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## Note

### ***ASHCROFT v. IQBAL: HOW THE SUPREME COURT REWROTE RULE 8 TO IMMUNIZE HIGH-LEVEL EXECUTIVE OFFICIALS FROM POST-9/11 LIABILITY (A PLAUSIBLE INTERPRETATION)***

CARA SHEPLEY\*

*“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”*<sup>1</sup>

In *Ashcroft v. Iqbal*,<sup>2</sup> the Supreme Court of the United States considered whether Respondent Javaid Iqbal’s claims against two executive-level government supervisors asserting a qualified immunity defense were sufficient to withstand dismissal.<sup>3</sup> Extending a plausibility standard for Rule 12(b)(6) motions<sup>4</sup> to all civil actions and limiting supervisory liability in *Bivens* cases<sup>5</sup> to the government officials’ own purposeful constitutional violations, the Court held that Iqbal had failed to allege facts giving rise to a plausible inference that Petitioners John Ashcroft and Ronald Mueller were personally liable for his grievances.<sup>6</sup> In so holding, the Court refused to evaluate the complaint as a whole, thereby erroneously categorizing certain allegations as legal conclusions and

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1. *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

2. 129 S. Ct. 1937 (2009).

3. *Id.* at 1942–43.

4. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007) (holding invalid a Section 1 Sherman Act violation complaint that included only conclusory assertions of “parallel conduct,” thereby failing to provide the Court with “plausible grounds to infer an agreement”).

5. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (recognizing an implied private cause of action for damages against federal officers who had allegedly violated plaintiff’s constitutional rights).

6. *Iqbal*, 129 S. Ct. at 1950–51, 1953.

exemplifying the degree to which a discretionary “plausibility” standard can lead to arbitrary dismissals based on a judge or Justice’s individualized understanding of that single ambiguous word.<sup>7</sup> In extending *Twombly*’s highly flexible plausibility standard to all civil complaints faced with motions to dismiss—despite the fact that such an extension was unnecessary to resolve the case—the Court engaged in an act of judicial fiat unprecedented in the context of Rule 8.<sup>8</sup> Finally, the Court failed to acknowledge its veiled reliance on the post-September 11th context when it effectively immunized two high-level officials without considering the merits of either qualified immunity or supervisory liability in relation to Iqbal’s claims.<sup>9</sup> Having been cited numerous times by lower courts,<sup>10</sup> *Iqbal* has had an enormous practical impact beyond its oblique endorsements of judicial activism and non-accountability in high-level government officials.<sup>11</sup> If the Court had addressed the issue of qualified immunity, it could have resolved Iqbal’s case more transparently without breaking with the long-standing motion to dismiss standard.<sup>12</sup> *Iqbal* would therefore never have become a controversial landmark procedural case with implications that are—at worst—unconstitutional, and—at best—ethically dubious.<sup>13</sup>

## I. THE CASE

On November 5, 2001, during the immediate aftermath of the September 11th terrorist attacks on the United States, a Muslim Pakistani man named Javaid Iqbal was arrested on criminal charges related to fraudulent identification documents and conspiracy to defraud the United States.<sup>14</sup> After his arrest, Iqbal was initially detained at the Metropolitan Detention Center (“MDC”) in Brooklyn, New York.<sup>15</sup> He was then transferred to the MDC’s Administrative Maximum Special Housing Unit (“ADMAX SHU”), having been classified as a person ““of high interest””

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7. See *infra* Part IV.A.

8. See *infra* Part IV.B.

9. See *infra* Part IV.C.

10. As of May 16, 2010, *Iqbal* had been cited nearly 23,100 times according to Westlaw’s citing references.

11. See *infra* Part IV.A.

12. See *infra* Part IV.C.

13. See *infra* Part IV.C.

14. *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 2375202, at \*1 & n.1 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

15. *Id.* at \*1.

to ongoing government terrorist investigation.<sup>16</sup> He remained at the ADMAX SHU from January 8, 2002, until the end of July 2002.<sup>17</sup> During his detention, Iqbal pled guilty to the criminal charges for which he had been arrested, and on September 17, 2002, he was sentenced to sixteen months in prison.<sup>18</sup> Having been transferred back to the general prison population from the ADMAX SHU in July, Iqbal served the remainder of his sentence there before being removed to Pakistan on January 15, 2003.<sup>19</sup>

In May 2004, Iqbal filed a lengthy twenty-one count complaint against the United States and numerous federal officers of various rank, asserting constitutional and statutory violations stemming from allegedly egregious conditions of confinement during his detention in the ADMAX SHU.<sup>20</sup> Iqbal claimed that thousands of Arab Muslim men were arrested and detained in conjunction with the Federal Bureau of Investigation's ("FBI") post-September 11th investigations.<sup>21</sup> Like many of these detainees, Iqbal asserted he had been classified by the FBI as an individual "of high interest" solely because of his race, religion, and national origin, rather than on the basis of evidence that he was involved in terrorist activities.<sup>22</sup> According to the complaint, then-United States Attorney General John Ashcroft and FBI Director Robert Mueller had approved a policy of holding "high interest" detainees in "highly restrictive conditions until they were

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16. *Id.*

17. *Id.*

18. *Id.* at \*1 n.1.

19. *Iqbal*, 490 F.3d at 149.

20. *Id.* at 149 & n.3 (seeking damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). Iqbal filed his original complaint with co-plaintiff Ehab Elmaghraby, a Muslim man from Egypt who was also arrested on criminal charges unrelated to terrorism, deemed an individual of "high interest," and detained in the ADMAX SHU. *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 2375202, at \*1 & n.1. Elmaghraby's claims, however, were settled by the United States for \$300,000 after the district court ruled on the defendants' motion to dismiss and were never a part of the case on appeal. *Iqbal*, 490 F.3d at 147. Along with the United States, the complaint named a mass of individual government-officer defendants ranging from John Ashcroft, the Attorney General of the United States at the time of Iqbal and Elmaghraby's arrests, and Robert Mueller, then-Director of the FBI, to various high-ranking FBI and Federal Bureau of Prisons employees, MDC wardens, and low-ranking corrections officers. *Elmaghraby*, 2005 WL 2375202, at \*1. In addition to various claims filed under the Religious Freedom Restoration Act, the Federal Tort Claims Act, and the Alien Tort Claims Act, Iqbal alleged numerous violations of his constitutional rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments based on substantive and procedural due process, excessive force, interference with the right to counsel, denial of medical treatment, egregious conditions of confinement, unreasonable strip and body cavity searches, interference with religious practice, religious discrimination, and race-based equal protection. *Iqbal*, 490 F.3d at 149 n.3. At issue were allegations deriving from Iqbal's detention in the ADMAX SHU, but not from his arrest or initial MDC detention. *Id.* at 148.

21. *Iqbal*, 490 F.3d at 148.

22. *Elmaghraby*, 2005 WL 2375202, at \*2.

‘cleared’ by the FBI.”<sup>23</sup> Accordingly, Federal Bureau of Prisons (“BOP”) officers directed MDC staff to subject such detainees to the most restrictive conditions of confinement possible at the ADMAX facility and to develop “procedures” for handling them.<sup>24</sup> Iqbal claimed that these procedures, which included nearly constant confinement to a prison cell, no-contact social and legal visits, video monitoring, and communications blackouts, were implemented without individual review of any kind and continued until the FBI specifically approved a detainee’s release from the ADMAX SHU.<sup>25</sup>

Along with the other defendants, Ashcroft and Mueller moved to dismiss Iqbal’s complaint on a number of grounds, including qualified immunity.<sup>26</sup> Judge Gleeson of the United States District Court for the Eastern District of New York relied on a standard under which motions to dismiss could only be granted “if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’”<sup>27</sup> Judge Gleeson also explained that, on one hand, in addition to overcoming this general standard, government officials asserting a qualified immunity defense will only prevail on pre-discovery motions to dismiss when the plaintiff has alleged facts indicating that the official either did not violate a “clearly established” statutory or constitutional right, or, from an objectively reasonable perspective, did not believe that he had done so.<sup>28</sup> On the other hand, however, because government officials may not be held liable in a *Bivens* action under a theory of respondeat superior, a plaintiff must plead and prove the official’s personal involvement in the alleged violations to withstand a motion to dismiss.<sup>29</sup> Judge Gleeson clarified that

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23. *Iqbal*, 490 F.3d at 148.

24. *Id.*

25. *Id.* Regarding his personal experience as an ADMAX SHU detainee, Iqbal specifically alleged that he was: kept in solitary confinement where he was often forced to endure nearly twenty-four-hour stretches with his cell lights on; punitively subjected to harsh weather conditions when he was let outdoors in handcuffs and shackles; so deprived of adequate food that he lost forty pounds; verbally abused; twice brutally beaten by MDC guards and otherwise physically abused on a regular basis; denied medical care; subjected to daily strip and body-cavity searches; prevented from praying and sometimes deprived of his Koran; and blocked from communicating with his defense attorney. *Id.* at 149.

26. *Id.* at 150.

27. *Elmaghraby*, 2005 WL 2375202, at \*9. Judge Gleeson also noted an obligation to accept as true all of Iqbal’s factual allegations and to construe all reasonable inferences in his favor. *Id.* (citing *Walker v. City of New York*, 974 F.3d 293, 298 (2d Cir. 1992)).

28. *Id.* at \*10–11 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also id.* (citing *McKenna v. Wright*, 386 F.3d 432, 434, 436, 443 (2d Cir. 2004), for the proposition that a qualified immunity defense, though possible on a 12(b)(6) motion to dismiss, presents a formidable procedural hurdle for defendants).

29. *Id.* at \*11 (“The expectation that a defendant will assert qualified immunity as a defense does not elevate a plaintiff’s pleading requirements.” (citing *McKenna*, 386 F.3d at 434)).

the “personal involvement” of a supervisor must consist of an actual, direct constitutional violation, knowledge of and failure to remedy a wrong, the creation or sanction of an unconstitutional policy or custom, grossly negligent supervision of subordinates who commit constitutional torts, or failure to act upon receiving information regarding unconstitutional acts.<sup>30</sup> In other words, “[m]ere linkage” in the chain of command could not provide a sufficient basis for supervisory liability.<sup>31</sup>

Noting that the parties disagreed as to how “specific” and “nonconclusory” an allegation of personal involvement must be, Judge Gleeson reasoned that a tension exists between Rule 8’s liberal pleading standards and qualified immunity’s core purpose of protecting government officials from the burdens of discovery in unmeritorious litigation.<sup>32</sup> Judge Gleeson acknowledged that the Supreme Court had repeatedly declined to raise the pleading standard,<sup>33</sup> and had (1) endorsed a liberal reading of Rule 8 as requiring no more than “fair notice,” (2) concluded that courts should construe all inferences in the complaint in favor of the plaintiff, including inferences that would defeat an immunity defense, (3) emphasized that factual disputes regarding qualified immunity should be resolved as early in the litigation as possible, and (4) suggested that limited discovery may be required to resolve such a dispute.<sup>34</sup>

As a result, Judge Gleeson refused to dismiss Iqbal’s due process claim against Ashcroft and Mueller.<sup>35</sup> He reasoned that Iqbal had sufficiently asserted the existence of a clearly established liberty interest and that he had adequately pled personal involvement of the high-level government officials.<sup>36</sup> Moreover, the available evidence was so limited

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30. *Id.* at \*14. Judge Gleeson rejected Ashcroft’s blanket argument that he should not be subject to liability on the basis of “special factors” in the post-September 11th context militating against the provision of a *Bivens* remedy. *Id.* The court of appeals agreed. *Iqbal*, 490 F.3d at 159–60.

31. *Elmaghraby*, 2005 WL 2375202, at \*15.

32. *Id.* at \*11.

33. *Id.* at \*11 & n.13 (deeming the current Rule 8 pleading standard “permissive”).

34. *Id.* at \*13.

35. *Id.* at \*17, \*21. Judge Gleeson also rejected Ashcroft’s suggestion that “as a matter of law, constitutional and statutory rights must be suspended during times of crisis” and national emergency. *Id.* at \*18. Conceding that Ashcroft’s argument, which reasoned that the post-September 11th context justified departure from usual BOP standards, might ultimately persuade a court not to impose liability, the judge concluded that a determination of whether the defendants’ actions were reasonable could not be made on a motion to dismiss. *Id.* at \*19.

36. *Id.* at \*19–21 (citing *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989), for the proposition that ordinarily the mere assertion that high-level government officials had created an unconstitutional policy would not sufficiently suggest personal involvement to state a claim, but reasoning that the post-September 11th context provided enough support for Iqbal’s assertion to warrant some discovery because the need for

that Judge Gleeson was reluctant to grant defendants' motion without some discovery, especially since "the extent of defendants' involvement is peculiarly within their knowledge."<sup>37</sup> To mitigate concerns animating the qualified immunity doctrine, however, Judge Gleeson limited initial discovery to the issue of defendants' personal involvement.<sup>38</sup>

Turning finally to Iqbal's First and Fifth Amendment claims of religious and racial discrimination, Judge Gleeson explained that although proof of discriminatory intent is required for a plaintiff to prevail under equal protection principles, no such proof is required at the pleading stage.<sup>39</sup> Because he could not conclude that there existed "no set of facts" consistent with Iqbal's allegation that Ashcroft was the "principle architect" of the discriminatory policy that could establish the latter's liability, Judge Gleeson also refused to dismiss these claims.<sup>40</sup>

On appeal to the Second Circuit, the supervisory defendants challenged on qualified immunity grounds the district court's refusal to dismiss Iqbal's claims against them.<sup>41</sup> Agreeing with Judge Gleeson's legal conclusions, including his explanation of supervisory liability, the court of appeals echoed the district court's suggestion that the proper pleading standard required "to overcome a qualified immunity defense" was an "unsettled question."<sup>42</sup> Utilizing a newer standard than had Judge Gleeson,<sup>43</sup> the court relied on three somewhat conflicting Supreme Court cases<sup>44</sup> and noted that most circuits had rejected a generally applicable heightened pleading standard—until the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.<sup>45</sup>

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immediate, authoritative action made it more likely that high-level officials were personally involved in creating and/or implementing the detention policy).

37. *Elmaghraby*, 2005 WL 2375202, at \*20–21.

38. *Id.* at \*21.

39. *Id.* at \*28–29.

40. *Id.*

41. *Iqbal v. Hasty*, 490 F.3d 143, 151 (2d Cir. 2007). The only defendants to appeal the district court's order were supervisory officials. *Id.* at 152.

42. *Id.* at 152–53.

43. In 2007, the Supreme Court abrogated the "no set of facts" standard that Judge Gleeson had correctly applied to Iqbal's case in 2005. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007).

44. See *Iqbal*, 490 F.3d at 153–55 (parsing through and synthesizing the analyses of *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Crawford-El v. Britton*, 523 U.S. 574 (1998)).

45. See *Iqbal*, 490 F.3d at 155 (noting the First Circuit's assertion in *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 65 (1st Cir. 2004), that *Swierkiewicz* had resolved in the negative any lingering question whether a heightened pleading standard may still be possible after *Crawford-El*).

