

## THREE MYTHS ABOUT *TWOMBLY-IQBAL*

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*[British] Judge: Mr Houlihan, is your client aware of the maxim in pari delicto potior est conditio defendentis?*

*[Irish] Counsel: My Lord, in the bogs of Connemara they speak of little else.*<sup>1</sup>

### INTRODUCTION

In the legal bogs of the United States, judges and lawyers really are speaking of little besides *Bell Atlantic Corp. v. Twombly*<sup>2</sup> and *Ashcroft v. Iqbal*,<sup>3</sup> the two recent cases in which the U.S. Supreme Court revolutionized the law on pleading.<sup>4</sup> Academics too seem

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1. Peter Heerey, *Aesthetics, Culture, and the Whole Damn Thing*, 15 LAW & LITERATURE 295, 306 (2003). The story must be apocryphal, as it appears in many different places in an almost equal number of variations. The Latin in this particularly appropriate variation means: "In equal fault, the stronger is the situation of the defendant."

2. 550 U.S. 544 (2007) (dismissing an antitrust complaint that alleged an agreement in conclusory terms based upon information and belief, with the lack of detail owing to the fact that the plaintiffs had no proof in hand without discovery).

3. 129 S. Ct. 1937 (2009) (dismissing a civil rights complaint, while clarifying the intricate workings and broad applicability of *Twombly*).

4. By discombobulating a fundamental area of law, *Twombly* has managed to induce an absolutely extraordinary 29,704 cases to cite it in its first thirty-seven months as law, as measured by a Westlaw KeyCite search on July 2, 2010. It is on track to become the most-cited Supreme Court case of all time, unless it is surpassed by *Iqbal* itself, which has received 10,263 judicial citations in thirteen months. See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 86–88, 143–45 (2006) (discussing the measurement of a case's precedential importance by the number of cases citing

obsessed.<sup>5</sup>

Together with Professor Stephen Yeazell, I have already written about the three destabilizing attributes of *Twombly* and *Iqbal*: their doctrine is thoroughly novel, quite uncertain, and shakily resting on a foundation laid by a faulty legal process.<sup>6</sup> We fervently criticized the cases on those grounds, even though we were, and remain, agnostic on the question of whether notice pleading needs to be tightened. But the time for shock-and-awe commentary has passed. The time has come to think about moving forward. How will the new regime work?

One cannot figure out precisely what the two founding cases mean without ascertaining what they do not mean. Although I shall begin by provisionally summarizing the regime that the cases seemed to establish, I shall quickly shift to the necessary task of brush-clearing. I shall do that by refuting the three major myths that have arisen from misreadings of the two cases now seemingly prevalent in case and commentary.

By way of prologue, then, it was a deeply worrying supposition about meritless claims inundating the courts and inflicting discovery burdens that pushed the Justices into action. *Twombly* and *Iqbal* added a pleading requirement for claimants that goes beyond having to give notice. Invoking Federal Rule of Civil Procedure 8(a)(2)'s "short and plain statement of the claim *showing* that the pleader is entitled to relief,"<sup>7</sup> the Court imposed on the plaintiff the burden of establishing, by nonconclusory allegations, the complaint's plausibility as to liability on the merits.<sup>8</sup> Thus the Court, by case decision rather than by rulemaking, blazed a new and unclear path for all civil cases heard in federal court.<sup>9</sup> Much

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to it and compiling tables of the previously most-cited cases, with the summary judgment case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), listed as the case most often cited both by federal courts and by all courts combined). *But cf.* James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 22 (2008) (using network analysis to name *Cantwell v. Connecticut*, 310 U.S. 296 (1940), as the most important Supreme Court precedent, without a procedure case in sight).

5. For example, the January 2010 convention of the Association of American Law Schools in New Orleans was "like a notice pleading wake!" E-mail from Julie Cromer Young, Assoc. Professor, Thomas Jefferson Sch. of Law, to author (Jan. 20, 2010, 10:00 EST) (on file with author). Or as a writer for *Slate* put it: "[T]o America's civil-procedure professors, the effect . . . was akin to releasing a live ferret amid the Federal Rules of Civil Procedure." Dahlia Lithwick, *The Attorney General Is a Very Busy Man*, SLATE (Dec. 10, 2008), <http://www.slate.com/id/2206441>.

6. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010).

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

8. *Iqbal*, 129 S. Ct. at 1949; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007).

9. The Pretrial Practice and Discovery Committee of the ABA's Section of Litigation maintains a chart of the most significant decisions within each circuit

remains cloudy, but it now appears that pleading should work in the following way.<sup>10</sup>

First, upon a challenge to legal sufficiency, the judge should proceed in the traditional way for a demurrer by asking whether any legal claim exists that would be consistent with the words of the complaint—that is, the complaint must encompass a legal claim without including allegations that would defeat it.<sup>11</sup> Henceforth, however, the plaintiff must do more to identify the complaint’s legal theories, as a practical matter, because the plaintiff must be specific enough for the judge to weigh the complaint’s factual sufficiency under the next test.

Second, to satisfy the factual-sufficiency test, the plaintiff must plead facts and perhaps some evidence.<sup>12</sup> The plaintiff should give a particularized mention of the factual circumstances of each element of the causes of action.<sup>13</sup> The degree of particularization should be sufficient to make plausible an inference of liability, with the judge testing the plausibility not of each fact but only of the moving defendant’s ultimate liability on the particular cause.<sup>14</sup> The judge performs the decisional task (1) by ignoring any conclusory allegation, such as a bald assertion that an element exists, and (2) after accepting the remaining allegations as true, by weighing the plausibility of the liability inference in light of his or her judicial experience and common sense as applied in the case’s particular context.<sup>15</sup> This new approach will most seriously impact the plaintiff who needs discovery to learn the required factual particulars.

This simple summary has not, however, captured the minds of the citizenry. Instead, three widely prevailing myths lead to mistaken views that can seriously overstate or understate the cases’ significance. Each of the myths builds on its own faulty premise, as I shall now try to show.

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interpreting the meaning and proper application of *Iqbal*. ABA Sec. Litig., Pretrial Practice & Discovery Comm., *Iqbal Task Group: Chart of Cases*, AM. BAR ASS’N, <http://www.abanet.org/litigation/committees/pretrial/docs/iqbal-task-group-chart.pdf> (last visited Oct. 30, 2010); see also Memorandum from Andrea Kuperman on Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* to the Civil Rules Comm. & Standing Rules Comm. of the U.S. Courts (May 25, 2010), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal\\_memo\\_051710.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_051710.pdf) (presenting a study prepared for the Rules Advisory Committee and stating that “it remains difficult to draw many generalized conclusions about how the courts are interpreting and applying” the pleading requirements).

10. See RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, CIVIL PROCEDURE 1163–64 (10th ed. 2010) (setting out a similar summary).

11. See *Twombly*, 550 U.S. at 555–56.

12. See *id.*

13. See *Iqbal*, 129 S. Ct. at 1949–50; 71 C.J.S. *Pleading* § 256 (2000).

14. See *Iqbal*, 129 S. Ct. at 1949–50.

15. See *id.*

I. MYTH #1: THE *TWOMBLY-IQBAL* COURT HAS REVIVED  
FACT PLEADING

A. *Looking to the Past*

Many observers have concluded that the Supreme Court has, in *Twombly* and *Iqbal*, readopted fact pleading for the federal courts.<sup>16</sup> Depending on one's vantage point, the Court either is thereby foolishly leading a march into the past or is finally correcting the modern mistake of notice pleading. But, regardless of the wisdom that such a move would reflect, it is in actuality clear that the Court has not readopted fact pleading.

1. *How Fact Pleading Works*

The place to begin is reconsideration of the nature of fact pleading. It arrived as part of the Field Code of 1848.<sup>17</sup> The new pleading regime's defining characteristic was its requirement for complaints to state "the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."<sup>18</sup>

More than history is in play here. Fact pleading persists today in a good number of states,<sup>19</sup> as well as in a number of federal

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16. Cf. Adam McDonell Moline, Comment, *Nineteenth Century Principles for Twenty-First Century Pleading*, 60 EMORY L.J. (forthcoming 2010), available at <http://ssrn.com/abstract=1623102> (emphasizing David Dudley Field's original conception). My aim here is not to play gotcha. Rather than citing people who got this point wrong, I shall refer to only one of our wisest commentators, who took a first step in the direction of viewing *Twombly* as reembracing fact pleading before correcting course in light of *Iqbal*. For that example, drawn from my esteemed colleague's work, compare Michael C. Dorf, *The End of Notice Pleading?*, DORF ON L. (May 24, 2007, 7:35 AM), <http://www.dorfonlaw.org/2007/05/end-of-notice-pleading.html> (surmising that *Twombly* imposes a heightened-fact-pleading standard), with Michael C. Dorf, *My Letter to the Senate Judiciary Committee Regarding Notice Pleading*, DORF ON L. (Nov. 24, 2009, 1:36 AM), <http://www.dorfonlaw.org/2009/11/my-letter-to-senate-judiciary-committee.html> (distinguishing the older test of fact specificity from the new regime). See also Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217 (2010) (broadening his analysis).

17. See FIELD ET AL., *supra* note 10, at 1119–23, 1148–53.

18. Act of Apr. 12, 1848, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521.

19. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378, 1432 (1986) (listing the seventeen states that, in 1986, required some form of fact pleading, and noting that those states contained a majority of the country's population). Nebraska has since left that fact-pleading fold. See Legis. B. 876, 97th Leg., 2d Sess. (Neb. 2002) (adopting notice pleading). However, the trend in state procedure of moving toward the Federal Rules' model has definitely slowed. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003) (updating his earlier article by studying states' adoption of recent federal amendments to civil procedure rules).

provisions.<sup>20</sup> The typical requirement adopted by the framers of the various fact-pleading states' codes is that a pleader should give a "plain and concise statement of the facts constituting a cause of action."<sup>21</sup> The parties were to lay out the facts appropriately so that the court could apply the law.<sup>22</sup>

This mandate sounds simple. But vast accumulations of interpreting cases belie that simplicity, without yielding clear guidelines for decisions. What went wrong?

The code framers' most seriously wrong turn was their failure to realize that every statement of fact is both specified and generalized to some degree, because any description of a given situation requires selection and rejection of detail. The statement appropriate for pleading will depend on the objectives of pleading.<sup>23</sup>

Fact pleading therefore came to require the claimant to plead only the "ultimate facts," choosing ones that together constituted a "cause of action."<sup>24</sup> "The pleader was not to 'plead his evidence,' for that was being too specific; nor was he to 'plead conclusions of law,' for that was being too general; he was to plead the 'ultimate [or operative] facts.'"<sup>25</sup>

Does the lawyer "plead a contract by reciting that 'A said this, B said that, and so on' or by reciting that 'A and B mutually agreed such and such'?"<sup>26</sup> The standard proves quite unclear in application. The former allegation might be mere evidence, and the latter might be a legal conclusion.<sup>27</sup> What of "A is the wife of B"? The

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20. See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1296–1301.1, at 197–202, 297–98 (3d ed. 2004) (evaluating pleading requirements under FED. R. CIV. P. 9(b) and securities-fraud statutes).

21. Act to Amend the Code of Procedure, ch. 479, § 142(2), 1851 N.Y. Laws 876, 887 (1851). From its beginning, the Field Code in New York underwent frequent revision. Today, N.Y. C.P.L.R. 3013 (McKinney 1991) provides: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Although the section's omission of the word "facts" was liberalizing, see DAVID D. SIEGEL, NEW YORK PRACTICE § 208 (4th ed. 2005), its retention of "cause of action" has left New York with at least one foot in the fact-pleading camp, see Oakley & Coon, *supra* note 19, at 1411.

22. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38 (2d ed. 1947); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 329 (1988).

