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Iqbal and Interpretation

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IQBAL AND INTERPRETATION

KAREN PETROSKI*

ABSTRACT

Assessing a year's worth of debate over the 2009 Supreme Court decision in Ashcroft v. Iqbal, *this Article provides a novel explanation for the decision and presents it as radical indeed, but in a way previously unremarked by commentators. The sharp divisions in the responses to* Iqbal *have masked a deeper consensus and have blocked wide awareness of the decision's constructive potential for diverse interest groups. This consensus is based on a simplified account of the ideal function of pleading in our system of civil litigation, one that first took hold in the early twentieth century. What unsettles many observers about* Iqbal *is its suggestion that district court judges must interpret a civil complaint in order to decide whether it states a claim. As this Article explains, however, pleading scrutiny always has involved interpretation; if we find that suggestion troubling, it is only because the vocabulary we have long used to discuss the role and treatment of civil pleadings represses this fact. The Article describes the ways this vocabulary has shaped the debate over* Iqbal *and the contingent historical reasons for its dominance. Looking forward, it shows how* Iqbal *makes possible a new agenda for procedural scholarship that draws from work on other types of legal interpretation, and it suggests some of the specific ways in which this perspective can guide implementation of* Iqbal *and clarification of its requirements.*

I. INTRODUCTION 417
II. THE *IQBAL* CONTROVERSY 421
A. *What Happened?* 421
B. *Should This Have Happened?* 426
C. *Why Did This Happen?* 431
III. PRAGMATISM AND INTERPRETATION IN PROCEDURAL DOCTRINE 434
A. *The Return of Pragmatism's Repressed* 435
1. *The Standard Story of Pleading* 435
2. *The Simplification of Pragmatism* 440
3. *The Effect on Responses to* Iqbal 446
B. *Taking Interpretation Out of Procedure and Putting It Back In* 450
1. *Why the Avoidance of Interpretation?* 451
2. *What If We Did Not Avoid the Issue?* 453
IV. PLEADING SCRUTINY AS A MATTER OF INTERPRETATION 456
A. *Conclusoriness, Gap-Filling, and Superfluity* 456
1. *Gap-Filling* 457
2. *The Rule Against Superfluities* 459
B. *Plausibility and Deference* 461
V. CONCLUSION 465

I. INTRODUCTION

As soon as it was issued in May 2009, the Supreme Court's decision in *Ashcroft v. Iqbal*[1] was hailed as a potential watershed in American

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1. 129 S. Ct. 1937 (2009).

civil procedure.[2] On its face, *Iqbal* offered a clarification of the requirements of Federal Rule of Civil Procedure 8(a)(2), which applies to most complaints presenting civil claims in federal court. As a result, many have expected the decision to have profound systemic effects.[3] But observers are deeply divided over what these effects might be, as well as over their desirability.[4] Some commentators, too, maintain that expectations of a system-wide shift are unfounded.[5]

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2. *See, e.g.*, Andrew F. Halaby, *Pleading Analysis Under* Iqbal*: Once More Unto the Breach!*, 46 ARIZ. ATT'Y 34, 34 (2009) (referring to *Iqbal* in the preface as a "watershed decision"); Jess Bravin, *New Look at Election Spending Looms in September*, WALL ST. J., July 1, 2009, at A4 (quoting Tom Goldstein, founder of SCOTUSblog, as stating that *Iqbal* will "be the most cited Supreme Court case in a decade"); *see also infra* Part II, especially notes 47-65 and accompanying text.

3. *See, e.g.*, Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) (stating the Court's analysis in *Iqbal* is, "in certain types of cases, an invitation to 'cognitive illiberalism' "); Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 MONT. L. REV. 285, 291 (2010) (describing the *Iqbal* standard as "mean[ing] . . . that it all depends on the luck of the draw and who your district judge is"); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 (2010) (describing *Iqbal* as "altering a defining feature of the legal system"); Cassidy M. Flake, Case Note, *Ashcroft in a Defendant's Wonderland: Redefined Pleading Standards in* Ashcroft v. Iqbal, 61 MERCER L. REV. 977, 992 (2010) ("[*Iqbal*] has the potential to confuse the traditional roles of judge and jury, result in the dismissal of many meritorious claims, and undermine the civil process of discovery."); Halaby, *supra* note 2, at 38 (concluding that under *Iqbal*, "federal court plaintiffs and defendants seem destined to rejoin battle" on issues debated by "long-departed legions of lawyers whose skirmishes . . . taught us to fight our procedural battles elsewhere"); Goutam U. Jois, Pearson*,* Iqbal*, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 901 (2010) (describing *Iqbal*, with Pearson v. Callahan, 555 U.S. 223 (2009), as a "game changer[]" that "is fairly well known" as likely to "significantly curtail the availability of remedies in civil litigation"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368 (2010) (citing *Iqbal* as example of skeptical and efficiency-focused "restrictive ethos in procedure [that] appears ascendant and poised for dominance"); John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 60-61 (2009) (concluding that "real problem" with *Iqbal* is that standard "will not produce uniform results"); Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly*,* Iqbal*, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 908 (2010) (arguing that *Iqbal* gives "district court judges the most powerful case management tool of all—a broader authority to simply dismiss a case outright"); *see also* discussion *infra* Part II.B, especially notes 47-52 and accompanying text.

4. Some expect the standard announced in *Iqbal* to foreclose certain classes of plaintiffs from civil relief. *See, e.g.*, Jois, *supra* note 3, at 901; David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 426 (2010); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 940 (2010); Melodee C. Rhodes, *The Battle Lines of Federal Rule of Civil Procedure 8(a)(2) and the Effects on a* Pro Se *Litigant's Inability to Survive a Motion to Dismiss*, 22 ST. THOMAS L. REV. 527, 529 (2010) (arguing that under *Iqbal*, Federal Rule of Civil Procedure 8(a)(2) "violates an individual's procedural due process rights by requiring a pleading standard that a layperson finds difficult to satisfy"); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 519 (2010); Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. 179, 192 (2010) ("*Iqbal* ha[s] left the requirements for pleading intentional employment-discrimination claims in disarray . . . ."); Darwinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims*

Agreeing that *Iqbal* is significant, this Article argues that a major aspect of its importance lies in its reintroduction into procedural doctrine of the insight that the scrutiny of civil complaints is (always) a matter of textual interpretation. Understanding *Iqbal* in this way dramatically realigns the debate. It supplies an entirely new way to understand why *Iqbal* was decided as it was, as well as some of the apparently inconsistent responses to the case. Only a few commentators have noted the tie between the type of analysis described by *Iqbal* and practices of textual interpretation. Almost without exception, these commentators have labeled the implication distressing.[6] What commentators have been reluctant to address is that their assessments of the decision, across partisan lines, are all based on a long-dominant cluster of narratives about the development and function of pleading in civil litigation and the nature of legal interpretation.[7] These narratives provide the current vocabulary for discussion of pleading. For complex historical reasons, the limitations of these narratives have remained invisible for several generations. When the narratives' origins and drawbacks are recognized, *Iqbal* looks different: not necessarily a disaster, but the potential beginning of a new and productive era for procedural scholarship and doctrine.

I support this claim in a three-part discussion. Part I below outlines the controversy over *Iqbal*, describing the key Supreme Court decisions that preceded it and reviewing the wide range of academic and popular responses to the decision. These responses have been divided not just in their evaluations of *Iqbal,* but also in their explanations of why the Court decided the case as it did. Part II traces the

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of Discrimination, 58 BUFF. L. REV. 419, 423 (2010) (arguing that *Iqbal* "may be one of the most infamous and harmful [decisions] to . . . individual rights of this generation"); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 390-91 (2010).

Others consider the chief flaw of the decision to be its introduction of unpredictability into the process of pretrial disposition of claims of all types. *See infra* notes 51-52 and accompanying text. Still others, granting these possible effects, argue that costs flowing from them are outweighed by the positive reforms effected by *Iqbal*. *See, e.g.*, Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 632 (2009) (arguing that the plausibility standard offers "an excellent solution to the problem of inefficient and costly personal jurisdiction determinations"); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1110 (2010) (arguing that change in pleading standards was needed); Douglas G. Smith, *The Evolution of a New Pleading Standard:* Ashcroft v. Iqbal, 88 OR. L. REV. 1053, 1055 (2009) (arguing that *Iqbal* "recognize[s] that, as the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases"); Richard J. Pocker, *Why the* Iqbal *and* Twombly *Decisions Are Steps in the Right Direction*, 57 FED. LAW., May 2010, at 38, 38 (arguing that *Iqbal* is not inconsistent with prior practice); *see also infra* notes 53-57 and accompanying text.

5. For representatives of this "agnostic" position, *see infra* notes 53-54 and accompanying text.

6. *See infra* Part II.A.3, especially notes 142-45 and accompanying text.

7. *See infra* Part II.

common source of these diverse perspectives on *Iqbal* (as well as of the *Iqbal* decisions themselves): a historical-legal narrative, internalized by legal academics and many judges, and providing the dominant vocabulary for contemporary discussions of pleading. This narrative and vocabulary date from the first third of the twentieth century; they depend on the premise that in order to be fair, efficient, and rational, civil pleading practices cannot be focused on the text of complaints. This premise was originally, and self-consciously, developed as part of a pragmatic approach to procedure. Indeed, early twentieth-century philosophical pragmatism influenced this legal framing of the function of civil complaints. But the version of pragmatism that shaped this legal narrative was a simplification of the original pragmatist vision, which had sought to develop an innovative vocabulary for the analysis of issues of meaning and interpretation. As pragmatism was adopted by nonphilosophical audiences, the philosophy lost this focus. In the process, it became difficult for those describing the function of pleading to acknowledge that trial court judges assessing the sufficiency of pleadings continued to treat these materials much as they treated other legally significant texts, even though earlier visions of pleading and procedure had recognized this connection. Together, these developments made it all but inevitable that something like *Iqbal* would come along eventually—and ensured that any such development would be difficult to accommodate within the prevailing vocabulary for discussing civil pleadings.

Part III considers some aspects of the new agenda that *Iqbal* makes possible when considered from this perspective. *Iqbal* is troubling to many because it seems to propose standards for the evaluation of civil complaints that are both formalistic and indeterminate. Commentators seeking to explain how to implement these standards have already turned to other areas of doctrine for models.[8] This Part argues that some of the best resources for focusing discussion of how to implement these standards may be found in the doctrine developed to guide various aspects of legal interpretation. Consideration of the *Iqbal* "conclusoriness" standard, for example, might usefully draw on the conception of default rules as information-forcing devices in contract law and on linguistic canons of statutory interpretation; implementation of the "plausibility" standard could productively be informed by the extensive work done to study a partly analogous doctrine con-

8. *See, e.g.*, Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 474-75 (2010) (recommending recourse to rules permitting discovery management); 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, 1226 (2008) (recommending recourse to summary judgment and removal doctrines); Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1455 (2010) (outlining parallels to doctrines for adjudicating motions for judgment as a matter of law and summary judgment).

cerning administrative agency interpretations of statutes. Moving our understanding of civil pleading in this direction would assuage concerns about the subjectivity of pleading scrutiny by allowing judges to tie their determinations of pleading sufficiency to established standards. It would also restore an important, and unnecessarily overlooked, dimension to our vocabulary for discussing civil pleading and civil procedure more generally.

II. THE *IQBAL* CONTROVERSY

Most of the controversy about *Iqbal* concerns the relationship of the decision to prior law, especially prior Supreme Court decisions. This Part outlines this legal background, then briefly describes the decision itself, and finally summarizes the positions commentators have taken on the wisdom of *Iqbal* and the reasons for the decision. It clarifies the main fault lines dividing responses to the decision, and it shows how these divisions seem irreconcilable within the prevailing vocabulary.

A. What Happened?

The Federal Rules of Civil Procedure became law in 1938, creating for the first time a uniform set of procedural directives for all United States federal trial courts. Rule 8 addresses the pleading of claims and defenses. Section (a)(2) of that Rule, unchanged since its original promulgation, provides that a party presenting a claim must, to state it successfully, offer "a short and plain statement of the claim showing that the pleader is entitled to relief."[9]

The Supreme Court first addressed the requirements of this Rule twenty years later in its 1957 *Conley v. Gibson*[10] decision. *Conley* arose from a suit filed by a group of African-American railroad union members against their union, which had failed to represent them after their employer abolished the plaintiffs' positions and replaced the plaintiffs with white employees.[11] The union defendant moved to dismiss the complaint on two grounds: exclusive jurisdiction of the dispute belonged with the National Railroad Adjustment Board, and the complaint failed to state a claim upon which relief could be granted. The lower courts approved dismissal on the first ground, but not on the ground of the complaint's insufficiency.[12] The Supreme Court, in a unanimous opinion written by Justice Black, held that the

9. FED. R. CIV. P. 8(a)(2). On post-1938 attempts to revise Rule 8, see Amber A. Pelot, Case Note, Bell Atlantic Corp. v. Twombly*: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1375 (2008).

10. 355 U.S. 41 (1957). On the details of the *Conley* case, see Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73 (2008).

11. *Conley*, 355 U.S. at 43.

12. *Id.* at 43-44.

complaint indicated that the core of the plaintiffs' claims was not a dispute over their collective bargaining agreement (an issue that would have been within the Board's exclusive jurisdiction) but an allegation of racial discrimination (an issue that would not be),[13] and further that the complaint could not have been properly dismissed on the alternative pleading ground, since it had "adequately set forth a claim upon which relief could be granted" under the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[14] The *Conley* plaintiffs had alleged that the union had protected white employees but not the plaintiffs, so they had alleged events that, if proven, would constitute a "breach of the Union's statutory duty to represent . . . without hostile discrimination all of the employees in the bargaining unit."[15] The Court also rejected the argument that the complaint was deficient because it "failed to set forth specific facts to support its general allegations of discrimination"[16]:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. . . . [A]ll the Rules require is "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. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to . . . define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.[17]

In the fifty years following this decision, courts quoted and relied on its "no set of facts" language more than 10,000 times[18] and cited *Conley* itself more than 40,000 times, making it the fourth most-cited Supreme Court case in American legal history by 2009.[19]

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13. *Id.* at 44-45.

14. *Id.* at 45-46 (citing Leimer v. State Mut. Life Assurance Co., 108 F.2d 302 (8th Cir. 1940)).

15. *Id.* at 46.

16. *Id.* at 47.

17. *Id.* at 47-48 (footnotes omitted).

18. *See* Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007).

19. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357-60 (2010) (providing table of 100 most-cited Supreme Court opinions "of all time"). As of March 17, 2010, *Twombly* had become the seventh most-cited case. *Id.* at 1357. It was the most-cited Supreme Court case between June 30, 2009, and March 17, 2010; during this period, *Iqbal* was the fourth most-cited case. *Id.* at 1360.

During this same half century, as a series of commentators noted starting in the 1990s, the lower federal courts' adherence to *Conley* was not uniform.[20] In certain kinds of actions, these courts appeared to demand more of complaints than *Conley* had. Responding to such observations, the Supreme Court reaffirmed the scope of *Conley* in a 2002 decision, *Swierkiewicz v. Sorema N.A.*[21] Akos Swierkiewicz, a reinsurance underwriter, had been demoted after six years of employment and replaced by a man decades younger and with far less experience.[22] In his complaint, Swierkiewicz alleged that his employer's actions had violated federal law prohibiting discrimination on grounds of national origin and age; his complaint was dismissed by the trial court for failure to "allege[] circumstances that support an inference of discrimination."[23] The Supreme Court, reversing in a unanimous decision written by Justice Thomas, characterized the supporting-circumstances requirement as "an evidentiary standard, not a pleading requirement"[24] and noted the Court's previous refusal to import standards for the assessment of evidence into the pleading phase.[25] The opinion also noted that,

> [I]mposing the . . . heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." . . . This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.[26]

The Court further noted that nine years earlier it had held that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation' "[27] and that "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits."[28] *Swierkiewicz* was widely taken to clarify that the

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20. *See generally, e.g.*, Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987(2003); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1998); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); *see also* Ryan Gist, Note, *Transactional Pleading: A Proportional Approach to Rule 8 in the Wake of* Bell Atlantic Corp. v. Twombly, 2008 WIS. L. REV. 1013, 1015-16, 1025-31.

21. 534 U.S. 506 (2002).

22. *Id.* at 508.

23. *Id.* at 509.

24. *Id.* at 510.

25. *Id.* at 511-12.

26. *Id.* at 512 (citing Conley v. Gibson, 355 U.S. 41, 47-48 (1957)).

