
Note

Between the Possible and the Probable: Defining the Plausibility Standard After *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*

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Nearly every complaint filed in federal court must meet the simple pleading requirements of Rule 8(a).¹ It is a shame, then, that no one seems to know what exactly these requirements entail. As one judge observed, “We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.”² This was not always so. For fifty years, the rule on pleading was clear: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³

Bell Atlantic Corp. v. Twombly changed all that.⁴ The Court “retired” Conley’s famous statement and held that a conspiracy claim under section 1 of the Sherman Act based on parallel conduct must contain “enough facts to state a claim to relief that is plausible on its face.”⁵ In so doing, it introduced what came to be called the “plausibility standard”—a new pleading standard against which the sufficiency of complaints

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1. See FED. R. CIV. P. 8(a) (specifying the standards for a complaint).
2. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 853 (2008).
3. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
4. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).
5. *Id.* at 1974.

is assessed.⁶ Unfortunately, the precise meaning of this standard was anything but clear,⁷ and a variety of often conflicting and incomplete interpretations emerged.⁸

Late this past spring, the Court brought some clarity to the issue. *Ashcroft v. Iqbal* made clear what had largely been assumed all along, namely that the plausibility standard is a transsubstantive pleading standard applicable to all claims brought in federal court.⁹ Beyond that, however, *Iqbal* did little to clarify the meaning of “plausibility.”¹⁰ Instead, it situated the plausibility standard in a two-prong analytical framework under which a court must first identify a complaint’s nonconclusory allegations and then determine whether those allegations state a plausible claim for relief.¹¹ Accordingly, most of the myriad definitions of plausibility that developed post-*Twombly* continue to be applied.

Not only does this create uncertainty for litigants and courts,¹² it also has the potential to significantly increase the pleading burden plaintiffs face, for in many ways *Twombly* and especially *Iqbal* can be read as extreme opinions.¹³ One court, for example, has gone so far as to suggest that “even the official Federal Rules of Civil Procedure Forms . . . have been cast into doubt by *Iqbal*.”¹⁴ Rather than embrace the most extreme aspects and language of these opinions, this Note seeks to develop

6. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 441–47 (2008).

7. E.g., Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1257 (2008) (“Virtually everyone . . . regards plausibility as an ambiguous standard.”).

8. E.g., Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 n.3 (D.C. Cir. 2008) (“Many courts have disagreed about the import of *Twombly*.”).

9. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

10. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. (forthcoming 2010) (manuscript at 67), available at <http://ssrn.com/abstract=1428992> (“Precisely what the *Twombly* pleading standard requires stirred debate and probably remains uncertain after *Iqbal*.”).

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

12. E.g., A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 10, 27–28 (2009).

13. E.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010) (manuscript at 4), available at <http://ssrn.com/abstract=1442786> (“[T]he current discourse threatens to make *Iqbal*’s (and *Twombly*’s) effect on pleading standards a self-fulfilling prophecy.”).

14. *Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.*, No. Civ. 09-245, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009).

a definition of “plausibility” that preserves the basic tenets of simplified pleading and brings clarity to the keystone of the federal procedural system. Part I first provides an overview of the system of notice pleading created by the Federal Rules and developed by the Supreme Court; it then describes in greater detail *Twombly* and *Iqbal*. Part II discusses and critiques attempts by courts and commentators to define the plausibility standard. Part III argues that the plausibility standard is best understood as a minimal standard, representing at most a small break from past pleading practice, which requires only that a complaint support a reasonable inference that the plaintiff has a viable claim, which a court is then required to draw.

I. AN OVERVIEW OF FEDERAL PLEADING STANDARDS

Prior to 2007, the Supreme Court’s pleading jurisprudence more or less consistently affirmed the liberal pleading standards envisioned by the drafters of the Federal Rules. *Bell Atlantic Corp. v. Twombly* marked a potentially startling break from this tradition. Two years later, the Supreme Court, in *Ashcroft v. Iqbal*, expanded on *Twombly*, confirming that its plausibility standard applies to all complaints.

A. FEDERAL PLEADING STANDARDS PRE-*TWOMBLY*: THE PROCEDURAL SYSTEM CREATED BY THE FEDERAL RULES

With the adoption of the Federal Rules of Civil Procedure in 1938, notice pleading, as it came to be called, replaced the stringencies and technicalities of common law and code pleading.¹⁵ No longer would plaintiffs be required to plead ultimate facts constituting a cause of action, avoiding evidence on the one hand and conclusions of law on the other.¹⁶ Instead, pleading under the Rules was premised on “a system of simple, di-

15. See FED. R. CIV. P. 8(a)(2), (d)(1), (e) (requiring only “a short and plain statement of the claim showing that the pleader is entitled to relief”; specifically rejecting the requirement of technical forms; and mandating that pleadings “be construed so as to do justice”); Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1937) (contrasting the “extreme flexibility and adaptability” of pleading practice under the Rules with the technical requirements of code pleading); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554–55 (2002); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437–40 (1986).

16. *E.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1216, 1218 (3d ed. 2004); Clark, *supra* note 15, at 450; see also Fairman, *supra* note 15, at 556 (noting that under the Federal Rules pleadings serve a single function, providing notice).

rect allegation” by which the plaintiff initiated litigation and informed the defendant and the court of the general nature and basis of the claim.¹⁷ Nothing more was required of the pleadings, for liberal discovery coupled with summary judgment provided superior means for performing the other traditional pre-trial tasks of narrowing the issues, uncovering the facts, and resolving early disputes about proof.¹⁸ The underlying goal of this procedural system was to efficiently set the stage for trial, where the case would be resolved on the merits.¹⁹

Conley v. Gibson endorsed the liberal ethos embodied by the Federal Rules and, in so doing, gave content to Rule 8.²⁰ Rejecting the need for specific facts in support of general allegations and compliance with technical niceties, the Court held that Rule 8(a)(2) requires only “a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”²¹ Apart from failing to satisfy these minimal notice requirements, the Court stated that a complaint should be dismissed only 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.”²² *Conley* thus announced two standards that pleadings must meet: one formal (adequate notice), the other substantive or legal (any possible factual support warranting legal relief).

Time and again the Supreme Court affirmed *Conley*’s interpretation of federal pleading standards and their role in the broader, liberal procedural system.²³ Accordingly, when a court

17. Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 272–73, 278 (1942); see also Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45, 47, 49, 53–54 (1957) (discussing the rules that address pleading).

18. See, e.g., Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 314–19 (1938) [hereinafter Clark, *Handmaid*]; Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

19. See generally Clark, *Handmaid*, *supra* note 18, at 318–20 (discussing how the Rules subordinate procedure to substance so that cases are resolved on the merits).

20. 355 U.S. 41, 45–48 (1957).

21. *Id.* at 47–48 (quoting FED. R. CIV. P. 8(a)(2)).

22. *Id.* at 45–46.

23. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–14 (2002) (rejecting the requirement that a Title VII plaintiff “plead a prima facie case of discrimination” and explaining 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”); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (concluding that

rules on a 12(b)(6) motion to dismiss for failure to state a claim, it must accept the allegations in the complaint as true, view them in a light most favorable to the pleader, and draw all reasonable inferences from the allegations in favor of the pleader.²⁴ This ensures that only the most defective complaints are dismissed before discovery.

Notice pleading contrasts with heightened pleading, which generally requires the plaintiff to plead with particularity facts supporting the claim or some element thereof.²⁵ Heightened pleading applies in only two situations: when required by the statute under which the claim is brought²⁶ or when Rule 9 controls.²⁷ Courts, of their own accord, are not permitted to impose heightened pleading requirements.²⁸ This should not be surprising, for the Federal Rules are transsubstantive,²⁹ and pleading is no exception.³⁰

Whether this picture accurately reflects pleading practice among the lower courts through the years is debatable.³¹ At times, the Court itself has suggested that more specific plead-

judicially imposed heightened pleading standards conflict with requirements of Rule 8 and noting that “federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later”).

24. 5B WRIGHT & MILLER, *supra* note 16, § 1357.

25. *See, e.g.*, Fairman, *supra* note 15, at 554–67 (contrasting the requirements of notice, fact, and heightened pleading).

26. *See* 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 8.04(8)(b) (3d ed. 2009) (explaining that Congress has the power to enact specific statutory modifications to Rule 8 and in so doing impose heightened pleading). The Private Securities Litigation Reform Act of 1995 imposes such requirements. *See* 15 U.S.C. § 78u-4(b) (2006) (laying out specific pleading requirements).

27. *See* FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”).

28. *Leatherman*, 507 U.S. at 168.

29. *See* FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts”); 5A WRIGHT & MILLER, *supra* note 16, § 1332 (describing the “trans-substantive . . . system that is a benchmark of federal practice”).

30. *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”); 5 WRIGHT & MILLER, *supra* note 16, §§ 1204, 1221.

31. For a survey of federal court pleading practices that complicate the notion of notice pleading as the operative regime, see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998–1011 (2003); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1754–65, 1771 (1998).

ings are required.³² But, until recently, first in *Twombly* and then in *Iqbal*, it had never abandoned the language of notice pleading.³³

B. *BELL ATLANTIC CORP. V. TWOMBLY* AND THE INTRODUCTION OF PLAUSIBILITY PLEADING

Twombly was a putative class action brought on behalf of all purchasers of local telephone or high-speed internet services.³⁴ The plaintiffs alleged that Verizon, BellSouth, Qwest, and SBC had conspired to restrain trade in violation of section 1 of the Sherman Act, thereby allowing them to charge beholden consumers inflated prices.³⁵

From 1984 and the break-up of AT&T until 1996, the defendants, known as Incumbent Local Exchange Carriers (ILECs), enjoyed government-sanctioned monopoly power in their respective regional telecommunications markets, but were subject to extensive regulation and prohibited from competing in other local markets or the long-distance telephone market.³⁶ The Telecommunications Act of 1996 changed all of this.³⁷ Designed to open the local telecommunications market to competition, the Act required ILECs to facilitate the entry of Competitive Local Exchange Carriers (CLECs) into the market by making available their infrastructure at beneficial rates.³⁸ In return, the ILECs would henceforth be allowed to compete in other regional markets and the long-distance market.³⁹ Despite Congress's wishes, the structure of the local telephone services

32. See *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (purporting to apply the minimal requirements of notice pleading but dismissing the complaint for failure to provide notice with regard to one element of plaintiff's securities fraud claim).