23. See CLARK, *supra* note 22, § 38, at 231–32; FIELD ET AL., *supra* note 10, at 1152–53.

24. See FIELD ET AL., *supra* note 10, at 1152; 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218, at 265 (3d ed. 2004).

25. FIELD ET AL., *supra* note 10, at 1152; see also 5 WRIGHT & MILLER, *supra* note 24, § 1218, at 265–67.

26. FIELD ET AL., *supra* note 10, at 1152.

27. See CLARK, *supra* note 22, § 38, at 229–30, 234–39 (providing further examples of the difficulties and challenges of fact pleading); see also *id.* § 45, at

impropriety of such an allegation turns on whether the parties are likely to fight over the marital status.<sup>28</sup>

Nevertheless, we should not exaggerate the uncertainty. More than a century and a half of interpretation helps. Officially approved forms for common types of actions, and unofficial practice books with forms, offer further assistance.<sup>29</sup> Litigators and judges seem to have acquired a fairly good grasp of the level of factual detail that the mandate requires.<sup>30</sup>

Thus, fact-pleading jurisdictions do manage. Still, partly because of the remaining uncertainty and the resulting litigation, their version of fact pleading has tended to fade into a form that is sometimes difficult to distinguish from notice pleading.<sup>31</sup> Even the leading treatise on code pleading phrases the object of fact pleading as “fair notice of each material fact of the pleader’s cause.”<sup>32</sup> For the federal courts, of course, the rulemakers abandoned fact pleading in 1938, and the courts gradually adopted notice pleading.<sup>33</sup> Many

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276–77.

28. *See id.* § 38, at 232 (stating that the propriety turns on the nature of the case: the factual allegation is proper if *A* and *B* are suing for their individual injuries in a single case; the allegation is an improper legal conclusion if the marriage is a key fact, as when *B* is suing for loss of services of *A*).

29. *See, e.g.*, 1 DEBORAH L. NELSON & JENNIFER L. HOWICZ, UNIFORM COMMERCIAL CODE: PLEADING AND PRACTICE FORMS § 2:7 (3d ed. 1994); 9 ALAN D. SCHEINKMAN, WEST’S MCKINNEY’S FORMS: MATRIMONIAL AND FAMILY LAW §§ 1:1–3:103 (2007).

30. *See* CLARK, *supra* note 22, § 38, at 233–34 (giving examples of case-specific, proper factual allegations and judicial dispositions of allegations under the system of code pleading); 5A WRIGHT & MILLER, *supra* note 20, § 1298, at 197–202 (explaining that judicial precedent has provided judges and attorneys examples of proper interpretation of the pleading requirements of FED. R. CIV. P. 9(b)); *id.* § 1301.1, at 297–98 (noting fact-pleading requirements in securities-fraud statutes).

31. For example, California is a fact-pleading state, but its modern decisions often espouse notice pleading. *See* Oakley & Coon, *supra* note 19, at 1383; *cf.* Sheehan v. S.F. 49ers, Ltd., 201 P.3d 472, 476–77 (Cal. 2009) (asserting after *Twombly* that “we may affirm the sustaining of a demurrer only if the complaint fails to state a cause of action under any possible legal theory”).

32. CLARK, *supra* note 22, § 38, at 232. One might think that Judge Clark was expressing a bias in favor of notice pleading, but in fact he was not a fan of notice pleading. Rather than notice pleading, he favored so-called simple pleading. *See* Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295, 299–303 (Kevin M. Clermont ed., 2d ed. 2008) (discussing Clark’s view and its critics).

33. *See* 5 WRIGHT & MILLER, *supra* note 24, § 1202, at 87–92. It appears that notice pleading actually arrived with *Conley v. Gibson*, 355 U.S. 41 (1957), rather than with the original Federal Rules of Civil Procedure in 1938. *See* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685–86 (1998) (arguing that prior to *Conley* the original Rules maintained more of a gatekeeping function for pleading).

states openly followed suit.<sup>34</sup> This change has not generated much nostalgia until now.<sup>35</sup>

## 2. *How Nonconclusory-and-Plausible Pleading Differs*

Now the Supreme Court has rebuilt the federal pleading regime. When one tries to absorb something this new, particularly when the new appears very confusing, one naturally looks to experience for some help. The only plausible procedural analog for the *Twombly-Iqbal* requirements is fact pleading.<sup>36</sup> Moreover,

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34. See Clermont & Yeazell, *supra* note 6, at 831 & n.40 (estimating the number of states “that have adopted the Federal Rules as their pleading model” at “thirty or so”).

35. See *id.* at 825–26 & n.12 (mentioning occasional attempts in the past to roll back FED. R. CIV. P. 8); *infra* note 58 and accompanying text (observing the current resurgence of enthusiasm for fact pleading in its old form).

36. One could take a comparative-law perspective on the debate. See, e.g., Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 455 (2010) (“This nearly universal standard is . . . essentially similar to the old code pleading requirement rejected by the Federal Rules of Civil Procedure. . . . Recent trends in American pleading suggest that America may be moving toward the global norm by experimenting with more rigorous fact pleading and dispensing with mere notice pleading.”); James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. (forthcoming 2010) (manuscript at 29–35), available at <http://ssrn.com/abstract=1579196> (comparing American and German pleading requirements). Although the comparative-law lessons are valuable for scholars, foreign practice is not sufficiently familiar to most lawyers and judges for the comparison to serve the practical purpose of providing a guiding hand through the actual pleading process. Moreover, foreign systems may not be an apt comparison because their pleading is more permissive where *Twombly-Iqbal* has the most bite: in the situation in which the plaintiff has no access to the needed information in the defendant’s hands, the civil law does not require a high level of specificity from the plaintiff and instead often shifts the burden of proof and pleading to the defendant. See, e.g., Antonio Carchietti, *Responsabilità Civile del Medico e Della Struttura Sanitaria e Canoni di Ripartizione dell’Onere Probatorio tra Vittima e Convenuto [Liability in Torts of the Doctor and the Hospital and the Criteria for Distributing the Burden of Proof Between the Plaintiff and the Defendant]*, DIRITTO E GIUSTIZIA 2010, 0, 18 (It.) (describing how the shifted burden of proof in medical malpractice cases in Italy greatly lessens the specificity requirement for the plaintiff in pleading both breach and causation).

The simple fact is that civil-law pleading schemes do not serve a significant gatekeeping purpose. Those systems use pleading more as a way to start the case effectively, rather than as a way to weed out weak cases. Thus, they truly are more like old American fact pleading than like the *Twombly-Iqbal* innovation. Cf. ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE princ. 11.3 (2006) (“In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be

because nonconclusory-and-plausible pleading requires the plaintiff to plead particularized facts, the typical federal complaint of the future will look much like a complaint drafted under a fact-pleading regime.

Therefore, some commentators have looked to fact pleading for illumination. But it provides none of the needed comfort or instruction, because the *Twombly-Iqbal* Court's approach is thoroughly new. Commentators who stress that the new and old pleading standards both required more factual detail than does notice pleading mask some big differences. The more useful message would be that the Court did not reimpose fact pleading. Three observations settle that point.

First, the Court expressly denied that it reimposed fact pleading. *Twombly* maintained that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."<sup>37</sup> Indeed, the Court in *Leatherman* and *Swierkiewicz* had earlier refused to append any so-called heightened-fact-pleading requirement absent a special Federal Rule of Civil Procedure or statutory provision.<sup>38</sup> *Twombly*

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offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding."); the ALI/UNIDROIT principle attempts to capture the civil law, but seems partially to miss.

Indeed, pleadings have long played a comparatively small role in Europe. See Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 273 (1942) ("In the countries of Continental Europe very little is expected of these documents . . ."). Maybe one has to go farther than Europe to find a telling comparison for the new gatekeeping regime. See Andrea Cheuk, Comment, *The Li'an ("Docketing") Process: Barriers to Initiating Lawsuits in China and Possible Reforms*, 26 UCLA PAC. BASIN L.J. 72, 75-79 (2008) (describing China's system of extreme policing of complaints).

37. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see also *id.* at 569 n.14 ("[W]e do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 . . ."); cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era . . .").

38. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (holding that heightened fact pleading was not required in a case involving a Title VII employment discrimination claim); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that a court could not impose a heightened-fact-pleading standard in a case involving a civil rights claim against a municipality). Some lower courts had been demanding heightened fact pleadings. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil*

expressly preserved those prior cases as still good law, citing them repeatedly before outright denying that the new rule “runs counter” to them.<sup>39</sup> Although some lower-court cases persist in saying that the Court must nonetheless have overruled those prior cases,<sup>40</sup> those courts are incorrect.<sup>41</sup> There is no inconsistency between rejecting heightened fact pleading and adopting nonconclusory-and-plausible pleading, because the two are different systems: the former requires factual detail, while the latter tests for factual convincingness.

I nonetheless do not mean to conflate heightened fact pleading and classic fact pleading. The heightened fact pleading that the Supreme Court rejected differed from code-style fact pleading as well.<sup>42</sup> The heightened-fact-pleading courts were shifting more toward gatekeeping. They demanded a lot of factual detail, partly to discourage plaintiffs from filing claims.<sup>43</sup> Requiring greater factual detail also gave courts an excuse to weed out frivolous cases before discovery.<sup>44</sup> Still, they were not acting as *Twombly-Iqbal* gatekeepers, in that they did not yet have the *Twombly-Iqbal* weapons of paring down the complaint by ignoring many allegations and of testing the remainder for reasonable convincingness.

Second, the *Twombly* facts themselves best show the difference between classic fact pleading and nonconclusory-and-plausible

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*Procedure*, 86 COLUM. L. REV. 433 (1986).

39. *Twombly*, 550 U.S. at 569–70.

40. *See, e.g.*, *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (dictum); *Hughes v. Colo. Dep’t of Corr.*, 594 F. Supp. 2d 1226, 1240 (D. Colo. 2009) (dictum); *Harley v. Paulson*, No. 07-3559 (JBS), 2008 WL 5189931, at \*3 (D.N.J. Dec. 9, 2008) (dictum); *Kamar v. Krolczyk*, No. 1:07-CV-0340 AWI TAG, 2008 WL 2880414, at \*8 (E.D. Cal. July 22, 2008); *Aztec Energy Partners, Inc. v. Sensor Switch, Inc.*, 531 F. Supp. 2d 226, 228 (D. Conn. 2007).

41. *See* David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. (forthcoming 2010) (manuscript at 33–35), available at <http://ssrn.com/abstract=1561369> (arguing that *Swierkiewicz* survived *Twombly-Iqbal*); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 193–95 (2010) (same); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1322–23 (2010) (same).

42. *See* Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 262–65 (2010) (distinguishing the modern federal cases that adopted heightened fact pleading from earlier cases that required code-style fact pleading, on the ground that these modern courts did so for the purpose of excluding so-called frivolous cases, whereas earlier courts used fact pleading to narrow the issues at an earlier stage in litigation).

43. Indeed, the demand for factual detail under heightened fact pleading could sometimes exceed the detail demanded by nonconclusory-and-plausible pleading. *See, e.g.*, *Santiago v. Walls*, 599 F.3d 749, 759 (7th Cir. 2010). Thus, the Eleventh Circuit has held that *Iqbal* overturned the remnants of heightened fact pleading—and its extra demands—in that circuit. *See* *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010).