27. *Id.* at 15 (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993), which reached a similar conclusion with respect to civil rights claims against municipal officials under 42 U.S.C. § 1983).

28. *Id.*

Conley standard supplied the only acceptable terms for use in analysis of the sufficiency of civil claims not governed by a rule or statute requiring more detailed pleading, as well as that a judge's contemplation of the likelihood of success of the plaintiff's claim was inappropriate on motions to dismiss.[29]

It was in light of this relatively recent precedent that the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*[30] appeared to depart markedly from the Court's established approach to pleading. The plaintiffs in *Twombly* were customers of regional telephone companies alleging that larger incumbent long-distance phone service carriers had violated federal antitrust law by conspiring to price their services so as to keep smaller competitors out of their respective markets.[31] In a decision written by Justice Souter, which held that these plaintiffs had not stated a claim for violation of the antitrust statute, the Court explicitly renounced the fifty-year-old "no set of facts" language from *Conley*.[32] Justice Souter justified "retirement" of this phrase largely based on his conclusion that courts and commentators using it had been misinterpreting *Conley* itself. Both *Conley*'s account of Rule 8(a)(2) and later courts' assumptions about *Conley*, he argued, had been unduly narrow.[33] According to Justice Souter, the famous *Conley* phrase was a gloss of only part of the text of Rule 8(a)(2), which requires not just a "short and plain statement" but also a "showing" of entitlement to relief. Such a showing, Justice Souter contended, could not be made "[w]ithout some factual allegation" in a complaint.[34] This observation was the basis for *Twombly*'s controversial requirement that to survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible

29. *See, e.g.*, Christopher Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002).

30. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

31. *Id.* at 550-51.

32. *Id.* at 562-63. In his opinion for the majority, Justice Souter observed that the *Conley* "no set of facts" language had "earned its retirement," *id.* at 563, after being "questioned, criticized, and explained away long enough," *id.* at 562. For discussions of the facts of *Twombly*, see Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Became (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 72-78 (2007) and 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, 625-36 (2007).

33. *Twombly*, 550 U.S. at 562-63.

34. *Id.* at 555 n.3 ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."). Justice Souter also argued that absurd consequences would flow from treating the *Conley* phrase as a free-standing principle: applying a "no set of facts" standard would seem to justify denying every motion to dismiss, making Rule 12(b)(6) meaningless. *See id.* at 561-62; *see also, e.g.*, Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 629 (2008).

on its face," or to "nudge [the plaintiff's] claims across the line from conceivable to plausible."[35]

Twombly prompted great controversy, much of which will be summarized shortly. But the scope of its holding was not self-evident. On the one hand, it explicitly rejected the famous *Conley* language, long considered the default standard for pleading federal civil claims. On the other, some language in *Twombly* suggested that the "plausible" standard might apply only to complaints asserting antitrust claims or initiating other types of complex litigation. The Court clarified these matters in *Iqbal*.

Iqbal arose out of events occurring shortly after the September 11, 2001 terrorist attacks; the plaintiffs were noncitizens alleging violations of their federal statutory and constitutional rights during their detention and imprisonment after September 11.[36] The defendants they named included then-Attorney General John Ashcroft and then-FBI Director Robert Mueller,[37] who, the plaintiffs alleged, crafted and directed discriminatory policies leading to the plaintiffs' mistreatment.[38] Ashcroft and Mueller successfully moved to dismiss the claims against them in 2005.[39]

In 2009, in a decision written by Justice Kennedy, the Supreme Court held that this dismissal had been proper under *Twombly*. The *Iqbal* decision confirmed that *Twombly* was not limited to particular types of actions.[40] It also elaborated on the implementation of the *Twombly* standard, describing a district court judge's assessment of the plausibility of a claim as "a context-specific task that requires the . . . court to draw on its judicial experience and common sense."[41] And it offered some more structured guidelines for analysis of complaints on motions to dismiss:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[42]

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

36. Iqbal v. Hasty, 490 F.3d 143, 147-49 (2d Cir. 2007).

37. *Id.* at 147.

38. *See, e.g.*, *id.* at 175 ("[T]he complaint alleges broadly that Ashcroft and Mueller were instrumental in adopting the 'policies and practices challenged here.' ").

39. *See id.* (citing Elmaghraby v. Ashcroft, No. 04 CV 1409, 2005 WL 2375202 (S.D.N.Y. Sept. 27, 2005)).

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

41. *Id.* at 1950.

42. *Id.*

While not presented as a mandatory scheme, this two-step framework outlines Justice Kennedy's approach to analysis of the *Iqbal* complaint; the majority opinion first identified certain allegations referring to Ashcroft and Mueller as "conclusory" and thus to be disregarded[43] before concluding that the remaining allegations did not plausibly support the inference that Ashcroft and Mueller acted with the required state of mind.[44] In this way, the analysis suggested not only that allegations consisting of "conclusions" may not be assumed to be true, but also that they should be treated as if they do not appear in the complaint when the court assesses the plausibility of the plaintiff's claim.[45] Dissenting, Justice Souter, author of the *Twombly* majority opinion, contended that the plausibility of a claim should be assessed based on consideration of the complaint as a whole; in his view, the majority's excision of "conclusory" allegations from the complaint robbed its remaining allegations concerning Ashcroft and Mueller of significance, and thus misconceived the inferences they supported.[46]

B. Should This Have Happened?

Twombly and *Iqbal* have generated a massive volume of commentary.[47] Most of the commentary is evaluative, identifying problems with the legitimacy or predicted implementation of the decisions or, less often, refuting such criticisms. Assuming the decisions do mark a significant legal change, some commentary also ventures explanations of the reasons *Twombly* and *Iqbal* might have been decided as they were. This Section focuses on the evaluative commentary on *Iqbal*; the next discusses efforts to explain the decision.

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43. *Id.* at 1951. For further discussion of this analysis, see Steinman, *supra* note 19, at 1308-10.

44. *Iqbal*, 129 S. Ct. at 1951-52.

45. *See also infra* notes 205-06 and accompanying text, for a discussion of district courts' citation of *Iqbal*'s equation of plausibility with reasonable inference.

46. *Iqbal*, 129 S. Ct. at 1960-61 (Souter, J., dissenting).

47. *See, e.g.*, sources discussed *supra* notes 2-8; *see also, e.g.*, Capital Report, *Congress Considers Impact of* Iqbal *and* Twombly *Rulings*, 46 TRIAL, Feb. 2010, at 10, 10 ("In December, the full Senate Judiciary Committee held a hearing . . . to discuss the impact of [*Twombly* and *Iqbal*]. . . . At the hearing, Senate Judiciary Chairman Patrick Leahy (D-Vt.) said the Supreme Court had 'abandoned' 50 years of precedent to enact 'judge-made law,' potentially denying justice to thousands of Americans.[Professor] Stephen Burbank . . . cautioned that the court's misguided decision will lead to a 'whole new brand of mischief' in which trial judges subjectively dismiss complaints.").

An exhaustive discussion of commentary on *Iqbal* would be voluminous and soon obsolete; as of March 6, 2011, Westlaw listed 769 articles citing *Iqbal* in law reviews and professional journals. More than half of these articles appear in professional journals, and many address the implications of the case for particular areas of law, such as employment discrimination and civil rights, or particular settings, such as bankruptcy proceedings and state court systems. The discussion in this Part does provide a comprehensive overview of the commentary treating *Twombly* and *Iqbal* in general terms as of the date of drafting.

In a recent article assessing responses to *Iqbal*,[48] David Noll noted that criticism of the decision tends to draw on arguments of three types: (1) a "Catch-22" argument that the decision disadvantages those plaintiffs least able to offer more factual detail in their pleadings (for example, consumers and victims of civil-rights violations); (2) a "judicial discretion" argument that the "plausibility" standard cannot be applied consistently and will lead to judicial abuse; and (3) an "illegitimacy" argument attacking the propriety of judicial revision of the *Conley* standard, especially in light of the Court's unanimous position in *Swierkiewicz*.[49] As Noll acknowledges, there is some overlap among these arguments. The argument that *Iqbal* licenses judicial discretion often accompanies the argument that judges will exercise that discretion to serve their personal visions of the claims that deserve to be litigated. The argument that the standard contravenes Rule 8(a)(2) may also be cast as an argument about the permissible bounds of judicial discretion. And the argument that the decisions are illegitimate sometimes takes the form of an argument that the "plausibility" standard violates Seventh Amendment limitations on trial judges' decisionmaking.[50] But Noll's breakdown accurately captures the general shape of criticism of *Twombly* and *Iqbal*. Before *Iqbal* was decided, the first two arguments (about the differential disadvantaging of certain plaintiffs and about subjectivity) appeared to be dominant.[51] After *Iqbal*, the third (the argument about illegitimacy) has become equally visible.[52]

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48. *See* David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117 (2010).

49. *Id.* at 120-21.

50. *See, e.g.*, Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards onto Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) (arguing that *Iqbal* "is unconstitutional when measured against the traditional . . . interpretation of the Seventh Amendment"); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 38 (2010) ("[T]he *Iqbal*/*Twombly* standard is unconstitutional.").

51. *See, e.g.*, Saritha Komatireddy Tice, Recent Developments, *A "Plausible" Explanation of Pleading Standards:* Bell Atlantic Corp. v. Twombly, *127 S. Ct. 1955 (2007)*, 31 HARV. J.L. & PUB. POL'Y 827, 827, 838 (2008) (emphasizing "leeway" given to lower courts and lawyers by *Twombly* and "uncertainty" it created); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433 (2008) (arguing that *Twombly* "will frustrate the efforts of plaintiffs with valid claims to get into court").

52. For examples of the Catch-22 argument, see Chemerinsky, *supra* note 3, at 291 (describing *Iqbal* as "the five conservative justices on the Court making it harder for those with claims to get access to the federal judiciary"), Brooke D. Coleman, *Recovering Access:Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 285 (2009) (reading decisions as "signal[ing] an attenuation of access as a guiding principle"), Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in* Ashcroft v. Iqbal, 62 FLA. L. REV. 951, 952 (2010) (arguing that decisions "place plaintiffs in a Catch-22"), and Schneider, *supra* note 4, at 519 ("[T]he greatest impact of this change . . . is the dismissal of civil rights and employment discrimination cases from federal courts.").

For examples of the discretion argument, see Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 535 (2009) [hereinafter Burbank, *General Rules*] (describing the standard as "an invitation to the lower courts to make ad

Noll's taxonomy helps to make the voluminous commentary on *Iqbal* comprehensible. But three other refrains are equally widespread in that commentary. First, many commentators, including Noll,[53] express agnosticism about the likely impact of *Twombly* and *Iqbal*.[54] They argue that it is too soon to know whether consequence-

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hoc decisions reflecting buried policy choices"), *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 252, 261 (2009) ("By imposing a probability requirement, the Court imposed its own view of the most likely explanation for a set of allegations—performing a role normally reserved for the factfinder—and invited lower courts to do the same."), Chemerinsky, *supra* note 3, at 291 ("What is plausible and credible to one district judge is not going to be plausible and credible to another."), Clermont & Yeazell, *supra* note 3, at 832 (criticizing *Iqbal* for "fix[ing] on a *novel* and *unpredictable* test"), Eichhorn, *supra*, at 953 (noting "the unbounded discretion that the opinion grants to judges"), Kilaru, *supra* note 3, at 919-20 (noting that decisions "give lower courts a tremendous power that they did not have before"), Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 26 (2010) (describing "judicial experience and common sense" as "highly ambiguous and subjective concepts"), Rajiv Mohan, Recent Development, *A Retreat from Decision by Rule in* Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)*, 33 HARV. J.L. & PUB. POL'Y 1191, 1196, 1197 (2010) (describing *Iqbal* holding as "highly discretionary"), Pardo, *supra* note 8, at 1466 (referring to "unprincipled discretion" licensed by decisions), Collyn A. Peddie, *Let's All Play* Iqbal, 46 TRIAL, Aug. 2010, at 54, 54 ("[D]efendants and some courts . . . see [in *Iqbal*] a Darwinian panacea that gives judges virtually unfettered discretion."), and Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35:3 LITIGATION 1, 2 (2009) ("*Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses . . . based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success.").

For examples of the illegitimacy argument, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 883-84 (2010) (arguing that the Supreme Court "is not in a good position to gather and process" the information needed to determine the optimal stringency of pleading standards); Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1191-92 (2010) [hereinafter Burbank, *Future*] (arguing that *Iqbal* "ignored the requirements of the Enabling Act and [the Court's] own prior decisions"); Clermont & Yeazell, *supra* note 3, at 832 (criticizing the Court's "follow[ing] a *disruptive* legal process in . . . altering a defining feature of the litigation system"); Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 155 (2009), http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf (arguing, in contribution by Burbank, that decisions cannot be described as interpretations of Rule 8(a)(2)).

53. Noll, *supra* note 48, at 122, 147, 149 (concluding that "the answer to the question 'What do we know about the *Iqbal* model?' is 'Not much' " and that *Iqbal* is likely a "watershed opinion[] whose deep logic only gradually becomes clear and whose language fails to capture that deep logic").

54. *See, e.g.*, Mark Anderson & Max Huffman, Iqbal*,* Twombly*, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1, 1 (2010) (noting that "real world" operation of standard "is poorly understood"); Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 448 (2010) (noting that implications of *Iqbal* remain unclear); John G. McCarthy, *An Early Review of* Iqbal *in the Circuit Courts*, 57 FED. LAW, May 2010, at 36, 36-37 ("Opinions issued by many . . . circuit courts in which *Iqbal* is discussed or analyzed arrive at the same result that would have been reached under prior case law."); Colin T. Reardon, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2181-82 (2010) (suggesting that cases involving "severe information[al] asymmetries" may be rarer than many critics contend); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v.

focused criticisms of the decisions (the possibilities that they might disadvantage certain classes of plaintiffs and be applied unpredictably) are well-founded. In addition, more than a few critical and agnostic responses stress not the implications of the decisions in the abstract, but decisional techniques that litigants and courts might use to cabin any potential adverse effects.[55] The position of these observers is that *Iqbal* and *Twombly* need not make a big difference in practice, regardless of their implications in theory. And with apparently increasing frequency, some have been arguing that *Twombly* and *Iqbal* are defensible in theory as well as in practice, either because they represent sound solutions to problems arising from changes in civil litigation over the past fifty years[56] or because

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Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (concluding, based on a study of district court decisions in the seven months following *Twombly*, that it "appears to have had *almost* no substantive impact," except in civil rights cases, where the decisions "show a significant departure" from prior patterns); Michael R. Huston, Note, *Pleading With Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 427 (2010) (arguing that decisions "have not dramatically increased the number of cases dismissed in federal court for failure to state a claim").

55. *See, e.g.*, Bone, *supra* note 52, at 851 (urging consideration of "*Twombly*'s virtues without the taint of *Iqbal*'s vices"); Stephen B. Brown, *Reconstructing Pleading:* Twombly, Iqbal*, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1267 (2010) ("[M]uch of this criticism [of the decisions] is unjustified because it overlooks the analytical steps that occur before the plausibility inquiry"); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 1998 (2010) (proposing a "plaintiff neutrality principle" for use in implementing standard); Hartnett, *supra* note 8, at 474-75 (emphasizing "*Twombly*'s connection to prior law and suggest[ing] ways in which it can be tamed"); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 70 (2010) ("[T]rial courts . . . should consider narrow, targeted discovery to determine plausibility at the pleading stage."); Seiner, *supra* note 4, at 181 (offering "an analytical framework for asserting the essential facts of a Title VII claim"); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 5 (2009) ("[T]he . . . defining principle of contemporary pleading doctrine is the requirement that a complaint . . . describe events about which there is a *presumption of impropriety*."); Allan R. Stein, *Confining* Iqbal, 45 TULSA L. REV. 277, 277 (2009) (urging "a limiting construction [of *Iqbal*] that may serve to constrain its impact beyond its peculiar context"); Steinman, *supra* note 19, at 1298, 1314, 1324-25 ("[T]he primary inquiry at the pleadings phase is not a claim's 'plausibility,' but rather whether a necessary element of a plaintiff's claim is alleged in the form of a 'mere legal conclusion.'").

