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COURTS SHOULD APPLY A RELATIVELY MORE STRINGENT PLEADING THRESHOLD TO CLASS ACTIONS

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Policymakers from Senator Edward Kennedy to Civil Rules Advisory Committee Reporter Edward Cooper have proposed that class actions be subject to a more stringent pleading threshold than individually-filed suits, yet the question has not been fully explored in legal scholarship. This Article addresses that gap. It shows that courts following the guidance of Bell Atlantic v. Twombly *should apply a relatively more stringent pleading threshold to class actions, and a relatively less stringent threshold to individually-filed suits.*

This contribution is set forth in two steps. First, this Article explains that, all else being equal, the anticipated systems' costs and benefits of allowing a lawsuit brought via the class action mechanism past the pleading stage differ categorically from the costs and benefits of allowing through an individually-filed suit. That is because a suit that comes to court via a class action circumvents a gate-keeping mechanism that is both prior to and more important than pleading: the potential litigant's decision whether to sue. Second, this Article points to the history of Twombly*, the Supreme Court's contemporaneous pleading decisions, and the Federal Rules of Civil Procedure to show that courts should subject damages class actions to a relatively more stringent pleading threshold in light of the different mix of costs and benefits they pose.*

In addition to exploring in depth whether class actions should be subject to a different threshold, this Article briefly discusses two other areas where it may be appropriate to adjust the stringency of the pleading threshold based upon procedural context. Specifically, it suggests that the stringency of the pleading threshold should depend upon whether a case is brought pro se *and whether it seeks review of agency action on the administrative record.*

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I. INTRODUCTION

In 1978, Senator Edward Kennedy introduced "A Bill to Revise Class Damage Procedures"[1] which, among other things, would have imposed a special pleading requirement for class actions more stringent than the rule applicable to individually-filed suits. The bill originated in the Department of Justice and was a response to the perceived revolution in civil litigation brought about by the creation of the opt-out damages class action reflected in Federal Rule of Civil Procedure 23(b)(3). Although it received significant scholarly attention,[2] the bill was ultimately unsuccessful. Still, the idea has never completely gone away; in 1998 Edward Cooper noted the possibility of "requiring more particularized pleading in class actions than in other litigation."[3]

In 1995, as part of incoming Speaker of the House Newt Gingrich's "Contract with America," Republicans in Congress introduced the "Private Securities Litigation Reform Act" (PSLRA).[4] Among other things, the PSLRA required that federal private securities lawsuits plead *mens rea* with particularity.[5] This change was in large part a response to the perceived abuse and waste caused by securities class actions brought pursuant to Federal Rule 23.[6] The Act became law over President Bill Clinton's veto, helped in part by the vote of Senator Edward Kennedy.[7]

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1. S. 3475, 95th Cong., § 3006 (1978).

2. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*", 92 HARV. L. REV. 664, 682–93 (1978); *see also* George B. Mickum, III & Carol A. Rhees, *Federal Class Action Reform: A Response to the Proposed Legislation*, 69 KY. L.J. 799 (1980); Dennis J. Block & Irwin H. Warren, *New Battles in the "Class Struggle"—The Federal Courts Reexamine the Securities Class Action*, 34 BUS. LAW. 455 (1978).

3. Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 962 (1998).

4. Pub. L. No. 104-67, 109 Stat. 737 (1995).

5. *Id.* at 747 (codified at 15 U.S.C. § 78u-4(b)(2) (2013)) ("[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.").

6. *See generally* S. REP. NO. 104-98 (1995); *see also* 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1796.1 (3d ed. 2012) (cost of discovery in class actions was "the primary rationale" for provisions in the PSLRA mandating discovery be stayed pending resolution of a motion to dismiss for failure to state a claim on the merits); Stephen J. Choi, Drew T. Johnson Skinner, & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. Emp. L. Stud. 650, 651 (2011) (PSLRA was intended in large part to address perceived abuses in securities class actions); James D. Cox, Randall S. Thomas, & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 431 (2009) (particularity pleading requirement in PSLRA was intended by Congress to curb what it perceived to be "the frequency of baseless securities class actions that were being filed to extort recoveries as a consequence of lax procedural protections of defendants"); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 645–46 (1997) (describing development of Private Securities Litigation Reform Act); Richard H. Walker & J. Gordon Seymour, *Recent Judicial and Legislative Developments Affecting the Private Securities Fraud Class Action*, 40 ARIZ. L. REV. 1003, 1023 (1998) (PSLRA was "designed to prevent abuses of federal securities class action lawsuits").

7. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77a to 78u-5

In 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*,[8] in which the Court held that a complaint seeking to bring a massive damages class action on behalf of millions of telephone service subscribers should be dismissed because it did not present a "plausible" claim for relief.[9] The Court explained its decision preventing the suit (or, rather, millions of suits) from proceeding was necessary to combat the problem of "abuse" in civil litigation, though it did not elaborate at any length on that concept. This lead to conjecture that the new "plausibility" requirement was limited to *Twombly*'s case type: an antitrust class action.[10] But that conjecture was rejected in *Ashcroft v. Iqbal*,[11] when the Court explained that the plausibility standard must be met by any Plaintiff hoping to bring a civil action in federal court.[12] The two cases have sparked a wealth of debate in the federal reporters[13] and law journals about the nature and stringency of the plausibility standard and the so-called "pleading problem"[14] some believe the standard was intended to address.

Considered together, these three moments in the history of pleading policy present an underlying question: Do cases brought via the class action mechanism warrant special treatment when it comes to pleading? In the host of post-*Twombly* pleading scholarship, the question has not yet been fully explored.[15] This Article addresses that gap, and answers "yes," class actions should get special treatment.

Answering this question of pleading policy is no simple task. In order to evaluate whether class actions should receive special treatment when it comes to pleading, we first need to at least sketch a conceptual framework that can explain what the pleading rule "should" be. That framework must be complete enough to do two things: (1) evaluate

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(2006)); *see also* David H. Webber, *Is 'Pay-to-Play' Driving Public Pension Fund Activism in Securities Class Actions? An Empirical Study*, 90 B.U. L. REV. 2031, 2037 (2010) (discussing passage of PSLRA).

8. 550 U.S. 544 (2007).

9. *Id.* at 556.

10. *See* William M. Janssen, Iqbal *'Plausibility' in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 555–56 (2011) (discussing confusion); *see also* Ettie Ward, *The After-Shocks of* Twombly*: Will We 'Notice' Pleading Changes?*, 82 ST. JOHN'S. L. REV. 893 (2008) (same).

11. 556 U.S. 662 (2009).

12. *Id.* at 684.

13. Kendall W. Hannon, *Much Ado about* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

14. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

15. Professor Moore rejects the possibility without explanation in his treatise. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.61[1] (3d ed. 2012). Professor Effron discusses and largely rejects the possibility in *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2029 (2010), but as explained below the analysis therein does not account fully for several considerations that undermine its conclusion. *See infra* Part III(A)(2).

whether the expected benefits of allowing a particular case into court outweigh the expected costs in light of the case's particular factual context; and (2) decide which aspects of a case (or "case facts"[16]) that alter these costs and benefits, if any, the pleading rule should take into account in a world in which information is both incomplete and costly.

After laying out such a conceptual framework, this Article applies it in the class action context and concludes that, as a categorical matter, class actions warrant special treatment. This is because the relative expected costs and benefits of allowing a suit brought via the class action past the pleading stage are different than the costs and benefits of allowing into court a lawsuit brought via a traditional, individual action. These differences are driven by a crucial categorical distinction between suits brought as class actions and those filed individually: ordinary lawsuits are subject to a gate-keeping device both antecedent to and more important than pleading—the individual litigant's decision to sue—but the class action mechanism short circuits around this gate-keeping device.

Because the class action mechanism brings suits into court even when the individual litigants did not choose to sue, purported damages class actions pose a very different mix of costs and benefits at the pleading stage. The expected costs of letting such a suit past the pleading stage, be they outcome-independent (like discovery expense) or outcome-dependent (like the risk of false positives), exceed the expected costs of letting an individually-filed suit past the pleading stage. As for the benefits, suits brought as class actions may (or may not) tend to do more to advance the outcome-dependent benefits of letting suits in, namely, advancing the goals of the underlying substantive law. But suits brought to court through the class action mechanism do not do as much as individually-filed suits to further the sometimes forgotten transaction *benefit* of civil litigation, namely, the system's interest in giving an interested litigant his day in court to air his grievance, right or wrong.

The following is an example to illustrate the point: imagine two entities involved in fixing (actual) broken hearts, Acme, a medical supply company that manufactures pacemakers, and Dr. Bayer, a heart surgeon who puts them in. Both injure, perhaps negligently, fifty customers/patients: Acme injures fifty of the 5,000 patients implanted with one of its pacemakers via a defect that it arguably should have noticed and fixed,[17] and Dr. Bayer injures fifty patients in the years

16. *See* Lewis A. Kornhauser, *Modeling Courts in* THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 1 (Mark D. White ed., 2009) (modeling judicial decision making in "case space," where cases are described by case facts).

