge, the plaintiff should typically know enough information to plead the necessary facts for an attorney to reasonably believe that the plaintiff has a case based on the information provided.

In the rare situation that the defendant has the exclusive knowledge of facts necessary to plead a plausible case when the plaintiff and her attorney know the claim is legitimate, presuit discovery provides a solution. Allowing presuit discovery in cases that involve private knowledge or information exclusively in the defendant's hands would give the plaintiff an opportunity to obtain the missing information and show that her complaint has merit.

E. The Plausibility Standard is Too Subjective

A final objection to plausibility pleading is that in its application, plausibility pleading will tend toward a high level of judicial subjectivity. The *Iqbal* Court stated, determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."²⁹⁸ The objection is that because different judges have different experiences and viewpoints as to what is reasonable, the determination of whether or not a complaint is plausible is bound to be

297. See FED. R. CIV. P. 11(b) (stating that by presenting a pleading to the court, an attorney certifies "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument[.]"); MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]").

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

arbitrary.²⁹⁹ Professor Steven Burbank predicted *Iqbal* will be “a blank check for federal judges to get rid of cases they disfavor.”³⁰⁰ Other critics have expressed concern that judges will use the plausibility standard as a means of reducing their caseload and perhaps even deny litigants their right to a jury trial in violation of the Seventh Amendment.³⁰¹

It is true that the plausibility standard for pleading entails a certain degree of subjectivity in determining whether a complaint’s allegations are unreasonable. Determining plausibility will depend, to a certain extent, on the judge’s understanding of how the world works.³⁰² However, inductive reasoning—drawing inferences from common sense—is a central feature of litigation to which judges are already accustomed.³⁰³

The Rules give judges a great deal of discretionary power over litigation.³⁰⁴ One of the areas where judges have a great deal of discretion is over discovery matters. Plausibility pleading allows judges to apply the same common sense used in deciding discovery matters to determine whether or not a complaint should proceed to discovery. The discretion in plausibility pleading is, therefore, just an extension of judicial discretion over discovery.³⁰⁵

The suggested alternative toward limiting discovery abuses is judicial regulation; however, if we do not trust the judges to implement plausibility pleading fairly, there is no reason to believe they will be fair in their stricter regulation of discovery. To make matters worse, if we suspect judges will dismiss meritorious cases to lessen their caseloads or because they dislike certain kinds of cases, we should suspect they would maintain this same bias at other points in the proceeding (perhaps even in their

299. Surbin, *supra* note 63, at 390 (“The new ‘plausibility’ test, to be applied after a judge strikes allegations that he or she thinks are conclusory, is an invitation to ad hoc decision making.”).

300. Adam Liptak, *SIDEBAR: Case About 9/11 Case Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009 (quoting Professor Burbank).

301. Surbin, *supra* note 63, at 391.

302. See Hartnett, *supra* note 143, at 498 (“What strikes a judge as plausible depends on the judge’s sense of what is (to use the *Twombly* Court’s term) ‘natural’”).

303. *Id.* (describing the relationship between inductive reasoning and legal decision-making).

304. Surbin, *supra* note 63, at 391.

There is discretion at every turn in the open-textured Federal Rules, from what constitutes the statement of a claim for which relief can be granted; [sic] to what constitutes conduct, transaction, or occurrence (as these concepts manifest themselves in different rules); to what is impairment as a practical matter in necessary party jurisdiction; to when discovery has become so onerous that judicial curtailment is in order; to when a Rule 11 sanction should be imposed; to what is a lack of sufficiency of potential evidence for summary judgment purposes.

Id.

305. See FED. R. CIV. P. 16(a), (26)(b); see also Epstein, *supra* note 141, at 10 (“In the end, of course, the trial judge must always retain some discretion on discovery matters.”).

ultimate decisions at bench trials). Moreover, if trial judges abuse their discretion by dismissing cases just to lessen their caseload, we should expect appellate judges to reverse the improper dismissals.

While the plausibility pleading standard involves the judge's common sense, judicial common sense is not the only consideration in determining plausibility. The "reasonable" standard in determining whether a claim is plausible requires assessing the context of the complaint as a whole, not simply according to the judge's personal opinion of how the world works. The *Twombly* Court, for example, did not rest its evaluation of the complaint on only its common sense; rather, the Court looked to the history of the telecommunications industry and what was economically reasonable behavior in that industry.

Dismissal of suits under the plausibility standard does not offend the Constitution. Before plausibility pleading, courts imposed much more stringent pleading standards (including code pleading) that were not considered contrary to the Seventh Amendment. Moreover, judges already take certain cases away from juries in appropriate circumstances. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*³⁰⁶ the Supreme Court reasoned, "[i]n numerous contexts [including *Daubert*, judgment as a matter of law, and summary judgment], gate-keeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment."³⁰⁷

CONCLUSION

Twombly and *Iqbal* unquestionably represent a change to the pleading world. In thirty-two months, *Twombly* garnered 22,980 judicial citations.³⁰⁸ By contrast, *Erie* only generated 13,546 citations in its first seventy-two years.³⁰⁹ Despite these many references, it remains unclear which understanding of plausibility pleading the Court will ultimately accept or how lower courts will interpret *Iqbal* and *Twombly*. While some understandings of plausibility pleading are subject to the objections explained above, the approach toward plausibility pleading adopted by this

306. 551 U.S. 308 (2007); see also Herrmann et al., *supra* note 77, at 158 ("[I]t does not offend the Constitution to weed out implausible claims before trial. Summary judgment was upheld against a Seventh Amendment challenge ninety years ago Directed verdict survived a similar challenge There's nothing new here.").

307. 551 U.S. 308, 327 n.8 (2007).

308. Clermont & Yeazell, *supra* note 92, at 2 n.4 (measuring reference to *Twombly* on a Westlaw KeyCite run on January 15, 2010).

309. *Id.*

article addresses many of the concerns raised while balancing the interest of investing judicial resources in meritorious suits with curbing the expenses of discovery and frivolous suits.

The Federal Rules of Civil Procedure were written in an era in which litigation was far simpler than it is today. Given the changes to the system since then, some of the underlying assumptions behind the reformers' visions of the Rules no longer apply. Because of the extreme cost of discovery, even unmeritorious cases can have settlement zones; Because of the risk of aggregate litigation, defendants may settle unmeritorious cases to avoid exposure to a class action; and because of the prevalence of settlement, most cases are no longer resolved in a single trial on the merits.

In an ideal world with ideal resources it might be preferable to have true notice pleading and allow all cases to proceed through discovery. Nevertheless, today's realities require a balancing of resources. Our courts do not have the resources to bring all cases to trial and litigants do not have the resources to follow through with costly discovery and costly trial. Given this reality, plausibility pleading strikes an appropriate balance between focusing on merit and accounting for reality.