33. *Id.*

34. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1958 (2007).

35. *Id.* at 1962–63; see also 15 U.S.C. § 1 (2006) (prohibiting “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).

36. *Twombly*, 127 S. Ct. at 1961, 1962 n.1. Together, the defendants controlled more than ninety percent of the local telecommunications market. *Id.* at 1962 n.1. The structure of the local telephone services market was shaped by its unique history. After the divestiture of AT&T, itself the result of anti-trust action, seven ILECs were formed. Through a series of mergers, the seven ILECs combined to become the four named defendants. *Id.* at 1961–62 & n.1.

37. See *id.* at 1961.

38. *Id.*

39. *Id.*

market remained largely unchanged, which gave rise to the plaintiffs' suit.⁴⁰

Because section 1 does not reach independent behavior, no matter how unreasonable, the existence of an agreement is essential.⁴¹ Lacking direct evidence of conspiracy, the plaintiffs in *Twombly* based their claims on two patterns of parallel behavior.⁴² First, the defendants engaged in a course of parallel conduct to prevent CLECs from entering their respective markets.⁴³ Second, the defendants collectively failed to enter each other's contiguous markets as CLECs, thereby foregoing attractive business opportunities.⁴⁴

After the Second Circuit reversed the district court's dismissal of the claim,⁴⁵ the Supreme Court granted certiorari to answer the question of what a complaint based on parallel conduct must contain to state a claim under section 1 of the Sherman Act.⁴⁶ Justice Souter's opinion, joined by six other Justices, began its analysis by laying out the controlling principles of antitrust law, emphasizing the problems that attend attempts to prove agreement through parallel conduct and the corresponding steps the Court had taken throughout the trial sequence to hedge against false inferences.⁴⁷ Turning to the requirements of Rule 8, the Court began by citing *Conley's* notice standard, but then proceeded to stress that, by its terms, Rule 8 also requires the complaint to make a showing of the grounds entitling the

40. See *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 177–78 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd* 127 S. Ct. 1955 (2007).

41. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (noting that section 1 rests on a “basic distinction between concerted and independent action”).

42. See *Twombly*, 127 S. Ct. at 1970–71. It is well-established that parallel behavior is circumstantial evidence from which a conspiracy may be inferred in some circumstances. *E.g.*, *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–41 (1954); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007).

43. *Twombly*, 127 S. Ct. at 1962–63.

44. *Id.* at 1962.

45. See *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 106, 117–19 (2d Cir. 2005), *rev'd* 127 S. Ct. 1955 (2007) (holding that dismissal of a complaint that included conspiracy among the plausible possibilities was proper only if the plaintiffs could marshal “no set of facts” demonstrating collusive as opposed to independent action). The Court of Appeals defined “plausib[ility]” as “superficially worthy of belief: CREDIBLE.” *Id.* at 111 n.5 (quoting *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 664 (9th Cir. 2003)).

46. *Twombly*, 127 S. Ct. at 1963.

47. *Id.* at 1964.

plaintiff to relief.⁴⁸ This standard does not require detailed factual allegations, but taking the allegations pleaded as true “must be enough to raise a right to relief above the speculative level.”⁴⁹

For a section 1 claim, the Court held that these “general standards” require that the complaint contain “enough factual matter . . . to suggest that an agreement was made.”⁵⁰ Put differently, the allegations must render the claim of conspiracy plausible.⁵¹ Importantly, said the Court, plausibility is not an invitation for judges to engage in probabilistic reasoning to weed out improbable, but well-pleaded complaints.⁵² Even with this caveat, plausibility conflicts with the metaphysical possibility that *Conley* treated as sufficient to withstand a Rule 12(b)(6) motion to dismiss.⁵³ As such, the Court “retire[d]” *Conley*’s “no set of facts” language,⁵⁴ reasoning that such a standard dispenses with Rule 8’s requirement that a complaint show entitlement to relief.⁵⁵ Despite this somewhat dramatic shift, the Court rejected the argument that asking for plausible grounds from which to infer a conspiracy amounted to heightened pleading because it did not require allegations of specific facts.⁵⁶

Applying the plausibility standard to the facts before it, the Court held that dismissal was appropriate because the plain-

48. *Id.* at 1964–65; see also FED. R. CIV. P. 8(a)(2) (using the language: “showing . . . entitle[ment] to relief”).

49. *Twombly*, 127 S. Ct. at 1965.

50. *Id.*

51. *Id.* But for a few examples, the Court declined to specify what exactly in addition to parallel conduct would push a plaintiff’s complaint across the line to plausible. *Id.* at 1965 & n.4, 1966.

52. *Id.* at 1965.

53. *Id.* at 1968.

54. *Id.* at 1969.

55. See *id.* at 1968–69. The Court further justified the importance of showing entitlement to relief and its section 1 specific manifestation as the plausibility requirement on two grounds. First, there is a need to dispose efficiently of unmeritorious claims used to extract settlements. *Id.* at 1966. Second, both the scope and expense of antitrust discovery, along with the potential for abuse, place a premium on disposing quickly of groundless claims. *Id.* at 1966–67. Neither careful case management nor summary judgment, the Court found, is up to the task, for the latter follows discovery, and discovery predicated on minimal knowledge cannot help but be expansive. See *id.* at 1967; see also Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989).

56. *Twombly*, 127 S. Ct. at 1973 & n.14, 1974.

tiffs' allegations did not suggest an agreement.⁵⁷ In analyzing the complaint, the Court found that the claim of conspiracy rested solely on the defendants' parallel behavior.⁵⁸ But such allegations, standing alone, did not suggest a conspiracy.⁵⁹ In light of "common economic experience" and the unique structure of the local telecommunications market, the defendants' actions were just as likely the result of natural business decisions made independently.⁶⁰ As such, dismissal was appropriate.⁶¹

Widespread confusion followed in the wake of *Twombly*.⁶² Courts and commentators alike struggled to determine the applicability and meaning of the plausibility standard and its relation to notice pleading.⁶³ Many observed that the Supreme Court would have to address pleading standards again, and soon.⁶⁴ Two years later, it did.

C. *ASHCROFT V. IQBAL*

Ashcroft v. Iqbal concerned a *Bivens* action brought by Javid Iqbal, a Pakistani Muslim detained as part of the post-9/11

57. *Id.* at 1973–74.

58. *Id.* at 1970–71. Absent such an allegation, said the Court, the complaint would have likely failed for lack of notice. *Id.* at 1970 n.10.

59. *Id.* at 1970–73.

60. *Id.*

61. *Id.* at 1974.

62. *E.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) ("We are not alone in finding the opinion confusing."); McMahon, *supra* note 2, at 858 (explaining that the district courts have been thrown into "disarray").

63. See Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) ("The most difficult question in interpreting *Twombly* is what the Court means by 'plausibility.'"); 5 WRIGHT & MILLER, *supra* note 16, § 1216 (Supp. 2009) ("[C]ourts continue to struggle with the meaning of 'plausibility' . . ."); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1088 (2009) (expressing the same concern). Compounding the confusion was *Erickson v. Pardus*, a per curiam decision issued just two weeks after *Twombly* that vacated the dismissal of a prisoner's Eighth and Fourteenth Amendment claims for cruel and unusual punishment and affirmed the primacy of notice pleading without any mention of plausibility. *Erickson v. Pardus*, 127 S. Ct. 2197, 2198, 2200 (2007) (per curiam).

64. Phillips, 515 F.3d at 234 ("The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come."); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts, Again*, FINDLAW, Aug. 13, 2007, <http://practice.findlaw.com/law-practice-management-articles/00006/000312.html> ("What is clear is that the Supreme Court will soon have to revisit the question of pleading standards to resolve the ambiguity that *Twombly* created.").

investigation into persons with suspected ties to terrorism.⁶⁵ Following his arrest, Iqbal was designated a person of “high interest,”⁶⁶ held in highly restrictive conditions and allegedly subjected to abusive treatment.⁶⁷ Upon release and deportation, Iqbal filed suit, alleging that John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the FBI, deprived him of his constitutional rights by instituting a policy pursuant to which he was designated a person of “high interest” and subjected to harsh conditions of confinement solely because of his “religion, race, and/or national origin.”⁶⁸

In response, Ashcroft and Mueller moved to dismiss for failure to state a claim, raising the defense of qualified immunity.⁶⁹ On interlocutory appeal, the Second Circuit, in an opinion issued shortly after *Twombly*, affirmed the district court’s denial of Ashcroft’s and Mueller’s motions to dismiss.⁷⁰ The Second Circuit interpreted the recently announced plausibility standard to require “factual amplification” in “those contexts where such amplification is needed to render a claim plausible.”⁷¹ Concluding that this was not such a situation, the Second Circuit held that Iqbal’s complaint could proceed.⁷² The Supreme Court granted certiorari to address whether Iqbal had pled enough factual matter to state a claim upon which relief could be granted.⁷³

As in *Twombly*, the Court (in an opinion by Justice Kennedy, who was joined by four other Justices) framed its analysis in terms of the controlling principles of the relevant substantive law.⁷⁴ Under the case law interpreting and applying § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*, govern-

65. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

66. *Id.* at 1943–44.

67. *Id.*

68. *Id.* at 1942, 1944.

69. *Id.* at 1943–45.

70. Iqbal v. Hasty, 490 F.3d 143, 177 (2d Cir. 2007), *rev’d on other grounds sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

71. *Id.* at 157–58.