44. *See* Clermont & Yeazell, *supra* note 6, at 836 n.57 (distinguishing the frivolity standard from the plausibility standard).

pleading:

[T]elephone and Internet subscribers brought a class action against various telecommunications giants, claiming an illegal conspiracy in restraint of trade. Under antitrust law, however, parallel and even consciously identical conduct unfavorable to competition is not illegal if it comprises only independent acts by competitors without any agreement. The complaint alleged parallel conduct in great detail, explaining how each company sought to inhibit upstarts in its own region and refrained from entering the other major companies' regions. But the complaint alleged an agreement in conclusory terms based upon information and belief because the plaintiffs had no proof yet in hand.<sup>45</sup>

Pleading the critical element of agreement merely by stating conclusions on information and belief, as Mr. Twombly did, would have been fine under fact pleading. Fact pleading permitted pleading elements of a cause of action on information and belief, as when the plaintiff lacked the needed information.<sup>46</sup> Fact pleading especially allowed conclusory pleading when the plaintiff had no access to needed information that was in the defendant's hands.<sup>47</sup>

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45. *Id.* at 826 (footnotes omitted). *Twombly* is the cleaner illustration of sufficient pleading, but in my opinion the *Iqbal* complaint likewise would have passed muster under fact pleading. The twenty-nine-page *Twombly* complaint is available at Consolidated Amended Class Action Complaint, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. Apr. 14, 2003) (No. 02 CIV 10220), 2003 WL 25629874. The fifty-four-page *Iqbal* complaint is available at First Amended Complaint and Jury Demand, *Elmaghraby v. Ashcroft*, No. 04 CV 1809, 2005 WL 2375202 (E.D.N.Y. Sept. 30, 2004), 2004 WL 3756442.

46. See CLARK, *supra* note 22, § 36, at 216 ("Affirmative allegations of fact in the complaint may be made upon information and belief instead of positively, so that the pleader may be enabled to verify even where he lacks definite knowledge."); *id.* § 36, at 220–21 (expanding that idea); cf. 5A WRIGHT & MILLER, *supra* note 20, § 1298, at 192 n.7 (collecting cases applying this lenient approach under FED. R. CIV. P. 9(b)). Of course, the same is true of notice pleading. See *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard, which applies to all civil actions, does not prevent a plaintiff from 'pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant . . .'" (citation omitted) (quoting *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (internal quotation marks omitted))); see also Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 503–05 (2010).

47. See PHILEMON BLISS, A TREATISE UPON THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE § 310, at 454 (St. Paul, West 3d ed. 1894) (explaining that less particularity is necessary when the facts lie within the opponent's knowledge); CLARK, *supra* note 22, § 39, at 247 ("[A] general mode of pleading was allowed . . . in the case when the facts lay more in the knowledge of the adverse party than of the party pleading."); HENRY JOHN STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS § 226, at 426 (James DeWitt Andrews ed., 2d ed. 1901) (stating the same and collecting cases). Incidentally, in some states today, the availability of pre-filing discovery serves a similar ameliorative

By contrast, the Court held *Twombly's* pleading to be insufficient under the new nonconclusory-and-plausible pleading test.<sup>48</sup>

Third, the illustration of *Twombly* more importantly reveals the fundamental difference in purpose between the two pleading systems. The codes demanded factual detail as a means to focus the case early on, not as a means to convey factual convincingness. It required little more than an appropriate level of generality using the available facts. There were of course concerns with meritless complaints, but the codes' cure for such abuse rested with requiring verification of facts by the pleader and testing by demurrer for the legal sufficiency of the pleadings.<sup>49</sup> That is, fact pleading itself was more a judicial management scheme and not substantially a gatekeeping scheme.<sup>50</sup> Perhaps, in light of fact pleading's mixed motives, the best way to describe its essence is that it is *not necessarily* a gatekeeping regime.

Admittedly, as time went on, the fact-pleading regimes saw more and more testing of pleadings for insufficiency of factual statements, even if the testing was done in a rather modest pursuit of gatekeeping that an amendment could often circumvent.<sup>51</sup> Indeed, over time, the same trend toward more screening prevailed

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function. See Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 57–60 (2010); Kourlis et al., *supra* note 42, at 273–78.

48. The cases maintain that pleading on information and belief remains permissible under nonconclusory-and-plausible pleading, but only if the rest of the allegations satisfy the new pleading test. See *Arista Records*, 604 F.3d at 120–21 (“[W]e reject Doe 3’s contention that *Twombly* and *Iqbal* require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.”). However, as part of the expected push-back by the lower courts, see Clermont & Yeazell, *supra* note 6, at 838–40, one might see courts interpreting *Twombly-Iqbal* loosely when the plaintiff is in a bind without critical information—even if this interpretation directly contradicts the Court’s holdings on the *Twombly* and *Iqbal* facts. See, e.g., *Trs. of the Auto. Mechs.’ Indus. Welfare & Pension Funds Local 701 v. Elmhurst Lincoln Mercury*, 677 F. Supp. 2d 1053, 1056 (N.D. Ill. 2010) (“Courts typically afford plaintiffs greater latitude and require less specificity where such allegations [relating to matters particularly within the defendants’ knowledge] are concerned.”).

49. See CLARK, *supra* note 22, § 36, at 215–19 (describing acceptable forms of verification); *id.* § 82, at 521 (explaining demurrer); Subrin, *supra* note 22, at 330–31 (describing Field’s vision of pleading, including the safeguards of verification and demurrer).

50. See LEONARD P. MOORE, MOTION PRACTICE AND STRATEGY 75 (1955) (“Courts are generally most reluctant to deprive a litigant of his so-called ‘day in court’ by disposing of any litigation with finality upon the pleadings [under the code.]”); cf. CLARK, *supra* note 22, § 11 (describing the proper functions of pleading); STEPHEN, *supra* note 47, § 1, at 1, § 53, at 100, § 132, at 254 (same).

51. See Clark, *supra* note 36, at 276–77 (discussing “reversions to pleading formalities recurring under code pleading”); Maxeiner, *supra* note 36, at 23–24 (characterizing the tendency to screen pleadings as increasing over the years following the implementation of the code-pleading system).

under common-law pleading<sup>52</sup> and notice pleading.<sup>53</sup> Unless the procedural system were to eliminate definitively all screening of pleadings,<sup>54</sup> the urge to keep the gate seemingly will increase with time, until a new round of pleading reform kicks in. This cycle helps to exemplify Judge Clark's aphorism that "every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings."<sup>55</sup>

The new pleading approach of *Twombly-Iqbal* anticipates the typical decay by embracing gatekeeping right from the outset. And it does so in such an open and full embrace, by knocking out factually unsupported cases at first glance, that we can no longer ignore how inappropriate a function such gatekeeping is at the pleading stage as currently structured. *Twombly-Iqbal* calls for a judge to weigh factual convincingness without any evidential basis and with few procedural protections. Such a practice, in the absence of emergency or other special circumstances, offends our fundamental procedural principles. True, insisting on nonconclusory statements and then testing for a reasonable inference, to render judgment as a matter of law, is not a method unknown at law—but officially authorizing judges routinely to do so based on only the complaint is an invention.<sup>56</sup> This gatekeeping invention truly distinguishes the new regime from both fact pleading and notice pleading.

### 3. *How the Two Systems Stack Up*

Ironically, if one were bent on tightening up notice pleading,<sup>57</sup> readoption of fact pleading would be considerably easier to defend than would the *Twombly-Iqbal* invention.<sup>58</sup> Modern academics were

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52. See Clark, *supra* note 36, at 274–77 (discussing the disintegration of common-law pleading); Sherwin, *supra* note 32, at 296–97 (describing the encrustation of common-law pleading over time).

53. See *supra* notes 38–44 and accompanying text (referring to heightened-fact-pleading rebellions).

54. See FIELD ET AL., *supra* note 10, at 1156–58 (making such a proposal).

55. Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 46 (1957).

56. See Allan R. Stein, *Confining Iqbal*, 45 TULSA L. REV. 277, 284 (2009) ("To allow a judge to make those determinations based on his own sense of history and human behavior without the benefit of an adversarial presentation of the facts is the precise definition of prejudice: he is pre-judging, without regard to the evidence.").

57. Much can be said against notice pleading. See, e.g., Hazard, *supra* note 33, at 1671–72 (noting the potential problems associated with notice pleading); Sherwin, *supra* note 32, at 318–20 (same); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985, 992–94 (1987) (contrasting the arguments for and against reduced pleading requirements).

58. Indeed, some commentators are now championing the adoption of fact pleading in lieu of *Twombly-Iqbal*. E.g., AM. COLL. OF TRIAL LAWYERS TASK

brought up in a federal-court culture and taught to hold in ridicule the older procedural systems.<sup>59</sup> But fact pleading is not a crazy scheme at all, especially for a legal system in which discovery is underdeveloped (and even more so in a system without our sort of trials and our juries), and possibly even for the federal courts, which must contend with litigation very different from the litigation of 1938.

Much can be said in defense of fact pleading.<sup>60</sup> First, the fact pleader must think through the case: he must develop a tenable theory, ascertain what facts are necessary to support that theory, and perhaps conclude that the client has no valid contention.<sup>61</sup> Second, the clarification of issues required under fact pleading puts outer limits on permitted discovery, facilitates summary judgment motions, and streamlines the trial.<sup>62</sup> Third, the detail required under fact pleading “facilitates the application of the doctrine of *res judicata*.”<sup>63</sup>

Most convincingly, fact pleading looks good in comparison to nonconclusory-and-plausible pleading. It would not be nearly as novel, uncertain, or destabilizing. First, it is an established system, with which we have lots of experience, and it works pretty well. Second, it is a system that its practitioners understand, which would spare us years of wandering in the “nonconclusory plausibility” bewilderment. Third, courts can demand the sort of factual detail

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FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JOINT PROJECT, FINAL REPORT 5–6 (2009) [hereinafter FINAL REPORT] (supporting a return to code-style fact pleading for claims and affirmative defenses); Kourlis et al., *supra* note 42, at 280–82 (proposing a similar change, with a provision for pre-filing discovery); Julie D. Cromer Young, *Centering the Pleading Pendulum After Iqbal* (unpublished manuscript) (on file with author); *cf.* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 147 (2009) (calling for a return to fact pleading, but only for certain “high risk” classes of cases).

59. A nice way to appreciate this point about intergenerational disdain is to read some of the contemporaneous paeans to code pleading, made in contrast to common-law pleading. *See, e.g.*, IRVING BROWNE, HUMOROUS PHASES OF THE LAW 97–124 (San Francisco, Sumner Whitney & Co. 1876).

60. *See* FIELD ET AL., *supra* note 10, at 1150–51.

61. *Id.* at 1150; *see also* FINAL REPORT, *supra* note 58, at 6 (describing the additional consideration of facts required by fact pleading); Stancil, *supra* note 58, at 148 (explaining how strict pleading requirements decrease the number of plaintiffs’ suits).

62. FIELD ET AL., *supra* note 10, at 1150; *see also* FINAL REPORT, *supra* note 58, at 6 (“Discovery cannot be framed to address the facts in controversy if the system of pleading fails to identify them.”); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FACT-BASED PLEADING: A SOLUTION HIDDEN IN PLAIN SIGHT 5–6 (2010) (suggesting that federal courts ought to note how fact-based pleading has streamlined litigation in state courts).

63. FIELD ET AL., *supra* note 10, at 1150; *see also* Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 519 (1918) (“[T]he presence of essential-fact pleadings in the record is valuable in view of the subsequent use of the case as *res judicata*.”).

that fact pleading requires without imposing dangerous practices such as gauging probability on the basis of a bare paper document, and fact pleading would not have the undesirable effect of knocking out meritorious cases when the plaintiff needs discovery to unearth the required factual particulars.

Of course—even assuming the need to tighten up notice pleading—to say that fact pleading might be preferable to *Twombly-Iqbal* is not to say that resurrecting fact pleading would be a good idea. The aforementioned experience with fact pleading that led to the federal reform of 1938 suggests that fact pleading tends to work out in ways that are far from optimal. Moreover, the modern champions of gatekeeping could too easily co-opt any resurrected version of fact pleading and turn it to their purposes.