17. This example has as its inspiration *Cohen v. Guidant Corp.*, an actual would-be class action that was dismissed under Federal Rule 12(b)(6) on Feb. 15, 2011, in part for failure to plead a case

leading up to his retirement because the onset of old age has robbed him of his abilities but he refuses to recognize it.[18]

Research on malpractice suit filing rates suggests that, of the 50 patients injured during surgery performed by Dr. Bayer, perhaps six will ask a court to declare Dr. Bayer is at fault and order compensation; the rest will simply go on with their lives.[19] When any patient does so, the court will apply the pleading standard of Rule 8 to determine whether to hear *Patient v. Bayer* and, if it does so and the patient succeeds, Dr. Bayer (or rather his insurer) will be on the hook for that one individual's injury.

The same percentage of Acme's customers may go to court, but because Acme's liability will be a question common to all class members (i.e. "should Acme have spotted the defect?"), its action will likely be susceptible to class treatment under Federal Rule of Civil Procedure 23. There is a good chance that at least one of its injured customers will seek to bring the suit as a class action on behalf of all 50 patients injured by the arguable defect in Acme pacemakers.

If *Patient v. Acme* is allowed into court as a purported class action, Acme will face liability of a magnitude far greater than that faced by Dr. Bayer in the few individually-filed suits that may be brought against him. Acme will face the prospect of a single suit in which it could be held liable for the damage done to close to 100% of the people injured by its pacemakers, most of whom would not (for whatever reason) have sued individually. This fact makes the expected costs and benefits of allowing a class complaint against Acme past the pleading stage systematically different from the expected costs and benefits of allowing an individual suit against Dr. Bayer into court. Among other changes, discovery costs will be relatively higher in the class action against Acme, because Acme will have a greater incentive to fight discovery and the burden of any search and production will be more readily

"under the Rule 8(a) standards announced" in *Twombly* and *Iqbal*. *See* Cohen v. Guidant Corp., No. 05-08070-R, 2011 WL 637472, at *3 (C.D. Cal. Feb. 15, 2011).

18. This example has as its inspiration a news report about an 82-year-old vascular surgeon in California who was asked to surrender his medical license after a competency assessment ordered by the Medical Board of California determined that he "had visual-spatial abnormalities, could not do fine motor movements," and "could not retain information." *See* Laurie Tarkan, *As Doctors Age, Worries About Their Ability Grow*, N.Y. TIMES, Jan. 24, 2011, at D1 ("[E]xperts warn that there are too few safeguards to protect patients against those who should no longer be practicing."). The physician "did not think he had a problem." *Id.*; *see also* Jennifer F. Waljee et al., *Surgeon Age and Operative Mortality in the United States*, 244 ANN. SURG. 353 (2006) (concluding that for certain complex procedures, surgeons older than 60 years have statistically-significant higher mortality rates than their younger counterparts).

19. *See* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 70 tbl.4.1 (1993) (about one in eight negligent injuries led to a legal claim); *see also* David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000).

outweighed by the amount in controversy under the proportionality production rule of Federal Rule 26(b)(2). The risk of a false positive will be greater because Acme may be risk averse and prefer to settle rather than face a huge all-or-nothing verdict. Finally, if Acme really was at fault, the substantive law (here, tort) may benefit by allowing the class suit through because a successful class action will force Acme to compensate all of its victims rather than only those few who choose to sue and succeed in their suit, as Dr. Bayer would have to do.[20] Because of this different mix of costs and benefits posed by class actions, the pleading standard applicable to such suits should be different. If the added cost of discovery and false positives outweighs any added benefit associated with greater enforcement of the substantive law, the standard should be more stringent. If the added cost is outweighed by any added benefit, then the standard should be less stringent.

This Article makes two closely related contributions. Its first contribution is to show that, for the reasons just discussed, the pleading threshold applicable to class actions should be *different* than that applicable to other suits, regardless whether that bar should be higher or lower in the class action context. Reasonable people might disagree about the relative weights of the costs and benefits associated with class treatment and so may disagree about whether the rule for class actions should be more or less strict than the rule for individually-filed suits. As a result, it is difficult to say more by means of logical syllogism than "the rule should be different."

Courts do not make pleading rules by logical syllogisms, however. In our system, courts affect pleading policy by interpreting Federal Rule of Civil Procedure 8 and are bound to be faithful to precedent in doing so. This fact enables the second contribution of this Article—that courts should apply a more stringent pleading threshold to damages class actions than individually-filed suits.

There is reason to believe that the Supreme Court's latest effort at pleading reform is intended to address burdens on the litigation system that are caused disproportionately by class actions. As a result, this Article shows that judges and justices interpreting and applying Rule 8 pursuant to the Supreme Court's instructions in *Twombly* should apply a relatively more stringent pleading threshold to class actions than individually-filed suits, all else being equal. (Indeed, this author's personal intuition is that the best way to address the burdens with which *Twombly* was most concerned while doing the least damage to an individual's "day in court" may be to apply a strict pleading rule to

20. It would not be correct to say the substantive law "will" benefit because whether the substantive law is furthered by increasing the lawsuit rate depends on ones view of the purposes of the tort system. *See infra* Part II(A)(2).

purported damages class action complaints and a notice pleading rule to most other complaints.)

This Article proceeds in three parts. Part II surveys recent pleading case law and literature in order to develop a taxonomy of the costs and benefits that should be considered in setting the stringency of the pleading threshold that a complaint must clear in order to make it into court, and also discusses what sort of case facts that influence these costs and benefits should be reflected in the pleading rule. Part III then applies this methodology to damages class action complaints, and shows that the expected costs and benefits of allowing a case into court depend categorically upon whether the suit comes at the behest of a litigant who has decided to sue or via the class action mechanism, so that the pleading threshold applicable to damages class action complaints should be different than that applicable to individually-filed suits. It then explains that courts interpreting and applying Rule 8 in a particular case (or, in other words, applying *Twombly* and *Iqbal*) should read the rule to require relatively more of class actions and relatively less of individually-filed suits. Part IV discusses other potential situations beyond class actions where the framework developed in Part II suggests a more or less stringent pleading threshold is warranted, or at least should be considered. Finally, a brief conclusion is offered.

II. A FRAMEWORK FOR CALIBRATING THE STRINGENCY OF THE PLEADING THRESHOLD

For decades most scholars and judges believed that anyone who wanted to bring a federal civil claim in federal court would be permitted to do so.[21] So long as a would-be plaintiff came to court bearing a complaint that gave notice to the defendant of the plaintiff's claim for relief and the grounds therefore—so that the defendant could prepare a defense—the courthouse doors would be open.

In *Twombly* and then in *Iqbal*, the Supreme Court announced that the pleading standard is more difficult to meet than many believed. Not just any federal case or controversy belongs in federal court, as Justice Souter and then Justice Kennedy explained. Rather, only complaints that set forth a "plausible" claim to relief satisfy the pleading requirement of Federal Rule 8.[22] The jury is still out on what the Justices meant by "plausible;" neither elaborated much, and they

21. *See, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

22. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

themselves have publically disagreed on the meaning of the standard.[23] But the would-be plaintiffs in *Twombly* and *Iqbal* can themselves attest that the "plausibility" standard means at least that some who want to bring federal (or diverse) cases in federal court may not do so. Pleading no longer serves only a notice-giving function, if it ever did—now it keeps some cases out of court altogether.

Whatever the merits of the "plausibility" standard, one benefit of *Twombly* and *Iqbal* is that the two cases have provided the spark for a pleading renaissance. Never before has so much judicial and scholarly attention been paid to the pleading process by which cases come into federal court. No approach to the issue has been overlooked. Doctrinally, a significant and necessarily speculative effort (absent further judicial elaboration) is underway to understand exactly how the standard articulated in *Twombly* and *Iqbal* works.[24] Empirically, a number of scholars have investigated how the "plausibility" standard is being interpreted by those who are best suited to understand the operation of the Federal Rules—federal judges.[25]

Theoretically, and of most immediate importance to this Article, scholars have paid renewed attention to the role that access to court plays in federal civil litigation in an effort to better understand pleading policy and the tradeoffs at play in establishing a pleading standard. If courts applying Rule 8 are to play Saint Peter and the courthouse doors are to be the pearly gates, then we need a theory of which lawsuits should be allowed through and which should be rejected.

This Part builds upon existing literature to survey the costs and benefits relevant to the decision of whether a case should be allowed into court, and then addresses which case facts that influence these costs and benefits the pleading rule should take into account. In other words, this Part lays out a framework that can be used in evaluating questions of pleading policy. The framework here is articulated in terms of costs and benefits in order to enable a weighing for purposes of policymaking.[26]

The framework described in this Part sets the stage for the analysis in

23. *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009) (Souter, J., dissenting).

24. *E.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); *see* David Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117 (2010).

25. *E.g.*, Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011); Patricia Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Hannon, *supra* note 13, at 1811.

26. For an alternative but related framework articulated in terms of discrete goals rather than costs and benefits, see Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 6 FLA. L. REV. 845 (2012).

Part III of how the class action mechanism changes the pleading calculus, and the suggestion that, if Rule 8 must be read to include a gate-keeping pleading requirement as indicated in *Twombly* and *Iqbal*, that requirement should be relatively more stringent for suits brought as class actions and relatively less stringent for suits people actually decide to bring, all else being equal.

A. The Costs and Benefits of Letting Suits into Court

That setting the bar for cases to be allowed into court requires a "balance" has been widely recognized.[27] It is equally well-known that the costs of discovery and risk of *in terrorem* settlements in speculative cases weigh in favor of a more stringent pleading standard that will keep more cases out of court.[28] There is much less agreement, however, about the benefits that weigh in favor of letting lawsuits into court. These two sides of the "pleading equation,"[29] are discussed below in turn.