*Twombly*, the court opined, had created “[c]onsiderable uncertainty” regarding the proper pleading standard for motions to dismiss because conflicting “signals” in the opinion could imply either that the new plausibility standard should be construed narrowly, applying only to antitrust cases, or broadly, subjecting all civil actions to “a new and heightened pleading standard.”<sup>46</sup> Carefully analyzing these conflicting signals, the court concluded that the Supreme Court had not meant to announce a universally heightened standard but intended instead to require a flexible plausibility standard demanding amplified factual allegations only “in those contexts where such amplification is needed to render the claim *plausible*.”<sup>47</sup>

In so concluding, the court acknowledged that Ashcroft and Mueller’s argument for a heightened pleading standard in *Iqbal*’s case had some merit to the extent that such a standard would support the important privilege of qualified immunity while blocking generalized allegations of supervisory liability with the potential to create the exact discovery burdens that qualified immunity was designed to prevent.<sup>48</sup> The court declined to impose such a standard but noted that courts denying 12(b)(6) motions by government officials claiming immunity should structure and manage discovery to shield the officials from expensive, time-consuming litigation.<sup>49</sup>

Accepting *Iqbal*’s factual allegations as true and applying *Twombly*’s plausibility standard, the court dismissed the procedural due process claims.<sup>50</sup> Reasoning that *Iqbal* had sufficiently alleged both the violation of a constitutional right and the personal involvement of the relevant defendants—including Ashcroft and Mueller—in violating that right, the court concluded that there was a legitimate question as to whether the right was clearly established at the time of the alleged violation.<sup>51</sup> As to the equal protection claims, the court found that *Iqbal*’s allegation that his classification and confinement were solely race-based was sufficient to state a claim of objectively illegal animus-based discrimination, Ashcroft and Mueller’s assertion of qualified immunity notwithstanding.<sup>52</sup> Noting that the Supreme Court had specifically rejected a heightened pleading

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46. *Iqbal*, 490 F.3d at 155.

47. *Id.* at 157–58 (failing to elaborate on or give examples of contexts that would require amplified pleading).

48. *Id.* at 158–59 (underscoring a district court’s obligation to manage cases with a qualified immunity defense in such a way as to “protect the substance” of that defense).

49. *Id.*

50. *Id.* at 164–68 (reasoning that dismissal is warranted when there exists a legitimate question as to whether there is an exception to a constitutional requirement).

51. *Id.* at 167–68.

52. *Id.* at 174.



requirement for improperly motivated civil rights violations, the court turned to the issue of personal involvement to conclude that Iqbal's assertions that Ashcroft had designed the discriminatory policy and that Ashcroft and Mueller had condoned and agreed to it were sufficiently plausible.<sup>53</sup>

The Supreme Court of the United States granted certiorari to decide (1) whether Iqbal's complaint had sufficiently stated a claim that petitioners Ashcroft and Mueller had deprived him of a constitutional right, and (2) whether a high-ranking government official may be held liable for unconstitutional acts of subordinate officials on the basis of knowledge and acquiescence in those acts.<sup>54</sup>

## II. LEGAL BACKGROUND

Pleading practice in the United States developed from an archaic set of technical requirements to a lenient and long-lasting regime based on fair notice that was memorialized in the landmark case *Conley v. Gibson*.<sup>55</sup> In 2007, the Supreme Court shattered this regime with its decision in *Bell Atlantic Corp. v. Twombly*, which introduced a new plausibility standard for motions to dismiss for failure to state a claim and whose interpretation and potential scope created a significant amount of confusion in the lower federal courts.<sup>56</sup> While the Court has traditionally taken the view that procedural rules should be amended through the official federal rulemaking process rather than from the bench, Justice Kennedy has suggested that a heightened pleading standard may be appropriate in the context of a qualified immunity defense.<sup>57</sup> Qualified immunity is a doctrine that seeks to balance the goal of preventing disruptive litigation against government officials against justice's demand in some instances for limited pre-dismissal discovery.<sup>58</sup>

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53. *Id.* at 175–76 (echoing Judge Gleeson's reasoning that the post-September 11th context increased the likelihood that high-level government officials would have been personally involved in designing and implementing confinement policies for people who were arrested on federal charges in the New York City area and then classified as "of high interest" in terrorism investigations).

54. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1955–56 (2009) (Souter, J., dissenting) (citing Petition for a Writ of Certiorari at \*29, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015)). Writing for the Court, Justice Kennedy asserted that the case turned on the narrower question of whether Iqbal had pled "factual matter that, if taken as true, state[d] a claim that [Ashcroft and Mueller] deprived him of his clearly established constitutional rights." *Id.* at 1942–43 (majority opinion).

55. *See infra* Part II.A.

56. *See infra* Part II.B–C.

57. *See infra* Part II.D.

58. *See infra* Part II.E.

A. *The Evolution of Pleading: From Archaic Codes and Common Law to the Advent of Rule 8 and the Notice Regime*

Federal Rule of Civil Procedure 8 is the product of an ongoing procedural evolution. United States pleading practice developed from an arcane, oppressive set of common-law and Code procedures into a pro-plaintiff approach under which a complaint survived dismissal unless it failed to give the defendant fair but general notice of the claim.<sup>59</sup> Once the Court officially announced this construction of Rule 8 in *Conley v. Gibson*,<sup>60</sup> however, the pleading standard evolution came to an apparent end.<sup>61</sup>

At common law, a “Byzantine”<sup>62</sup> pleading system required plaintiffs to navigate a complex series of highly scientific-like requirements dictating how to properly recite claims and relevant legal issues.<sup>63</sup> Pleadings that failed to adhere to these technical constraints were swiftly dismissed, such that the system’s formal rigidity trumped the promotion of justice through principled decisions based on the merits of each case.<sup>64</sup> In America, the ancient pleading system was first reformed in 1848 with the enactment of the New York Field Codes.<sup>65</sup> The Codes, which shifted the substantive core of pleading practice from issues to facts, required plaintiffs to submit “a plain and concise statement of the facts constituting each cause of action without unnecessary repetition.”<sup>66</sup> Like the common-law system, the Codes eventually revealed defects, most notably the underlying assumption

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59. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 89–92 (3d ed. 2004).

60. 355 U.S. 41, 45–47 (1957) (explaining that the Rules require only that the plaintiff “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”).

61. Neither the Federal Rules of Civil Procedure nor their judicial interpretation departed from notice pleading until 2007. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (“*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough.”).

62. See *Twombly*, 550 U.S. at 573–74 (Stevens, J., dissenting) (explaining that the language of Rule 8 was “not inadvertent,” but rather an intentional response to the difficulties associated with hyper-technical English and American pleading rules from the mid-nineteenth century).

63. See WRIGHT & MILLER, *supra* note 59, § 1202, at 90 (explaining that the “maze” of common-law pleading requirements was premised on the assumption that “eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case”).

64. *Id.* at 90–92. See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 53–57, 76–79, 86–90 (4th ed. 2002) (discussing the early English writ system, the first form of pleading practice, and the decline of the common-law system of pleading, which resulted from its inflexibility).

65. See generally CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 21–22 (2d ed. 1947) (“In this country the movement for pleading reform resulted in the adoption of the New York [Field] Code of 1848, the mode and forerunner of all the practice codes in states which have adopted code pleading.”).

66. *Id.* at 210 (citing N.Y. CODE CIV. P. § 481).

that plaintiffs could compartmentalize facts and conclusions at the first stage of litigation.<sup>67</sup> Fact pleading under the Codes ultimately became unworkable, having imposed enormous time and cost expenditures in litigating inconsequential procedural issues.<sup>68</sup>

When the Federal Rules of Civil Procedure were enacted in 1938, Rule 8 was designed to respond to the technical deficiencies of both the common law and the Codes: The drafters intentionally excluded references to both “facts” and “causes of action.”<sup>69</sup> In so doing, the drafters also abolished the problematic formal distinction between facts and conclusions.<sup>70</sup> Having only been amended twice since its promulgation,<sup>71</sup> Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>72</sup> This intentionally simplified standard was complemented by Rule 8’s explicit directive of interpretive flexibility: Pleadings must be construed in such a way as to promote and achieve justice.<sup>73</sup>

Because the drafters of the Federal Rules sought to expand access to the courts, they used Rule 8 to clear away the confusion and injustice of rigid procedural rules “so that the sunlight of substance might shine through.”<sup>74</sup> Pleading under Rule 8 did not demand detailed allegations that would ultimately prove a claim but only required enough information to

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67. WRIGHT & MILLER, *supra* note 59, § 1218, at 265.

68. *Id.* § 1202, at 91–92.

69. *Id.* § 1216, at 207–08 (explaining that the drafters “obviously felt that the use of a new formulation would . . . destroy the viability of the old code precedents, which were a source of considerable confusion, and encourage a more flexible approach by the courts in defining the concept of claim for relief”).

70. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 574–75 (2007) (Stevens, J., dissenting) (noting that because Rule 8 was enacted in direct response to the difficulty of distinguishing between facts and legal conclusions, its drafters self-consciously avoided any reference to these terms); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3–4 (9th Cir. 1963) (“[O]ne purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law . . . .”); *Oil, Chem. & Atomic Workers Int’l Union v. Delta Ref. Co.*, 277 F.2d 694, 697 (6th Cir. 1960) (suggesting that under notice pleading, “the ancient distinction between pleading ‘facts’ and ‘conclusions’ is no longer significant”).

71. The Court has only ordered amendments to Rule 8 three times since the Federal Rules of Civil Procedure were first enacted; Rule 8(a)(2) was only affected by two of those orders and has never been amended substantively. See 113 F.R.D. 189, 194–95 (1987) (making technical changes); 39 F.R.D. 69, 214 (1966) (amending Rule 8(e) only); Order of the Supreme Court of the United States, available at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules/ProposedSupCt0407.aspx> (effective Dec. 1, 2007) (making stylistic changes).

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

73. See WRIGHT & MILLER *supra* note 59, § 1202, at 97 (referring to Rule 8(f), which provides that “all pleadings shall be so construed as to do substantial justice”).

74. Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 2–3 (1988).

give the defendant and the court notice of that claim.<sup>75</sup> As a result, modern pleading practice became known as “notice pleading.”<sup>76</sup> According to Judge Charles E. Clark, the principal architect of the Federal Rules, giving notice meant setting forth the general nature and basis of a claim to clarify the act or event a plaintiff sought to litigate.<sup>77</sup> The new, simplified pleading standard was, moreover, complemented and enabled by the introduction of liberal discovery rules and other pretrial procedures, which allowed litigants who had given proper notice of their claims to gather evidence regarding the specific legal issues on which their case would ultimately turn.<sup>78</sup> In 1954, a few years before its landmark case of the notice pleading regime—*Conley v. Gibson*<sup>79</sup>—the Court paved the way for that decision by implicitly endorsing a minimalist pleading standard.<sup>80</sup> In *United States v. Employing Plasterers Ass’n of Chicago*, the Court suggested that a complaint could actually be “too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading.”<sup>81</sup>

In *Conley*, the Supreme Court definitively interpreted Rule 8 and clarified its interaction with Rule 12(b)(6) motions to dismiss<sup>82</sup>: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support

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75. See WRIGHT & MILLER, *supra* note 59, § 1202, at 89–90.

76. Although the drafters did not use the term “notice pleading,” Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958), the Supreme Court did so in *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957) (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules . . .”). The Court has also included the term “simplified” in describing the appropriate standard. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.”).

77. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–61 (1943) (espousing the necessity of simple, direct procedural rules that, in addressing only the “broad outlines” of a case, do not allow form to rise above substance).

78. See *Swierkiewicz*, 534 U.S. at 512 (explaining that the “simplified notice pleading standard relies on liberal discovery rules and summary judgment motions”); *Conley*, 355 U.S. at 47 (noting that “simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures”); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (“The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.”).

79. 355 U.S. 41.

80. See *United States v. Employing Plasterers Ass’n of Chi.*, 347 U.S. 186, 189 (1954) (embracing a simplistic pleading standard).

81. *Id.*

82. Federal Rule of Civil Procedure 12(b)(6) grants parties the right to move for dismissal of complaints that “fail[] to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6).

of his claim which would entitle him to relief.”<sup>83</sup> Plaintiff-petitioners were African-American railroad employees who sued their union and some of its officers under the Railway Labor Act for unfair bargaining-agent representation after they had been discharged or demoted, allegedly on the basis of race.<sup>84</sup> In response to the Union’s argument that the employees’ complaint failed to plead sufficient facts to support a general allegation of discrimination, the Court reasoned that because the underlying purpose of pleading is to foster adjudication on the merits, the Federal Rules did not require detailed factual allegations.<sup>85</sup> To withstand a motion to dismiss, the Court concluded, a complaint must only allege enough information to give the defendant fair notice of the plaintiff’s claims and their grounds.<sup>86</sup> Therefore, the employees’ allegations that the railroad had wrongfully discharged them and that the Union had because of their race refused to assist them in dealing with their grievances provided sufficient notice to defeat the Union’s motion to dismiss.<sup>87</sup>

Until *Bell Atlantic Corp. v. Twombly*,<sup>88</sup> the Court consistently applied *Conley*’s “no set of facts” standard—or its underlying rationale—to motions to dismiss for failure to state a claim.<sup>89</sup> Accordingly, the Court determined that the task of evaluating a complaint before discovery was a necessarily limited undertaking that required judges to carefully distinguish between complaints that were sufficiently pleaded but that suggested an improbability that the claimant would succeed on the merits, and complaints that actually failed to sufficiently state a claim.<sup>90</sup> In *Swierkiewicz v. Sorema N.A.*,<sup>91</sup> for instance, the Court affirmed that the

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83. *Conley*, 355 U.S. at 45–46 (1957), *abrogated by* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63, 570 (2007) (abrogating *Conley*’s “no set of facts” language but purporting not to raise the pleading standard).

84. *Conley*, 355 U.S. at 42–43.

85. *Id.* at 47–48.

86. *Id.* at 47.

87. *Id.* at 45–46.

88. 550 U.S. 544.

89. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citing *Conley* for the proposition that “[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim”). In fact, even after *Twombly*, the Court referred approvingly to *Conley*’s notice pleading standard. *See* *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing language from *Conley* quoted in *Twombly* to assert that a complaint need only “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests’” (alteration in original) (quoting *Twombly*, 550 U.S. at 555)).

90. *See* *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (“The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”).

91. 534 U.S. 506.

simplified standard of Rule 8 applied to all civil actions and had been adopted to shift the focus of litigation from the art of pleading claims to the merits involved in adjudicating them.<sup>92</sup> Further, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>93</sup> the Court rejected as inconsistent with the liberal system of notice pleading the Fifth Circuit's requirement that plaintiffs suing government officials likely to evoke a qualified immunity defense must "state with factual detail and particularity the basis for the claim" as well as the basis for a rebuttal to the immunity argument.<sup>94</sup> The Court declined to adopt the challengers' rationale that this requirement did not constitute a heightened pleading standard because the Federal Rules demand varying degrees of factual specificity depending on the substantive complexities of the legal doctrines underlying the plaintiff's claims.<sup>95</sup>

The lower federal courts adopted the Supreme Court's pleading pronouncements. In a case decided only one month before *Twombly*, Judge Easterbrook underscored the Seventh Circuit's understanding of the Court's construction of Rule 8 by cautioning district court judges considering motions to dismiss to be vigilant in demanding nothing more from a complaint than notice.<sup>96</sup> According to Judge Easterbrook, Rule 8 demanded neither facts nor legal theories, both of which would emerge later in the litigation process.<sup>97</sup> The judge concluded that 12(b)(6) motions to dismiss should be granted only when a complaint fails to state a legally cognizable claim.<sup>98</sup>

*B. From Notice to Plausibility: In Bell Atlantic Corp. v. Twombly, the Court Departed from Conley v. Gibson's Long-Standing "No Set of*

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92. *Id.* at 514–15.

93. 507 U.S. 163 (1993).

94. *Id.* at 167–68 (internal quotation marks omitted).