72. *See id.* at 166 (“It is arguable that, under the plausibility standard of *Bell Atlantic*, some subsidiary facts must be alleged to plead adequately that Ashcroft and Mueller condoned the Plaintiff’s continued confinement However, all of the Plaintiff’s allegations respecting the personal involvement of these Defendants are entirely plausible, without allegations of additional subsidiary facts.”).

73. *Iqbal*, 129 S. Ct. at 1942–43.

74. *Id.* at 1947.

ment officials cannot be held vicariously liable for the actions of their subordinates.⁷⁵ Thus, a plaintiff must establish that each defendant individually violated the plaintiff's constitutional rights.⁷⁶ When the claim is unconstitutional discrimination, this means that the "plaintiff must plead and prove" that the challenged course of conduct was undertaken "because of, not merely in spite of, the action's adverse effects upon an identifiable group."⁷⁷

With this groundwork in place, the Court then elaborated on the plausibility pleading standard set forth in *Twombly*. Two principles, the Court explained, underlie that decision. First, on a motion to dismiss, courts are not required to accept as true legal conclusions and conclusory allegations.⁷⁸ Second, only plausible claims, regardless of the substantive law they invoke,⁷⁹ will survive a motion to dismiss.⁸⁰

Determining whether a claim is plausible is a "context-specific task" requiring the exercise of "judicial experience and common sense."⁸¹ But the standard is not met when a complaint merely parrots the elements of a cause of action or when its well-pleaded facts raise only the possibility of liability.⁸² Instead, a complaint's "factual content" must allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged."⁸³

The Court then suggested a two-step approach for assessing a claim's plausibility.⁸⁴ In step one, the court identifies

75. *Id.* at 1948.

76. *Id.*

77. *Id.* (internal quotation marks and citation omitted). In reaching this result, the Court rejected as inconsistent with the lack of vicarious liability the plaintiff's attempt to use a theory of supervisory liability, under which Ashcroft and Mueller could be held liable for their knowledge of and acquiescence in the purposely discriminatory actions of their subordinates. *Id.* at 1949.

78. *Id.* at 1949–50.

79. *Id.* at 1953 ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.' Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (citations omitted)).

80. *Id.* at 1950.

81. *Id.*

82. *Id.* at 1949–50.

83. *Id.* at 1949.

84. *Id.* at 1950. *But see id.* at 1959–61 (Souter, J., dissenting) (arguing that the majority misapplied the plausibility standard by discrediting allega-

those pleadings that are merely conclusions and thus not entitled to the assumption of truth.⁸⁵ In step two, the court asks whether the remaining well-pleaded allegations, accepted as true, “plausibly give rise to an entitlement to relief.”⁸⁶

Following this methodological approach, the Court’s analysis of Iqbal’s complaint first identified the allegations—that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to” a policy that subjected Iqbal to “harsh conditions of confinement” because of his race, religion, or national origin and that the two were respectively the “principal architect” of this policy and “instrumental” in its adoption and implementation—which were not entitled to the assumption of truth because of their conclusory nature.⁸⁷ Such “bare assertions,” reasoned the Court, were no more than “a ‘formulaic recitation of the elements’ of a constitutional discrimination claim,” which, after *Twombly*, cannot be accepted as true.⁸⁸

Second, the Court considered whether Iqbal’s remaining well-pleaded factual allegations against Ashcroft and Mueller suggested a plausible entitlement to relief.⁸⁹ According to Iqbal, the FBI, under the direction of Mueller, “arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.”⁹⁰ Iqbal also alleged that Mueller and Ashcroft approved the policy of holding such detainees in highly restrictive conditions until they were cleared by the FBI.⁹¹ The Court held that *these* allegations, taken as true, did not state a plausible claim, a conclusion with which the four dissenting Justices agreed.⁹² Although the allegations were consistent with purposeful discrimination, in light of more like-

tions that were not “naked legal conclusions” and failing to consider the complaint as a whole).

85. *Id.* at 1950 (majority opinion).

86. *Id.*

87. *Id.* at 1950–52 (“[W]e do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”). *But see id.* at 1961 (Souter, J., dissenting) (disputing this conclusion).

88. *Id.* at 1951 (majority opinion) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

89. *Id.*

90. *Id.* at 1944.

91. *Id.* at 1951.

92. *Id.* at 1951–52; *id.* at 1956 (Souter, J., dissenting).

ly lawful explanations,⁹³ “discrimination [was] not a plausible conclusion.”⁹⁴ Thus, the Court concluded that *Iqbal* had failed “to plead sufficient facts to state a claim for purposeful and unlawful discrimination.”⁹⁵

After *Iqbal*, it is clear that the plausibility standard cannot, as some had argued,⁹⁶ be confined to the antitrust context, but this was never really in doubt.⁹⁷ It is a general pleading standard, one that requires allegations of at least some facts. Going forward, the two central issues in analyzing the sufficiency of a complaint will be: (1) whether the allegations are conclusory or nonconclusory⁹⁸ and (2) whether the nonconclusory allegations state a plausible claim.

93. *Id.* at 1951 (majority opinion) (“It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”).

94. *Id.* at 1951–52.

95. *Id.* at 1954.

96. See generally *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15–17 (D.C. Cir. 2008); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/31/LRColl2007n31Bradley.pdf>; Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 632 (2007).

97. 5 WRIGHT & MILLER, *supra* note 16, § 1216 (Supp. 2009) (“[M]ost of the decisions citing the case have been applying its pleading guidelines broadly to Rule 8 and Rule 12(b)(6) motions, regardless of the legal context.”).

98. After *Iqbal* this distinction will have potentially dispositive consequences for a plaintiff’s complaint. It is thus unfortunate that *Twombly* and *Iqbal* appear to take different approaches to this step. *Twombly* suggested that wholly conclusory complaints, devoid of any factual allegations, were insufficient. See *Bell Atl. Corp v. Twombly*, 127 S. Ct. 1955, 1964–65 & n.3 (2007) (indicating that a modicum of facts is required to ensure adequate notice, if nothing else). Likewise, under *Twombly*, a plaintiff cannot turn inadequate factual allegations (parallel business conduct) into a valid claim by coupling them with an assertion of wrongdoing (agreement, but resting entirely on the allegations of parallel conduct). *Id.* at 1963–64, 1970–71 & nn.9–11. *Iqbal*, by contrast, goes further, suggesting that a court may analyze a complaint allegation by allegation, determining which are conclusory and so disentitled to the assumption of truth at the motion to dismiss stage. Compare *Iqbal*, 129 S. Ct. at 1950–51 (identifying and analyzing *Iqbal*’s individual allegations separately to determine whether each is conclusory or nonconclusory and endorsing this approach for all claims), with *id.* at 1959–60 (Souter, J., dissenting) (explaining that under the plausibility standard allegations, whether conclusory or not, must be accepted as true unless they “are sufficiently fantastic to defy reality as we know it” and reasoning that “[t]he fallacy of the majority’s position . . . lies in looking at the relevant assertions in isolation”); *Twombly*, 127 S. Ct.

II. ATTEMPTS TO DEFINE PLAUSIBILITY

Lower courts have treated *Iqbal* as an unproblematic application of *Twombly*. Accordingly, the actual meaning of the plausibility standard, as opposed to the scope of its applicability, remains as important and as unclear as ever. Largely setting aside the issue of whether a complaint's allegations are conclusory, this Part surveys and critiques the more prominent definitions of "plausibility" that have been advanced post-*Twombly*. It concludes that while they provide guidance in developing a workable understanding of the plausibility standard, they are ultimately incomplete.

A. IS THE PLAUSIBILITY INQUIRY STILL RELEVANT AFTER *IQBAL*?

As many courts have noted, a significant aspect of *Iqbal* is its introduction of a two-prong analytical approach, the first step of which is to identify the allegations in a complaint that are conclusory and so disentitled to the presumption of truth.⁹⁹ This has led Professor Adam N. Steinman to argue that after *Iqbal* "plausibility is not the primary issue when evaluating the sufficiency of a complaint."¹⁰⁰ Instead, the key issue is whether a complaint's allegations are conclusory.¹⁰¹ If "a complaint contains non-conclusory allegations on every element of a claim for relief, *the plausibility issue vanishes completely.*"¹⁰² Steinman concludes that the plausibility inquiry is necessary "only when a crucial allegation is disregarded as conclusory."¹⁰³ In many cases, then, it will not be necessary at all.¹⁰⁴

at 1973 n.14 ("[T]he complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."). It is worth flagging this important issue on which the Supreme Court provided little guidance, but the remainder of this Note focuses primarily on the meaning of "plausibility" and addresses the conclusory-nonconclusory distinction only insofar as it is relevant to this primary concern.

99. See, e.g., *Borneo Energy Sendirian Berhad v. Sustainable Power Corp.*, No. H-09-0612, 2009 WL 2498596, at *3 (S.D. Tex. Aug. 12, 2009) (explaining that under *Iqbal* and *Twombly* a court is required "to engage in a two-step analysis" to assess the plausibility of a complaint); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861, at *2 (D. Del. May 31, 2009); see also *Iqbal*, 129 S. Ct. at 1950.

100. Steinman, *supra* note 13, at 26.

101. *Id.* at 5.

102. *Id.* at 28.

103. *Id.* at 5.

104. *Id.* at 26.

Steinman is surely right to emphasize the importance of prong one of *Iqbal*. After all, when some of a complaint's allegations are deemed conclusory and so discredited, the plausibility standard will necessarily be harder to meet. *Iqbal* is illustrative.¹⁰⁵ Had his allegations against Ashcroft and Mueller been credited, dismissal would have been inappropriate, for the complaint would have adequately alleged all the elements necessary to sustain recovery for *Bivens* liability.¹⁰⁶

But it is a mistake to think that the plausibility inquiry has become secondary or can be bypassed.¹⁰⁷ First, it is not clear that one can define "conclusory" on the basis of *Iqbal* and *Twombly* in a way that will allow most claims to escape the plausibility analysis.¹⁰⁸ Second, *Iqbal* suggests that even a complaint comprised entirely of nonconclusory allegations must still surpass a threshold level of plausibility.¹⁰⁹ And in many cases, as where a plaintiff must allege a secret act or a defendant's mental state, only conclusory or indirect allegations will be possible.¹¹⁰ In such situations, the plausibility analysis will determine the fate of the claim.