1. The Costs of Letting Suits In

The costs of letting a suit into court can be subdivided into two categories: (1) outcome-independent costs, like money spent on discovery, and (2) outcome-dependent costs, like false positives that result when a defendant settles a speculative suit simply to avoid the unlikely risk of a losing judgment. As for the former, in addition to discovery costs, outcome-independent costs most apparently include attorneys' fees, the court's time, and the cost to either party of releasing sensitive private information through litigation. In economic terms, these can all be thought of as the transaction costs of civil litigation.

Turning to outcome-dependent costs, these include the false positive discussed above, those costs imposed on innocent defendants who, for one reason or another, through settlement or a losing judgment, come to bear some liability. (Liability borne by a guilty defendant may be seen as a cost to that defendant, but this Article lists it as a system benefit of letting suits in below.)

The Supreme Court noted both sorts of costs in *Twombly* (though not in so many words). Avoidance of discovery cost was a refrain throughout the court's opinion. And regarding false positives, the Court quoted with approval the statement in *Dura Pharmaceuticals Inc. v. Broudo* that a complaint must support more than the mere possibility of

27. *E.g.*, Twombly v. Bell Atlantic Corp., 425 F.3d 99, 111 (2d Cir. 2005).

28. *Id.*

29. *See generally* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90 (2009).

liability "lest a plaintiff 'with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'"[30]

2. The Benefits of Letting Suits In

Much less attention has been paid to the other side of the pleading equation—the benefits of letting lawsuits into court.[31] The Supreme Court in *Twombly* and *Iqbal* offered no guidance; it did not even hint at what countervailing considerations make lawsuits worthwhile, instead taking what Arthur Miller has called a "telescopic focus on the burdens" of litigation.[32] But it is impossible to talk of the appropriate pleading standard without identifying the benefits of letting lawsuits into court in addition to the costs.[33]

The most readily apparent benefit of letting lawsuits into court, and the most prominent in the literature, is that the imposition of liability on a guilty defendant advances the substantive law that forms the basis for the cause of action.[34] A damages award against a party that has in fact violated a law (in theory) deters further violations of that law, often compensates the person who suffered a legal injury, and can serve the purpose of retribution.

Some scholars that have modeled pleading and the goals of civil procedure assume, without saying so, that this outcome-dependent benefit, enforcement of substantive law, is the only benefit to litigation.[35] For example, in his analysis of *Twombly* Professor Epstein concluded that "standard expected utility calculations suggest that litigation should be allowed to go forward only when the likelihood of a positive case is high enough to justify . . . the enormous costs of

30. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (citing Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 347(2005)).

31. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 66 (2010) ("Unfortunately, the empirical work done so far on the expense of litigation, including the submissions to the Duke Conference, only explores one side of the cost–benefit equation.").

32. *Id.* at 71.

33. *Id.* ("Given the current state of procedural flux and its direction, a wide-angle evaluation of the pretrial process must replace today's telescopic focus on the burdens on defendants. That seems a necessary precursor for developing balanced and workable solutions."); Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 765, 768 (2010) ("Without a normative standard, it is impossible to say, in any meaningful way, that litigation is too expensive.").

34. *E.g.*, Bone, *supra* note 24, at 849.

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

discovery in class action antitrust suits."[36] Professor Epstein did not explain from whence he had derived the implicit view of the utility function of the civil justice system that underlies this statement. On this view, it should be noted, there is never any value in allowing a meritless suit (one brought against a party who has not in fact violated the law) into court.

However, courts, politicians, and other scholars have identified a second sort of benefit of litigation that is outcome-independent. Namely, in the eyes of many, giving a person who has been injured his day in court is itself a system value, even if the court winds up deciding (correctly) that the target of his lawsuit bears no fault. As Benjamin Spencer has explained, "[a]ccess to justice is a cornerstone principle of our democracy. Vital to that principle is our civil justice system and the ease with which those who have been aggrieved are able to seek relief from the federal courts."[37] As shorthand, this Article refers to this as the access value.[38]

This access value is furthered regardless of whether a lawsuit, once brought, leads to a judgment against a guilty party.[39] The system benefits even when a losing suit is brought and loses, because the "sharp clash of proofs presented by adversaries in a highly structured forensic setting" is fundamental to resolving a dispute in a way that is acceptable not only to the winner, but to the loser.[40]

In economic terms, while civil litigation certainly has outcome-independent transaction costs, it has outcome-independent transaction benefits, too. In terms of our recurring example, some would say the system benefits when a patient who feels he (or a loved one) was wronged by Acme (or Dr. Bayer) gets the opportunity to have his grievance considered by a neutral judge, even if the court ultimately concludes that Acme (or Dr. Bayer) did nothing wrong.[41]

Professor Arthur Miller has been a passionate and tireless advocate of

36. *Id.* at 81.

37. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L REV. 1, 2 (2009).

38. It might also be called the rule of law value.

39. *Cf.* Spencer, *supra* note 37, at 23 ("The second and equally important sense of the term justice refers to the value of procedural fairness, meaning that the procedure established to resolve a dispute permits the aggrieved and the accused to participate in the proceedings and have their claims and defenses heard and resolved in a fair manner. Processes that promote litigant access, permit the discovery of supporting evidence, and call for resolution by an impartial decisionmaker can be viewed as procedurally just regardless of the accuracy of the result.").

40. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988).

41. *Cf.* Joan Savitsky, MD., *A Patient Dies, and Then the Anguish of Litigation*, N.Y. TIMES, Dec. 29, 2009, at D 5 (describing children of a deceased patient, "whom I barely knew, were coping with their own complex emotions, which I imagined to be grief, very likely anger and frustration, and perhaps misunderstanding. Filing a malpractice suit somehow addressed this").

the access value. In his Article lamenting what he perceives to be the access value's declining salience among those who set the rules of procedure, he asked, "after *Twombly* and *Iqbal*, is our American court system still one in which an aggrieved person, however unsophisticated and under-resourced he may be, can secure a meaningful day in court?"[42] In his view, *Twombly* and *Iqbal* overlooked the access value, subordinating it "to one-dimensional claims of excessive litigation costs and abuse that have not been validated."[43] As one Court put it, our "system [is] becoming increasingly inaccessible to the average citizen."[44] By so doing, in Professor Miller's view, policymakers have "overlooked . . . that the modes of civil procedure are the mechanisms for operating an important societal regulatory system."[45]

Professor Miller is not alone; after *Iqbal*, a House Subcommittee held a hearing titled "Access to Justice Denied," considering the ramifications of *Twombly* and *Iqbal* and possible legislative responses to the cases.[46] As Benjamin Spencer notes,[47] courts have recognized the right of court access as a fundamental value of civil litigation: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."[48] The value was recognized as early as *Marbury*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives injury."[49] Indeed, a limited right of court access is constitutionality-mandated by the First Amendment.[50]

Of course, unlike discovery cost, the value of court access is hard—perhaps impossible—to quantify.[51] More could certainly be said about

42. Miller, *supra* note 31, at 2; *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*?, 78 N.Y.U. L. REV. 982, 987–88 (2003) (expressing concern for erosion of access to courts).

43. Miller, *supra* note 31, at 2.

44. Scheetz *ex rel.* Scheetz v. Bridgestone/Firestone, Inc., 152 F.R.D. 628, 630 n.2 (D. Mont. 1993) (quoting Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 3 (1992)).

45. Miller, *supra* note 31, at 71–72.

46. *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009).

47. Spencer, *supra* note 37, at 27 n.124.

48. *Id*. (citing Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907)).

49. Marbury v. Madison, 5 U.S. 137, 163 (1803).

50. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.").

51. *See* Spencer, *supra* note 37, at 24 ("Neither can we know with any certainty the degree to which premature dismissals of invalid claims undermine the public's sense of the system's procedural fairness and how that may impact its perceived legitimacy.").

the access value, not to mention the other costs and benefits of lawsuits. But a fuller exposition is not necessary for, and therefore beyond the scope of, this Article.

B. Which Case Facts Should Affect the Stringency of the Pleading Threshold?

In a world of perfect and costless information, the optimal pleading rule would simply take into account all case facts that affect the costs and benefits of letting a suit into court. But we do not live in such a world, and so the question of which case facts the pleading rule should take into account is more complicated. Courts have limited information about the cases in front of them, especially at the pleading stage. As a result, identification of the facts about a case and determination of their influence on the system costs and benefits of letting the suit into court can be a costly endeavor in itself, and the cost of this endeavor might well outweigh the benefits of a finely-tailored rule.

In order to identify exactly which case facts should be taken into account and when, one would need detailed empirical data, or, absent that, years of experience with various case types, such that it would be possible to estimate the likely cost of identifying whether a particular case fact is present in a case and compare that estimated cost to the estimated benefit of screening more (or less) strictly cases that include that fact. As this author has neither the data nor the experience to evaluate precisely which case facts the pleading rule ought to take into account, doing so is a task beyond the scope of this Article.

It is possible to say without such detailed data, however, that the pleading rule should take into account case facts that (1) are present on the face of the complaint, and (2) categorically affect the expected system costs and benefits of letting the case into court. Such facts can be identified without costly fact-finding or dispute between the parties.