### B. *Generating Subsidiary Myths*

The first myth might be losing its importance as it dies a natural death, that is, as experience with *Twombly-Iqbal* makes obvious just how different the new doctrine is from fact pleading. However, two new specific misunderstandings of nonconclusory-and-plausible pleading have sprung from it to become mythical corollaries.

#### 1. *Mythical Corollary 1.1: The Nonconclusoriness Step Draws from Fact-Pleading Doctrine*

a. *Nonconclusoriness Is Key, but Uncertain and Novel.* In applying the new test to complaints, a court's determination of which allegations to ignore as conclusory will do much of the critical work. As an illustration, Justice Souter in his *Iqbal* dissent argued that the majority had managed to dismiss the civil rights complaint by rejecting good allegations as conclusory, rather than by playing with plausibility.<sup>64</sup> So, this key step needs definition.

As everyone is now realizing, the determination of conclusoriness remains an unclear and undeniably subjective step. Conclusory allegations include any bare assertion that an element of the cause of action exists.<sup>65</sup> But perhaps they will include more. A candidate for conclusoriness would be “deductions of fact,” as

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64. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1960–61 (2009) (Souter, J., dissenting) (identifying allegations that the majority, but not he, considered conclusory).

65. See Hartnett, *supra* note 46, at 491–93 (equating a “conclusory” allegation to one alleging merely a claim’s element); cf. Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. (forthcoming 2010) (manuscript at 26), available at <http://ssrn.com/abstract=1469638> (“An allegation in a complaint is conclusory when the allegation attempts to plead directly an element of a claim that is only indirectly sensory-perceptible.”).

opposed to more purely factual assertions.<sup>66</sup> The probable end result is that courts will look mainly at what the plaintiff appears to be alleging to have actually happened (before taking those allegations as true and asking whether they generate a plausible inference of liability).<sup>67</sup> But still one will yearn for more definiteness, if possible.

A good starting place for pinning down the meaning of nonconclusoriness is to acknowledge that it does not draw its meaning from fact pleading. It is all new—even though fact pleading had a verbally similar prohibition.<sup>68</sup>

The code courts literally condemned “legal conclusions,” but they did not actually invoke a law/fact line.<sup>69</sup> As always, the pleader was to avoid pleading pure law.<sup>70</sup> Fact pleading went further. The pleader was to avoid legal characterization, in order to leave the test of legal sufficiency as a task for the court.<sup>71</sup> The conclusoriness prohibition thus swept up some mixed questions. It even included fact-heavy assertions, such as an assertion that the pleader was a “holder” of a bond if that was an issue in the case.<sup>72</sup> Accordingly, commentators often spoke of a general prohibition on “conclusions,” not just *legal* conclusions.<sup>73</sup>

Ultimately, this prohibition on conclusions was meant to keep factual detail at an appropriate level: not too general, while not too

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66. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (quoting *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005)).

67. See Steinman, *supra* note 41, at 1334–39 (defining a “conclusory” allegation as one that fails to identify the real-world acts or events that entitle the plaintiff to relief, that is, an allegation that fails to allege concretely what happened); cf. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 14 (2009) (proposing looking to “observed or experienced objective facts about what transpired”).

68. See GEORGE L. PHILLIPS, AN EXPOSITION OF THE PRINCIPLES OF CODE PLEADING § 402, at 461 (Percival W. Viesselman ed., 2d ed. 1932) (“If the conclusion is reached by natural reasoning it is one of ultimate fact; if reached only by the application of artificial rules of law, it is a legal conclusion.”); cf. *id.* § 405 (explaining that an allegation such as indebtedness might be one of fact in one complaint (say, for goods sold) and a legal conclusion in another (say, to set aside a fraudulent conveyance), depending on whether the law will be applied to the allegation in the lawsuit). *But cf. supra* note 28 and accompanying text (suggesting the location of the line might depend on how likely the allegation will be in dispute).

69. See Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 912–13, 917 (1961).

70. See *id.* at 911–12.

71. See PHILLIPS, *supra* note 68, §§ 403–404.

72. See CLARK, *supra* note 22, § 38, at 229 & n.60.

73. *E.g., id.* § 38, at 225, 231. It is true that John Norton Pomeroy spoke more in terms of a law/fact divide. JOHN NORTON POMEROY, CODE REMEDIES § 423, at 640 (5th ed. 1929). But he nonetheless gave the conclusoriness test very broad application by approving allegations only of “dry, naked, actual facts.” *Id.* Moreover, his position received considerable and devastating criticism. See, e.g., James, *supra* note 69, at 912–16.

specific. In application, it was a matter of degree only.<sup>74</sup> A helpful image was that the pleader should not allege a conclusion that the adjudicator had to find to decide the case, but instead should stay one step back from that conclusion.<sup>75</sup> Thus, the conclusoriness test blocked only critical conclusions, the ones on major points. Here is a concrete formulation of that image:

The comparison of an action to a syllogism is a favorite one. It is said that the major premise is a rule of law, not to be pleaded; the minor premise, the facts of the case making the rule of law applicable (these alone are to be pleaded); and the conclusion is the judgment of the court.<sup>76</sup>

Moreover, the only effect of pleading a conclusion under the codes was that the court could strike it as surplusage before any testing for legal sufficiency.<sup>77</sup>

The conclusory/nonconclusory distinction did not really survive the 1938 adoption of the Federal Rules of Civil Procedure. Because the Rules did not expressly reject the “legal conclusion” phrase, some early cases did use it.<sup>78</sup> But this usage has become less common over the years.<sup>79</sup> In any event, the prevailing view was that no separate conclusoriness test applied under Rule 8.<sup>80</sup> The court might require more notice occasionally, or more frequently it might treat the case as one that fell under a federal fact-pleading provision.<sup>81</sup> But notice pleading imposed no separate conclusoriness test, by which the court would ignore certain allegations when going through the complaint. There was simply no reason to knock out as surplusage any summarizing conclusions. Consequently, the courts

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74. See CLARK, *supra* note 22, § 38, at 231–36.

75. See *id.* § 38, at 234.

76. *Id.* § 38, at 237 n.88.

77. See *Tag v. Linder*, 94 N.E.2d 383, 385 (Ohio Ct. App. 1949) (treating conclusions as surplusage); PHILLIPS, *supra* note 68, § 406.

78. See CLARK, *supra* note 22, § 38, at 244 n.108 (collecting cases).

79. See 5 WRIGHT & MILLER, *supra* note 24, § 1218, at 276.

80. See, e.g., *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (“A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts.”); *Brown v. W.T. Grant Co.*, 53 F. Supp. 182, 186 (S.D.N.Y. 1943) (observing that whether “the allegation in the complaint that the defendant has sold at prices in excess of those authorized is a mere conclusion or an allegation of law, is an inquiry which, under the Federal Rules of Civil Procedure, the courts need not pursue”).

81. See, e.g., *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001) (“A plaintiff cannot base securities fraud claims on speculation and conclusory allegations.”); *supra* note 30; *infra* note 118. Here and elsewhere, courts sometimes use “conclusory” in a pejorative sense, to sum up their condemnation. See *supra* notes 38–44 and accompanying text (referring to the gatekeeping endeavor of the heightened-fact-pleading rebellions). But such usage as a concluding label for a dismissed complaint differs from the editing process involved in assessing the complaint under nonconclusory-and-plausible pleading.

operating under Rule 8 decided not to bother about conclusions.<sup>82</sup>

*Twombly-Iqbal* reverses direction to reinstate its version of nonconclusoriness.<sup>83</sup> But it is not thereby resurrecting fact pleading's conclusoriness. The Court would not be happy with that stunted kind of conclusoriness test, which aimed merely at optimizing the pleading's level of generality.<sup>84</sup> The new nonconclusoriness has a very different aim, which entails knocking out certain allegations in preparation for measuring the complaint's plausibility. There are other differences. Under the new regime, the nonconclusoriness test applies to all allegations, not just to critical conclusions on major points.<sup>85</sup> Moreover, the new screening would not be satisfied by lopping the complaint's surplusage off the top, but instead seeks to excise all sorts of allegations before asking whether to dismiss the complaint.<sup>86</sup>

b. *Nonconclusoriness Draws No Law/Fact Line.* More particularly, some brilliant theorists have lamented that nonconclusoriness turns on a law/fact distinction, characterizing this defect as a fact-pleading holdover, while astutely bemoaning the uselessness and hopelessness of drawing a distinction between law and fact.<sup>87</sup> I disagree, believing that neither fact pleading nor the new nonconclusoriness test involves any law/fact distinction.

I admit that *Iqbal* speaks of "legal conclusions":

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82. See 5 WRIGHT & MILLER, *supra* note 24, § 1218, at 267 ("It should be clear . . . that the federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties."); *id.* § 1218, at 268 n.9 (collecting cases); cf. CHESTER H. SMITH, SMITH'S REVIEW OF CODE PLEADING 33–35 (1964) (presenting a table, in a study aid, that contrasts the treatment of conclusions under the codes and under the federal rules). Of course, in testing for legal sufficiency, a court can ignore a sweeping statement by the plaintiff that the complaint states a legal claim. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 521–57 (3d ed. 2004).

83. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

84. See *Dodson*, *supra* note 36, at 461–62.

85. See Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 913–15 (2010); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 517 n.98 (2009).

86. See Kilaru, *supra* note 85, at 914–15; Tymoczko, *supra* note 85, at 517 n.98.

87. See, e.g., Elizabeth G. Thornburg, *Law, Facts, and Power*, 114 PENN ST. L. REV. (forthcoming 2010) (manuscript at 1–6), available at <http://ssrn.com/abstract=1540092> (arguing that *Iqbal* tells us to ignore as conclusory only conclusions of law but that the law/fact distinction is hopeless); cf. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 530 n.59 (2010) ("The murky distinction between factual and legal allegations in the 12(b)(6) context haunts this [*Iqbal*] decision.").

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [The Court here quotes *Twombly* while observing:] Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation.” . . .

. . . While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.<sup>88</sup>

I also concede that Justice Kennedy probably derived the term “legal conclusions” from the fact-pleading usage, doing so because the phrase sounds good. And maybe he even thought the modifier was doing some actual work.

Nonetheless, Justice Kennedy did not use that phrase to draw a real distinction. He instead used “legal conclusion” in a conclusory way, ironically enough. Henceforth, the label “legal conclusion” will attach to any sort of allegation, legal or factual, that a court can ignore as a matter of law.

Justice Kennedy would of course ignore any *legal* conclusions, but he was after much more. He also meant to encourage the pleading of facts, but again he meant more. He did not mean to say that a court should ignore only legal statements. Justice Kennedy would reject conclusory *factual* allegations too. The *Iqbal* facts themselves best demonstrate this point. Justice Kennedy’s opinion parsed the plaintiff’s complaint and, viewing each allegation in isolation, held that the following highly factual allegations were mere “legal conclusions” that a court must disregard:

(1) Attorney General Ashcroft and FBI Director Mueller “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.’”

(2) Ashcroft was the “principal architect” of this policy.

(3) Mueller was “instrumental” in adopting and executing it.<sup>89</sup>

That is, when Justice Kennedy passed from discussing the test to

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88. *Iqbal*, 129 S. Ct. at 1949–50 (citation omitted).

89. *Id.* at 1951.

applying it, he was not applying a law/fact distinction. He was applying only a conclusory/nonconclusory distinction.