95. *Id.*

96. *Vincent v. City Colleges of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007) ("Any decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b)." (internal quotation marks omitted) (quoting *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006))). Later in the opinion, Judge Easterbrook offered even more specific advice on this score, suggesting that "[a]ny district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain . . . ' should stop and think: What rule of law *requires* a complaint to contain that allegation?" *Id.* at 924 (internal quotation marks omitted) (quoting *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005)).

97. *Id.* at 923 (reasoning that a complaint's indication of "the possibility that facts to be adduced later, and consistent with the complaint, could prove the claim" precludes pre-discovery dismissal).

98. *Id.* at 924.

*Facts” Language and Adopted a Plausibility Pleading Standard in the Context of an Antitrust Action*

In *Bell Atlantic Corp. v. Twombly*,<sup>99</sup> the Supreme Court abrogated *Conley*’s oft-quoted “no set of facts” interpretation of Rule 8, reasoning that the phrase had been often and problematically taken out of context by the lower courts and that it had been “questioned, criticized, and explained away long enough.”<sup>100</sup> The *Twombly* plaintiff-respondents were consumers of local telephone and/or high-speed Internet services who sued Bell Atlantic and other Incumbent Local Exchange Carriers (“ILEC”)—regional service monopolies—under Section 1 of the Sherman Act in a putative class action<sup>101</sup> for conspiracy to restrain trade.<sup>102</sup> Writing for the Court, Justice Souter found the allegation that the telecommunications providers had “engaged in parallel conduct” insufficient to state an antitrust violation and therefore held that the complaint should be dismissed.<sup>103</sup> In so holding, Justice Souter considered the complaint under a new standard that enabled him to declare that an assertion of parallel conduct alone did not plausibly suggest an unlawful conspiracy on the part of the ILECs.<sup>104</sup>

To replace *Conley*’s (mis)interpretation of Rule 8, the Court introduced new language declaring that a complaint will only withstand dismissal if it includes, on its face, “allegations plausibly suggesting (not merely consistent with)” liability.<sup>105</sup> Plausibility, Justice Souter explained, implies neither probability<sup>106</sup> nor conceivability,<sup>107</sup> but falls somewhere between the two and cannot be based on conclusory assertions that would require a judge to speculate about whether the plaintiff is entitled to

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99. 550 U.S. 544 (2007). The Court framed its reason for granting certiorari narrowly: “[T]o address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” *Id.* at 553.

100. *Id.* at 562–63 (retiring the “puzzling” phrase as one “best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint”).

101. *Id.* at 550, 559 (noting the potentially exorbitant discovery costs associated with a case in which “plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States”).

102. *Id.* at 550. Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1 (2006).

103. *Twombly*, 550 U.S. at 570 (concluding that plaintiffs had not “nudged their claims across the line from conceivable to plausible”).

104. *See id.* at 564–70 (noting 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”).

105. *Id.* at 556–57 (explaining that a facially plausible pleading “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal” activity).

106. *Id.* at 556.

107. *Id.* at 570.

relief.<sup>108</sup> Like labels and conclusions, “a formulaic recitation of the elements of a cause of action” cannot alone give rise to a plausible inference of liability.<sup>109</sup> The Court explicitly rejected any requirement of “heightened fact pleading of specifics” and framed the decision as a logical extension of the Court’s pleading philosophy rather than a departure from it.<sup>110</sup>

Justice Stevens dissented,<sup>111</sup> asserting that the Court’s plausibility test—which he interpreted as a “dramatic departure from settled procedural [standards]”<sup>112</sup>—was not a legally acceptable basis for dismissing a complaint.<sup>113</sup> Examining the history of Rule 8,<sup>114</sup> Justice Stevens pointed out that plaintiffs had difficulty distinguishing among facts, evidence, and conclusions under the Codes and suggested that rather than a bright line separating a conceivable complaint from a plausible one, there existed a pleading “continuum varying only in the degree of particularity with which the occurrences are described.”<sup>115</sup> After rebutting the majority’s suggestion that *Conley* had put an “incomplete, negative gloss on an accepted pleading standard,”<sup>116</sup> Justice Stevens concluded that the Court had actually heightened that standard<sup>117</sup> from possibility to plausibility.<sup>118</sup>

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108. *Id.* at 555–56.

109. *Id.* at 555. Applying the plausibility standard to the facts of the case, Justice Souter first outlined the substantive legal requirements underlying the plaintiff’s claim of an antitrust violation. *Id.* at 553–54. He then reasoned that allegations of parallel conduct, without any assertion of an actual agreement or conspiracy to unreasonably restrain trade, did not give rise to the plausible inference of a Section 1 Sherman Act violation. *Id.* at 564–70.

110. *Id.* at 570.

111. Justice Stevens was joined in dissent by Justice Ginsberg, except as to Part IV, which criticized the majority’s method of statutory interpretation as applied to *Twombly* for ignoring Congress’s intent in enacting the Sherman Act in order to advance its own policy agenda of “protecting antitrust defendants . . . from the burdens of pretrial discovery.” *Id.* at 547, 595–97 (Stevens, J., dissenting).

112. *Id.* at 573 (arguing that the insertion of plausibility into the Rule 12(b)(6) analysis “seems to be driven by the majority’s appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency”).

113. *Id.* at 571.

114. *Id.* at 573–76 (asserting that *Conley* must be understood in this context). Justice Stevens lamented *Conley*’s interment and pointed out in “eulogy” that the majority opinion “is the first by any Member of this Court to express any doubt as to the adequacy of the *Conley* formulation.” *Id.* at 577–78.

115. *Id.* at 574 (internal quotation marks omitted) (quoting Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957)).

116. *Id.* at 579. First, Justice Stevens explained that, because the Federal Rules of Civil Procedure neither encourage nor require the pleading of facts, the *Conley* Court would have understood the majority’s introduction of plausibility as erroneously imposing an evidentiary standard at the pleading stage. *Id.* at 579–80 & n.6 (conceding that the majority was correct in asserting that Rule 8 requires only a “‘showing’” that plaintiff is entitled to relief, and suggesting that “[w]hether and to what extent that ‘showing’ requires allegations of fact will depend on the



C. *Twombly Created Considerable Confusion in the Lower Courts and Set the Stage for Supreme Court Clarification*

*Twombly* instigated a considerable amount of debate and speculation in the lower federal courts regarding the scope of the new pleading standard and the meaning of plausibility.<sup>119</sup> Although the courts generally applied *Twombly* outside of the federal antitrust context, they did so to varying degrees.<sup>120</sup> More importantly, some courts found that a plausibility requirement squared well with long-standing principles of notice pleading while others interpreted it as a significant departure.<sup>121</sup> Regardless of how a court ultimately construed *Twombly*, however, each attempted “neither to over-read nor to under-read” the Supreme Court’s new language.<sup>122</sup>

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particulars of the claim”). Second, Justice Stevens noted that *Conley* developed a minimum standard with which a complaint *must* comply to withstand dismissal, not a standard dictating what a plaintiff *may* include in a complaint. *Id.* at 580.

117. *See id.* at 588, 596 (calling *Twombly* a “Big Case” that tempted the majority into succumbing to the temptation of imposing a heightened pleading standard, which “previous Courts [had] steadfastly resisted,” and asserting “that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious” in light of the decision’s “transparent policy concern” of protecting antitrust defendants).

118. *Id.* at 591–93 (rejecting the Court’s notion that any inference of antitrust conspiracy based on the allegation of parallel conduct is implausible and asserting that such inferences “sit[] comfortably within the realm of possibility,” which is “all the Rules require”). Justice Stevens concluded that “in the final analysis,” the Court’s decision reflects “only a lack of confidence in the ability of trial judges to control discovery.” *Id.* at 596.

119. *E.g.*, *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541–42 (6th Cir. 2007) (noting confusion over *Twombly*’s scope but declining to take a position, as doing so was unnecessary for resolution of the case).

120. *Compare* *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 48, 54–55 (3d Cir. 2007) (applying *Twombly* to affirm a motion for summary judgment under the New Jersey Antitrust Act), *with* *Bryson v. Gonzales*, 534 F.3d 1282, 1286–87 (10th Cir. 2008) (applying *Twombly* to a § 1983 action to hold that a former prisoner’s complaint failed to state a claim against the former city chief of police for unconstitutional denial of access to DNA evidence).

121. *See* Brief of Professors of Civil Procedure & Fed. Practice as Amici Curiae in Support of Respondents at 4, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2008) (No. 07-1015) (“*Compare Aktieselkaet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (“*Twombly* leaves the longstanding fundamentals of notice pleading intact.”), *with* *Brotherhood of Locomotive Engineers v. Union Pacific RR Co.*, 537 F.3d 789, 791 (7th Cir. 2008) (Easterbrook, J., and Posner, J., concurring) (“In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier.”)). The Professors argued that the Court in *Twombly* did not “endorse or apply” a heightened pleading standard, *id.* at 7–8, and reasoned that the implausibility of *Twombly*’s complaint “was a product of substantive law filtered through unremarkable pleading standards,” *id.* at 11.

122. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082 (7th Cir. 2008). The Tenth Circuit, one of the few circuits attempting to put into its own words what the Supreme Court meant by “plausibility,” found that “the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

Judge Ripple of the Seventh Circuit asserted in *Tamayo v. Blagojevich* that the Court had not intended to supercede the basic notice-pleading standard and assumed that *Twombly* applied to various types of civil actions.<sup>123</sup> According to Judge Ripple, *Twombly* had not heightened the pleading standard but had established that a complaint must pass “two easy-to-clear hurdles” to survive a motion to dismiss: First, the complaint must contain enough factual detail to give the defendant “fair notice” of the plaintiff’s claims and their grounds; second, that factual detail must also “plausibly suggest” that the plaintiff is entitled to relief.<sup>124</sup> The court interpreted the Supreme Court’s “explicit praise of Form 9 of the Federal Rules of Civil Procedure” as suggesting that some conclusory statements might permissibly contribute to a plausible inference of entitlement to relief.<sup>125</sup>

The plaintiff in *Tamayo* had sued her employers, the Illinois Gaming Board and the Illinois Department of Revenue, and individual defendants, including Governor Blagojevich, under Title VII, the Equal Pay Act, and Section 1983 for retaliation and gender-based discrimination.<sup>126</sup> *Tamayo* alleged that her employers had reneged on a promised salary, treated her differently from and paid her less than similarly situated male employees—in part because she was a woman—and subjected her to various, specifically identified “adverse employment actions” on account of her gender and in response to her complaints about lack of equal pay and her filing of an Equal Employment Opportunity Commission charge.<sup>127</sup> Judge Ripple concluded that *Tamayo*’s complaint had alleged sufficient facts with respect to her sex discrimination and retaliation claims, reasoning that the allegations put the defendants on adequate notice of her claims, which she had not attempted to obfuscate.<sup>128</sup>

Like Judge Ripple, Judge Archer of the Federal Circuit concluded in *McZeal v. Sprint Nextel Corp.* that *Twombly*’s abrogation of *Conley*’s “no set of facts” language did not suggest that the Court had changed the

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123. *Tamayo*, 526 F.3d at 1082–83; see also *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007) (concluding that the Court’s abrogation of *Conley*’s “no set of facts” language “does not suggest that *Bell Atlantic* changed the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*” and noting that, in fact, “*Bell Atlantic* favorably quoted *Conley*”).

124. *Tamayo*, 526 F.3d at 1084 (quoting *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)).

125. *Id.* at 1084–85 (suggesting, for instance, that a negligence complaint could survive dismissal without stating “the respects in which the defendant was alleged to be negligent (i.e., driving too fast, driving drunk, etc.)”).

126. *Id.* at 1080.

127. *Id.* at 1085.

128. *Id.* at 1085–86.

pleading requirements of Rule 8 “as articulated in *Conley*.”<sup>129</sup> In *McZeal*, the pro se plaintiff sued Sprint Nextel Corporation and Nextel Communications, Inc. for patent and trademark infringement, setting forth his allegations in a ninety-five page, twenty-four count complaint.<sup>130</sup> Reasoning that McZeal only had access to Sprint’s public statements and advertisements, Judge Archer concluded that McZeal’s allegation that one of Sprint Nextel’s products was the logical equivalent of his invention—an international walkie talkie—contained sufficient detail to allow the corporation to answer the complaint with respect to the patent infringement claim.<sup>131</sup> Specifics about how the allegedly infringing product worked, the court reasoned, would emerge through discovery.<sup>132</sup>

Although he noted that that courts may “grant leeway” to pro se plaintiffs on procedural matters,<sup>133</sup> Judge Archer also referred broadly to the pleading standard, suggesting that even after *Twombly*, a complaint will withstand dismissal so long as it provides the defendant with “enough detail to allow the defendants to answer.”<sup>134</sup> Rejecting the majority’s view, Judge Dyk concluded that under the new pleading standard announced in *Twombly*, McZeal’s bare, conclusory allegations of patent infringement were insufficient to provide Sprint with any meaningful notice under the doctrine of equivalents,<sup>135</sup> and therefore should not be permitted to subject Sprint to expensive and time-consuming discovery.<sup>136</sup>

Seeking to reconcile the long-standing notice requirement with *Twombly*’s new additions to the pleading standard, Judge Nygaard explained for the Third Circuit in *Phillips v. County of Allegheny*<sup>137</sup> that what made *Twombly*’s impact on Rule 12(b)(6) so confusing was the fact that the new plausibility paradigm had been introduced alongside the seemingly conflicting assertion that the Court was not actually changing the

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129. 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007) (noting that the Court in *Twombly* had quoted *Conley* favorably).

130. *Id.* at 1355.

131. *Id.* at 1357. As for the trademark infringement claim, Judge Archer rejected the district court’s basis for dismissing McZeal’s complaint, asserting that whether the trademark was generic, and therefore invalid, was a factual question that could not be decided on a motion to dismiss. *Id.* at 1358.

132. *Id.* at 1358.

133. *Id.* at 1356.

134. *Id.* at 1357.

135. The doctrine of equivalents, in essence, prevents patent fraud. See *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608–10 (1950) (establishing the modern doctrine of equivalents).

136. *McZeal*, 501 F.3d at 1361 (Dyk, J., concurring in part and dissenting in part).

137. 515 F.3d 224 (3d Cir. 2008).

framework for Rules 8 or 12(b)(6).<sup>138</sup> According to Judge Nygaard, *Twombly* introduced two new concepts to the assessment of a civil complaint.<sup>139</sup> First, the Court introduced new language, such as the “showing” required to demonstrate entitlement to relief; second, the Court renounced old language, that is, *Conley*’s “no set of facts” passage.<sup>140</sup> Attempting to make sense of *Twombly*’s “confusing” and “conflicting signals,”<sup>141</sup> the Judge explained that insufficient factual allegations in a complaint could not withstand dismissal because such allegations could not provide the defendant with sufficient notice.<sup>142</sup> The Judge noted that the Supreme Court had carefully rooted its analysis of and departure from *Conley* in accepted principles and concluded that *Twombly* had not shattered the notice pleading standard.<sup>143</sup>

In *Phillips*, an administratrix sued numerous defendants under Section 1983 in relation to the murder of her son Mark Phillips and his girlfriend, Gretchen Ferderbar, by Ferderbar’s ex-boyfriend Michael Michalski, an Allegheny County 911 call center dispatcher.<sup>144</sup> The defendants included Daniel Nussbaum, Michalski’s supervisor, and Danielle Tush and Brian Craig, other dispatchers.<sup>145</sup> Michalski had secretly used the call center’s computer network to obtain information about the whereabouts of Ferderbar and Phillips.<sup>146</sup> When Nussbaum initially became aware of this, he suspended Michalski for one week.<sup>147</sup> During the suspension, Tush and Craig assisted Michalski in obtaining unauthorized information about the victims from the call center database.<sup>148</sup> Ferderbar learned of Michalski’s actions and notified Nussbaum, who terminated Michalski and then contacted Ferderbar and a local police department to warn them about Michalski’s volatile state.<sup>149</sup> Later that day, Michalski phoned the call

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138. *Id.* at 230.