Under *Twombly* and *Iqbal*, the court already takes into account one such case fact that is present on the face of the complaint and affects the system costs and benefits of the case. Specifically, the court considers whether the facts alleged in the complaint rise to the level of "plausibility." The preceding framework certainly suggests this aspect of a case should be considered in deciding whether the case should be allowed into court (assuming that pleading must serve some screening function, as it now must under *Twombly* and *Iqbal*). The allegations of a complaint are of course present on its face. As for the categorical system costs and benefits of letting a case into court, to the extent that "plausibility" correlates with likelihood of success, it certainly affects system costs and benefits. Both the estimated outcome-dependent costs

(like false positives) and the estimated outcome-dependent benefits (like advancement of substantive law) of letting a case into court depend on an obvious way upon the estimated likelihood that the case will be a winner.

As discussed in the next Part, the costs and benefits of letting a case into court also depend to a significant degree upon the mechanism by which a suit comes to court. Specifically, damages suits that come as class actions and individually-filed suits pose a very different mix of expected benefits and burdens. As a result, the pleading standard for these two types of cases should be different.

III. PLEADING CLASS ACTIONS

After a brief background of the rule that governs damages class actions, Federal Rule 23(b)(3), Part A below explores how class treatment under the rule categorically alters the costs and benefits of allowing a suit into court. Part B then makes a recommendation based upon that analysis: the pleading rule applicable to class actions should be different, and for purposes of courts faithfully applying the teachings of *Twombly* in interpreting Federal Rule 8, it should be more stringent.

In the federal system, the courts themselves have broad authority to issue rules that govern their own internal procedures. Via the Rules Enabling Act (REA), Congress delegated to the federal courts power to issue rules that do not "abridge, enlarge, or modify any substantive right."[52] Under the authority granted by the REA, the courts have adopted a variety of rules codified in the Federal Rules of Civil Procedure governing the process by which lawsuits are brought, including a general rule governing pleading, Federal Rule 8.[53]

One of the most controversial rules adopted by the federal courts through their Rules Enabling Act power is Rule 23, the rule providing for class actions. Under this rule, a judge can allow a plaintiff to sue not just on behalf of himself, but also on behalf of all similarly-situated persons who arguably were harmed in the same way by the same defendant. Through this mechanism, a person's lawsuit can be brought in federal court and he can win or lose, all without ever being aware that he had a case.

In order for a suit seeking money damages to proceed in this manner under Rule 23(b)(3), the judge must find that the various cases that would be brought via the class action are sufficiently similar to be susceptible to class treatment and that the lead plaintiff—who wants to

52. Rules Enabling Act, 28 U.S.C. § 2072(b) (1990).

53. FED. R. CIV. P. 8.

bring other potential plaintiffs' suits for them—is fit to serve that role. This is done using a five-part test, pursuant to which the judge must conclude: (1) the class is so numerous as to make joinder of all members impracticable, (2) there are questions of law or fact common to the class that predominate over any individual questions, (3) the claims of the lead plaintiff or plaintiffs are typical of the claims of absent class members, (4) class treatment would be superior to other available methods for fair and efficient adjudication, and (5) the lead plaintiff or plaintiffs will fairly and adequately represent the interests of the absent class members.

As the Rules Advisory Committee has stated and the Supreme Court echoed (or trumpeted), the rule facilitates the vindication of the "rights of groups of people who individually would be without effective strength to bring their opponents to court at all" because their claims would lead to recoveries too small to be individually profitable.[54] As stated, "[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[55] This is because, while each plaintiff whose lawsuit is brought as a class action receives only their share of any judgment, the single lawyer who litigated all their suits receives a proportionate chunk of the aggregated judgment.

Neither the Rules Advisory Committee nor commentators expected the dramatic changes that the new class action rule would work on mass tort, securities, and other types of litigation, especially in positive-value cases (cases in which the potential benefit of suit already outweighs the cost). Indeed, the Advisory Committee stated, in issuing the rule, that a "'mass accident'" resulting in injuries to numerous persons is "'ordinarily not appropriate' for class treatment . . . ."[56] The rule lay relatively dormant in the field of high-value claims until the Dalkon Shield case, when it first began being used for mass torts and products liability actions. Once the rule's power had been demonstrated, however, use of the device became ever more "adventuresome."[57] Ever since, it has been looked upon as civil litigation's Frankenstein monster or shining knight, depending upon who you talk to.[58]

54. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prepatory Note*, 10 B.C.L. REV. 497 (1969)).

55. *Id.* (citing Mace v. Van Ru Credit Corp. 109 F.3d. 338, 344 (7th Cir. 1997)).

56. *Id.* at 625.

57. *Id.* at 617.

58. *See* Miller, *supra* note 2, at 682–93.

A. Federal Rule 23 and the Costs and Benefits of Letting a Suit into Court

The class action device has been at the center of numerous efforts at pleading reform,[59] successful and not, including *Twombly* itself. It is surprising, therefore, that the implications of the class action device for pleading have received scant attention in the torrent of recent pleading scholarship. This Part addresses that void by applying the framework developed in the last Part to evaluate whether and how the fact that a suit comes to court via a class action categorically alters the four types of pleading policy costs and benefits discussed in Part III: outcome-dependent costs, outcome-independent costs, outcome-dependent benefits, and outcome-independent benefits. But before doing so, it is necessary to discuss a categorical effect of class treatment that will inform every step of this analysis. Class certification circumvents an important gate-keeping mechanism that has historically kept cases out of court even before the pleading stage: the decision to sue.

1. A Categorical Effect of Class Treatment

Although pleading is the most visible mechanism for determining which cases come through the courthouse door, and understandably has been the primary focus of recent court access scholarship, it is usually not the most important. Rather, the individual litigant's decision whether to sue is a far more important determinant of whether a lawsuit is brought for most potential cases. As discussed below, available empirical research available suggests that litigant self-selection screens out (prevents from being brought) from 50–90% of potential lawsuits.

Contrary to economic theorizing on the subject,[60] people do not just decline to sue only in cases where it would be unprofitable to litigate; we routinely decline to bring even potentially profitable lawsuits.[61] Indeed,

59. *E.g.*, A Bill to Revise Class Damage Procedures, S. 3475, 95th Cong. § 3006 (1978); Cooper, *supra* note 3, at 962.

60. *E.g.*, Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173 (1990); Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).

61. Some studies of when people decide to sue have found support for the "fault and equity approach." This theory explains lawsuits as arising when people believe "that someone else is at fault and a successful claim for compensation can restore the justice or equity of the situation." Faten Sabry & Frederick C. Dunbar, *The Propensity to Sue: Why Do People Seek Legal Action*, 42 BUS. ECON. 31 (2007); Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L. J. 443, 448 (1987) (citing studies). For example, in one survey, those who blamed others for an accident (rather than themselves) were more than ten times more likely to consider suing. Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J. L. SOC'Y 400 (1991).

numerous qualitative studies of actual litigant behavior have shown that we do not decide to sue based on purely economic motives, whatever highly-publicized examples of American "litigiousness" might suggest.[62] Ellickson, in a study of lawsuit behavior in a rural farming community, provides several anecdotes:

> The landowners who were interviewed clearly regard their restraint in seeking monetary relief as a mark of virtue. When asked why they did not pursue meritorious legal claims arising from trespass or fence-finance disputes, various landowners replied: "I'm not that kind of guy;" "I don't believe in it;" "I don't like to create a stink;" "I try to get along."' The landowners who attempted to provide a rationale for this forbearance all implied the same one, a long-term reciprocity of advantage. Ann Kershaw: "The only one that makes money [when you litigate] is the lawyer."' Al Levy: "I figure it will balance out in the long run." Pete Schultz: "I hope they'll do the same for me."' Phil Ritchie: "My family believes in 'live and let live.'"[63]

Ellickson's study is not unique.[64] One study showed social pressure against suing in a rural Illinois community, regardless of the identity of the tortfeasor.[65] Another study showed a largely Baptist opposition to lawsuits in an Atlanta suburb.[66] Yet another study, relevant to *Patient v. Bayer*, showed that patients sue their doctors for potential malpractice only a fraction of the time.[67] This fraction appears to go *down* when the doctor offers an apology.[68] And in a very different context, Cox & Thomas found that institutional investors with extremely high stakes claims (averaging $90,000) file to collect on class settlements with

62. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 984, 988 (2003) (prominent litigation examples like suit against McDonalds for serving coffee too hot are covered in the media but are not reported accurately and unrepresentative of civil litigation generally).

63. Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 681–82 (1986).

64. For a similar qualitative approach to understanding lawsuit behavior, see, e.g., *As Seen on TV: The Normative Influence of Syndi-Court on Contemporary Litigiousness*, 11 VILL. SPORTS & ENT. L. J. 1 (2004). *See also* WEILER ET AL., *supra* note 19, at 70 tbl.4.1 (about one in eight negligent injuries led to a legal claim); Abel, *supra* note 61.

65. David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984).

66. M. P. Baumgartner, *Social Control in Suburbia*, *in* 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 79, 82, 93 (Donald Black ed., 1984).

67. WEILER ET AL., *supra* note 19, at 140 (reporting that "our analysis of malpractice litigation data demonstrates that the problem is not a litigation surplus, but a litigation deficit").