56. *See, e.g.*, Hartnett, *supra* note 8, at 474-75 (suggesting that a "tamed *Twombly*" is consistent with "broader trends toward managerial and discretionary judging"); Herrmann, Beck & Burbank, *supra* note 52, at 147 (maintaining, in contribution from Herrmann & Beck, that "given the enormous transaction costs that litigation entails, Type II errors (false negatives[, disadvantaging plaintiffs with weak but meritorious claims]) are probably preferable to Type I errors (false positives)"); *id.* at 157 (arguing that "[t]he discovery system is, in fact, broken") (quoting INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (2008), *available at* http://druganddevicelaw.net/ACTL%20Discovery%20Report.pdf; Kenneth S. Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 468 (2010) (arguing that *Iqbal* may "be the necessary impetus to revisit . . . the way we interpret the Seventh Amendment's preservation of a

they are more faithful to the original vision of Rule 8(a)(2) and *Conley* than were intervening decisions such as *Swierkiewicz*.[57] This perspective casts the decisions as eminently practical and critics as unduly formalist.

Noll also does not seek to explain—or to describe how others have explained—the reasons *Twombly* and *Iqbal* might have been decided as they were. Such explanations are often implicit in particular criticisms or defenses of the decisions, most of which are based on particular normative visions of judicial decisionmaking. For example, a conclusion that *Iqbal* is problematic because it disadvantages information-poor plaintiffs can fit well with an account of *Iqbal* as more or

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right to a jury trial"); Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 246 (2010) ("In hindsight . . ., removing the issue-narrowing function [of the common-law system] from pleadings has proven to be a serious mistake. . . . [A] move to fact-based pleading need not upset the general structure and values of the existing pretrial process."); Ressler, *supra* note 4, at 632 (contending that "*Twombly*[] . . . offers an excellent solution to the problem of inefficient and costly personal jurisdiction determinations"); Schwartz & Appel, *supra* note 4, at 1110 (concluding that broadnotice pleading has "rightfully 'earned its retirement'" and that state courts should follow plausibility standard); Smith, *supra* note 4, at 1055 (arguing that *Iqbal* "is likely to increase the efficiency and fairness of modern civil practice"); Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 340-42 (2010) (arguing that before decisions, district court judges "regularly err[ed] in deciding Rule 12 dismissal motions," often "giv[ing] credence to incredibly weak legal arguments and factual assertions"); Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 DENV. U. L. REV. 407, 407-08 (2010) (noting "deep flaws" of the pre-*Twombly* regime).

57. *See, e.g.*, Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 1 (2010) (arguing that the *Twombly* decision was "not revolutionary, but simply part of the Court's ever-expanding application of the familiar three-factor *Mathews v. Eldridge* test"); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 455 (2010) ("America may be moving toward the global norm by experimenting with more rigorous fact pleading and dispensing with mere notice pleading."); Herrmann, Beck & Burbank, *supra* note 52, at 146 (arguing, in contribution from Herrmann & Beck, that decisions "are right on the law," since "the better-reasoned decisions did not credit ["labels," "conclusions," and "formulaic recitations"] even under *Conley*"); Hillel Y. Levin, Iqbal, Twombly*, and the Lessons of the* Celotex *Trilogy*, 14 LEWIS & CLARK L. REV. 143, 144 (2010) (arguing that both sets of decisions "are best viewed as lag indicators (albeit imperfect ones) of what had been going on in the lower courts for years"); Darrell A.H. Miller, Iqbal *and Empathy*, 78 UMKC L. REV. 999, 1005 (2010) ("*Iqbal* . . . lays bare both the fact that pleading doctrine is a form of 'choice architecture' and that the materials used to build that architecture [legal doctrine and language] are seriously, and ineluctably, deficient."); Pardo, *supra* note 8, at 1485 (concluding that decisions are consistent with proposed "unified theory of civil litigation," implicit in prior doctrine and practice); Pocker, *supra* note 4, at 38 ("[I]t is hard to see how the analysis now required is any more subjective or capable of prolonging dubious litigation than was the *Conley v. Gibson* process."); Smith, *supra* note 4, at 1055 (arguing that *Iqbal* is "consistent with the text of Rule 8, giving effect to the language that in the past had often lain dormant"); Spencer, *supra* note 55, at 5 ("[B]y bringing fact pleading out of the shadows . . ., the Supreme Court has made it possible . . . to discuss pleading doctrine without having to contend with the pesky contradictions between . . . high-minded rhetoric about notice pleading and the reality on the ground of particularized pleading."); Adam McDonnell Moline, Comment, *Nineteenth-Century-Principles for Twenty-First-Century Pleading*, 60 EMORY L.J. 159, 163 (2010) (arguing that decisions "mark a return to the original meaning of the Rules").

less consciously intended to disadvantage exactly those plaintiffs. Articulating a similar point before *Iqbal* was decided, Lonny Hoffman has suggested that commentators' ideological commitments to particular visions of procedural reform drive their descriptions of the significance of pleading doctrine.[58] But as the next Section suggests, this explanation of commentators' disagreements is not completely satisfying, given that commentators themselves tend to explain the emergence of the new pleading standards in an analogous way.

C. Why Did This Happen?

Why did the Court decide *Iqbal* as it did? As this Section will detail, most of the explanations advanced to date rest on a legal realist-influenced assumption that the decision was to some extent pretextual. Some focus on the extraordinary nature of the dispute at issue in the case. Most, however, explain *Iqbal* as a stealth reform of the civil litigation system, intended to achieve systemic goals not discussed in the decision itself.

More than a few observers have suggested that the sensational facts in Iqbal's case might have swamped the Justices' consideration of the broader implications of their decision. On this account, the majority Justices were blinded to the technical implications of the case by their biases against Javaid Iqbal, a noncitizen, and in favor of Ashcroft and Mueller, as well as by a reluctance to second-guess high-level executive national security decisions.[59] While the hot-

58. Hoffman described a basic ideological split among commentators on pleading reform that remains valid after *Iqbal*. Some commentators are "Traditionalists," holding "that robust efforts to regulate [litigation] at the pleading stage are wrongheaded and inconsistent with the traditional pleading standard" expressed in *Conley*; others are "Reformists," who "favor . . . an expanded judicial role" in regulating civil litigation and whose approach appears to be reflected in *Twombly*. Hoffman, *supra* note 8, at 1225. *See also* Robert D. Owen & Travis Mock, *The Plausibility of Pleadings After* Twombly *and* Iqbal, 11 SEDONA CONF. J. 181, 181 (2010) (noting emphasis of commentary on "broad range of theories and narratives, which often appear to be shaped by the authors' pre-existing beliefs about the proper role of pleadings in federal civil litigation").

Noll does not explore in depth the reasons for the *Iqbal* decision. *See, e.g.*, Noll, *supra* note 48, at 132 (arguing that the "open texture" of *Iqbal* is "the product of a number of factors, some . . . inherent in the project of laying down general standards, . . . others . . . linked to how the Court reintroduced factual screening into federal practice").

59. *See, e.g.*, Michael C. Dorf, Iqbal *and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 218-19 (2010) (focusing on how *Iqbal* "puts the imprimatur of the Supreme Court on a particular narrative of the excesses carried out by the Bush Administration in the name of fighting terrorism"); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 227 (2009) ("*Iqbal* illustrates one side of the relationship between national security case law and the larger domain of public law: Emergencies are opportunities for sweeping doctrinal and functional changes affecting many subject matters."); Sidhu, *supra* note 4, at 423 (arguing that *Iqbal* "may be one of the most infamous and harmful [opinions] to American jurisprudence and individual rights of this generation"); Stein, *supra* note 55, at 277 (arguing that *Iqbal* "lends itself to a much narrower construction," based on "[t]he substantive law controlling the defendants' immunity").

button nature of the dispute surely had some relation to the Court's decision to review it and to the Justices' attitudes toward Iqbal's complaint, this explanation seems too simple, since it requires us to assume that these aspects of the case entirely overcame the Justices' ordinary conceptions of their roles.

Others explain the decision as a pretext not for the exercise of animus against noncitizens or solicitude for executive-branch officials, but for sweeping reform of the civil litigation system. Some commentary thus explains the *Twombly* and *Iqbal* decisions as motivated by a desire to deter suits by "outsider" parties presumed more likely to initiate harassing litigation, be they consumers (as in *Twombly*), aliens (as in *Iqbal*), or putative victims of civil-rights violations (as in *Iqbal* and *Swierkiewicz*). This explanation also assumes that the Justices' biases drive their legal reasoning, but it views that bias as one favoring "insider" parties like government entities, large corporations, and defendants in general, while disfavoring "outsider" parties. It often accompanies critiques of *Iqbal* on grounds of illegitimacy and the creation of a Catch-22 for plaintiffs.[60] Other commentary explains the decisions not as driven by animus per se but as efforts to disguise broad procedural reform—aimed especially at reducing the costs of civil discovery—as a modest readjustment of pleading standards.[61] This argument, however, is in some

60. *See, e.g.*, Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875-77 (2009) (describing *Twombly* as focused on "prevent[ing] undesirable lawsuits from entering the court system"); Scott Dodson, Essay, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. (IN BRIEF) 135, 138 (2007) (suggesting that *Twombly* was motivated by goal of "[s]afeguarding defendants from meritless strike suits"); Helen Gunnarsson, Iqbal*: A "Dangerous" Tightening of Federal Pleading Standards?*, 97 ILL. B.J. 602, 602 (2009) ("Professor Stephen B. Burbank . . . was quoted in The New York Times as saying *Iqbal* is 'a blank check for federal judges to get rid of cases they disfavor.' "); Jois, *supra* note 3, at 901 (describing *Iqbal* as exemplifying "the invention of procedural rules to significantly curtail the availability of remedies in civil litigation"); Marcus, *supra* note 4, at 412 (suggesting that decisions "bespeak hostility to the underlying substantive claims"); Miller, *supra* note 52, at 53 (describing decisions as "motivated in significant part by a desire to develop a stronger role for motions to dismiss to filter out a hypothesized excess of meritless litigation, to deter allegedly abusive practices, and to contain costs"); Schneider, *supra* note 4, at 518 (arguing that decisions are attributable in part to "widespread and generalized 'hostility to litigation' " at every level of the federal judiciary); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 197 (2010) ("[T]he *Iqbal* majority's new fact skepticism . . . derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders."); Steinman, *supra* note 19, at 1299 (noting that decisions "appear to be result-oriented decisions designed to terminate . . . lawsuits that struck the majorities as undesirable"); Tice, *supra* note 51, at 827 (noting that *Twombly* "signals a growing hostility toward litigation"); Bravin, *supra* note 2, at A8 (quoting Richard Samp of the Washington Legal Foundation as stating that the Court decided *Iqbal* as it did because it "is sort of fed up with excesses in the tort system and is looking for ways to try to eliminate frivolous lawsuits").

61. *See, e.g.*, Blair-Stanek, *supra* note 57, at 1 (arguing that *Twombly* was "part of the Court's ever-expanding application of the familiar three-factor *Mathews v. Eldridge* test" to discovery costs); Miller, *supra* note 52, at 53 (describing decisions as "motivated . . . by a

tension with criticism of the *Twombly*/*Iqbal* standard as licensing boundless discretion, since the Justices have no way to ensure that district court judges will share their visions of the appropriate direction of reform.[62] Overall, the realist vision of the decisions as pretextual attributes to judges ignorance of the very phenomenon that is so obvious to commentators; although there is surely some truth in such explanations, they are less than fully satisfying. Even some of the explanations acknowledging that *Iqbal* and *Twombly* must have stemmed from more complex motivations attribute the details of the standard to a regrettable judicial habit of clothing motivations in neutral doctrinal garb[63] or to hubris resulting from the Justices' inexperience with trial court-level decisionmaking.[64]

A few explanations decline to take this realist approach. They cast *Twombly* and *Iqbal* as relatively straightforward responses to changes in federal civil litigation.[65] The rest of this Article considers a distinct

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desire to develop a stronger role for motions to dismiss to . . . contain costs"); Reardon, *supra* note 54, at 2178 (noting that "[p]lausibility pleading" "arose out of" concerns with discovery costs); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 227 (2010) (noting that decisions were driven "in part[by] a concern that discovery is so expensive and burdensome that pleadings must be found sufficient before discovery is allowed to begin"); Smith, *supra* note 4, at 1055 (arguing that *Iqbal* marks a "recogni[tion] that, as the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases"); Subrin, *supra* note 4, at 390 (characterizing standards as motivated partly by "[t]he expense of discovery in federal court").

62. *Cf.* McCarthy, *supra* note 54, at 37 ("After eight months . . ., it appears that[] in most circuits the *Iqbal* decision will not change the result reached in most cases.").

63. *See, e.g.*, Spencer, *supra* note 51, at 468 ("Perhaps by ridiculing the statement in *Conley* as some crazy old relative that had long been viewed derisively by most members of the family, the Court was able to conceal the magnitude of what it was doing . . . and to get away with not making any effort to articulate the compelling justification ordinarily required for departures from stare decisis."); *see also* Edward Brunet, *The Substantive Origins of "Plausible Pleadings",* 14 LEWIS & CLARK L. REV. 1, 14 (2010) (arguing that Court's use of "plausible" term was "misguided and only continues to confuse what is already a less than clear standard"); Burbank, *General Rules*, *supra* note 52, at 535 (arguing that the Supreme Court should "forthrightly require fact pleading as a matter of substantive federal common law"); Eichhorn, *supra* note 52, at 953 ("[B]y drawing on a metaphor of judging-as-measuring, the Court invests its new plausibility test with the appearance of objective consistency, and in so doing, deflects attention from the unbounded discretion that the opinion grants to judges who will administer that test from now on in the lower courts.").

64. *See, e.g.*, Edward D. Cavanaugh, Twombly*, The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 882-89 (2008) (arguing that *Twombly* showed Court to be "out of touch with the judicial system that it is charged with managing"); Clermont & Yeazell, *supra* note 3, at 850 (arguing that the "opinions . . . smack more of confusion than of political motivation"); Miller, *supra* note 57, at 1006 (arguing that *Iqbal* "seems largely uninformed by psychological evidence detailing the way in which human beings—including judges—assess likelihoods"); Reinert, *supra* note 4, at 946 (arguing that *Iqbal* evinced "the Court's profound mistrust of lower courts' ability to use their case management power to balance concerns like qualified immunity and abusive discovery," thus representing "a shift in power within the judiciary").

65. *See, e.g.*, Levin, *supra* note 57, at 144 (arguing that decisions "are best viewed as lag indicators (albeit imperfect ones) of what had been going on in the lower courts for

and novel explanation for the decisions, one that also declines to attribute to the Justices motivations that are not apparent from the *Iqbal* opinions themselves. The Justices deciding *Iqbal*, when faced with the question of the significance to be attached to the allegations in Iqbal's complaint, honestly struggled with that question and cast their answers in terms indicating that they saw their struggles as involving interpretation of the complaint as a text. The Justices' differing conclusions were, to be sure, colored by their presuppositions about human behavior both in and outside the civil litigation system, but those conclusions were also colored by the Justices' divergent understandings of the practice of textual interpretation. The Justices did not clearly describe the problem in these terms, however. They did not do so for the same reason that commentators, even when recognizing that the decision involved and licensed a kind of textual interpretation, have been reluctant to pursue the implications of this observation. The Justices and commentators alike have grown up within, and had their vocabularies shaped by, a procedural vision that represses the role that textual interpretation plays in the early stages of civil litigation.

III. PRAGMATISM AND INTERPRETATION IN PROCEDURAL DOCTRINE

The view of *Twombly* and *Iqbal* advanced here is in some respects counterintuitive. Accepting it requires a critical perspective on a powerful legal-historical narrative that most academic commentators and many judges embrace and endorse: what this Article calls the standard story of pleading. The origins of this narrative lie in the adoption of a particular philosophical and social vision—the pragmatic vision—by those responsible for shaping the federal civil legal system in the United States during the first several decades of the twentieth century. When this vision was taken up by lawyers and particularly by proceduralists, important aspects of its originator's thought had already been repressed—specifically, a concern with the analysis of meaning (including, but not limited to, the special case of verbal meaning). Because today's neo-pragmatism and legal pragmatism descend from this simplified pragmatic vision, they too look very little like pragmatism in its earliest form. That richer pragmatic vision holds much of value, as is shown by subsequent work drawing on it in other legal areas. In particular, it supports a thicker, more accurate description of many of our common experiences, including our experiences with legal communication and norm development. As this Part shows, *Iqbal* is a natural, if not exactly predictable, result of all of these developments. Many judges have long implicitly recognized the

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years"); Moline, *supra* note 57, at 163 (arguing that decisions "mark a return to the original meaning of the Rules").

role of interpretation in screening pleadings, but neither judges, litigants, nor commentators have had access to a vocabulary for expressing that recognition. This conceptual impoverishment breeds unnecessary discomfort with the notion that judges' activity with respect to complaints might most accurately be conceived as interpretive.