Moreover, placing the analytical emphasis on whether allegations are conclusory or nonconclusory is problematic and ultimately undesirable. As Steinman acknowledges, under this view, the "crucial question . . . is how to assess whether an allegation may be disregarded as conclusory . . ."¹¹¹ Unfortunately, drawing this distinction in a precise and easily applicable

105. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–52 (2009).

106. See *id.* at 1959–60 (Souter, J., dissenting) (concluding that if *Iqbal*'s allegations were accepted as true, the complaint would meet the plausibility standard).

107. See *id.* at 1950 (majority opinion) ("[A] court . . . can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." (emphasis added)).

108. See *id.* at 1960–61 (Souter, J., dissenting) (explaining how, in light of the complaint as a whole, *Iqbal*'s allegations were not conclusory, but rather were tied to specific, clearly identified transactional occurrences).

109. See *id.* at 1949 (majority opinion) (indicating that, first and foremost, a claim must be "plausible on its face" (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007))).

110. See Howard Wasserman, *More Iqbal: What's a Plaintiff to Do?*, PRAWFSBLAWG, Aug. 25, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/08/more-iqbal-whats-a-plaintiff-to-do.html> (discussing *Moss v. U.S. Secrete Service*, 572 F.3d 962, 974–75 (9th Cir. 2009), and explaining the ease with which courts will find allegations going to a defendant's state of mind conclusory).

111. Steinman, *supra* note 13, at 6–7.

way will be exceedingly difficult.¹¹² Indeed, the Court in *Iqbal* was divided on whether the plaintiff's allegations were conclusory, but in agreement that the nonconclusory allegations, as identified by the majority, did not meet the plausibility standard.¹¹³ What is more, while Steinman offers his analysis in an attempt to harmonize *Iqbal* and *Twombly* with prior, more liberal pleading cases, thereby limiting their potentially restrictive effects,¹¹⁴ embracing the conclusory-nonconclusory distinction risks returning federal pleading practice to the repudiated technicalities of common law and code pleading.¹¹⁵ It also gives courts, especially in light of the distinction's vague definition, excessive latitude in identifying certain allegations as conclusory and finding that the rest of the claim is implausible.

Quite apart from the merits of reading *Iqbal* as refocusing the pleading inquiry on whether a complaint's allegations are conclusory, courts have treated *Iqbal* as consistent with *Twombly*.¹¹⁶ Rather than introducing new concepts, the decision simply clarifies how concepts established by *Twombly* are to be applied.¹¹⁷ Accordingly, plausibility remains the touchstone of the Rule 12(b)(6) inquiry, and its pre-*Iqbal* definitions remain relevant.

B. COURT-CREATED DEFINITIONS OF PLAUSIBILITY

Although plausibility remains essential to the sufficiency of a complaint, courts have struggled to develop a clear definition of the standard. Situating a vague and problematic definition within a two-prong framework, as in *Iqbal*, does not add any

112. Scott Dodson, *Beyond Twombly*, CIVIL PROCEDURE & FEDERAL COURTS BLOG, May 18, 2009, <http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html> (citing *Iqbal*, 129 S. Ct. at 1960–61 (Souter, J., dissenting)).

113. See *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting) (“[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.”).

114. See Steinman, *supra* note 13, at 5.

115. See Dodson, *supra* note 112.

116. *E.g.*, *Gonzalez v. Kay*, No. 08-20544, 2009 WL 2357015, at *2 (5th Cir. Aug. 3, 2009); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *Brown v. JP Morgan Chase Bank*, No. 08-1890, 2009 WL 1761101, at *1 (7th Cir. June 23, 2009).

117. See, *e.g.*, *United States v. Lloyds TSB Bank, P.L.C.*, No. 07 Civ. 9235, 2009 WL 2371562, at *10 (S.D.N.Y. Aug. 4, 2009) (“While *Iqbal* amplifies and expands upon the Court’s reasoning in *Twombly*, it introduces no new concepts, and neither party in the case at bar has asked leave to discuss *Iqbal* in a supplemental brief.”).

clarity to the underlying inquiry. But a survey of the different approaches adopted by courts, however incomplete they may be, helps illuminate features that are relevant to correctly understanding the plausibility standard.

1. Most Courts Fail to Define the Plausibility Standard

Courts were quick to apply the plausibility standard in a variety of contexts, but they generally failed to define what it required. Instead, they simply adopted certain key phrases from *Twombly*—“a formulaic recitation of the elements . . . will not do”¹¹⁸ and the right to relief must be more than “conceivable” or merely speculative¹¹⁹—and plugged them into the sections of their respective opinions laying out pleading standards.¹²⁰ This practice has largely continued post-*Iqbal*, but with an increased emphasis on whether the complaint’s allegations support an inference of misconduct.¹²¹

There would be no problem if the standard picked out by these phrases was clear, but it is not.¹²² As a result, an area of the law where certainty is to be prized¹²³ is infected with an unwelcome degree of uncertainty.¹²⁴ With this uncertainty comes an increase in procedural battles and their attendant costs.¹²⁵ Moreover, courts will likely continue to develop and apply divergent standards for assessing the sufficiency of pleadings,¹²⁶ which undermines the goal of a uniform procedural system and may promote forum shopping.¹²⁷ All of this underscores the need for a clear definition of “plausibility.”

118. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

119. *Id.* at 1974.

120. See Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 909 (2008).

121. See, e.g., *Monroe v. City of Charlottesville*, No. 08-1334, 2009 WL 2749993, at *4–5 (4th Cir. Aug. 31, 2009); *Sinaltrainal v. Coca-Cola Co.*, No. 06-15851, 2009 WL 2431463, at *11 (11th Cir. Aug. 11, 2009) (reciting the relevant formulations from *Twombly* and *Iqbal* and concluding that the “plaintiffs’ attenuated chain of conspiracy fails to nudge their claims across the line from conceivable to plausible”).

122. See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POLY 61, 76–77 (2007) (“[T]he ostensible distinction between ‘conceivable’ to ‘plausible’ looks to be fuzzy at birth . . .”); McMahon, *supra* note 2, at 864.

123. McMahon, *supra* note 2, at 869.

124. Spencer, *supra* note 12, at 10.

125. *Id.* at 26; see Ward, *supra* note 120, at 915–16.

126. Spencer, *supra* note 12, at 26.

127. McMahon, *supra* note 2, at 867.

2. The Third Circuit Approach

The Third Circuit has read the plausibility standard, both before and after *Iqbal*, through the lens of notice pleading, but has failed to satisfactorily explain the relationship between notice and plausibility.¹²⁸ Stating a plausible claim, however, simply “requires a complaint with enough factual matter (taken as true) to suggest the required element.”¹²⁹ Proof of the required element need not be probable, but the complaint must contain enough facts to suggest that discovery will reveal related evidence.¹³⁰ By attaching plausibility to the elements of the claim, the implication is that every element must meet the plausibility standard.¹³¹ Thus, while the Third Circuit has suggested that the plausibility standard is a minimal one,¹³² its formulation, if followed literally, may require more detailed factual pleading.

3. The Tenth Circuit Approach

Like the Third Circuit, the Tenth Circuit connects the plausibility standard with notice of the grounds of a claim, but it has said more about the actual meaning of “plausibility.” Recognizing that the plausibility standard cannot concern the likelihood that the complaint’s allegations are true, the court in *Robbins v. Oklahoma* defined “plausibility” in light of the scope of the allegations.¹³³ If the allegations “are so general that they

128. See, e.g., *Fowler v. UPMC Shadyside*, No. 07-4285, 2009 WL 2501662, at *6 (3d Cir. Aug. 18, 2009) (“Under the ‘plausibility paradigm’ . . . these averments are sufficient to give [the defendant] notice of the basis for [the plaintiff’s] claim.” (quoting *Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315, 322 (3d Cir. 2008))); *Phillips v. County of Allegheny*, 515 F.3d 224, 233–34 (3d Cir. 2008).

129. *Phillips*, 515 F.3d at 234 (internal quotation marks omitted); see also *Fowler*, 2009 WL 2501662, at *5.

130. *Phillips*, 515 F.3d at 234 (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

131. See, e.g., *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 370 (M.D. Pa. 2008) (fitting the plausibility standard, as defined by *Phillips*, into the traditional definition of substantive sufficiency, i.e., facts constituting a cause of action).

132. See *Fowler*, 2009 WL 2501662, at *6 (indicating that so long as a complaint contains some factual matter and provides adequate notice, it will survive a motion to dismiss).

133. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008); see also *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (explaining that Rule 12(b)(6) dismissals cannot be “based on a judge’s disbelief of a complaint’s factual allegations” and that “a well-pleaded complaint may proceed even if it appears ‘that recovery is very remote and unlikely’” (citing *Neitzke v. Williams*,

encompass a wide swath of conduct, much of it innocent,” then the complaint is merely conceivable, not plausible.¹³⁴ To be plausible, “the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.”¹³⁵ What suffices to meet this requirement depends on context.¹³⁶ The Tenth Circuit is likely correct to note that as the breadth of lawful behavior described by the complaint increases, the need for more factual allegations suggesting liability increases. Without further elaboration, however, it is difficult to know what exactly is required by the plausibility standard in any given case.

4. The Plausibility Standard as a Sliding-Scale

Many courts, perhaps most notably the Second¹³⁷ and Seventh Circuits,¹³⁸ have treated plausibility, even after *Iqbal*,¹³⁹ as a flexible standard or a sliding-scale.¹⁴⁰ Although the plausibility standard must be satisfied in every case, the amount of “factual amplification” needed to cross this threshold will vary depending on the claim.¹⁴¹ The Second Circuit, however, has failed to explain when such “factual amplification” is required or how much is needed, which necessarily limits the utility of such an approach.¹⁴²

490 U.S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *cf.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

134. *Robbins*, 519 F.3d at 1247.