139. *Id.* at 231–32.

140. *Id.*

141. *Id.* at 234 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007)).

142. *Id.* at 232 (contrasting the necessary “showing” to a “blanket assertion of entitlement to relief”).

143. *Id.* at 233. Like the Third and Seventh Circuits, the Second Circuit recognized “conflicting signals” in *Twombly* that created uncertainty as to the opinion’s intended scope. *Iqbal*, 490 F.3d at 157–58 & n.7 (concluding that *Twombly* was not limited to antitrust cases and reasoning that “it would be cavalier to believe that the Court’s rejection of the ‘no set of facts’ language from *Conley* . . . applies only to section 1 antitrust claims”).

144. *Phillips v. County of Allegheny*, 515 F.3d 224, 228–29 (3d Cir. 2008).

145. *Id.* at 229.

146. *Id.* at 228.

147. *Id.*

148. *Id.* at 229.

149. *Id.*

center, saying he had “nothing left to live for” and that Ferderbar and Phillips were going to “pay for putting him in his present situation,” but neither Tush nor Craig nor any other dispatcher took any action to warn Ferderbar or to notify the police.<sup>150</sup> That evening, Michalski tracked down and shot Ferderbar and Phillips.<sup>151</sup>

Judge Nygaard applied *Twombly* and analyzed the complaint under the four-part test of the state-created danger theory.<sup>152</sup> The judge found that the claims were pled insufficiently against Nussbaum because they did not allege that he had acted affirmatively.<sup>153</sup> As for Tush and Craig, however, the judge concluded that the complaint sufficiently alleged that both dispatchers had acted affirmatively in providing Michalski with unauthorized call center information and that there was a direct causal relationship between this action and the murders, since Michalski had used the call center information to locate the victims.<sup>154</sup> In addition, the complaint alleged that Tush and Craig were actually aware of the risk of harm, since they knew that Mikulski was in a distraught mental state as a result of his break-up with Ferderbar.<sup>155</sup> Finally, the complaint sufficiently established that Tush and Craig had acted with deliberate indifference, which raised their culpability to the level of conscience-shocking and satisfied the final prong of the test.<sup>156</sup> Therefore, under *Twombly*, the district court erred in dismissing Phillips’s claims against the dispatchers.<sup>157</sup>

*Erickson v. Pardus*,<sup>158</sup> a brief per curiam decision issued by the Supreme Court only a few weeks after *Twombly*,<sup>159</sup> added further confusion to the debate over *Twombly*’s scope and meaning. In *Erickson*, a

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150. *Id.*

151. *Id.*

152. *Id.* at 235. The state-created danger theory is an exception to the general rule that States have no obligation to act affirmatively to protect their citizens. Under the four-part test, a plaintiff must plead and prove:

(1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiff’s safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his authority to create an opportunity for danger that otherwise would not have existed.

*Id.*

153. *Id.* at 236. Rather than affirming the district court’s dismissal of the claims against Nussbaum, Judge Nygaard remanded them to give Phillips an opportunity to amend the complaint. *Id.*

154. *Id.* at 237.

155. *Id.* at 238.

156. *Id.* at 241.

157. *Id.* at 243.

158. 551 U.S. 89 (2007).

159. *Twombly* was decided on May 21, 2007. *Erickson* was decided on June 4.

Section 1983 action against medic prison officials that turned on the sufficiency of a pro se complaint,<sup>160</sup> the Court quoted *Conley*, via *Twombly*, in acknowledging the “fair notice” standard and reasoned that a Rule 8 “[short and plain] statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”<sup>161</sup> Emphasizing that the Federal Rules of Civil Procedure set forth “liberal pleading standards,” the Court rejected the contention that Erickson’s allegations were “too conclusory” to state Eighth and Fourteenth Amendment violations for cruel and unusual punishment.<sup>162</sup> The Court reasoned that the allegations in Erickson’s complaint—that a prison doctor had removed him from a year-long hepatitis C treatment program, that prison officials refused to provide necessary medical treatment, and that lack of treatment endangered his life—were sufficient under Rule 8(a)(2), even without Erickson’s additional, more specific allegations.<sup>163</sup>

*D. Although the Court Has Often Declined to Amend the Federal Rules of Civil Procedure from the Bench, Preferring Instead to Defer to the Official Rulemaking Process, Justice Kennedy Has Endorsed the Possibility of a Heightened Standard in the Context of a Qualified Immunity Defense*

Since 1988, the Supreme Court has had the authority to prescribe general rules of federal practice and procedure, so long as those rules do not “abridge, enlarge or modify any substantive right.”<sup>164</sup> This does not mean, however, that the Court has either the authority or the inclination to announce or change federal procedural rules from the bench, as doing so would comply neither with the mandates of the Rules Enabling Act<sup>165</sup> nor

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160. *Id.* at 94 .

161. *Id.* at 93 (internal quotation marks omitted) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), as quoted in *Twombly*, for its construction of Rule 8(a)(2)).

162. *Id.* at 94.

163. *Id.*

164. 28 U.S.C. § 2072(b) (2006) (enacted as part of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988)). The 1988 rule is essentially the same as the original 1934 Rules Enabling Act promulgation, which provided that “the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.” Pub. L. No. 73-415, 48 Stat. 1064 (1934).

165. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1024–27 (1982) (offering “a general reinterpretation of the Act in light of the pre-1934 history,” examining the implications of that interpretation and the adequacy of the Act in light of it, and proposing procedural reform in the hopes of achieving “a rational allocation of lawmaking power between the Supreme Court and Congress”). For a discussion of the respective rulemaking roles of the Court and Congress, see Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1072 (1993).

with traditional notions of judicial authority.<sup>166</sup> Therefore, the Court has consistently taken the position that procedural rules, especially those related to pleading, discovery, and summary judgment, should be amended through official rulemaking or legislative processes.<sup>167</sup>

In *Gomez v. Toledo*,<sup>168</sup> the Court unanimously declined to revise the pleading standard such that it would require plaintiffs to anticipate a qualified immunity defense.<sup>169</sup> Similarly, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>170</sup> the Court addressed the impropriety of judge-made amendments to Rule 8 and held that the Fifth Circuit, in requiring that a complaint contain factual specificity, had mistakenly implemented a judicially heightened pleading standard.<sup>171</sup> Writing for a unanimous Court, Justice Rehnquist suggested that if Rule 8 were to be rewritten as a general matter, it might include a greater level of specificity regarding the requirements for Section 1983 municipal liability.<sup>172</sup> He declined, however, to use the Court's authority to require such specificity, on the grounds that a procedural shift as significant as a heightened pleading standard should derive from amendments to the Federal Rules and not from judicial interpretation.<sup>173</sup>

Citing *Gomez* and *Leatherman*, the Court in *Crawford-El v. Britton* affirmed its reluctance to engage in judicial legislation by changing the Federal Rules outside of the official rulemaking process.<sup>174</sup> In *Crawford-El*, the divided D.C. Circuit had concluded, first, that independent government officials facing constitutional torts are entitled to pre-discovery summary judgment on the issue of qualified immunity—including the question of the officer's mental state, if applicable—and second, that a

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166. *Cf. Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (“[T]o change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority.”).

167. *Id.* at 595 (explaining that the Court has consistently and unanimously refused to engage in judicial legislation to revise established procedural rules separate from the qualified immunity defense); *see also id.* at 610 (Rehnquist, J., dissenting) (“[W]hether a defendant is entitled to protection against the ‘peculiarly disruptive’ inquiry into subjective intent should not depend on the willingness or ability of a particular district court judge to limit inquiry through creative application of the Federal Rules.”).

168. 446 U.S. 635 (1980).

169. *Id.* at 640.

170. 507 U.S. 163 (1993).

171. *Id.* at 167–69.

172. *Id.* at 168.

173. *Id.*; *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514–15 (2002) (“Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that [requires legislative, not judicial, action].”).

174. 523 U.S. 574, 595 (1998) (citing *Leatherman*, 507 U.S. at 164–69; *Gomez*, 446 U.S. at 639–40).

plaintiff must produce clear and convincing evidence of the officer's improper motive to defeat a motion for summary judgment or directed verdict.<sup>175</sup> In rejecting both conclusions,<sup>176</sup> Justice Stevens conceded that a judge "may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment," regardless of whether the case includes an immunity defense.<sup>177</sup> However, he also reiterated the Court's unanimous reluctance to resolve questions about procedural standards other than through the rulemaking or legislative processes, thereby distinguishing between a court's discretion in individual case management and a court's ability to change procedural rules as a general matter.<sup>178</sup>

In line with the Court's view, Justice Kennedy has asserted that the authority to propose far-reaching procedural changes, even as a means of advancing the Court's long-standing goal of shielding governmental officials from trial and discovery, lies with Congress and not with the judiciary.<sup>179</sup> In *Siegert v. Gilley*,<sup>180</sup> however, a *Bivens* case in which a government employee alleged that his former supervisor had violated his Fifth Amendment due process rights, Justice Kennedy advocated for a heightened pleading standard in defamation cases against government officials.<sup>181</sup> Such a standard, he reasoned, would resolve the tension between the subjective element required to prove actual malice with respect to the underlying substantive claim and the objective element involved in the threshold question of qualified immunity.<sup>182</sup> Moreover, a heightened

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175. *Id.* at 583. A motion for summary judgment and a motion to dismiss are different procedural tools with differing standards of review; motions for summary judgment are governed by Federal Rule of Civil Procedure 56. A pre-discovery motion for summary judgment, however, is nearly the same as a pre-discovery motion to dismiss with respect to the issues relevant to this Note's discussion of *Ashcroft v. Iqbal*.

176. First, Justice Stevens concluded that *Harlow v. Fitzgerald*, which eradicated the need to prove unlawful intent with respect to the affirmative defense of qualified immunity, did not support the D.C. Circuit's conclusion that the need to prove unlawful intent was also unnecessary for the underlying constitutional violation. *Id.* at 589. Second, he concluded that the lower court's imposition of a heightened standard on the merits was at odds with the Court's consistent hesitation to revise established rules independent of the immunity defense, *id.* at 594–95, and with "traditional limits on judicial authority," *id.* at 594.

177. *Id.* at 598 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

178. *Id.* at 595.

179. *See, e.g., id.* at 601 (Kennedy, J., concurring); *cf. Siegert*, 500 U.S. at 235 (Kennedy, J., concurring in the judgment) (concluding that in light of the differences of opinion between the majority and dissent, "it is unwise to resolve [the issue of whether a liberty interest exists] without the benefit of a decision by the Court of Appeals and full briefing and argument here").

180. 500 U.S. 226.

181. *Id.* at 235–36 (Kennedy, J., concurring in the judgment).

182. *Id.*



standard would better serve a fundamental purpose of the official immunity doctrine—to avoid disruptive discovery.<sup>183</sup> Justice Kennedy did not have the votes for such a standard, however, and the Court held that the plaintiff’s complaint could not withstand dismissal because it had failed to satisfy the threshold requirement of alleging the violation of a clearly established constitutional right.<sup>184</sup>

*E. Qualified Immunity: A Compromise Between Countervailing Concerns*

Government officials facing personal liability for objectively discernable constitutional violations committed in the course of performing discretionary functions of their office are entitled to assert an affirmative defense of qualified immunity,<sup>185</sup> or, as the Supreme Court now prefers to call it, immunity from suit.<sup>186</sup> In cases where the defense applies, a plaintiff’s claim may only be legally cognizable if it alleges personal involvement on the part of the government official.<sup>187</sup> The Supreme Court has found that judicial inquiry is appropriate, therefore, when a plaintiff’s complaint makes a “substantial showing” that a specific government official was responsible for wielding governmental authority to impinge on that plaintiff’s private, constitutional rights.<sup>188</sup> Until *Iqbal*’s case reached

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183. *Id.* (“[I]t is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.”).

184. *Id.* at 231 (majority opinion).

185. *See, e.g.,* *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (“[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff’s cause of action; instead we have described it as a defense available to the official in question.”). For an explanation of the qualified immunity defense, see *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982), which held that government officials performing discretionary functions are shielded by immunity so long as they have not “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow* discarded the subjective element required for qualified immunity under *Wood v. Strickland*, 420 U.S. 308 (1975), which had refused to immunize school officials who committed unlawful acts with the subjective intent to do so. *Id.* at 322. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Court clarified that under the *Harlow* standard, a qualified immunity defense could not be rebutted by evidence that the government official’s conduct was malicious or otherwise improperly motivated, because evidence related to the officer’s subjective intent is “simply irrelevant to that defense.” *Id.* at 587–88; *see also Harlow*, 457 U.S. at 818 (establishing that qualified immunity is assessed under a standard of objective reasonableness).

186. The Court first began referring to qualified immunity as “immunity from suit,” rather than as a “mere defense to liability,” in *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). For a list of “thoughtful” scholarly articles on qualified immunity, see Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 235 n.29 (2006).

187. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001) (explaining that the determination whether a government official is entitled to qualified immunity is a purely legal question); *see also Gomez*, 446 U.S. at 640 (asserting that because qualified immunity is a defense, “the burden of pleading it rests with the defendant”).

188. *Sterling v. Constantin*, 287 U.S. 378, 398 (1932).

the Supreme Court, personal involvement of a supervisory official could be established in the Second Circuit<sup>189</sup> if the official (1) directly participated in the alleged constitutional violation, (2) failed to remedy a wrong after learning of it through a report or appeal, (3) created or allowed an unconstitutional policy or custom, (4) was grossly negligent in supervising subordinates who actually committed the wrongful acts, or (5) failed to act on information regarding an unconstitutional act when such failure displayed a deliberate indifference to the rights of others.<sup>190</sup> The Second Circuit had further clarified that personal involvement did not necessitate a government official's direct participation in a constitutional violation.<sup>191</sup>

In *Saucier v. Katz*,<sup>192</sup> the Court developed a sequential two-part test for determining whether an individual government officer is entitled to qualified immunity in a Section 1983 or *Bivens* action.<sup>193</sup> First, a court must ascertain whether the pleaded facts sufficiently allege the violation of a constitutional right.<sup>194</sup> If so, then the court must determine whether that right was "clearly established" at the time of the defendant's alleged wrongdoing.<sup>195</sup> Recently, the Court receded from the required order of the test, holding that courts may still follow the *Saucier* sequence, but now have the discretion to deviate from it in cases where to do so would be more efficient or where judicial restraint calls for avoiding a constitutional question that can be resolved on alternate grounds.<sup>196</sup>

Despite the frequency with which the immunity defense is evoked, Judge Wilson of the Eleventh Circuit has acknowledged that "[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face."<sup>197</sup> Underlying the qualified immunity doctrine is the implicit assumption that not only are government officials capable of error, but the possibility of injury resulting from such error is outweighed by the possibility that fear of liability could lead government officials not to act at all.<sup>198</sup> In *Pearson*, the Court noted that the "driving force" behind the

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189. Iqbal's case fell under the Second Circuit's jurisdiction. See *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007).

190. *Johnson*, 239 F.3d at 254.

191. *Al-Jundi v. Estate of Rockefeller*, 855 F.2d 1060, 1066 (2d Cir. 1989).

192. 533 U.S. 194 (2001).

193. *Id.* at 200–01.

194. *Id.*

195. *Id.*

196. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) ("[W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory.").