A. The Return of Pragmatism's Repressed

Fleshing out the sketch offered in the previous paragraph, this Section considers, first, the standard story of pleading that is now so widely accepted as legally authoritative, then the simplification of pragmatism that occurred around the time this story was formulated and that shaped later understandings of procedure and legal interpretation, and finally the ways this simplification has affected the doctrine and commentary discussed in Part I.

1. The Standard Story of Pleading

A chief architect of the standard story of pleading was Judge Charles E. Clark, who was the drafter of the Federal Rules of Civil Procedure and, as such, was responsible for the account of prior pleading regimes presupposed by the pleading portion of those Rules.[66] In his writing on this topic, Clark split the history of pleading practices into three phases, progressing from common-law or "issue" pleading through nineteenth-century code or "fact" pleading and culminating in the more practical "notice" pleading that Clark championed in the early twentieth century. In Clark's description, the progression through these phases involved a gradually decreasing "emphasis . . . [on] the pleading stage of the trial," in accordance with what Clark presented as a natural tendency of maturing legal systems.[67] It is only a slight overstatement to say that this story has been universally accepted by subsequent proceduralists.[68]

Clark was critical of the first chapter in his story, that of common-law pleading. In early modern England, where this regime developed,

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66. On Clark's contribution to the drafting of the Federal Rules, see especially David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 448-501 (2010); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961-73 (1987). Marcus provides a comprehensive bibliography of Clark's writings on civil procedure, including pleading topics (on which Clark wrote a great deal), at Marcus, *supra*, at 435 n.1, and concludes that Clark would have found *Iqbal* "an anathema," *id.* at 507. This Article agrees but provides a slightly different explanation of why. Its account of Clark's narrative draws heavily on CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (2d ed. 1947).

67. CLARK, *supra* note 66, at 12 (noting a parallel between tendency in Roman law to reduce emphasis on pleadings over time and similar tendency in Anglo-American legal systems).

68. *See infra* Part III.A.3, especially notes 133-37 and accompanying text.

a plaintiff hoping to initiate a civil action had to "procure[] a writ" from the chancery clerks; the writs available were limited to a specific, fixed set of "forms of action" that grew only slowly and haphazardly to accommodate new kinds of disputes.[69] Once a writ had been obtained, the issues for decision by the court were identified through a back-and-forth exchange of further pleading documents that placed a premium on esoteric drafting skills.[70] The fatal flaws of common-law pleading, according to Clark, were its extreme formalism and the substantive injustices this formalism engendered.[71] In Clark's account, the formal meaninglessness of common-law pleadings was the flip-side of their functional excess of significance for the litigation process (although Clark did not cast his critique of the process explicitly in terms of "meaning").

Clark was less dismissive of code or fact pleading, the second chapter in his story. The mid-nineteenth-century New York civil procedure code that supplied the prototype for this regime[72] absorbed the more free-form regime of equity pleading favored by Clark[73] and replaced claim-specific pleading requirements with the general requirement that every civil complaint contain just a statement of the facts constituting the cause of action.[74] But as courts began to use this statutory language to explain their conclusions about the sufficiency of particular pleadings, the standard's apparent simplicity broke down. Trial court judges reached different conclusions about whether identical allegations were "statements of fact," as required

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69. CLARK, *supra* note 66, at 14-15.

70. Thus, Clark wrote,

> the common-law system was limited in the extent of the relief which it could grant and the manner of granting it to the arbitrary units comprising the forms of action. Coupled with this were the refinements enforced to induce the production of an issue [for trial], resulting in a highly technical system which afforded none too complete relief.

Id. at 15.

71. Echoes of Clark's assessment of common-law pleading as formalist appear throughout recent commentary. *See, e.g.*, Jason G. Gottesman, Comment, *Speculating as to the Plausible: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 976 (2008) ("Pleading in [the common-law] system was full of dangerous pitfalls for careless lawyers. The formalistic and repetitious requirements created a situation where the slightest error in pleading would cause the dismissal of the action."); Hannon, *supra* note 54, at 1812 (explaining that "[a]t its early common law stage, pleading in the United States was formalistic to the point of 'subordinat[ing] substance to form'").

72. *See, e.g.*, CLARK, *supra* note 66, at 23-31; *see also* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 506 (2000) (explaining that by 1897, thirty-one states had enacted civil procedure codes modeled on the New York code).

73. CLARK, *supra* note 66, at 16-17, 32-33.

74. *See, e.g.*, Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520 (1957) ("[The] New York Code of 1848 sought only simple truthful statements of the facts showing that there was a cause of action.").

by the code standard, or "evidentiary facts" or "conclusions of law," which some courts prohibited.[75] Courts also reached different conclusions about the nature of a "cause of action," and this was the aspect of the debate that most engaged Clark.[76] His relative lack of interest in the "statement of facts" debate is revealing, since that debate, as conducted by academic commentators of the era, directly concerned verbal meaning and interpretation.[77] One side of the "statement of facts" controversy urged that the difference between facts and legal conclusions was purely conventional, a matter of judicial habits of classifying more general allegations as legal and more particular ones as factual,[78] based on judges' exposure to prior similar classifications.[79] The other side of the debate insisted on an essential "logical" distinction between factual allegations and legal contentions, the latter containing technical legal language, the former only everyday or "common language."[80] Both sides agreed, however, that understanding pleading requirements required understanding the mechanics of verbal communication and comprehension.[81] For both sides, analyzing the sufficiency of pleadings required a self-conscious focus on the language used in the allegations in a complaint.[82]

As mentioned above, Clark mostly steered clear of this debate.[83] Preferring to focus on problems with the concept of a "cause of action,"

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75. In particular, see Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) [hereinafter Cook, 1921], and Walter Wheeler Cook, *'Facts' and 'Statements of Fact*,*'* 4 U. CHI. L. REV. 233, 233-35 (1936) [hereinafter Cook, 1936].

76. *See, e.g.*, CLARK, *supra* note 66, at 129-38.

77. The "statement of facts" debate was conducted mainly between Walter Wheeler Cook, a colleague of Clark's at Yale, and Bernard Gavit, then dean of the Indiana University School of Law, who also participated in the "cause of action" debate. *See especially* Cook, 1936, *supra* note 75; Bernard C. Gavit, *Legal Conclusions*, 16 MINN. L. REV. 378 (1932).

78. Cook, 1921, *supra* note 75, at 417 (arguing that there is "no logical distinction" between statements of fact and conclusions of law).

79. *See id.* at 420-21; Cook, 1936, *supra* note 75, at 243-45.

80. Gavit, *supra* note 77, at 389, 391.

81. Cook developed this theme in greater detail than Gavit did. The articulation of a claim in a complaint, he argued, occurred at the end of a process of abstraction from the world of physical stimuli, involving a matching between simplified sense experiences and a set of linguistic schemata based on the perceiver's experiences, education, and purposes. Cook, 1936, *supra* note 75, at 238-40. A similar process occurred, according to Cook, when a judge deemed allegations factual or legal. *See id.*

82. *Id.* at 236 (insisting that that issues of pleading are linked to issues of the "meaning of words and how words get their meaning"); Gavit, *supra* note 77, at 378-87 (discussing ambiguity between common and legal meaning of terms and relationship of legal form, or vocabulary, to legal substance, or meaning).

83. To be sure, Clark endorsed Cook's position. *See, e.g.*, Charles E. Clark, *Walter Wheeler Cook*, 38 ILL. L. REV. 341, 343 (1944) (describing Cook's statement-of-fact articles as "outstanding"). But in complimenting Cook, Clark also expressed his impatience with the debate itself, which he considered "trite" and full of "pseudo learning" (albeit not in Cook's analysis). *Id.* It is not entirely clear that Clark cared to grapple with the details of Cook's position in this debate. *See also infra* note 84. Thanks to David Marcus for bringing

Clark urged courts, litigants, and commentators not to focus on the abstract essence of such causes of action—as common-law pleading had done with the analogous forms of action—but to focus on the *function* of pleading in general as a vehicle for furthering "trial convenience"[84]:

> This . . . is avowedly a flexible and loose definition of the term ["cause of action"]. No ready yardstick is offered a court; but, except where aided by previous precedents, it is forced to use its discretion, having in mind the purposes to be subserved. This is frankly placing the matter in the hands of the judge and seems much preferable to the seeming exactness of many definitions which turns out to be mere delusion. It seems better to compel a court to support its decision on procedural points by arguments based on practical trial conditions than upon arbitrary formal distinctions read haphazardly into vague phrases.[85]

The last sentence of this passage makes especially clear how Clark's critique of fact pleading, unlike the "statement of facts" debate, deemphasized attention to details of communicative form. In general, Clark seemed frustrated by debates over textual meaning, preferring to think of the judge's task at the pleading stage as a matter of discretionary consideration of the "facts" asserted by the plaintiff (the express or implied referents of the plaintiff's allegations), not of the plaintiff's specific verbal presentation of those facts (the language in the complaint).[86]

This distaste for thinking of pleadings as texts deeply affected subsequent accounts of pleading. It is evident, for example, in the Federal Rules' approach to pleading. The Rules represented Clark's solution to the problems of the code pleading regime and marked the beginning of the third chapter in his story: the notice pleading era. Federal Rule of Civil Procedure 8, governing pleadings, contains no reference to "statements of facts" and thus made irrelevant debates over the nature of complaint language of the kinds summarized above. *Conley* also reflected Clark's vision of the function of complaints and the trial judge's role in reviewing them: under *Conley*, at least in theory, plaintiffs did not need to worry about whether their allegations were factual, evidentiary, or legal, nor about whether they identified legally recognized rights in their pleadings.[87] The

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this article to my attention.

84. CLARK, *supra* note 66, at 137; *see also* Clark, *supra* note 83, at 343 ("[T]he modern highly successful trend to simplified pleading is built upon Cook's demonstration that these abstractions [statements of fact and law] were not absolutes, only at most differences of degree, which should turn not on formalistic rules, but on the need or convenience of the business in hand, and the amount of persuasive pressure the pleader desires presently to apply."); Bernard Gavit, *A "Pragmatic Definition" of the "Cause of Action"?*, 82 U. PA. L. REV. 129 (1933) (criticizing position taken by Clark and others on this point).

85. CLARK, *supra* note 66, at 138.

86. *See, e.g.*, *id.* at 129; *see also supra* note 84.

87. *See supra* notes 10-19 and accompanying text; *see also, e.g.*, Steinman, *supra* note

Conley standard appeared to reassign the basis for judicial decision regarding the sufficiency of pleadings from characteristics of the pleadings as documents to the judge's assessment of the type of proceeding likely to follow.[88] In later work, Clark explicitly endorsed the standard articulated by the Court in *Conley*.[89]

Well before *Twombly* (and before *Swierkiewicz*), commentators recognized that not all federal courts were actually treating complaints in this way.[90] In some kinds of cases (as in *Swierkiewicz*, at the lower court levels), some courts required plaintiffs to plead in specific ways in order to survive motions to dismiss.[91] But the commentary critical of these practices did not recommend a return to understanding pleadings as texts in need of structured explication.[92] The prevailing position remained the Clark-*Conley* assumption that the complaint as a text should function as a transparent window into more important features of the dispute: that judges should look through the paper complaint to the events alleged in it, the defendant's imputed awareness, and the kind of trial proceedings implied by these facts, and that judges should base decisions about pleading sufficiency on conclusions about such underlying or projected facts, not on features of the pleading documents.

The skeptical commentators were correct that the Clark-*Conley* conception of notice pleading was never an accurate account of what litigants and courts were actually doing with complaints. But this was not merely because judges treated complaints differently depending on the substantive law involved, the judges' preconceptions, and the inconsistent signals sent by other sources of legal authority, as the commentators stressed. It was also because, even in simple, everyday cases, judges (and parties arguing motions to dismiss) did indeed have to analyze the text of complaints; judges always had to try to identify the claims presented by plaintiffs in their complaints and to assess whether the complaints included verbal formulations directly or indirectly relating to the required components of the identified claims.[93] All along, courts were interpreting complaints as well

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19, at 1300 (referring to "the liberal approach [to pleading] that governed during the first several decades of the Federal Rules of Civil Procedure").

88. *See, e.g.*, Marcus, *supra* note 66, at 481-95.

89. *See, e.g.*, Charles E. Clark, *Special Pleading in the "Big Case"?*, 21 F.R.D. 45 (1957), *reprinted in* PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK 147 (Charles Alan Wright & Harry M. Reasoner eds., 1965).

90. *See generally* sources cited *supra* note 20.

91. *See, e.g.*, *supra* notes 21-23 and accompanying text.

92. *See, e.g.*, Fairman, *supra* note 20, at 1059 (attributing irregular adherence to *Conley* to doctrinal confusion and inconsistent messages from Supreme Court); Hazard, *supra* note 20, at 1672 (suggesting that more detailed pleading is appealing to litigants for practical reasons); Marcus, *supra* note 20, at 1750-52 (similar).

93. Some deny that this kind of analysis occurs. *See, e.g.*, Fairman, *supra* note 20, at 1001; Sherwin, *supra* note 10, at 75, 84, 94. But most acknowledge that something like it is

as the law, even though Clark had strongly suggested that this was unnecessary and counterproductive. The variability of practice under *Conley* was a product of this more basic fact as much as it was a result of headstrong judges' decisions to single out certain cases for special treatment.

Yet Clark's account of the ideal function of pleadings retains a strong hold on contemporary understanding of the issue. Clark's three-part history remains the standard framework for the history of pleading in all American civil procedure casebooks and virtually all law review articles on procedure.[94] This history is explicitly teleological. It presents the passage from code to notice pleading as an unqualified improvement, and a key aspect of that improvement is the renunciation of any concern with the form of pleadings. Clark himself identified as "pragmatic[]"[95] this focus on pleading as "a means to an end," rather than "an end in itself."[96] The next Section explores why he might have chosen this label for his conception of pleading and how this choice is related to his insistence that the form of complaints is irrelevant to their sufficiency.

2. The Simplification of Pragmatism

Clark's distaste for questions of verbal meaning was not just a personal quirk. It was part and parcel of his self-identification as "pragmatic." Specifically, it was a corollary of the way in which philosophical pragmatism was popularized in the first few decades of the twentieth century, as pragmatism became not just a school of philosophical thought but a cultural phenomenon.[97] One result of this development is that it is relatively uncontroversial to claim that most American legal professionals and academics are now pragmatists in

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inevitable. *See, e.g.*, Bone, *supra* note 60, at 882 (noting that even most liberal pleading standard requires a complaint to "offer some reason to believe that the story it tells is linked to the elements of a legal claim"); Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 22-28 (2008); Huffman, *supra* note 34, at 636-37, 639, 652; Ides, *supra* note 32, at 606-07, 610.

94. *See, e.g.*, RICHARD H. FIELD ET AL., CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE 1057-64, 1097-1141 (9th ed. 2007); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS 546-647 (9th ed. 2005); A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 403-506 (2d ed. 2007); STEPHEN C. YEAZELL, CIVIL PROCEDURE 333-73 (7th ed. 2008); *see also, e.g.*, Schwartz & Appel, *supra* note 4, at 1108-21; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347 (2003); *infra* notes 133-37 and accompanying text.

95. *See, e.g.*, CLARK, *supra* note 66, at 137 ("The extent of the cause is to be determined pragmatically by the court. . . ."); *see also* Thurman W. Arnold, *The Code "Cause of Action" Clarified by United States Supreme Court*, 19 A.B.A. J. 215 (1933); Gavit, *supra* note 84, at 129; Marcus, *supra* note 66, at 486.

96. CLARK, *supra* note 66, at 54.

97. *See, e.g.*, David A. Hollinger, *The Problem of Pragmatism in American History*, 67 J. AM. HIST. 88, 89-91 (1980).

some sense.[98] Moreover, our form of pragmatism is similar to Clark's, or at least more similar to his form of pragmatism than to what gave rise to it. These partly independent developments reinforce the appeal of Clark's account of pleading, making it doubly difficult for us to see how *Iqbal* represents a kind of return of what pragmatism repressed as it was popularized.

Standard accounts of philosophical pragmatism trace its origins to the late nineteenth-century meetings of the Metaphysical Club, which counted the future Justice Holmes, as well as Charles S. Peirce (1839-1914) and William James (1842-1910) among its members.[99] Although Peirce was the oldest of the classic pragmatists, and the coinage of the term "pragmatism" is attributed to him,[100] his ideas are probably the most unfamiliar to contemporary lawyers.[101] James and John Dewey (1859-1952) more directly sought to shape pre- and inter-war American political and intellectual culture, as well as legal thought, and succeeded in doing so.[102] It is not inaccurate to think of James and Dewey as developing a coherent tradition begun by Peirce, but each of these three thinkers had a different focus. Peirce,

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98. *See, e.g.*, Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 569-72 (2007); Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 NEB. L. REV. 545, 546, 643-44 (1994); Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 862, 873, 946-48 (1981).