68. Kevin Sack, *Doctors Start to Say 'I'm Sorry' Before 'I'll See You in Court'*, N.Y. TIMES, May 18, 2008, at A.1.

securities violators less than 30% of the time.[69] These studies do not reveal why it is we so rarely sue. In behavioral terms, three possibilities are: that we have internalized an obligational norm against litigation[70] (such as the one shared by some Lutheran denominations that was the impetus for the Supreme Court's recent decision on the ministerial exception to Title VII),[71] that we do not want to appear litigious,[72] or that our decision to sue is affected by some form of status quo bias.[73]

Whatever the reason for litigant self-selection, what matters for present purposes is that it plays a much reduced role in that subset of cases where suit can be brought by class action. Theoretically, because suing is a passive rather than an active decision under the class action procedure,[74] the behavioral considerations that might normally motivate self-selection—be they normative, reputational, or fueled by status quo bias—are circumvented by the class mechanism. Normative and reputational considerations can be reduced when an act is passive rather

69. James D. Cox & Randall S. Thomas, *Letting Billions Slip through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 428 (2004). The authors of the study explain this surprisingly low rate as the result of a desire on the part of those who head investment institutions not to be seen as joining the plaintiff's lawyers in suing a common enemy. After all, those who work at public investment institutions often later seek work in the private sector working for the very same companies that are usually defendants in large securities cases. Noting that no institutional investor has ever agreed to be a lead plaintiff in a securities class action, Cox & Thomas explain that:

> The same social and commercial forces that prevents banks, mutual funds, and insurance companies from stepping forward to be a lead plaintiff may also weaken the commitment of their managers to assure the firm reaps the full advantage of securities class action litigation.

Id. at 428.

70. An "obligational norm" is a "rule[] or practice[] that actors not only self-consciously adhere to or engage in, but feel obliged in some sense to adhere to or engage in, although (by hypothesis) the rule or practice is neither a legal nor an organizational rule." In such a case "a departure from the norm is likely to involve either self-criticism or criticism by others." Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1257 (1999).

71. *See* Hosanna Tabor Evangelical Church and School v. EEOC, 132 S.Ct. 694 (2012).

72. For a discussion of the desire of some patients not to signal litigiousness to their doctors in Matthew J.B. Lawrence, *In Search of an Enforceable Medical Malpractice Exculpatory Agreement: Introducing Confidential Contracts as a Solution to the Doctor-Patient Relationship Problem*, 84 N.Y.U. L. REV. 850, 870–73 (2009).

73. The tendency of people to favor the "status quo" in making decisions is well established, but the mechanism behind this tendency, and the mechanism by which people come to perceive a state of affairs to be the "status quo," is not so well established. *See* A. Nicolle *et al.*, A regret-induced status-quo bias, 31 J. Neurosci. 3320 (2011) (discussing possible explanations for status quo bias, positing and evaluating one hypothesis).

74. Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Due Process*, 95 CAL. L. REV. 1573, 1615 (2003). Redish and Larsen argue that opt-out class treatment violates the stakeholder's due process right—a stakeholder who simply does not opt out of a class could lose her stake as a result of the passive decision (or lack thereof) not to opt out. They do not reach the pleading issues discussed in this Article.

than active,[75] and status quo bias may encourage rather than discourage litigation when the class action device is utilized—because a plaintiff must affirmatively opt-out in order to prevent his suit from being brought.[76] If this reasoning holds, we would expect the lawsuit rate to increase dramatically when suit is brought via the class action mechanism.

This theoretical projection is consistent with studies of actual litigant behavior, which show across the board that the rate at which individuals participate in an opt-out class action is nearly 100%.[77] While only a fraction of injured patients would sue in *Patient v. Bayer*, all injured patients save a few who opt-out would be part of the class action in *Patient v. Acme*.

2. Federal Rule 23 and the Costs and Benefits of Pleading

Does the categorical effect of class treatment on lawsuit rates alter the costs and benefits of allowing a suit into court? Yes, as discussed below.

a. Outcome-independent Costs

At least according to popular perception, the primary driver of outcome-independent costs in litigation is discovery cost. The relationship between the discovery cost aspect of the pleading equation and the class mechanism has been subject to scholarly attention. In *The Plaintiff Neutrality Principle*, in addition to analyzing plausibility pleading as applied to allegations regarding Plaintiff (and potential Plaintiff) conduct, Professor Effron argues that class actions should not

75. *See* Lawrence, *In Search of an Enforceable Medical Malpractice Exculpatory Agreement*, 84 N.Y.U. L. REV. at 870–71.

76. The possibility that status quo bias could be at play in the decision to sue and affected by class certification has been pointed out elsewhere by Professors Issacharoff and Geoffrey Miller, though not in so many words. Speaking of the choice between an opt-in and an opt-out procedure they said:

> In the case of opt-outs, the path of inertia—doing nothing—also is the path of rationality. It is nearly always in the class member's interest not to opt-out of class cases. If the class member opts out he gains virtually nothing but loses the right to participate in whatever benefit the class litigation may generate—a small benefit, perhaps, but still one that confers some value. Conversely, if the class member does nothing, he loses nothing other than an essentially worthless right to bring his own lawsuit, but gains the right to participate in the proceeds of the class litigation. A rational class member will not opt-out.

Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179 (2009).

77. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1549 (2004) (reporting trivial opt-out rate).

be subject to greater scrutiny in evaluating plausibility, because class treatment does not increase discovery cost.[78] Professor Effron's analysis is not complete, because it does not adequately incorporate three litigation considerations that, by virtue of the categorical effect of class treatment discussed above, do cause class treatment to increase discovery cost. In light of these considerations, while discovery cost necessarily varies a great deal from case to case, we should theoretically expect discovery to be categorically more costly in class actions than it is in individually-filed suits, all else being equal.

First, Professor Effron suggests that class actions can reduce discovery costs because, when multiple actions are consolidated in a single class action, redundant discovery for each suit need not be duplicated. Even assuming the premise is true—that those who opt out of class actions do not seek their own independent and costly discovery, undermining the efficiency benefits of class treatment—as Professor Effron recognizes, coordinated discovery is not just possible without class treatment, but routine. Even where class treatment is unavailable, individually-filed lawsuits that share "one or more common questions of fact" (a more easily met test than Rule 23's requirement that common questions "predominate") can be consolidated in a single court for coordinated discovery by the Judicial Panel on Multidistrict Litigation, regardless where they are filed.[79] Using this process, a judge "need not rely on the class action, with its demanding requirements, to achieve the benefits of aggregation."[80] Therefore, there is no reason to believe that class actions create a significant efficiency benefit as compared to other formal (or informal) means of coordinating discovery.

Second, Professor Effron's analysis does not address the fact that, as discussed above, the class action significantly increases the stakes of a lawsuit by increasing the number of suits at issue in an action. This has direct implications for discovery because the rules that govern discovery include a proportionality requirement: when a defendant opposes discovery because it would be "burdensome," the court inquires whether the requested discovery is likely to be worth the expense pursuant to Federal Rule 26(b)(2). Specifically, the court asks whether "the burden of expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, *the amount in controversy*, the parties'

78. Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2028–40 (2010).

79. *See generally* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008).

80. *Id.*; *see also* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, NYU School of Law, Law & Econ. Research Paper No. 09-09; Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008).

resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[81]

So it is that as the stakes goes up, the extent to which additional discovery is warranted goes up as well. The more Acme stands to lose in a lawsuit, the more a court should require Acme to do in order produce potentially relevant evidence to the patient, according to Federal Rule 26(b)(2).

Finally, and relatedly, Professor Effron's analysis does not address the fact that a defendant's incentive to litigate discovery—rather than just turn over any requested documents—depends in large part upon the magnitude of the defendant's exposure should discovery turn up a smoking gun. "[D]iscovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter."[82] Institutional defendants—or, more specifically, their in-house and hired counsel—often do not know what discovery will uncover unless and until they take the time to review the documents they have agreed to produce. Hence the term "fishing expedition."[83] As a result, "[c]ompanies are willing to invest more in cases where the stakes are . . . high."[84] Again, because class treatment increases the stakes of litigation, it increases the incentive to litigate discovery and, therefore, expected discovery costs, all else being equal.

b. Outcome-dependent Costs

As for outcome-dependent costs, Federal Rule 23 increases the risk of false positives associated with allowing a suit to proceed past the pleading stage by increasing the likelihood that a defendant who has not violated the law will be forced into a settlement in order to avoid even a very small risk of a massive judgment. This threat has been recognized almost since the rule's inception. Harry Friendly first described the phenomenon in 1972, famously calling many class settlements "blackmail settlements." Richard Nagareda explored this concern and disaggregated two reasons innocent defendants are more likely to settle lawsuits brought as class actions than individually-filed suits: the "addition effect" (the fact that class treatment increases the total number of claims brought against the defendant) and the "amplification effect" (the possibility that by clumping all suits into one all-or-nothing lawsuit,

81. FED. R. CIV. P. 26(b)(2).

82. Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 421 (S.D.N.Y. 2002).

83. *E.g.*, N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co., 872 F. Supp. 1411, 1412 (E.D. Pa. 1995).