197. Charles R. Wilson, "Location, Location, Location": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000).

198. *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974).

creation of the qualified immunity doctrine was the goal of ensuring that unmeritorious claims against government officials would be resolved before the case reached discovery, thereby preventing the official from being distracted from official duties and decreasing significant exertions of time and expense during the pre-trial process.<sup>199</sup> The reason for treating immunity as a threshold issue, therefore, is not only to spare government defendants from unwarranted liability, but also to shield them from the “unwarranted demands” of a traditional and prolonged lawsuit.<sup>200</sup> In *Crawford-El v. Britton*, the Court acknowledged that the usual concerns about social costs associated with subjecting public officials to discovery and trial are especially acute in the context of claims that turn on improper intent.<sup>201</sup>

Even so, as Justice Powell explained in *Harlow v. Fitzgerald*, “[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.”<sup>202</sup> Therefore, the Court has often asserted that limited discovery is sometimes necessary before a district court can resolve a motion for summary judgment regarding qualified immunity.<sup>203</sup> In the case of a government official who has abused his or her official office, though, imposition of liability may afford the only realistic means of vindicating the aggrieved party’s constitutional rights.<sup>204</sup> Moreover, the threat of such abuse is even more acute with respect to high-level officials, whose greater power increases the potential for both individual abuse of office and “a regime of lawless conduct.”<sup>205</sup>

### III. THE COURT’S REASONING

In *Ashcroft v. Iqbal*,<sup>206</sup> the Supreme Court of the United States reversed the judgment of the Second Circuit, remanded the case,<sup>207</sup> and

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199. *Pearson*, 129 S. Ct. at 815 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

200. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

201. 523 U.S. 574, 584–85 (1998) (“Because an official’s state of mind is ‘easy to allege and hard to disprove,’ insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials.”).

202. 457 U.S. 800, 813–14 (1982).

203. *See, e.g., id.* at 820–21 (Brennan, J., concurring) (agreeing with the substantive standard for qualified immunity set forth by the majority but suggesting also that “it seems inescapable . . . that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did ‘know’ at the time of his actions”); *see also Crawford-El*, 523 U.S. at 593 n.14 (acknowledging that the Court has “recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity”).

204. *Harlow*, 457 U.S. at 814 (majority opinion).

205. *Butz v. Economou*, 438 U.S. 478, 505–06 (1978).

206. 129 S. Ct. 1937 (2009).

held that respondent Iqbal failed to plead sufficient factual allegations to withstand petitioners Ashcroft and Mueller's pre-discovery motion to dismiss the complaint's First and Fifth Amendment claims of unlawful discrimination.<sup>208</sup> In so holding, the Court concluded first that because there is no vicarious liability in Section 1983 and *Bivens* actions,<sup>209</sup> such that each defendant may only be held liable for his own unlawful acts,<sup>210</sup> a plaintiff seeking to impose supervisory liability on a government official for racial discrimination must plead and prove that the official acted with a discriminatory purpose.<sup>211</sup> Second, the Court extended the plausibility standard governing the relationship between Rule 8 pleading requirements and Rule 12(b)(6) motions to dismiss that was announced in *Bell Atlantic Corp. v. Twombly*<sup>212</sup> to all civil actions.<sup>213</sup> Because the factual assertions in Iqbal's complaint did not give rise to a plausible inference of petitioners' discriminatory states of mind, the Court held that his allegations against Ashcroft and Mueller failed to satisfy the applicable standard under *Twombly*.<sup>214</sup>

Writing for a majority of five,<sup>215</sup> Justice Kennedy circumscribed the two questions presented by the petitioners into a single, broad issue: Whether Iqbal had pled sufficient facts to state a claim that petitioners had violated his clearly established constitutional rights.<sup>216</sup> The Court first discussed the legal doctrines for the underlying substantive claims, then addressed the proper pleading standard under *Twombly* and Rule 8, finally applying that standard to Iqbal's complaint.<sup>217</sup>

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207. The Supreme Court instructed the court of appeals to decide whether to remand the case to the district court regarding whether Iqbal should be granted leave to amend his complaint. *Id.* at 1954.

208. *Id.* Although the original action named more than thirty defendants, the only two defendants who petitioned for certiorari were John Ashcroft, the former U.S. Attorney General, and Robert Mueller, then-Director of the FBI. *Id.* at 1942.

209. *Id.* at 1948. A *Bivens* action is the federal equivalent of a § 1983 action against state officials. *Id.*

210. *Id.* at 1949.

211. *Id.* at 1948.

212. 550 U.S. 544 (2007).

213. *Iqbal*, 129 S. Ct. at 1953.

214. *Id.* at 1952 (citing and construing FED. R. CIV. P. 8).

215. *Id.* at 1941 (including Chief Justice Roberts and Justices Scalia, Thomas, and Alito).

216. *Id.* at 1942–43. Opening the opinion with a brief overview of the historical context giving rise to Iqbal's grievances, Justice Kennedy explained that the Department of Justice launched a vast investigation of suspected terrorists in the immediate aftermath of the September 11, 2001, attacks. *Id.* at 1943. He next clarified that Iqbal's constitutional challenge centered on the conditions of his confinement rather than on the confinement itself or on his arrest. *Id.* at 1943–44. Because only Ashcroft and Mueller had sought Supreme Court review, the only relevant allegations were those against the executive level officials. *Id.* at 1944.

217. *Id.* at 1947–51.

In determining the elements of the underlying legal claims, the Court first considered the level of intent required for an unconstitutional discrimination claim against government officials asserting a qualified immunity defense.<sup>218</sup> Because the alleged conduct giving rise to Iqbal's claims was primarily that of lower-level federal employees and because petitioners were two high-level government officials, the Court framed its brief discussion of intent in terms of supervisory liability.<sup>219</sup> Neither respondeat superior nor vicarious liability, Justice Kennedy concluded, are applicable in *Bivens* actions,<sup>220</sup> so a plaintiff must plead that each supervisory official has directly violated the Constitution through his or her own individual actions.<sup>221</sup> For First and Fifth Amendment *Bivens* violations alleging discrimination on the part of a supervisor, "individual action" requires discriminatory purpose.<sup>222</sup>

In designating purpose as the proper level of intent, the Court rejected Iqbal's argument that liability should attach when a supervisor with knowledge of a subordinate's purposively discriminatory conduct has acquiesced in or condoned that conduct.<sup>223</sup> Because *Bivens* liability for unconstitutional discrimination requires discriminatory purpose on the part of a subordinate, the Court reasoned, the same standard of intent should also be required of supervisors.<sup>224</sup> Therefore, supervisory liability is actually a "misnomer" in *Bivens* cases.<sup>225</sup>

Before considering whether Iqbal had sufficiently alleged that Ashcroft and Mueller acted with discriminatory purpose, the Court first reiterated and extended its holding in *Twombly* to conclude that for all civil actions, only complaints that are facially plausible will survive a motion to dismiss.<sup>226</sup> Facial plausibility exists, the Court explained, when a complaint contains "sufficient factual matter, accepted as true" to enable the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>227</sup> Justice Kennedy noted that although the Court's conception of plausibility does not reach the level of probability, it does envision "more than a sheer possibility that a defendant has acted

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218. *Id.* at 1948.

219. *Id.* at 1948–49.

220. *Id.* at 1948 (assuming without deciding that Iqbal's First Amendment claim was actionable under *Bivens*, the federal equivalent of a § 1983 suit against state officials).

221. *Id.*

222. *Id.*

223. *Id.* at 1949.

224. *Id.*

225. *Id.*

226. *Id.* at 1949, 1953.

227. *Id.* at 1949.

unlawfully.”<sup>228</sup> In other words, plausibility demands factual allegations that are more than “merely consistent with” a defendant’s liability.<sup>229</sup>

The standard in *Twombly*, the Court reasoned, was based on two working principles: First, whereas all factual allegations in a complaint must be accepted by the court as true, legal conclusions are entitled to no such presumption; second, a complaint must state a plausible claim for relief to survive dismissal.<sup>230</sup> Accordingly, Justice Kennedy proposed a two-pronged approach for courts to employ in assessing a 12(b)(6) motion to dismiss: (1) identify those allegations in a complaint that are not factual and therefore not entitled to a presumption of truth, and (2) consider whether the remaining allegations, taken as true, state a plausible claim.<sup>231</sup> This assessment, the Court acknowledged, is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>232</sup>

Applying the two-step *Twombly* approach to Iqbal’s complaint, the Court first identified three “bare assertions” that, while not “unrealistic or nonsensical,” were so “conclusory” that the Court could not presume them to be true.<sup>233</sup> Turning to the remaining allegations,<sup>234</sup> Justice Kennedy then applied the test’s second prong to conclude that a more likely explanation for Iqbal’s classification as “of high interest” was a legitimate post-September 11th policy intended to arrest and detain illegal aliens with suspected links to the terrorist attacks.<sup>235</sup> Because the hijackers were Arab Muslims, Justice Kennedy reasoned, it “should come as no surprise” that the policy resulted in a “disparate, incidental impact” on individuals of such race, religion, and national origin.<sup>236</sup> Given this “obvious alternative

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228. *Id.*

229. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 500 U.S. 554, 557 (2007)).

230. *Id.* at 1949–50.

231. *Id.* at 1950.

232. *Id.*

233. *Id.* at 1951. Specifically, Justice Kennedy construed the following assertions as too conclusory: (1) that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to egregious conditions of confinement at the ADMAX SHU “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,” (2) that Ashcroft was “the principal architect” of the discriminatory policy, and (3) that Mueller was “instrumental” in accepting and implementing it. *Id.*

234. Although the complaint set forth 270 individual claims, the Court noted only two in its plausibility assessment. First, that in the months after September 11, 2001, the FBI, “under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.” *Id.* Second, that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.” *Id.*

235. *Id.*

236. *Id.*

explanation,”<sup>237</sup> the Court determined that it was not plausible to conclude that Iqbal’s arrest was a result of purposeful discrimination.<sup>238</sup>

Moreover, even if such an inference were plausible as to Iqbal’s arrest, the allegations did not lead to the plausible inference that his classification as “of high interest” was based on a policy that categorized post-September 11th detainees based on their race, religion, or national origin.<sup>239</sup> Reasoning that Iqbal’s allegations failed to “show, or even intimate” that Ashcroft and Mueller had detained Iqbal and others in the ADMAX SHU with the intent to discriminate on the basis of race, religion, or national origin, the Court noted that the complaint merely suggested that Ashcroft and Mueller had adopted and approved a policy of holding post-September 11th detainees in restrictive conditions.<sup>240</sup> This policy, Justice Kennedy concluded, could only lead to the plausible inference that the high-level officials had responded to “a devastating terrorist attack” by seeking to keep individuals who were detained because of a suspected link to the attack in the most secure conditions possible.<sup>241</sup> Without more specific facts indicating petitioners’ intent, Iqbal’s allegation of purposeful discrimination did not state a claim that entitled him to relief.<sup>242</sup>

Addressing in conclusion three of Iqbal’s arguments, the Court made clear that (1) *Twombly*’s plausibility standard applies broadly to “all civil actions,”<sup>243</sup> (2) the “careful-case-management approach” to controlling discovery could not save an implausible complaint from dismissal,<sup>244</sup> and (3) bare assertions “affix[ed with] the label ‘general allegation’” are the very type of conclusory claims that, without further factual enhancement, are inherently unable to support a plausible inference of liability.<sup>245</sup>

Joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter dissented from the Court’s opinion, reasoning that it unnecessarily eradicated supervisory liability under *Bivens* and misapplied the correct pleading standard announced in *Twombly* to mistakenly hold that Iqbal’s

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237. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

238. *Id.* at 1951–52.

239. *Id.* at 1952.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1953 (quoting FED. R. CIV. P. 1).

244. *Id.* at 1953–54 (noting that rejecting a less “relax[ed]” pleading standard despite discovery controls is “especially important” in the context of cases against government officials entitled to a qualified immunity defense).

245. *Id.* at 1954 (rejecting Iqbal’s contention that Federal Rule of Civil Procedure 9 “expressly allow[s]” for a general assertion of discriminatory intent, because “‘generally’ is a relative term” whose specific meaning in the context of Rule 9 is inapplicable here).

complaint failed to state a claim under Rule 8(a)(2).<sup>246</sup> First, Justice Souter recited a number of assertions contained in Iqbal's complaint, including allegations against defendants not before the Court.<sup>247</sup> He then parsed through the two questions contained in Ashcroft and Mueller's petition for certiorari, explaining that while both questions assumed that supervisory liability claims are actionable under *Bivens*, neither asked the Court to assess the elements of such a claim.<sup>248</sup> Because the standard for supervisory liability was not only undisputed, but specifically agreed upon by the parties,<sup>249</sup> Justice Souter reasoned that the Court erred in ruling on the substantive standard *sua sponte*.<sup>250</sup> The Court's ruling, Justice Souter contended, was "especially inappropriate" in this case because such a ruling was, even according to the Court's own analysis, unnecessary to decide the questions presented.<sup>251</sup> Noting that "a spectrum of possible tests" exists for supervisory liability, Justice Souter argued that the majority's assumption that such liability could exist only under a theory of respondeat superior or not at all was a false dichotomy that exemplified the danger of issuing far-reaching decisions without briefing, argument, or any real depth of analysis.<sup>252</sup>

Second, Justice Souter clarified that his analysis of Iqbal's complaint differed from the majority's not because he disagreed that *Twombly*'s plausibility standard should apply or because he took issue with that

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246. *Id.* at 1954–55 (Souter, J., dissenting). Rule 8(a)(2) requires that a pleading for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8.

247. *Iqbal*, 129 S. Ct. at 1955.

248. *Id.* at 1955–56. The two questions were as follows: (1) "Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*"; and (2) "Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." *Id.*

249. Ashcroft and Mueller conceded that knowledge of their subordinate's unconstitutional acts coupled with their own "deliberate[] indifferen[ce]" to those acts could subject them to supervisory liability under *Bivens*. *Id.* at 1956.

250. *Id.* at 1956–57.

251. *Id.* at 1957. Justice Souter explained that because the Court construed the allegation that Ashcroft and Mueller "authorized, condoned, or even were aware of their subordinates' discriminatory conduct" as both conclusory and not entitled to the presumption of truth, the complaint would have been dismissed as implausible regardless of the liability standard. *Id.* at 1958. In addition, Justice Souter opined that because the Court ruled on the supervisory liability issue without receiving any briefing or argument from the parties, "[t]he attendant risk of error [was] palpable." *Id.* at 1957. Finally, Justice Souter declared that the ruling was "most unfair to Iqbal," who "was entitled to rely on [petitioners'] concessions." *Id.*

252. *Id.* at 1958.



standard,<sup>253</sup> but rather because he disagreed with the majority's application of it.<sup>254</sup>

Specifically, he rejected the Court's contention that three particular allegations were too conclusory to be taken as true and offered a more contextualized, less stringent identification of the complaint's factual allegations.<sup>255</sup> Agreeing that dismissal would have been proper if the only allegations in *Iqbal*'s complaint entitled to a presumption of veracity were the two selected by the majority, Justice Souter went on to assert that "these allegations do not stand alone as the only significant, nonconclusory statements."<sup>256</sup> His disagreement with the majority's approach, therefore, was based on what he considered to be an improper interpretive approach of analyzing *Iqbal*'s assertions in isolation, thereby disregarding certain "subsidiary allegations" that could have pushed those allegations disregarded by the Court as too conclusory into what Justice Souter considered factual assertions.<sup>257</sup> Implicitly rejecting the Court's two-pronged approach to assessing plausibility, Justice Souter conversely endorsed a method of interpretation under which courts should consider the complaint "as a whole."<sup>258</sup> Under this approach, given petitioners' concession that knowledge and acquiescence could sufficiently support a supervisory liability claim, *Iqbal*'s complaint was sufficiently plausible.<sup>259</sup>

Justice Breyer wrote his own brief dissent to endorse the adequacy of careful discovery management and "other legal weapons" that courts could use to prevent unwarranted litigation against government officials asserting a qualified immunity defense.<sup>260</sup> Although he joined Justice Souter's dissent—which approved of the Court's understanding of *Twombly*'s plausibility standard—Justice Breyer did not agree that the need to prevent

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253. Justice Souter actually announced this standard for the Court in *Twombly*. *Bell Atlantic Corp. v. Twombly*, 500 U.S. 544, 547 (2007).