135. *Id.* (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

136. *Id.* at 1248 (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 231–32 (3d Cir. 2008)) (explaining that simple claims, such as for negligence based on an automobile accident, require less than complex claims, such as those based on wide swaths of perfectly legal behavior, or those where, as a matter of policy, there is an interest in resolving some aspect of the litigation before discovery).

137. *See* *Boykin v. KeyCorp*, 521 F.3d 202, 214 (2d Cir. 2008); *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd on other grounds sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

138. *See* *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008); *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803–04 (7th Cir. 2008).

139. *See, e.g.,* *Sebast v. Mahan*, No. 09-cv-98, 2009 WL 2256949, at *1 (N.D.N.Y. July 28, 2009); *Bilal v. Wolf*, No. 06 C 6978, 2009 WL 1871676, at *1 (N.D. Ill. June 25, 2009).

140. Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 548.

141. *See, e.g., Iqbal*, 490 F.3d at 157–58.

142. *See* *Boykin*, 521 F.3d at 214 (noting the lack of guidance “regarding when factual ‘amplification [is] needed to render [a] claim plausible” (alteration in original) (quoting *Iqbal*, 490 F.3d at 158)). *But see* *McMahon, supra*

The Seventh Circuit avoids this failing by connecting the amount and specificity of the factual allegations required to the potential cost of discovery.¹⁴³ In simple cases, and those cases that do not impose a risk of forcing settlement consequent of potential litigation expenses, the standard is minimal.¹⁴⁴ But in complex litigation where the scale of discovery may force settlement, a greater factual showing is required to meet the threshold of plausibility.¹⁴⁵ Regardless of the context, though, notice remains the touchstone of pleading and the dominant metric for assessing the sufficiency of a complaint in the Seventh Circuit.¹⁴⁶ Thus, the easily satisfied requirement of notice tempers the potential bite of the plausibility standard.¹⁴⁷

Post-*Iqbal*, the Seventh Circuit continues to adhere to this approach. *Brooks v. Ross* considered *Iqbal*'s potential effect on its post-*Twombly* pleading jurisprudence and concluded that *Iqbal* simply affirms *Twombly*'s general applicability and admonishes plaintiffs to provide some facts in their complaints to ensure that they are not "abstract recitations" of law, which a court need not accept as true.¹⁴⁸ Similarly, in *Smith v. Duffey*, the court suggested that, even after *Iqbal*, plausibility remains

note 2, at 863 (suggesting that the Second Circuit standard "requires more factual detail in complaints that allege more complex theories of liability . . .").

143. *Tamayo*, 526 F.3d at 1083; see also Marcus, *supra* note 10, at 68 ("As the anticipated costs of litigation, however defined, rise, the plaintiffs' obligation to include more particularized obligations does as well.")

144. Cf. *Tamayo*, 526 F.3d at 1084 ("*Bell Atlantic*'s explicit praise of Form 9 of the Federal Rules of Civil Procedure illustrates that conclusory statements are not barred entirely from federal pleadings."); *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007) ("Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.")

145. *Tamayo*, 526 F.3d at 1083; *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803–04 (7th Cir. 2008).

146. *Tamayo*, 526 F.3d at 1083 ("Although the opinion contains some language that could be read to suggest otherwise, the Court in *Bell Atlantic* made clear that it did not, in fact, supplant the basic notice-pleading standard."); *Lang v. TCF Nat'l Bank*, 249 F. App'x 464, 466 (7th Cir. 2007).

147. *Limestone*, 520 F.3d at 803 ("*Bell Atlantic* must not be overread. The Court denied . . . 'requir[ing] heightened fact pleading of specifics' . . ." (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007))); see also *Maxie v. Wal-Mart*, No. 3:09-CV-260, 2009 WL 1766686, at *2 (N.D. Ind. June 19, 2009) (acknowledging the ongoing force of this admonition, even after *Iqbal*).

148. *Brooks v. Ross*, No. 08-4286, 2009 WL 2535731, at *5 (7th Cir. Aug. 20, 2009).

2009] tied to the cost of pretrial discovery and its potential to force a settlement.¹⁴⁹

While the Seventh Circuit's approach improves on the Second Circuit's, it is not without problems. First, insofar as the requirements of notice and plausibility are independent,¹⁵⁰ it is not clear how the former can be used to limit the latter.¹⁵¹ Second, although connecting a greater factual showing at the pleading stage with the potential size, expense, and burden of discovery finds some support in both *Twombly* and *Iqbal*,¹⁵² the latter can be read to foreclose such an approach. *Iqbal*'s refusal to relax the requirements of Rule 8 in light of the promise of cabined discovery suggests that the potential expense of discovery is independent of the plausibility inquiry.¹⁵³ Third, cases where discovery is likely to be too expensive may also be those where it is needed most because of the defendant's monopoly on the relevant information.¹⁵⁴ In such situations, it seems particularly unfair to ask plaintiffs to know and plead what they cannot know.¹⁵⁵

More fundamentally, even though a flexible definition of the plausibility standard helps reconcile the results in *Twombly* and *Iqbal* with the succinctness of Form 11,¹⁵⁶ it does not help define "plausibility." Consequently, all of the problems discussed in Part II.B.1 apply to a flexible standard as well. Moreover, introducing additional factors for judges to consider increases the complexity of what is supposed to be a simple procedural system.¹⁵⁷ As the number of factors to be considered

149. *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009) (expressing skepticism about the reach of *Twombly* and noting that "*Iqbal* is special in its own way" because of the unique role of qualified immunity).

150. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. (forthcoming 2009) (manuscript at 23–24), available at <http://ssrn.com/abstract=1351994>.

151. See Spencer, *supra* note 12, at 19.

152. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953–54 (2009) (connecting the need for a plausibility standard with the burdens and distractions imposed by discovery); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966–67 (2007); Spencer, *supra* note 12, at 33–38.

153. See *id.*; see also Spencer, *supra* note 12, at 36 ("[W]hether discovery is expected to cost \$1 million or \$10 million does not, strictly speaking, bear on whether the plausibility threshold has been surpassed.").

154. See McMahon, *supra* note 2, at 867.

155. *Id.*

156. See FED. R. CIV. P. Form 11.

157. See Ward, *supra* note 120, at 909.

increases, so does the potential for variation among the courts, which itself creates further uncertainty for litigants.¹⁵⁸

C. PLAUSIBILITY AS PLEADING ELEMENTS, DIRECTLY OR INFERENTIALLY

Some commentators define the plausibility standard as requiring allegations for each of the material elements necessary to establish liability under some legal theory.¹⁵⁹ There are two versions of this definition, which can be described as the weak version and the strong version. Under the weak version the standard is construed liberally and a plaintiff is not required to allege specific facts for each element.¹⁶⁰ So long as the complaint's allegations touch, however inferentially or conclusory, on the requisite elements, the standard is met.¹⁶¹ By contrast, the strong version requires nonconclusory factual allegations for each material element of the claim.¹⁶²

The problem underlying both of these approaches is that the plausibility standard measures the adequacy of the allegations in support of a claim.¹⁶³ It does not simply require that

158. See McMahon, *supra* note 2, at 864.

159. See Charles B. Campbell, *A "Plausible" Showing After Bell Corp. v. Twombly*, 9 NEV. L.J. 1, 22–23 (2008) (arguing that the plausibility standard should be interpreted as requiring "factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law"); Smith, *supra* note 63, at 1088 ("The central theme of the plausibility standard is logical coherence. . . . [Under logical coherence,] plaintiffs' allegations [must] contain a set of factual assertions that, if taken as true, are both necessary and sufficient to establish defendants' liability.").

160. See Campbell, *supra* note 159, at 25–28.

161. See *id.*; see also Hairston v. Geren, No. C-08-382, 2009 WL 2207181, at *2, *4 (S.D. Tex. July 21, 2009) (deeming, post-*Iqbal*, conclusory allegations in a discrimination case sufficient to withstand a Rule 12(c) motion for judgment on the pleadings—which applies the same standard as a Rule 12(b)(6) motion—even though the complaint did "not contain an overabundance of facts to support [the plaintiff's] claims"); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1042–47 (arguing for a proposed pleading framework for Title VII employment discrimination cases under which a plaintiff must allege, in concise and general terms, the material elements of the offense as defined by the statute's language).

162. See Smith, *supra* note 63, at 1089–90; see also Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047–48 (9th Cir. 2008) (requiring plaintiffs to plead not just ultimate facts—such as a conspiracy—but evidentiary facts which, if true, would prove the cause of action).

163. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 882 (2009) (distinguishing between the elements that must be alleged and the adequacy of allegations in support of

such allegations exist.¹⁶⁴ After all, the plaintiffs in *Twombly*, both directly and indirectly, alleged an agreement,¹⁶⁵ just as Iqbal alleged purposeful discrimination.¹⁶⁶ In both cases, however, the Court held that the factual allegations failed to satisfy the plausibility standard because they did not support an inference of the asserted misconduct.¹⁶⁷ A further problem faced by the strong version is that it seems irreconcilable with the Forms accompanying the Federal Rules,¹⁶⁸ which by definition state plausible claims.¹⁶⁹ Of course a complaint that *adequately* alleges, directly or inferentially, each of the material elements necessary to sustain recovery will survive a motion to dismiss, but stated thusly the proposition says little about the meaning of “plausibility,” which remains the central issue.

D. PLAUSIBILITY IN RELATION TO AN ORDINARY STATE OF AFFAIRS

Professors A. Benjamin Spencer and Robert G. Bone have both analyzed the plausibility standard in relation to the ordinary state of affairs.¹⁷⁰ According to Spencer, the plausibility standard is a factual sufficiency standard that “significantly raises the pleading bar” from where notice pleading had it originally set.¹⁷¹ In an attempt to move beyond the indeterminate concepts generally used to define “plausibility,” Spencer has

those elements and explaining that *Twombly* and the plausibility standard deal with the latter).