99. *See, e.g.*, LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 201 (2001).

100. *See* William James, *Philosophical Conceptions and Practical Results* (1898), *in* COLLECTED ESSAYS AND REVIEWS 406, 410 (1920); *see also, e.g.*, Morris Dickstein, *Pragmatism Then and Now*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 1, 1 (Morris Dickstein ed., 1998).

101. *See, e.g.*, Hollinger, *supra* note 97, at 95 (describing Peirce as "the Melville of American philosophy"). Although Peirce's influence on legal thought has been indirect, many of his ideas have been adopted in various areas of law. *See, e.g.*, ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS (1988) (using Peirce's semiotic theory to analyze legal systems); Susan Haack, *On Legal Pragmatism: Where Does "The Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 79-80, 88 (2005); John R. Josephson, *On the Proof Dynamics of Inference to the Best Explanation*, 22 CARDOZO L. REV. 1621 (2001); Note, *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123, 1140 (1975) (concluding that Peirce's direct influence on Holmes may have been greater than Holmes admitted). Most recently, Kevin Collins has urged that Peirce's tripartite semiotic theory supplies the concepts needed to make sense of the printed matter doctrine in patent law. *See* Kevin Emerson Collins, *Semiotics 101:Taking the Printed Matter Doctrine Seriously*, 85 IND. L.J. 1379 (2010).

102. *See, e.g.*, DAVID L. HILDEBRAND, BEYOND REALISM AND ANTIREALISM: JOHN DEWEY AND THE NEOPRAGMATISTS, at ix (2003) (focusing on Dewey as representative of classical pragmatism); JOSEPH MARGOLIS, REINVENTING PRAGMATISM: AMERICAN PHILOSOPHY AT THE END OF THE TWENTIETH CENTURY, at x, 1 (2002) (noting centrality of Dewey to neopragmatism); JOHN P. MURPHY, PRAGMATISM: FROM PEIRCE TO DAVIDSON 39 (Richard Rorty ed., 1990) (noting that it was James's 1907 book Pragmatism that "spread pragmatism around the world"); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS 1972-1980) 28-29, 46, 63-64 (1982); Robert B. Westbrook, *Pragmatism and Democracy: Reconstructing the Logic of John Dewey's Faith*, *in* THE REVIVAL OF PRAGMATISM, *supra* note 100, at 128 (noting Dewey's influence); Dickstein, *supra* note 100, at 1.

who worked as a scientist, focused on logic and what he called his "phaneroscopy," a vast systematic theory of experience and existence similar to what would later be called phenomenology.[103] James's frame of reference, in contrast, was mostly psychological; Dewey's was social.[104] As James and Dewey adapted Peirce's ideas to their own preoccupations for delivery to the wider public, the younger pragmatists also abandoned important aspects of the conceptual framework within which Peirce had developed those ideas, particularly his interest in the phenomenon of signification, or meaning.

A good example of this transformation of Peirce's ideas is the fate of his "pragmatic maxim," which Peirce first proposed in an 1878 essay in these terms:

> [T]he rule for attaining the third grade of clearness of apprehension [of a conception] is as follows: Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.[105]

The second and third sentences in this passage are much easier to understand than the first, which might be incomprehensible to readers not accustomed to Peirce's writing. The final sentence seems to counsel us, if we want to understand something, to look at the effects that thing has (identified as effects by their "practical bearings").[106] This was the stress that James and Dewey placed on the maxim in their own work,[107] and it is very similar to the ideas at the core of Clark's vision of pleading and civil litigation more generally.

But this emphasis on outcomes does not fully capture the maxim's significance within Peirce's own work. The maxim "was regarded by Peirce himself as a . . . rule[] and method for ascertaining the meaning of signs."[108] One of the unfamiliar aspects of the first sentence in the maxim is its reference to "the third grade of apprehension." This reference is characteristic of one of the most basic features of all of Peirce's writing, his preoccupation with three-part or triadic analysis (as opposed to the two-part, dyadic analysis characteristic of philoso-

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103. *See, e.g.*, T.L. SHORT, PEIRCE'S THEORY OF SIGNS 60-66 (2007).

104. *See, e.g.*, H. S. THAYER, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM 133, 165 (2d ed.1981).

105. Charles S. Peirce, *How to Make Our Ideas Clear*, 12 POP. SCI. MONTHLY 286 (1878), *reprinted in* 5 THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE para. 388, 402 (Charles Hartshorne & Paul Weiss eds., 1936) [hereinafter CP].

106. Judge Posner often makes this equation in his work. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 153-54, 162 (1990); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 866 (1988).

107. *See infra* notes 121-23 and accompanying text.

108. THAYER, *supra* note 104, at 87. *See also, e.g.*, John Dewey, *The Pragmatism of Peirce*, 13 J. PHIL. PSYCHOL. & SCI. METHODS 709, 710 (1916) ("Peirce confined the significance of the term [pragmatism] to the determination of the meaning of terms, or . . . propositions; the theory was not, of itself, a theory of the test, or the truth, of propositions.").

phers from Plato through Descartes to Kant).[109] This obsession sometimes led Peirce astray, but often led him to useful insights, as for example in his theory of signification, or "semeiotic."

Peirce's tripartite theory of signification may be familiar to some readers from its adoption by later (mostly nonpragmatist) writers.[110] Peirce regarded every sign, or meaningful phenomenon, as composed of three aspects: the sign itself (also called the "representamen" or "sign-vehicle" by Peirce), the object (akin to the referent of the sign), and the interpretant (the dimension of the sign's meaning, akin to the understanding we have of the relation between sign and object or to the product of that understanding, however manifested, as for example by our stepping on the brake pedal when we see a stop sign).[111] Without all three components, Peirce argued, a sign does not function; signification, or meaning, occurs only when a sign acquires an interpretant, or is interpreted. Interpretants may be, and often are, themselves potential sign-vehicles.[112] And signs, both as sign-vehicles and as interpretants, need not be verbal, but can include other sensory phenomena.[113] Although Peirce's theory of signification may be understood and usefully applied without acquaintance with other aspects of his thought, it was not a free-standing theory in his writing but was, rather, intimately related to his triadic analysis of what he called the "categories" of experience and being, which he called firstness, secondness, and thirdness.[114] Firstness Peirce identified as the aspect of reality consisting of pure quality, experienced as a kind of pure possibility (e.g., redness in the abstract).[115] He called secondness the aspect of relation, experienced as constraint or effort (e.g., the pressure of the brake pedal against our foot when we brake at a stop sign).[116] And thirdness he defined as the aspect of mediation, experienced as predictable regularity, intelligibility, and meaning

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109. *See, e.g.*, SHORT, *supra* note 103, at 27-90.

110. *See, e.g.*, Collins, *supra* note 101, at 1408-13; *see also generally* UMBERTO ECO, A THEORY OF SEMIOTICS (Thomas A. Sebeok ed., 1976); ROMAN JAKOBSON, ON LANGUAGE (Linda R. Waugh & Monique Monville-Burston eds., 1990).

111. *See, e.g.*, Charles S. Peirce, *Sign*, 2 DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 527 (James Mark Baldwin ed., 1902), *reprinted in* PEIRCE ON SIGNS 239-40 (James Hoopes ed., 1991).

112. As Peirce's follower Josiah Royce perceived, this theory implied that interpretation is an endless process. *See generally* JOHN E. SMITH, ROYCE'S SOCIAL INFINITE: THE COMMUNITY OF INTERPRETATION (Archon Books 1969) (1950).

113. *See, e.g.*, SHORT, *supra* note 103, at 151-206.

114. The literature on Peirce contains many explanations of the categories. For an introduction, see, for example, SANDRA B. ROSENTHAL, CHARLES PEIRCE'S PRAGMATIC PLURALISM 77-82 (1994). Peirce maintained that the categories were irreducible, that is, that thirdness cannot be described fully in terms of qualities (firstness) and relations (secondness). *See, e.g.*, Charles S. Peirce, A Guess at the Riddle, *in* PEIRCE ON SIGNS, *supra* note 111, at 186, 192-93 (manuscript unpublished during Peirce's lifetime); SHORT, *supra* note 103, at 74.

115. *See, e.g.*, ROSENTHAL, *supra* note 114, at 77-82.

116. *See id.*

(e.g., our perception of the sign as a reason to stop the car).[117] Peirce understood verbal meaning as just one instance of thirdness among many others, including natural laws and behavioral regularities of other kinds.[118] This understanding explicitly discarded a number of assumptions basic to common understandings of meaningfulness in Peirce's day (and our own), most important among them the notion that meaning is reducible to communicative intention or, alternatively, to some state of affairs (a referent) in the world. Both of these correspondence-based conceptions of meaning are dyadic (focusing on the collapse of sign into intention or referent), and Peirce viewed them as basically flawed for this reason.[119]

This sketch of Peirce's ideas is very abbreviated. One of the important points to take from it is that Peirce saw his theory of signification as related to the most basic features of a broader philosophical system. As James and Dewey developed Peirce's ideas for a wider audience within their own thought, they did not further develop his account of meaning. Instead, they usually took the phenomenon of meaning for granted. In fact, in some respects they endorsed accounts of meaning that Peirce had explicitly rejected.[120] James, for example, sometimes embraced the correspondence theory of truth that Peirce criticized.[121] (A correspondence theory of truth, analogous to a correspondence theory of meaning, holds that a proposition is true if it carries a meaning that corresponds to or in some way copies reality; such a theory is dyadic.) Dewey's instrumentalist conception of truth as "warranted assertability"[122] also coexisted in his work with a correspondence theory of truth and meaning.[123] Yet it was James's and Dewey's versions of pragmatism, and especially Dewey's commitments to process, voluntarism, and democracy, that most directly influenced Clark and the Federal Rules of Civil Procedure; similar commitments shaped Clark's understanding of the cause of action in terms of trial convenience, his reconceptualization of the functions of pleading in terms of notice and sensibly managed decisions

117. *See id.*

118. *See, e.g.*, Peirce, *supra* note 111, at 239-40.

119. *See* SHORT, *supra* note 103, at 16-18.

120. *See, e.g.*, THAYER, *supra* note 104, at 146 (noting that James "apparently had little interest in enunciating . . . a theory" of meaning, and that while "Peirce undertook to explicate the idea of meaning[,] James was concerned to explicate the meanings of ideas").

121. *See, e.g.*, Richard M. Gale, *William James's Semantics of "Truth,"* 33 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 863, 866-67 (1997); H. S. Thayer, *On William James on Truth*, 13 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 3, 6 (1977).

122. John Dewey, *Propositions, Warranted Assertability, and Truth*, 38 J. PHIL. 169, 169 (1941).

123. *See, e.g.*, *id.* at 178-79, 183; H. S. Thayer, *Two Theories of Truth: The Relation Between the Theories of John Dewey and Bertrand Russell*, 44 J. PHIL. 516 (1947) (arguing that Dewey's conception of truth is basically compatible with Russell's logical correspondence theory).

on the merits, his disregard for the text of complaints, and his concomitant focus on the facts presumed to lie behind that text.[124] In this way, pragmatist approaches to decisionmaking and justification have come to coexist with correspondence theories of meaning and truth in mainstream contemporary American legal thought on procedure.

Judge Richard Posner's work on pragmatism and legal interpretation offers an example of the form taken by this simplified pragmatism and the difficulty of meshing it fully with sophisticated accounts of interpretation. Over the past several decades, Judge Posner has self-consciously articulated a platform of pragmatic adjudication.[125] The central planks in his platform are context-sensitivity and instrumentalism.[126] The pragmatic adjudicator, to Judge Posner, is one who considers not just legal authorities but all relevant information in reaching the decisions likely to have the best short- and long-term consequences.[127] For Judge Posner, unlike Judge Clark, pragmatism does not require distaste for issues of textual meaning. Indeed, Judge Posner has written extensively on problems in legal interpretation.[128]

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124. *See, e.g.*, Desautels-Stein, *supra* note 98; Marcus, *supra* note 66.

125. *See, e.g.*, RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 165, 168-69, 198 (2001) [hereinafter POSNER, FRONTIERS]; RICHARD A. POSNER, HOW JUDGES THINK 13-14, 202-03, 345-46 (2008) [hereinafter POSNER, THINK]; RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) [hereinafter POSNER, DEMOCRACY]; RICHARD A. POSNER, OVERCOMING LAW 2-21, 387-405 (1995) [hereinafter POSNER, OVERCOMING]; RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 82, 112, 119, (1999) [hereinafter POSNER, PROBLEMATICS]; POSNER, *supra* note 106, at 14, 108, 192; Richard A. Posner, *Pragmatic Adjudication*, *in* THE REVIVAL OF PRAGMATISM, *supra* note 100, at 235 [hereinafter Posner, *Adjudication*]; Richard A. Posner, *The Decline of Law As an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 763 (1987) [hereinafter Posner, *Decline*]; Posner, *supra* note 106, at 829, 866; Richard A. Posner, *Tribute to Ronald Dworkin and a Note on Pragmatic Adjudication*, 63 N.Y.U. ANN. SURV. AM. L. 9, 9-14 (2007); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990) [hereinafter Posner, *Offer*].

126. Similarly, Thomas Grey defines legal pragmatism as a "practical" orientation toward law, characterized by a blending of "contextualist and . . . instrumentalist strands of legal thought" that replicates Jamesian and Deweyan popularized pragmatism. Thomas C. Grey, *Freestanding Legal Pragmatism*, *in* THE REVIVAL OF PRAGMATISM, *supra* note 100, at 256. In Grey's understanding, legal pragmatism is not concerned with questions of meaning or textual detail; like most proceduralists since Clark, Grey seems to find legal communications interesting only insofar as they function as means to other ends. *See id.* at 254-57.

127. *See, e.g.*, Posner, *Adjudication*, *supra* note 125, at 235, 240 ("[T]he positivist starts with and gives more weight to the authorities, while the pragmatist starts with and gives more weight to the facts."); POSNER, THINK, *supra* note 125, at 202-03; *id* at 248 ("Good pragmatic judges balance two types of consequence, the case-specific and the systemic.").

128. *See, e.g.*, POSNER, THINK, *supra* note 125, at 113, 193-202. *See also, e.g.*, POSNER, OVERCOMING, *supra* note 125, at 155, 199, 215-16; POSNER, *supra* note 106, at 40, 42, 60; Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1368-80 (1990); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1576 (1969); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

And in some respects, his account of interpretation recalls Peirce's. In a recent book, for example, Judge Posner described interpretation as a "quintessentially intuitive human faculty," "not a rule-bound activity," but rather one based on "experience[, which] creates a repository of buried knowledge on which intuition can draw when one is faced with a new interpretandum."[129] While this view seems indebted to Peirce,[130] divorced from Peirce's broader conceptual framework, this type of flexible understanding of meaning and interpretation is vulnerable to criticism as unprincipled and unpredictable.[131] And when pushed, Judge Posner acknowledges the value of "accuracy" in interpretation, which seems for him to be dependent on a correspondence theory of meaning.[132] For Peirce, in contrast, meaning was by definition principled and predictable, even though it could not always be known with certainty.

Thus, Judge Posner's position ultimately seems consistent with the form of pragmatism adopted by Clark. The difficulty this position has with issues of interpretation is even more visible in the commentary on *Iqbal*, reconsidered in the next Section.

3. The Effect on Responses to Iqbal

The commentary discussed in Parts I.B and I.C bears the marks of Clark's expressed vision, including his teleological view of pleading doctrine and the instrumentalist values associated with notice pleading. The responses to *Iqbal* also share the later pragmatists' and

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129. POSNER, THINK, *supra* note 125, at 113; *see also id.* at 193.

130. Judge Posner has never referred to Peirce as an influence on his thinking about legal interpretation, aside from occasional citation of Peirce as the originator of the idea of "interpretive community." *See, e.g.*, POSNER, *supra* note 106, at 450; Richard A. Posner, *Conventionalism: The Key to Law as an Autonomous Discipline?*, 38 U. TORONTO L.J. 333, 339 (1988). When he has addressed Peirce's pragmatic maxim, Judge Posner paraphrases it as a consequentialist directive: meaning equals effects. *See supra* note 106. Most often, he simply refers to Peirce as a founder of pragmatism. *See, e.g.*, POSNER, DEMOCRACY, *supra* note 125, at 100-01, 139; POSNER, OVERCOMING, *supra* note 125, at 388, 396, 450, 459; RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE 231-32 (2008); POSNER, *supra* note 106, at 16 n.25, 27, 436 n.17, 450, 462-64; Posner, *Decline*, *supra* note 125, at 763; Posner, *Offer*, *supra* note 125, at 1654-55; Posner, *supra* note 106, at 879-80 n.90. Less often, he distinguishes Peirce from the main pragmatist tradition. *See, e.g.*, POSNER, DEMOCRACY, *supra* note 125, at 24-25, 26 n.6.