84. Emery G. Lee, III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 765 (2010).

class treatment is especially onerous to risk-averse defendants).[85] Even if Acme is completely blameless, the sheer magnitude of the potential liability may cause it to a settle a class action—to avoid a company-busting judgment—where Dr. Bayer (or rather his insurer) can litigate individual suits notwithstanding the possibility that he might lose one or two.

c. Outcome-dependent Benefits

Turning to the benefits of class treatment, there is intuitive reason to believe that class actions, by increasing the lawsuit rate categorically, do more to advance the underlying substantive law than individually-filed suits. Indeed, according to some normative economic theories of the tort system, at least, a close to 100% lawsuit rate is optimal because that is the rate necessary to achieve optimal enforcement.[86]

Normative economic theories notwithstanding, whether increasing enforcement of substantive law above the default, individual-filing rate for claims subject to class treatment is actually consistent with the purposes of the underlying substantive law is in fact a difficult question that depends in large part upon the law itself. As stated, "[n]ot all substantive principles necessarily warrant enforcement to the nth degree."[87] Indeed, some have argued that Congress creates private rights of action under the assumption that lawsuits will be brought only occasionally—not whenever they are profitable—and that bringing such actions as class actions in fact frustrates the legislative bargain struck in the statute.[88]

Statutes that provide for statutory damages, such as treble damages, are a good example of the fact that Congress does not always intend that people will sue whenever they believe they have suffered a legal wrong. Allowing these actions to proceed as class actions can not only frustrate the purposes of the underlying law,[89] but can lead to absurd results[90] and

85. Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006).

86. *See generally* Richard A. Posner, ECONOMIC ANALYSIS OF LAW (1973).

87. Richard Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1885 (2006) (describing "'the Javert problem': the possibility that aggregation might amount to a rigid, literalistic insistence upon substantive law in all its details akin to that exhibited by the police inspector in Victor Hugo's Les Miserables").

88. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–80 (2003).

89. Richard Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1878 (2006) ("Aggregation of statutory damages . . . would make for a kind of double counting discordant with the underlying remedial scheme.").

90. Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and*

perhaps even violate due process.[91] For instance, the Fair and Accurate Credit Transactions Act (FACTA) provides statutory damages where a business includes certain credit card information on its receipts. In combination with the increase in the participation rate where a suit is subject to class treatment, the resulting damages can become ludicrous for businesses with many customers. One such class action against the pizza restaurant Chuck E. Cheese sought damages of $1.9 billion; the company had only earned $68 million the year before.[92] It is difficult to say that this result furthered the underlying values of the FACTA.[93]

Furthermore, by increasing the magnitude of liability for claims subject to class treatment, the device increases the likelihood that such a claim will be brought at all. As a result, for claims that would otherwise be "negative value"—not worth bringing, at least in monetary terms—class treatment can affect not just the degree to which substantive law goals are furthered (be they compensation, retribution, or deterrence), but also whether these goals are realized at all. This is another way in which class treatment may do more to further the outcome-dependent benefits of suing.

d. Outcome-independent Benefits

Finally, the primary outcome-independent benefit of letting suits into court—the court access value—is unaffected by class treatment, because the additional plaintiffs brought into court by the class action mechanism have not sought judicial vindication in the same sense as a plaintiff who actually wants to sue. Absent a plaintiff demanding justice, the right to a "day in court" loses any meaning it has independent of advancing the compensation, deterrence, or retribution goals of substantive law. Indeed, rhetoric articulating the access value presumes an active litigant,[94] and at least one rationale for the access value is completely absent where a lawsuit comes to court as part of a class action. Courts and commentators have explained that access is a value because the civil justice system provides an alternative to violence

Class Actions, 74 MO. L. REV. 103 (2009) ("Combining the litigation incentives of statutory damages and the class action in one suit, however, creates the potential for absurd liability and over-deterrence.").

91. *See* J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004); *cf.* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 454 n.225 (2005).

92. Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MISSOURI L. REV. 106 (2009).

93. *Id.*

94. *E.g.* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275 (2004) ("Participation is essential for the normative legitimacy of adjudication processes.").

through which citizens can resolve disputes in a way that is legitimate even to the loser. But, there is no need for courts to play that role when the plaintiff in a case did not choose to bring suit.

B. The Pleading Threshold for Class Actions Should Be Different

A brief recap of the preceding Part: class actions categorically increase both the outcome-independent and the outcome-dependent costs of letting suits into court; they have no categorical impact on the outcome-independent benefit of letting suits in; and, they may or may not categorically increase the outcome-dependent benefits of letting suits in, depending on what the crafters of the substantive law at issue in a particular case had in mind. In short—a mixed bag.

1. Policy Recommendation: A Different Pleading Threshold

The foregoing analysis does not show that, as a matter of policy, pleading should serve a gate-keeping function at all, in class actions or otherwise.[95] Furthermore, the foregoing analysis does not show that, if pleading should keep some cases out of court, the threshold for class actions should be more stringent than the threshold for individually-filed suits, and it does not show that the threshold for class actions should be less stringent. But it does show that, because class actions categorically pose a different mix of pleading costs and benefits, the pleading threshold, if there is one, should be different for class actions.[96]

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95. For an argument on this front, see, e.g., Colin T. Reardon, *Pleading in the Information Age*, 56 N.Y.U. L. REV. (2010).

96. Professor Effron suggests that it may be appropriate to address any special burdens imposed by class actions at class certification, not the pleading stage, Effron, *supra* note 78, at 2041–44, but it is not apparent that such an approach is preferable. Conceptually, gate keeping does not fit squarely into the class certification decision as it does into pleading: the class certification inquiry is designed to ensure that the interests of absentee plaintiffs will adequately be represented and that class treatment would be efficient, not to perform a gatekeeping merits determination. Practically, class certification simply happens too late to forestall many of the costs that gatekeeping at the pleading stage is apparently intended to avoid, as Professor Effron recognizes. *Id.* at 2042. In most cases, by the time the class issue is joined extensive discovery will have taken place, a trend that should only increase since the Supreme Court married class certification and the merits in *Wal Mart v. Dukes*, and because certification is often tantamount to victory for the Plaintiffs, settlement will often already have occurred. *E.g.*, Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 106, 107 (2009); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1003 n.12 (2005). Furthermore, it is entirely feasible to consider the fact of potential class treatment at the motion to dismiss stage, because class allegations not included in the initial complaint must be added by amendment later, and may not relate back to the initial complaint. *See* D.C. CT. R. 23.1 (2012) (requiring that allegations in support of class treatment be included in complaint); Leal v. Gov't Employees Ins. Co., No. M-09-228, 2009 WL 4852670, at *6 (S.D. Tex. Dec. 14, 2009) (class allegations added via amended complaint can create new removal window under the Class Action Fairness Act); *see also* Wilson v. Zarhadnick, 534

Whether these differences warrant a more or less stringent pleading standard for class actions depends, ultimately, upon two policy judgments: (1) whether a higher lawsuit rate in fact does more to serve the purposes of the underlying substantive law; and, (2) whether and to what extent any such boost in the advancement of substantive law values associated with class treatment outweighs the corresponding increase in the burdens of class litigation.[97] As explained in the next Part, the Federal Rules, the history of *Twombly*, and the Supreme Court's other pleading case law reflect answers to these two questions that courts must take into account in applying Federal Rule 8. As a result, courts interpreting Rule 8 (and therefore applying *Twombly*), should apply a relatively more stringent pleading threshold to class actions than they do to individually-filed actions.

2. Rule 8 Recommendation: A More Stringent Pleading Rule

As elaborated upon below, courts interpreting Federal Rule 8 should apply a more stringent "plausibility" requirement to damages class actions for three reasons.[98] First, there is reason to believe that the fact that *Twombly* was a class action influenced the Supreme Court's application of the standard in that case. Second, the Supreme Court's contemporaneous pleading decisions also reflect a more searching eye toward class actions at the pleading stage. Third, the one possible benefit of class treatment (for pleading purposes) that could outweigh the increased burdens they put on the system—advancement of substantive law—is an improper consideration in interpreting the Federal Rules of Civil Procedure, including Rule 8.[99]

F.2d 55, 57 (5th Cir. 1976) ("To maintain a class action, the existence of the class must be pleaded . . . .").

97. Some might not subscribe to the access value and think lawsuits have no transaction benefit. Others might think that by inflating lawsuit rates over where they would be absent the mechanism, class actions always frustrate congressional intent.

98. Professor Effron discusses the possibility of singling out the class allegations of a complaint, treating a motion to dismiss such allegations separately from a motion to dismiss the named plaintiff's allegations in support of his or her own claim. Effron, *supra* note 78, at 2051–56. To the extent that a motion to dismiss under Federal Rule 12(b)(6) may permissibly draw such a distinction between class claims and individual claims, the analysis here counsels subjecting the class allegations to a more stringent pleading threshold than the allegations of the named Plaintiff in support of his or her own claims.