164. See *id.* at 888 (concluding that “plausibility” cannot be equated with pleading elements because the plaintiffs in *Twombly* did allege an agreement). But see Epstein, *supra* note 122, at 66 (suggesting the ease with which the required elements of a Sherman Act section 1 violation are alleged).

165. Bell Atl. Corp. v. *Twombly*, 127 S. Ct. 1955, 1962, 1970–71 (2007). But see *id.* at 1984–85 (Stevens, J., dissenting) (“[T]he theory on which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.”).

166. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009) (holding that Iqbal’s direct allegations were insufficient because they were conclusory and the remaining factual allegations did not support the desired inference).

167. *Id.*; *Twombly*, 127 S. Ct. at 1965–66, 1971–73 (looking for but not finding plausible grounds from which to infer an unlawful agreement).

168. See, e.g., FED. R. CIV. P. Forms 11, 12, 15; see also Bone, *supra* note 163, at 886, 888 (noting Form 11’s “skeletal” nature).

169. FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

170. Bone, *supra* note 163, at 888 (“[P]lausibility [is correctly associated] with allegations that differ from an ordinary state of affairs . . .”); Spencer, *supra* note 12, at 13–18.

171. Spencer, *supra* note 6, at 445–46.

advanced a descriptive framework for determining whether a complaint's factual allegations are sufficient to withstand a motion to dismiss for failure to state a claim.¹⁷²

To satisfy the plausibility standard, argues Spencer, a complaint must "describe events about which there is a *presumption of impropriety*."¹⁷³ Factual scenarios possessing a presumption of impropriety "convey some sense of specific wrongdoing in the eyes of the law."¹⁷⁴ By contrast, scenarios that ordinarily have lawful explanations enjoy a presumption of propriety; they are "neutral with respect to wrongdoing."¹⁷⁵ To state a plausible claim, a complaint must create a presumption of impropriety through the allegation of "objective facts"¹⁷⁶ and "supported implications,"¹⁷⁷ not just "speculative suppositions."¹⁷⁸ On this view, the amount of facts that must be alleged depends on whether the claim requires suppositions beyond objective factual allegations to connote wrongdoing.¹⁷⁹

Although he advocates a similar approach, Bone criticizes Spencer's idea of a presumption of impropriety as "confusing," arguing that it fails to "explain clearly how to tell whether a set of allegations 'suggests wrongdoing' strongly enough to meet the standard."¹⁸⁰ To clarify the matter, Bone proposes the idea of a baseline. A "baseline" is "the normal state of affairs for situations of the same general type as those described in the complaint."¹⁸¹ The plausibility standard serves to screen out claims based on allegations that "describe a state of affairs that is not merely consistent with lawful [conduct], but fits neatly within the normal baseline of conduct expected from [the defen-

172. Spencer, *supra* note 12, at 5–6.

173. *Id.* at 5.

174. *Id.* at 14–15 (suggesting a negligence claim resulting from an automobile accident or allegations of a breach of contract as examples of scenarios naturally possessing a presumption of impropriety).

175. *Id.* at 15–16.

176. *See id.* at 14 (defining "objective facts" as those that are "observed or experienced" and concern what actually transpired in the world, one might say, rather than what was going on in someone's head).

177. *Id.* at 17 (explaining that "supported implications" are objective facts that suggest the desired supposition).

178. *Id.* at 16 (describing "suppositions" or "speculative suppositions" as reasons or explanations, perhaps going to the defendant's mental state, offered by the plaintiff to explain the defendant's conduct).

179. *Id.* at 34–35.

180. Bone, *supra* note 163, at 888.

181. *Id.* at 885.

dant].”¹⁸² An allegation that only describes baseline conduct is implausible, for it is unlikely that society would tolerate wrongdoing as the ordinary state of affairs.¹⁸³

On this view, “plausibility” refers “to the strength of the inference” from the factual allegations, assuming they are true, “to [a] necessary factual conclusion.”¹⁸⁴ A plausible inference is more than merely possible, but not as strong as a probable inference.¹⁸⁵ Where, precisely, between these two poles plausibility should be located is unclear.¹⁸⁶ Bone argues, in apparent contrast to Spencer, that *Twombly* indicates “‘plausibility’ should not be interpreted as a demanding standard[,]”¹⁸⁷ and that it only “requires . . . allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct.”¹⁸⁸

Spencer and Bone are surely right to draw a distinction between situations that inherently or naturally suggest wrongdoing or deviate from a baseline, for example, an automobile accident, and those that do not necessarily suggest wrongdoing, at least without additional information, such as an antitrust conspiracy based on parallel conduct.¹⁸⁹ In this respect, their analyses dovetail with and expand upon the approach taken by the Tenth Circuit in *Robbins*.¹⁹⁰ The central problem facing such accounts is the uncertainty surrounding the quantum of facts—after *Iqbal*, it is clear that legal conclusions will not do¹⁹¹—needed to turn an equivocal complaint into one that ac-

182. *Id.* at 884–85.

183. *Id.* at 885.

184. *Id.* at 881.

185. *Id.* at 881 & n.42.

186. *Id.* at 881 & n.42, 882 (“What *Twombly* actually says about this issue is difficult to determine because the Court sends seemingly inconsistent messages on the subject.”).

187. *Id.* at 883–84.

188. *Id.* at 885–86. Bone has since argued that *Iqbal* represents an undesirable break from *Twombly* in that it uses the plausibility standard as a significantly more demanding device for screening not just meritless suits, but weak suits as well. Robert G. Bone, *Plausibility Pleading Revisited and Revisited: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010) (manuscript at 3, 24–25), available at <http://ssrn.com/abstract=1467799>.

189. Bone, *supra* note 163, at 885–86; Spencer, *supra* note 12, at 14–16.

190. See *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (explaining that when a complaint’s allegations suggest a wide range of perfectly legal behavior, more is required).

191. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–51 (2009).

tually suggests wrongdoing, whether understood as a presumption of impropriety or deviation from a baseline.¹⁹² Ultimately, a fuller account of the plausibility paradigm is needed.

III. "PLAUSIBILITY" PROPERLY UNDERSTOOD

The plausibility standard is best understood as an inferential standard unrelated to notice that is used to assess the substantive sufficiency of a complaint. Because of ambiguous language and conflicting signals from the Court in both *Twombly* and *Iqbal*, it might appear to impose a stringent merits determination at the pleading stage. Reading *Twombly* and *Iqbal* in connection with other pleading cases shows that this is not so. Plausibility is in fact a minimal standard, requiring only that the complaint give the court reason to believe the claim should proceed. In light of the low threshold it sets, courts should be hesitant to use it to dismiss any but the most tenuous claims.

A. THE PLAUSIBILITY STANDARD MEASURES THE SUBSTANTIVE SUFFICIENCY OF A COMPLAINT, NOT THE ADEQUACY OF THE NOTICE IT PROVIDES

1. Notice and Plausibility Are Independent

Conspicuously absent from *Iqbal's* discussion of pleading standards was any mention of notice.¹⁹³ In many respects this alone represents a sea change in pleading jurisprudence.¹⁹⁴ Nevertheless, this should not be altogether surprising, for the plausibility standard measures the substantive sufficiency of a complaint, which is unrelated to the adequacy of the notice it provides.

To avoid dismissal under Rule 12(b)(6), a complaint must be both formally and substantively sufficient.¹⁹⁵ Formal suffi-

192. See generally Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 141–42 (2007), <http://virginia-lawreview.org/inbrief/2007/07/09/dodson.pdf> (explaining that the amount and type of facts needed to meet the plausibility standard is difficult to discern).

193. *Iqbal*, 129 S. Ct. at 1949–52; see also Dodson, *supra* note 112 (suggesting that after *Iqbal* “[n]otice is now an aside”). Also missing were citations to pleading cases besides *Twombly*. Dodson, *supra* note 150, at 23 (commenting that *Iqbal* relied “exclusively on *Twombly*”).

194. See Dodson, *supra* note 150, at 25 (explaining that together *Twombly* and *Iqbal* achieve a “shift in pleadings jurisprudence from notice to facts,” and in so doing, overturn what had been the hallmark of pleading).

195. See *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th

ciency concerns the amount of detail required by Rule 8(a)(2) to ensure that the complaint contains enough information to provide adequate notice.¹⁹⁶ Substantive sufficiency, by contrast, concerns legal merit, focusing on whether the complaint's allegations provide grounds for relief.¹⁹⁷ Because a complaint must meet both of these requirements, it has always been misleading to speak of "notice pleading."¹⁹⁸ Providing notice has traditionally been understood as the primary purpose of pleadings under the Rules,¹⁹⁹ but the sufficiency of a complaint has never risen or fallen on the sufficiency of notice alone.²⁰⁰

Neither *Twombly* nor *Iqbal* was concerned with formal sufficiency. Indeed, *Twombly* affirmed the standard for measuring the adequacy of notice that has been in place since *Conley*²⁰¹—a result which *Iqbal* did not purport to upset.²⁰² Rather, the issue in both cases was the substantive sufficiency of the complaint.²⁰³ It was in this context that the plausibility standard was announced and applied.²⁰⁴

Distinguishing between formal and substantive sufficiency is a basic point, but it is important because formal sufficiency is unrelated to substantive sufficiency.²⁰⁵ Accordingly, the notice-giving function of Rule 8 cannot, as some courts have sug-

Cir. 1999) (explaining that the formal requirements of Rule 8 are different from the substantive or legal requirements and that both must be met to survive a Rule 12(b)(6) motion); THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 60 (2004); Ides, *supra* note 96, at 605–06.