254. *Iqbal*, 129 S. Ct. at 1959.

255. *Id.* at 1959–60 (arguing that the allegation that Ashcroft was a "principal architect" of the allegedly discriminatory policy and the claim that he and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [*Iqbal*] to [the 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" were factual, rather than conclusory); *see supra* note 233 and accompanying text (listing the three allegations identified as too conclusory by Justice Kennedy's majority opinion).

256. *Iqbal*, 129 S. Ct. at 1960.

257. *Id.* at 1960–61 (noting also that "the majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory").

258. *Id.* at 1961.

259. *Id.* at 1958–59.

260. *Id.* at 1961–62 (Breyer, J., dissenting).

harmful discovery or litigation against government officials adequately justified the Court's interpretation of *Twombly* and Rule 8.<sup>261</sup>

#### IV. ANALYSIS

Although *Ashcroft v. Iqbal* seemed to do little more than extend *Bell Atlantic Corp. v. Twombly*'s<sup>262</sup> plausibility standard to all civil actions, its implications for pleading practice, court access, and the judicial role run much deeper. In moving further from *Conley v. Gibson*'s<sup>263</sup> pro-plaintiff standard, the Court not only endorsed but seemingly encouraged an unprecedented level of judicial discretion in the lower courts with respect to pre-discovery motions to dismiss.<sup>264</sup> This all but ensures a non-uniform, arbitrary procedural landscape across which certain defendants will no longer gain meaningful access to the federal courts.<sup>265</sup> In departing from longstanding deference to the formal rulemaking process, the Court anticipated the same threat of judicial activism that the plausibility standard is likely to exacerbate.<sup>266</sup> The standard itself is problematic insofar as it has raised the pleading bar, thereby departing from the vision of the drafters of the Federal Rules of Civil Procedure—to encourage resolution of cases on the merits.<sup>267</sup> Moreover, it represents the quintessential procedural solution to a substantive dilemma.<sup>268</sup> The Court not only indirectly attacked the growing problem of outrageous discovery costs, but also granted de facto immunity to high-level government officials, thereby absolving them from culpability on the basis of a pleading standard that is patently unjust for plaintiffs incapable of pleading “non-conclusory” facts before discovery.<sup>269</sup>

##### A. *The Problem with Plausibility: Iqbal Shifted the Analysis for 12(b)(6) Motions to Dismiss from a Relatively Bright-Line Test to an Open Market on Judicial Subjectivity*

Although *Bell Atlantic Corp. v. Twombly*<sup>270</sup> had created considerable confusion in the lower federal courts,<sup>271</sup> the Court in *Ashcroft v. Iqbal*<sup>272</sup>

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261. *Id.* at 1961.

262. 500 U.S. 554 (2007).

263. 355 U.S. 541 (1957).

264. *See infra* Part IV.A.

265. *See infra* Part IV.A.

266. *See infra* Part IV.B.

267. *See infra* Part IV.B.

268. *See infra* Part IV.C.

269. *See infra* Part IV.C.

270. 550 U.S. 544 (2007).

did little to clarify the meaning of plausibility or suggest how judges might distinguish plausible inferences of liability from those that are probable, possible, or conceivable.<sup>273</sup> Revealing only that the new standard applies to all civil actions, the Court limited its advice to a single, curious suggestion: Discerning plausibility is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>274</sup> As a result, the Court all but ensured that the contentious response to *Twombly* reflects merely the beginning of the difficulties that federal courts will continue to face as they develop understandings—and applications—of the flexible, discretionary directive that is plausibility.<sup>275</sup> Moreover, as one federal district judge has suggested, this evolution in the lower courts—an “inherently subjective endeavor”—will inevitably produce varied results, such as those regarding the quantum of facts required for a sufficient complaint.<sup>276</sup>

The Court’s explicit invitation of judicial discretion is problematic on the Court’s own terms: Just as “Rule 12(b)(6) does not countenance . . . dismissals based on a judge’s disbelief of a complaint’s factual allegations,”<sup>277</sup> nor should Rule 8 encourage dismissals based on a judge’s subjective disbelief that particular factual allegations could plausibly

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271. See Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 858 (2008) (suggesting that *Twombly* provided so little guidance that it threw the lower federal courts into “disarray” and led to “every conceivable answer” regarding how broadly the decision should be applied). See generally Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876–77 (2009) (arguing that *Twombly* was a court access decision rather than a procedural decision, and suggesting that *Twombly* did not “alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1088 (2009) (defending the plausibility standard as one with “fairly clear guidelines”); Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 894 n.7 (2008) (listing scholarly articles discussing pleading standards after *Twombly*).

272. 129 S. Ct. 1937 (2009).

273. See *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”).

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

275. Compare McMahon, *supra* note 271, at 863–64 (pointing out the impossibility of a consistent approach to interpreting and applying “plausibility” in the district courts), with Smith, *supra* note 271, at 1088–89 (arguing that a careful reading of *Twombly* “provides fairly clear guidelines for courts assessing whether a complaint meets the requirements of Rule 8”).

276. McMahon, *supra* note 271, at 869 (arguing that “[t]he standard for pleading a claim must be clear, and it must be the same for everyone”); see also Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 (quoting Professor Stephen B. Burbank as saying that *Iqbal* “is a blank check for federal judges to get rid of cases they disfavor”).

277. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

establish liability.<sup>278</sup> When the Federal Rules were originally enacted, Judge Clark explained that a court's ability to dismiss a pleading summarily was confined to "the clearest of cases."<sup>279</sup> Conspicuously departing from and complicating that dictate by adding a subjective dimension to the analysis, the Court endorsed a standard that is not only incapable of uniformity, but that rejects, sub silentio, the careful vision of the Rules' drafters.<sup>280</sup>

Comments from a number of Justices at the *Iqbal* oral argument underscore the difficulty of achieving consistency in the application of a discretionary standard. Justice Souter admitted, for instance, that he found significant tension in *Iqbal*'s allegations,<sup>281</sup> while Justice Scalia easily reduced the gist of the complaint to two basic possibilities: (1) a valid and lawful post-September 11th policy, or (2) the "much less plausible" possibility that Ashcroft and Mueller personally directed unconstitutional and unlawful acts.<sup>282</sup> Eclipsing plausibility entirely, Justice Scalia went so far as to pronounce the complaint's allegation that *Iqbal* and others similarly situated were detained solely because of their race, religion, and national origin "impossible."<sup>283</sup> Writ large in this assertion is the troubling insinuation that no amount of factual allegations could have satisfied Justice Scalia's version of plausibility given the particular factual context of *Iqbal*'s claims. For him, the very premise of those claims—that high-level government officials were even *capable* of participating in a discriminatory policy—is simply *not possible*.<sup>284</sup>

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278. Cf. Saritha Komatireddy Tice, *A "Plausible" Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL'Y 827, 830 (2008) (noting that while offering little guidance to lower courts and plaintiffs with respect to the precise meaning of plausibility, *Twombly* "reflects a significant shift away from the litigation-promoting mindset embodied in *Conley* and instead solidifies what has been a growing hostility toward litigation").

279. Clark, *supra* note 77, at 465 (citing *Worthington & Co. v. Belton*, 18 T.L.R. 438 (Eng. C.A. 1902)). Judge Clark also asserted that cases warranting such dismissal "are the great exceptions, not the rule." *Id.* at 472.

280. See, e.g., *id.* at 467 (asserting the desirability of "a system of procedure which will substantially eliminate motion practice dealing with pleading forms and force adjudication upon the merits, either by way of summary judgment or trial").

281. Transcript of Oral Argument at \*9, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2008) (No. 07-1015), 2008 WL 5168391.

282. *Id.* at \*32–33. Also noteworthy is the way in which Justice Scalia framed the two alternatives, using the term "policy" only for the possibility that was, for him, obviously more plausible. The textualist's language belies that Ashcroft and Mueller's culpability is so far from the realm of possibility for Justice Scalia that he cannot even bring himself to use the same language to describe it.

283. *Id.* at \*54–55.

284. Also concerning is Justice Scalia's obfuscation of the long-standing principle that "[s]tandards of pleadings are not the same as standards of proof." *Phillips v. County of Allegheny*, 515 F.3d 224, 246 (3d Cir. 2008).

Dissenting in *Twombly*, Justice Stevens suggested that the Court's decision in that case was driven by a "transparent policy concern"—protecting antitrust defendants.<sup>285</sup> The decision in *Iqbal* is susceptible to the same criticism of a subjective judicial agenda.<sup>286</sup> More disquieting than the way Supreme Court Justices deploy their personal understandings of abstract terms like "plausible" in specific cases, though, are the broader institutional consequences that may follow from the Court's approbation and infliction of this method of procedural adjudication on the systemic level.<sup>287</sup>

Like those of his colleagues, Justice Alito's remarks at oral argument also highlight, somewhat ironically, just how problematic a discretionary standard can be. Rejecting the notion that a district court judge could use his or her discretion to limit and structure discovery to adequately protect high-level government officials who fail to attain dismissal on qualified immunity grounds, Justice Alito asked, "How many district judges are there in the country? Over 600. One of the district judges has a very aggressive idea about what the discovery should be. What's the protection there?"<sup>288</sup> The Justice's question could just as easily refer to the lack of protection plaintiffs' complaints will receive under a plausibility standard.<sup>289</sup> In implying that high-level government officials who have tried—and failed—to obtain qualified immunity at the 12(b)(6) stage should nonetheless be shielded from discovery, Justice Alito ironically undermined the very

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285. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting).

286. McMahon, *supra* note 271, at 863–64 (calling plausibility assessments "inherently subjective").

287. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947) ("[T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."). This criticism is applicable to *Iqbal* on two different levels. First, the Court itself employed a subjective policy judgment unmoored to precedent (other than *Twombly* and its nascent progeny) in determining that the best way to resolve the case and controversy before it was to amend, rather than apply, Rule 8. Second, in so amending, the Court opened the door to potentially limitless judicial subjectivity from the lower federal courts, which must use their "judicial experience and common sense" in determining whether civil complaints subject to 12(b)(6) motions are plausible enough to withstand dismissal. *Iqbal*, 129 S. Ct. at 1950.

288. Transcript of Oral Argument, *supra* note 281, at \*48.

289. For a particularly germane example of the possible divergence in federal appellate judges' understanding of plausibility, compare *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) ("Drawing on our 'judicial experience and common sense,' as the Supreme Court urges us to do, we find that *al-Kidd* has met his burden of pleading a claim for relief that is plausible . . ."), with *id.* at 992–94 (Bea, J., concurring in part and dissenting in part) (arguing, on the grounds of *Twombly* and *Iqbal*, that "[i]t may be conceivable to *al-Kidd* that Ashcroft encouraged his subordinates to flout the requirements of § 3144, but *al-Kidd*'s allegations have not 'nudged [his] claims across the line from conceivable to plausible'").

premise supporting the plausibility standard he later voted for—faith in judicial discretion.<sup>290</sup>

Just as a plausibility standard raises serious concerns about the judicial role, it also raises serious concerns about a judicially-driven (d)evolution of the law of federal civil procedure; rather than moving the law forward, *Twombly* and *Iqbal* signal a return to the fact-based pleading system that has already been rejected as historically unjust and effectively unworkable.<sup>291</sup> Though the Court in *Iqbal* paid lip-service to the long-dead days of fact pleading under the Codes, its language in asserting the inadequacy of facts “merely consistent with” the defendant’s liability masked a covert mandate of increased factual specificity.<sup>292</sup> The imposition of such a mandate suggests that the Court clearly ignored the fact that plaintiffs in 2009 are in no better a position to distinguish between facts and conclusions than were plaintiffs in 1959.<sup>293</sup>

Moreover, the Court’s insistence on a bright line between facts and legal conclusions<sup>294</sup> raises the question whether *Iqbal* signifies a departure from the Court’s long-standing position that “ordinary pleading rules are not meant to impose a great burden upon a plaintiff.”<sup>295</sup> Plaintiffs relying on Form 9 in the appendix to the Federal Rules of Civil Procedure,<sup>296</sup> for instance, will no longer receive meaningful assistance from a template that

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290. A certain level of discretion, it is worth noting, has always been part of a court’s assessment under the qualified immunity doctrine. See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (“Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading.”).

291. See, e.g., McMahon, *supra* note 271, at 867 (noting that the drafters of Rule 8 specifically rejected a conception of the Rule that would require pleading facts).

292. *Iqbal*, 129 S. Ct. at 1950 (affirming that “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

293. See WRIGHT & MILLER, *supra* note 59, § 1218, at 265 (asserting the practical impossibility of distinguishing between “ultimate facts,” which were required, and “evidence” and “conclusions of law,” which were improper, and explaining that the three categories “tended to merge to form a continuum” with “no readily apparent dividing markers”); Weinstein & Distler, *supra* note 115, at 520–21 (“[I]t is virtually impossible logically to distinguish among ‘ultimate facts,’ ‘evidence,’ and ‘conclusions.’”).

294. *Iqbal*, 129 S. Ct. at 1949 (“[T]he 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.”).

295. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (conceding that “ordinary pleading rules are not meant to impose a great burden upon a plaintiff” and suggesting that “it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with *some indication* of the loss and the causal connection that the plaintiff has in mind” (emphasis added)). After *Iqbal*, this burden of giving defendant “some indication” of loss and cause has effectually evolved into the burden of giving enough facts to convince the particular judge hearing the case that liability is plausible.

296. Form 9 in the appendix to the Federal Rules of Civil Procedure is a sample complaint form for a simple negligence action. FED. R. CIV. P. app., Form 9.

provides defendants being sued for negligence with what can only be construed under the plausibility standard as a bare, conclusory allegation that “defendant negligently drove a motor vehicle against plaintiff who was then crossing [the] highway.”<sup>297</sup> Another way of framing this inequity for plaintiffs is in terms of “information asymmetry.”<sup>298</sup> Such asymmetry occurs when, paradoxically, plaintiffs with bona fide grievances are at once unable to include sufficient facts in an original complaint without first investigating the source of those facts through discovery and also blocked from discovery because of their inability to plead the very facts that only discovery can yield.<sup>299</sup>

*B. Amending Rule 8 by Judicial Fiat: Purporting Simply to Extend Twombly’s Plausibility Standard, the Court Actually Effectuated More Significant Changes in Federal Procedure Jurisprudence*

That the Court has often declined to amend the Federal Rules from the bench reflects distaste for judicial activism in the context of establishing and re-writing procedural rules.<sup>300</sup> Justice Kennedy’s reluctance to revise

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297. Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 141 (2007), <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/07/09/dodson>. The possible inutility of the forms after *Twombly* and *Iqbal* represents a significant departure from *Conley*’s assertion that the “illustrative forms appended to the Rules” demonstrate that a complaint need only give the defendant fair notice of the claim and its grounds. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). It also undermines Judge Clark’s vision that the relatively un-detailed information contained in Form 9 clearly “affords adequate basis for *res judicata*,” Clark, *supra* note 77, at 461–62, in seeking to accomplish the twin goals of differentiating the plaintiff’s case from all others and giving the defendant notice of the general type of claims being advanced, *id.* at 456–57.