99. Courts are not precluded from holding certain types of actions to a more demanding "plausibility" threshold by *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). That case held that courts may not create pleading standards other than that provided in Rule 8 to govern certain substantive areas. *See id.* at 168–69 (requiring specificity in pleading cases of a certain subject matter "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation"). This Article does not advocate a different pleading standard for class actions, like the particularity requirement that governs certain

a. Twombly*'s Procedural History Indicates the Supreme Court Considered its Class Status*

First, the procedural history of *Twombly* itself suggests that the fact that it was a class action influenced the Supreme Court's application of the plausibility standard in that case. *Twombly* was a massive would-be class action; the complaint alleged that various telephone carriers had categorically and almost imperceptibly overcharged their customers for several years, resulting in hundreds of millions in aggregate damages, and sought to bring suit on behalf of every injured customer. The defendants moved to dismiss the complaint at the earliest possible stage—long before the court had adjudicated the question of class certification, any discovery had been conducted, or defendants had even answered the allegations of the complaint. Pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6), the defendants argued the complaint was not even serious enough to require a response, let alone judicial resolution.[100]

The plaintiffs in *Twombly* argued that at the pleading stage Federal Rule 8 requires only that the complaint say enough to give the defendant notice of the nature of the claim, which their complaint did. For support, they pointed to a long line of cases from the Supreme Court and elsewhere. For example, they quoted *Conley v. Gibson* for the proposition 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."[101]

Defendants disagreed that notice was enough. They argued to the Second Circuit that the necessary showing was in fact more stringent, and that some gate-keeping at the pleading stage was necessary in light of the likely burden of litigating the class action, as well as the sheer magnitude of liability that defendants could face in such a large class action.[102] The Second Circuit rejected those arguments, holding that the

actions under Federal Rule 9. Rather, it advocates that the stringency of the governing "plausibility" standard be different for class actions. *Iqbal* held that the "plausibility" standard applies in all civil actions, but it did not say that the standard applies with the same level of rigor. *But see* W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 98 (3rd Cir. 2010) ("*Iqbal* made clear that Rule 8's pleading standard applies with the same level of rigor in 'all civil actions.'") (quoting Ashcroft v. Iqbal, 556 U.S. 662 (2009) (emphasis omitted)). This approach is not unprecedented; courts have consistently held that the pleading threshold for *pro se* actions should be less stringent than that applicable to other actions, *see infra* Part IV(A). *See also* Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010), *amended and superseded on other grounds*, 627 F.3d 338 (2010) ("[B]ecause *Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings, we continue to construe *pro se* filings liberally."). Just as courts put a thumb on the scales in favor of *pro se* actions when applying Rule 8, courts can (and should) put a thumb on the scales against class actions in this context.

100. Brief for Petitioner at 13–14, Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005).

101. 355 U.S. 41, 45–46 (1957).

102. *Id.*

defendants actually sought recalibration of the pleading standard in light of the burdens they had identified and that such recalibration was beyond its competence:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.[103]

Defendants accepted the Second Circuit's invitation and took their case to the Supreme Court, where they again argued that Rule 8 should play a gate-keeping role by requiring a plaintiff do more than notify a defendant of the nature of her claim in order to access federal court. Plaintiffs, for their part, again argued to the contrary, and again pointed to a long line of precedent holding that notice alone is enough.

This time the defendants were successful. They argued to the Supreme Court that mere notice was not enough because "the costs and burdens imposed by meritless litigation—particularly class action litigation, where plaintiffs have no risk of counterclaims or harm to business and where discovery burdens are borne almost exclusively by defendants—are too well documented to require or to allow great elaboration here."[104] These burdens are especially pronounced in the class context, they argued, because "[i]f a plaintiff can secure certification of a class—even if the underlying case is without merit—the pressure to settle (like the potential fee award to the class action lawyer) becomes enormous." Rigorous gate-keeping at the pleading stage, they explained, was necessary to curb speculative suits seeking only to extract a settlement.[105]

The Supreme Court agreed. The long line of precedent holding that notice is enough was incorrect, it held, and had always been.[106] A liberal notice-pleading rule would allow prospective plaintiffs to bring lawsuits even though their case was at best speculative, the Court explained, just to bully defendants into a settlement.[107] Rather, it

103. Twombly v. Bell Atlantic Corp., 425 F.3d 99, 111 (2d Cir. 2005).

104. Reply Brief for Petitioners, Twombly v. Bell Atlantic Corp., 550 U.S. 544 (2006), 2006 WL 3265610, *13–14.

105. *Id.* at *14–15.

106. 550 U.S. at 562–63.

107. 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.").

reminded courts that, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[108] Applying the newly-announced "plausibility" standard to the case before it, the Court held that the plaintiffs had failed to state a claim.[109] The Court's heavy emphasis on the class action features of the *Twombly* complaint and the defendants' explicit reliance upon *Twombly*'s status as a would-be class action in making their case to the Court provide reason to believe the Court considered this fact about the case in doing so.

b. The Supreme Court's Contemporaneous Decisions Indicate a More Stringent Threshold for Class Actions

Second, interpreting *Twombly*'s plausibility standard to require more in the class action context in light of the greater burdens class actions pose explains what is otherwise a perplexing inconsistency in the Supreme Court's recent pleading jurisprudence. In five recent pleading decisions, the Supreme Court has appeared somewhat schizophrenic about the stringency of the showing required by Rule 8(a). In *Swierkiewicz v. Sorema*[110] and *Erickson v. Pardus*,[111] the Court reversed the Second and Tenth Circuits, respectively, faulting them for applying a too-stringent pleading standard, even though the complaints at issue were relatively sparse. But, in *Dura Pharmaceuticals, Inc. v. Broudo*,[112] *Twombly*, and *Iqbal*, it held that the complaints had not made the necessary showing, even though the allegations therein were somewhat detailed.

The Ninth Circuit recently expressed confusion regarding the state of the law after these five cases:

> The juxtaposition of *Swierkiewicz* and *Erickson*, on the one hand, and *Dura*, *Twombly*, and *Iqbal*, on the other, is perplexing. Even though the Court stated in all five cases that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard in *Dura*, *Twombly*, and *Iqbal*. . . . To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard.[113]

The Ninth Circuit is not alone in its confusion, commentators have

108. *Id.*
109. *Id.*
110. 534 U.S. 506 (2002).
111. 551 U.S. 89 (2007).
112. 544 U.S. 336 (2005).
113. Starr v. Baca, 652 F.3d 1202, 1215 (9th Cir. 2011).

noticed this apparent disconnect, as well.[114]

Swierkiewicz and *Erickson* were run-of-the-mill individually-filed lawsuits brought by an employee against his employer and a prisoner against his prison, respectively. But *Dura* and *Twombly* were both large class actions.[115] That the Supreme Court seemed to demand more of the complaints in the latter two cases should come as no surprise, then, because as explained above class actions should be subject to a different standard. Following the teaching of the Supreme Court in *Dura*, *Twombly*, *Swierkiewicz*, and *Erickson*, that standard should be more stringent than the one applicable to ordinary lawsuits. (As for *Iqbal*, the reason the complaint in that case failed to meet the plausibility threshold is beyond the scope of this paper, but others have explained at length why that case, although not a class action, was far from ordinary.[116]) Indeed, as discussed above, the petitioners in *Twombly* focused specifically on the burdens of class treatment in advocating for the pleading rule the Supreme Court adopted, and the Court appeared sympathetic to those arguments.[117]

Put in concrete terms, *Twombly* stated that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level."[118] Whether a claim for relief is speculative or not can depend, quite naturally, on the breadth of the relief sought. Factual allegations that suffice to render plausible the patient's claim for individual relief in *Patient v. Bayer* might not suffice to raise a claim for class-wide relief in *Patient v. Acme.*

c. Advancement of Substantive Law is an Inappropriate Consideration in Interpreting Rule 8

Third, it is inappropriate for a court interpreting Rule 8, be it the

114. *E.g.* Bone, *supra* note 24, at 873.

115. *See Twombly*, 550 U.S. at 559 (noting the "potential expense is obvious enough . . . plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years").

116. *See* Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2010).

117. *See* Reply Brief for Petitioners, Twombly v. Bell Atlantic Corp., 550 U.S. 544 (2006), 2006 WL 3265610, *13–16. ("[T]he costs and burdens imposed by meritless litigation—particularly class action litigation, where plaintiffs have no risk of counterclaims or harm to business and where discovery burdens are borne almost exclusively by defendants—are too well documented to require or to allow great elaboration.") (emphasis added); *see also id.* ("If a plaintiff can secure certification of a class—even if the underlying case is without merit—the pressure to settle (like the potential fee award to the class action lawyer) becomes enormous.").

118. 550 U.S. at 555.

Supreme Court or any other, to consider the only expected benefit of the class mechanism that potentially offsets its increased costs, i.e., class treatment's potential to do more to advance substantive law. Although Congress may certainly consider substantive law values in regulating the courts, the courts themselves may not. Rather, the Rules Enabling Act, which is the basis for both Federal Rule 8 and Federal Rule 23, does not grant authority to "abridge, enlarge, or modify" substantive rights. Therefore, in interpreting and applying Federal Rule 8, the only policy considerations properly considered by courts are considerations that relate to procedure qua procedure.[119]

This is made explicit by Federal Rule 1, which announces the factors to be considered in interpreting the Federal Rules of Civil Procedure. That rule explains the Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Unlike whether an interpretation will lead to the "just" and "inexpensive" determination of an action, whether a particular way of construing the rules will best advance the particular substantive law upon which a claim is premised is not a listed consideration. Indeed, consideration of substantive law values in interpreting rules of procedure would run directly contrary to the principle of transubstantivity underlying the Federal Rules.[120]

As explained above, the possibility that class actions do more to further substantive law values is the only potential benefit that counsels against applying a more stringent pleading standard to such actions. As a result, because that consideration is itself improper in interpreting Rule 8, the standard set forth in that rule, which *Twombly* interpreted to include a "plausibility requirement," should be relatively more stringent when it is applied to class actions than when it is applied to individually-filed suits.

Furthermore, even if advancement of substantive law were a proper consideration in interpreting a federal rule, it is not the sort of clear, categorical benefit that should obviously be considered in applying the pleading rule. That is because, as discussed above, whether class treatment in fact advances the substantive law at issue in a particular case is case-dependent and highly debatable. Consideration of this potential effect would force every court applying the pleading rule to a new area of law to preside over the parties' inevitable dispute about the

119. *See* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1885 (2006) ("[T]here is no authority in the hands of courts charged with the administration of aggregate procedure somehow to select which features of substantive law to temper.").