131. For the classic critique of legal pragmatism along these lines, see, for example, RONALD DWORKIN, JUSTICE IN ROBES (2006); Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY 359 (Michael Brint & William Weaver eds., 1991).

132. *See, e.g.*, POSNER, THINK, *supra* note 125, at 198 ("[T]he accuracy of a literal interpretation of a legislative text is easier to evaluate than the soundness of a pragmatic interpretation."). On Judge Posner's inconsistency on this point, see also Lake, *supra* note 98, at 564, 578-80, 596-97, 604, 615-16, 618-19, 645, Tibor R. Machan, *Posner's Rortyite (Pragmatic) Jurisprudence*, 40 AM. J. JURIS. 361, 362, 366-68, 375 (1995), and Richard Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915, 920-23 (2007).

Clark's lack of interest in issues of interpretation and the related denial that interpretation should play any role in the pleading process.

Virtually every commentator on *Twombly* and *Iqbal* has adopted Clark's narrative of the development of pleading doctrine. Many discussions reiterate Clark's three-phase narrative.[133] Some contend that *Twombly* and *Iqbal* signal reversion to the fact pleading regime.[134] Others suggest that we have, for better or worse, entered a fourth post-Clark phase.[135] But both positions are faithful to Clark's basic story. Commentators also widely endorse Clark's account of notice pleading as intended to minimize formalities, increase access, and facilitate adjudication on the merits.[136] Interestingly, it is commentary by judges that comes closest to rejecting Clark's narrative.[137]

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133. *See, e.g.*, Dodson, *supra* note 57, at 448; Gressette, *supra* note 54, at 403-11; Hannon, *supra* note 54, at 1812-14; Muhammad Umair Khan, *Tortured Pleadings: The Historical Development and Recent Fall of the Liberal Pleadings Standard*, 3 ALB. GOV'T L. REV. 460, 477-81 (2010); Klein, *supra* note 56, at 474-78; Moline, *supra* note 57, at 163-77; Schwartz & Appel, *supra* note 4, at 1111-21; Subrin, *supra* note 4, at 378-79; Sullivan, *supra* note 3, at 8-17.

134. *See, e.g.*, Bone, *supra* note 52, at 859-64 ("*Iqbal*'s novel doctrinal contribution is to subdivide the pleading analysis formally into two prongs, with the first prong sorting legal conclusions from factual allegations. . . . The distinction . . . was an important feature of nineteenth century code pleading, but the Federal Rules . . . eliminated it. . . ."); Halaby, *supra* note 2, at 38 ("[F]ederal court plaintiffs and defendants seem destined to rejoin battle on just what is a mere conclusion, as opposed to a factual allegation[, like] . . . . those long-departed legions of lawyers whose skirmishes on that front taught us to fight our procedural battles elsewhere . . . ."); Hartnett, *supra* note 8, at 486 (admitting "worry that . . . *Twombly* means the resurrection of concepts that the drafters of the Federal Rules . . . thought they had left behind," namely, "distinctions between evidentiary facts, ultimate facts, and legal conclusions" that were "crucial to code pleading"); Herrmann, Beck & Burbank, *supra* note 52, at 161 (in contribution by Burbank, describing decisions as imposing "a system of complaint-parsing that is hard to distinguish from that which the drafters of the Federal Rules explicitly rejected").

135. Clermont & Yeazell, *supra* note 3, at 850 ("[I]t is quite hard to resist the conclusion that the Justices inadvertently stumbled into a new procedural era."); Gressette, *supra* note 54, at 449-50; Kilaru, *supra* note 3, at 908; Marcus, *supra* note 4, at 412; Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 111 (2010); Schwartz & Appel, *supra* note 4, at 1110; Spencer, *supra* note 3, at 368; Smith, *supra* note 4, at 1055 (describing *Iqbal* as an "evolution in the pleading standard that is likely to increase the efficiency and fairness of modern civil practice"); Spencer, *supra* note 51, at 441-42.

136. *See, e.g.*, Burbank, *supra* note 3, at 111; Coleman, *supra* note 52, at 285; Jois, *supra* note 3, at 901; Miller, *supra* note 52, at 2; Ryan Mize, Comment, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1249 (2010); Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1221 & n.64 (2009); Pocker, *supra* note 4, at 38; Rothman, *supra* note 52, at 2; Spencer, *supra* note 3, at 354; Spencer, *supra* note 55, at 2; Tice, *supra* note 51, at 833-34; Nicolas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 508 (2009).

137. *See* Kourlis, Singer & Knowlton, *supra* note 56, at 246 ("The new [Federal Rules] system was innovative, and the theory behind it reasonable. [But i]n hindsight, . . . removing the issue-narrowing function [of the common-law system] from pleadings has proven to be a serious mistake."); Levin, *supra* note 57, at 144.

The majority view of *Twombly* and *Iqbal* as disruptions of the Clark-*Conley* system has led to confusion about the extent to which the recent decisions should be considered "pragmatic." Clark's narrative is, rightly, closely associated with pragmatism, at least of the simplified kind described above. Understanding *Twombly* and *Iqbal* as departures from that narrative would seem to entail understanding them as antipragmatic. And accounts of the decisions that describe them as harking back to the fact pleading era do indeed describe them as renouncing a commitment to the pragmatic notice pleading regime.[138] But commentators have also characterized *Twombly* and *Iqbal* as pragmatic decisions, usually in a less positive sense.[139] On this view, the decisions' pretextual cloaking of policy judgments in procedural trappings and their conferral of unbounded discretion on trial court judges reflect and license result-oriented decisionmaking constrained only by personal preferences.[140]

This confusion in contemporary applications of the "pragmatic" label is, in the pleading context, a corollary of the developments described earlier, especially the habit of denying that the screening of pleadings has anything to do with considering the language in which the pleadings are presented, itself the product of a merging of consequentialist policy assessment with correspondence theories of meaning and truth. In the specific context of twenty-first-century pleading doctrine, these traditions can help to explain, for example, the widespread misapprehension that the "plausibility" standard requires plaintiffs to offer "evidentiary support" for their allegations in the complaint itself.[141] Commentators reach this conclusion because they are conditioned to think of the contents of a complaint not as verbal propositions, but as directly reflecting or somehow constituting facts in the world. The same conditioning explains the negative tone used by most of the commentators who do acknowledge that *Twombly* and *Iqbal* seem to require judges to interpret complaints.[142] Stephen

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138. *See* sources cited *supra* note 134.

139. Judge Posner himself, writing before the *Iqbal* decision, called *Twombly* "pragmatic." POSNER, THINK, *supra* note 125, at 53-54; *see also* Scott Dodson, *Justice Souter and the Civil Rules*, 88 WASH. U. L. REV. 289, 298 (2010) (calling *Twombly* "nonoriginalist and pragmatic"); Tidmarsh, *supra* note 56, at 407-08 (noting that the "modern procedural system was built largely on the foundations of Roscoe Pound's [Realist] vision" of "a simple, uniform, discretionary, 'decide each case on its merits' approach to legal procedure," the "deep flaws" of which became evident only over time).

140. *See* sources cited *supra* notes 49-52.

141. *See, e.g.*, Steinman, *supra* note 19, at 1328-33 (discussing this trend in reception of *Iqbal*). To similar effect are arguments that the standards invade the province of the jury. *See, e.g.*, Flake, *supra* note 3, at 992; Kilaru, *supra* note 3, at 925-26; Spencer, *supra* note 60, at 199; *see also* sources cited *supra* note 50.

142. *See, e.g.*, Burbank, *General Rules*, *supra* note 52, at 535 (describing standard as "invitation to the lower courts to make ad hoc decisions reflecting buried policy choices"); Chemerinsky, *supra* note 3, at 290-91 ("What is plausible and credible to one district judge is not going to be plausible and credible to another."); Eichhorn, *supra* note 52, at 953

Burbank, for example, has described the "architecture of *Iqbal*'s mischief . . . [a]s the power the Court claimed to parse a complaint."[143] Virtually all of those who have noted *Iqbal*'s implication that a judge must interpret a complaint in order to determine its sufficiency similarly regard this implication as disastrous.[144]

Only one commentator, Robert Bone, has acknowledged without panic that *Twombly* and *Iqbal* indicate that a judge must interpret a complaint in order to assess its sufficiency:

> The complaint is supposed to give a coherent account of the relevant events and transactions involved in the dispute. Therefore, it must be interpreted as a coherent whole, and the sufficiency of its allegations must be evaluated in a holistic way. The *Twombly* Court understood this point clearly. . . . Justice Souter also understood this fundamental point in his *Iqbal* dissent. He interpreted the key allegations in the context of the complaint as a whole before concluding that the plausibility standard was met. It follows from the holistic nature of pleading analysis that

("[B]y drawing on a metaphor of judging-as-measuring, the Court . . . deflects attention from the unbounded discretion that the opinion grants to judges who will administer that test."); Gist, *supra* note 20, at 1037 (noting that in ruling on a motion to dismiss, a judge "is simply interpreting what a short plain statement means to him"); Herrmann, Beck & Burbank, *supra* note 52, at 161 (Burbank, closing statement) (describing decisions as imposing "a system of complaint-parsing that is hard to distinguish from that which the drafters of the Federal Rules explicitly rejected"); Kilaru, *supra* note 3, at 919-20 ("*Twombly* and *Iqbal* give lower courts a tremendous power that they did not have before. . . . Yet at the same time, the disagreement between Justices Souter and Kennedy on what constitutes a 'conclusory' allegation reveals that the distinction is as manipulable as it is powerful."); Miller, *supra* note 52, at 26 (describing "judicial experience and common sense" as "highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning"); Mohan, *supra* note 52, at 1197 ("The looseness of the *Iqbal* test allows for a disparate range of interpretations about what is conclusory and what is plausible."); Rothman, *supra* note 52, at 2 ("*Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses . . . to . . . legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success."); Allison Sirica, Case Comment, *The New Federal Pleading Standard:* Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)*, 62 FLA. L. REV. 547, 555 (2010) (noting general consensus of most commentators that the plausibility standard "may result in highly subjective judgments and inconsistent results among trial courts"); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1885 (2008) ("[T]he court makes a substantive interpretative judgment [under *Twombly*] as to how much evidence is sufficient evidence."); Tice, *supra* note 51, at 827 (noting that *Twombly* leaves "lower courts and plaintiffs' lawyers . . . significant leeway to tease out the meaning of 'plausibility' in different contexts"); Capital Report, *supra* note 47, at 10 ("[Professor] Burbank . . . cautioned that the court's misguided decision will lead to a 'whole new brand of mischief' in which trial judges subjectively dismiss complaints.").

Although Noll does not take a critical view of "the many interpretative questions the Court's decision left open," the questions to which he refers are primarily questions of the interpretation of *Iqbal* as precedent, not the interpretation of complaints. Noll, *supra* note 48, at 117.

143. Burbank, *supra* note 3, at 115.

144. *See* sources cited *supra* note 142; *see also, e.g.*, Peddie, *supra* note 52, at 54 (noting criticisms that *Iqbal* licenses judges to "dismiss complaints that appear implausible based only on caprice or 'judicial experience and common sense' ").

> there is no conceptual distinction between the two parts of *Iqbal*'s two-pronged approach. . . . The reason certain allegations are conclusory is that the complaint, interpreted *with them in it*, does not meet the pleading standard for the legal element the defective allegations are meant to support.[145]

Professor Bone is unusual in noting that both *Twombly* and *Iqbal* displayed an understanding that judges engage in the interpretation of complaints when deciding motions to dismiss. Professor Bone does not, however, explicitly defend the holistic approach to interpretation that he endorses. More particularly, he does not explain why we need not fear that even if all judges considered all pleadings holistically, judges might still reach inconsistent conclusions about their sufficiency.

The combination of acceptance of Clark's vision of pleading and this vision's rejection of the role played by interpretation in the pleading process further explains the Catch-22 criticism of *Iqbal* described above, which depends on the assumption that a plaintiff cannot allege facts that the plaintiff does not know to be true. It also explains the judicial discretion critique, which depends on the assumption that the conclusoriness and plausibility of allegations cannot be assessed on a stable, intersubjective basis but are necessarily subjective and unpredictable. And it explains the legitimacy critique; most forms of this argument rest on a positivist-style distinction between the judicial interpretation of legal rules (understood as subjective and hence illegitimate) and legislatively enacted rules themselves (understood as objective, democratically generated, and hence legitimate). All of these responses to the Court's recent pleading decisions have their source in the developments described above.

B. Taking Interpretation Out of Procedure and Putting It Back In

The prevailing understanding of *Twombly* and *Iqbal* as pragmatic in a negative sense because they countenance the interpretation of complaints is the result of abandonment of Peirce's concern with meaning in the popularization of pragmatism. The disappearance of this concern from the vocabularies of, first, popularized pragmatism and then twentieth-century proceduralism was not inevitable, but it was probably overdetermined. The reappearance of the concern now is cause not for distress, but for optimism.

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145. Bone, *supra* note 52, at 868-69. *Cf.* Hartnett, *supra* note 8, at 498 ("The need to rely on experience and common sense in drawing inferences is hardly radical—it is a staple of inductive reasoning, which in turn is at the heart of our system of adjudication."); Miller, *supra* note 57, at 1005 (observing that *Iqbal* "lays bare both the fact that pleading doctrine is a form of 'choice architecture' and that the materials used to build that architecture are seriously, and ineluctably, deficient," and describing *Iqbal* as "one of the unusual cases that expose the meager and borrowed nature of the materials with which we build this architecture," namely, language).

1. Why the Avoidance of Interpretation?

Is pragmatism compatible with an understanding of interpretation that is not uselessly subjective and instrumentalist? Peirce's ideas suggest that it is. The turn away from Peirce's understanding of interpretation resulted mainly not from the incoherence of that understanding but from developments in the twentieth-century academy, including the legal academy.

As noted above, James and Dewey, like Clark, mostly regarded issues of signification, meaning, and interpretation as at best trivial and at worst dangerous.[146] The dyadic, correspondence-based conception of meaning to which they sometimes resorted precluded an understanding of verbal meaning, and interpretation, as intersubjective and thus stable and predictable, even if not mechanically produced. A dualistic conception of meaning (one that identifies a good interpretation as involving an interpreter's "matching" a particular sign to its referent or to the intention with which it was produced) reduces each instance of interpretation to an individual act of judgment. Such a conception cannot account for why different interpreters might be expected to form consistent judgments, or interpretants. Peirce's account of signification as a three-part phenomenon embedded in a three-aspect reality, in contrast, tied meaning to the most basic structures of regularity in general; thirdness, for Peirce, was the realm not just of signification but also of natural laws and habit.[147] For him, perceiving meaning was just one way of tapping into preexisting regularity. The possibility of meaningfulness, in Peirce's view, precedes perceptions of regularity and makes such perceptions possible. While different individuals may, due to divergent experiences, perceive different aspects of this regularity when they interpret signs, on Peirce's theory, it should usually be possible to mediate between differing judgments by enlarging the interpreters' frames of reference. Despite their interests in pluralism, James and Dewey left all of these notions behind when they introduced pragmatism—in the sense of a concern with practical engagement and effectiveness—to the wider public. In the process, pragmatism lost its foundation in a positive intersubjective conception of stable meaning.

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146. *See supra* notes 109-23 and accompanying text.

147. *See, e.g.*, Vincent Colapietro, *Habit, Competence, and Purpose: How to Make the Grades of Clarity Clearer*, 45 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y. 348, 355 (2009); Marjorie C. Miller, *Peirce's Conception of Habit*, *in* PEIRCE'S DOCTRINE OF SIGNS: THEORY, APPLICATIONS, AND CONNECTIONS 71, 74 (Vincent M. Colapietro & Thomas M. Olshewsky eds., 1996) ("[H]abit, as a tendency to act, is generality-in-the-making, the mediation between first and second which is the institution of a third."); Richard Rorty, *Pragmatism, Categories, and Language*, 70 PHIL. REV. 197, 210 (1961) (noting that "[s]ign" and "[h]abit" were for Peirce "two of the most important sobriquets of thirdness").