298. Dodson, *supra* note 297, at 138–39 & n.18 (borrowing the term “information asymmetry” from Professor Randy Picker and calling the plausibility standard “notice-plus”).

299. *See Gomez v. Toledo*, 446 U.S. 635, 641 (1980) (“The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know.”); Dodson, *supra* note 297, at 138–39 (arguing that plaintiffs will have difficulty alleging sufficient facts with respect to claims where information is not in their control, such as in antitrust cases); McMahon, *supra* note 271, at 867 & n.114 (making the same argument and offering the example of employment discrimination claims); *cf. Crawford-El v. Britton*, 523 U.S. 574, 590–91 (1998) (explaining that one reason *Harlow* abrogated the subjective element required for a qualified immunity defense is because “focusing on ‘the objective legal reasonableness of an official’s acts’ . . . avoids the unfairness of imposing liability on a defendant who ‘could not reasonably be expected to anticipate subsequent legal developments’” (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982))); *Siegert v. Gilley*, 500 U.S. 226, 245–46 (1991) (Marshall, J., dissenting) (rejecting the court of appeals’s “heightened pleading standard” and reasoning that because “evidence of [malice] is peculiarly within the control of the defendant,” the standard “effectively precludes any *Bivens* action in which the defendant’s state of mind is an element of the underlying claim”).

300. *Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (suggesting that “the administration of legal proceedings” is “an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules” (quoting *Lumbermen’s Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963))). *But see Tellabs, Inc.*

pleading standards by judicial fiat in *Crawford-El v. Britton*,<sup>301</sup> therefore, was more likely a function of disdain for judicial intervention in the procedural arena than uncertainty as to the substantive merits of an amended standard.<sup>302</sup> Given his affirmative argument for a heightened standard in *Siegert v. Gilley*,<sup>303</sup> it is not surprising that Justice Kennedy was willing to vote in favor of extending *Twombly* to all civil cases in *Iqbal* and further to author the opinion himself—potential accusations of judicial activism notwithstanding.<sup>304</sup>

Admittedly, Justice Kennedy’s analyses in *Siegert*—a defamation case in which the immunity issue was whether the plaintiff had demonstrated a clearly established liberty interest—and *Iqbal*—in which the Court did not address the immunity issue directly—necessarily differed.<sup>305</sup> Justice Kennedy’s proposal of a heightened pleading standard in *Siegert* signifies that he strongly champions governmental immunity as a general matter and is not opposed to some judicial intervention into the realm of procedure where countervailing concerns, such as the need to protect high-level officials from the intrusions of discovery, outweigh his reluctance to bypass the formal rulemaking process.<sup>306</sup> What significantly distinguishes *Siegert*

v. Makor Issues & Rights, Ltd., 551 U.S. 308, 332 (2007) (Scalia, J., concurring in the judgment) (asserting that courts must interpret statutes according to their single most plausible meaning, suggesting that “[t]o describe this as an exercise of ‘delegated lawmaking authority’ seems to me peculiar—unless one believes in lawmakers who have no discretion,” and adding that “[c]ourts must apply judgment, to be sure[, b]ut judgment is not discretion”).

301. 523 U.S. at 601 (Kennedy, J., concurring).

302. One reason the Court may disfavor amending procedural rules may be a recognition that the Justices are ill-equipped to engage in such rulemaking, given their distance from the daily realities of litigation. McMahon, *supra* note 271, at 869. Moreover, none of the *Iqbal* Justices ever sat on a federal district bench, though Justice Souter was a state court trial judge. *See id.* at 869 & n.122 (suggesting that the Justices’ lack of experience as trial lawyers or judges may be responsible for “problematic decisions like *Twombly*” and opining that Justice Souter’s experience as a trial judge makes his authorship of *Twombly* “utterly mystifying”). Nothing underscores the Court’s lack of familiarity with the minutiae of the Federal Rules more starkly than one of Justice Breyer’s comments at the *Iqbal* oral argument: “I want to know where the judge has the power to control discovery in the rules. That’s—I should know that. I can’t remember my civil procedure course. Probably, it was taught on day 4.” Transcript of Oral Argument, *supra* note 281, at \*17.

303. 500 U.S. at 235–36 (Kennedy, J., concurring in the judgment); *see also supra* Part II.D.

304. *See* Liptak, *supra* note 276 (calling *Iqbal* “[t]he most consequential decision of the Supreme Court’s last term,” assuming that the decision “makes it much easier for judges to dismiss civil lawsuits right after they are filed,” and suggesting that, after *Iqbal*, “a lawsuit has to satisfy a skeptical judicial gatekeeper” with accusations that “ring true”).

305. *Compare Siegert*, 500 U.S. at 235–36 (“The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter.”), *with Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953–54 (2009) (declining to “relax the pleading requirements” in qualified immunity cases such that limited discovery would be permitted under a “careful-case-management approach”).

306. Given the choice between a departure from established procedural standards and the possibility of subjecting government officials to disruptive discovery absent immunity, Justice



from *Iqbal*, moreover, are the stakes of the two cases. In the former, the Court considered and dismissed a defamation claim by a clinical psychologist employed by a federal government facility because the psychologist's complaint had not sufficiently alleged a constitutional violation.<sup>307</sup> *Iqbal*, on the other hand, had potentially graver consequences, not only with respect to public sentiment regarding the Bush Administration's response to the September 11th attacks as a general matter, but also because the case came dangerously close to implicating men in the highest stations of federal government in the highest order of constitutional violations.<sup>308</sup> Moreover, Justice Stevens's assertion in *Crawford-El* that the Court has "consistently declined . . . invitations to revise established rules *that are separate from the qualified immunity defense*,"<sup>309</sup> bolsters the likelihood that in *Iqbal*, the Court effectively sutured the pleading issue to the immunity defense.<sup>310</sup>

At oral argument, Justice Kennedy made only four comments, all in close succession and all about the same issue.<sup>311</sup> Addressing petitioners' counsel, Justice Kennedy asked, "If we were to say that *Twombly* is to be confined to the antitrust and commercial context, would—would that destroy your case?"<sup>312</sup> In framing the question in terms of outcome, thereby linguistically subordinating legal doctrine to final disposition, Justice Kennedy's question reveals—in retrospect at least—that he may already have landed on what he believed to be the only plausible way to resolve the case without either exposing the high-level government officials to discovery or explicitly extending the qualified immunity doctrine.<sup>313</sup> If so, then follows the disturbing question whether the Court's most significant player votes based on underlying substantive norms and

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Kennedy has asserted that "[t]he substantive defense of immunity controls." *Siegert*, 500 U.S. at 236.

307. *Id.* at 227, 233–34 (majority opinion) (concluding that, under *Paul v. Davis*, 424 U.S. 693, 708–09 (1976), damage to reputation is not a liberty interest protected under the Fourteenth Amendment and is not recoverable in a *Bivens* cause of action).

308. Because the standards for supervisory liability were unclear, however, *Iqbal* would not necessarily have been able to prove a clearly established constitutional violation even if his complaint had withstood dismissal. *Iqbal*, 129 S. Ct. at 1948–49 (asserting that supervisory liability is a "misnomer" and that because "purpose rather than knowledge is required to impose *Bivens* liability on [a] subordinate for unconstitutional discrimination," the same standard applies to "an official charged with violations arising from his or her superintendent responsibilities").

309. 523 U.S. 574, 595 (1998) (emphasis added).

310. *See infra* Part IV.C.

311. Transcript of Oral Argument, *supra* note 281, at \*22–23.

312. *Id.*

313. *See Siegert v. Gilley*, 500 U.S. 226, 235–36 (1991) (Kennedy, J., concurring in the judgment) (reasoning that although a "heightened pleading standard" represents a departure from usual pleading requirements, "[t]he substantive defense of immunity controls").

ideology.<sup>314</sup> If not, it is unclear what else might account for Justice Kennedy's inconsistency in evoking the principle against judicial legislation in *Crawford-El* on one hand and conspicuously failing to do so in *Siegert* and *Iqbal* on the other.<sup>315</sup> Although it could have been possible to resolve *Iqbal* on the basis of interlocutory jurisdiction, this would not necessarily have shielded Ashcroft and Mueller from ongoing litigation in the courts below.<sup>316</sup> Therefore, Justice Kennedy extended *Twombly* to all civil actions.<sup>317</sup>

In so doing, he exposed himself to the inevitable criticism of not only having amended Rule 8 from the bench, but having done so in such a way as to heighten the pleading standard.<sup>318</sup> According to the Court, a "heightened pleading standard" is one "more stringent than the usual

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314. Adam Liptak, *The Roberts Court, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1 (asserting that Chief Justice Roberts is orchestrating an incremental shift to the right, that Justice Kennedy tends to vote with Chief Justice Roberts, that Justice Kennedy is the Court's swing vote and the "most powerful jurist in America," and that the "Constitution, it turns out, means what Justice Kennedy says it means"). If it is true that Justice Kennedy is drifting from his central position further to the right, this may account for his willingness to join his more conservative colleagues in using judicial activism qua rulemaking from the bench to expand governmental immunity and other principles according to Chief Justice Roberts's agenda. *Id.*

315. Judge Weinstein of the Eastern District of New York argues that federal judges have consistently ignored the design of the Federal Rules—which were intended to facilitate a smoother journey through confusing procedural obstacles, thereby encouraging courts to re-shift the litigation emphasis to the merits of a case—by resorting to an emphasis on procedural efficiency. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 107–08 (2008) [hereinafter Weinstein, *Role of Judges*]. This is misguided, the Judge argues, not only because it has the effect of closing the proverbial courthouse doors to "the weak and the aggrieved," thus threatening the legitimacy of the judiciary, but also because it often leads to a denial of substantive rights absent procedural safeguards. *Id.* at 107; see also Jack B. Weinstein, *After Fifty Years of Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1919–21 (1989) (stating that the anti-access movement is objectionable because plaintiffs' substantive rights should not be denied through "procedural subterfuge"). What this means, according to Judge Weinstein, is that the Court now so favors defendants, including the government, that the current pleading standards have closed off access to the courts, thereby deviating from President Lincoln's notion that government should exist "for the people." Weinstein, *Role of Judges, supra*, at 112. The anti-access movement also ignores the Court's assertion that there is no immunity from all discovery. *Crawford-El v. Britton*, 523 U.S. 574, 593 n.14 (1998) (recognizing that "limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity").

316. In the *Iqbal* majority opinion, Justice Kennedy first resolved the threshold jurisdictional question before evaluating *Iqbal*'s complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009). He found that both the court of appeals and the Supreme Court had subject matter jurisdiction over petitioners' interlocutory appeal from the district court's rejection of qualified immunity at the motion to dismiss stage. *Id.*

317. *Id.* at 1953.

318. *E.g.*, *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) ("Post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints.").

pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.”<sup>319</sup> In *Twombly*, the Court explicitly rejected the notion that it was raising the pleading standard.<sup>320</sup> In changing the scope of the *Twombly* standard rather than its substance, *Iqbal* implicitly echoed this contention.<sup>321</sup> Yet despite the Court’s assertions to the contrary, both courts and commentators have suggested that the two decisions have imposed a more stringent pleading standard.<sup>322</sup> More interesting than who is correct on this point—which will only be revealed over time as the lower federal courts apply the plausibility standard and the *Twombly-Iqbal* line evolves<sup>323</sup>—is the issue of judicial legislation in the realm of civil procedure and its implications for the judiciary, the Court, and the cases that have inspired the question.<sup>324</sup>

*C. A Procedural Solution to a Substantive Problem: To the Extent that the Court in Iqbal “Fixed” Rule 8, It Was Not Because Rule 8 Itself Needed Fixing*

Javaid Iqbal did not likely file his complaint with an eye toward making *legal history* regarding the Federal Rules of Civil Procedure, though he may have hoped that *factual history* would vindicate his prolonged and depraved confinement without due process of law. What Iqbal may not have anticipated was how two issues—the pleading standard and the qualified immunity doctrine evoked in response to his allegations against Ashcroft and Mueller—would come together in the perfect storm to

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319. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

320. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face.”); cf. *Leatherman*, 507 U.S. at 168 (evoking the statutory construction canon *expressio unius est exclusio alterius*—the express mention of one thing excludes all others—to suggest that Rule 9(b)’s factual particularity requirement for certain contexts implies that there is no such requirement generally under Rule 8).

321. *Iqbal*, 129 S. Ct. at 1953 (explaining that “[o]ur decision in *Twombly* expounded the pleading standard for ‘all civil actions’”). Justice Kennedy did not explicitly address the question whether *Iqbal* raised the pleading standard, assumedly because the Court did so in *Twombly*. To address the issue again where doing so was not necessary would have drawn unwanted attention to the also unacknowledged confusion in the lower courts over the meaning of plausibility.

322. See, e.g., Tice, *supra* note 278, at 827 (describing the *Twombly* standard as “a broad decision that appears to tighten the reins on pleading standards”). For scholarly critiques of *Twombly* by federal judges suggesting that plausibility is a heightened standard, see Weinstein, *Role of Judges*, *supra* note 315, at 110–11, and McMahon, *supra* note at 271, at 863 (asserting that the Supreme Court’s contention in *Twombly* that it was not imposing a heightened pleading standard was “sheer sophistry,” but conceding that the Court had not intended to do away with notice pleading entirely).

323. Cf. Dodson, *supra* note 297, at 142 (suggesting that it will take years of increased litigation to determine what *Twombly* actually requires).

324. See *infra* Part IV.C.

which his grievances were ultimately sacrificed. Petitioners' attorney, General Garre, framed the case in the opening sentence of his oral argument as one that "concern[ed] the qualified immunity of high-ranking government officials like the Attorney General of the United States and Director of the FBI and supervisory liability claims under *Bivens* based on the alleged wrongdoing of much lower level officials."<sup>325</sup> Later in his argument, General Garre reiterated that the case was primarily about qualified immunity, even as he urged the Court to formally extend *Twombly* beyond the antitrust context.<sup>326</sup> In so doing, the General conflated the substantive issue of qualified immunity with the procedural issue of whether Iqbal's complaint sufficiently stated a claim for relief, thereby suggesting to the Court that one way—perhaps the only way—to ensure immunity for his clients would require a procedural resolution of the case.<sup>327</sup>

To bolster this invitation to the Court, General Garre made two claims regarding the substantive standards of law germane to Iqbal's claims: First, he argued that Iqbal must plead an affirmative link between petitioners and the alleged wrongdoing of the lower-level officials, as required for supervisory liability under *Bivens*; second, he asserted that Ashcroft was "entitled to a presumption of regularity of his actions, so that—that standard itself ought to affect how one views the complaint."<sup>328</sup> None of the Justices responded directly to this strange suggestion that a particular type of defendant—the U.S. Attorney General and others similarly situated—is somehow entitled to a "standard" under which his actions are presumed to be consistent,<sup>329</sup> but the Court's opinion silently echoes the sentiment.<sup>330</sup>

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325. Transcript of Oral Argument, *supra* note 281, at \*3.

326. *Id.* at \*24.

327. General Garre argued:

[R]eally we're here talking about claims against the highest-level officials of our government, who everyone agrees are entitled to the doctrine of qualified immunity, a doctrine that was designed, at the end of the day, to protect the effective functioning of our government. *These officials are entitled at least to the protections that this Court found appropriate for civil antitrust defendants.*

*Id.* (emphasis added). For a critique of the relationship between qualified immunity and pleading standards as articulated in petitioners' brief, see Brief of Professors of Civil Procedure & Fed. Practice, *supra* note 121, at 28 (arguing that petitioners' argument "tacitly moves from the policies that animate qualified immunity to the standards of pleading" and criticizing the argument's reliance on "the abstraction of qualified immunity" as "a free-floating concept that permeates any case to which it might attach" such that "the standards of pleading are virally infected by the concept").