196. See ROWE ET AL., *supra* note 195, at 60; A. BENJAMIN SPENCER, CIVIL PROCEDURE 434 (2007).

197. See ROWE ET AL., *supra* note 195, at 60; SPENCER, *supra* note 196, at 434.

198. See Ides, *supra* note 96, at 611–12 (describing the label "notice pleading" as "inapt" because the adequacy of notice has nothing to do with substantive sufficiency).

199. See 5 WRIGHT & MILLER, *supra* note 16, § 1202.

200. See *Kirksey*, 168 F.3d at 1041 ("Where the plaintiff has gone astray is in supposing that a complaint which complies with Rule 8(a)(2) is immune from a motion to dismiss.").

201. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (2007); see also Ides, *supra* note 96, at 609.

202. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–52 (2009); see also Dodson, *supra* note 112 (suggesting that after *Iqbal* "[n]otice is now an aside").

203. *Iqbal*, 129 S. Ct. at 1942–43; *Twombly*, 127 S. Ct. at 1964–66; see also Ides, *supra* note 96, at 619.

204. See *Twombly*, 127 S. Ct. at 1968–69 (replacing *Conley*'s "no set of facts" standard with the plausibility standard).

205. See, e.g., Ides, *supra* note 96, at 610 ("[W]hether a claim is legally cognizable is, quite simply, not measured by the adequacy of the notice.").

gested,²⁰⁶ limit the force with which the plausibility standard applies. But, importantly, it does not necessarily follow that the plausibility standard is a demanding factual sufficiency standard, different in name only from the requirements of code pleading replaced by the Rules.²⁰⁷

2. The Plausibility Standard Is an Inferential Standard

Having established that the plausibility standard, at the highest level of generality, measures the substantive sufficiency of a complaint, it is now necessary to specify with what aspect of the complaint the standard is concerned. Despite language in some post-*Iqbal* cases,²⁰⁸ plausibility does not concern the truth of a complaint's factual allegations or the likelihood that a plaintiff will be able to prove them at trial.²⁰⁹ Instead, it concerns the viability of an inference. But the issue is complicated because *Twombly* in particular, but *Iqbal* also, uses "plausibility" in at least two different senses.²¹⁰ Sometimes the cases refer to the strength of the inference from the complaint's factual allegations to a material element of the claim.²¹¹ Other times they refer to the strength of an inference from the complaint as a whole to the conclusion that it shows entitlement to relief.²¹²

The distinction is important because if plausibility concerns the elements of a claim, and every element of a claim must be alleged,²¹³ then potentially it is an exceedingly demanding standard bearing a strong resemblance to fact-

206. See, e.g., *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082–83 (7th Cir. 2008).

207. See Bone, *supra* note 163, at 884 (arguing that plausibility is not a "demanding" standard); cf. Ides, *supra* note 96, at 611–12 (explaining how substantive sufficiency can be a minimal standard).

208. See, e.g., *PrivacyWear, Inc. v. QTS & CTFC, LLC*, No. EDCV 07-1532, 2009 WL 2590082, at *3 (C.D. Cal. Aug. 20, 2009) ("[T]he *allegations must be plausible* on the face of the complaint." (emphasis added)).

209. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009); *Twombly*, 127 S. Ct. at 1964–66.

210. See Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae Supporting Respondents at 13, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

211. *Iqbal*, 129 S. Ct. at 1951–52 (discriminatory intent); *Twombly*, 127 S. Ct. at 1965 (agreement); see also Bone, *supra* note 163, at 881.

212. *Iqbal*, 129 S. Ct. at 1951 (entitlement to relief); *Twombly*, 127 S. Ct. at 1974 (claim); *Smith v. Duffey*, 576 F.3d 336, 337 (7th Cir. 2009) (claim).

213. See *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (holding that because a plaintiff must prove loss causation, he or she must adequately allege loss causation).

pleading. But *Iqbal* disclaimed any such requirement.²¹⁴ Thus, the better interpretation is that plausibility concerns the claim as a whole. Of course, if the success of the claim depends on a single disputed element, then the two inquiries are coextensive, as was the case in *Twombly* and *Iqbal*.²¹⁵ The plausibility standard is thus an inferential standard and not, or at least not exactly, a factual sufficiency standard, for much besides a complaint's factual allegations bears on the plausibility of the inferences that can be drawn from it.

B. BETWEEN POSSIBLE AND PROBABLE: DEFINING THE PLAUSIBILITY STANDARD

In both *Twombly* and *Iqbal* there is a sharp divergence between how the Court formulates the plausibility standard in the abstract and how it is applied to the facts at hand. The former makes the standard look minimal; the latter makes it look substantial. Correctly understood, plausibility is a minimal standard requiring only that the complaint give a court reason to believe that a claim has merit.

1. Describing the Plausibility Standard Versus Applying the Plausibility Standard

As formulated by *Twombly*, the plausibility standard seems to set a low threshold that plaintiffs must cross.²¹⁶ The Court said that the allegations, on the assumption that they are true, “must be enough to raise a right to relief above the speculative level.”²¹⁷ Unlawful conduct, explained the Court, must be more than merely conceivable or possible—the allegations must “suggest” it—but it need not be probable.²¹⁸ *Iqbal*

214. See *Iqbal*, 129 S. Ct. at 1950.

215. See *id.* at 1948–49 (2009) (stating that *Iqbal*'s claim depended entirely upon Ashcroft's and Mueller's purpose); *Twombly*, 127 S. Ct. at 1974 (Stevens, J., dissenting) (explaining that the viability of the plaintiffs' claim turned entirely on the existence of an agreement).

216. See, e.g., *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007); McMahon, *supra* note 2, at 857 (“[T]he Court eschewed any notion that it was imposing a heightened pleading requirement . . . on plaintiffs whose claims were governed by Rule 8.”).

217. *Twombly*, 127 S. Ct. at 1965 (majority opinion).

218. See *id.* at 1965–66 (explaining that there is a “line between possibility and plausibility,” but cautioning that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage”). The Court acknowledged that the plausibility standard could be met even though the prospect of recovery was “remote and unlikely.” *Id.* at 1965 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

endorsed these definitions²¹⁹ and offered its own: a claim is plausible when the complaint contains “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²²⁰

But both opinions contain language suggesting that the threshold is considerably higher. For example, allegations that are “merely consistent with” unlawful conduct are insufficient.²²¹ On a motion to dismiss, however, a court is required to view the complaint in a light most favorable to the nonmoving party and draw all reasonable inferences in his or her favor.²²² Why, then, are equivocal allegations insufficient? Has the Court via the plausibility standard implicitly imposed a more demanding definition of “reasonable” on the inferences that can be drawn from a complaint?²²³

The sense that more is required than the Court’s abstract formulations suggest gains force when one considers its actual application of the plausibility standard. In *Twombly*, the Court held that because the plaintiffs failed to plead facts tending to exclude the possibility of independent action, they had failed to state a plausible claim.²²⁴ Likewise, in *Iqbal* the Court made clear that if there are “more likely explanations” or “obvious alternative explanation[s]” for the challenged conduct, an inference of discriminatory purpose is not plausible.²²⁵ In both cases, it might appear, the plaintiffs’ failure to allege facts rendering their inference the most plausible doomed their claims.

The contrast between these two formulations is stark. Under the first, “plausibility” means reasonable or more than merely “possible.” Under the second, “plausible” means more likely than any other (plausible) explanation. After *Iqbal*, courts have adopted both interpretations.²²⁶ Even when the

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

220. *Id.* at 1949.

221. *Id.* at 1949; *Twombly*, 127 S. Ct. at 1966.

222. See 5B WRIGHT & MILLER, *supra* note 16, § 1357.

223. Cf. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (“The Supreme Court did not address the point about drawing reasonable inferences in favor of the plaintiff, but we do not read its decision to undermine that principle.”).

224. See *Twombly*, 127 S. Ct. at 1971–73.

225. See *Iqbal*, 129 S. Ct. at 1951–52.

226. Compare, e.g., *Shoregood Water Co., v. U.S. Bottling Co.*, No. RDB 08-2470, 2009 WL 2461689, at *4 (D. Md. Aug. 10, 2009) (“On a spectrum, the Supreme Court has recently explained that the plausibility standard requires

lower threshold is used to describe the standard, its stringency can vary greatly.²²⁷ The question, then, is which standard controls?

2. The Higher Plausibility Standard Must Be Rejected in Favor of the Lower Plausibility Standard

Interpreting “plausible” to mean more likely than opposing lawful explanations leads to absurd results. In *Tellabs v. Makor Issues & Rights, Ltd.*, the Supreme Court interpreted the Private Securities Litigation Reform Act’s (PSLRA) “strong inference” requirement,²²⁸ to mean that an inference of scienter must be more than merely “reasonable,” “plausible,” or “permissible.”²²⁹ Rather, it must be “cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”²³⁰ In reaching this result, the Supreme Court expressly rejected requiring the inference of scienter to be the “most plausible of competing inferences.”²³¹ To read *Twombly* and *Iq-*

that the pleader show more than a sheer possibility of success, although it does not impose a probability requirement.” (internal quotation marks omitted), *with* *Straeten v. Roper*, No. 4:09CV1132 TCM, 2009 WL 2757091, at *1 (E.D. Mo. Aug. 26, 2009) (“When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff’s proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.” (citing *Iqbal*, 129 S. Ct. at 1950–52)).

227. *Compare* *Hairston v. Geren*, No. C-08-382, 2009 WL 2207181, at *4 (S.D. Tex. July 21, 2009) (refusing to dismiss), *with* *Palmore v. Mass*, No. 09-cv-282-bbc, 2009 WL 1749797, at *2 (W.D. Wis. June 19, 2009) (granting motion to dismiss).

228. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2006) (“In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, *the complaint shall*, with respect to each act or omission alleged to violate this chapter, *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*” (emphasis added)).

229. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504–05, 2510 (2007).

230. *Id.* at 2510. That is, so long as the allegations render “an inference of scienter *at least as likely as* any plausible opposing inference,” the strong inference standard is met. *Id.* at 2513.