More generally, a law/fact distinction had nothing to do with the Court's logic or purpose. To knock out the kinds of allegations that the Court wanted to discard, it had to sweep more broadly than conclusions of law. Seldom would a "conclusory" allegation involve only law, as a plaintiff should not even be alleging law. Usually, the kind of "conclusory" allegation disdained by the Court would involve an application of law to fact, but not always. Sometimes, a purely factual allegation would run afoul of the Court's thinking. Indeed, the new test could cut more deeply into fact than did fact pleading: rather than hewing to fact pleading's line between "legal conclusion" and "ultimate fact," the Court's test could sometimes reject an allegation of "ultimate fact" and so insist on the formerly prohibited pleading of "evidence."<sup>90</sup> It seems as if the Court, in a throwback to *Pomeroy*, wanted to require the pleading of "dry, naked, actual facts."<sup>91</sup>

The only way the law/fact divide enters this arena is that the Court has added a test of *factual* sufficiency to the pleading stage, in addition to the test of *legal* sufficiency that Rule 12(b)(6) imposed from its beginning and that continues unchanged under *Twombly-Iqbal*.<sup>92</sup> In the application of the Court's new test of factual sufficiency, however, the law/fact divide is irrelevant.

## 2. *Mythical Corollary 1.2: The Plausibility Step Resembles Fact-Pleading Doctrine*

a. *How Plausibility Works.* The next step—the plausibility test—is even more unclear and subjective.<sup>93</sup> This standard asks

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90. Recall that the rejected allegation of an agreement in *Twombly* was almost purely factual in nature. See Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. (forthcoming 2010) (manuscript at 10 n.56), available at <http://ssrn.com/abstract=1585331>. And it would have constituted proper fact pleading. See *supra* text accompanying notes 46–48.

91. See *supra* note 73 and accompanying text.

92. See *Mayer v. Belichick*, 605 F.3d 223, 229, 237 (3d Cir. 2010) (dismissing a legal claim by a football ticket holder, brought in response to the "Spygate" scandal, for legal insufficiency); *supra* text accompanying note 7. See generally Wendy G. Couture, *Conley v. Gibson's "No Set of Facts" Test: Neither Cancer Nor Cure*, 114 PENN STATIM 19 (2010), <http://pennstatelawreview.org/114/114PennStatim19.pdf>.

93. See Pamela Atkins, *Twombly, Iqbal Introduce More Subjectivity to Rulings on Dismissal Motions, Judge Says*, 78 U.S.L.W. 2667, 2667 (2010) ("J. Douglas Richards, . . . who represented the plaintiff in *Twombly*, called the kind of reasoning judges have to do under the new standard for assessing pleadings 'ugly' and agreed with [District Judge Sidney H.] Stein, that the standard is based on a judge's personal perspective and experience of 'how the world works.' Richards called this result the 'antithesis of justice,' 'deeply troubling,' and 'moving in the direction of yahoo justice' because it encourages bias."); Clermont

whether inferring the moving defendant's liability on a cause of action is "plausible" given the facts nonconclusorily pled—that is, whether liability is a "reasonable inference."<sup>94</sup> It is unavoidably probabilistic in nature.<sup>95</sup> It thus asks whether the assertion is reasonably possible. Although the judge is to weigh the question in light of his or her judicial experience and common sense as applied in the case's particular context, the shock of this subjectivity is lessened by the realization that a reasonable factfinder (or jury) can bring life experience and common sense to bear on the particular case.<sup>96</sup>

No inconsistency necessarily exists between nonconclusoriness

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& Yeazell, *supra* note 6, at 841–46 (illustrating plausibility's lack of clarity). Or one might ponder Emily Dickinson, *I Dwell in Possibility*, in *THE COMPLETE POEMS OF EMILY DICKINSON* 327, 327 (Thomas H. Johnson ed., 1960):

I dwell in Possibility—  
 A fairer House than Prose—  
 More numerous of Windows—  
 Superior—for Doors—

94. *Iqbal*, 129 S. Ct. at 1949; *see also* Tymoczko, *supra* note 85, at 515. A nice statement appears in *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (quoting *Iqbal*, 129 S. Ct. at 1949):

"Plausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, "the plausibility standard is not akin to a probability requirement." As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen.

By contrast, the Court interpreted "strong inference" in the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2006), to mean that the plaintiff's allegations must make the inference of scienter cogent and at least as compelling as any opposing inference of nonfraudulent intent, and hence more than merely plausible or reasonable. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007); *cf.* *Campo v. Sears Holdings Corp.*, No. 09-3589-CV, 2010 WL 1292329, at \*3–4 (2d Cir. Apr. 6, 2010) (allowing the defendant, but not the plaintiff, to pursue discovery in aid of its motion to dismiss); Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507, 532 (arguing that the statute has made the motion to dismiss in securities cases a hybrid falling somewhere between Rule 12(b)(6) and Rule 56).

95. *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."); *see also Iqbal*, 129 S. Ct. at 1949 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." (quoting *Twombly*, 550 U.S. at 556)). But these statements reject only a standard as high as more-likely-than-not. They do not disavow any and all probabilistic standards.

96. *See* J. Alexander Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623, 700 (1986).

and plausibility testing.<sup>97</sup> The plaintiff must state facts in nonconclusory form, subject to Rule 11.<sup>98</sup> The plaintiff need not offer proof.<sup>99</sup> Nor need the plaintiff even try to show that proof is possibly obtainable. Instead, the court must take those facts to be true.

Next, the court must decide whether it thinks that liability is reasonably possible, given those facts.<sup>100</sup> This step is admittedly an artificial and unprecedented sort of decisional task. The precise question for the court, it seems, is *whether a factfinder, if it were to accept the pleaded nonconclusory facts, could reasonably find the moving defendant to be liable on the merits of the cause of action.*

b. *How Plausibility Compares to Summary Judgment.* The plausibility standard appears equivalent to the standard of decision for summary judgment. Admittedly, the Court's phrasing differs slightly, in that summary judgment speaks of "genuine issue" without mention of plausibility.<sup>101</sup> But in essence, both motions ask whether a factual assertion is reasonably possible, or whether a reasonable factfinder could find for the proponent.<sup>102</sup>

This equivalence of the standards of plausibility and summary judgment is a significant insight. It has led some commentators, stressing the similarity between the two, to assert that a motion to dismiss after *Twombly-Iqbal* has become identical to a motion for summary judgment.<sup>103</sup> I think, however, we must recognize that some important differences remain between the two sorts of

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97. *But see* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 867–70 (2010) (arguing that this first step is inherently incoherent and that courts should directly apply the plausibility test to the complaint as a whole); Stein, *supra* note 56, at 281–82, 291–92 (viewing nonconclusoriness and plausibility as redundant, and so collapsing them into a single test that demands an adequate offer of proof).

98. *See* Clermont & Yeazell, *supra* note 6, at 849 (explaining the interaction of Rule 8 and Rule 11).

99. *See* 61B AM. JUR. 2D *Pleading* § 919 (1999).

100. *See Iqbal*, 129 S. Ct. at 1951.

101. *See* FED. R. CIV. P. 56(c)(2); KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 79–82 (2d ed. 2009).

102. *See* Clermont & Yeazell, *supra* note 6, at 833 n.47 (comparing, more carefully, the two motions' standards).

103. *See, e.g.,* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 17 (2010) ("The standard for the motion to dismiss has evolved in such a way as to make the motion to dismiss the new summary judgment motion."); *cf. id.* at 36 ("[T]he majority's requirement of plausibility . . . was in effect heightened pleading."). This prolific Seventh Amendment scholar from the University of Illinois has built on her premise of equivalence to conclude that the motion to dismiss is now unconstitutional. *See* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1855 (2008) ("The [new] standards involve improper steps by which the courts will first assess the plausibility of the allegations pled by the plaintiffs rather than simply accepting them as true . . .").

motions. Most importantly, the latter proceeds without the evidential development and procedural protections applicable upon summary judgment.<sup>104</sup>

A difference cutting the other way, but another that keeps the two motions from blending quite as much as some say they do, is the motions' depths of operation. In arguing identity, perhaps the commentators are imagining *Twombly-Iqbal* to work at the depth that fact pleading did. Fact pleading applied its yearning for appropriate detail to every allegation. Similarly, summary judgment can burrow down to the fact-by-fact level, as it tests each for reasonable possibility.

By contrast, the new plausibility test for pleading does not apply to everything—it does not apply element-by-element or allegation-by-allegation or fact-by-fact. Instead, *Twombly-Iqbal* asks no more than whether inferring the moving defendant's ultimate liability on the cause of action is plausible.<sup>105</sup> “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.”<sup>106</sup> The court should look at the alleged merits of the cause of action, and ask whether the existence of all its elements is sufficiently likely.<sup>107</sup> Of course, a dismissing court can focus on the implausibility of one key allegation (such as the existence of an agreement in restraint of trade<sup>108</sup>), because the implausibility of that one allegation necessarily implies the implausibility of overall liability. Nevertheless, the court's assigned task remains to gauge the convincingness of asserted liability in order to weed out weak claims.

Therefore, at least thus far in the doctrine's development, the new pleading regime tests the plausibility only of the overall or final liability inference.<sup>109</sup> It does not test the plausibility of allegations

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104. See FED. R. CIV. P. 56. For other differences, see Clermont & Yeazell, *supra* note 6, at 834 nn.48–49 (discussing the frequency with which the motions are granted and their respective burdens of proof).

105. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

106. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); see also *id.* at 1950 (requiring “a plausible claim for relief”); *Twombly*, 550 U.S. at 559, 570 (requiring “plausible entitlement to relief” or “a claim to relief that is plausible on its face”).

107. Curiously, by testing the plausibility of the conjoined string of the cause's elements, *Twombly-Iqbal* treats the famous conjunction paradox in a way that is at odds with the rest of the law. The Court's innovation further disadvantages plaintiffs, at least in theory, because it is harder to show the requisite probability for a conjunction than for an individual element. See FIELD ET AL., *supra* note 10, at 1362–65.

108. See *Twombly*, 550 U.S. at 556–57.

109. See *Zoltek Corp. v. Structural Polymer Group*, 592 F.3d 893, 896 n.4 (8th Cir. 2010) (“[O]ur task is to review the plausibility of the plaintiff's claim as a whole, not the plausibility of each individual allegation.” (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (noting that “the complaint should be read as a whole, not parsed piece by piece to determine

separate from the merits of liability, as summary judgment can do. Summary judgment can produce judgments for the defendant based on an affirmative defense or a plea to the jurisdiction or in abatement, or even judgments for the plaintiff. It can also produce partial summary adjudication on particular facts.<sup>110</sup>

Another way to make this point is to say that *Twombly-Iqbal*, problematic though it might be, is not as broadly applicable as summary judgment is. Indeed, this kind of overreading of *Twombly-Iqbal* is illustrative of the next myth.

## II. MYTH #2: *TWOMBLY-IQBAL* APPLIES TO ALL PARTS OF ALL PLEADINGS

Many cases and commentators view *Twombly-Iqbal* as discouragingly broad in application. For example, some courts have talked of *Twombly-Iqbal* as applying to all pleadings, including those of defendants. Indeed, in the current confusion, many lower courts are applying the new test to affirmative defenses,<sup>111</sup> although their reasoning is largely on the level of “sauce for the goose is sauce for the gander.”<sup>112</sup>

Yet, without a further pronouncement from the Court itself, *Twombly-Iqbal* should apply only to claims, albeit by whomever asserted.<sup>113</sup> First, in those cases the Court was avowedly interpreting a Rule, rather than inventing a principle applicable to all pleadings. It was construing the word “showing” in Rule 8(a)(2) governing claims, a word that does not appear in Rule 8(b) or (c) treating answers. One could, however, counterargue that the provisions on answers have always implicitly incorporated the general pleading requirements,<sup>114</sup> despite the limited time for

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whether each allegation, in isolation, is plausible”)).