328. Transcript of Oral Argument, *supra* note 281, at \*57–58 (emphasis added).

329. General Garre seems to be suggesting that high-level government officials are automatically entitled to something like an exception to Federal Rule of Evidence 404, which prohibits the admission of "[e]vidence of a person's character or a trait of character . . . for the

In other words, although the Court never explicitly expressed a desire to immunize high-level government officials from liability for actions immediately following September 11th, the structure of Justice Kennedy's opinion suggests that the majority had an implicit intention of doing so.<sup>331</sup> First, after briefly outlining the case's question presented and stating the Court's disposition, Justice Kennedy began the opinion in full by offering a version of the relevant historical context unlike those that had appeared in the opinions of the courts below, pointedly citing factual material from a 2003 Department of Justice study.<sup>332</sup> From the outset, then, the Court signaled its intent to shroud the case in its own version of the aftermath of September 11th.<sup>333</sup> That the Court did its own research is not in itself surprising or problematic. But the fact that the Court cited research from the government—hardly an impartial party in a case where potential constitutional violations seriously implicated Bush Administration policies—coupled with the Court's conspicuous omission of details regarding Iqbal's individual allegations<sup>334</sup> suggests that Justice Kennedy

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purpose of proving action in conformity therewith on a particular occasion." FED. R. EVID. 404(a).

330. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009) (arguing that Iqbal's allegation that Ashcroft and Mueller had acted with discriminatory intent was not plausible, given the "obvious alternative explanation" that the arrests overseen by the high-level officials were lawful and justified by the post-September 11th context); *cf.* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573 (2007) (Stevens, J., dissenting) (arguing that the insertion of plausibility into 12(b)(6) analysis "seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency").

331. *Cf.* *Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting) (proposing a qualified immunity test for intent-based constitutional torts under which "once the trial court finds that the asserted grounds for the official action were objectively valid . . . it would not admit any proof that something other than those reasonable grounds was the genuine motive" and conceding that his proposal is "of course a more severe restriction").

332. *Iqbal*, 129 S. Ct. at 1943.

333. *Id.* (explaining that only one week after the attacks, "the FBI had received more than 96,000 tips or potential leads from the public" (citing U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1, 11–12 (2003), [http://www.usdoj.gov/oig/special/0306/full.pdf?bsci\\_scan\\_61073EC0F74759AD=0&bsci\\_scan\\_filename=full.pdf](http://www.usdoj.gov/oig/special/0306/full.pdf?bsci_scan_61073EC0F74759AD=0&bsci_scan_filename=full.pdf))).

334. Downplaying the multitude of individual physical and mental abuses catalogued in the complaint, Justice Kennedy noted only that, as "one of the detainees," Iqbal was arrested on immigration charges, designated a person "of high interest" to the September 11th investigations, held at the ADMAX SHU where he was "kept in lockdown 23 hours a day," sentenced to a prison term after pleading guilty to the criminal charges, and removed to Pakistan. *Id.* The Court's introductory remarks reduced the constitutional violations alleged in Iqbal's twenty-one-cause-of-action complaint to a single sentence:

For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification; subjected him to serial strip and body-cavity searches when he posed no

intended from the start to paint a picture of a legitimate and reasonable executive response to an unprecedented affront to American values and way of life.

Next, Justice Kennedy turned to procedural history, where he selectively emphasized sections of the lower courts' opinions suggesting that qualified immunity is of paramount importance in the post-September 11th context.<sup>335</sup> He noted, for instance, Second Circuit Judge Cabranes's "concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to 'a national and international security emergency unprecedented in the history of the American Republic'—to the burdens of discovery."<sup>336</sup> Echoing Judge Cabranes's dramatic language with respect to this issue, Justice Kennedy declined to utilize the same rhetorical flourishes in describing Iqbal's egregious conditions of confinement in the ADMAX SHU.<sup>337</sup> Acknowledging the wantonness of these allegations would have made it more difficult for the Court to explain why it accorded favorable treatment to policymaking Executive Branch officials by reducing their accountability through the judicial process.

The Court further bolstered its underlying norms about the behavior of such officials in the opinion's legal analysis. For instance, Justice Kennedy identified Iqbal's allegation that Ashcroft was the "principal architect" of the allegedly discriminatory policy as a "bare assertion[]" not entitled to the presumption of truth accorded to facts.<sup>338</sup> He also identified, as a "more likely explanation[]" and "obvious alternative" to Iqbal's theory that animus-based discrimination drove the post-September 11th detention policy, that Ashcroft's actions reflected legitimate security measures necessary to deal with an unprecedented homeland attack.<sup>339</sup> That Justice Souter came to the opposite conclusion indicates the degree to which the Court's "experience and common sense" slid imperceptively into a certain

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safety risk to himself or others; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists."

*Id.* at 1943–44 (alteration in original) (citations omitted).

335. *Id.* at 1944–45 (suggesting that the Court granted certiorari to resolve "'at the earliest opportunity'" how to immunize officials at the motion to dismiss stage).

336. *Id.* at 1945 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007)).

337. *Id.* at 1944. Given Justice Kennedy's concern with separating facts from legal conclusions in assessing the plausibility of a complaint, his emphasis on dubiously factual post-September 11th events is stark. Ignoring the equivocality of history, Justice Kennedy artfully spun his own version of the facts relevant to Iqbal's case—external facts—in such a way as to mask his own selectivity in announcing them. See *id.* at 1949–50 (explaining that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

338. *Id.* at 1951.

339. *Id.* at 1951–52.

strain of political ideology.<sup>340</sup> The inherent subjectivity involved in high-stakes decisionmaking by the Supreme Court coupled with that Court's discomfiting mandate of ad hoc adjudication in the lower courts reveals a shift away from *Marbury v. Madison*'s premise that judicial review means saying what the law is,<sup>341</sup> rather than what it should be, and back toward the bygone eras of the Codes<sup>342</sup> and *Lochner*.<sup>343</sup>

In rejecting the "careful-case-management approach"<sup>344</sup> that would allow district judges to deal with potential infringement on a high-level official's governmental duties by letting a case proceed beyond the 12(b)(6) stage but prudently overseeing discovery, Justice Kennedy stated that the Court would not "relax" the pleading requirements of *Twombly* and Rule 8, in part owing to the fact that such an approach would "provide[] especially cold comfort in *this* pleading context."<sup>345</sup> Because the discovery in question would likely require Ashcroft and Mueller to reveal information about post-September 11th government action better left unexposed, the Court's ability to determine that Iqbal's complaint was deficient provided a more blunt and predictable tool against such a consequence than an ad hoc judicial management approach could.<sup>346</sup> In fact, the Court's approach had the effect of absolutely immunizing certain officials through the promulgation of a pleading standard that Iqbal could only overcome by alleging specific information regarding petitioners' intent, a virtual impossibility.<sup>347</sup> It also retreated from the Court's position in *Leatherman*

340. *Id.* at 1955 (Souter, J., dissenting).

341. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

342. CLARK, *supra* note 65 (giving a history of the Field Codes and outlining problems associated with them).

343. Many consider *Lochner v. New York*, 198 U.S. 45 (1905), as symbolic of the height of judicial activism in the Court. Some scholars offer a different view, however. See, e.g., Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873-75 (1987) (calling *Lochner* "the most important of all defining cases" in constitutional law, but arguing that its lesson "has yet to be settled" and that the decision should actually be read to symbolize "an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law" such that it has not, in fact, been overruled).

344. *Iqbal*, 129 S. Ct. at 1953 (majority opinion).

345. *Id.* at 1953-54 (emphasis added).

346. *Cf.* Crawford-El v. Britton, 523 U.S. 574, 595-96 (1998) (noting that the D.C. Circuit had adopted a heightened proof standard largely to decrease discovery in actions against government officials that require proof of motive and concluding that "the Court of Appeals' indirect effort to regulate discovery employs a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiffs with bona fide constitutional claims" (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986))).

347. See McMahon, *supra* note 271, at 867 (suggesting that district judges look to Rule 8(e) when assessing plausibility in such circumstances). Rule 8(e) provides that "[a]ll pleadings shall be so construed as to do substantial justice." FED. R. CIV. P. 8(e).

v. *Tarrant County Narcotics Intelligence & Coordination Unit*<sup>348</sup> that a relaxed pleading standard subjecting government officials to costly and time-consuming discovery would confuse freedom from liability with immunity from suit.<sup>349</sup>

Over the past thirty years, the Supreme Court has “dramatically” expanded the scope of the doctrine of sovereign immunity.<sup>350</sup> *Iqbal* has now provided federal courts with a “weapon” to continue doing so—the dubious panacea of plausibility.<sup>351</sup> Whether lower courts will utilize *Iqbal* in this way remains to be seen.<sup>352</sup> Ultimately, the more interesting question is what the implications of such an open-ended, flexible pleading standard will be not only for the difficult political cases like *Iqbal*, but for all civil actions.<sup>353</sup>

Whether the Court’s reason for implementing a plausibility standard was to save businesses from exposure to exorbitant discovery costs by creating a weeding-out mechanism for “implausible” suits as early in the litigation as possible,<sup>354</sup> to prevent years of litigation in the lower courts over the meaning of *Twombly* or otherwise,<sup>355</sup> or to continue along a conservative line fundamentally concerned with protecting government,<sup>356</sup>

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348. 507 U.S. 163 (1993).

349. *Id.* at 166.

350. Weinstein, *Role of Judges*, *supra* note 315, at 103–04 (suggesting that the Roberts Court has played a role in this broadening scope and arguing that the expansion is problematic because it allows government actors to behave unjustly while still enjoying the impenetrable shield of immunity).

351. This weapon is likely to be even more effective when coupled with other Roberts Court tools for expanding immunity, such as through a judge-centered interpretation and application of “reasonableness”—a term that is, like “plausibility,” inherently malleable. *See, e.g.*, *Scott v. Harris*, 550 U.S. 372, 393 (2007) (Stevens, J., dissenting) (criticizing the Court for “basing its conclusions on its own factual assumptions” in applying the Fourth Amendment reasonableness standard in a seizure case that turned on whether an officer who had run a citizen off the road in a high speed chase, rendering the latter a quadriplegic, had used unreasonable force).

352. *Cf. Dodson*, *supra* note 297, at 142 (suggesting that it will take years of increased litigation to determine what *Twombly* actually means).

353. It has long been accepted that procedural law has substantive implications. For an argument that the converse is also true—that is, that substantive law is informed by procedural expectations—see Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010).

354. Tony Mauro, *Roberts Court Takes a Pro-Business Stance*, N.Y. L.J., July 5, 2007, at 5.

355. McMahon, *supra* note 271, at 868 (pointing out that, ironically, although the Supreme Court may have intended to decrease the caseload of the district courts by lowering the standard for motions to dismiss, the new pleading standard will actually have the effect of delaying the final disposition of many cases while judges consider a greater number of motions to dismiss than ever before).

356. *See generally* Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court’s Stealth Hard-Liner*, NEW YORKER, May 29, 2009, at 44. Toobin suggests that “[a]s a lawyer and now as Chief Justice, Roberts has always supported legal doctrines that serve a gatekeeping function.”



what is clear is that *Iqbal*'s impact has been significant. Only two months after the Court announced the decision, Senator Arlen Specter introduced a bill entitled Notice Pleading Restoration Act of 2009.<sup>357</sup> As its title suggests, the bill seeks to restore notice pleading by preventing federal courts from dismissing complaints under Rule 12(b)(6) "except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*."<sup>358</sup> Senator Specter's proposal echoes Judge Clark's belief that just as history proved with the failure of the common-law and Code pleading eras, "people will not tolerate the denial of justice for formalities only."<sup>359</sup> It also responds to the possibility that the Court's plausibility standard may be on shaky constitutional grounds.<sup>360</sup>

## V. CONCLUSION

In *Ashcroft v. Iqbal*, the Supreme Court extended the plausibility pleading standard announced in *Bell Atlantic Corp. v. Twombly*<sup>361</sup> to all civil actions and dismissed under that standard respondent *Iqbal*'s claims against two executive-level government supervisors asserting a qualified

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such as qualified immunity. *Id.* at 49. He also quotes then-Senator Obama as having said of the Chief Justice, "It is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak." *Id.* at 51 (internal quotation marks omitted).

357. S. 1504, 111th Cong. (as introduced by Senate, July 22, 2009). The House of Representatives introduced a similar bill, the Open Access to Courts Act of 2009, soon after the Senate. H.R. 4115, 111th Cong. (as introduced by House, Nov. 19, 2009) (seeking to amend 28 U.S.C. § 2078 to provide, in relevant part, that a "court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief" and that a "court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged").

358. S. 1504.

359. Clark, *supra* note 77, at 458.

360. Cf. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1882 (2008) (arguing that *Twombly* and *Tellabs* have strayed from the Seventh Amendment right to a jury trial in civil cases by permitting courts to consider and weigh "plausible inferences" from both parties' pleadings, which were questions for the jury, not the judge, at common law). Professor Thomas argues that, consciously or not, the Court has started to create new Seventh Amendment jurisprudence devoid of common-law analysis and therefore in violation of constitutional limits on courts' and Congress's authority over juries. *Id.* at 1867–68. The Court's decision in *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902), she suggests, is the closest that the Court has come to addressing the constitutionality of a motion to dismiss as a general matter. She asserts that *Fidelity* supports the constitutionality of the *Conley* standard, but not the new plausibility standard. Thomas, *supra*, at 1871–72 & n.114; see also McMahon, *supra* note 271, at 865 ("If *Twombly* indeed instructs district court judges to assess at the pleading stage whether facts pleaded in a complaint give rise to a 'believable' (or 'credible') claim, we are inching perilously close to the line drawn by the Seventh Amendment . . .").

361. 550 U.S. 544 (2007).

immunity defense.<sup>362</sup> Reasoning that supervisory liability in *Bivens* cases<sup>363</sup> are limited to purposeful constitutional violations by government officials, the Court held that the facts alleged in Iqbal's complaint did not support a plausible inference that petitioners Ashcroft and Mueller were personally liable for his grievances.<sup>364</sup> In so holding, the Court took a piecemeal approach to the complaint, dividing factual assertions from legal conclusions in such a way as to highlight the degree to which a flexible "plausibility" standard based on the reviewing court's experience and common sense lends itself to judicial subjectivity.<sup>365</sup> The Court therefore endorsed and encouraged judicial discretion in the lower courts, which will likely spawn a non-uniform, arbitrary pleading regime in which certain defendants will no longer gain meaningful access to the courts.<sup>366</sup> This is because in devising and applying a procedural remedy to resolve the case, thereby retreating from longstanding deference to the formal rulemaking process as well as from the vision of the drafters of Rule 8, the Court essentially raised the pleading bar in an act of judicial rule revision unprecedented in the context of the Federal Rules of Civil Procedure.<sup>367</sup> This aggressive act, justified by an asserted need to shield government officials from the burdens of discovery, reflects the Court's unacknowledged reliance on the post-September 11th context in effectively immunizing the two high-level officials without consideration of the merits of qualified immunity in relation to Iqbal's claims.<sup>368</sup> The decision therefore represents a procedural solution to a substantive dilemma.<sup>369</sup>

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

363. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

364. *Iqbal*, 129 S. Ct. at 1952–53.

365. *See supra* Part IV.A.

366. *See supra* Part IV.A.

367. *See supra* Part IV.B.

368. *See supra* Part IV.C.

369. *See supra* Part IV.C.