231. *Id.* at 2510 (quoting *Fidel v. Farley*, 392 F.3d 220, 227 (6th Cir. 2004)); *see also* Brief for American Ass’n for Justice as Amicus Curiae Supporting Respondent at 10–11, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015), 2008 WL 4805229 at *10–11 (“The majority opinion expressly rejected Justice Scalia’s proposed alternative formulation, ‘whether the inference of scienter (if any) is *more plausible* than the inference of innocence.’” (quoting *Tellabs Inc.*, 127 S. Ct. at 2513 (Scalia, J., concurring))).

bal as requiring that plaintiffs plead facts sufficient to exclude “more likely explanations” would make Rule 8’s general pleading requirements even more stringent than the PSLRA’s heightened fact pleading requirements.²³² As one commentator has observed, “[o]f course, that would be ridiculous.”²³³

The better interpretation treats “plausible” as meaning “reasonable” or “permissible.” *Iqbal* expressly endorsed this interpretation and it is of a piece with the general descriptions of the plausibility standard put forth in that case and in *Twombly*.²³⁴ Moreover, it comports with the definition of “plausibility” suggested by the Court in *Tellabs*, which was decided only a month after *Twombly*.²³⁵ Indeed, defining “plausible” as “reasonable” places the requirements of Rule 8 in proper relation to the heightened pleading requirements of the PSLRA.²³⁶ It also preserves the relevance and vitality of past Supreme Court pleading decisions, which neither *Twombly* nor *Iqbal* purported to overrule, because for nearly as long as there have been 12(b)(6) motions, there have been courts required to draw all reasonable inferences in favor of the nonmoving party.²³⁷ Thus, the plausibility standard requires only that the inference from the well-pleaded factual allegations to the purported unlawful conduct be reasonable. If it is, a court *must* draw it and the complaint should not be dismissed.

Of course a reasonable inference is not any possible inference, but that has never been the case.²³⁸ Rather, whether an inference is reasonable and a claim plausible will depend on a variety of factors, including those identified by courts and commentators and discussed in Part II. These include:

232. Burbank, *supra* note 140, at 552 (“The language in question can be read to require that inferences—or to the extent that a complaint does not rely on inferences, direct allegations—grounding liability not just be plausible in the *Tellabs* sense (reasonable), and not just as strong (cogent or compelling) as any competing account, but stronger than any account of nonliability.”).

233. *Id.*; see also McMahon, *supra* note 2, at 864.

234. See *Iqbal*, 127 S. Ct. at 1949; *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

235. See McMahon, *supra* note 2, at 864–65 (“[T]here is no reason to think that ‘plausible’ means anything different in *Twombly* than it does in *Tellabs*.”).

236. See Bone, *supra* note 163, at 881 & n.42.

237. See 5B WRIGHT & MILLER, *supra* note 16, § 1357; cf. Steinman, *supra* note 13, at 34 (noting that a number of Supreme Court decisions are irreconcilable with an evidentiary approach to pleadings).

238. 5B WRIGHT & MILLER, *supra* note 16, § 1357 (explaining that many courts have refused to draw “unwarranted inferences” from pleadings).

(1) reasonable expectations about how the world works,²³⁹ (2) the breadth of perfectly legal behavior described by the complaint's allegations,²⁴⁰ (3) the amount and type of factual allegations in the complaint,²⁴¹ (4) the plausibility of other competing inferences,²⁴² and (5) the substantive legal context in which the claim is brought.²⁴³ Additionally, though, it depends on the claim's relation to others of the same sort.²⁴⁴ As the claim becomes more novel, as it moves beyond the boundaries of reasonable judicial expectations, a plaintiff may have to say more, either factually or legally, to justify the inference of misconduct.²⁴⁵ Likewise, when the opposite is true, a largely conclusory allegation may very well be plausible.²⁴⁶ This should be the case for most claims, even after *Iqbal*.

C. RECONCILING PLAUSIBILITY AS REASONABILITY WITH *IQBAL* AND *TWOMBLY*

In equating plausibility with reasonability, this Note necessarily rejects the idea that it is a demanding standard. The question, then, is whether this interpretation can be squared with the results in *Iqbal* and *Twombly*. Careful analysis shows that it can.

Twombly illustrates the role that peculiarities of substantive law can play in determining whether a claim is plausible.²⁴⁷ Although parallel business conduct, the basis of the plaintiffs' claim in that case, is evidence from which section 1

239. See Geoffrey P. Miller, *Pleading after Tellabs*, 2009 WIS. L. REV. 507, 510.

240. See *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008).

241. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

242. See *id.* at 1951–52; *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008); *Burbank*, *supra* note 140, at 553 (“[J]udgments about plausibility . . . are necessarily comparative.”).

243. See *Burbank*, *supra* note 140, at 552.

244. See *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041–42 (7th Cir. 1999).

245. See *id.* at 1042 (“[A] claim that does not fit into an existing legal category requires more argument by the plaintiff to stave off dismissal, not less, if the defendant moves to dismiss on the ground that the plaintiff’s claim has no basis in law.”); *Ides*, *supra* note 96, at 613 (“One might say that such a claim also needs more facts.”).

246. See *Seiner*, *supra* note 161, at 1049–53; *cf.* FED. R. CIV. P. Forms 11 & 15 (indicating that conclusory allegations suffice to state viable claims in at least some cases).

247. See *Burbank*, *supra* note 140, at 552.

conspiracy can be inferred,²⁴⁸ without more it is ambiguous—as consistent with conspiracy as it is with independent action.²⁴⁹ To prevent false positives, antitrust law thus limits, as a matter of policy, the inferences that can be drawn from such evidence.²⁵⁰ For an inference of conspiracy to be permissible, the plaintiff must couple allegations of parallel conduct with “evidence that tends to exclude the possibility of independent action.”²⁵¹ By failing to allege such facts, the plaintiffs in *Twombly* were asking the Court to draw an inference that was impermissible as a matter of law. Thus, a unique feature of antitrust law prevented the plaintiffs’ equivocal allegations from supporting a plausible inference of conspiracy.

Although *Iqbal*’s analysis adopts much of *Twombly*’s language, in truth it was decided on much different grounds. Rather than exemplifying a similar type of substantive law-specific limitation on inferences from circumstantial evidence in the context of *Bivens* actions and qualified immunity,²⁵² *Iqbal* shows how plausibility determinations are necessarily comparative.²⁵³ Once *Iqbal*’s direct allegations concerning Ashcroft’s and Mueller’s involvement in the discriminatory policy were discredited, his complaint was left with only sparse allegations indicating unconstitutional discrimination.²⁵⁴ When the Court concluded that *Iqbal*’s inference was implausible, it was not just that other explanations were more likely; it was that, given the paucity of the surviving allegations, the lawful explanations were so likely that *Iqbal*’s inference could not even be

248. See *Theatre Enters. Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–41 (1954).

249. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1958–59 (2007).

250. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); see also *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 280 (1968); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 628 (2d ed. 1999) (explaining that the plausibility standard synthesized by *Matsushita* is “not limited to summary judgment at all,” but instead is a principle of substantive law).

251. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 768 (1984); see also *Matsushita*, 475 U.S. at 587–88.

252. But see *Pecover v. Elec. Arts, Inc.*, No. C 08-2820, 2009 WL 1604696, at *3 (N.D. Cal. June 5, 2009) (“Recently, the Supreme Court extended [*Twombly*’s] reasoning to a case involving a somewhat analogous safe harbor from liability: qualified immunity.”).

253. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009); cf. *Burbank*, *supra* note 140, at 553.

254. See *Iqbal*, 129 S. Ct. at 1951–52.

deemed reasonable.²⁵⁵ In such situations, a plaintiff must allege more facts to state a plausible claim.²⁵⁶ Because *Iqbal*'s complaint lacked such facts, dismissal was appropriate.²⁵⁷ Now, one might object to the Court's plausibility determination, and this reading is not necessarily the most natural of the literal language in *Iqbal*,²⁵⁸ but it must be correct if one is to accept the Court's descriptions of the plausibility standard and preserve the distinction between heightened pleading and pleading under Rule 8.

It is unfortunate that the Court's language obscured the fact that *Iqbal* and *Twombly* illustrate very different factors affecting the plausibility determination. But if the above analysis is correct, it should go some way toward explaining why the claims in both cases were implausible and why plausibility is not a demanding standard.

CONCLUSION

Twombly's abrogation of *Conley*'s "no set of facts" language and introduction of the plausibility standard injected an unwelcome degree of uncertainty into federal pleading practice. *Iqbal* confirmed the general applicability of the plausibility standard, but failed to clarify the meaning "plausibility." Instead, it endorsed a series of conflicting signals in *Twombly* that can be read to suggest that pleading standards have been raised significantly. The result is both an abiding confusion at the heart of the procedural system created by the Federal Rules and greater license for courts to dismiss potentially meritorious claims. Rather than embrace the more extreme aspects of *Iqbal* and *Twombly*, courts should recognize that the plausibility standard is a minimal standard, requiring only sufficient grounds to draw the reasonable inference that a plaintiff's claim can proceed to discovery.

255. *Cf. Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 ("Events that have a very low antecedent probability of occurring nevertheless do sometimes occur (the Indian Ocean tsunami, for example); and if in a particular case all the alternatives are ruled out, we can be confident that the case presents one of those instances in which the rare event did occur." (quoting *Anderson v. Griffin*, 397 F.3d 515, 521 (7th Cir. 2005))).

256. *See United States v. Beard*, 354 F.3d 691, 693 (7th Cir. 2004) ("Confidence in a proposition . . . is created by excluding alternatives and undermined by presenting plausible alternatives.").

257. *See Iqbal*, 129 S. Ct. at 1951–52.

258. *See id.* (implying that *Iqbal* would have to refute "more likely explanations" and "obvious alternative[s]" to state a plausible claim).