110. See FIELD ET AL., *supra* note 10, at 1325–26.

111. See, e.g., Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 648 (D. Kan. 2009) (striking affirmative defenses, with leave to amend), *noted in* 25 FED. LITIGATOR 89, 90 (2010) (observing that probably a majority of cases now apply *Twombly-Iqbal* to affirmative defenses); Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at \*5 (E.D. Mich. Apr. 21, 2009) (finding an affirmative defense to be insufficiently pled under *Twombly*).

112. Kaufmann v. Prudential Ins. Co. of Am., No. 09-10239-RGS, 2009 WL 2449872, at \*1 (D. Mass. Aug. 6, 2009) (dictum) (“Assuming, without deciding, that sauce for the goose is sauce for the gander, the court is inclined to think that a defendant has the same Rule 8 obligations . . . as does a plaintiff.”).

113. See *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 623 (S.D.N.Y. 2008) (“Counterclaims, like claims, are subject to Rule 8(a)’s pleading requirements.”).

114. See *Instituto Nacional de Comercializacion Agricola v. Cont’l Ill. Nat’l Bank & Trust Co.*, 576 F. Supp. 985, 988 (N.D. Ill. 1983) (“Affirmative defenses are of course also subject to the general pleading requirements of Rules 8(a), 8(e) and 9(b), generally requiring only a short and plain statement of the facts but demanding particularity as to the circumstances constituting fraud and mistake.”). *But see* 5 WRIGHT & MILLER, *supra* note 24, § 1274, at 618 n.7 (citing *Instituto* as the sole case to take this proposition so far as to apply FED. R. CIV.

preparing an answer.<sup>115</sup> Second, and more importantly then, the Court was establishing a gatekeeping test for people trying to bring a claim into court, an aim that should not bear on the opposing party. The opposing party is not opening a new proceeding, and also defenses probably impose less risk of abuse because less intrusive and burdensome discovery comes with them than with claims.<sup>116</sup>

Therefore, on both the doctrinal and the purposive level, *Twombly-Iqbal* applies only to claimants.<sup>117</sup> The backup test of notice pleading instead applies to defendants' pleadings, as it does everywhere else.<sup>118</sup>

For another example of overbreadth, some cases apply *Twombly-Iqbal* to the plaintiff's threshold allegations. Thus, lower courts are confusingly applying the new test to issues beyond the merits, even to personal jurisdiction<sup>119</sup> or class allegations.<sup>120</sup>

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P. 9(b) to affirmative defenses). Of course, that the general principles of notice pleading have been applied to answers in the past does not necessarily imply that nonconclusory-and-plausible principles should apply.

115. See *Holdbrook v. SAIA Motor Freight Line, LLC*, No. 09-CV-02870-LTB-BNB, 2010 WL 865380, at \*2 (D. Colo. Mar. 8, 2010) (“[I]t is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses.”).

116. Cf. Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift in Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 (positing that the pre-*Iqbal* “approach . . . gave plaintiffs settlement leverage. Just by filing a lawsuit, a plaintiff could subject a defendant to great cost and inconvenience in the pre-trial fact-finding process called discovery.”).

117. See *Charleswell v. Chase Manhattan Bank, N.A.*, No. 01-119, 2009 WL 4981730, at \*4 (D.V.I. Dec. 8, 2009) (recognizing that “[d]istrict courts are divided on whether *Twombly* and *Iqbal* should extend to affirmative defenses,” and comparing three cases in which courts did not extend *Twombly* and *Iqbal* to affirmative defenses with two cases in which courts did).

118. Of course, one could argue about what notice requires. Compare *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294–95 (7th Cir. 1989) (striking a barely stated defense), with *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979) (declining to strike a defense because the plaintiff received fair notice of the nature of the defense).

119. See, e.g., *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (applying *Twombly* to determination of personal jurisdiction, but using it to uphold jurisdiction). See generally Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMPLE L. REV. 627, 633–34, 649 (2009) (arguing for application of the plausibility test to disputes over personal jurisdiction).

120. See, e.g., *Hodczak v. Latrobe Specialty Steel Co.*, No. CIV 08-649, 2009 WL 911311, at \*9 (W.D. Pa. Mar. 31, 2009) (finding class allegations too speculative under *Twombly*); cf. *Nicholas v. CMRE Fin. Servs., Inc.*, No. 08-4857JLL, 2009 WL 1652275, at \*4 (D.N.J. June 11, 2009) (applying the conclusoriness branch of *Twombly-Iqbal* to require a more definite statement of the class allegations). See generally Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2045, 2051 (2010) (applying the plausibility test to each allegation subject to FED. R. CIV. P. 8(a), but then struggling with how to apply it to class allegations).

This extension reflects the tendency to view the cases as unleashing a free-floating plausibility test for use against any factual assertions, creating the rough equivalent of a preliminary summary adjudication procedure. Yet, *Twombly-Iqbal* actually says that all nonconclusory allegations are to be taken as true and that the plausibility test is to be applied only to the ultimate inference of liability of the moving defendant on the particular cause of action.<sup>121</sup> The plausibility test should apply only to test the merits of liability, and so should not apply to any other allegations outside Rule 8(a)(2). There is no reason thus far, on the basis of the Supreme Court's pronouncements, to think that *Twombly* and *Iqbal* apply to jurisdiction or other threshold matters.<sup>122</sup>

Accordingly, a court assumes to be true any allegations of jurisdiction or class members' positions, at least as long as they are nonconclusory—until the jurisdiction or certification decision, when the plaintiff must provide proof.<sup>123</sup> As a pleading matter, if pleading the matter is required at all, the test for such threshold allegations is fair notice.<sup>124</sup>

On the one hand, in recounting these examples, I do not want to fault pessimism. It is probably the sound betting strategy here, as the Court probably has worse in store. I know that by cutting *Twombly-Iqbal* down to size for the time being and by pointing out the restrictions on what the Court actually decided, I may come off sounding like an apologist. I am not.<sup>125</sup>

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121. See *supra* text accompanying notes 105–10.

122. Standing, and the related doctrines of ripeness and mootness, might be a problem-point midway between “jurisdiction” and “liability,” exposing more of the illogic of *Twombly-Iqbal*. See 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.12, at 163 (3d ed. 2008) (discussing the relationship among those justiciability doctrines). It is sounder, however, to treat such matters as jurisdictional. See *id.* § 3531.15, at 319. Nevertheless, the pleading standard for such matters still might need to become more demanding than notice pleading. See David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 391, 394 (1980). But that is a decision for another day in court.

123. See *Burchette v. Abercrombie & Fitch Stores, Inc.*, No. 08 Civ. 8786, 2009 WL 856682, at \*3–4 (S.D.N.Y. Mar. 30, 2009) (undertaking different analyses for Rule 12(b)(2) and Rule 12(b)(6)); *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 393–94 (S.D.N.Y. 2009) (extending a different analysis to FED. R. CIV. P. 12(b)(1)).

124. Some find an illogic in being more demanding on pleading the merits than on pleading jurisdiction. See S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 565–75 (2010) (arguing for extending *Twombly-Iqbal* to allegations of jurisdiction). The simple explanation is that the purpose of demanding plausibility testing does not extend beyond the allegations of ultimate liability. Cf. Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 978–79 (2006) (observing a lesser standard of proof for jurisdiction than on the merits).

125. In my defense, I can only reassert that I am a negativist on *Twombly-Iqbal* for its craftsmanship and other legal process. Nevertheless, I am not resting my argument in this Article on my opinion of the cases' legal

On the other hand, I am saying that pessimism's role should remain cabined. It should serve only as an opinion about the future, not as a basis for contending that *Twombly-Iqbal* has already decided all these extensions in favor of screening. Critics can sometimes make a bad decision seem worse than it is and sometimes help fulfill their own prophecies of terrible results.<sup>126</sup>

Thus, my bottom line is that pessimism can go overboard.<sup>127</sup> I think that *Twombly-Iqbal* thereby enjoys the fear mongering of its enemies. But still, in adjusting one's pessimistic outlook, one needs to beware falling into the next myth that draws on optimism.

My point, however, is a bit more subtle than to suggest that there is one true path, from which one can fall off to either side, so that being too pessimistic or too optimistic can lead to an overreading or an underreading. Instead, I am saying that this second myth lies in supposing that no limits exist on the *scope* of *Twombly-Iqbal*'s application to the whole pleading phase. The upcoming third myth is different in kind, as it supposes that the *Twombly-Iqbal* Court's diffidence in *purpose* left its rule to govern only certain kinds of cases or promised that other exceptions will save us. Proof of a difference in kind between the two myths resides

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process. Nor am I resting on my view on the need for pleading reform. *Cf.* Clermont & Yeazell, *supra* note 6, at 823 (criticizing the legal process without taking a position on whether pleading should be tightened up). In fact, I remain open-minded on the need for pleading reform. And I certainly realize that the plaintiffs' and defendants' bars have sharply different views of the matter. See ABA SEC. LITIG., MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 3 (2009), available at <http://www.abanet.org/litigation/survey/1209-report.html> ("[Seventy percent] of defense lawyers, but only 21% of plaintiffs' lawyers, believe that notice pleading has become a problem."). Instead, in this Article I am writing only about how to read *Twombly* and *Iqbal*.

126. See, e.g., *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at \*2 (W.D. Va. Aug. 24, 2009) (dismissing a complaint, with leave to amend, in a removed slip-and-fall case for an accident in a Virginia Dollar General store).

In this case, the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred. . . . While consistent with the possibility of the Defendant's liability, the Plaintiff's conclusory allegations that the Defendant was negligent because there was liquid on the floor [sic], but that the Defendant failed to remove the liquid or warn her of its presence are insufficient to state a plausible claim for relief.

*Id.* This decision accomplished nothing. The plaintiff thereafter amended to tell a much more specific story, and the case proceeded to discovery.

127. For example, one witness in the House hearings on *Iqbal* said that "*Iqbal* returns us to the kind of legal practice Dickens condemned in *Bleak House*." *Access to Justice Denied—Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 72 (2009) (statement of John Vail, Center for Constitutional Litigation), available at [http://judiciary.house.gov/hearings/printers/111th/111-36\\_53090.PDF](http://judiciary.house.gov/hearings/printers/111th/111-36_53090.PDF).

in the realization that a determined misreading of the cases could simultaneously fall prey to both.

### III. MYTH #3: THE *TWOMBLY-IQBAL* JUSTICES DIDN'T REALLY MEAN IT

Other judges and theorists, although they may also be unhappy with *Twombly-Iqbal*, show a more optimistic bent. Finding the Court's position to be encouragingly ambiguous in meaning, they have come up with clever ways to limit and circumvent the opinions.<sup>128</sup>

I am not saying these optimists are wrong in their analyses. Indeed, they are among the most insightful analysts working on this problem. Instead, I am merely disagreeing with their optimistic predictions about the future. (Note that I am not even pausing on the biggest myths of all, propagated by those who assert that there is nothing new in these cases<sup>129</sup> or that the *Twombly-Iqbal* test lay

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128. See cases cited *supra* note 48 (mentioning lower courts' resistance to *Twombly-Iqbal*); Brown, *supra* note 65, at 37–41 (reading the plausibility test to measure loosely whether the plaintiff has accurately predicted that the allegations will have evidentiary support); Hartnett, *supra* note 46, at 507 (suggesting that discovery can proceed, even after *Iqbal*, while the motion to dismiss is pending); Noll, *supra* note 41, at 36–37 (arguing that courts, after resolving *Iqbal's* massive uncertainties, might lead us to a less terrible place than *Iqbal's* critics fear); Stein, *supra* note 56, at 302–06 (taking the view that *Iqbal* was a very special case, which will not change pleading in ordinary cases); Steinman, *supra* note 41, at 1320–33 (reconciling *Twombly-Iqbal* with pre-*Twombly* authority, and thereby developing a new paradigm of “plain pleading”).