120. *Cf.* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Procedure*, 59 DEPAUL L. REV. 371 (2010).

meaning and purpose of the substantive law at issue, in order to determine whether Congress would or would not have intended for suits to be brought *en masse*. The expense of litigating this issue—in terms of both time and cost—would likely (though not inevitably) exceed the benefits.

d. Calibrating the stringency of the pleading standard based on context is not unprecedented

Application of a more stringent standard to certain cases based upon their procedural posture is not unprecedented. The Supreme Court has explicitly shown a willingness to tailor the pleading standard in light of categorical differences among case types. In *Pardus* the Court stated that pleadings brought *pro se* "must be held to less stringent standards."[121] So understood, while *Iqbal* makes clear that the "plausibility" requirement applies to all complaints, the stringency of this standard can simply be heightened in the context of class action complaints, just as it is lowered in the context of *pro se* complaints. Indeed, the framer of the civil rules, Charles E. Clark, believed that the showing required under Rule 8 itself can vary depending on context,[122] and the draftsman of Rule 23, Edward Cooper, proposed a heightened pleading rule for class actions.[123]

Furthermore, that class action complaints should be subject to closer scrutiny is fully consistent with the "plausibility" standard, as articulated by the Supreme Court and understood by both commentators[124] and courts.[125] Indeed, numerous courts have suggested that the plausibility standard of *Twombly* should apply only, or most stringently, in certain

121. Erickson v. Pardus, 551 U.S. 89, 94 (2007).

122. *See* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 282 (1942) (noting that Rule 9, requiring allegations of fraud, inter alia, be plead with "particularity," "probably states only what courts would do anyhow.").

123. *See* Cooper, *supra* note 3, at 962.

124. Spencer, *supra* note 37, at 35 ("[L]anguage from Twombly could support the idea that pleading standards also vary depending upon a different kind of context than what we have been discussing thus far: the complexity and prospective cost associated with litigating the claim. The Twombly Court certainly made the cost of discovery relevant to its analysis and lower courts that are so inclined may feel encouraged to do the same."); Miller, *supra* note 31, at 36 ("Perhaps the most significant source of optimism is that the concepts articulated by the Court are malleable enough to enable federal judges to apply them in a manner consistent with systemic values other than cost and efficiency."); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39 (2008) (suggesting antitrust lawsuits should be subject to a more stringent pleading standard, all else being equal).

125. Limestone Dev. Corp. v. Village of Lemont, Ill., 520 F.3d 797, 803–04 (7th Cir. 2008) ("If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim.").

contexts where closer scrutiny is warranted.[126]

Such an approach is entirely consistent with the Supreme Court's guidance. Although a number of cases and articles[127] have attempted to define precisely the nature of the "plausibility" inquiry required by *Twombly* and *Iqbal*, Professor Noll has persuasively argued that the truth is that all we can say for sure is that, whatever goes into determining how "plausible" a claim is, and however "plausible" a claim must be in order to satisfy Federal Rule 8, the standard was not met by the complaints in *Twombly* or *Iqbal*.[128] The Court itself said as much in *Iqbal*, explaining that "[d]etermining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[129] Therefore, for now the work of elaborating upon both the content of the standard (what a court considers in assessing "plausibility") and its stringency (how "plausible" a case must be in order to pass the threshold) falls first into the capable hands of the district courts and courts of appeals. For the reasons set forth above, courts should consider the fact that a case is brought as a class action as a thumb on the scales against plausibility.

Finally, to the extent that decisions like *Twombly* and *Iqbal* have put the "important values of civil litigation . . . in jeopardy" by "subordinating" the day in court "to one-dimensional claims of excessive litigation costs and abuse,"[130] applying a relatively higher pleading threshold to class actions represents a compromise position. Such an approach mitigates many of the litigation costs that drove *Twombly* and *Iqbal*, while preserving undiminished (or at the very least, less diminished) the individual litigant's ability to secure his day in court.

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126. Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009) ("Courts in and out of the Sixth Circuit have [indicated that *Twombly's*] holding is likely limited to expensive, complicated litigation like that considered in *Twombly*."); *see also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2012) ("[S]everal circuits have ruled that . . . the degree of 'plausibility' that must be present in any given complaint . . . will depend on the context.").

127. *E.g.* Bone, *supra* note 24, at 849 (relying on "inferences from the way the Court applies the plausibility standard in [*Twombly* and *Iqbal*] and on contrasting language in the two opinions" to extrapolate a definition of the "plausibility" standard); Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473 (2010).

128. *See* David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L. REV. 117 (2010); *see also* Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1257 (2008) ("Virtually everyone (except, perhaps, the five Justices in the majority in Twombly) regards plausibility as an ambiguous standard."); Miller, *supra* note 31, at 28 ("Given the expanded judicial scope of inquiry on a Rule 12(b)(6) motion, is it now incumbent on a plaintiff to negate any and all potentially innocent explanations for the defendant's challenged conduct, a long-proscribed form of anticipatory pleading?").

129. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

130. Miller, *supra* note 31.

IV. OTHER CANDIDATES FOR SPECIAL TREATMENT

The mechanism by which a case comes to court is not the only fact that alters the mix of costs and benefits of allowing the case past the pleading stage. This Part discusses two other case facts that the framework developed in Part II suggests should also be subject to a different pleading threshold. First, courts have long recognized that suits brought *pro se* should be subject to a lower pleading threshold. Second, although not yet recognized by courts, cases challenging agency action on the administrative record—such as Administrative Procedure Act cases—should also be subject to a lower pleading threshold under *Twombly*, because these cases systematically pose lower discovery costs.

A. Pro Se Actions Are Already Subject to a Less Stringent Threshold

Federal courts have long applied a less-stringent pleading threshold to lawsuits that are brought *pro se*. Indeed, the Supreme Court reaffirmed this rule in *Erickson v. Pardus*, a case decided since *Twombly*.[131] There, the Court held that "a *pro* se complaint, however inartfully pleaded, must be held to *less stringent standards* than formal pleadings drafted by lawyers."[132] Or as Federal Practice and Procedure puts it, "[t]he judicially created requirements for pleading under the rules are even less stringent (although there are limits) when a party is litigating *pro se*."[133]

The lower pleading threshold applied to *pro se* actions is fully consistent with the framework set forth in Part II, above. A sustained analysis is beyond the scope of this Article, but *pro se* cases feature one categorical difference that could affect the mix of pleading benefits and burdens they pose, namely, the plaintiff in a *pro se* case has been unable (or perhaps unwilling) to secure counsel. As a result, *pro se* lawsuits necessarily are brought solely by aggrieved persons who genuinely want to bring a suit that is either not profitable or otherwise popular (and so did not attract contingent-fee or *pro bono* legal representation). Judges might reasonably believe that allowing such a case into court is more likely to serve the access value.

131. Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.").

132. *Id.* (emphasis added).

133. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 (3d ed. 2012); *see also id.* at n.11 (collecting cases).

B. Record Review Actions Should Be Subject to a Less Stringent Threshold

Federal courts confronting *Twombly*-based motions to dismiss actions for review of agency action on the administrative record have applied the standard without comment.[134] The framework set forth in Part II suggests, however, that the fact that a complaint (or count of a complaint) seeks review of agency action on the administrative record should cause courts to apply a relatively less stringent pleading requirement to that complaint (or count).

Record review actions are systematically different in that discovery is not allowed in such a case (other than in certain rare and narrowly-circumscribed circumstances).[135] Instead, in a record review case, the agency compiles and files an administrative record that forms the exclusive basis for the Court's review.

An obvious implication of this difference for the costs and benefits of letting a record review case into court is that the concerns about broad and expensive discovery articulated in *Twombly* are all but nonexistent. Indeed, a number of districts specifically exempt record review cases from holding a pre-discovery conference under Federal Rule 16(f) requirements in light of this fact.[136] In light of the categorically lower outcome-independent costs threatened by record review actions, the pleading threshold applicable to such actions should be relatively less stringent than that applicable to other actions.

V. CONCLUSION

There is no reason that a pleading rule designed to balance certain costs and benefits should be blind to the fact that different case types can pose a systematically different mix of costs and benefits. Quite to the contrary, a pleading rule tailored to take this fact into account will maximize the benefits of pleading while minimizing its costs, and thereby best balance "the just, speedy, and inexpensive determination of

134. *See* Pat Huval Restaurant & Oyster Bar, Inc. v. U.S. Intern. Trade Comm'n, 823 F. Supp. 2d 1365, 1379 (C.I.T. 2012) ("In the absence of any factual allegations from which we otherwise could conclude that either agency's actions were violative of the APA, we conclude that the . . . Plaintiffs' APA claim must be dismissed."); Todd Constr., L.P. v. United States, 88 Fed. Cl. 235, 249 (Fed. Cl. 2009).

135. *See* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."); Camp v. Pitts, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

136. *E.g.* D.C. CT. R. 16.3(b) (2012) (exempting from meet and confer requirements "an action for review on an administrative record").

every action."[137] As the foregoing analysis shows, the pleading threshold courts apply to class actions (and possibly *pro se* and record review actions), should be different than the threshold applicable to other types of actions. Indeed, it should be higher.

137. FED. R. CIV. P. 1.