After pragmatism was popularized, its influence on American academic philosophy waned, making revival of Peirce's perspective increasingly unlikely in that forum. Through the mid-twentieth century, the philosophical study of meaning returned mostly to analysis of the kind Peirce had criticized.[148] The neopragmatist revival in the American academy of the 1980s was mainly a revival of Deweyan pragmatism and thus did not lead academics directly back to Peirce.[149] Although they were nominally concerned with "interpretation," pragmatist revivalists generally approached the topic from the more dyadic perspective of hermeneutics.[150]

Independent of any strictly philosophical influences, legal commentary on the subject of interpretation developed along parallel lines. Throughout the entire period addressed by this Article, such commentary has been preoccupied with figuring out how meanings in general—and legal meaning in particular—can be made stable and predictably effective. Typical of many twentieth-century approaches to these issues was the perspective advanced by Peirce's contemporary James Bradley Thayer, who denigrated judicial interpretation as a mechanical exercise unsuited for important political decisionmaking.[151] Thayer's position was echoed in legal realists' critiques of the rhetoric associated with legal interpretation, especially statutory interpretation, in the early twentieth century.[152] Over the next hundred years, the most visible and influential work on legal interpretation never stopped puzzling over the question of whether interpretive discretion, and interpretation itself, were inimical to law or synonymous with it.[153]

In the area of civil procedure, as described above, legal academics quickly accepted the Dewey-Clark vision of pragmatism, which left no room for the operation of interpretation within procedure. After 1938, academic proceduralists seeking to justify their scholarship as having some significance for the real world of litigation shifted their focus from the pre-Rules concern with formalities to a Clark-style

148. The wartime influx of European émigrés into American philosophy departments shifted the center of gravity of academic philosophy toward the kind of conceptual analysis that the classic pragmatists had combated. For a general discussion, see SHORT, *supra* note 103, at 91-144, 263-346.

149. *See supra* note 102.

150. *See, e.g.*, RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); *see also* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

151. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893).

152. *See, e.g.*, Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) [hereinafter Llewellyn, 1950]; K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

153. *See, e.g.*, Karen Petroski, *Does It Matter What We Say About Legal Interpretation?*, 43 MCGEORGE L. REV. (forthcoming 2012).

emphasis on individual outcomes and system-wide effects.[154] Debates about procedure, and pleading in particular, tended to turn on disagreements about which systemic effects to promote and the best devices for promoting them.[155] The same focus is visible throughout the commentary on *Iqbal*, including commentary taking a less critical view of the decision.[156] This consistency is understandable. Proceduralists today continue to face disincentives to think of trial court judges as interpreters of complaints. If interpretation is conceived in dyadic terms, it seems inherently unstable, so acknowledging its role in the screening of claims for litigation can seem to concede the futility of any procedural recommendations directed at rationally governing subsequent stages of a lawsuit. Few procedural commentators are likely to be eager to imply the irrelevance of their recommendations in this way.

The result of all of these developments is the scenario we face following *Iqbal*: one in which judges appear to recognize the role of interpretation in screening pleadings, either explicitly or implicitly, but in which neither they nor commentators have access to a vocabulary for communicating this recognition positively.

2. What If We Did Not Avoid the Issue?

Perhaps James, Dewey, and Clark were right to turn away from Peirce's concern with interpretation. Does it not just complicate things unnecessarily? No; in fact, there might be much to gain from considering the similarities (and differences) between the scrutiny of pleadings and other forms of legal interpretation. First, as *Iqbal* indicates, judges already recognize these similarities, even if only implicitly. Any account of the treatment of pleadings that does not acknowledge the similarities is therefore descriptively incomplete. Second, although the main approach to legal interpretation in other areas has been dyadic and subjectivist, a more Peircean conception has persisted alongside that prevailing view. We thus have familiar grounds for acknowledging the place of interpretation in procedure in a way that does not open the door to radical unpredictability. Third, if these first two points are granted, the scholarly literature and doctrine pertaining to the interpretation of other kinds of legal texts offers a vast resource for ideas about how *Twombly* and *Iqbal* should and will be implemented.

First, the analysis suggested by *Iqbal* requires the interpretation of complaints in a sense that differs from the mainstream understanding of that activity, but that is consistent with what has always

154. *See supra* notes 84-86, 106, and accompanying text.
155. *See supra* notes 52, 58, and accompanying text.
156. *See supra* notes 53-57 and accompanying text.

occurred on motions to dismiss.[157] From close up—when one studies complaints, or orders on motions to dismiss, one at a time, focusing on the legal standards cited and the reasons given for judicial conclusions—it is not always easy to see how similarly district court judges treat complaints and other legal texts. This is not a new practice.[158] Most district court orders on motions to dismiss, both before and after *Twombly* and *Iqbal*, include extensive quotations from complaints, often in quantities far exceeding quotations from legal authority.[159] Quotations from complaints anchor orders in the details of cases, just as quotations from precedent anchor them in the law. Further, over time, complaint text handled in this way takes on properties of legal authority. As later orders on motions to dismiss cite previous orders, the new orders sometimes include in their citations the previous orders' quotations from complaints.[160] Material that originally appeared in a complaint can thus be transformed from litigants' allegations into legally significant formulations, causing the distinction between factual allegations and legal conclusions to shift or even disappear.[161] Considered in this way, judicial practice on motions to dismiss has always involved interpretation not just in the subjectivist sense but also in the Peircean sense: it has involved the generation of new signs (orders ruling on motions to dismiss) marking the emergence of "interpretants" out of judges' (and parties') encounters with those signs we refer to as complaints (as well as briefing and arguments), and giving rise to new instances of interpretation. The patterns in communication and behavior constituted and revealed by such practices are the patterns of meaningfulness recognized in complaints. They

157. The assertions contained in the rest of this paragraph are based the author's original study of 136 district court orders from July 2006, 2008, and 2009 issued in the Southern District of New York (the district of origin of *Twombly*) and in the Eastern District of New York (the district of origin of *Iqbal*) deciding 12(b)(6) or 12(c) motions. The list of orders considered was generated by a Westlaw search on the term "12(b)(6)" in the relevant periods and districts (orders mentioning 12(b)(6) motions without deciding one were discarded). The number of orders examined per year and district was, for 2006, 41 orders, 15 from the Eastern District of New York (E.D.N.Y.) and 26 from the Southern District of New York (S.D.N.Y.); for 2008, 47 orders, 16 from the E.D.N.Y. and 31 from the S.D.N.Y.; and for 2009, 48 orders, 11 from the E.D.N.Y. and 37 from the S.D.N.Y..

158. Before *Twombly*, courts sometimes cited authority referring to the "construal" and "interpretation" of pleadings, especially pro se pleadings. *See, e.g.*, Roth ex rel. Beacon Power Corp. v. Perseus, L.L.C., No. 05 Civ. 10466 (RPP), 2006 WL 2129331 (S.D.N.Y. July 31, 2006). In this context, however, "interpreting" a pleading sometimes amounted to a confession that the court would be exercising its judgment regarding the meaning of a complaint, reflecting the subjective conception of interpretation held by Clark.

159. Only nine of the 136 orders studied include no citations to the plaintiff's complaint. Several of these exceptions extensively cite and quote other dispositive documents incorporated by reference in the complaint.

160. *See, e.g.*, Adelphia Recovery Trust v. Bank of Am., N.A., 646 F. Supp. 2d 489 (S.D.N.Y. 2009).

161. This possibility is reminiscent of Cook's argument that what counts as "legal language" is not static but shifts as legal professionals' practices change. *See supra* notes 75-82 and accompanying text.

are also the content of what Justice Kennedy called district court judges' "experience and common sense" with respect to civil complaints.[162] Indeed, rather than licensing courts to decide motions to dismiss any way they wish, *Iqbal* seems simply to have inspired district court judges and their clerks to find new (yet still recognizable) ways to describe the regularities that this process involves.[163]

Second, as this discussion suggests, recognizing that the screening of pleadings involves their interpretation does not require us to consider the process unstable. Justice Kennedy's reference in *Iqbal* to "experience and common sense" as an aspect of the legal standard may suggest that he, at least, considers interpretation to be a stable enough process to function as such.[164] (And in other areas of law, we are willing to accept legal standards that include interpretation as a component, one of the best known being the *Chevron* standard, discussed below.) Although Justice Souter disagreed with Justice Kennedy's understanding of Iqbal's complaint, Justice Souter appeared to share Justice Kennedy's assumption on this point; like Professor Bone,[165] Justice Souter presented his own reading of the complaint as the one that should strike more readers as correct (and if Peirce is right, then the "holistic" approach recommended by Justice Souter and Professor Bone is a more accurate description of how verbal and legal meaning arise).[166] Both approaches resemble Judge Posner's and are aligned with the most sophisticated contemporary accounts of legal interpretation. These accounts acknowledge—as did Peirce and his contemporary Holmes[167]—that while interpretation is not a mechanical process and may involve some variation, intersubjective practices do limit it, making some assertions about meaning more defensible than others.[168] The growing interest in using empirical methods to examine issues of interpretation is based on similar premises.[169] This perspective on interpretation does not assume that all regularity is best explained in terms of mechanical compulsion (Peirce's secondness); it allows that some regularity may occur

162. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).
163. *See infra* notes 203-05 and accompanying text.
164. *Iqbal*, 129 S. Ct. at 1950.
165. *See supra* note 145 and accompanying text.
166. *Iqbal*, 129 S. Ct. at 1960-61 (Souter, J., dissenting).
167. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899).
168. Much work in this vein is influenced by LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. E. M. Anscombe trans., 1953), and a good sample is the collection LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., 1995).
169. For a recent example, see FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009). An early qualitative version of this approach was KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

through a more complex process that we can describe only from a more distant point of view (Peirce's thirdness).[170]

Finally, if the scrutiny of complaints has always involved interpretation, and if this need not mean that the process is a free-for-all, then we should be able to look to thought about the interpretation of other kinds of legal texts to understand what courts are doing in the wake of *Twombly* and *Iqbal*, and to identify useful models for the analysis of particular complaints or types of complaints. The literature on legal interpretation offers a rich resource for the analysis of pleading practice. The final Part of this Article explores some of the ways this material might usefully orient discussion of how *Iqbal* should be implemented.

IV. PLEADING SCRUTINY AS A MATTER OF INTERPRETATION

Pleading scrutiny has always been a matter of interpretation: a matter of finding legal significance in a text and basing conclusions about legal action on reasons drawn from that text. *Iqbal* has merely made this fact more difficult to deny than it previously was. In addition, of course, the *Iqbal* opinions also present specific principles for courts to use in scrutinizing complaints: the recommendation that courts decline to extend the presumption of truth to conclusory allegations, and the *Twombly*-derived requirement that nonconclusory allegations plausibly suggest a claim to relief.[171] If pleading scrutiny (under *Iqbal* as before) is a matter of interpretation, it should be possible to clarify application of these principles using resources drawn from other legal interpretation contexts. This Part explores, first, how the conclusoriness standard might be illuminated by ideas about gap-filling in contract law and superfluity in statutory and contractual interpretation, and then how work on judicial deference to administrative agency interpretations might help us to think critically about the plausibility standard in a structured way.

A. Conclusoriness, Gap-Filling, and Superfluity

As noted, Justice Kennedy's reference in *Iqbal* to the treatment of "legal conclusions" is reminiscent of the early twentieth-century "statement of facts" debate.[172] But resuming this debate, without more, is unlikely to resolve all of our questions about how the conclusoriness principle should be implemented. This Section considers two concepts developed to address parallel issues that arise in the interpretation of other kinds of legal texts: the concepts of filling gaps in

170. *See supra* notes 114-19 and accompanying text.
171. *Iqbal*, 129 S. Ct. at 1950; *see also supra* notes 40-44 and accompanying text.
172. *See supra* notes 75-82, 134, and accompanying text.

incomplete contracts and of avoiding superfluities in statutory as well as contractual text.

1. Gap-Filling

Complaints have some unexpected functional similarities to contracts. Like complaints, contracts are drafted by individual parties—usually not by government bodies—to address particular situations. Also like complaints, they establish and articulate a relation between (at least) two parties. To be sure, most contracts purport to coordinate relations, and every complaint implies a coordination breakdown. But this distinction may be less fundamental than it first seems. In a sense, complaints initiate something like a contractual relationship; indeed, they trigger a process that often results in a formal contractual agreement. They sometimes function just as much like contractual offers as like declarations of war. Further, on most accounts, contract law over the past century has largely discarded those doctrines based on concepts of mutual intent that seem most inapplicable to the civil pleading context.[173] Questions of contract interpretation are basically questions of the legal effect to be given to documents created by private persons, and in this they are much like questions of pleading sufficiency.

When a contract is silent on an issue, a court asked to enforce the contract as to that issue must decide how to resolve it without guidance from contract language. Many, though not all, commentators consider such a decision to be a kind of interpretive question; whether or not it is labeled interpretive, the decision does concern the significance the court will give to the contract.[174] Much of the commentary on the standards for justifying such decisions evaluates existing legal default rules that function to fill such gaps in contract language, identifies the systemic effects of such rules, and recommends new default rules to address recurring forms of contractual silence.[175]

A conclusory allegation resembles a contractual gap. At least in theory, such an allegation reproduces the words of a legal standard but lacks any language linking the standard to the plaintiff's specific circumstances. Justice Kennedy's *Iqbal* opinion suggests that when faced with such a gap, a judge should not fill it, but should, rather,

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173. *See, e.g.*, Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 477 (2000).

174. *See, e.g.*, David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

175. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992). For a critical assessment, see W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISC. L.J. 29 (1994).

impose a penalty on the conclusory drafter.[176] Yet neither *Twombly* nor *Iqbal* mandates such a penalty default rule. Neither decision, for instance, expressly disapproved Federal Rule of Civil Procedure 84, which provides that, "The forms in the Appendix [to the Rules] suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[177] One of these form pleadings, Form 11, contains an apparently conclusory allegation of negligence: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."[178] To the extent this Form includes a "gap" concerning the nature of the defendant's negligence, courts seem to remain authorized to fill it.

In *Iqbal*, however, Justice Kennedy declined to fill the gaps in Iqbal's complaint relating to Ashcroft's and Mueller's discriminatory state of mind.[179] Which gaps, then, should a court fill in a complaint? In the contract context, arguments about optimal gap-filling rules have focused largely on the types of recurring situations in which contracts tend to contain gaps and on the systemic consequences of resolving that silence in favor of particular types of parties—particularly consequences relating to incentives to provide information in the process of contract formation.[180] Taking a similar approach in the complaint context would require us to identify the types of situations in which complaints tend to contain conclusory allegations and the consequences of reading these allegations out of complaints or, instead, filling these "gaps" to plaintiffs' benefit. Commentators have already begun to do this, suggesting, for example, that allegations of corporate or governmental motive, especially in discrimination and civil-rights suits, are more likely than others to be necessarily conclusory, since plaintiffs will lack access to the information they need in order to be more specific.[181] But there is a need for further systematic work in this area.[182]

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176. *See supra* notes 40-45 and accompanying text.

177. FED. R. CIV. P. 84.

178. Fed. R. Civ. P. Form 11. The website for the Administrative Office of the United States Courts continues to offer the Appendix Forms, including Form 11, as downloadable document templates. The website notes, "[g]iven their nature, language in these forms may require modification before the document can be filed with the court. Red font is used to draw attention to these instances." *Illustrative Civil Rules Forms,* UNITED STATES COURTS, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms/IllustrativeCivilRulesForms.aspx (last accessed Nov. 18, 2011).

179. *See supra* notes 40-45 and accompanying text.

180. *See, e.g.*, sources cited *supra* notes 174-75.

181. *See, e.g.*, Spencer, *supra* note 55, at 32-35.

182. Such work could, for example, gather information about the types of cases in which complaints tend to contain conclusory allegations (that is allegations repeating legal standards verbatim) to determine when, in fact, gaps may be inevitable, thus identifying the kinds of claims in which gap-filling in the plaintiff's favor should at least be considered. It could also consider the relative costs imposed on defendants by various kinds of conclusory allegations and the corresponding relative costs to plaintiffs and third

This approach to the analysis of "conclusoriness" has limits. In particular, some instances of putatively conclusory language may not lend themselves to description as "gaps." The difference of opinion between Justices Kennedy and Souter in *Iqbal*, for instance, was more a disagreement about whether the Court should *create* gaps in Iqbal's complaint than one about whether the Court should fill any gaps: Justice Kennedy concluded that some of Iqbal's allegations relating to Ashcroft's and Mueller's states of mind should be disregarded. From this perspective, the theoretical-doctrinal analogy more suited to the analysis of conclusoriness might be the rules against "superfluities" in the interpretation of contracts and statutes.