129. See, e.g., Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (“Notice pleading, however, remains the rule in federal courts, requiring only ‘a short and plain statement of the claim.’”); Daniel R. Karon, “*Twombly and All Through the Bar, Not a Plaintiff Was Troubled from Near or from Far*”—*The Unremarkable Effort of the U.S. Supreme Court's Re-expressed Pleading Standard in Bell Atlantic Corp. v. Twombly*, 44 U.S.F. L. REV. 571 (2010); see also *Has the Supreme Court Limited Americans' Access to Courts: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) (statement of Gregory G. Garre, former Solicitor General), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>.

While unquestionably important, the Supreme Court's decisions in *Twombly* and *Iqbal* were hardly bolts from the blue. To the contrary, they are firmly grounded in decades of prior precedent at both the Supreme Court and federal appellate court level concerning the pleading standards under Rule 8 of the Federal Rules of Civil Procedure. Indeed, what would have been truly remarkable in light of this well-settled precedent is if the Supreme Court had decided that either the complaint in *Twombly* or *Iqbal* were sufficient to proceed past Rule 12(b)(6).

*Id.*; accord *Access to Justice Denied—Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 33 (2009) (statement of Gregory G. Katsas, Former Assistant Attorney General, Civil Division), available at [http://judiciary.house.gov/hearings/hear\\_091027\\_1.html](http://judiciary.house.gov/hearings/hear_091027_1.html) (“I believe that these

undiscovered within Rule 8(a)(2) for seventy years.<sup>130</sup> Instead, I am writing of those who are perplexed by this development.)

To begin the refutation of optimism, I note that it has a bad track record in this arena. Many had optimistically predicted a narrow reach of *Twombly*.<sup>131</sup> But that holding turned out not to be limited to certain kinds of cases. In *Iqbal*, the Court ruled, by express wording, that *Twombly* applied to all federal complaints.<sup>132</sup>

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decisions faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants.”). Messrs. Garre and Katsas represented the defendants in *Iqbal* as the Solicitor General and a Justice Department attorney, respectively.

130. See, e.g., *Vorassi v. US Steel*, No. 09cv0769, 2009 WL 2870635, at \*2 (W.D. Pa. Sept. 3, 2009) (stating that the new “standard does not impose a heightened burden on the claimant above that already required by Rule 8”); Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 645 (2008) (“*Twombly* does not state a new way to understand pleading procedure.”). *Contra* Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y (forthcoming 2010) (manuscript at 30–50), available at <http://ssrn.com/abstract=1548232> (applying *Twombly* as if it were a new procedural standard).

131. See, e.g., Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 631–36, 639 (2007) (approving, with reservations, *Twombly*’s application of pleading’s substantive-sufficiency test to this antitrust case); J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN’S L. REV. 849, 851 (2008) (taking a very narrow view of *Twombly*); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 122 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/31/lrcoll2007n31Bradley.pdf> (“Plausibility” is an element of a certain kind of antitrust conspiracy claim, not a standard for pleadings in general.”). For another route to a restricted view, see Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1083–85 (2009) (criticizing those who believe *Twombly* applies only to complex cases involving significant discovery); cf. Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. (forthcoming 2010) (manuscript at 26–27), available at <http://ssrn.com/abstract=1463844> (approving *Iqbal* as an evolution in the pleading standard that is likely to increase the efficiency and fairness of civil practice).

132. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); cf. Clermont & Yeazell, *supra* note 6, at 856 (sketching the possibility of having the pleading rules vary with the circumstances). *But cf.* Ronald J. Allen & Alan E. Guy, Conley as a Special Case of *Twombly* and *Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules*, 114 PENN. ST. L. REV. (forthcoming 2010) (manuscript at 4–6), available at <http://ssrn.com/abstract=1589732> (arguing that the Court was establishing a pleading test that was not transsubstantive, and explaining *Erickson v. Pardus*, 551 U.S. 89 (2007), in those terms); Mark Moller, *Procedure’s Ambiguity*, 85 IND. L.J. (forthcoming 2010) (manuscript at 76–77), available at <http://ssrn.com/abstract=1587842> (suggesting that *Twombly-Iqbal*’s beneficial ambiguity permits variable application); Stein, *supra* note 56, at 303–04 (suggesting that *Twombly-Iqbal*’s

We now have to adjust to the broad meaning of the Court's holdings,<sup>133</sup> even if some holdouts refuse to do so.<sup>134</sup>

How big is the actual impact of the change, out in the world? On the one hand, in the years before *Twombly-Iqbal*, many pleadings were including tremendous detail, and many observers attributed this practice to the encouragement, if not requirement, of the lower courts.<sup>135</sup> To some extent, notice pleading was already gone. On the other hand, many courts, naturally enough, will still deny motions to dismiss after *Twombly-Iqbal*.<sup>136</sup> After all, it is true that some dismissals are beneficial. So, it is not wise to proclaim that the sky is falling.

The desire for more precision runs into the facts that no effective empirical work exists yet on the costs or benefits of the new regime, and any empirical study will prove dauntingly difficult to perform.<sup>137</sup> Still, we can safely say that the Court's holdings will necessarily produce considerable effects.<sup>138</sup> Those holdings will lead to motions being made in new situations, and to more expensive motions that will involve both fighting over *Twombly-Iqbal*'s meaning and dealing with fact-intensive disputes. Defendants have reportedly received the new regime with exuberance, using the

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expressly context-dependent application is the route to variable application).

133. Compare Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 935–36 (2009) (arguing that what the author saw as the Court's "thin plausibility" standard could be justifiable, if adopted by the proper statutory or rule process), with Bone, *supra* note 97, at 870–83 (criticizing the now-accepted "thick" screening).

134. See, e.g., *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009) (Posner, J.) (dictum) (suggesting that *Twombly* and *Iqbal* were special cases involving, respectively, complex litigation and qualified immunity); Transcript of Proceedings at 2, *Madison v. City of Chi.*, No. 1:09-CV-03629 (N.D. Ill. Oct. 14, 2010) (Shadur, J.) (stating "you don't have to be a nuclear physicist to recognize that *Twombly* and *Iqbal* don't operate as a kind of universal 'get out of jail free' card," and declining to apply *Twombly-Iqbal* in an employment discrimination case). Such approaches receive criticism even in the optimistic Noll, *supra* note 41 (manuscript at 19–20).

135. See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (finding barebones notice pleading to be far less common than assumed).

136. See Lori Andrus, *In the Wake of Iqbal*, TRIAL, Mar. 2010, at 20, 24–28 (collecting cases that denied motions).

137. See Clermont & Yeazell, *supra* note 6, at 839 n.66, 848 n.98 (criticizing early empirical work as biased to exaggerate the *Twombly-Iqbal* effect, and cataloging impediments to empirical work).

138. "The fact that the Supreme Court dismissed two complaints, including a complaint seven federal judges found sufficient, indicates a new willingness to decide cases on the pleadings . . ." Noll, *supra* note 41 (manuscript at 39). *But cf.* CIVIL RULES ADVISORY COMM., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 2 (May 17, 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf> ("But it is clear that the evolutionary processes of judicial refinement are moving rapidly. They also seem to be working well."); *supra* note 48 (mentioning lower courts' resistance to *Twombly-Iqbal*).

motions for such tactical purposes as achieving preliminary one-sided discovery.<sup>139</sup> Even if most of these new motions fail, claimants will now bear the accompanying burdens.<sup>140</sup> Those claimants who actually need discovery to show nonconclusory plausibility will suffer more.<sup>141</sup> *Twombly-Iqbal* is having an impact here, changing

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139. John A. Freedman, a partner at Arnold & Porter, Washington, D.C., says: "I am more likely now to file a motion to dismiss under Rule 12(b)(6) in almost every case but that does not necessarily mean the motions will be granted." Janet Cecelia Walthall, Iqbal, *Twombly Pleading Standards Hotly Debated by Conference Panelists*, 78 U.S.L.W. 2782, 2782 (2010).

140. See FED. JUDICIAL CTR., MOTIONS TO DISMISS: INFORMATION ON COLLECTION OF DATA (2010), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions to Dismiss\\_042710.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss_042710.pdf) (suggesting that the Court's two pleading cases correlate with an increase in the number of motions to dismiss under FED. R. CIV. P. 12(b)). The Federal Judicial Center plans to refine this study, focusing on Rule 12(b)(6) motions.

Any such study looking at the universe of all such motions, however, is apt to understate the effect of *Twombly-Iqbal*. Obviously, the case-selection effect of litigants' adjusting to the change in pleading law comes into play, because the study is ignoring the cases not filed. In a perfect world, cases like *Twombly-Iqbal* would have no effect on the number of motions or number of dismissals, as both plaintiffs and defendants immediately adjust to the new regime. Plaintiffs not only will gather more facts and plead more facts, but also will sometimes choose not to pursue cases that will fall to *Twombly-Iqbal*. This means that one should not expect to see major changes in the data—if only the world were perfect.

More subtly, if one were to compile all dismissal decisions, the effects of *Twombly-Iqbal* would be hard to measure because these precedents apply to only a restricted subset of motions to dismiss (and result in final dismissal for a smaller subset). That is, *Twombly-Iqbal* will have its bite only in cases in which the plaintiff cannot plead more detail and the plaintiff nevertheless sues without the detail. The other cases will overwhelm and mask the subsets. In other words, the numbers of motions and dismissals might be high enough to conceal any effect of the new regime.

As to the number of motions, I think that *Twombly-Iqbal* will produce more motions. But there will be lots of 12(b)(6) motions on grounds other than true *Twombly-Iqbal* grounds, such as legal insufficiency. The only safe conclusion, then, is that the denominator of the dismissal success rate should be suspect.

Meanwhile, as to the number of dismissals, there will be dismissals on those non-*Twombly-Iqbal* grounds. There will also be some dismissals on *Twombly-Iqbal* grounds when the plaintiff pleaded too little but can plead more (and probably does so by successful amendment, perhaps while the motion to dismiss is pending or perhaps after the motion is decided). All these usual decisions are going to resemble but dwarf the true bite of *Twombly-Iqbal*, which involves only those cases that would have succeeded under notice pleading but now definitively fail under the new test.

In sum, when I contemplate the possibility of a relatively noninflated numerator and an inflated denominator in the dismissal success rate, combined with the inevitable case-selection effect, I am left wondering whether any study looking at the numbers of motions and dismissals really could result in anything other than a showing of little impact. Perhaps there is no substitute for looking at a sample of cases filed and unfiled, viewing them from the inside and on a case-by-case basis.

141. See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV.

what may have been favorable results to dismissals.<sup>142</sup> Prime examples include cases in which the plaintiff is suing for conspiracy in violation of the antitrust law<sup>143</sup> or for a supervisor's violation of the civil rights statutes.<sup>144</sup> A subset of these new dismissals, and of decisions not to sue, will entail meritorious suits being defeated because of informational asymmetry.<sup>145</sup> Regret over this last effect conflicts with the wish to dismiss meretricious suits fairly and efficiently, thus making so difficult the policy choices in reforming the pleading system.<sup>146</sup>

In any event, even if there were no big increase in the numbers of motions or dismissals, the impact of *Twombly-Iqbal* is big on who we are—in the sense of what sort of access to justice we afford, and to what extent we intend to continue our reliance on private enforcement of the law.<sup>147</sup>

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(forthcoming 2010) (manuscript at 26–29), available at <http://ssrn.com/abstract=1525642>.

142. See, e.g., *SEC v. Cohmad Sec. Corp.*, No. 09 Civ. 5680 (LLS), 2010 WL 363844, at \*7 (S.D.N.Y. Feb. 2, 2010) (dismissing with leave to replead the SEC's securities-fraud civil action against defendants allegedly involved in the Bernard Madoff Ponzi scheme); *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217, 226 n.4 (D.P.R. 2009) (dismissing a civil rights complaint that “clearly met the pre-*Iqbal* pleading standard under Rule 8”); *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 200 (S.D.N.Y. 2009) (“While such allegations may have provided sufficient notice pleading in the past, *Twombly* and *Iqbal* provide clear instructions that conclusory statements about a party's alleged intentions should be accompanied with supporting factual allegations where circumstances so demand.”); *Ansley v. Fla. Dep't of Revenue*, No. 4:09cv161-RH/WCS, 2009 WL 1973548, at \*2 (N.D. Fla. July 8, 2009) (“These allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal*. But now they do not.”).

143. See, e.g., *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 898 (6th Cir. 2009) (affirming dismissal of a suit against airlines for capping commissions in an allegedly concerted effort to drive travel agencies out of business).

144. See, e.g., *Floyd v. City of Kenner*, 351 F. App'x 890, 899–900 (5th Cir. 2009) (affirming dismissal against chief investigator).

145. See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1666770> (suggesting empirically that the cases dismissed under *Twombly-Iqbal* would be no less successful than other cases and doing so by tracking the ultimate outcome in 1990s cases in which an appellate court had reversed dismissal on grounds no longer viable under *Twombly-Iqbal*). This clever study is far from definitive, of course. One problem is calculating a “success rate,” which should be something like the percentage of claims found to be well-founded, as evidenced either by a judgment on the merits or by a settlement sufficiently close to initial demands to serve as a reliable proxy for such a judgment. Another problem is defining a comparable cohort of cases for calculation of a background success rate.

146. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (distinguishing “the meritorious Rule 10b-5 suit from the meretricious one”).

147. See *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (“Thus, while a plaintiff must offer sufficient factual allegations to show that he or she is not merely engaged in a fishing expedition or strike suit, we must also

Optimists might want to believe that the Court did not intend such significant effects. But of late the Justices seem to have entertained steadily an image of meritless claims and discovery being out of control, regardless of that image's accuracy.<sup>148</sup> The *Twombly-Iqbal* Court has surely demonstrated confusion and poor craftsmanship, but not a wavering or haphazard set of concerns.<sup>149</sup> Much may be wrong with the new line of cases imposing the novel and uncertain test by a faulty legal process, but the cases have revealed a fairly coherent purpose.

In particular, *Erickson v. Pardus*<sup>150</sup> generated some of the early optimism by overturning a pleading dismissal only two weeks after *Twombly*.<sup>151</sup> Some observers, indeed, maintain a bit of *Erickson*

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take account of their limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.”)

148. See generally EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/FJC\\_Civil\\_Report\\_Sept\\_2009.pdf/\\$file/FJC\\_Civil\\_Report\\_Sept\\_2009.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FJC_Civil_Report_Sept_2009.pdf/$file/FJC_Civil_Report_Sept_2009.pdf) (painting a picture of a system not out of control).

149. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 53–84 (2010); Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. (forthcoming 2011) (manuscript at 13–14), available at <http://ssrn.com/abstract=1568127>; A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 196–200 (2010); cf. Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. (forthcoming 2010) (manuscript at 23), available at <http://ssrn.com/abstract=1577210> (explaining how the Court's use of stylized language masked the enormity of the change).

150. 551 U.S. 89 (2007) (per curiam).

151. See, e.g., *Boykin v. KeyCorp*, 521 F.3d 202, 213–15 (2d Cir. 2008); *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007) (noting that *Erickson* was one of the “conflicting signals [that] create some uncertainty as to the intended scope of the Court's decision” in *Twombly*), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); Ides, *supra* note 131, at 638–39 (“One gets the sense, given *Erickson*'s relative lack of ‘certworthiness,’ that the rapidly prepared and issued *Erickson* opinion was written as a reassurance that the *Bell Atlantic* decision had not altered Rule 8(a)(2) pleading principles.”); Jeremy D. Kerman, Note, *Righting the Notice Pleading Ship: How Erickson v. Pardus Solidifies the Modern Supreme Court Trend of Notice-Giving in Light of Bell Atlantic Corporation v. Twombly*, 84 CHI.-KENT L. REV. 691, 693 (2009) (opining that “*Erickson* demonstrates the Court's desire to isolate *Twombly* as an outlier”); Amy Howe, *More on Yesterday's Decision in No. 06-7317*, *Erickson v. Pardus*, SCOTUSBLOG (June 5, 2007, 5:10 PM), <http://www.scotusblog.com/2007/06/more-on-yesterdays-decision-in-no-06-7317-erickson-v-pardus/> (concluding that the Court “decided to summarily reverse in *Erickson*, likely in order to counteract any impression that could arise that *Twombly* was intended to set a

hope even after *Iqbal*.<sup>152</sup>

William Erickson, as a pro se plaintiff, brought a civil rights claim against prison officials, alleging that they had endangered his life by wrongfully terminating his medical treatment for hepatitis C.<sup>153</sup> After the district court dismissed the complaint on its legal merits, the Tenth Circuit affirmed on the ground that the plaintiff had pleaded the substantial-harm element in a “conclusory” way.<sup>154</sup> This being in 2006, before *Twombly*, the appellate court was using “conclusory” in heightened fact pleading’s pejorative sense, which worked to the special detriment of prisoner litigation.<sup>155</sup> The Supreme Court summarily vacated the ruling for having departed “in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure.”<sup>156</sup> Its action came via a per curiam opinion,<sup>157</sup> which seemed neither fully cognizant of the new *Twombly* test nor intent on expanding it. The Court cited *Twombly* for the propositions that notice pleading does not require allegations of “specific facts” and that the “judge must accept as true all of the factual allegations contained in the complaint.”<sup>158</sup>

*Erickson*, this tonic for optimists, deserves a reread after *Iqbal*. Although it sounded so permissive, it is reconcilable. And to reconcile it, one need not resort to the pro se status of the plaintiff. The key is to recognize that the *Erickson* Court left the *Twombly-Iqbal* test unaddressed. The Court merely found the detailed allegations not to be conclusory in the old sense, acting just in the way that the *Swierkiewicz-Leatherman* Court did and further confirming that those cases are still good law.<sup>159</sup> The Court did not

particularly high pleading standard”).

152. See, e.g., *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (“Any [suspicion] that *Twombly* had repudiated the general notice-pleading regime of Rule 8 was put to rest two weeks later, when the Court issued *Erickson* . . . .”); Stein, *supra* note 56, at 306 (interpreting *Erickson* as support for a limited and variable pleading standard).

153. *Erickson*, 551 U.S. at 89–90.

154. *Erickson v. Pardus*, 198 F. App’x 694, 696–97 (10th Cir. 2006), *aff’g* No. 05 CV 00405 LTB MJW, 2006 WL 650131 (D. Colo. Mar. 13, 2006) (never using the word “conclusory”), *vacated*, 551 U.S. 89 (2007); see *id.* at 698 (“[P]laintiff has made only conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the Interferon/Ribavirin treatment program.”).

155. See *supra* note 81.

156. *Erickson*, 551 U.S. at 90.

157. Justices Scalia and Thomas dissented on other grounds. *Id.* at 95.

158. *Id.* at 93–94; see also *id.* at 94 (“The complaint stated that Dr. Bloor’s decision to remove petitioner from his prescribed hepatitis C medication was ‘endangering [his] life.’ It alleged this medication was withheld ‘shortly after’ petitioner had commenced a treatment program that would take one year, that he was ‘still in need of treatment for this disease,’ and that the prison officials were in the meantime refusing to provide treatment.” (citations omitted)).

159. See *id.* at 94; *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 502 U.S. 163, 168–69 (1993); *supra* text accompanying notes

need to reach, and so made no reference to, any plausibility test.<sup>160</sup> Thus, *Erickson* does not mean that weak but appealing cases will henceforth survive. It provides no basis for hope that the Court will cut back on *Twombly-Iqbal*. There is simply no inconsistency, or even overlap, between *Erickson* and *Twombly-Iqbal*.<sup>161</sup>

More generally, one might wonder why the Justices in 2002 were willing to leave pleading reform to the rulemakers,<sup>162</sup> but by today they have shifted into revolutionary mode. It is possible that mounting concerns and frustrated waiting finally forced them to take reform into their own hands. More likely, however, is that they are inadvertent revolutionaries.<sup>163</sup> The Court stumbled into the thicket without realizing where *Twombly's* path would lead.<sup>164</sup> Then in *Iqbal*, a case that politically speaking had to come out the way it did, the Court momentarily decided to stay the course. By its broad wording in this new case, it proceeded to paint itself into a corner. Today, I find it hard to imagine that the Court's current personnel will choose on their own to walk through the wet paint, just to undo a revolution.

In sum, I contend that optimism in resolving the ambiguities and unsettled questions left by *Twombly-Iqbal* "fails to 'hear the music' in the Court's recent pleading decisions."<sup>165</sup> Hence, I would defend—at least for being realists—those who want to turn to Congress for a cure,<sup>166</sup> or to a rule amendment.<sup>167</sup>

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38–44 (referring to heightened-fact-pleading rebellions).

160. See *Erickson*, 551 U.S. at 94 ("Whether petitioner's complaint is sufficient in all respects is a matter yet to be determined."). Later the lower court upheld part of the complaint, without citing *Twombly*. See *Erickson*, 238 F. App'x at 696–700.

161. See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 140 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (arguing that "*Erickson* was a 'no-brainer' of a reversal under any Rule 8 pleading standard").

162. See *supra* text accompanying note 38 (discussing *Swierkiewicz* and *Leatherman*).

163. See Clermont & Yeazell, *supra* note 6, at 850–52 (cataloging signs of inadvertence).

164. The ambiguous origin of the *Twombly* path lay in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346–48 (2005) (dismissing a securities complaint as insufficient).

165. Noll, *supra* note 41 (manuscript at 39).

166. See Clermont & Yeazell, *supra* note 6, at 857 n.133 (listing proposed statutes). But see Michael Robert Huston, Note, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1627704>.

167. See Clermont & Yeazell, *supra* note 6, at 857–59 (listing proposed amendments); Miller, *supra* note 149, at 103–27 (collecting newer proposals); Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24, 33 (2010), [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_95\\_Hartnett.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hartnett.pdf) (proposing, as a new Rule, that if a "court decides that the allegation is likely to have evidentiary support after a reasonable opportunity for discovery, it must allow for that discovery"); *Summary*

## CONCLUSION

This Article has tried to convey the meaning of the recent eye-opening cases on federal pleading law. To do so, the Article refuted the three leading myths about the *Twombly* and *Iqbal* cases and thereby established these three propositions: First, the Supreme Court has not revived code-style fact pleading. This first conclusion implies that the codes' law/fact distinction plays no role in screening allegations under the new test for nonconclusoriness, and it also implies that the courts should not apply the new test for plausibility to each allegation but only to the ultimate assertion of liability. Second, we academics must beware of overstating the scope of the new cases. Their holdings apply only to claimants' pleadings, and indeed only to the claimants' allegations on the merits. Third, we must also beware of reading optimistically the opinions' evident confusions to infer an aimless Court. The Court's rather steady purpose indicates that the Justices now mean business as pleading revolutionaries.

The *Twombly-Iqbal* regime is a novel and uncertain one, as well as one instituted by an unwise legal process. But at the core, it is clear what the Court is trying to do—which is a good deal more revolutionary than reinstating fact pleading. The change in pleading, unless somehow undone, represents a truly major development in modern procedure.

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*Comparison of Bar Association Submissions to the Duke Conference Regarding the Federal Rules of Civil Procedure*, 2010 CONF. ON CIVIL LITIG. 3–7 (Apr. 26, 2010), <http://civilconference.uscourts.gov> (collecting proposals). For the current status of the amendment process, see CIVIL RULES ADVISORY COMM., *supra* note 138, at 2–4.