2. The Rule Against Superfluities

One of many maxims used to guide and justify judicial interpretations of statutory law, the "rule against superfluities" in that context is based on the polite fiction that a legislature does nothing without a purpose[183] and the more basic "cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it."[184] Also called the "rule against redundancy"[185] and the "rule against surplusage,"[186] this principle parallels an analogous rule in contract interpretation[187] and directs courts to, where possible, give statutory text an effect that does not render any words of the text meaningless—to construe each statute "so that no part will be inoperative or superfluous, void or insignificant."[188] A similar principle justifies the "whole act rule," which "directs that '[w]hen "interpreting a statute, the court will look not merely to a particular clause . . . but will . . . give to [the whole statute] such a construction as will carry into execution the will of the Legislature." ' "[189]

Justice Souter's dissent in *Iqbal* cites none of these maxims, but his analysis of Iqbal's complaint is animated by the principle underlying them (and underlying Peirce's, Judge Posner's, and Professor

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parties of failing to have gaps resolved in their favor, costs that would vary with the type of claim involved.

183. *See, e.g.*, Gutierrez v. Ada, 528 U.S. 250, 258 (2000) (citing Kungys v. United States, 485 U.S. 759, 778 (1988)).

184. Hibbs v. Winn, 542 U.S. 88, 101 (2004) (citing General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 596 (2004); 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, pp. 181-86 (6th rev. ed. 2000)).

185. *Gutierrez*, 528 U.S. at 258.

186. *Cf.* Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004) (citing Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001)).

187. *See* sources cited *infra* note 194.

188. *Hibbs*, 542 U.S. at 101 (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, pp. 181-86 (6th rev. ed. 2000)).

189. Hernandez v. Kalinowski, 146 F.3d 196, 200 (3d Cir. 1998) (citing Kokozka v. Belford, 417 U.S. 642, 650 (1974) (quoting Brown v. Duchesne, 19 How. 183, 194 (1857))).

Bone's respective understandings of interpretation), that is, the idea that meaning arises holistically rather than atomistically:

> [The allegations discarded by Justice Kennedy as not plausibly suggesting a claim to relief] do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. . . . The fallacy of the majority's position . . . lies in looking at the relevant assertions in isolation."[190]

Justice Souter's *Twombly* opinion exhibits a similar concern with testing meaning—in that opinion, the meanings of *Conley* and Rule 8(a)(2)—by reference to context.[191]

Justice Kennedy's analysis of Iqbal's complaint, in contrast, appears to violate the principle. The maxim is not an absolute rule; even Justice Souter has recognized that "as one rule of construction among many, . . . the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way."[192] But ordinarily, a judge offers some alternative justification for an interpretation of a text that renders some of its language inoperative. Justice Kennedy offers no such justification in his *Iqbal* opinion. He merely lists the allegations he deems conclusory and observes their linguistic similarity to legal standards.[193] Nor does he explain why principles of holistic interpretation—which are not limited doctrinally to statutory interpretation, but are also observed in the interpretation of contracts[194]—would not apply in the context of interpreting complaints.

More consistent with these familiar principles is the approach of the Ninth Circuit in its decision in *Al-Kidd v. Ashcroft*.[195] Like *Iqbal*, this case involved claims against John Ashcroft, among others, arising out of the plaintiff's detention in the period following September 11. Abdullah al-Kidd, however, was detained not for immigration violations but under the federal material witness statute,[196] and he asserted claims for direct violation of that statute as well as for violations of his constitutional rights.[197] In considering the sufficiency of al-Kidd's complaint under the *Twombly-Iqbal* standard, the Ninth Circuit did not detach "bare [legal] allegations" resembling those in Iqbal's complaint from other, more concrete allegations, but consid-

190. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1960 (2009) (Souter, J., dissenting).
191. *See supra* notes 30-35 and accompanying text.
192. Gutierrez v. Ada, 528 U.S. 250, 258 (2000).
193. *Iqbal*, 129 S. Ct. at 1951.
194. *See, e.g.*, Kohler Co. v. Wixen, 555 N.W.2d 640, 644-45 (Wis. Ct. App. 1996); Honulik v. Town of Greenwich, 963 A.2d 979, 987 (2009)).
195. Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), *reh'g en banc denied*, 598 F.3d 1129 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 415 (Oct. 18, 2010).
196. 18 U.S.C. § 3144 (2006).
197. *See Al-Kidd*, 580 F.3d at 955-56.

ered the cumulative effect of all these allegations taken together.[198] The court expressly rejected as "hypertechnical" a "reading" of the complaint urged by Ashcroft in his motion to dismiss and involving a disjunctive, allegation-by-allegation analysis akin to Justice Kennedy's in *Iqbal*.[199]

Al-Kidd supplies further reason to think that courts do, indeed, approach the interpretation of complaints much as they approach the interpretation of other legal instruments, and that they will continue to do so under *Iqbal*. While the canons of statutory and contract construction, including the rule against superfluities, are not without their own uncertainties,[200] acknowledging the relevance of at least linguistic canons to the interpretation of complaints can only advance the clarity, stability, and legitimacy of that practice.

B. Plausibility and Deference

When commentators note that *Twombly* and *Iqbal* appear to require judges to engage in interpretation, they are usually referring not to the conclusoriness standard but to the plausibility standard introduced by *Twombly* and reaffirmed by *Iqbal*.[201] The recognition that plausibility is "a matter of interpretation," for many, seems to lead directly to the conclusion that there can be no regularity to trial courts' assessments of complaints against this standard. A few skeptics have investigated whether the new standards actually have made outcomes on motions to dismiss more lopsided or unpredictable. Conclusions vary, but most of the evidence suggests that decisional patterns have not changed radically, with the possible exception of civil rights actions.[202]

The idea that district court judges are likely to conform their post- to their pre-*Iqbal* practices is borne out by those judges' articulations of the relevant legal standards in their orders on motions to dismiss. The same study discussed above to illustrate how courts have been

198. *Id.* at 975-76.

199. *Id.* at 975 n.24 ("The paragraph alleging outright violations of § 3144 begins with '*the* post-9/11 policies and practices,' with the definite article. (Emphasis added). There is no reason from the text of the complaint to think that *those* 'post-9/11 policies and practices' are anything other than '*The* post-9/11 material witness policies and practices *adopted and implemented by Defendant Ashcroft*' alleged fourteen paragraphs earlier in the complaint. (Emphasis added).").

200. For skeptical accounts of the canons, see, for example, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Llewellyn, 1950, *supra* note 152.

201. *See supra* notes 142-44 and accompanying text.

202. *See supra* note 54; *see also, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically*?, 59 AM. U. L. REV. 553, 556 (2010); Joe S. Cecil et al, *Motions to Dismiss for Failure to State a Claim After Iqbal*, JUDICIAL CONFERENCE ADVISORY COMMITTEE (Mar. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

treating complaints as texts revealed interesting regularities in courts' presentation of their statements of the applicable legal standard.[203] After *Twombly*, judges in the Southern and Eastern Districts of New York largely stopped referring to the *Conley* "no set of facts" formula, as would be expected, but these judges did not stop reciting the related standards regarding the assumed truth of allegations and the drawing of all inferences in the plaintiff's favor. Alongside these standards, however, and sometimes in place of them, these judges started to explain the relation of "plausibility" to existing legal standards.[204] After *Iqbal*, judges stopped referring to the assumed truth of the plaintiff's allegations and began defining plausibility as a matter of the inferences reasonably supported by the allegations in a complaint, rather than as a territory separated by a boundary from other standards.[205] Without necessarily noting this detail of district court practice, commentators have also been tending to equate plausibility with reasonableness.[206]

If the assessment of plausibility requires both interpretation of a text and an assessment of the reasonableness of the inferences that text supports, then we might usefully look to other situations in which judges must assess the reasonable inferences suggested by an

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203. Only two of the 136 orders in the sample contain no statement of a legal standard. Before *Twombly*, orders did tend to cite the *Conley* "no set of facts" standard and the related principles that the court should accept all allegations as true and draw all inferences in the plaintiff's favor. Yet occasionally, even pre-*Twombly* orders cited standards resembling the *Iqbal* conclusoriness standard. *See, e.g.*, Koleanikov v. Johnson, No. CV-05-05206, 2006 WL 2095859 (E.D.N.Y. July 27, 2006); *cf.,* Chapdelaine Corp. Sec. & Co. v. Depository Trust & Clearing Corp., No. 05 Civ. 10711 (SAS), 2006 WL 2020950, at *2 (S.D.N.Y. July 13, 2006) ("[A] complaint '[may] not be dismissed on the ground that it is conclusory or fails to allege facts.' " (alteration in original) (quoting In re Initial Public Offering Sec. Litig., 241 F. Supp. 2d 281, 323 (S.D.N.Y. 2003)).

204. Some such references focus on the difference between "plausibility" and a "conceivable" or "possible" standard and/or the difference between plausibility and heightened fact pleading; others cite the *Twombly* reference to allegations "nudg[ing]" the plaintiff's claim across the line from conceivable to plausible. *See, e.g.*, Johnson v. City of New York, No. 07 Civ. 01991(PKC), 2008 WL 2971772, at *1 (S.D.N.Y. July 25, 2008); Flaherty v. All Hampton Limousine, Inc., No. 02-CV-4801 (DRH) (WDW), 2008 WL 2788171, at *4 (E.D.N.Y. July 16, 2008).

205. The *Iqbal* statement that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the *reasonable inference* that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 129 S.Ct. 1951, 1949 (2009) (emphasis added), appears in 21 of the 37 2009 S.D.N.Y. orders and 10 of the 11 2009 E.D.N.Y. orders referenced *supra*, note 150. In addition, references to "judicial experience and common sense," nonexistent before *Iqbal*, have become numerous after the opinion. *See Iqbal*, 129 S.Ct. at 1950. Westlaw assigned no headnote to this part of the *Iqbal* opinion, but cases regularly cite to it. *See, e.g.*, Carpenter v. Republic of Chile, No. 07-CV-5290 (JS) (ETB), 2009 WL 5255327, at *2 (E.D.N.Y. July 29, 2009); Adelphia Recovery Trust v. Bank of Am., N.A., 646 F. Supp. 2d 489, 493 (S.D.N.Y. 2009).

206. *See, e.g.*, Huston, *supra* note 54, at 435 ("[J]udges are . . . likely to read 'plausibility' as imposing something like a requirement that a complaint's well-pled facts 'reasonably' show a claim to relief."); Pardo, *supra* note 8, at 1455 ("[A] complaint is 'plausible' if it presents an explanation of the relevant events that a reasonable jury may be able to accept as the best available explanation.").

interpreted text to find hints of how *Iqbal* may and should be implemented. In a sense, this question does look like the question facing a judge asked to decide, on a motion for summary judgment or judgment as a matter of law, what inferences a reasonable jury could draw from the evidence.[207] But those procedural questions do not require the judge to focus analysis on a discrete text, as most motions to dismiss do. When this aspect of the *Iqbal* standard is considered, an equally valid analogy might be to the standard for judicial review of agency interpretations of statutory law, as articulated by the Supreme Court in its 1984 *Chevron U.S.A., Inc. v. NRDC* decision.[208] That standard, like *Iqbal*, involves two steps. In each setting, the first step requires analysis of a text (in *Chevron*, to determine whether statutory text clearly speaks to the issue. and in *Iqbal*, to determine whether a complaint contains conclusory allegations). The second step involves assessing the reasonableness of inferences from the same text (in *Chevron*, determining whether the agency's interpretation is reasonable,[209] and in *Iqbal*, whether the allegations plausibly state a claim).

The *Chevron* standard is, of course, controversial in its own right.[210] The past two decades have seen debate on every detail of the standard: when it applies,[211] whether its application makes any difference to the decision of disputes,[212]and how the two steps relate to

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207. This is the approach Professor Pardo takes to reconciling pleading standards with other dispositive civil procedural standards. *See* Pardo, *supra* note 8.

208. 467 U.S. 837 (1984). The well-known formulation reads: "First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous . . . , the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43.

209. The Court repeatedly described step two as a "reasonableness" inquiry in the *Chevron* decision itself. *See id.* at 845, 863, 865, 866; *id.* at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

210. The *Chevron* doctrine is among the most-commented-upon statutory interpretation topics. As of March 6, 2011, the case had been cited in 8,200 scholarly articles; by comparison, as of the same date, *Conley* had been cited in only 1,865 articles—even though *Conley* was decided twenty-seven years earlier.

211. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

212. *See, e.g.*, Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767 (2008); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008) (exploring a variety of forms taken by deference to agency interpretations in Supreme Court opinions); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 53 (1998) (finding no relationship between asserted interpretive method and conclusions of ambiguity at step one); Note, *"How Clear Is Clear"*

one another (as well as whether they are even distinct).[213] These questions parallel those debated in the commentary on *Twombly* and *Iqbal*: namely, whether their standards apply to all cases, whether those standards will make a difference to outcomes, and how the standards should be applied in particular cases.[214] But the parallels do not extend to the terms in which these issues are considered in each context. In the *Chevron* setting, the emphasis is on basic issues of legal interpretation: On what interpretive issues is a federal judge more likely to reach a defensible conclusion than an administrative agency? By what standards should the defensibility of an interpretation be judged? When should a court conclude it has an obligation to defer to a party's account of what a text means? In the pleading setting, so far, no similar questions have been considered. Rather, most commentators seem to assume that no standards for assessing the defensibility of interpretive conclusions exist, so that implementation of *Iqbal* must be evaluated in terms of outcomes alone, without reference to the matter presented in complaints.

Reluctance to use *Chevron* as a model for thinking about pleading scrutiny may stem from the apparently divergent presumptions and policies underlying the two standards. *Chevron* is widely understood as a principle of deference justified on separation-of-powers grounds.[215] The plausibility standard, in contrast, is regarded as a *reversal* of *Conley*'s pleader-favoring presumption.[216] These presumptions, however, are explicit components of only the second step of each standard. In the *Chevron* context, courts do not extend the presumption of deference to their analysis of the text alone.[217] This practice provides at least an analytic model for assessing conclusoriness free of any presumptions about the sufficiency of a pleading. Moreover, to the extent that both the second step of *Chevron* and the plausibility standard rest on the assessment of reasonable inferences, *Chevron* supplies a framework for arguments moderating the apparently plaintiff-unfriendly presumption of the pleading standard. Just as reasonableness in the *Chevron* context is assessed against the backdrop of assumptions about legislative delegation and agency exper-

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in Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1708 (2005) ("[A]part from a very few cases, there seems to be no rhyme or reason to whether a court is deferential or active at Step One."); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 94-95 & n.69 (1994).

213. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) ("[J]udges, scholars, and teachers . . . should . . . acknowledge that *Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation.").

214. *See supra* Parts II.A and II.B.

215. *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-45.

216. *See, e.g.*, sources cited *supra* notes 51, 52, and accompanying text.

217. *See, e.g.*, Kerr, *supra* note 212, at 53; Note, *supra* note 212, at 1708.

tise, so should reasonableness in the pleading context be assessed against the delegation model inherent in the party-driven adversary system erected by the Federal Rules and the related assumption of the parties' expertise with respect to factual questions.

More generally, there is no reason to think it would be any more difficult to conceive of standards for the interpretation of complaints than it is to conceive of standards for the interpretation of statutes. The assumption to the contrary is an artifact of Clark's vision of civil pleading. We might make real progress if we admitted the limits of this vision and again candidly confronted district courts' inevitably interpretive task in screening pleadings, as *Iqbal* prompts us to.

V. CONCLUSION

Understanding *Iqbal* fully requires us to reexamine the story we have told for nearly a century about the development of civil pleading doctrine. An early twentieth-century invention, that story takes pleading review in its best and most advanced form to have nothing to do with the close scrutiny of text. *Iqbal* has discomfited so many mainly because this story, the source of the present-day vocabulary for discussing civil pleading, encouraged an impoverished conceptualization of the treatment of civil complaints. But the story's grip on us is largely a matter of historical contingencies, not its fundamental accuracy. From this perspective, *Iqbal* might indeed have turned back the pleading clock, but in so doing, it has also reinvigorated important concepts that lawyers of past generations correctly perceived as lying close to the core of pragmatic thought and standard understandings of civil pleading. Effective reform of civil pleading practices requires confronting these issues, not denying them, and we have all the tools we need to get started on the task.